

# salary history bans

a 2018 compliance guide for employers

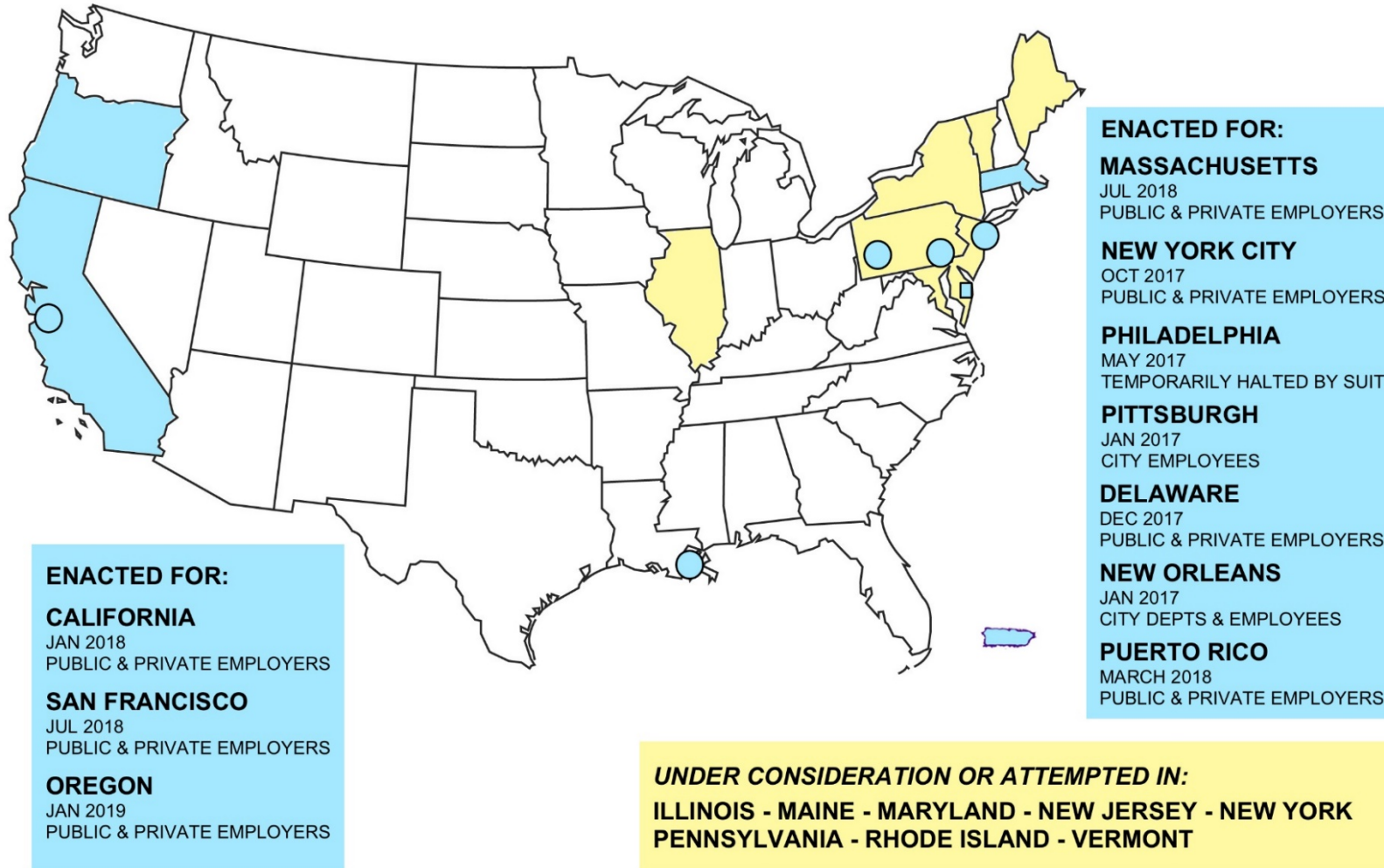


# what are salary history bans?

New laws spreading across the country  
which in their most basic form,  
make it illegal for employers  
to ask applicants  
about their salary history.



