

Employment Hot Topics: Salary History Bans and Independent Contractors

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Columbus: Salary History Ban

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Columbus: Salary History Ban

- Effective 3/1/24
- Prohibits employers from:
 - inquiring about a job applicant's wage rates or salary history
 - while working for a prior employer

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Columbus: Salary History Ban

- Covered Employers
 - 15 or more employees within the City of Columbus
- Covered Individuals
 - Applies regardless of whether the individual is ultimately interviewed by the employer



Columbus: Salary History Ban

- Prohibited Conduct
 - Inquiring about salary history of job applicant
 - Screening job applicants based on salary histories
 - Relying solely on the salary history of an applicant in deciding whether to offer employment
 - Retaliating against an applicant for not disclosing salary history



Columbus: Salary History Ban

- What can employers do?
 - Discuss salary expectations
- Exceptions



Columbus Salary History Ban

- Penalties
 - Aggrieved applicant may file a complaint with the Columbus Community Relations Commission (“CRC”)
 - Civil fine up to \$5,000

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Complaint

Your Personal

Name

Date of birth Gender

Nationality

Unit No.

Town/City/State

Country

DEPLOYMENT

1 Communicate purpose, vision and values to employees

Communicate purpose, vision and values to customers

Salary History Bans: Practical Guidance

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Salary History Bans: Practical Guidance

- Most bans apply to private employers
- BUT...some salary history bans are **ONLY applicable to public employers**
 - **Examples:** District of Columbia; Illinois and Chicago; Michigan; New Jersey; New York; North Carolina; Pennsylvania; Virginia; Jackson, MS; Columbia, SC; Kansas City, MO; Louisville, KY, Montgomery County, MD; New Orleans, LA; Pittsburgh, PA; Richland County, SC; Salt Lake City, UT, St. Louis, MO



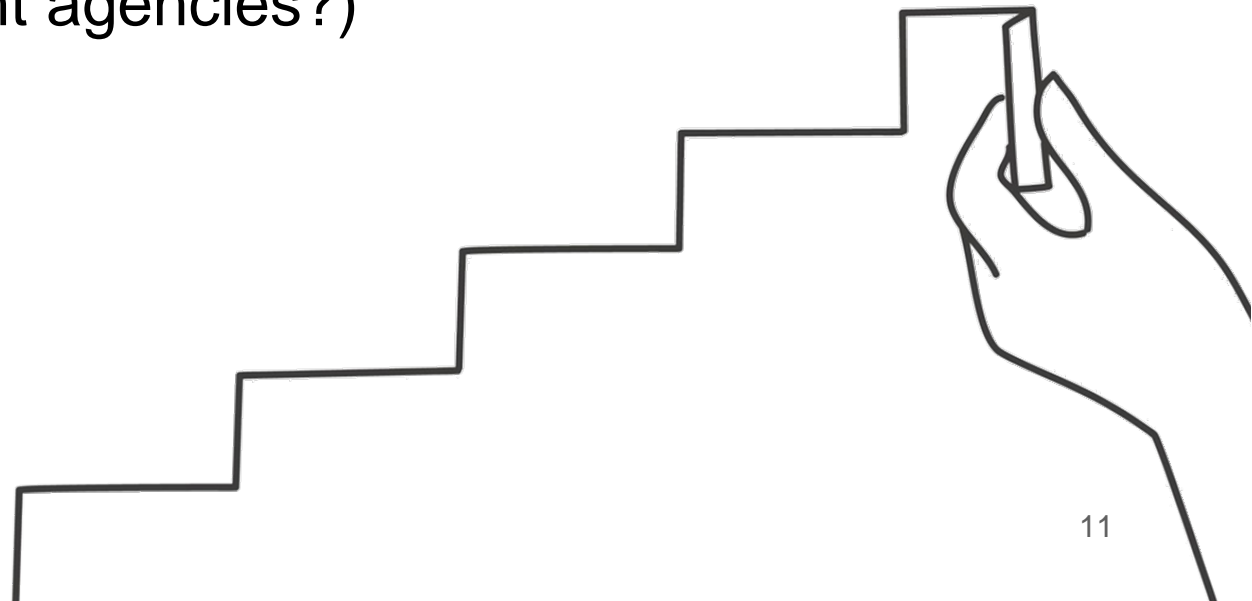
Salary History Bans: Practical Guidance

- Federal pay salary history ban
 - Final Rule: Advancing Pay Equity in Governmentwide Pay Systems
 - Prohibits use of previous non-federal salary history in setting pay for federal employment offers
 - Effective April 1, 2024



Salary History Bans: Practical Guidance

1. Understand the applicable ban
 - Where does it apply (for companies with multiple locations)
2. Know to whom the ban applies
 - Employees?
 - Agents (i.e. recruiters; employment agencies?)



