

BOARD of SUPERVISORS



City Hall  
1 Dr. Carlton B. Goodlett Place, Room 244  
San Francisco 94102-4689  
Tel. No. 554-5184  
Fax No. 554-5163  
TDD/TTY No. 554-5227

## MEMORANDUM

TO: Patrick Mulligan, Director, Office of Labor Standards Enforcement  
Jon Givner, Deputy City Attorney, Office of the City Attorney  
Ben Rosenfield, City Controller, Office of the Controller  
William Scott, Police Chief, Police Department  
Emily Murase, PhD, Executive Director, Department on the Status of Women

FROM: Erica Major, Assistant Clerk, Government Audit and Oversight Committee,  
Board of Supervisors

DATE: April 11, 2017

SUBJECT: LEGISLATION INTRODUCED

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The Board of Supervisors' Government Audit and Oversight Committee has received the following proposed legislation, introduced by Supervisor Farrell on April 4, 2017:

**File No. 170350**

**Ordinance amending the Police Code to ban employers from considering current or past salary of an applicant in determining what salary to offer the applicant, and from asking applicants about their current or past salary; to prohibit employers from disclosing a current or former employee's salary history without that employee's authorization; authorizing the Office of Labor Standards Enforcement to implement and enforce these provisions; and authorizing the City to bring a civil action against an employer for violations.**

If you have any additional comments or reports to be included with the file, please forward them to me at the Board of Supervisors, City Hall, Room 244, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102, or by email at: [erica.major@sfgov.org](mailto:erica.major@sfgov.org).

c:  
Donna Levitt, Division Manager, Office of Labor Standards Enforcement  
Todd Rydstrom, Office of the Controller  
Rowena Carr, Assistant to the Police Chief  
Kristine Demafeliz, Executive Secretary to Assistant Chief Hector Sainez  
Minouche Kandel, Policy Director, Department on the Status of Women

1 [Police Code - Employer Consideration of Applicant's Salary History]

2  
3 **Ordinance amending the Police Code to ban employers from considering current or**  
4 **past salary of an applicant in determining what salary to offer the applicant, and from**  
5 **asking applicants about their current or past salary; to prohibit employers from**  
6 **disclosing a current or former employee's salary history without that employee's**  
7 **authorization; authorizing the Office of Labor Standards Enforcement to implement and**  
8 **enforce these provisions; and authorizing the City to bring a civil action against an**  
9 **employer for violations.**

10 NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.  
11 **Additions to Codes** are in *single-underline italics Times New Roman font*.  
12 **Deletions to Codes** are in *strikethrough italics Times New Roman font*.  
13 **Board amendment additions** are in double-underlined Arial font.  
14 **Board amendment deletions** are in ~~strikethrough Arial font~~.  
15 **Asterisks (\* \* \* \*)** indicate the omission of unchanged Code  
16 subsections or parts of tables.

17 Be it ordained by the People of the City and County of San Francisco:

18 Section 1. The Police Code is hereby amended by adding Article 33J, entitled "Parity in  
19 Pay," consisting of Sections 3300J.1, 3300J.2, 3300J.3, 3300J.4, 3300J.5, 3300J.6, and  
20 3300J.7, to read as follows:

21 **ARTICLE 33J: PARITY IN PAY**

22  
23 **SEC. 3300J.1. TITLE.**

24 **This Article 33J shall be known as the "Parity in Pay Ordinance."**

25 **SEC. 3300J.2. FINDINGS.**

1 (a) In San Francisco, women are paid 84 cents for every dollar a man makes, according to the  
2 2015 United States Census Bureau report. Women of color are paid even less. African American  
3 women are paid only 60 cents to each dollar paid to men. Latinas are paid only 55 cents to each dollar  
4 paid to men.

5 (b) According to the National Committee on Pay Equity, the gender wage gap has narrowed by  
6 less than one-half a penny per year in the United States since 1963, when Congress passed the Equal  
7 Pay Act, the first law aimed at prohibiting gender-based pay discrimination.

8 (c) The problematic practices of seeking salary history from job applicants and relying on their  
9 current or past salaries to set employees' pay rates contribute to the gender wage gap by perpetuating  
10 wage inequalities across the occupational spectrum. Women are paid less than men in 99.6% of the  
11 occupations and are more likely to face enduring financial losses for taking time out of the paid  
12 workforce due to childbearing and family caregiving responsibilities.