# where are there salary history bans?



# why are there salary history bans?

The spirit of these laws is to ensure  
pay equity based on merit & experience  
& close a gender pay gap which even today  
has women earning an average of 80 cents  
to every dollar earned by a man.



# compliance with the bans

This compliance guide focuses  
on California's salary history ban  
Assembly Bill 168 – aka AB 168 –  
which amends California's Labor Code  
effective January 1, 2018.



# compliance with the bans

Although this compliance guide  
might be applicable to some  
salary bans outside California,  
consulting an attorney  
before doing so is recommended.



# compliance with the bans

Looking at the actual text of AB 168, the heart of the law is contained in 13 simple words...

“ An employer shall not,

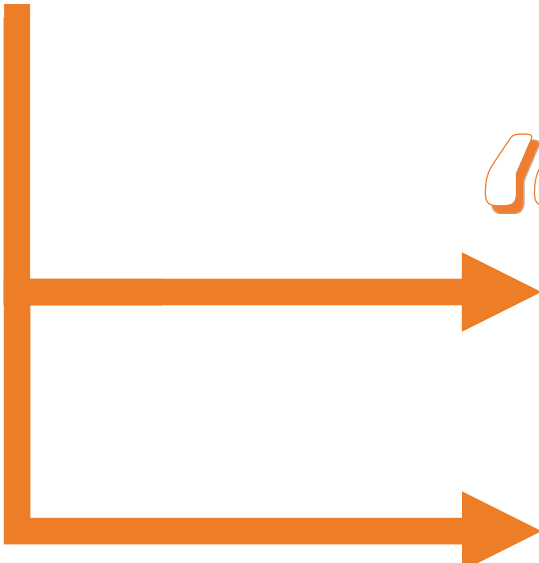
seek salary history information,

about an applicant for employment. ”



# compliance with the bans

It's the rest of this text that makes compliance a challenge...



“ An employer shall not, orally or in writing, personally or through an agent, seek salary history information, including compensation and benefits, about an applicant for employment. ”





# compliance with the bans

“ An employer shall not, orally or in writing, personally or through an agent, seek salary history information, including compensation and benefits, about an applicant for employment. ”

## How to comply:

HR must remove salary history references from applicant paperwork.

Employers must not ask applicants about salary history through any communication medium.

Recruiters/3<sup>rd</sup> parties must not ask applicants about their salary history through any communication medium (including initial phone screens).

Employers must not go through a recruiter (or other “agent”) to ask applicants about salary history.



# compliance with the bans

“ An employer shall not, orally or in writing, personally or through an agent, seek salary history information, **including compensation and benefits,** about an applicant for employment. ”

## How to comply:

Hiring managers & recruiters must first understand what “compensation and benefits” technically means...



# compliance with the bans

Employee compensation & benefits are usually divided into 4 basic categories:

1

## GUARANTEED PAY

A fixed monetary (cash) reward paid by an employee. The most common form of guaranteed pay is base salary. Guaranteed pay also includes cash allowances (housing, transport allowance, etc.), differentials (shift, holiday) & premiums (overtime, night shift, etc.)

2

## VARIABLE PAY

A non-fixed monetary (cash) reward paid to an employee that is contingent on discretion, performance, or results achieved. The most common forms of variable pay are commissions, bonuses & incentives.

3

## BENEFITS

Programs an employer uses to supplement employees' compensation, such as paid time off, medical insurance, company car & more.

4

## EQUITY BASED COMPENSATION

Stock or pseudo stock programs an employer uses to provide actual or perceived ownership in the company which ties an employee's compensation to the long-term success of the company. The most common examples are stock options.

# compliance with the bans

AB 168 states:

“ An employer shall not, orally or in writing, personally or through an agent, seek salary history information, including compensation and benefits, about an applicant for employment. ”

## How to comply:

In addition to not asking applicants about salary history information, employers and recruiters/3<sup>rd</sup> parties must not ask applicants about any compensation history involving:  
“guaranteed pay”,  
“variable pay”,  
“benefits” or  
“equity based compensation”.

