

August 5, 2021

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

Dear Director Ahuja:

The DOJ Gender Equality Network (DOJ GEN)¹ congratulates you on your recent confirmation to lead the Office of Personnel Management (OPM). We are encouraged by what you have already done to advance racial and gender equity in your career, including at the Justice Department, and we are excited to see how you can further these pursuits at OPM for the millions of federal workers who rely on your leadership.

One of the primary issues DOJ GEN has attempted to address is pay equity.² Across all racial and ethnic groups, women in the United States are paid approximately 82 cents for every dollar paid to men, and the disparity is far more acute for Black, LatinX and Native American women.³ Although the gender gap in the federal workforce has narrowed in recent years, a significant gap still exists, especially for women of color.⁴

While the overall drivers of gender and racial wage gaps, including discrimination, are complex, one fact is not: requesting or using salary history during the hiring process perpetuates

¹ DOJ GEN is a 1,000-member employee-run organization that has advocated for gender equity and equality at the Justice Department since our founding in 2016. In pursuit of that goal, we have worked to eradicate pay inequities that result from DOJ's hiring practices; convince leadership to address the Department's systemic sexual harassment problem; push for a comprehensive effort to enhance diversity; and we lobbied Congress to pass paid family leave legislation. You can find more about us at www.dojgen.org, and read our letters and advocacy documents at: <https://www.dojgen.org/what-we-have-done>. Our briefing document on pay equity is available at: <https://static1.squarespace.com/static/5a7097c0d55b41a81fbfaec/t/610b4f61aeeb4e7cb8026147/1628131169955/DOJ+GEN+pay+equity+briefing+document.pdf>.

² In August 2020, DOJ GEN and other Justice Department affinity groups asked the heads of every DOJ component, including the Justice Management Division (JMD), to stop using salary history when setting pay. The letter to JMD is available at: <https://static1.squarespace.com/static/5a7097c0d55b41a81fbfaec/t/60e7a9c9bab0621613359996/1625795017566/DOJ+Salary+History+Letter+8-19-20+JMD.pdf>.

³ United States Census Bureau, *Work Experience—People 15 Years Old and Over, by Total Money Earnings, Age, Race, Hispanic Origin, Sex, and Disability Status*, available at: <https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pinc/pinc-05.html>.

⁴ See United States Government Accountability Office, *Gender Pay Differences*, available at: <https://www.gao.gov/assets/gao-21-67.pdf> (finding that in 2017, a gender pay gap of seven cents existed between men and women generally; it was significantly higher for Black, Latinx and Native American women). In its executive summary, the report notes that “unexplained” parts of the pay gap may be due to “factors that cannot be measured, such as discrimination and individual choices.” *Id.*

gender wage gaps within a given workforce.⁵ We believe that the main barriers to pay equity for federal employees generally are OPM regulations—in particular 5 C.F.R. §§ 531.212(a)(3) and (c)(2)—because they permit agencies to consider a new hire’s prior salary when setting pay.⁶ Indeed, DOJ GEN has anecdotal evidence from many of our own members who came from the nonprofit sector or other federal government jobs and receive lower pay than their experience would otherwise merit because the Justice Department considered their prior pay when setting their starting salary.⁷

With President Biden’s full-throated commitment to ending “racial and gender pay gaps” in his June 25, 2021 Executive Order 14035 on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce (EO 14035), moving significantly closer to pay equity has never been so possible.⁸ As you know, Section 12 of EO 14035 directs you to, in part, review and revise compensation practices, and consider banning agencies from “seeking or relying on an applicant’s salary history during the hiring process” when setting federal pay. DOJ GEN asks that you consider the following recommendations, which are based on our years of member surveys and advocacy, as you implement Section 12 of EO 14035:

⁵ See, e.g., Harvard Business Review Analytic Services, *Navigating the Growing Pay Equity Movement: What Employers Need to Know About What to Do* (2019), available at: <https://resources.trusaic.com/pay-equity-downloads/harvard-business-review-trusaic-pulse-survey>.

⁶ In JMD’s response to the affinity group letter, it stated that the law and OPM regulations justify its use of prior salary history to set an individual’s pay. DOJ GEN and other affinity groups sent a second letter to JMD explaining what we believe to be the discriminatory impact of DOJ’s salary-setting policies. The affinity groups’ September 21, 2020 follow-up to JMD is available at: <https://static1.squarespace.com/static/5a7097c0d55b41a81fbfaec/t/5fff401d6a08386769e264e8/1610563613513/DQJ+GEN+salary+history+follow-up+to+JMD.pdf>.

⁷ Attachments B and C of the August 2020 affinity group letter (*supra* note 2) contain examples of job postings requiring or soliciting pay history, such as a 2020 Environmental and Natural Resources Division job posting stating that “[c]urrent salary and years of experience will determine the appropriate salary level.” As of the date of this letter, numerous postings on USAJobs from several agencies solicit or require salary history. For example, a Justice Department advertisement states that current salary will be used to, in part, determine the new hire’s pay at DOJ. Available at: <https://www.usajobs.gov/GetJob/PrintPreview/605150700>. Similarly, the Department of the Interior states in a summary that “Pay is set based on consideration of the selectee’s current salary and other factors,” and lists prior salary as a required element of a candidate’s resume. Available at: <https://www.usajobs.gov/GetJob/PrintPreview/608540200>. Further, a Federal Aviation Administration posting directs applicants to “**Please also ensure EACH work history includes ALL of the following information: Job title [...] & Salary**” (emphasis in original). Available at: <https://www.usajobs.gov/GetJob/PrintPreview/608985000>.

