2021

Closing the Gender Pay Gap Through Salary History Bans: Bad for Employers, Bad for Women

John Kaschak

CLOSING THE GENDER PAY GAP THROUGH SALARY HISTORY BANS: BAD FOR EMPLOYERS, BAD FOR WOMEN

*John Kaschak**

I. Introduction

Chants of "U.S.A. Equal Pay" rang out and signs that read "[p]arades are cool, equal pay is cooler" filled the streets of New York City as the United States Women's National Soccer Team celebrated its victory at the 2019 World Cup.[1] The victory parade was followed shortly by an award reception in Los Angeles where players and presenters alike made calls for equal pay.[2] This politically charged conversation was nothing new for members of the team who, several months earlier, had filed a class-action lawsuit in a federal district court.[3] The lawsuit, which was filed against The U.S. Soccer Federation, alleged institutionalized gender discrimination in regard to their pay, citing disparities between the pay of male and female soccer players.[4]

The U.S. Women's Soccer Team's lawsuit is just one of the many recent stories surrounding gender pay disparity, but awareness of the gender pay gap is not something that has just recently come into vogue. It is a well-known statistic that women earn, on average, 20% less than the average man,[5] and legislatures have continually sought to close this gap since the early 1960's.[6]

---

* J.D. Candidate, 2021, Seton Hall University School of Law; B.A. Franklin and Marshall College

[1] Michael Rothman, *ESPYS 2019: US Women's National Team win big with equal pay message of the night*, ABC (Jul. 10, 2019), https://abcnews.go.com/GMA/Culture/espys-2019-alex-morgan-wins-best-female-athlete/story?id=64255819.

[2] *See id.*

[3] Complaint at 2, Morgan v. U.S. Soccer Fed'n, Inc., No. 2:19-CV-01717, 2019 WL 5867441 (C.D. Cal. 2019).

[4] *Id.* at 1–2.

[5] *See* Am. Ass'n of Univ. Women, *The Simple Truth About the Gender Pay Gap* 5 (2018), https://www.aauw.org/app/uploads/2020/02/AAUW-2018-SimpleTruth-nsa.pdf [hereinafter *The Simple Truth*].

[6] *See* NAT'L EQUAL PAY TASK FORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT 4 (2013), https://obamawhitehouse.archives.gov/sites/default/files/equalpay/equal_pay_task_force_progress_report_june_2013_new.pdf.

In recent years, as the topic of pay disparity has been increasingly scrutinized, legislatures have implemented innovative methods to solve the problem. One novel approach a number of states and municipalities have taken is to ban employers from asking job applicants about their prior pay, reasoning that doing so will prevent them from perpetuating existing pay disparities.[7] This note will argue that salary history bans will not close the gender pay gap in the United States and may, in some cases, hurt women. Part II will begin with a discussion of the gender pay gap and its possible causes. Part III will analyze prior legislative attempts to close the gap and why they are ineffective in banning the use of salary history, and Part IV will examine some of the recently enacted salary history bans. Finally, Part V will analyze these bans and discuss why they not only harm employers, but also why they will be ineffective in promoting equal pay for women and Part VI will conclude.

II. The Gender Pay Gap and a Need for Legislative Response

The gender pay gap is a fairly straightforward concept. The earnings ratio, which compares the average earnings of a women to that of a man shows that women earned approximately $0.80 for every $1.00 a man earned in the United States in 2017.[8] On its face, this may not seem like a daunting statistic. This pay gap, however, causes the average woman worker to lose $530,000 of earnings over the course of her lifetime.[9] This outcome is even worse for the average college-educated woman who loses $800,000 over her lifetime.[10] Thus, it is clear that the gender pay gap has an overwhelmingly harmful impact.

---

[7] Genevieve Douglas, *Pay History Bans Continue Popping Up at the State and Local Level*, BLOOMBERG LAW (Apr. 8, 2019), https://www.bloomberglaw.com/document/XCA572D4000000?bna_news_filter=daily-labor-report&jcsearch=BNA%252000000169ed8fdf2dad7bffbf7f780002#jcite.
[8] *The Simple Truth*, *supra* note 5, at 5.
[9] ELISE GOULD ET AL., ECON. POLICY INST., WHAT IS THE GENDER PAY GAP AND IS IT REAL? THE COMPLETE GUIDE TO HOW WOMEN ARE PAID LESS THAN MEN AND WHY IT CAN'T BE EXPLAINED AWAY 7 (2016), https://www.epi.org/files/pdf/112962.pdf.
[10] *Id.*

The gender pay gap does not, of course, affect all women equally, but the figures are even more problematic for minority women.[11] When compared to the average earnings of white men, who are thought to be the least disadvantaged group, black women earn only $0.61 per dollar.[12] Similarly, Hispanic women also earn significantly less than white men at $0.53 per dollar.[13] Furthermore, this disparity becomes more widespread as women move further up the corporate ladder as the gap is larger at the executive level than in entry level positions.[14]

The reasons for this gender discrepancy in pay have been widely debated, with some arguing that the gap is the result of the cumulative choices women make in their careers while other arguments point to societal forces and historic discrimination.[15] For example, some of the gap is due to differences in the types of jobs men and women tend to have and the varying levels of compensation of these jobs.[16] Men dominate some more highly paid fields so greatly, in fact, that approximately 50% of women would need to move into these male dominated positions to eliminate the effects of occupational segregation.[17] Pay disparities exist between genders even within the same industry, such as finance and insurance, however, raising the question of the reason for this difference.[18]

---

[11] *See The Simple Truth*, *supra* note 5, at 9.
[12] *Id*.
[13] *Id.*
[14] PAYSCALE, THE STATE OF THE GENDER PAY GAP IN 2018 4 (2018), https://www.payscale.com/content/whitepaper/Gender-Pay-Gap.pdf. PayScale is a software company focused on providing a data platform to help employers and job applicants understand the market pay for various positions. *See* PAYSCALE, https://www.payscale.com/about (last visited Nov. 2, 2019).
[15] *See The Simple Truth*, *supra* note 5, at 14.
[16] *Id.* at 15 (For example, over two million women in the United States were employed as secretaries and administrative assistants in 2017 where the average earnings are less than $40,000 per year while only one million work as accountants and auditors where the average earnings for a woman exceed $60,000 per year).
[17] KIM A. WEEDEN ET. AL., STANFORD CENTER ON POVERTY AND INEQUALITY OCCUPATIONAL SEGREGATION 1 (2018), https://inequality.stanford.edu/sites/default/files/Pathways_SOTU_2018_occupational-segregation.pdf.
[18] PayScale, *supra* note 14, at 8.

Another often cited cause for the gender wage gap relates to how men and women share familial responsibilities.[19] Studies indicate that the pay gap expands most dramatically during one's 20's and 30's, the ages when many women become parents.[20] Naturally, women who give birth might need time away from work to recover, but women also tend to take on more of the parental responsibilities than men, even when both work full-time.[21] Even women who do not have children, however, are more likely than men to give up career opportunities to accommodate their spouse's career.[22] The effect of these choices is that women have more time away from work or miss out on opportunities for more pay which contributes to pay differences with men, who do not face these obstacles as often.