Not sure if it’s “compensation”?  
**THEN DON’T ASK!**



# compliance with the bans

AB 168 also states:

“ An employer,  
upon reasonable request,  
shall provide the pay scale  
for a position  
to an applicant  
applying for employment. ”

## How to comply:

“Reasonable request” is not defined...but asked or not, managers & recruiters should know the pay scales for their open positions before they conduct an interview.

Don't guess at the employer's pay scales...get the “official” numbers from HR.

Knowing a job's pay scale also helps interviewers “change the conversation” away from asking about salary history (slide 16).



# compliance with the bans

So how does an employer have a “safe” conversation about salary history



# compliance with the bans

Instead of asking about salary history, ask...

This legally-permitted question:

Lets the candidate share what they seek to make for the job.

Lets you decide if you should keep talking with them.

Tells you whether they've done their homework or not. (If they *don't* answer with, "*Well, I've been researching and it seems that the going rate in the market is...*" that gives you some insight to their work as a potential employee).

"What are your salary expectations?"



# compliance with the bans

Instead of asking about salary history...



Share your hiring range for the position and explain why the range is set where it is. Example:

*"We're trying to grow such and such area, so as a result we've targeted very competitively in the market. Our hiring range is X to Y. Let's talk about where you'd fit into that range based on your experience, skills and project results."*

Reinforce the value of the job relative to organizational goals & objectives. Reiterate the job's market value & have a conversation about what motivates the applicant. Example:

*"This position helps us ensure our customers get the best service, which is core to our organizational values. We recently did a market study and found that X is typical for the role. Are you most motivated by in a job? How do you see yourself thriving in our organization?"*



# compliance with the bans

AB 168 does allow using salary history in a hiring decision \*IF\* the applicant \*voluntarily\* discloses salary history \*without\* prompting...



# compliance with the bans

...here's the relevant AB 168 text:

“ Nothing in this section shall prohibit an applicant from **voluntarily and without prompting** disclosing salary history information to a prospective employer.

If an applicant **voluntarily and without prompting** discloses salary history information to a prospective employer, nothing in this section shall prohibit that employer from considering or relying on that voluntarily disclosed salary history information in determining the salary for that applicant.

”



# compliance with the bans

Be careful using “voluntarily” disclosed salary history:

## REMEMBER:

Another part of the California Labor Code (The California Fair Pay Act) forbids employers to rely on prior salary, by itself, to justify any disparity in pay.

## THINK ABOUT:

How does an employer (or recruiter or other 3<sup>rd</sup> party) prove that an applicant disclosed salary history information “voluntarily and without prompting”?

Such proof could become key if an applicant attempts legal action alleging that he or she was denied the job because of salary history violations.

One possible solution: interview documentation (slide 22).



# compliance with the bans

## THE COST OF



- Fines (up to \$250K in New York City)
- Jail time
- Legal fees
- Possible class action



# compliance recommendations

Notify recruiters that the organization complies with bans on compensation history inquiries.

Have recruiters acknowledge this policy.

Have recruiters confirm with each submitted candidate that they have abided by the policy & did not ask the candidate about compensation history.

Prepare for each interview (including phone screenings).

Secure official job descriptions & pay ranges for open positions from HR before each interview.

Prepare clear, legal interview questions that focus on candidate qualifications, experience & education and which DO NOT ASK about compensation history.

Document interview results on a simple, standardized form that includes identifying whether or not compensation history was discussed and if so, how that discussion came about (slide 22).

For high visibility positions, consider partnering with HR to conduct interviews as co-interviewer, witness & event recorder.



# compliance recommendations


## CANDIDATE INTERVIEW FORM (DOWNLOAD SEPARATELY)

Easy to use e-form: check  
the boxes on-screen.

Assess candidates using  
standardized criteria  
common to most positions.

Facilitates feedback to  
recruiters.

Red font section  
memorializes compliance  
with salary history ban  
laws.



PHOENIXHR LLC  
HR services that help businesses thrive not just survive.  
LinkedIn & resume writing that connects people with success.