13 (d) When employers make salary decisions during the hiring process based on prospective  
14 employees' current or past salaries or require employees to disclose current or past salaries as part of  
15 the application process or during salary negotiations, women applicants often end up at a significant  
16 disadvantage. In effect, to the extent employers consider applicants' salary history in setting salaries  
17 of new hires, historical patterns of gender bias and discrimination repeat themselves, causing women  
18 to continue earning less than their male counterparts and less than they would have earned, but for  
19 their gender.

20 (e) In 2015, on Equal Pay Day, the Chair of the Equal Employment Opportunity Commission  
21 (EEOC) advised employers on important steps they could take to ensure equal pay for equal work,  
22 including eliminating "discriminatory pay gaps on the basis of prior salary" and the 2005 EEOC  
23 Compliance Manual states that "prior salary cannot, by itself, justify a compensation disparity."

24 (f) In July 2015, the acting director of the Federal Office of Personnel Management provided  
25 guidance on advancing pay equality in the federal government, warning that reliance on salary history

1 “could potentially adversely affect a candidate who is returning to the workplace after having taken  
2 extended time off from his or her career or for whom an existing rate of pay is not reflective of the  
3 candidate’s current qualifications or existing labor market conditions.”

4 (g) Courts also have warned against relying on salary history and have stated that prior salary  
5 cannot, by itself, justify a wage disparity. In Corning Glass Works v. Brennan, (1974) 417 U.S. 188, at  
6 205, the United States Supreme Court held that a pay differential which “ar[ises] simply because men  
7 would not work at the low rates paid women . . . and reflect[s] a job market in which [the employer]  
8 could pay women less than men for the same work” is not based on a cognizable factor other than sex  
9 under the Equal Pay Act (Public Law 88-38).

10 (h) More recently, in its order in Rizo v. Yovino, Fresno County Superintendent of Schools,  
11 (Case No. 1:14-cv-0423-MJS (E.D. Cal. December 18, 2015), pp. 16-17), the federal district court  
12 denied summary judgment on defendant’s motion under the federal Equal Pay Act based on finding  
13 that, “a pay structure based exclusively on prior wages is so inherently fraught with the risk – indeed,  
14 here, the virtual certainty – that it will perpetuate a discriminatory wage disparity between men and  
15 women that it cannot stand, even if motivated by a legitimate non-discriminatory business purpose.”  
16 The court went on to explain that, “say[ing] an otherwise unjustified pay differential between women  
17 and men performing equal work is based on a factor other than sex because it reflects historical market  
18 forces which value the equal work of one sex over the other perpetuates the market’s sex-based  
19 subjective assumptions and stereotyped misconceptions Congress passed the Equal Pay Act to  
20 eradicate.”

21 (i) Since women are paid on average lower wages than men, basing wages upon a worker’s  
22 wage at a previous job often serves to perpetuate gender wage inequalities and leaves families with less  
23 money to spend on food, housing, and other essential goods and services.

24 (j) In August 2016, the California State Assembly passed AB 1676 specifying that prior salary  
25 cannot, by itself, justify any disparity in compensation.

1           (k) Combatting gender discrimination by prohibiting consideration of an applicant's current or  
2 past salary is emerging as an important policy for promoting gender equity in employee salaries. In  
3 August 2016, Massachusetts became the first state to enact a law prohibiting employers from seeking  
4 or requiring a prospective employee's wage history.

5           (l) If an employer is able to ask a potential employee for their prior salary, it is unlikely that this  
6 information would not be a factor in negotiating or setting a salary offer.

7           (m) This Article 33J will help ensure that an individual's prior earnings, which may reflect  
8 widespread, longstanding, gender-based wage disparities in the labor market, do not continue to weigh  
9 down a woman's salary throughout her career.

10           (n) This measure will also help ensure that both employers and workers are able to negotiate  
11 and set salaries based on the qualifications of the person and the job in question, rather than on an  
12 individual's prior earnings, which may reflect widespread, longstanding, gender-based wage  
13 disparities in the labor market.

14           **SEC. 3300J.3. DEFINITIONS.**

15           "Applicant" shall mean a person applying for a job to be performed in the geographic  
16 boundaries of the City and whose application, in whole or part, will be processed or considered,  
17 whether or not through an interview, in the City. "Applicant" shall not include a person applying for a  
18 job with their current Employer.

19           "City" shall mean City and County of San Francisco.

20           "Employer" shall mean any individual, firm, corporation, partnership, labor organization,  
21 group of persons, association, or other organization however organized, which is or should be  
22 registered to do business in the City. "Employer" includes job placement and referral agencies and  
23 other employment agencies. "Employer" does not include any unit of local, state, or federal  
24 government, except that it does include the City.

