



December 11, 2018

MEMORANDUM

TO: Principal Investigators, Project Administrators, and Individuals Involved in the Hiring Process (Regular-Status and Non-Recruited)

SUBJECT: Act 108: Prohibits Employers from Inquiring about a Job Applicant's Salary History

Effective January 1, 2019, employers cannot inquire about a job applicant's salary history, which includes any information regarding compensation (e.g., salary and wages) and benefits (e.g., medical and retirement package).

Senate Bill 2351 was signed into law as Act 108, which amended Chapter 378, Hawai'i Revised Statutes (Employment Practices). The law addresses the pay disparity between men and women who perform similar work and helps promote equality in the workplace. Hawaii is following other states such as California and Oregon who have enacted similar bans.

In compliance with Act 108, RCUH has removed salary history from its list of job application requirements, and policies, procedures, and forms have been updated to eliminate references to salary history.

Principal Investigators will be responsible for educating and ensuring all individuals (e.g., employee, sponsor affiliate) involved in the hiring process comply with the law. RCUH recommends the following:

- 1) Educate yourself and train all personnel involved in the hiring process – Implement changes to your interview and hiring process to refrain from making any inquiries about salary history. Senate Bill 2351 and FAQs on the new law from the Hawaii Employers Council (HEC) are attached for your reference.
- 2) Review and modify all paperwork related to the hiring process – Does your project utilize a standard set of interview questions or forms that mention salary history? If so, modify as appropriate and distribute to involved individuals to avoid inadvertent non-compliance.
- 3) It's okay to ask an applicant about their salary expectations – This is legal. During the interview process, you may ask an applicant about his/her salary expectations to help you understand what the applicant is looking for and how it falls in line with your budgeted salary. Should the applicant self-disclose his/her salary history information without prompting, that is fine. In this instance, the self-disclosed salary history information may be used to assist you in determining pay.
- 4) Know the salary range (Regular-Status), funding limitations, and competitive market salaries – Regular-Status positions have been classified and assigned a pay range, which is your guide to pay at least the minimum but not more than the maximum salary (refer to the job description). For Non-Recruited hires, you may inquire about their salary expectations.

Please contact RCUH Human Resources (rcuhr@rcuh.com or 956-3100) if you have any questions.

Attachments: (1) Senate Bill 2351 (Act 108), (2) HEC FAQs on Hawaii's New Pay Secrecy Law

THE SENATE
TWENTY-NINTH LEGISLATURE, 2018
STATE OF HAWAII

S.B. NO. 2351
S.D. 1
H.D. 1
C.D. 1

A BILL FOR AN ACT

RELATING TO EQUAL PAY.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

1 SECTION 1. The legislature finds that pay disparity
2 persists between men and women who do similar work. The
3 Institute for Women's Policy Research reported that if the
4 progress to achieve pay parity continues at the same rate as it
5 has since 1960, women and men will not reach pay parity until
6 2058.

7 The legislature further finds that existing Hawaii law
8 generally prohibits an employer from paying an employee at wage
9 rates less than the rates paid to employees of the opposite sex.
10 However, in 2015, the gender wage gap in Hawaii stood at sixteen
11 cents on the dollar. A woman working full-time and year-round
12 earned an average of eighty-four cents to every dollar a man
13 earned. The gap was far worse for women of color: for every
14 dollar a white male made, African-American and Asian-American
15 women made only seventy-three cents and Latina women made only
16 sixty-seven cents. This wage gap extends across almost all
17 occupations reporting in Hawaii.



1 The legislature believes that the ability of employers to
2 consider a job applicant's previous salary history is a
3 contributing factor to the gender pay disparity. Women often
4 disclose their lower salary histories, and employers offer lower
5 salaries in response. In 2017, New York City became the first
6 municipality in the United States to address this problem by
7 prohibiting employers from requesting a job applicant's salary
8 history. Hawaii should follow suit to help promote equality in
9 the workplace and close the pay gap between men and women.

10 The legislature further finds that there are extreme income
11 disparities for native Hawaiians, particularly for native
12 Hawaiian women, which suggests that the combination of gender
13 and race discrimination in pay may significantly impact the
14 native Hawaiian community. Recent research indicates that
15 native Hawaiian men and women make less than the statewide
16 average annual income. Native Hawaiian men earn on average
17 \$7,621 less annually than the total male population statewide.
18 Native Hawaiian women, meanwhile, make on average \$5,967 less in
19 income annually than women statewide, \$11,393 less annually than
20 native Hawaiian men, and an average of \$19,014 less than all men
21 statewide. Native Hawaiian women make seventy cents for every



1 dollar a man makes, and seventy-nine cents for every dollar a
2 native Hawaiian man makes. Such disparities should be
3 acknowledged and addressed in the search for true income equity
4 in Hawaii.

