

MOTIVATION,
INC.

P.O. BOX 486
Dallas, GA 30132

keiths@motivation-inc.com

678.794.3066

www.motivation-inc.com



To: Our Valued Clients and Colleagues

From: J. Keith Swiney, President/CEO

Date: February 28, 2021

Re: **Section 3 New Rule Substantial Salary Ban/Restrictions Conflicts Urgent Issue!**

In October of 2020, I released a national blast that there seemed to be a conflict with the New Section 3 Final Rule and the existing state and local laws banning or restricting the asking about an applicants prior salary history.

Because the Final Rule uses the individuals income to determine if they are Section 3, the mere asking about income in any way would/could constitute a violation of law in roughly 39 states or cities around the country as of today. That list may actually be longer and the law has not been published.

After discussing the matter with HUD, they seem to think that reserving the question about salary history for after the person is hired would be an acceptable work-around. My advice is that for those of you in any of the states or cities listed at the end of this communication, you should defer to your legal advisors for their interpretation of the governing laws and if you can ask the question at all.

The Final Rule states clearly that Section 3 be "Consistent with federal, state, and local laws and regulations". Therefore, if you are not a PHA, or contractor for a PHA hiring your own public housing and Section 8 residents, you would not be able to ask about prior salary as a method of determining if an applicant is Section 3.

If you are a Community Development recipient, your contractors would not be able to ask about an applicants prior income at all in those locations which prohibit it. Thus, meeting the Benchmarks will be challenging.

These laws are all over the board as to the level of restrictions and penalties, so no one approach may be right for all recipients and their contractors, sub-contractors, and sub-recipients. There are two states that passed laws banning salary ban laws but I didn't add them here.

I sent the email below to HUD last week and hope to receive an official response soon. I know HUD is working on some of my other concerns around the old rule and SPEARS not being a required reporting tool right now, so I hope they will include this in the FAQ.

Good Afternoon HUD Section 3 Team,

Amanda and I discussed this very serious conflict issue right after the final rule's release, although there has not been a final determination from HUD as to exactly how to proceed. So I am pleading for a solution so we can comply as required.

Many states, and local governments have various forms of laws all prohibiting either the asking for, or using the salary history in a negative or punitive manner. In short, here is what the final rule reads in both Sections 75.9 and 75.19 that causes the concern:

Requirements - (a) Employment and Training.

(1) Consistent with existing Federal, state, and local laws and regulations, PHAs or other recipients receiving public housing financial assistance, and their contractors and subcontractors, must make their best efforts to provide employment and training opportunities generated by the public housing financial assistance to Section 3 workers.

Here is the stated definition of a Section 3 Worker:

Section 3 worker means:

Any worker who currently fits or when hired within the past five years fit at least one of the following categories, as documented:

(i) The worker's income for the previous or annualized calendar year is below the income limit established by HUD.

Under the Record Keeping Section at 75.31

(b) Recipients must maintain documentation, or ensure that a subrecipient, contractor, or subcontractor that employs the worker maintains documentation, to ensure that workers meet the definition of a Section 3 worker or Targeted Section 3 worker, at the time of hire or the first reporting period, as follows:

(1) For a worker to qualify as a Section 3 worker, one of the following must be maintained:

(i) A worker's self-certification that their income is below the income limit from the prior calendar year;

So when such conflict exists and the Recipient or Contractor can not legally ask or use the applicant/ worker prior salary history, what does HUD want to happen?

In the case where the recipient or contractor fears even asking the person after they have been hired to voluntarily complete a form asking for that prior salary history for the purposes of aligning the hire with Section 3 categories and benchmarks, what does HUD want to happen? Where the persons current annualized salary would make them non-Section 3 the advantage is to use the prior salary where possible as it provides the best pathway to meeting the Benchmarks. See our current Section 3 Individual Low Income Person Self-Certification Form attached.

