
# E. K. Ward & Associates
# AAP Bulletin 2017

## Prohibition to Salary Inquiry

With little chance that Congress will enact the Paycheck Fairness Act at any time in the near future, pay equity advocates have redirected their efforts in recent years toward individual states, and a number of states have now enacted laws that contain many of the Paycheck Fairness Acts' key provisions. Massachusetts has become the first major jurisdiction in the country to bar employers from using an applicant's salary history or requirements as a selection criterion, or even asking about prior salary, until after a job offer has been extended and compensation has been "negotiated". The salary inquiry bar provision is included in the state's equal pay law overhaul which was approved unanimously by the state legislature and signed into law, which goes into effect July 1, 2018. While this practice is not barred outright under federal law, the Equal Employment Opportunity Commission (EEOC) takes the position that prior salary alone cannot be used to justify differences in pay between a man and woman performing the same job. According to the laws' sponsors, the restriction on inquiring about prior salary is designed to "end the self-perpetuating cycle of wage disparity." In other words, the goal is to prevent a woman's current wages from being artificially suppressed due to historical gender-based pay gaps.

The city of Philadelphia is the first major local jurisdiction in the country to ban employers and employment agencies doing business in the city from asking job applicants for their salary history. It is also unlawful under the new ordinance for an employer to base its compensation offer on an applicant's prior salary unless the applicant knowingly and willingly discloses that salary history to the employer.

We can expect additional states and localities to take similar steps to enact salary history inquiry bans in the future. Accordingly, we encourage employers to continue scrutinizing their compensation practices to identify and remedy any pay discrepancies that cannot be supported by solid nondiscriminatory reasons.

## Revised Pay Secrecy Language

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has made a small technical change to the prescribed language federal contractors are required to incorporate into existing "employee manuals and handbooks" and electronic postings regarding the agency's "pay transparency rule" which bars retaliation against employees for discussing pay. The change simply provides a regulatory citation to the currently prescribed language. Since OFCCP requires contractors to use the agency's prescribed language, EKW&A recommends you update your materials accordingly. For more information, go to http://bit.ly/2mi8G7b

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# Legalized Marijuana

Through ballot initiatives at last year's elections, voters in four more states (California, Maine, Massachusetts, and Nevada) legalized marijuana for recreational use, bringing the total number of states with such laws to eight (Colorado, Washington, Alaska, Oregon) in addition to the District of Columbia. In addition, three more states (Arkansas, Florida, and North Dakota) adopted "compassionate use" laws permitting medical marijuana use, bringing the total to 28.

Although marijuana remains a controlled substance under federal law, state legalization for recreational or medical use can create potential conflicts with employers' drug free workplace policies. The United States Supreme Court ruled in 2005 that state laws permitting medical marijuana use did not trump federal law, so that individuals who use, grow, and distribute marijuana legally under state law can be prosecuted under federal law. However, the Obama Administration Justice Department adopted a "hands-off" policy, directing U.S. attorneys nationwide not to expend resources prosecuting those who use or provide marijuana for medical purposes consistent with state law.

The federal Drug Free Workplace Act of 1988 still requires federal contractors to maintain a drug-free workplace. This includes, among other things, prohibiting the manufacture, distribution, dispensation, possession, or use of a controlled substance in the workplace, notifying employees of the policy and making it a condition of employment, and making good faith efforts to maintain a drug-free workplace. In cases where the conflict between medical marijuana and drug-free workplace policy exists, the state courts have generally ruled in favor of the employer. While many of these state laws specifically address employer concerns, including some that explicitly disavow any kind of workplace accommodation requirements, others contain less protective language or none at all. Some of the state medical marijuana laws merely shield employers from having to permit employees to use or be under the influence of marijuana "in the workplace", but leave open the question of how employers can deal with employees use outside of work. None of the state recreational or compassionate use laws enacted to date provides explicit workplace protection for users, and marijuana use remains illegal under federal law. Employers who operate in a state where there is a recreational or compassionate use law may want to review their current drug free workplace policies, but not necessarily abandon zero-tolerance practices.

Marijuana remains an illicit drug under federal and most state laws, although its increasing social acceptance is evident from recent elections. According to a 2015 survey, 8.9 percent of Full-Time Employees (FTEs) used marijuana in the past month, a fifth consecutive year of increase. The percentage of U.S. workers who are full-time employees engaging in illicit drug use on a monthly basis increased to 10.8 percent , the highest percentage in 10 years. Illicit drug use includes the misuse of prescription psychotherapeutics or the use of marijuana, cocaine (including crack), heroin, hallucinogens, inhalants or methamphetamine.

## Data Confidentiality

A recent report issued by the Office of the Inspector General (OIG) detailed several continuing management challenges faced by the Department of Labor (DOL). Among other things, the report finds that the Department of Labor's Information Security Practices continue to "represent ongoing, unnecessary risk to the confidentiality, integrity and availability of DOL's data." Given the DOL's focus in recent years on developing a cloud-based enforcement system, and the highly sensitive employee level compensation information DOL's OFCCP collects during a compliance review, this is concerning. Since the OIG report raises serious doubts as to the DOL's ability to maintain data confidentiality, contractors are encouraged to take whatever steps necessary to protect their data before providing it.

