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City and County of San Francisco
Department on the Status of Women



Edwin M. Lee
Mayor

MEMORANDUM

Date: April 17, 2017
To: Angela Calvillo, Clerk of the Board of Supervisors
Cc: Supervisor Mark Farrell; Mawuli Tugbenyoh, Mayor's Office
From: Emily Murase, Director
Re: File #170350: Proposal to Ban Salary History

Below is the analysis prepared by Policy Fellow Allie Walker on the proposed ban on salary history as reflected in File #170350. Please do not hesitate to contact her directly with any questions, allie.walker@sfgov.org.

I. EXISTING SALARY HISTORY POLICIES

A. United States Salary History Policies

The United States Equal Pay Act of 1963 which amends the Fair Labor Standards Act of 1938 prohibits an employer from discriminating between employees on the basis of sex by paying wages to employees at a rate less than the rate at which he or she pays wages to employees of the opposite sex for equal work, when taking into account skill, effort, and responsibility, performed under similar working conditions. Under the Equal Pay Act, there are some exceptions to the rule of equal pay for equal work, including a) a seniority system, b) a merit system, c) a system which measures earnings by quantity or quality of production, or d) a differential based on any other factor than sex. The Equal Pay Act does not include salary history as a potential method of discriminating against an employee in terms of pay.

On September 14, 2016, Representative Eleanor Holmes Norton (DC) introduced the Pay Equity for All Act of 2016 to amends the Fair Labor Standards Act of 1938 and make it an unlawful practice for an employer to screen prospective employees based on their previous wages or salary histories and to seek the previous wages or salary history of any prospective employee from any current or former employer of such employee. This bill was last referred to the House Committee on Education and the Workforce.

B. State Salary History Policies

In August 2016, Massachusetts become the first state to pass an equal pay law that prohibits employers from asking prospective hires about their salary histories until after they make a job offer that includes compensation, unless the applicants voluntarily disclose the information.¹

California's Fair Pay Act prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when taking into account skill, effort, and responsibility, performed under similar working conditions, unless the employer demonstrates that specific, reasonably applied factors account for the entire wage differential. The California Fair Pay Act was expanded in 2016 with Senate Bill No. 1063, which prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work. This bill also states that prior salary shall not, by itself, justify any disparity in compensation.²

On January 17, 2017, Assemblymember Susan Eggman (D-Stockton) introduced Assembly Bill No. 168 which would prohibit an employer, including state and local government employers, from seeking salary history information about an applicant for employment, except as otherwise provided. AB 168 would require an employer, except state and local government employers, to provide the pay scale for a position to an applicant for employment upon reasonable request.³

C. Local Salary History Policies

1. Municipal Policies

The following cities have proposed and implemented legislation that prohibits employers from asking prospective hires about their salary histories: Philadelphia, PA; New York City, NY.

Signed by Mayor Jim Kenney on January 23, 2017, the Philadelphia ordinance, which takes effect on May 23, 2017, aims to end the cycle of pay discrimination by prohibiting employers from inquiring about or requiring applicants to provide information on past compensation. It also prohibits employers from relying on applicants' salary histories to set their salary, unless applicants voluntarily offer up that information, and prohibits retaliation against applicants who refuse to disclose their wage history.⁴

The legislation in New York City, NY prohibits employers from inquiring about a prospective employee's salary history during all stages of the employment, and goes so far as to state that if an employer is already aware of a prospective employee's salary history, they cannot rely on that information in the determination of a salary. The city's Public Advocate Letitia James notes that the bill is a response to wage inequality, considering that the wage gap costs women \$5.8 billion a year in New York City alone.⁵ Mayor Bill de Blasio is expected to sign the legislation into law shortly, and the law will become effective within 180 days of signing.

D. Private Sector Salary History Policies

Some U.S. employers have voluntarily adopted policies of not asking applicants about salary history to decide upon current compensation. Google in particular has noted that the gender wage gap is greatly affected by "anchoring bias," a cognitive bias in which a hiring manager's brain becomes fixated on a certain number and will not move far from that.⁶ To combat this bias, Google sets a pay target for each job when hiring promoting, using industry surveys, and offers that salary to every new employee, rather than basing compensation on the employee's prior salary. Google representatives note that by paying for the role, not the person, the employer mitigates any bias embedded within the employee's prior salary.

II. IMPACT AND IMPLEMENTATION OF SALARY HISTORY POLICIES

A. Benefits of Salary History Policies

Research shows that the pay gap between men and women starts as early as college graduation. One year after graduation, the American Association of University Women found that there is an unexplainable 7% difference in the earnings of male and female college graduates, when holding all factors equal (college major, occupation, economic sector, hours worked, months unemployed since graduation, GPA, type of undergraduate institution, institution selectivity, age, geographical location, and marital status), which increases over time.⁷ Over the course of her 35-year career, a woman with a college degree will make an average of \$1.2 million less than a man with

the same level of education. If the gender wage gap were to close and women were to receive equitable salaries, the Institute for Women's Policy Research estimates that the stimulus effect would grow the U.S. economy by at least three to four percentage point.⁸

This gap affects women from all backgrounds, at all ages, and of all levels of educational achievement, but particularly disadvantages women of color. Among full-time workers in 2016, black women and Hispanic and Latina women were paid only 65% and 59%, respectively, of what white men were paid.⁹ Not relying on salary history to inform current compensation will prevent the cycle of systemic underpayment of women, especially women of color, by paying for the role based on industry standards rather than on past discriminatory compensation.

