

## CUT AND PASTE POST APRIL, 2018

### FOCUS ON PAY

#### **New Rule on Tipped Wages**

The March 23, 2018 federal budget spending bill includes an amendment to the Fair Labor Standards Act (FLSA) which prohibits employers, managers, or supervisors from collecting or retaining tips made by employees, regardless of whether the employer takes a tip credit.

The law essentially blocks a U.S. Department of Labor [2017 proposed rule](#) which would have allowed tip sharing between 'back of the house' workers and servers. The DOL may pull the 2017 proposed rule, or may change the rule to conform to the spending bill. For the time being, the [FLSA standard](#) continues: "[a] valid tip pool may not include employees who do not customarily and regularly receive tips, such as dishwashers, cooks, chefs, and janitors."

For more information, go to: [Eater](#)

#### **Salary History Ban**

Many companies routinely ask about an applicant's salary history either on the application, or during the interview process. In many places, an employer can no longer ask an applicant about his or her salary history. At least 21 states and Washington, D.C., along with several municipalities, have proposed legislation that would prohibit salary history questions. More bans are expected at both the state and local level.

While the provisions of each law vary, they make it illegal for employers to ask applicants about their current compensation or how they were paid at past jobs. The rationale for these laws stems from the equal pay issue and the premise that pay for the job should be based on the value of the job to the organization, not the pay an applicant might be willing to accept. In addition, protected classes have historically been paid less than other classes, and basing new employee salary decisions on current pay exacerbates the inequity. Salary history bans are designed to reverse this pattern of wage inequality resulting from past gender bias or discrimination.

**Professional Pointer:** Employers should consider:

- Establishing compensation ranges for open positions and asking applicants if the salary range for the position would meet their compensation expectations;
- Updating employment applications to remove the salary history information; and
- Training hiring managers and interviewers to avoid asking questions about salary history.

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## Pay Transparency

Many employers have had a long standing practice of discouraging employees from openly discussing their compensation. In fact, in many businesses, an employee may be disciplined or even subject to immediate termination for divulging their pay or asking another employee what s/he is paid.

Many states are proposing or have enacted laws that allow employees to discuss their wages and other forms of compensation with others. In addition to state law, Section 7 of the National Labor Relations Act (NLRA) allows employees to engage in pay discussions as “concerted and protected activities for the purpose of collective bargaining or other mutual aid or protection.”



During the Obama administration, the National Labor Relations Board (NLRB) broadly interpreted the NLRA’s Section 7 as supporting employees’ rights to discuss wages and other terms and conditions of employment. Unless the current administration’s NLRB changes direction on this issue, which is not expected, *employers need to review their policies and practices, and remove any which prohibit employees from discussing pay or working conditions with others.*

## Equal Pay for Equal Work

The Equal Employment Opportunity Commission’s (EEOC) [Strategic Plan for fiscal years 2018-2022](#) makes enforcing the Equal Pay Act (EPA) a priority. The EPA is intended to close the pay gap between men and women. This issue is being addressed at the state level, as legislators in more than 40 jurisdictions introduced bills related to equal pay in 2017. It’s also important to know that the Trump administration has not indicated any interest in changing the direction of the EEOC’s plan.

Interesting tidbit: Montana’s *Equal Pay for Women for Equivalent Service Act* was passed in 1919. Despite this law, among full-time, year-round workers in Montana, women earn 72.5% of men’s median earnings.

**Professional Pointer:** When was the last time you reviewed gender pay differences in your organization? Organizations may set different pay for the same position for bona fide reasons such as seniority and documented performance differences, but it’s important to document the bona fide business reason for the differences, and to correct wage disparities as needed.

## White Collar Salary Rule Update

(Well, really, this isn’t much of an update, but I thought it would be good to give you an update anyway!) The U.S. Department of Labor’s Wage and Hour Division has projected that a white collar salary rule proposal will be published in October. It is likely that the rule will propose increasing the White Collar salary threshold, but the increase will be less than the rule adopted by the Obama administration which was later pulled. The current guess is that the proposal will include an increase in the white collar salary from the current \$455 per week to somewhere between \$650 and \$730 per week.

We will keep you updated!