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Prior Salary in Employment Decisions: California Changes and Attempts to Clarify Recent Salary History Ban and Fair Pay Act Legislation

By [Pay Equity Practice Group](#)

All California employers should be aware of important revisions to California's "Salary History Ban" (Labor Code section 432.3) and "Fair Pay Act" (Labor Code section 1197.5) that will be effective January 1, 2019. AB 2282 changes and seeks to clarify these two existing laws in the following key ways:

First, California's existing Salary History Ban requires employers "upon reasonable request, [to] provide the pay scale for a position to an applicant applying for employment." AB 2282 attempts to clarify the term "pay scale" by defining it as "a salary or hourly wage range." While the definition appears to clarify for employers that a "pay scale" does not include other forms of compensation, such as bonus or long-term incentive compensation, it leaves several questions unanswered, including:

- What if my company does not have a formal "pay scale" or "wage range" for this job?
- Does "pay scale" mean the pay range for the individual applicant or a new hire, in light of his or her experience and skill set, or must it include the range for all employees in the role, regardless of experience, tenure, or other job-related criteria?

AB 2282 does, however, provide helpful clarification on when and to whom pay scales must be provided. It defines "upon reasonable request" as "after an applicant has completed an initial interview with the employer." And it defines "applicant" or "applicant for employment" as "an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position." (Emphasis added.) Thus pay scale data need not be provided to incumbent employee applicants or to individuals who apply for a position but never complete an initial interview.

Second, the initial Salary History Ban clearly prohibits employers from seeking an applicant's "salary history information," but unlike laws in some other states, it was silent on whether employers can seek an applicant's "salary expectation" for the position. AB 2282 answers that question, and confirms that employers may ask applicants about salary expectations.

Third, AB 2282 makes an important change to California's Fair Pay Act. Currently, the Fair Pay Act states that prior salary "shall not, by itself, justify any disparity in compensation." The "by itself" language led some to conclude that prior salary, when combined with other factors, can account for a



pay differential. No longer. Striking “by itself” from the statute, the law will now state simply: “Prior salary shall not justify any disparity in compensation.” The section will then go on to state, “Nothing in this section shall be interpreted to mean that an employer may not make a compensation decision based on a current employee’s existing salary, so long as any wage differential resulting from that compensation decision is justified by one or more of the factors in this subdivision.”

Despite these new clarifications, many questions remain, and pay equity litigation continues to present risk for employers within California and across the country. Please feel free to contact a Paul Hastings lawyer for advice on this important topic.



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