

Memorandum in Support

COMMITTEE ON WOMEN IN THE LAW

Women #1

May 30, 2017

S. 5532
A. 2040-A

By: Senator Alcantara
By: M. of A. Crespo
Senate Committee: Investigations and
Government Operations
Assembly Committee: Governmental Operations
Effective Date: 90th day after it shall have
become a law

AN ACT to amend the executive law, in relation to prohibiting employers from seeking salary history from prospective employees.

LAW & SECTION REFERRED TO: Section 296 of the executive law.

THE COMMITTEE ON WOMEN IN THE LAW SUPPORTS THIS LEGISLATION

The New York State Bar Association's Committee on Women in the Law (CWIL) supports this Bill, which would amend the Executive Law in relation to prohibiting employers from seeking salary history from prospective employees.

BACKGROUND

The 1963 Equal Pay Act and Title VII of the 1964 Civil Rights Act established the legal right to equal pay for equal work. These laws sought to correct historic discriminatory employment practices and wage inequities based on sex, race, color, national origin and religion. Although gaps in pay generally have narrowed in the intervening years, in part due to continued legislative efforts as well as changing attitudes, a gender pay gap persists, especially for women as compared to non-Hispanic white men, the largest workforce demographic group. According to the U.S. Census Bureau's 2015 figures, the nationwide median wage gap between women's and men's salaries is 80 cents to the dollar.¹ The gap is wider, based on recent numbers from the Pew Foundation, for women who are African Americans (63 cents) or Hispanic (54 cents), and for men who are

¹ *Highlights of women's earnings in 2015*, U.S. BUREAU OF LABOR STATISTICS (November 2016), <https://www.bls.gov/opub/reports/womens-earnings/2015/pdf/home.pdf>.

African American (73 cents) or Hispanic (69 cents).² Other factors that may influence pay equity include age, educational attainment, disability, sexual orientation and identity, and immigrant status.

Researchers and economists have sought to explain the persistence of the gender pay gap by citing, for example, differences in the types of fields women tend to gravitate towards (e.g., social work versus aerospace engineering), differences in women's willingness or ability to spend longer hours at the office, women's tendency to spend child-bearing years out of work or in jobs with more flexible hours, and differences in women's salary negotiations.³ Yet, notwithstanding choices that women may make or barriers they may face, few dispute that discriminatory bias towards women contributes in part to pay inequity.

ANALYSIS

This Bill would amend the Executive Law by making it an “unlawful discriminatory practice” for an employer to “seek a salary history from a prospective employee for an interview or as a condition for employment.”⁴

Prospective employees are free to provide salary information as part of the negotiation process; employers may discuss salary, benefits and other compensation expectations with the applicant; and a prospective employer may confirm salary history “after obtaining written authorization from the prospective employee.”⁵ Although the law is not as clear as it could be regarding how businesses would operationalize this third exception, presumably what is intended is that the employer may ask for salary history following a conditional job offer in order to confirm the employee's job history. We suggest that the legislature require employers to give prospective employees a conditional job offer before asking for salary history and to clarify that employers may not use this provision to undermine the purpose of the law.

The Bill would also require the New York State Division of Human Rights to establish a public awareness campaign to publicize the prohibition, and to collect and publish data on complaints about violations.

² Anna Brown and Eileen Patten, *The narrowing, but persistent, gender gap in pay*, PEW RESEARCH CENTER (Apr. 3, 2017), <http://www.pewresearch.org/fact-tank/2017/04/03/gender-pay-gap-facts/>.

³ Glenn Kessler, *Here are the facts behind that '79 cent' pay gap factoid*, THE WASHINGTON POST (Apr. 14, 2016), available at https://www.washingtonpost.com/news/fact-checker/wp/2016/04/14/here-are-the-facts-behind-that-79-cent-pay-gap-factoid/?utm_term=.6b5dee20a532.

⁴ A2040A (S5532), 2017-2018 Reg. Sess. (N.Y. 2017).

⁵ *Id.*

LEGISLATIVE INTENT

The primary goal of this Bill would be to “prevent gender based wage discrimination from when women enter the labor force.”⁶

A critical point that underlies the rationale for the Bill is that employers who use prior wage history to set wages for a new employee will perpetuate an underlying wage disparity that existed from any employer in a woman's work history, including, potentially, her very first employer. A major 2013 study from the American Association of University Women found that on average women are paid 6.6 percent less than men in their very first jobs even when taking into account other demographic information.⁷ As research has shown that women start out with a lower salary to begin with, “pegging new wages to old wages maintains the discriminatory practice.”⁸ An employer’s use of salary history guarantees that pay inequality follows workers wherever they go, regardless of their profession or skills. With this Bill, prospective employers would instead have to use the employee’s education, experience, and workplace and industry standards as guideposts.