Many also argue that the gender pay gap is manifested at the bargaining table as research shows that women are less likely than men to negotiate in a variety of situations.[23] In the context of salary negotiations, one study examined the starting salaries of Ivy League business school graduates and found that men, on average, negotiated a starting salary that was 4.3% higher than their initial offer while women negotiated for only a 2.7% increase.[24] Thus, while both groups were able to negotiate for higher starting pay, men negotiated for more which resulted in the men

[19] *See, e.g.*, Claire Cain Miller, *The Gender Pay Gap Is Largely Because of Motherhood*, N.Y. TIMES (May 13, 2017), https://www.nytimes.com/2017/05/13/upshot/the-gender-pay-gap-is-largely-because-of-motherhood.html.
[20] Claudia Goldin et al., *The Expanding Gender Earnings Gap: Evidence from the LEHD-2000 Census* 2 (June 2017), https://scholar.harvard.edu/files/goldin/files/gkob_longerversion.pdf (A shorter version of this paper was published in the American Economic Review. See Claudia Goldin et al., *The Expanding Gender Earnings Gap: Evidence from the LEHD-2000 Census*, 107 AM. ECON. REV. 110 (2017)).
[21] Miller, *supra* note 19.
[22] *Id.*
[23] *See* Alan B. Krueger, *Economic Scene; Women are less likely to negotiate, and it can be costly to them*, N.Y. TIMES (Aug. 21, 2003), https://www.nytimes.com/2003/08/21/business/economic-scene-women-are-less-likely-to-negotiate-and-it-can-be-costly-to-them.html.
[24] *See* Barry A. Gerhart & Sara L. Rynes, *Determinants and Consequences of Salary Negotiations by Graduating Male and Female MBAs* 10-11, 14 (Center for Advanced Human Resource Studies, Working Paper #89-16, 1989) (https://pdfs.semanticscholar.org/cbb9/f6ed79170edd9e6d337b31290ad0c4c02fd2.pdf).

having higher average earnings at the outset.[25] If this practice continued over the course of a lifetime, it would continue to widen the pay gap in each subsequent negotiation.[26]

There is likely no single cause of the gender pay gap, and the previously mentioned reasons, as well as others,[27] all likely play some role in causing the disparity. Another widely discussed cause, and the one most likely to receive the attention of legislatures and courts, however, is discrimination, that is, paying women less based directly or indirectly on the fact that they are women. Discrimination can have multiple meanings, ranging from overt, unequal treatment, to societal pressures that influence women's educational and professional decisions.[28]

Regardless of how one defines discrimination, statistics have indicated that even when other potential causes of pay disparity, such as college major, grade point average, undergraduate institution, and occupational choice, are corrected for, there is still a 7% difference in the average pay between men and women one year after graduation.[29] This difference increases to 12% after a decade in the workforce.[30] This unexplained difference in pay suggests that discrimination, whether purposeful or not, plays a role in the pay gap, prompting a need for legislative response.

III. The Equal Pay Act and Title VII

For most of our history, gender discrimination was not illegal in the United States and employers could, and did, pay women less simply because of their gender.[31] In fact, the United

---

[25] *Id.* at 14.
[26] *See* Krueger, *supra* note 23 (noting that, if men negotiated a 2% raise each year while women negotiated only 1% and both began with a starting salary of $35,000, the average salary for men would be over $79,000 while the average woman's salary would be just over $50,000. Over the course of a career this would result in men making $440,000 more than women.).
[27] *E.g.*, Elise Gould et al., *supra* note 9, at 16 (noting that women are about twice as likely than men to work part-time which will result in lower average pay).
[28] *See* Anthony P. Carnevale & Nicole Smith, *Gender Discrimination Is at the Heart of the Wage Gap*, TIME, (May 19, 2014), https://time.com/105292/gender-wage-gap/ (arguing that educational and occupational segregation should not count as evidence against gender discrimination).
[29] *The Simple Truth*, *supra* note 5, at 17.
[30] *Id.*
[31] *See* Catherine Hill, *A Look Back at Where Pay Equity Has Been and Where It's Going*, HUFFPOST (Jan. 22, 2015), https://www.huffpost.com/entry/a-look-back-at-where-pay-_b_6519076.

States Government actually required that its female employees be paid 25% less than men who performed the same work.[32] Prior to World War II, the majority of women did not work outside the home, and those who did mostly worked a few clerical types of jobs such as receptionists and secretaries.[33] With a tremendous number of men deployed during the war, however, women began filling the jobs these men left vacant, forever transforming women's role in the workforce.[34]

After the war, Congress began giving the issue of unequal pay between men and women increasing attention, beginning with the Pepper-Morse Bill, better known as the Women's Equal Pay Act of 1945.[35] Although this bill did not become a law, it was the first of a number of bills that were introduced involving the issue of equal pay.[36] Finally, in the early 1960's, as a result of the increasing number of women in the workforce, Congress enacted both the Equal Pay Act of 1963 and Title VII of the Civil Rights Act.[37]

The first of these two statutes was the Equal Pay Act of 1963, which amended the Fair Labor Standards Act.[38] The statute was enacted "[t]o prohibit discrimination on account of sex in the payment of wages by employers engaged in commerce or in the production of goods for commerce."[39] Section 2(d)(1) of the Equal Pay Act provides that:

> No employer . . . shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on

---

[32] *Id.*
[33] Annette Mcdermott, *How World War II Empowered Women: How did women's service during World War II inspire their fight for social change and equality?* HISTORY (Oct 10, 2018), https://www.history.com/news/how-world-war-ii-empowered-women.
[34] *Id.*
[35] Bureau of National Affairs, *Equal Pay for Equal Work: Summary Analysis, Legislative History and Text of the Federal Equal Pay Act of 1963* 4 (1963).
[36] *Id.*
[37] Faith D. Ruderfer, *Sex-Based Wage Discrimination Under Title VII: Equal Pay for Equal Work or Equal Pay for Comparable Work? 22* WM. & MARY L. REV. 421, 421–22 (1981). See Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963); Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 21 (1964).
[38] 29 U.S.C. § 206(d)(1) (2018).
[39] Equal Pay Act of 1963.

> jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . .[40]

The Equal Pay Act does, however, provide several exceptions that allow an employer to pay differing wages to employees of the opposite sex doing the same job if they are paid based on: (1) a seniority system, (2) productivity, and (3) "any factor other than sex."[41]

Only a year later, Congress enacted Title VII, as part of the more comprehensive, antidiscrimination focused, Civil Rights Act of 1964.[42] Title VII made it unlawful to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[43] Recognizing a potential conflict with the recently enacted Equal Pay Act, Senator Bennett introduced an amendment to Title VII explicitly recognizing that this legislation did not make anything unlawful if it was otherwise authorized under the Equal Pay Act.[44] Despite Senator Bennett's attempt to reconcile these provisions, there is still a great deal of judicial uncertainty in how these laws relate.[45] Nonetheless, both statutes provide potential avenues for women to bring claims of pay discrimination and many often do bring claims under both.[46]

Although these statutes have been in effect for over a half century, inequality in pay continues to be a matter of concern. There has been significant debate about the effectiveness of Title VII and the Equal Pay Act, with some arguing that, when controlling for inflation, there has

[40] 29 U.S.C. § 206(d)(1).
[41] *Id.*
[42] Civil Rights Act of 1964.
[43] 42 U.S.C. § 2000e-2-e-17(a)(1) (2018).
[44] 110 CONG. REC. 13,647.
[45] *See* Peter Avery, Note, *The Diluted Equal Pay Act: How was it broken? How can it be fixed?*, 56 Rutgers L. Rev. 849, 850 (2004) (noting how courts have differing views on how to view the Equal Pay Act and Title VII in unison).
[46] *Id.* at 875.

been little change in relative salaries since the 1960's.[47] Given that women earned about 62% of what men earned in 1979, however, it is likely that the gap has closed significantly since these two statutes became effective, though much of this may be attributable to women's increasing education levels and participation in the workforce.[48]

Despite Title VII and the Equal Pay Act's initial success in closing the gender pay gap, the tightening of the gap seems to have slowed since the 1990's.[49] One often cited reason for continued pay disparity is employers' use of salary history in determining new hire's pay.[50] This is, no doubt, a commonly employed technique as research indicates that roughly half of job applicants are asked about what they earned at previous jobs.[51] Armed with this information, employers are likely to try to offer the lowest salary a job applicant will accept in order to minimize labor expenses. As women move from one employer to another, their salary will be largely based on what they earned previously, and, given that women, on average, earn less than men, the pay gap is perpetuated.[52]

Given that utilizing prior salary seems to have the effect of perpetuating inequity in pay between men and women, it is natural to wonder why this is not discriminatory under either Title VII or the Equal Pay Act. Both statutes, however, allow exceptions, at least arguably, that permit employers to utilize this practice.

---

[47] *Id.* at 855.
[48] Elise Gould et al., *supra* note 9, at 8–9.
[49] *Id.*
[50] *E.g.*, Torie Abott Watkins, *Note: The Ghost of Salary Past: Why Salary History Inquiries Perpetuate the Gender Pay Gap and Should be Ousted as a Factor Other than Sex*, 103 Minn. L. Rev. 1041, 1043 (2018).
[51] *Is Asking for Salary History … History?*, PAYSCALE, https://www.payscale.com/data/salary-history (last visited Jan. 5, 2020).
[52] Watkins, *supra* note 50, at 1055.

While some courts have found the use of salary history to be violative of the Equal Pay Act,[53] others have refused to do so,[54] leading to a circuit split on the issue. The main point of contention between the varying decisions is whether salary history qualifies as "any factor other than sex" under the Equal Pay Act's explicit exceptions. In *Taylor v. White,* the female plaintiff, an employee of the United States Army, sued her employer claiming that she received lower pay than her male counterparts, despite doing equal work.[55] Each of the employees' salaries was determined by their respective paygrades in their prior roles.[56] The court held that utilizing salary history is a legitimate factor other than sex under the Equal Pay Act because the statute does not, facially, limit the encompassing catch-all factor.[57] It also noted that the legislative history supported this view because Congress had listed several examples for the factor's meaning but expressly noted that the catch-all provision was needed because it could not predict every possible situation.[58] The court observed that, although use of salary history might perpetuate unequal pay, it could also serve legitimate purposes and, thus, was a legitimate factor other than sex under the Equal Pay Act.[59]

Other courts have reached the opposite conclusion of the Eighth Circuit. For example, in *Rizo v. Yovino,* the plaintiff's starting pay was determined by a policy that explicitly calculated her starting pay by increasing her previous salary by 5% and placing her in a particular pay grade range

[53] *E.g.*, Rizo v. Yovino, 950 F.3d 1217, 1232 (9th Cir. 2020). This was the second time the 9th Circuit found in favor for Rizo by holding that prior salary history does not qualify as a legitimate factor other than sex. *See* Rizo v. Yovino, 887 F.3d 453, 468 (9th Cir. 2018). The first decision was vacated and remanded by the Supreme Court on procedural grounds after Judge Reinhardt, who had written the original opinion for the 9th Circuit, died eleven days prior to that decision being issued. Yovino v. Rizo, 139 S. Ct. 706, 708–10 (2019).
[54] *E.g.*, Taylor v. White, 321 F.3d 710, 720 (8th Cir. 2003).
[55] *Id.* at 712, 715.
[56] *Id.* at 713.
[57] *Id.* at 717–18.
[58] *Id.*
[59] *Id.* at 718.

based on that amount.[60] The plaintiff learned, during a lunch conversation, that her male counterparts, who performed the same work, were hired into higher pay grades.[61] As such, she sued the superintendent of the school, in his official capacity, under both Title VII and the Equal Pay Act.[62]

In deciding *Rizo*, the Ninth Circuit overturned precedent that had previously considered salary history to be a legitimate factor other than sex under the Equal Pay Act.[63] The court explained that a legitimate factor, under the Equal Pay Act's fourth exception, is restricted to only those factors related to the job.[64] Salary from a prior job, the court went on to explain, is not a job related factor.[65] The court also noted that salary history could not be allowed because it had the effect of perpetuating the very pay disparities the Equal Pay Act sought to eliminate.[66]

Some circuits have taken a middle ground approach of sorts by allowing the use of salary history so long as some other legitimate factor is utilized in determining one's pay.[67] In *Irby v. Bittick*, a female criminal investigator sued her employer after it hired two male investigators at higher starting salaries than hers based, in part, on their earnings while serving as contractors for that employer.[68] The Eleventh Circuit ruled that salary history alone cannot be the basis for determining a pay disparity among employees of differing genders and who do the same work.[69] The court also held, however, that, where an employer also relies on another legitimate factor, then salary history may be utilized in determining salary.[70] Ultimately, the court noted, the question is

[60] *Rizo*, 950 F.3d at 1220.
[61] *Id.*
[62] *Id.*
[63] *Id.* at 1229.
[64] *Id.* at 1227.
[65] *Id.*
[66] *See Rizo*, 950 F.3d at 1228.
[67] *See* Irby v. Bittick, 44 F.3d 949, 955 (11th Cir. 1995).
[68] *Id.* at 952–53.
[69] *Id.* at 955.
[70] *Id.*

whether or not the reliance on prior salary can be justified by business reason.[71] In this case, the employer had also relied on the investigators' experience in determining their salaries and, thus, did not violate the Equal Pay Act.[72]

The use of salary history may also be discriminatory under Title VII because of its disparate impact on women. In *Griggs v. Duke Power Company*, an employer, who had previously allowed black workers in only one of its five departments, was forced to permit black individuals the opportunity to work in all of the departments after the implementation of Title VII.[73] In response, the employer began requiring that, in order to be considered for transfer to the other departments, individuals must have a high school diploma or achieve a minimum score on two aptitude tests.[74] This had the effect of excluding a much larger portion of black applicants than white.[75] The Supreme Court held, in response, that Title VII bans not only purposeful discrimination, but facially neutral employment practices that have a disparate impact on a protected group.[76] Seemingly then, because the use of salary history has a disparate impact on women, it would be violative of Title VII under *Griggs*.