1 "Inquire" shall mean any direct or indirect statement, question, prompting, or other  
2 communication, orally or in writing, personally or through an agent, to gather information from or  
3 about an Applicant, using any mode of communication, including but not limited to application forms  
4 and interviews.

5 "OLSE" shall mean the Office of Labor Standards Enforcement or any successor department or  
6 office. The "Director" of OLSE shall mean the head of OLSE.

7 "Salary" shall mean an Applicant's financial compensation in exchange for labor, including  
8 but not limited to wages, commissions, and any benefits.

9 "Salary History" shall mean an Applicant's current and past Salary in the Applicant's current  
10 position, or in a prior position with the current Employer or a prior Employer.

11 **SEC. 3300J.4. PROHIBITIONS ON USE OF SALARY HISTORY IN HIRING.**

12 (a) An Employer shall not Inquire about an Applicant's Salary History.

13 (b) An Employer shall not consider an applicant's Salary History as a factor in determining  
14 what Salary to offer an Applicant. This prohibition applies even if, absent an Inquiry from the  
15 Employer, the Applicant discloses Salary History to the Employer.

16 (c) An Employer shall not refuse to hire, or otherwise disfavor, injure, or retaliate against an  
17 Applicant for not disclosing his or her Salary History to the Employer.

18 (d) An Employer shall not release the Salary history of any current or former employee to that  
19 person's Employer or prospective Employer without written authorization from the current or former  
20 employee.

21 (e) Nothing in this Article 33J shall prohibit an Applicant from voluntarily disclosing Salary  
22 History following an Employer's initial salary offer in order to negotiate a different salary or prohibit  
23 an Employer from considering that applicant's Salary History in determining a counter-offer.

24 **SEC. 3300J.5. IMPLEMENTATION AND ENFORCEMENT.**

1           (a) The OLSE is authorized to take appropriate steps to enforce and coordinate enforcement of  
2 this Article 33J, including the investigation of possible violations of this Article.

3           (b) An employee, applicant, organization, or other person may report to the OLSE any  
4 suspected violation of this Article. The OLSE shall encourage reporting pursuant to this subsection (b)  
5 by keeping confidential, to the maximum extent permitted by applicable law, the name and other  
6 identifying information of any employee or person reporting the violation; provided, however, that with  
7 the authorization of such person, the OLSE may disclose his or her name and identifying information as  
8 necessary to enforce this Article.

9           (c) Where the OLSE determines that a violation has occurred, it may issue a determination;  
10 provided however, that for a first violation occurring any time, or for any violation occurring during  
11 the first 12 months following the operative date of this Article, the OLSE must issue a warning and  
12 notice to correct. Following the initial 12-month period referenced in the prior sentence, for any  
13 subsequent violation other than a first violation (including a first violation occurring during the initial  
14 12-month period), the OLSE may impose an administrative penalty of no more than \$100 that the  
15 Employer must pay to the City for each employee or applicant as to whom the violation occurred.  
16 Thereafter, for subsequent violations occurring within 12 months of that violation, the penalty may  
17 increase to no more than \$200 for the second violation, and to no more than \$500 for each additional  
18 violation. The penalty shall be payable to the City for each employee or applicant whose rights were  
19 violated. Such funds shall be allocated to the OLSE and used to offset the costs of implementing and  
20 enforcing this Article.

21           (d) Where the OLSE determines in its sole discretion that prompt compliance is not  
22 forthcoming, the OLSE may refer the action to the City Attorney, who may initiate a civil action  
23 pursuant to subsection (i).

24           (e) OLSE may initiate an administrative enforcement action for any suspected violation of this  
25 Article within one year of the date the suspected violation occurred.

1 (f) The Director of OLSE shall establish rules governing the administrative process for  
2 determining and appealing violations of this Article. The Rules shall include procedures for:

3 (1) Providing the Employer with notice that it may have violated this Article;

4 (2) Providing the Employer with a right to respond to the notice;

5 (3) Providing the Employer with notice of the OLSE's determination of a violation; and,

6 (4) Providing the Employer with an opportunity to appeal the OLSE's determination to a  
7 hearing officer, appointed by the Controller or the Controller's designee.

8 (g) If there is no appeal of OLSE's determination of a violation, the absence of an appeal shall  
9 constitute a failure to exhaust administrative remedies, which shall serve as a complete defense to any  
10 petition or claim brought by the Employer against the City regarding OLSE's determination of a  
11 violation.