Please note that we live in a very litigious society and if an employee faces any post-hire disciplinary action, they may use the Section 3 form as a means or method of the employers intent to discriminate against them. Unfortunately, I can see this happening constantly.

Right now, without any specific guidance (even during this transition period) from HUD, it looks like those recipients/contractors of the recipients in locations where these laws are in conflict with the core of the new final rule, that they would be unable to logistically and legally comply. Therefore, we would write in the agency Section 3 documents that due to the conflict with 79.9/75.19 that recipient is not able to comply in any way with the final rule and thus Section 3 adherence is impossible.

Would you all please provide me some direction or legal option on this very urgent matter? I know some of our clients have also addressed this issue with their respective HUD regional or field offices and have not received any guidance at all or a deference to DC for guidance. The rule makes clear that we are to use this transition period to develop processes and procedures along with any new Section 3 Policy to comply with the new rule, so the time for clarity on this issue is now.

Time is of the essence. Feel free to call to discuss further. My cell is 678.794.3066.

Thank you

*End of Email
(Form not attached here)*

24CFR Part 135 Old Dead Rule

For those of you in any of the affected locals, I strongly suggest you cease using any of your old rule Section 3 Resident Self-Certification forms. The old rule was based around the total household

income and household size, however, you wouldn't know who is in a single-person household when you first hand them the form. Again, there could be serious risk if you violate the law, so be certain to discuss that with your attorney as well if you are one of the agencies still managing contracts based on the old rule. As a precaution to not running afoul of these laws, I strongly encourage you all to throw away every Section 3 document related to old rule compliance. Mistakes under these rules have penalties as high as \$10,000 per violation.

Section 3 is a very important tool to helping low income persons achieve economically. These laws were clearly not considered in the Final Rule, so rather than just shut down completely on complying with the new Rule, you should be thinking of how you can still target your opportunities to known low- and very low-income persons such as those in public or other means tested affordable housing where people have to be at or below the 80% AMI. Be careful of assuming all Tax Credit residents or residents in RAD mixed Income properties are all low income. That is not always the case. Lastly, if you feel 100% confident in using the Qualified Census Tract (QCT) data for recruiting individuals, do so. Again, that is a high-risk assumption, so make it with much care and legal considerations.

The states and territories that have enacted salary history bans include:

- 1. Alabama*
- 2. California*
- 3. Colorado*
- 4. Connecticut*
- 5. Delaware*
- 6. District of Columbia*
- 7. Georgia*
- 8. Hawaii*
- 9. Illinois*
- 10. Kentucky*
- 11. Louisiana*
- 12. Maine*
- 13. Maryland*
- 14. Massachusetts*
- 15. Michigan*
- 16. Mississippi*
- 17. Missouri*
- 18. New Jersey*
- 19. New York*
- 20. North Carolina*
- 21. Ohio, Oregon*

- 22. Pennsylvania
- 23. Puerto Rico
- 24. South Carolina
- 25. Utah
- 26. Vermont
- 27. Washington

Source: paycore.com (2.28.21)

State	Municipality	Employers Affected	Law
Alabama		All	Employers can't decline hiring, interviewing, promoting or employing an applicant if they refuse to provide their pay history.
California		All	Employers can't ask for an applicant's pay history. If they already have the information or the applicant volunteers it, that information can't be used to determine pay. Employers are also required to provide pay scale information if an applicant asks.
California	San Francisco	All (incl. contractors and subcontractors)	Employers can't ask for or use an applicant's compensation when setting pay. Employers also can't disclose a current or former employee's salary without their consent.
Colorado		All	Employers can't ask for an applicant's pay history. They also can't use pay history to set salaries. They can't discriminate or retaliate against a candidate who doesn't disclose their pay history.
Connecticut		All	Employers can't ask for an applicant's pay history, unless the applicant voluntarily disclosed the information.
Delaware		All	Employers can't screen applicants based on past salary and they can't ask about salary history. They can verify salary after extending an offer.