The Supreme Court, however, also limited its holding regarding disparate impact by explaining that the hallmark in determining whether an employment practice is discriminatory under a disparate impact theory is whether there is a business necessity for that practice.[77] Congress later codified the business necessity justification, as well as disparate impact discrimination itself.[78] It is, at least, arguable that utilizing salary history to determine

[71] *Id.*
[72] *Id.* at 956.
[73] Griggs v. Duke Power Co., 401 U.S. 424, 426–27 (1971).
[74] *Id.* at 427–28.
[75] *See id.* at 430.
[76] *Id.* at 431.
[77] *Id.*
[78] 42 U.S.C. § 2000e-2(k)(1)(A)-(B) (2018).

compensation serves a business purpose because it gives employers a market reference point and allows them to minimize their expenses.

More importantly, however, is that the "any factor other than sex" exception of the Equal Pay Act also applies to unequal pay claims brought under Title VII.[79] As previously mentioned, the Bennett Amendment to Title VII bars claims of unequal pay where such differentiation is based on a practice authorized under the Equal Pay Act.[80] In *County of Washington v. Gunther*, the Supreme Court held that, since these exceptions are authorized under the Equal Pay Act, the Bennett Amendment makes them applicable to Title VII claims as well.[81] It follows then that, if prior salary history is a legitimate factor other than sex under the Equal Pay Act, it also provides a defense under Title VII.

In sum, despite two federal statutes aimed, at least in part, at preventing pay discrimination, neither conclusively bans the use of prior salary in determining employee pay. As such, lawmakers have looked for alternative options.

IV. Salary History Bans

Given the widespread belief that the use of salary history has the effect of perpetuating the gender wage gap, and because Title VII and the Equal Pay Act, at least arguably, allow the use of salary history, state and local legislatures have sought various ways to make its use unlawful, with many outright banning the practice.[82] Some employers have even entered the fray in an attempt to help remedy the gender pay gap.[83] For example, several companies such as Facebook, Google,

[79] *See* County of Washington v. Gunther, 452 U.S. 161, 171 (1981) (holding that the affirmative defenses of the Equal Pay Act apply to Title VII claims).
[80] 42 U.S.C.S. § 2000e-2(h).
[81] *Gunther*, 452 U.S. 161, 171.
[82] Kristin Wong, *Don't Ask Me About My Salary History*, N.Y. TIMES (Oct. 22, 2019), https://www.nytimes.com/2019/10/22/us/dont-ask-me-about-my-salary-history.html.
[83] Caroline O'Donovan, *Amazon Won't Ask Prospective Hires For Salary History Anymore*, BUZZFEED NEWS (Jan. 17, 2018), https://www.buzzfeednews.com/article/carolineodonovan/amazon-wont-ask-prospective-hires-for-salary-history-anymore.

and Amazon have voluntarily implemented internal policies that reject the use of salary history in determining starting pay for their employees.[84]

Not everyone, however, is on board with preventing employers from utilizing salary history. While many states have implemented varying bans on the practice, both Michigan and Wisconsin have passed statutes that prevent localities within those states from enacting bans on salary history use.[85] The rationale behind these measures is that cities' implementation of salary history bans would result in inconsistency across the state and would also require too much governmental involvement in the hiring process.[86]

Despite Michigan and Wisconsin's resistance to salary history bans, the overwhelming trend has been for legislatures to seek to limit the practice.[87] Currently, eighteen states and twenty-one localities have implemented varying laws that seek to prevent employer inquiries into, and utilization of, job applicants' salary history.[88]

At the narrowest end of these salary history bans, some governments ban the use of salary history only for government employers.[89] For example, North Carolina implemented Executive Order Number Ninety-three which prevents North Carolina state agencies from requesting a job applicant's salary history or relying on previously obtained salary history information.[90] It also

---

[84] *Id.*
[85] Fisher Phillips, *Banning The Bans: Michigan and Wisconsin Buck the Salary History Ban Trend*, JD SUPRA (Apr. 5, 2018), https://www.jdsupra.com/legalnews/banning-the-bans-michigan-and-wisconsin-37049/.
[86] *Id.*
[87] *See Salary history bans, A running list of states and localities that have outlawed pay history questions*, HR DIVE (Aug. 13, 2019), https://www.hrdive.com/news/salary-history-ban-states-list/516662/ (last updated Oct. 31, 2019).
[88] *Id.*
[89] Kate Nielsen, *State and Local Salary History Bans*, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN (July 31, 2019), https://www.aauw.org/article/state-local-salary-history-bans/ (As of July 31, 2019, Michigan, North Carolina, Pennsylvania, and Virginia each banned state agencies, through executive order, from utilizing salary history in the hiring process).
[90] N.C. Exec. Order 93 (Apr. 2, 2019), https://files.nc.gov/governor/documents/files/EO93-_Prohibiting_the_Use_of_Salary_History_in_the_State_Hiring_Process.pdf.

states that, since state employees' salaries are a matter of public record, state human resource departments will utilize best efforts to ensure that this information is not used discriminatorily.[91]

Despite these legislatures' best intentions, advocates of stronger salary history bans would argue that preventing government employers from using salary histories in determining starting pay does very little to close the gender pay gap because such bans do nothing to limit private employers. This, advocates might add, is problematic because private companies employ a much larger percentage of individuals than government agencies.[92] Furthermore, it is private employers who are more likely to be driven by the cost cutting potential offered by using salary history in determining employee pay due to their profit motivations.

Other states have, in fact, taken these salary history bans a step further by banning both public and private employers from seeking salary history from a job applicant.[93] For example, Connecticut, in passing Public Act Number 18-8, outlawed employers from inquiring, or directing a third party, such as a staffing firm, to inquire, about a job applicant's salary history.[94] The obvious advantages of this and similarly structured statutes are that they are broad enough to cover all employers and prevent those employers from obtaining information that could be used to perpetuate the salary history ban.