5 The legislature also believes that pay secrecy undermines
6 efforts to close the pay gap. A 2010 Institute for Women's
7 Policy Research/Rockefeller Survey of Economic Security reported
8 that 23.1 per cent of private sector workers reported that
9 discussion of wages and salaries was formally prohibited, and an
10 additional 38.1 per cent reported that this type of discussion
11 was discouraged by managers. Pay secrecy inhibits workers from
12 pursuing claims of pay discrimination because women cannot
13 challenge wage discrimination that they do not know exists. The
14 federal government and many states have taken action to end wage
15 secrecy by prohibiting retaliation against employees who discuss
16 wages. Hawaii can also take this step by prohibiting wage
17 secrecy and retaliation or discrimination against employees who
18 disclose or discuss their wages.

19 The purpose of this Act is to:

20 (1) Disrupt the cycle of wage inequality for women and
21 minorities by prohibiting prospective employers from



1 requesting or considering a job applicant's prior wage
2 or salary history in the job application process so
3 that employers will set compensation offers based on
4 skills and qualifications; and

- 5 (2) Encourage equal pay between men and women by
6 prohibiting enforced wage secrecy and prohibiting
7 retaliation or discrimination against employees who
8 disclose, discuss, or inquire about their own or
9 coworkers' wages for the purpose of exercising rights
10 under the law.

11 SECTION 2. Chapter 378, Hawaii Revised Statutes, is
12 amended by adding a new section to part I to be appropriately
13 designated and to read as follows:

14 "§378- Employer inquiries into and consideration of
15 salary or wage history. (a) No employer, employment agency, or
16 employee or agent thereof shall:

- 17 (1) Inquire about the salary history of an applicant for
18 employment; or

- 19 (2) Rely on the salary history of an applicant in
20 determining the salary, benefits, or other
21 compensation for the applicant during the hiring



1 process, including the negotiation of an employment
2 contract.

3 (b) Notwithstanding subsection (a), an employer,
4 employment agency, or employee or agent thereof, without
5 inquiring about salary history, may engage in discussions with
6 an applicant for employment about the applicant's expectations
7 with respect to salary, benefits, and other compensation;
8 provided that if an applicant voluntarily and without prompting
9 discloses salary history to an employer, employment agency, or
10 employee or agent thereof, the employer, employment agency, or
11 employee or agent thereof, may consider salary history in
12 determining salary, benefits, and other compensation for the
13 applicant, and may verify the applicant's salary history.

14 (c) This section shall not apply to:

15 (1) Applicants for internal transfer or promotion with
16 their current employer;

17 (2) Any attempt by an employer, employment agency, or
18 employee or agent thereof, to verify an applicant's
19 disclosure of non-salary related information or
20 conduct a background check; provided that if a
21 verification or background check discloses the



1 applicant's salary history, that disclosure shall not
2 be relied upon during the hiring process for purposes
3 of determining the salary, benefits, or other
4 compensation of the applicant, including the
5 negotiation of an employment contract; and

6 (3) Public employee positions for which salary, benefits,
7 or other compensation are determined pursuant to
8 collective bargaining.

9 (d) For purposes of this section:

10 "Inquire" means to:

11 (1) Communicate any question or statement to an applicant
12 for employment, an applicant's current or prior
13 employer, or a current or former employee or agent of
14 the applicant's current or prior employer, in writing,
15 verbally, or otherwise, for the purpose of obtaining
16 an applicant's salary history; or

17 (2) Conduct a search of publicly available records or
18 reports for the purpose of obtaining an applicant's
19 salary history;



1 provided that this shall not include informing an applicant, in
2 writing or otherwise, about the proposed or anticipated salary
3 or salary range for the position.

4 "Salary history" includes an applicant for employment's
5 current or prior wage, benefits, or other compensation, but
6 shall not include any objective measure of the applicant's
7 productivity, such as revenue, sales, or other production
8 reports."

9 SECTION 3. Section 378-2.3, Hawaii Revised Statutes, is
10 amended to read as follows:

11 "[-] §378-2.3 [+] Equal pay; sex discrimination. (a) No
12 employer shall discriminate between employees because of sex, by
13 paying wages to employees in an establishment at a rate less
14 than the rate at which the employer pays wages to employees of
15 the opposite sex in the establishment for equal work on jobs the
16 performance of which requires equal skill, effort, and
17 responsibility, and that are performed under similar working
18 conditions. Payment differentials resulting from:

- 19 (1) A seniority system;
- 20 (2) A merit system;



1 (3) A system that measures earnings by quantity or quality
2 of production;

3 (4) A bona fide occupational qualification; or

4 (5) A differential based on any other permissible factor
5 other than sex

6 do not violate this section.