CANDIDATE INTERVIEW EVALUATION FORM – COMPANY CONFIDENTIAL

CANDIDATE NAME: \_\_\_\_\_

POSITION INTERVIEWED FOR: \_\_\_\_\_

INTERVIEW DATE: \_\_\_\_\_

INTERVIEWER NAME: \_\_\_\_\_

FOR QUALITATIVE ANSWERS	LOW	AVERAGE	HIGH	NOT APPLICABLE	
FOR "YES/NO" ANSWERS	NO	YES			
<b>INITIATIVE</b> Did the candidate demonstrate, through their answers, a high degree of initiative?	<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
<b>Comments:</b>					
<b>CUSTOMER SERVICE SKILLS</b> Did the candidate demonstrate the knowledge & skills necessary to create a positive customer experience/interaction necessary for this position?	<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
<b>Comments:</b>					
<b>INTEGRITY</b> Does the candidate have experience handling sensitive and/or confidential company information? How well does the candidate manage work relationships and follow company policies to set a good example?	<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
<b>Comments:</b>					
<b>APPEARANCE</b> For in-person or video interviews, evaluate the candidate's dress/grooming/body language/eye contact. (Mark N/A if phone screening).	<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
<b>Comments:</b>					
<b>JOB EXPECTATIONS</b> To what degree does the candidate's job expectations align with the needs of the position?	<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
<b>Comments:</b>					
<b>COMPENSATION HISTORY</b> Was the candidate's compensation history discussed (if "yes", you must answer next question)? If compensation history was discussed, did candidate disclose their compensation history voluntarily and without prompting? (If "no" you must explain in "Comments" below how the compensation history discussion came about).	<input type="checkbox"/> YES	<input type="checkbox"/> NO			
<b>Comments:</b>					
<b>PAY EXPECTATIONS</b> Was pay range for the position disclosed (if "yes", you must answer next question)? Did candidate ask about the pay range for the position? (If "no" you must explain in "Comments" below how the pay range discussion came about).	<input type="checkbox"/> YES	<input type="checkbox"/> NO			
<b>Comments:</b>					
<b>CANDIDATE ENTHUSIASM</b> To what degree does the candidate's pay expectations align with the needs of the position? (Explain as needed in "Comments" below).	<input type="checkbox"/> 1	<input type="checkbox"/> 2	<input type="checkbox"/> 3	<input type="checkbox"/> 4	<input type="checkbox"/> 5
<b>Comments:</b>					
<b>FINAL RECOMMENDATION &amp; COMMENTS</b> Proceed with considering this candidate? (Explain in comments). <b>REMEMBER: you are rating the candidate against the job, not against other applicants.</b>	<input type="checkbox"/> YES	<input type="checkbox"/> NO			
<b>Comments:</b>					

UPON COMPLETION INTERVIEWER KEEPS ONE COPY & FORWARDS ONE COPY TO CORPORATE HR  
[CANDIDATE INTERVIEW FORM-C9-JAN 2018.DOCX]

CONTINUED PAGE 2

We hope you found this guide helpful! Send feedback or suggestions to: [solutions@phoenixhr.org](mailto:solutions@phoenixhr.org)

**PHOENIXHR LLC IS YOUR HUB FOR HR CONSULTING, LINKEDIN & RESUME WRITING SERVICES**

*HR that helps businesses thrive, not just survive.*

*Custom LinkedIn & Resume writing that connects people with success.*

For more information, call us today at 310-697-3434  
or click the live links below to visit our secure, mobile-friendly website:

[Read our blog on the New York City salary ban law.](#)

[Find out how you can get a LinkedIn profile makeover from PhoenixHR LLC for 50% off.](#)

[Find out how new resume clients can get a customizable cover letter solution \(normally \\$25\) for free.](#)



*This "Salary History Bans 2018 Compliance Guide for Employers" is a service provided by PhoenixHR LLC, its partners, affiliates or subsidiaries (collectively, "Provider"). Provider does not provide legal advice and is not a law firm. Although we go to great lengths to make sure our information is accurate and useful, we recommend you consult a lawyer if you want legal advice. No attorney-client or confidential relationship exists or will be formed between you and Provider or any of our representatives.*