Massachusetts was the first state to enact a statewide salary history ban.[95] The Massachusetts statute, like that in Connecticut, prevents employers from seeking a job applicant's

---

[91] *Id.*
[92] *See* Lymari Morales, *Gov't. Employment Ranges From 38% in D.C. to 12% in Ohio*, GALLUP (Aug. 6, 2010), https://news.gallup.com/poll/141785/gov-employment-ranges-ohio.aspx.
[93] Nielsen, *supra* note 89 (as of July 31, 2019, thirteen states implemented some form of salary history ban that encompassed both public and private employers).
[94] Conn. Gen. Stat. § 31-40z(b)(5) (LEXIS through the 2019 First Regular Session, and the July and December 2019 Special Sessions).
[95] Jena McGregor, *More states are banning questions about salary history in job interviews. What to say if you're asked about it anyway.*, WASH. POST (Aug. 15, 2019), https://www.washingtonpost.com/business/2019/08/15/more-states-are-banning-questions-about-salary-history-job-interviews-what-say-if-youre-asked-about-it-anyways/.

salary history.[96] This statute, which bans other gender discrimination practices in addition to salary history, allows employers a defense to accusations of pay discrimination where it has undertaken a recent self-evaluation and made reasonable progress towards eliminating pay differentials between genders.[97] Interestingly, the state seems to take a strong stance on violations of the salary history ban as these are, seemingly, excluded from the affirmative defense.[98]

Some proponents of salary history bans, however, argue that stronger statutes are needed to close the gender pay gap. The language of the Connecticut and Massachusetts statutes focuses on the employers' ability to inquire about salary history, but does not, explicitly, prevent an employer from utilizing a job applicant's salary history if it was able to obtain it through other channels.[99] For example, if a job applicant voluntarily offers up his or her current salary during an interview, or if that salary is a matter of public record, then it would, seemingly, not be unlawful for an employer to utilize that information to set the job applicant's starting salary and, thus, has the potential of perpetuating the gender pay gap.[100]

Perhaps recognizing the limitations of statutes such as Connecticut's, some states and localities have enacted bans that not only prevent employers from inquiring about a job applicant's prior salary, but also prevent them from relying on any salary history information that they are able to obtain in determining employees' pay.[101] California, another early adopter of salary history bans, enacted a statute that prevents all employers within the state from seeking a job applicant's

[96] Mass. Ann. Laws ch. 149, § 105A(c)(2) (LEXIS through Chapter 153 of the 2019 Legislative Session, Chapters 1-39 of the 2020 Legislative Session of the 191st General Court).
[97] Mass. Ann. Laws ch. 149, § 105A(d) (LEXIS).
[98] *See id.*
[99] *See* Conn. Gen. Stat. § 31-40z(b)(5) (LEXIS); Mass. Ann. Laws ch. 149, § 105A(c)(2) (LEXIS).
[100] *See* Karel Mazanec, *When Asking "What Did Your Last Company Pay You" Can Get You into Trouble*, VENABLE LLP (Jan. 19, 2018), https://www.venable.com/insights/publications/2018/01/when-asking-what-did-your-last-company-pay-you-can.
[101] *See, e.g.*, Cal Lab Code §§ 432.3(a)–(b) (LEXIS through Chapter 1 of the 2020 Regular Session).

salary history or relying on any salary history information at the employer's disposal.[102] While this statute outlaws both inquiring and relying on salary history, the latter ban is largely limited by other provisions in the statute explicitly allowing employers to rely on salary history when that information is voluntarily offered by the applicant and exempting salary information that is disclosable to the public.[103] One unique and interesting feature of the California statute is a requirement that employers must, upon request by the job applicant, provide the applicant with a salary range for the position in which he or she is applying to.[104] Such a provision provides job applicants with a tremendous advantage in negotiations.

Many other states have enacted similar laws. New Jersey, for example, after initially preventing only public employers from making salary history inquiries,[105] expanded its salary history ban to all employers, though it does not apply to internal applicants.[106] The statute prevents employers from screening job applicants based on their prior salaries or requiring that the applicants satisfy some minimum salary history.[107]

New Jersey's salary history ban also made it a violation of the New Jersey Law Against Discrimination (NJLAD), to screen a job applicant based on salary history when the applicant is part of a protected class.[108] Sex is one such protected class.[109] Thus, a woman may bring a discrimination claim in court, under the NJLAD, for violation of the salary history ban[110] and seek any remedy available in a common law tort action.[111] This would allow an aggrieved plaintiff to

[102] *Id.*
[103] Cal Lab Code § 432.3(e) (Lexis).
[104] Cal Lab Code § 432.3(c) (Lexis).
[105] N.J. Exec. Order No. 1 (Jan. 18, 2018), https://nj.gov/infobank/eo/056murphy/pdf/EO-1.pdf.
[106] N.J. Stat. § 34:6B-20(a)–(c) (LEXIS through New Jersey 218th Second Annual Session, L. 2019).
[107] N.J. Stat. § 34:6B-20(a) (LEXIS).
[108] N.J. Stat. § 10:5-12.12(a) (LEXIS).
[109] N.J. Stat. § 10:5-12(a) (LEXIS).
[110] N.J. Stat. § 10:5-38 (LEXIS).
[111] N.J. Stat. § 10:5-13 (LEXIS).

recover lost wages as well as damages for emotional distress.[112] An interesting feature of the New Jersey salary history ban, however, is that it also imposes civil penalties against employers who violate its provision which are collected by the Commissioner of Labor and Workforce Development.[113] These fines range from $1,000 to $10,000 depending on how many violations have occurred.[114] Given that, in many cases, simply asking for prior salary without utilizing it to determine one's pay is unlikely to result in any damages, and would be difficult to prove even if damages existed, this civil penalty will likely be important to enforcing the ban.

While statutes like New Jersey's are broad enough to cover all employers and prevent both inquiring into and utilizing salary history, as the next section will discuss, even the broadest statutes are insufficient in achieving their ultimate goal of eliminating the gender wage gap.

V. Salary History Bans Are Not the Answer

State and local legislatures' aim in eliminating the use of salary history in pay negotiations is well intended and, at first glance, seems like it would be an effective tool in eliminating the gender wage gap. If a gender wage gap undoubtedly exists, then banning a practice that seemingly perpetuates that gap seems like an obvious solution.

There are several problems with salary history bans, however. One apparent downside is that they are not employer friendly. Of course, there are both winners and losers with many laws, and this fact alone does not render salary history bans undesirable. These laws, however, also have several problems that make them ineffective in achieving their desired purpose. One reason is that many of these laws are largely underinclusive. More importantly, because these bans regulate

[112] Amy E. Hatcher, *Don't Ask: N.J. Law Soon To Ban Salary-History Inquiries*, MCCUSKER ANSELMI ROSEN & CARVELLI PC 3 (2019), https://www.marc.law/wp-content/uploads/2019/12/MARC-employers-cant-ask-salary-2019.pdf.
[113] N.J. Stat. § 34:6B-20(e)(1) (LEXIS).
[114] *Id.*

what an employer may and may not say, they may be unconstitutional. Furthermore, these bans may have unintended consequences as employers might employ forms of statistical discrimination that render these bans ineffective. This section will explore each of these issues in turn.

A. Salary History Bans Hurt Employers

Perhaps unsurprisingly, many employers have ferociously contested the enactment of salary history bans. For example, the California Chamber of Commerce, California Building Industry Association, and others submitted a letter to the state senate lobbying against the enactment of a salary history ban.[115] The coalition argued that there are many legitimate uses for salary history.[116] It is also unsurprising that employers lack confidence in how effective these bans will be.[117] In a survey conducted by consulting firm Korn Ferry, approximately two-thirds of the 108 companies surveyed indicated that they believed the legislation would have very-little or no impact on closing the gender pay gap.[118] Perhaps this employer pessimism is driven by the potentially detrimental effects these statutes pose for them.