12 (h) If there is an appeal of OLSE's determination of a violation, the hearing before the hearing  
13 officer shall be conducted in a manner that satisfies the requirements of due process. In any such  
14 hearing, the OLSE's determination of a violation shall be considered prima facie evidence of a  
15 violation. The hearing officer's decision of the appeal shall constitute the City's final decision. The  
16 sole means of review of the City's final decision, rendered by the hearing officer, shall be by filing in  
17 the San Francisco Superior Court a petition for writ of mandate under Section 1094.5 of the California  
18 Code of Civil Procedure. OLSE shall notify the Employer of this right of review after issuance of the  
19 City's final decision by the hearing officer.

20 (i) Civil Enforcement. The City may bring a civil action in a court of competent jurisdiction  
21 against the Employer violating this Article, and, upon prevailing, shall be entitled to such legal or  
22 equitable relief as may be appropriate to remedy the violation.

23 (j) Interest. In any administrative or civil action brought under this Article, OLSE or the court,  
24 as the case may be, shall award interest on all amounts due and unpaid at the rate of interest specified  
25 in subdivision (b) of Section 3289 of the California Civil Code.



1 (k) Remedies Cumulative. The remedies, penalties, and procedures provided under this Article  
2 are cumulative.

3 (l) Limitation on Actions. Civil actions to enforce this Article must be filed within one year after  
4 the date of the violation. This limitations period shall not commence until the date the violation was  
5 discovered or could reasonably have been discovered.

6 (m) A violation of this Article 33J shall be an infraction.

7 **SEC. 3300J.6. UNDERTAKING FOR THE GENERAL WELFARE.**

8 In enacting and implementing this Article 33J, the City is assuming an undertaking only to  
9 promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an  
10 obligation for breach of which it is liable in money damages to any person who claims that such breach  
11 proximately caused injury.

12 **SEC. 3300J.7. SEVERABILITY.**

13 If any section, subsection, sentence, clause, phrase, or word of this Article 33J, or any  
14 application thereof to any person or circumstance, is held to be invalid or unconstitutional by a  
15 decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining  
16 portions or applications of this Article. The Board of Supervisors hereby declares that it would have  
17 passed this Article and each and every section, subsection, sentence, clause, phrase, and word not  
18 declared invalid or unconstitutional without regard to whether any other portion of this ordinance or  
19 application thereof would be subsequently declared invalid or unconstitutional.

20  
21 **Section 2. Effective and Operative Dates.**

22 (a) Effective Date. This ordinance shall become effective 30 days after enactment.  
23 Enactment occurs when the Mayor signs the ordinance, the Mayor returns the ordinance  
24 unsigned or does not sign the ordinance within ten days of receiving it, or the Board of  
25 Supervisors overrides the Mayor's veto of the ordinance.

(b) Operative Date. This ordinance shall become operative on January 1, 2018.

APPROVED AS TO FORM:  
DENNIS J. HERRERA, City Attorney

By:

  
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JANA CLARK  
Deputy City Attorney

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## **LEGISLATIVE DIGEST**

[Police Code - Employer Consideration of Applicant's Salary History]

**Ordinance amending the Police Code to ban employers from considering current or past salary of an applicant in determining what salary to offer the applicant, and from asking applicants about their current or past salary; to prohibit employers from disclosing a current or former employee's salary history without that employee's authorization; authorizing the Office of Labor Standards Enforcement to implement and enforce these provisions; and authorizing the City to bring a civil action against an employer for violations.**

### Existing Law

Existing law permits consideration of current or past salary in setting a job applicant's salary. In addition, existing law permits asking job applicants questions about their current or past salary and doesn't require that an employer have a current or former employee's permission to share that employee's current or past salary.

### Amendments to Current Law

This Ordinance adds Article 33 to the Police Code to prohibit consideration of current or past salary in determining what salary to offer an applicant. In addition, this Ordinance prohibits employers from asking applicants about their current or past salary. The Ordinance also prohibits disclosure of a current or former employee's salary without that employee's permission. This Ordinance does permit an employer to consider current or past salary, if the applicant discloses their current or past salary following an initial offer, to determine a counter-offer. The Ordinance authorizes the Office of Labor Standards Enforcement to implement and enforce the Article. Finally, the Ordinance authorizes the City to bring a civil action against an employer for violations of the Article.

### Background Information

The purpose of the Ordinance is to narrow or close the gender-based wage gap. By prohibiting consideration of current or past salary in setting salary and prohibiting inquiry about or the sharing of current or past salary as part of the application process, the Ordinance is intended to prevent the perpetuation of historical patterns of gender bias and discrimination.