7 (b) An employer shall not retaliate or discriminate
8 against an employee for, nor prohibit an employee from,
9 disclosing the employee's wages, discussing and inquiring about
10 the wages of other employees, or aiding or encouraging other
11 employees to exercise their rights under this section."

12 SECTION 4. This Act does not affect rights and duties that
13 matured, penalties that were incurred, and proceedings that were
14 begun before its effective date.

15 SECTION 5. Statutory material to be repealed is bracketed
16 and stricken. New statutory material is underscored.

17 SECTION 6. This Act shall take effect on January 1, 2019.



S.B. NO. 2351
S.D. 1
H.D. 1
C.D. 1

Report Title:

Employment; Job Applicants; Salary History; Gender
Discrimination; Wage Secrecy

Description:

Prohibits prospective employers from requesting or considering a job applicant's wage or salary history as part of an employment application process or compensation offer. Prohibits enforced wage secrecy and retaliation or discrimination against employees who disclose, discuss, or inquire about their own or coworkers' wages. Takes effect 1/1/2019. (CD1)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.





HAWAII EMPLOYERS COUNCIL

FAQs on Hawaii's New Pay Secrecy Law

September 20, 2018

The Hawaii Legislature recently passed a new “Pay Secrecy” law, Act 108, which prohibits employers, employment agencies, and their employees or agents from inquiring into a job applicant’s current or prior compensation, and from relying on an applicant’s current/prior compensation to set initial compensation. Employers are permitted, however, to ask a job applicant about his/her expectations regarding compensation and benefits. The following are answers to some frequently asked questions about the new Pay Secrecy law.

Q1. What is the effective date of the new law?

A. The effective date is January 1, 2019. However, it would be wise for employers to familiarize themselves with the law and start complying with its requirements prior to the effective date, to give themselves a head start.

Q2. Why did the Hawaii legislature pass the Pay Secrecy law?

A. The basic purpose of the statute is to reduce existing wage disparities impacting women, particularly women of color. The preamble to the Act notes that as of 2015, women in Hawaii earned 84% of wages paid to men for equivalent work, and concludes that the practice of using a job applicant’s prior salary to set initial wages perpetuates lower wages for women. The Legislature reasoned that because women are generally paid lower salaries than men for equivalent work, when an employer uses a female job applicant’s prior salary to set initial compensation, such a practice prevents women from closing the wage gap.

Note: Although the statute was primarily designed to reduce pay disparities affecting women, the prohibition on asking job applicants about their salary history applies to all job applicants, regardless of gender.

Q3. Do other states have similar laws?

A. Yes, as of 2018, at least six other states (California, Connecticut, Delaware, Massachusetts, Oregon, and Vermont) and a number of cities have enacted similar bans prohibiting private employers from asking about the salary history of job applicants. In 2017, New York City enacted a similar measure prohibiting employers from inquiring into salary history. In 2016, a bill was introduced in Congress to prohibit salary history inquiries by private employers; however, that bill failed to pass.

Q4. When I interview job applicants, what types of questions am I prohibited from asking because of this pay secrecy law?

A. Employers, employment agencies, and any of their employees or agents are prohibited from:

- **Inquiring** into the salary history of a job applicant, or
- **Relying** on the salary history of an applicant in determining the salary, benefits, or other compensation for the applicant during the hiring process, including the negotiation of an employment contract

The statute defines “salary history” as including “an applicant for employment's current or prior wage, benefits, or other compensation, shall not include any objective measure of the applicant’s productivity, such as revenue, sales, or other production reports.”

As a result, an employer cannot question a job applicant about the work-related “benefits” available in their current or prior employer, including but not limited to, paid leave, 401K matches, retirement benefits, health insurance coverage, disability or life insurance coverage, education allowances, paid parking, car allowances, etc. Asking a job applicant about commission rates or commission formulas in their current or prior employment would also be clearly prohibited.

However, the statute provides that an employer can ask applicant’s about “any objective measure of the applicant’s productivity, such as revenues, sales, or other production reports.” For example, it would be unlawful to ask a job applicant how much he/she earned in commissions in a prior job, but permissible to ask about their annual sales revenues.

Q5. The statute prohibits inquiries into current or prior “benefits” in employment. What is included in “benefits”?

A. Unfortunately, the statute does not define the term “benefits.” Presumably, prohibited inquiries into “benefits” would include any job-related benefit with a monetary value, such as gym memberships, employee discount programs, 401K plans, paid leave, health insurance, etc. It is possible that “benefits” could also include non-monetary benefits such as flexible work hours or telecommuting arrangements. The types of non-monetary perks which could be included under “benefits” is unknown, and will likely be determined by either future rule making or court decisions.