One potential issue for employers is an increase in time and costs for interviewing and selecting new employees. Indeed, in its letter, the California Chamber of Commerce argued that asking an applicant for their salary history allows them to screen those applicants whose current salary is much larger than that which the employer intends to pay.[119] This allows them to avoid wasting their time interviewing a candidate who would likely never consider what the employer was willing to offer.[120] Of course, employers can simply ask a job applicant what their salary

[115] Letter from Cal. Chamber of Commerce et al., to Senate Committee on Appropriations Members (July 12, 2017), http://blob.capitoltrack.com/17blobs/40936ff6-35a3-4c9e-b847-a3bafc162c30.
[116] *Id.*
[117] *See* Tracy Kurschner, *Korn Ferry Executive Survey: New Laws Forbidding Questions on Salary History Likely Changes the Game for Most Employers*, KORN FERRY (Nov. 14, 2017), https://ir.kornferry.com/node/14806/pdf.
[118] *Id.*
[119] Letter from Cal. Chamber of Commerce et al., to Senate Committee on Appropriations Members, *supra* note 115.
[120] *Id.*

expectations are rather than asking for prior salary. Some statutes explicitly allow this practice.[121] This may have the same result, however, as asking for salary history because job applicants, who have limited market data, and who do not want to price themselves out of a job offer, will likely base their initial salary expectations on their current salary and ask for an amount comparable to what they currently make. This too will perpetuate any existing discriminatory pressure on women's wages. Employers could avoid this issue by providing salary ranges to applicants but may be reluctant to do so because showing their hand could hinder their negotiating power and provide insights to competitors.

Another potential issue for employers is increased costs in ensuring compliance with these salary history bans.[122] Employers will likely need to allocate resources to training Human Resource professionals and hiring managers to ensure they are not asking applicants anything illegal. More importantly, given the variety of flavors these salary history bans offer from one state to another, large, multi-state companies will face the difficulty of having to comply with differing laws depending on where the job applicant is located. As a risk mitigant, many employers have decided to comply with the most stringent statute among the jurisdictions within which they do business.[123] While this may minimize compliance costs, it could place these employers on a different playing field than competing employers who may be able to cut costs by hiring individuals at lower salaries or who may be able to gain a better understanding of market rates.

Employers may also face increased litigation costs as a result of salary history bans. Naturally, any time an organization must comply with additional regulations, there is an increased

[121] *E.g.*, 820 Ill. Comp. Stat. Ann. 112/10(b-15)(2) (LEXIS through P.A. 101-629 of the 2019 Regular Session of the 101st General Assembly).
[122] *See* Korn Ferry, *supra* note 117 (noting that employers will need to change their job applicant screening and interview processes).
[123] *Id*.

risk of violation and subsequent litigation costs for noncompliance. Employers, however, may face costs for noncompliance, even where no harm has been suffered, as some of these salary history bans impose fines for violation.[124] For example, an employer may inadvertently ask a job applicant about their salary history, and potentially even hire that applicant without considering their prior salary. Nonetheless, under the New Jersey statute, the employer could face a fine up to $1,000 if it is its first violation.[125]

Increased costs and similar challenges are to be expected when employers face new regulations. This is simply the cost of achieving whatever benefit that particular regulatory scheme hopes to achieve. Because salary history bans may be largely ineffective, however, they may not be worth the potential costs.

B. Many Bans Are Underinclusive

Many salary history bans are ineffective in remedying the gender pay gap because they are largely underinclusive. As discussed in the preceding section, many salary history bans focus only on government employers, leaving private employers entirely outside the scope of their protections.[126] Still, even those bans that include private employers do very little to protect internal job applicants. Some statutes explicitly allow the use of salary history for internal job applicants,[127] who represent no small portion of the applicant pool.[128] If an employer is banned from only asking the question of salary history, it will certainly utilize all of the information at its disposal in determining how much to pay an employee. Further, even if the ban prevents reliance

[124] *E.g.*, N.J. Stat. § 34:6B-20(e)(1) (LEXIS).
[125] *Id.*
[126] N.C. Exec. Order 93.
[127] *E.g.*, N.J. Stat. § 34:6B-20(c) (LEXIS).
[128] *See* Dan Schawbel, *The Power Within: Why Internal Recruiting & Hiring Are on the Rise*, TIME (Aug. 15, 2012), https://business.time.com/2012/08/15/the-power-within-why-internal-recruiting-hiring-are-on-the-rise/ (discussing the increased use of internal job candidates and citing several large companies who make a substantial amount of hires utilizing the internal job applicant pool).

on salary history it would be extremely difficult for an employee to show that the employer relied on that information when it already had the information on hand. Of course, some of the enacted bans do not even allow this possibility as they carve out an explicit exception regarding internal applicants.[129]

C. Salary History Bans May Be Unconstitutional

A more important reason salary history bans may be ineffective is because they may be largely unenforceable. State and local governments are effectively telling employers what they may and may not ask a job applicant. This naturally implicates questions about free speech, and these questions have already been raised in legal challenges to their enforceability.

In January 2017, the City of Philadelphia implemented an ordinance—not dissimilar to those discussed previously—after finding that the gender pay gap had narrowed only half a penny each year since the enactment of the Equal Pay Act.[130] The ordinance prevents employers from inquiring into, or relying upon, a job applicant's salary history unless it was knowingly and willingly provided by the applicant.[131] Shortly after the ordinance was passed, the Chamber of Commerce for Greater Philadelphia, as well as several large companies, including Comcast Corporation and the Children's Hospital of Philadelphia, brought suit against the city.[132] The plaintiffs sought a preliminary injunction to prevent the enforcement of the law on grounds that it violated free speech protections afforded by the by the First Amendment of the U.S. Constitution.[133] In order to prevail in obtaining the injunction order, the plaintiffs were required to demonstrate a likelihood of success on the merits.[134]

---

[129] *E.g.*, N.J. Stat. § 34:6B-20(a) (LEXIS).
[130] Phila., Pa., Code § 9-1131 (2019).
[131] *Id.*
[132] Chamber of Commerce for Greater Phila. v. City of Phila., 319 F. Supp. 3d 773, 779 (E.D. Pa. 2018).
[133] *Id.*
[134] *Id.* at 781.

The district court first examined the inquiry provision of the ordinance, that is, the provision banning employers from asking job applicants about salary history and analyzed whether it constituted regulation of commercial speech.[135] The Supreme Court has stated that commercial speech is that which involves only the economic interests of the speaker and the audience.[136] In the *Chamber of Commerce* case, the court noted three questions identified by the Third Circuit that guide whether speech is commercial: (1) whether the speech is an advertisement, (2) whether it relates to a particular product or service, and (3) whether the speaker is economically motivated.[137] It also noted that the determination is based largely on the common sense distinction between speech involved in a commercial transaction and other speech.[138] The district court went on to explain that, while a salary history inquiry does not fit as neatly into commercial speech as an advertisement, it is similarly commercial speech because it occurs in relation to negotiating a job.[139]

As commercial speech, the ordinance provision must withstand intermediate scrutiny which requires a showing that the government has a substantial interest in regulating the speech, that the regulation directly advances that interest, and that it does not go further than required to advance its legitimate interest.[140] The parties agreed that the city had a substantial interest in promoting wage equality and, thus, the dispute turned on whether the ordinance actually furthered that interest.[141]

---

[135] *Id.* at 782–83.
[136] Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 561 (1980).
[137] *Chamber of Commerce*, 319 F. Supp. 3d at 783 (citing U.S. Healthcare, Inc. v. Blue Cross of Greater Phila., 898 F.2d 914, 933 (3d Cir. 1990)).
[138] *Id*.
[139] *Id*.
[140] *Id.* at 785 (citing Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 566 (1980)).
[141] *Id.* at 787.

