On October 12, 2017, Governor Jerry Brown signed AB 168, prohibiting California employers from asking job applicants about their salary histories.

This new law thrusts California yet again into the forefront of jurisdictions tackling pay equity through local legislation. Although the new law does not specifically reference pay equity, the law’s authors justified the change as a means to eliminate pay gaps. The legislative commentary proclaims: “Gender wage discrimination is destructive not only for female workers but for our entire economy. Closing the wage gap starts with barring employers from asking questions about salary history so that previous salary discrimination is not perpetuated.”

Governor Brown had vetoed a similar bill two years ago, stating that he wanted to give the recently-amended Fair Pay Act a chance to work. The Fair Pay Act has since been amended two times in two years, and it appears that the legislature’s work is not done. Come January 1, 2018, California will join the ever-growing list of states (such as Delaware, Massachusetts, New York, Puerto Rico, and Oregon) and municipalities (New York City, Philadelphia, and San Francisco) that restrict or ban employers from asking about a job applicant’s salary history.

Current California law prohibits pay discrimination, but it does not prohibit salary history inquiries. Under the California Fair Pay Act, prior salary, in and of itself, may not be used to justify any pay differential. AB 168 adds Section 422.3 to the California Labor Code, which will not only prohibit salary history inquiries but also prohibit employers from relying on an applicant’s salary history as a factor in determining whether to offer employment or determining what salary to offer in most cases.

Employers will be prohibited from seeking salary history information (including compensation and benefits data) about an applicant, either personally or through an agent. An exception exists for salary history information that is disclosable to the public pursuant to federal or state disclosure laws such as the California Public Records Act and the federal Freedom of Information Act.

Further, upon reasonable request, employers must provide an applicant with the pay scale for the position being sought. The law does not define “pay scale.”

Although the law prohibits an employer from inquiring about an applicant’s salary history, an applicant may still, voluntarily and without prompting, disclose his or her salary history information to a prospective employer. In such an instance, although the employer may not consider that information in determining whether or not to hire the individual, the employer may consider or rely on that information in
determining his or her salary. Still, employers may want to note that the strictures of California Labor Code Section section 11975 would still disallow prior salary, by itself, to justify any disparity in compensation.

As a result of this new development, all California employers may want to:

1. revise their employment applications to remove requests for salary history;
2. modify their screening and interview practices to eliminate questions about salary history;
3. train hiring managers about permissible compensation questions to ask during an interview, as well as how to respond to requests for pay scale information and voluntary disclosure of salary history by an applicant;
4. produce pay scale information to applicants upon reasonable request.

All federal and state background check requirements are summarized in Ogletree Deakins' OD Comply: Background Checks and OD Comply: Employment Applications subscription materials, which are updated and provided to OD Comply subscribers as the law changes.