

Salary History Questions Will be a Thing of the Past

California, Delaware, Massachusetts, Oregon, New York City and San Francisco, all prohibit employers from asking job applicants about their prior salary history. Why? Female and minority job applicants historically make lower wages than comparable white, male applicants. Employers who set their rate of pay based on an individual's salary history could unintentionally discriminate against applicants based on their race or sex.

The Illinois legislature passed legislation banning salary history questions in late 2017, but Governor Rauner vetoed [HB2462](#) and the Illinois State Senate failed to override the veto.

Federal Courts Don't Like Salary History Questions Either

The 9th Circuit Court of Appeals located in California has now joined the 2nd Circuit, the 6th Circuit, the 10th Circuit and the 11th Circuit, in holding that employers cannot use an employee's salary history as an affirmative defense when defending against an Equal Pay Act ("EPA") claim. In [Rizo v. Yovino](#), decided two days ago, the federal appellate court that covers most of the West Coast recounted a familiar fact pattern.

The Fresno County Office of Education hired Aileen Rizo as a math consultant in 2009. At the time, it was the county's policy to pay new employees 5% more than what they received at their prior job. Fresno County only considered Rizo's prior salary of \$50,000 per year in Arizona when it hired her. It did not consider her experience or any other factor when it set her salary.

Rizo subsequently learned that some of her male colleagues, doing the same job, were being paid more than she was. She filed an internal complaint and then later filed a federal lawsuit under the EPA. First, a three-judge panel in the 9th Circuit ruled that the county could use its salary history model as a defense to Rizo's claim. But a full complement of 11 judges, *en banc*, overruled the three-judge panel and held that Rizo had a right to bring her EPA claim to trial.

The 7th Circuit Court of Appeals decides federal claims in Illinois where employers may still use salary history as a legitimate defense to EPA claims. Similarly, employers in Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota and South Dakota may use salary history information. But the federal courts in Illinois and these other states are now the minority position nationwide.

Takeaway

Illinois employers should stop using salary history as a method for setting employee compensation because it may soon be illegal. Moreover, employers should stop asking employees questions about their salary history. It is only a matter of time before a salary history ban comes to Illinois under state law. Indeed, we are probably one governor's election away from that result. Instead of salary history, Illinois employers should use any other objective factor for setting an employee's starting compensation. Illinois employers may also want to conduct a confidential pay audit to determine if any of their female or minority employees are underpaid compared to their peers. The question is no longer if there will be a salary history ban in Illinois. Rather, it is a matter of *when*.

If you have any questions about the matters addressed in this *CCM Alert*, please contact the following CCM author or your regular CCM contact.

Ross I. Molho
Clingen Callow & McLean, LLC
2300 Cabot Drive, Suite 500
Lisle, Illinois 60532
www.ccmlawyer.com
(630) 871-2614

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