



November 15, 2022

Hon. Kiran Ahuja  
Director  
Office of Personnel Management  
1900 E Street, NW  
Washington, D.C. 20415

Dear Director Ahuja:

As a Department of Justice (DOJ) employee advocacy group that has pushed for years to promote pay equity in the federal workforce, the DOJ Gender Equality Network (DOJ GEN)<sup>1</sup> was encouraged to see that OPM anticipates issuing a regulation to “address the use of salary history in the hiring and pay-setting processes for Federal employees.”<sup>2</sup> We believe such a regulation carries the potential to move agencies closer to pay equity. However, for the reasons explained below, OPM’s regulation should ban not only agencies’ *solicitation* of salary history, but also their *reliance* on to it set pay—regardless of how an agency acquires the information.<sup>3</sup>

DOJ GEN has worked for years to encourage DOJ<sup>4</sup> and OPM<sup>5</sup> to end the use of salary history during the hiring process, which research has shown to be a significant driver of pay inequities.<sup>6</sup> Despite a narrowing of the gender pay gap in recent years, as of September 2021,

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<sup>1</sup> DOJ GEN is a 1,250-member employee-run organization that has advocated for gender equity and equality at the Justice Department since 2016. In pursuit of that goal, we have worked to eradicate pay gaps that result from federal hiring practices; convince DOJ to address systemic sexual misconduct; push for greater flexible work options and a comprehensive effort to enhance diversity at DOJ; protect federal workers’ access to abortion care; and we lobbied Congress to pass paid family leave legislation. You can find more about us at [www.dojgen.org](http://www.dojgen.org).

<sup>2</sup> Executive Order on Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency, Exec. Order No. 14069, 87 F.R. 15315 (March 15, 2022).

<sup>3</sup> While it may not be possible to prohibit job applicants or new hires from volunteering their past salary, OPM should direct agencies not to consider it under any circumstances during the pay-setting process. To do so, it must rescind or amend the regulations at 5 C.F.R. §§ 531.212(a)(3) and (c)(2), which permit agencies to consider a new hire’s prior salary when setting pay.

<sup>4</sup> In August 2020, DOJ GEN sent a letter to each of DOJ’s 36 components urging them to stop soliciting and considering salary history, and then replied to the Justice Management Division’s resistance to doing so. See <https://static1.squarespace.com/static/61f3032d7eb5233ccc782af9/t/6201720eab72173dac7e621b/1644261904500/DOJ%2BSalary%2BHistory%2BLetter%2B8-19-20%2BJMD%2BClean.pdf>; <https://static1.squarespace.com/static/61f3032d7eb5233ccc782af9/t/620171aa9594886c5fa77f00/1644261802401/DOJ%2BGEN%2BSalary%2BHistory%2Bfollow-up%2Bto%2BJMD.pdf>. DOJ GEN has also made this appeal to Attorney General Garland and others in DOJ’s current leadership.

<sup>5</sup> In August 2021, DOJ GEN urged OPM to promulgate a regulation banning the solicitation and consideration of salary history; direct agencies to conduct pay audits and adjust salaries for victims of wage disparities; and provide guidance for agencies and employees regarding pay equity issues. See <https://static1.squarespace.com/static/61f3032d7eb5233ccc782af9/t/620154ba9f788f355070fa87/1644254395345/DOJ%2BGEN%2Bletter%2Bto%2BOPM%2BDirector%2BAhuja%2Bre%2BPay%2BEquity.pdf>.

<sup>6</sup> See, e.g., Harvard Business Review Analytic Services, *Navigating the Growing Pay Equity Movement: What Employers Need to Know About What to Do* (2019), <https://resources.trusaic.com/pay-equity-downloads/harvard->

women employed by the Executive branch still made 5.9% less than their male colleagues, and that disparity remains far more acute for Black, Latina and Native American women.<sup>7</sup> Robust, top-down efforts are needed to eliminate pay inequities entirely.

Banning the solicitation of salary history is one important way to eliminate pay gaps. As Vice President Kamala Harris observed, “requiring applicants to share their salary history . . . can mean inequitable pay from a previous job will follow [women] to their current job, and so on and so on.”<sup>8</sup> But even if agencies stop soliciting salary history, pay inequities will continue to be carried from job to job if agencies are allowed to *rely* on salary history information that applicants choose to provide, or that agencies otherwise learn about. Without a comprehensive salary history ban, male attorneys, who earn on average 22.6% more than female attorneys, could still leverage their past salary to negotiate higher starting salaries at DOJ than equally qualified female counterparts.<sup>9</sup> Similarly, when applying for federal sector positions in the STEM field, male applicants from Silicon Valley—where men have been found to earn as much as 61% more than similarly situated women—could volunteer their salaries and receive higher starting salaries than female applicants with the same or better credentials.<sup>10</sup>

A number of states and localities have implemented comprehensive bans that prohibit employers’ solicitation of and reliance on salary history. In Colorado, an employer may not “seek the wage rate history of a prospective employee or rely on the wage rate history” to set an employee’s pay, just as it is illegal for employers in Oregon to “[d]etermine compensation . . . based on current or past compensation,” and in California to solicit or “rely[] on the salary history information of an applicant for employment as a factor in determining whether to offer an applicant employment or what salary to offer an applicant.”<sup>11</sup> As New York City noted upon the passage of its comprehensive salary history ban, when “employers rely on salary histories to determine compensation, they perpetuate the gender wage gap.”<sup>12</sup> For the federal government to

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[business-review-trusaic-pulse-survey](#); James E. Bessen, *et al.*, *Perpetuating Inequality: What Salary History Bans Reveal About Wages*, Boston University School of Law (June 2020), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3628729](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3628729).