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# Make Disposition Codes Work for You

Applicant disposition codes can work for or against you. If not set up properly, they will work against you and could result in "hidden" discrimination findings. A good disposition code system easily differentiates the reasons applicants did not progress through the selection process. They indicate how far the applicant advanced, why they were excluded and if they withdrew. Good disposition codes allow you to easily defend your decision.

Disposition codes are critical in a compliance review because they help define which job seekers should be in the data that federal contractors provide to the OFCCP. They allow federal contractors to filter out individuals who do not meet the definition of an applicant, while also allowing them to identify adverse impact for a protected group.

An effective disposition code system enables contractors to:

1. Know when the candidate was excluded
2. Know why the candidate was excluded
3. Analyze their selection process to determine whether there is adverse impact overall as well as at any discrete step in the process.
4. Control the size of the applicant pool
5. Know who made the decision concerning the candidate's final status

***Examples of ineffective dispositions:***

- More qualified applicant selected
- Not selected
- Interviewed/screened
- Applicant disqualified

***Examples of effective dispositions (note how they tell the story):***

- Basic qualifications not met - experience
- Basic qualifications not met - education
- More qualified candidate selected - education
- More qualified candidate selected - skills
- Failed background check - post offer
- Failed drug screen - post offer
- Withdrew - reason unknown
- Withdrew - unwilling to relocate
- Withdrew - voluntarily from consideration
- Disqualified - not US Eligible
- Not eligible for rehire - former employee
- Applied after position was filled

When creating and applying disposition codes, employers should think through their entire selection and hiring process while also giving consideration that codes may differ by type of position. It is a good idea to create a flowchart of the selection process for common positions and to create codes that are aligned with each step. While too many codes can be burdensome, it is important to have enough codes to capture all necessary data including secondary codes to track detail that tells the story. For example, which test did they fail; which education requirement was missing, etc.

The most important thing to remember when assigning disposition codes is that you need to be able to defend your selection. If you simply assign a single disposition code to all applicants (such as "More qualified candidate selected - experience"), and the job group shows adverse impact, this decision could come back to haunt you in the event of an audit. If the OFCCP compliance officer questions the hire, you may be forced to go back and manually review each applicant's resume to determine where and why they fell out in the process. At that point, some of those involved in the recruiting process may have left the company making it almost impossible to accurately recreate.

If you would like us to review your disposition codes, please contact us at lsalatti@ekward.com.

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# Ban the Box Update

The number of states and localities that ban criminal history inquiries on job applications continue to expand. To date, there are now 9 states and numerous local jurisdictions that prohibit private employers from asking job applicants about their criminal history on a job application, and in some cases, until a conditional job offer is made. Since last April, Vermont, Connecticut and Los Angeles have instituted so called "Ban the Box" legislation. Currently, Hawaii, Massachusetts, Connecticut, Illinois, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, District of Columbia, and major local jurisdictions Austin, Baltimore, Chicago, Los Angeles, New York City, Philadelphia, Portland Oregon, San Francisco, and Seattle have such legislation. Although there are some differences among the jurisdictions, the key common feature is a prohibition on inquiring about an applicant's criminal history on a job application except when compelled to make such inquiry under federal or state law.

# New I-9's

Reminder from previous newsletter, US Citizenship and Immigration Services (USCIS) has made available the new I-9 for use by employers. Under OMB's terms of clearance, employers were to begin using the new I-9 on January 22, 2017. The new I-9, identified as "11/14/2016 N" can be found on the USCIS website at https://www.uscis.gov/i-9.

# Outreach


As part of your annual affirmative action plan process, don't forget to measure the effectiveness of your organization's outreach and recruitment efforts to protected veterans and individuals with disabilities. The data must be maintained for three years to be used to spot trends. Our 2016 4th Quarter AAP Bulletin had a lot of information pertaining to this subject. If you need any help or suggestions for improving your recruitment efforts, please contact us at lsalatti@ekward.com.

# Recruiter Access to Demographic Data

There was a case decided in a lower federal court last year that reinforces the point that access to employee or applicant demographic data should be on a strict need-to-know basis. In the case of Dougboh v Cisco Systems, Inc., the plaintiff claimed the defendant solicited his demographic information and subsequently used it to discriminate against him in hiring. The company was able to prove the demographic information was not available to the recruiters when they decided not to grant the plaintiff an interview. Restricting recruiter access can benefit a company's overall compliance stance and assist in defending against claims of discrimination.

***Disclaimer:*** This document is meant only as a guide based on practical recommendations for AAP compliance. The information is not intended to be, nor does it constitute legal advice. It is recommended that your Affirmative Action Plan compliance procedures and all employment policies, procedures and practices be reviewed by your in-house counsel or other legal counsel with qualifications background and experience in AAP compliance.

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