Furthermore, reliance on existing salary to decide on pay could potentially adversely affect a candidate who is returning to the workplace after having taken extended time off from her career or for whom existing rate of pay is not reflective of the candidate's current qualifications or existing labor market conditions. In a recent study based on the National Longitudinal Survey of Youth from 1979 to 2006, Professor Michelle Budig from the University of Massachusetts, Amherst, found that, on average, men's earnings increased more than 6% when men became fathers, while women's earnings *decreased* 4% for each child they had.¹⁰ While in the past, men were considered the breadwinners of families, nowadays, 71% of mothers with children at home work, according to the Bureau of Labor Statistics.¹¹ Women are the sole or primary earner in 40% of households with children, according to the Pew Research Center, but many employers still view fathers as stable and committed to their work while mothers are considered more distractible.¹² Thus, creating a target salary based on the job, not based on the candidate's prior salary history, will help eliminate the bias against women and in particular against mothers.

B. Components of Salary History Policies

The 5 most important aspects of salary history policies are:

1. An employer may not inquire about an applicant's salary history;
2. An employer may not use an applicant's salary history as a factor in determining what salary to offer the applicant, even if the salary history has been disclosed to the employer voluntarily from the applicant;
3. An employer may not refuse to hire or retaliate against an applicant for not disclosing his or her salary history to the employer; and
4. An employer may not release the salary history of any current or former employee to that person's employer or prospective employer without written consent from the current or former employee.

Salary history policies have the potential to help close the wage gap by ending the historical patterns of gender bias and discrimination embedded in prior compensation. Women are paid less than men in 99.6% of occupations and are more likely to endure financial losses for taking time out of the paid workforce for childbearing and family caregiving responsibilities.¹³ Prohibiting an employer from dictating a prospective employee's salary based on prior compensation will help to eliminate the wage gap no matter where the employee is in his or her career path.

C. Authority to Implement Policies at Local Level

Local governments may regulate private-sector employers by setting minimum labor standards and imposing requirements on companies that do business with the local government (market participants).¹⁴ Under the doctrine of preemption, local regulations can be struck down if they conflict with state laws or interfere in an area that falls within the exclusive power of the state.¹⁵ In any case, the proposed language should be reviewed by the City Attorney.

1. Examples from San Francisco

San Francisco created an ordinance that required employers to “either provide health benefit plans to their employees or make equivalent payments to the state to help fund a city health care program that uninsured employees could use if they met certain age and income requirements.”¹⁶ In 2008, the Ninth Circuit Court of Appeals found that the ordinance was not preempted.¹⁷

The San Francisco Paid Sick Leave Ordinance was adopted by voters in 2006.¹⁸ The ordinance requires all employers to provide paid sick leave to each employee who performs work in San Francisco.¹⁹ San Francisco was the first city in California to require all employers to provide paid sick leave.

D. Conclusion

For these reasons, we conclude that the proposed legislation would be an important step towards closing the gender pay gap.

¹ Covert, Bryce, “Massachusetts Becomes First State Ever to Ban Employers from Asking for Salary Histories” (Aug 1, 2016), *ThinkProgress*.

² Senator Hall, Isadore, Senate Bill No. 1063, (2016).

³ Assembly Member Eggman, Susan, Assembly Bill No. 168, (2017).

⁴ Nagele-Piazza, “Philadelphia Employers Can’t Ask About Salary History” (Feb. 9, 2017), *Society for Human Resource Management*.

⁵ Wong, Kristin, “Why Banning the Salary-History Question is Good for Job Applicants” (Apr. 11, 2017), *New York Magazine*.

⁶ Bock, Laszlo, “How the ‘What’s Your Current Salary’ Question Hurts the Gender Pay Gap” (Apr. 29, 2016), *The Washington Post*.

⁷ Corbett, Christianne and Catherine Hill, “Graduating to a Pay Gap: The Earnings of Women and Men One Year After Graduation” (Oct. 2012), *American Association of University Women*.

⁸ Bassett, Laura, “Closing the Gender Wage Gap Would Create ‘Huge’ Economic Stimulus, Economists Say” (Oct. 24, 2012), *The Huffington Post*.

⁹ Miller, Kevin and Kathleen Benson, “The Simple Truth about the Gender Pay Gap” (2016), *American Association of University Women*.

¹⁰ Cain Miller, Claire, “The Motherhood Penalty vs. the Fatherhood Bonus” (Sep. 6, 2014), *The New York Times*.

¹¹ Data & Statistics: Women in the Labor Force (2017), *United States Department of Labor Women’s Bureau*.

¹² Wang, Wendy, Kim Parker, and Paul Taylor, “Breadwinner Moms” (2013), *Pew Research Center*.

¹³ The Gender Wage Gap, *U.S. Bureau of Labor Statistics & Department of Commerce* (2017), Equal Means Equal.

¹⁴ Holtzman, Jonathan and Steven Shaw, Employee-Friendly Local Employment Laws in California (2010) 20 No. 10 Cal. Emp. L. Letter 5.

¹⁵ Id.

¹⁶ Employee-Friendly Local Employment Laws in California.

¹⁷ Id.

¹⁸ San Francisco Paid Sick Leave Ordinance- Fact Sheet (2007) *City and County of San Francisco, Department of Administrative Services, Office of Labor Standards Enforcement.*

¹⁹ Id.