<sup>7</sup> OPM, Agency Priority Goal | Action Plan | FY 22 – Q2, *Close gender and racial pay gaps in the Federal Government*,

[https://assets.performance.gov/APG/files/2022/june/FY2022\\_June\\_OPM\\_Progress\\_Close\\_gender\\_and\\_racial\\_pay\\_gaps\\_in\\_the\\_Federal\\_Government.pdf](https://assets.performance.gov/APG/files/2022/june/FY2022_June_OPM_Progress_Close_gender_and_racial_pay_gaps_in_the_Federal_Government.pdf); U.S. Government Accountability Office, *Gender Pay Differences* (December 3, 2020), <https://www.gao.gov/products/gao-21-67>.

<sup>8</sup> Erich Wagner, *The White House and OPM Say They Will ‘Address’ Salary History in Federal Hiring*, GOVERNMENT EXECUTIVE (March 15, 2022), <https://www.govexec.com/pay-benefits/2022/03/white-house-opm-say-they-will-address-salary-history-federal-hiring/363216/>.

<sup>9</sup> Debra Cassins Weiss, *Full-time female lawyers earn 77 percent of male lawyer pay*, ABA JOURNAL (March 17, 2016), [https://www.abajournal.com/news/article/pay\\_gap\\_is\\_greatest\\_in\\_legal\\_occupations](https://www.abajournal.com/news/article/pay_gap_is_greatest_in_legal_occupations).

<sup>10</sup> Suzanne McGee, *Silicon Valley’s gender problem extends beyond pay gap*, THE GUARDIAN (March 6, 2016), <https://www.theguardian.com/money/us-money-blog/2016/mar/06/silicon-valley-women-tech-industry-gender-pay-gap-bias#:~:text=Anyone%20who%20has%20looked%20in,more%20than%20their%20female%20counterparts>.

<sup>11</sup> Colo. Rev. Stat. § 8-5-102(2)(a) (2019); Or. Rev. Stat. § 652.220(1)(d) (2017); Cal. Lab. Code § 432.3(a) (2019).

<sup>12</sup> Summary of New York City’s comprehensive salary history ban (N.Y.C. Admin. Code § 8-107(25)), <https://legistar.council.nyc.gov/View.ashx?M=F&ID=4625980&GUID=E1F677D7-4A3C-418C-86B0-14B0A5E8032B>.

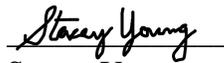
be a “model for diversity, equity, inclusion, and accessibility,”<sup>13</sup> it should place itself ahead of the curve—not behind it—and align itself with the policy that stands to be most effective.

Although some may argue that use of salary history can be an advantageous negotiating tool for women and people of color who come from high-paying jobs, the overall harmful impact it has on historically underpaid groups outweighs any limited individual employee gains. In a brief supporting a federal employee who was paid less than her less-qualified male coworker due only to his higher past salary, the National Women’s Law Center and 46 other *amici* explained why eliminating the use of salary history is so imperative: “Persistent inequality in pay translates into lower lifetime earnings for women, less income for families, and higher rates of poverty.”<sup>14</sup>

A comprehensive ban on both the solicitation and consideration of applicants’ salary history will not only help employees; it will benefit the federal government as well. Taking meaningful steps to shrink salary gaps will improve agencies’ ability to recruit and retain top talent, advance compliance with the Administration’s DEIA mandates,<sup>15</sup> and reduce costly legal challenges to salary disparities under the Equal Pay Act and other civil rights laws.<sup>16</sup>

DOJ GEN would welcome the opportunity to discuss this issue further. We remain sincerely grateful for your commitment to promoting fairness in the federal workforce.

Respectfully,



Stacey Young

Civil Rights Division

President, DOJ GEN

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*On behalf of DOJ GEN’s Board of Directors and the following members of its Pay Equity Working Group:*

Crista Colvin | Bureau of Prisons

Lindsay Dunn | Civil Division

Jamie Huang | Office of Privacy and Civil Liberties

Michelle Spatz | Environmental and Natural Resources Division

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<sup>13</sup> Executive Order on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce, Exec. Order No. 14035, 86 F.R. 34593 (June 25, 2021) (DEIA Exec. Order).

<sup>14</sup> Brief for the National Women’s Law Center and 46 Additional Organizations as *Amicus Curiae*, p. 10, *Boyer v. United States*, No. 22-1822 (Fed. Cir. 2022).

<sup>15</sup> *See, e.g.*, DEIA Exec. Order (promising to end “racial and gender pay gaps”).

<sup>16</sup> Federal courts have moved in the direction of prohibiting or limiting employers’ use of salary history as an affirmative defense to sex-based discrimination under the Equal Pay Act. *See, e.g.*, *Rizo v. Yovino*, 950 F.3d 1217, 1228 (9th Cir. 2020); *Aldrich v. Randolph Ctr. Sch. Dist.*, 963 F.2d 520, 526 (2d Cir. 1992); *Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1073 (8th Cir. 2009); *Riser v. QEP Energy*, 776 F.3d 1191, 1199 (10th Cir. 2015); *Glenn v. Gen. Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988); *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995).