Salary Bans: Practical Guidance

3. Know what is protected

- Salary?
- Piece-rate pay?
- Commissions?
- Bonuses?
- Benefits, perquisites?

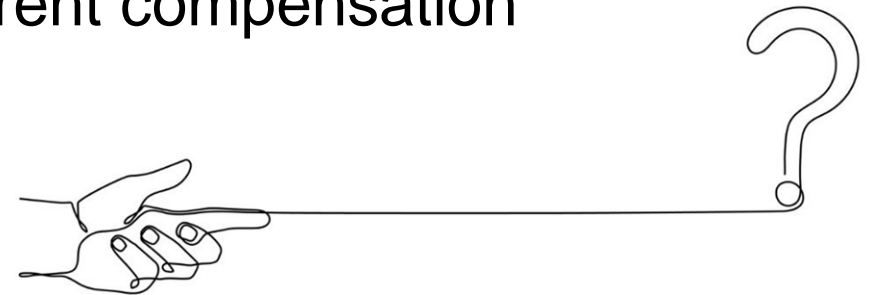
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Salary History Bans: Practical Guidance

4. Know what is NOT permitted:

- Inquiring, asking, seeking, requesting this information
- “encouraging” disclosure
- Requiring disclosure to advance in the hiring process
- Inquiries made directly or indirectly – i.e. through recruiter; reference
- Employment applications that ask the question
- Requesting documents that would include salary history
- Asking if a certain number is within their current compensation



Salary History Ban: Practical Guidance

5. Know what you may ask:

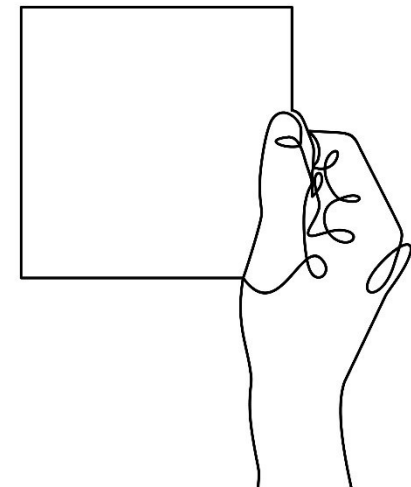
- Objective measures of performance/metrics
- Sales volume/quantity objectives
- Books of business
- Production reports

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Salary History Bans: Practical Guidance

6. Review **ALL** applicant materials, hiring practices, and screening tools to ensure compliance
7. Train Human Resources people and everyone who will interview prospective employees
8. Check on salary bans for all your locations



Salary history bans: Practical Guidance

9. Establish a procedure for documenting an applicant's voluntary disclosure of salary history information
 - Circumstances of the disclosure; voluntary nature; absence of any prompting; with whom the information was shared; that the information was NOT relied on in making an employment decision



Salary History Bans: Practical Guidance



- *Note:* Columbus's ban does NOT require employer to share or post the pay scale for the position

Salary History Bans: Practical Guidance

10. Instruct third parties as to the ban:

(i.e. recruiters, headhunters, background checkers)

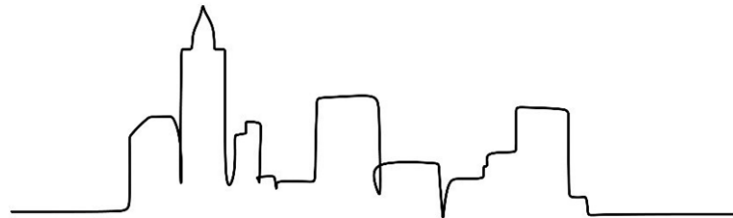
- That 3rd party is required to comply
- That 3rd party may not give employer salary information



Salary History Bans: Practical Guidance

11. Additional management decisions:

- Will you prohibit the use of applicant salary history in all cases, even where otherwise permissible?
- What is your approach to multi-state compliance (where some states/localities have no such bans)?
- Will you set the salary *before* any interviews?



Salary History Ban: Other Cities in Ohio

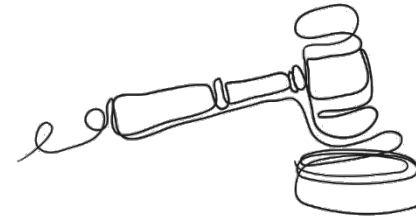
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Salary History Ban: Other Cities in Ohio

- ✓ Columbus
- Cincinnati (Eff. April 11, 2020)
- Toledo (Eff. June 25, 2020)



**Cincinnati and Toledo both have the same, respective law,
but those laws are *different* than Columbus' law**

Who does this apply to?