⁸ President Biden has made other statements condemning an employer’s use of salary history to set pay. In an April 15, 2021 statement applauding the House of Representatives’ passage of the Paycheck Fairness Act, President Biden noted that one of the ways the bill addressed wage inequality for women and people of color is that “[i]t bans the use of salary history in hiring and setting wages—a practice that only perpetuates disparities.” Available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/15/statement-from-president-joe-biden-on-house-passage-of-the-paycheck-fairness-act/>.

- 1. Promulgate a regulation prohibiting agencies' consideration of an individual's salary history when hiring or setting pay.** Currently, 5 C.F.R. §§ 531.212(a)(1–5)⁹ and (c)(2)¹⁰ permit agencies to use a new hire's previous salary when setting federal employee pay. Because women and people of color are more likely than their male, white counterparts to be victims of wage inequality, the government's use of prior salary frustrates a central principle of EO 14035, the explicit purpose of the Equal Pay Act of 1963, and a tenet of Title VII of Civil Rights Act of 1964—to combat pay disparities resulting from sex or race discrimination.¹¹

As the Ninth Circuit correctly explained, “setting wages based on prior pay risks perpetuating the history of sex-based wage discrimination.”¹² Similarly, in upholding Philadelphia's pay history ban, the Third Circuit stated that because the past salary of women and people of color “is more indicative of compounded discrimination than an accurate assessment of the individual's value to their prior employer,” using it to set pay “only perpetuates wage disparity.”¹³ The federal government should be a model employer and follow the 20 states/territories and 21 municipalities that enacted laws to ban the request for, and in some cases the consideration of, salary history.¹⁴ Data has shown that these bans succeed in narrowing the gender pay gap.¹⁵

DOJ GEN recognizes that Section 12(a)(ii) of EO 14035 permits—but does not require—agencies to consider an individual's salary history if it “is raised without prompting by the applicant or employee.” However, we fear that this exception would swallow the rule. For example, if a highly paid attorney at a large law firm seeks to negotiate a salary increase, he can evade the purpose of a salary history ban by simply volunteering the information. To truly break the cycle of wage discrimination and close the pay gap, the government cannot reward or penalize people for their pay in prior jobs, regardless of whether an agency solicits it or the applicant provides it without prompting.

⁹ These paragraphs require an agency, when setting the pay of a new hire who is coming from another federal position, to use that federal employee's previous pay unless several uncommon exceptions apply or the employee leaves the government for at least 90 days. Thus, even in the face of an employee's extraordinary qualifications, so long as the individual is within the GS range of the new job (even if it is as the lowest level), the regulations do not permit the hiring agency to increase the individual's salary.

¹⁰ This paragraph permits the use of prior salary when setting the pay of an individual entering federal sector employment from outside the federal government.

¹¹ See *Maxwell v. City of Tucson*, 803 F.2d 444, 447 (9th Cir. 1986) (holding that a municipal employer could not defend against an Equal Pay Act claim simply because the city's pay scheme “operates in compliance with civil service laws.”).

¹² *Rizo v. Yovino*, 950 F.3d 1217, 1228 (9th Cir. 2020).

¹³ *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, 949 F.3d 116, 131–32 (3d Cir. 2020).

¹⁴ A compilation of the laws, many of which ban not only employers' inquiries into salary history but the consideration of it during the hiring and pay-setting process, is available at: <https://www.hrdive.com/news/salary-history-ban-states-list/516662/>.

¹⁵ A study found that when employers were banned under California law from seeking or relying on a new hire's prior salary, the result was that the overall gender wage gap narrowed. Benjamin Hansen and Drew McNichols, *Information and the Persistence of the Gender Wage Gap: Early Evidence from California's Salary History Ban* (April 2020), National Bureau of Economic Research, available at: <https://www.nber.org/papers/w27054>.

2. **Encourage agencies to conduct pay audits and adjust salaries for victims of wage disparities.** DOJ GEN is aware of individuals who are currently fighting wage inequity through the Equal Employment Opportunity process, and we also know of others who are not because they lack the time or resources to challenge it, or they reasonably fear retaliation. To eliminate ongoing race- and gender-based wage disparities that the Administration acknowledges are unjust, OPM should encourage all agencies to give their employees the option of requesting an audit of how their salary compares to their peers'. OPM should also encourage agencies to conduct a global pay review so they can become aware of any inequities, and adjust upwards the salaries of those who have been victims of unlawful wage disparities.

3. **Provide guidance for agencies and employees regarding pay equity issues.** OPM does not need to wait until it promulgates a regulation to advance pay equity; it can immediately provide federal agencies and employees with guidance on a range of related issues. For example, OPM can help agencies eliminate the use of prior salary when setting pay, and advise against using prior salary history to defend pay inequity claims.¹⁶ OPM can also issue best practices that agencies can use to conduct pay audits or that employees can review when deciding whether to request an audit. These steps will help the government move closer to the goals outlined in EO 14035.

DOJ GEN would welcome the opportunity to discuss with you. Thank you for your consideration.

Respectfully,

Stacey Young, DOJ GEN President
Liza Zamd, DOJ GEN Board Member

On behalf of DOJ GEN's Board of Directors

¹⁶ The Ninth Circuit found that because “prior pay may carry with it the effects of sex-based pay discrimination, and because sex-based pay discrimination was the precise target” of the Equal Pay Act, “an employer may not rely on prior pay to meet its burden of showing that sex played no part in its pay decision” in challenges to pay inequities under that law. *Rizo*, 950 F.3d at 1229.