

# Does asking about prior salary create potential liability?

by Jodi R. Bohr  
Tiffany & Bosco, P.A.

The Equal Pay Act (EPA) makes it illegal for employers to pay unequal wages to men and women who perform substantially equal work. It allows for differences in pay, but sex cannot be a factor. An employer can justify a pay disparity by proving the disputed wages are based on one of four affirmative defenses in the statute:

1. A seniority system;
2. A merit system;
3. A system that measures earnings by quantity or quality of production; or
4. Any factor unrelated to sex.

Historically, employers have made it a practice to ask job applicants for prior salary information. Is there a connection between the EPA and questions about an applicant's salary history? Isn't prior salary a factor unrelated to sex? For more than three decades, the answer was yes. But even though requesting salary history is a seemingly innocuous request, the question can perpetuate gender pay gaps among employees.

The 9th Circuit recently found that past salary is not a job-related factor like experience, education, background, and performance, so it's no longer protected by the EPA's catchall defense of being a factor unrelated to sex. Prudent Arizona employers must consider whether it's worth keeping questions about salary history on job applications or whether such questions will open you up to liability.

### *The cycle*

Advocates for removing salary history questions from job applications argue that employers are using the information in a way that perpetuates the

gender pay gap, whether they do so intentionally or not. The logic is simple: The gender pay gap is real, so asking for information about an applicant's salary history in order to determine her starting salary effectively continues the gender pay gap.

For example, if a woman who works for a company that pays men more than women decides to make a job change, and her prospective employer bases her salary on what she's currently making, the gender pay gap is perpetuated by her salary history.

### *The fix*

Although Arizona employers aren't prohibited from asking about job applicants' salary history, you may not use salary history as a factor in setting pay. So why ask? Instead, you should consider setting a salary range and communicating it to applicants up front. Communicating your salary range is likely to improve candidate relations. Applicants will know up front whether the salary is within their desired range, and if it isn't, they won't apply and waste everyone's time.

Often, candidates who are asked about their salary history are automatically turned down just because they earn more than the salary range for the posted position. But salary isn't always everything, and the candidate may be willing to take less money because she is interested in the company's culture or flexibility. Asking for salary history could be needlessly narrowing the desired diverse pool of candidates.

### *Bottom line*

If you use past salary information in your hiring decisions, you may want to reconsider your process for determining starting salaries. Your review

should include identifying legitimate factors for pay differentiation so you can ensure that only those factors are used to determine starting salaries. Consider removing salary history questions from your job applications altogether unless you obtain substantial value from the information that's unrelated to starting salary determinations.

If you have used salary history information in the past, you may want to conduct an internal salary audit to determine whether your use of the information has resulted in pay differentials between men and women. If you find that pay differentials exist, determine if they are based on legitimate factors such as experience, production, or performance. If not, consider correcting the pay gap going forward, and determine whether you should offer back pay to reduce your risk of liability under the EPA.

*Jodi R. Bohr is an attorney with Tiffany & Bosco, P.A. and a contributor to Arizona Employment Law Letter. She practices employment and labor law, with an emphasis on litigation, class actions, and HR matters, and is a frequent speaker on a wide range of employment law topics. She may be reached at [jrb@tblaw.com](mailto:jrb@tblaw.com) or 602-255-6082.*