To make its case, the City of Philadelphia relied primarily on the testimony of various experts who explained that, because women earn less than men on average, it is common sense that utilizing prior salary history would continue to perpetuate this discrepancy.[142] The city also noted that precedent afforded the legislature significant deference towards its predictive judgment.[143] While the district court agreed with the overall premise of the ordinance, however, it also noted that, "the testimony in support of this theory is riddled with conclusory statements, amounting to 'various tidbits' and 'educated guesses.'"[144] The city had failed to provide statistical evidence or detailed studies on par with other cases where laws had been upheld in the face of First Amendment challenges.[145] According to the court, the city failed to consider other possible, nondiscriminatory causes of the pay gap, which might have indicated that the law would not accomplish its task of closing the pay gap.[146] Consequently, the inquiry provision was deemed unconstitutional.[147]

The court also went on to review the plaintiffs' claim that the reliance provision of the ordinance, which prevents employers from utilizing salary history, was also unconstitutional.[148] The court deemed that this provision concerned only conduct, however, and was not governed by the First Amendment.[149]

Nearly two years later, however, the Third Circuit overturned the district court's opinion in regard to the inquiry provision of Philadelphia's law.[150] In writing for the court, Judge McKee

[142] *Id.* at 787–88.
[143] *Chamber of Commerce*, 319 F. Supp. 3d at 788.
[144] *Id.* at 798 (quoting Rubin v. Coors Brewing Co., 514 U.S. 476, 490 (1995)).
[145] *See id.* at 796.
[146] *See id.* at 798.
[147] *Id.* at 800.
[148] *Id.* at 804.
[149] *Chamber of Commerce*, 319 F. Supp. 3d at 804.
[150] Greater Phila. Chamber of Commerce v. City of Phila., 949 F.3d 116, 121 (3d Cir. 2020).

agreed with the district court's holding that the inquiry provision concerned commercial speech.[151] Further, the court agreed that intermediate scrutiny was the appropriate standard of review for such speech, and likewise rejected the Chamber of Commerce's argument that strict scrutiny should apply.[152]

The Third Circuit, however, disagreed with the district court's analysis of intermediate scrutiny as applied to the city's salary history ban.[153] Judge McKee explained that the district court did not give proper credence to the "probative value" of the testimony and other evidence put forth by the city in support of its justification for enacting the law.[154] The Third Circuit believed that the city had an abundance of evidence from which it drew a reasonable inference,[155] and that the district court had gone too far in substituting its own factual analysis for the legislature's.[156]

Having concluded that the ordinance directly advanced the city's substantial interest in closing the wage gap, it went on to analyze whether it was narrowly tailored; a prong that the district court did not reach in its opinion.[157] The court held that the salary history ban was narrowly tailored because it prevents employers from asking questions related to only one topic and does not prevent them from obtaining market driven salary information elsewhere.[158] As such, the court overturned the district court's ruling regarding the inquiry provision, while also affirming its ruling as to the reliance provision.[159]

---

[151] *Id.* at 137.
[152] *Id.* at 136–37.
[153] *Id.* at 142–43.
[154] *Id.* at 143.
[155] *Id.* at 143–44 (quoting Turner Broad. Sys. v. FCC, 520 U.S. 180, 181 (1997)).
[156] *Chamber of Commerce*, 949 F.3d at 144 (quoting Turner Broad. Sys. v. FCC, 512 U.S. 622, 666 (1994)).
[157] *Id.* at 154.
[158] *Id.* at 154–55.
[159] *Id.* at 157.

The Third Circuit's ruling that the City of Philadelphia's salary history ban is constitutional does not close the door on further review by the Supreme Court.[160] Not only might the Chamber of Commerce choose to appeal this decision, but the ruling may inspire constitutional challenges to other salary history bans, providing more support for the nation's highest court to eventually settle the issue.[161]

If salary history inquiries are ultimately deemed unconstitutional, there would be a clear, profound impact on many salary history bans across the country. Bans, such as those in California and Massachusetts, that prevent employers from asking about salary history,[162] would be unconstitutional, at least in regard to that aspect of the legislation. Without that provision, these bans would be reduced to preventing employers from utilizing salary history, which would likely be much more difficult for a potential plaintiff to prove. While the risk of liability for utilizing salary history may prevent employers from seeking individualized salary information in any form, as the next subsection will discuss, they may seek alternative information that could be equally detrimental.

D. Even If Enforceable, Salary History Bans May Not Work

Perhaps the risk of liability for relying on salary history would be enough to prevent an employer from even asking the question, if preventing the inquiry itself is ultimately deemed unconstitutional. Employers, however, might also seek the information in less risky ways than requiring applicants to provide prior salaries by asking for broad voluntary disclosures, such as catch-all questions that ask applicants to offer any other relevant information on a job application;

---

[160] Anna Orso, *Court Rules in Favor of Philadelphia's Ban on Asking Job Applicants Their Salary History*, PHILA. INQUIRER (Feb. 6, 2020), https://www.inquirer.com/news/philadelphia/philadelphia-salary-history-ban-appeals-court-ruling-third-circuit-20200206.html.
[161] *Id.*
[162] Cal Lab Code § 432.3(a)-(b) (LEXIS); Mass. Ann. Laws ch. 149, § 105A(c) (LEXIS).

something an applicant might understand to include prior salary. If they are left to decide whether to voluntarily disclose, then many women whose wages are suppressed due to past discrimination will, likely, decide not to do so. This choice, however, may have detrimental impacts. In a study conducted by PayScale, job applicants were asked about job offers they had received, and, after controlling for factors, other than gender, the study found that, on average, a man who chose not to disclose salary history was offered 1.2% more than a man who did disclose.[163] Meanwhile a woman who did not disclose her prior salary was offered 1.8% less than one who did.[164] These results might indicate that employers are simply making the assumption that a woman earns less than the going market rate for a particular position.

Such an assumption by an employer may not be unreasonable, given the prevalence of the gender pay gap. Gender pay disparity is such a widely known topic that, since 1996, there has been a special day set aside each April to protest and raise awareness on the issue.[165] Therefore, it is likely that an employer may be privy to the fact that women earn less than men, on average, and might use that information to guess what a job applicant makes. Thus, even if an employer cannot ask the question of salary or obtain any prior salary history of the applicant, it may utilize the average data available to make an educated guess.