BENEFITING WOMEN AND MEN OF ALL BACKGROUNDS

Women are not the only demographic group who would benefit from the Bill. Because the prohibition affects all job seekers, other groups who could reasonably expect to benefit include men and women whose wages may have been affected by other forms of discrimination in prior jobs (e.g., race, ethnicity, disability, sexual orientation), workers whose salaries were depressed during the recession, and older workers who may be seeking, out of necessity, a job at a lower pay scale.

Without such legislation, courts may impose their own standards to determine whether employers can use differences in employees’ pay history to support continuing pay inequity. In a recent 9th Circuit case, the court overturned a lower court ruling to hold that employers **could** “base a pay differential on prior salary so long as [the employer] showed that its use of prior salary effectuated some business policy and that the employer

⁶ *Id.* The Legislature’s broad intent to benefit women aligns with the goals of fairness and growing the economy. See Binyamin Appelbaum, *To Lift Growth, Janet Yellen Says, Make It Easier for Women to Work*, N.Y. TIMES (May 5, 2017), available at <https://www.nytimes.com/2017/05/05/us/politics/to-lift-growth-janet-yellen-says-make-it-easier-for-women-to-work.html? r=0> (Federal Reserve Chairwoman Janet Yellen calls for more progressive United States policies on women and work to increase women's workforce participation rates, which have fallen since 1990 as compared to other countries, and to drive economic growth).

⁷ Christianne Corbett, M.A. and Catherine Hill, Ph.D., *Graduating to a Pay Gap: The Earnings of Women and Men One Year after College Graduation*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (“AAUW”) (Oct. 2012), <https://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf>.

⁸ AAUW Intern, *To Help End the Pay Gap, Stop Asking New Hires for Salary Histories*, AAUW (Oct. 14, 2016), <http://www.aauw.org/2016/10/14/stop-salary-histories/>.

used the factor reasonably” in light of its business purposes.⁹ Courts in the 7th and 8th Circuits have held similarly.¹⁰

NEW YORK CITY, OTHER STATES SUPPORT PROHIBITIONS AGAINST SALARY HISTORY

In 2016, Massachusetts became the first state to pass a law prohibiting employers from inquiring about a job applicant’s salary history. Since then, comparable laws have been introduced in several other states and cities, including New Jersey, California, Maryland, Pittsburgh, and Washington, D.C.

New York City’s Mayor de Blasio recently signed a pay history bill similar to This Bill. It covers all public and private NYC employers.¹¹ Additionally, New York City and State already ban their respective government agencies from salary inquiries prior to a conditional offer of employment (though most of these salaries are set by collective bargaining agreements).¹²

Nevertheless, a handful of critics allege that enacting such a law may unduly burden employers, spur increased litigation, and make the salary negotiation process more complicated. In Philadelphia, the city recently agreed to stay the enforcement of its own wage history law after the local Chamber of Commerce sued, claiming that the law violated employers’ free speech and Due Process rights. In Massachusetts, however, the Boston Chamber of Commerce participated in the drafting of that state’s bill and **strongly supported it.**

CONCLUSION

Prohibiting employers from inquiring about a prospective employee’s salary history frees employees from the weight of any past discriminatory bias that held their wages down, and potentially benefits other prospective employees whose salary histories may negatively impact future job and salary prospects. While not a complete fix for the pay gap, the bill would benefit all New Yorkers by moving us another step toward equal pay for equal work.

Based on the foregoing, the New York State Bar Association’s Committee on Women in the Law **SUPPORTS** the enactment of this legislation.

⁹ *Rizo v. Yovino*, No. 16-15372, 2017 WL 1505068, at *4 (9th Cir. Apr. 27, 2017).

¹⁰ *Wernsing v. Dep’t of Human Servs., State of Illinois*, 427 F.3d 466, at 469 (7th Cir. Oct. 21, 2005); *see also Taylor v. White*, 321 F.3d 710, at 718 (8th Cir. Mar. 4, 2003).

¹¹ María Cáceres-Boneau, Jean Schmidt, & David M. Wirtz, *New York City Set to Ban Inquiries About Salary History*, LITTLER (Apr. 14, 2017), <https://www.littler.com/publication-press/publication/new-york-city-set-ban-inquiries-about-salary-history>.

¹² *Mayor De Blasio Signs Executive Order Banning City Agencies from Inquiring About Salary History of Job Applicants*, NYC.GOV (Nov. 4, 2016), <http://www1.nyc.gov/office-of-the-mayor/news/863-16/mayor-de-blasio-signs-executive-order-banning-city-agencies-inquiring-salary-history-of>.