Q6. What if I don’t ask the applicant directly about their salary history, but try to obtain the information from current/prior employers or co-workers?

A. That would be a violation. The statute provides that prohibited “inquiries” not only include questions directly posed to the job applicant, but also questions directed to “an applicant’s current or prior employer, or a current or former employee or agent of the applicant’s current or prior employer.” Therefore, employers should not ask about the applicant’s prior compensation or benefits while conducting reference or background checks of applicants.

Q7. What if I research the job applicant’s pay by searching Internet sites like Payscale or Glassdoor?

A. The statute defines prohibited inquiries into salary history as including “a search of publicly available records or reports for the purpose of obtaining an applicant’s salary history.” Accordingly, employers are prohibited from conducting Internet searches to obtain information about an applicant’s salary, such as from IRS Form 990, SEC 10K filings, Bloomberg executive profiles, PayScale, Glassdoor, etc.

Q8. What happens if I am conducting a reference check, and the applicant’s prior employer or co-worker discloses salary history information -- for example, the prior employer tells me (without being asked) that the applicant’s final rate of pay was \$X per hour?

A. The statute not only prohibits employers from asking about salary history information, but also prohibits employers from relying on an applicant’s salary history information. As a result, if a prior or current employer or co-worker inadvertently discloses salary history information regarding the job applicant, employers are prohibited from using that information in making compensation decisions concerning the job applicant.

Q9. If employers are prohibited from asking an applicant about his/her current or prior compensation, how can an employer make a reasonable pay offer to a job applicant?

A. The statute specifically allows employers to ask job applicants about their expectations with respect to salary, benefits, and other compensation. Instead of making a salary offer based on a job applicant’s current or prior compensation, you can ask applicants about their salary and benefit expectations during the application or interview process. An employer could also inform the applicant of the anticipated salary range or available benefits for the position, then ask the applicant if that is acceptable or meets their expectations.

Q10. What happens if an employer does not ask an applicant about their current/prior compensation, but the applicant discloses that information to the employer? For example, let’s say I tell an applicant during the interview process that the job pays between \$50,000 and \$55,000 a year, depending on skills and experience. The applicant then tells me that he/she is already making a salary of \$55,000 per year. Am I prohibited from relying on that information when making a counter-offer?

A. If a job applicant voluntarily and “without prompting” discloses salary history information, an employer may use that information in making decisions about initial pay and benefits. The employer may also verify the voluntarily disclosed salary history (for example, by contacting the applicant’s prior employer). But employers cannot invite or encourage job applicants to disclose their salary history. Rather, the applicant must voluntarily disclose the salary history information. In many cases, this may happen when an applicant rejects an employer’s initial compensation offer and informs the employer that he/she is being paid more in his/her current job.

Q11. Does the statute prohibit an employer from using salary history information when the job applicant is a current employee who is applying for a transfer or promotion?

A. It does not. The statute specifically exempts from its coverage individuals applying for internal transfers or promotions with the current employer. You can always rely upon and use salary history information to make compensation decisions when the job applicant is a current employee of yours. The statute also exempts from its coverage public employees covered by a collective bargaining agreement.

Q12. How will the statute be enforced? Do job applicants simply file a lawsuit against the employer?

A. Because the statute is included in HRS Chapter 378 Part I, primary enforcement is through the Hawaii Civil Rights Commission (similar to discrimination claims). Claimants may request a right to sue letter and initiate a civil suit. A charge must be filed with the HCRC within 180 days after the violation occurred, and a civil suit initiated within 90 days of receipt of the right to sue letter.

Note that because salary history inquiries are *per se* illegal, the Hawaii Civil Rights Commission can find a violation even if there is no evidence of financial loss by the job applicant, and impose fines on employers who violate the statute.

Practical Tips:

- 1. Train managers, HR personnel, and co-workers involved in job interviews:** Many managers and HR personnel habitually ask job applicants about the applicant's compensation in current or prior employment, and need to be trained to refrain from making any inquiries about prior compensation or benefits during the hiring process.
- 2. Revise job applications:** Job applications often inquire into an applicant's prior compensation and sometimes benefits. Revise all job applications for compliance.
- 3. Consider disclosing salary ranges and benefits early in the hiring process:** There is nothing more disheartening than reviewing the qualifications of and interviewing a job applicant, only to find that time was wasted because the applicant's compensation expectations are beyond what you are willing to pay. Because employers are now prohibited from questioning job applicants about current or past compensation, they should consider disclosing salary ranges in initial job postings or very early in the hiring process.