The notion that an employer might utilize preconceived notions and average data about particular groups to support hiring decisions is not completely novel. This "statistical discrimination" is something that has also been studied in the context of individuals with a criminal history. Much like the notoriety of the gender wage gap, it is well documented that ex-offenders

[163] PayScale, *supra* note 51.
[164] *Id.*
[165] Shira Tarlo, *What Is Equal Pay Day? Here's Everything You Need to Know*, CBS NEWS (Apr. 4, 2017), https://www.nbcnews.com/news/us-news/what-equal-pay-day-here-s-everything-you-need-know-n741391.

have difficulty in obtaining employment.[166] In order to promote the hiring of these individuals, many states have implemented what have become known as ban-the-box laws[167] Generally, these laws prevent employers from inquiring about a job candidate's criminal history until some later point in the hiring process such as after an interview has been conducted or after the candidate has received an offer of employment.[168] The basic idea behind these laws is that, by delaying when an employer may seek criminal history information about an applicant, the employer will consider the applicants' other qualifications and, potentially, interview these individuals rather than immediately rejecting these applicants after seeing their criminal history.[169] Some studies indicate, however, that these laws have had unintended consequences.[170]

In one study, researchers created over 15,000 fake job applications in both New York and New Jersey.[171] They then used these applications to apply to jobs within these states both before and after the states' implemented ban-the-box laws.[172] Researchers then varied information about the job applicant but introduced several characteristics that an employer might correlate with having a criminal history such as black or Hispanic race, GED as the highest level of education, and employment gaps.[173] They found that, while the ban-the-box laws seemed to increase the number of interviews received by ex-offenders, these laws seemed to widen the gap between black and white applicants.[174] That is, prior to the ban-the-box laws being implemented, white applicants

[166] Dallan F. Flake, *Do Ban-the-Box Laws Really Work?* 104 Iowa L. Rev. 1079, 1081–82 (Mar. 2019).
[167] *Id.* at 1084.
[168] *Id.*
[169] *Id.*
[170] Amanda Agan & Sonja Starr, *Ban the Box, Criminal Records, and Statistical Discrimination: A Field Experiment*, UNIV. OF MICH. L. AND ECON. RESEARCH PAPER SERIES 24 (June 2016), https://law.yale.edu/sites/default/files/area/workshop/leo/leo16_starr.pdf.
[171] *Id.* at 3.
[172] *Id.*
[173] *Id.*
[174] *Id.* at 4.

received 7% more interviews, while that gap grew to 45% after the implementation of the laws.[175] The researchers theorized that, because statistics show that black men are more likely to have criminal histories than white men, employers chose to interview fewer black men without criminal records, assuming, due to the lack of information to the contrary, that they had a criminal history.[176] Similarly, they theorized that, due to lack of information, the employers assumed that the white applicants did not have a criminal record.[177]

In another study, researchers examined individual level data from the 2004-2014 Current Population Survey.[178] They concentrated on the likelihood of employment for black and Hispanic men, without a college degree, in the 25-34-year-old age range both prior to and after the implementation of ban-the-box laws, while controlling for various other factors.[179] The researchers reasoned that this particular demographic was the most statistically likely to be recently incarcerated and was the group that ban-the-box laws were most intended to benefit.[180] The results indicated that black men within the targeted age group were 5.1% less likely to be employed after implementation of ban-the-box laws while Hispanic men in the same age range were 2.9% less likely to be employed.[181] The results also indicated that older black men and older Hispanic women were significantly more likely to be employed after ban-the-box laws were implemented.[182] This indicates that the negative consequences experienced by young Hispanic

[175] *Id.*
[176] Agan, *supra* note 170 at 4.
[177] *Id.*
[178] Jennifer L. Doleac & Benjamin Hansen, *The Unintended Consequences of "Ban the Box": Statistical Discrimination and Employment Outcomes When Criminal Histories Are Hidden* 38-2 J. LAB. ECON. 321, 324 (2020).
[179] *Id.*
[180] *Id.*
[181] *Id.* at 324–25.
[182] *Id.* at 325.

and black men were based on their higher statistical likelihood of being incarcerated, rather than any racial animus.[183]

It is true that there are significant differences between an employer's decision to hire an ex-offender versus the employer's decision on what salary to pay a new job applicant. While an employer might want to guess whether or not an individual has a criminal history to avoid any risk of theft or other potential risks, there is likely less motivation to guess a woman's prior salary because the only potential downside is paying that individual a salary larger than it may have had to. Nonetheless, there is also little downside to the employer assuming a lower salary for female applicants. The worst-case scenario is that the applicant is offended by the low-ball offer and walks away from the job, but in many cases, they may simply make a counteroffer, which would likely be influenced by the low initial offer from the employer.

Employers may also attempt to make statistical assumptions in other situations that render lower risk to the employer than that presented with ban-the-box laws. For instance, several states have implemented bans on employers' ability to use credit report inquiries to screen job applicants based on the concern that utilizing these screenings may have a disparate impact on minority races because, on average, these groups have lower than average credit scores.[184] Researchers examined the effects of these bans by looking at current population survey as well as state unemployment records in jurisdictions with and without bans on pre-employment credit checks.[185] They also examined the data within those states with bans to determine how they changed after the bans went into effect.[186] The results indicated that bans on credit checks reduced job-finding rates for black

[183] *Id*. at 325–26.
[184] Alexander W. Bartik & Scott T. Nelson, *Deleting a Signal: Evidence from Pre-Employment Credit Checks* 1 (Becker Friedman Institute For Economics at University of Chicago, Working Paper No. 2019-137, Dec. 1, 2019), https://bfi.uchicago.edu/wp-content/uploads/BFI_WP_2019137.pdf.
[185] *Id.* at 1–2.
[186] *Id.*

job seekers.[187] These results indicate that, when employers are unable to determine a job applicant's credit history, they make the assumption that black men have lower credit scores.[188]

In the same way that employers use race as a proxy for criminal history or credit worthiness because black men, for example, are statistically more likely to have a criminal history or lower credit rating, employers will use gender as a proxy to determine prior salary because women are statistically likely to earn less than men. If employers respond in this manner, then banning them from asking about salary history will do little to close the gender pay gap. In fact, it may make things worse for some women. For example, an employer who makes this assumption, and bases a job offer on the statistically lower average salary of women in general, will likely make lower salary offers to those high earning women because they will be bucketed in with the average. Thus, while there may be beneficial impacts for those lower-earning women, those benefits may be negated by the adverse impacts to high earning women, resulting in no movement in average pay.

VI. Conclusion

No doubt, banning employers' use of salary history in the hiring process is the modern legislative trend and only time will tell whether or not these laws have the effect of reducing the persistent gender pay gap. Given the potential dollar amounts at stake, however, it seems likely that employers will adapt to this loss in information by seeking to fill in the gaps by using the statistical evidence available, that is, the fact that women earn less than men. Ultimately, these laws will place heavy burdens on employers and do very little to achieve the pay equity they are intended to provide.

[187] *Id.* at 1.
[188] *Episode 8: Amanda Agan*, PROBABLE CAUSATION (Jul. 23, 2019) (downloaded using iTunes).