All employers, and their agents:

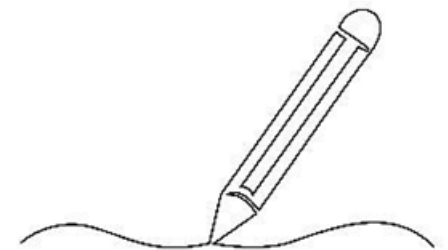
- located in the City of Cincinnati or City of Toledo, and
- using the services of **15 or more employees** for pay within city limits

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“Applicant”

Any person applying for employment to be performed **within the geographic boundaries of the City of Cincinnati/Toledo**, and whose application, in whole or in part, will be solicited, received, processed or considered in the City of Cincinnati/Toledo, regardless of whether the applicant is interviewed.



Prohibited Conduct

An employer shall **not**:

- inquire about the salary history of an applicant for employment verbally, in writing, or by searches of publicly available records;
- screen applicants based on:
 - their current or prior wages,
 - other benefits or compensation, or
 - requiring that salary history satisfy minimum or maximum criteria



Prohibited Conduct (continued)

- rely on salary history in deciding whether to extend an offer of employment, or in determining the salary, benefits, or other compensation for an applicant during the hiring process (including the negotiation of an employment contract); and/or
- refuse to hire or otherwise retaliate against an applicant for not disclosing their salary history



Exclusions:

- applicants for internal transfer or promotion;
- positions for which compensation is determined pursuant to collective bargaining;
- actions taken by an employer pursuant to any federal, state or local law that specifically authorizes the reliance on salary history to determine an employee's compensation;



Exclusions (continued):

- former employees who are re-hired by the same employer **within five years** of termination - provided that the employer already has the applicant's past salary history information from the individual's previous employment;
- Voluntary and unprompted disclosures by applicant;
- And again, the law does not apply to any unit of local, state or federal government, *except* that it does include the City of Cincinnati/Toledo

Mandatory Requirement:

This is the primary difference between Cincinnati/Toledo laws and the Columbus law!

Employer must provide the **pay scale** for a position to an applicant:

- 1) after the applicant has been provided with a conditional offer of employment, and/or
- 2) upon the applicant's reasonable request



Recourse:

- **Two (2) year** statute of limitations;
- May recover: compensatory damages, attorneys' fees, costs and such other legal and equitable relief as the court deems proper;
- Enforcement is through a **private cause of action** (lawsuit), not a government or city agency



JANUARY

SUN	MON	TUE	WED	TH
1	2	3	4	5
8	9	10	11	12
15	16	17	18	19
22	23	24	25	26
29	30	31		

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Salary History and Pay Transparency Laws Across the Country

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Salary History Bans

- 23 states have state and/or local laws that restrict employers' ability to inquire about or use salary history
- Scope of the restrictions vary by state

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California

Employers may **not**:

- Inquire about salary history
- Rely on salary history as a factor in hiring or salary decisions
- Use prior salary to justify a disparity in compensation

Employers **may**:

- Rely on salary history in determining salary when it is disclosed “voluntarily and without prompting”
- Ask about salary expectations

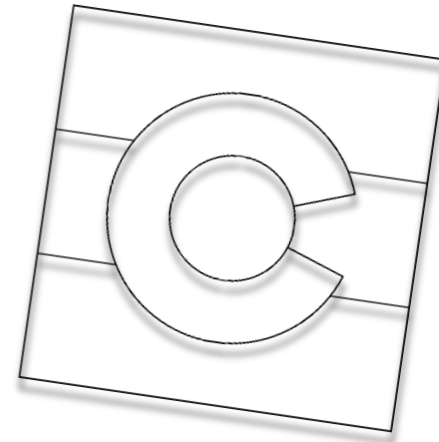


Colorado

Employers may **not**:

- Inquire about salary history
- Rely on salary history to determine wage rates
- Discriminate or retaliate
- Use prior salary to justify a disparity in compensation

The Colorado law contains **no exceptions**



Pay Disclosure Laws

- 13 states have state and/or local laws that require employers to disclose information about pay/benefits to applicants
- **May affect you even if you do not have employees in that state**

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Pay Disclosure in Job Postings

- Generally require disclosure of pay scale in a posting for jobs to be performed in that state **or** remote positions
- Jurisdictions with pay disclosure requirements for job postings:

California

Colorado

Hawaii

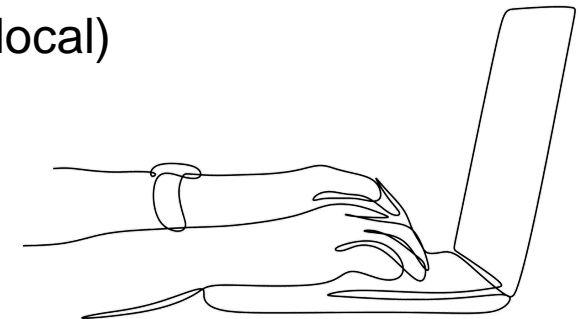
Illinois

Jersey City, NJ

New York (state and local)

Washington state

Washington, D.C.



Pay Disclosure to Applicants



- Generally require disclosure of pay scale to applicants upon request
- Some jurisdictions require proactive disclosure
- Jurisdictions that require disclosure of pay scale to applicants:

California

Connecticut

Illinois

Maryland

Nevada

Cincinnati and Toledo,
OH

Rhode Island

Washington state

Colorado

- Compensation and benefits required in job postings
- Notice of promotional and job opportunities
- Post-selection notices
- Career progression notices

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The Forever Hot Topic: Independent Contractors

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Department of Labor – Final Rule

- January 9, 2024 – DOL issued final rule
- March 11, 2024 – Final Rule is in Effect

The Rule has changed but some things have stayed the same

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The Test for Independent Contractors

- The Six Factor Test
- (bold is what is new)

1. Opportunity for Profit or Loss Depending on Managerial Skill

- *This factor considers whether the worker **exercises managerial skill that has opportunities for profit or loss based on managerial skill (including initiative or business acumen or judgment)** that affects the worker's economic success or failure in performing the work*



The Test for Independent Contractors

2. Investments by the Worker and the Potential Employer

- *Considers whether any investments by a worker are capital or entrepreneurial. **Costs to a worker of tools and equipment to perform a specific job, costs of labor, and costs that the employer imposes unilaterally on the worker, for example, are not evidence of capital or entrepreneurial investment and indicate employee status***
- *The worker's investments need not be equal to the **potential** employer's investments **and should not be compared only in terms of the investment dollar values or the sizes of the worker and employer. Instead, compare investments to determine whether the worker is making similar types of investments as the employer (even if on a smaller scale) to suggest the worker is operating independently, indicating independent contractor status***

The Test for Independent Contractors

3. Degree of Permanence of the Work Relationship

- *This factor weighs in favor of the worker being an employee when the work relationship is indefinite in duration, continuous, or **exclusive of work for other employers***

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The Test for Independent Contractors

4. Nature and Degree of Control

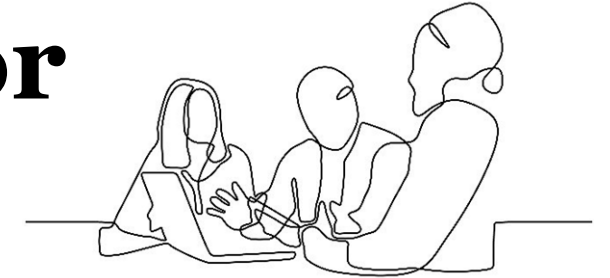
- *Considers the **potential** employer's control, including reserved control, over the performance of the work and the economic aspects of the working relationship...*
- ***Control implemented by the employer for purposes of complying with legal obligations, safety standards, or contractual or customer service standards may be indicative of control***
- ***Actions by the employer for the sole purpose of complying with a specific, applicable law or regulation are not indicative of control***
- ***Actions by the employer that go beyond compliance with a law or regulation and instead serve the employer's own compliance methods, safety, quality control, or standards may be indicative of control***

Independent Contractor Test

5. Extent to which the work performed is an integral part of the employer's business
 - *Considers whether the work performed is an integral part of the **potential** employer's business*
 - *This factor does not depend on whether any individual worker in particular is an integral part of the business, but rather whether the function they perform is an integral part **of the business***



Test for Independent Contractor



6. Skill and initiative

- *Considers whether the worker uses specialized skills and whether those skills contribute to business-like initiative*
- *Indicates employee status where the worker does not use specialized skills or is dependent on training from the **potential** employer*
- *Where the worker brings specialized skills, **this fact is not itself indicative of independent contractor status because both employees and independent contractors may be skilled workers.** It is the worker's use of those specialized skills in connection with business-like initiative that indicates an independent contractor*

Considerations and Best Practices

- No factor is weighed more than other
 - Challenge for employers to assess the risk
- Review every independent contractor agreement and apply test
 - Every factor counts
- Determine what you want the job to be – employee vs. independent contractor
- When in doubt, the person is probably an employee



Thank You!

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