District of Columbia		Government agencies	Government agencies can't ask applicants for their salary history unless it's brought up by the candidate after an employment offer is extended.
Georgia	Atlanta	City agencies	The city can no longer ask for pay history on its applications, in interviews or employment screenings.
Hawaii		All (incl. employment agencies)	Employers can't ask about salary history. They also can't use that information unless the applicant volunteers it. The law doesn't apply to internal applicants.
Illinois		State agencies	The state can't ask applicants about salary history.
Illinois		All	Employers can't ask about salary history including benefits or other compensation but they can discuss the applicant's pay expectations.
Illinois	Chicago	City departments	City departments can't ask for salary history.
Kentucky	Louisville	Louisville/Jefferson County Metro Government offices and agencies	City offices can't ask for an applicant's salary history.
Louisiana	New Orleans	City departments	City offices can't ask for an applicant's salary history. Applicants can provide pay history to negotiate a higher salary after an offer is made.
Maine		All	Employers can't ask for an applicant's pay history until a job has been offered.
Maryland		All	Employers can provide an applicant with a wage range for the position and can confirm voluntarily provided salary history once an offer of employment is made. Employers cannot retaliate against an applicant that does not voluntarily provide salary history.

Maryland	Montgomery County		The county can't use salary history to decide whether to hire an applicant. They also can't retaliate against or decline to hire a person who refuses to share their salary history. The county can use salary history to offer a higher salary than initially offered as long as this doesn't result in unequal pay for equal work and the information was voluntarily disclosed.
Massachusetts		All	Employers can't ask for salary history. They can confirm history if the applicant volunteers or if they've extended an offer.
Michigan		Private employers	Michigan has banned salary history bans.
Michigan		State departments	State offices can't ask an applicant about their salary history until a conditional employment offer is made. They also can't ask current or prior employers or search public records to get that information. If salary is already known, it can't be used to make a hiring decision..
Mississippi	Jackson	City offices	City offices can't ask for salary history.
Missouri		All	Employers can't ask for or use salary history when offering employment or determining salary, benefits or other compensation. They can discuss the applicant's pay expectations. Prohibitions don't apply to information disclosed by the applicant.
Missouri	Kansas City	City offices	City offices can't ask for pay history until the person has been hired.
New Jersey		All	Employers may not screen applicants based on salary history nor require specific salary history to satisfy a minimum or maximum criteria. Employers may confirm pay history after an offer of employment.
New York		All state agencies and departments (except Port Authority)	State offices can't request salary history until after an employment offer is made. If previous compensation is already known, it can't be used to determine an applicant's salary.

New York		Private employers	Employers can't ask for salary history. An employer can confirm salary if the applicant gives a pay history to support a higher salary when a job is offered.
New York	New York City	All	Employers can't ask about previous pay or benefits. If they already have that information, they're can't use it to set pay.
New York	Albany County	All	Employers can't request past compensation information until after a job offer is made.
New York	Suffolk County	All	Employers can't request past compensation information. They can't search public records or use known salary information to set pay.
New York	Westchester County	All	Employers can't request past compensation information. They can confirm past pay and use that information in setting pay in certain circumstances.
North Carolina		State agencies	State agencies can't request salary history and can't use previously obtained salary information to set pay.
Ohio	Cincinnati	State and local governments are excluded, with the exception of Cincinnati	Employers can't ask for salary history or use known salaries. They're also required to provide a pay scale for a position if the applicant has received an employment offer.
Ohio	Toledo	Employers with 15 or more employees located in the city	Employers can't ask for pay history. They also can't require an applicant's compensation to satisfy minimum or maximum criteria. They can discuss an applicants' pay expectations.
Oregon		All	Employers can't ask about pay history until an employment offer has been made. They're also prohibited from using previous salary information to set pay, except for existing employees moving to a new role.

Pennsylvania		State agencies	State agencies can't ask about current compensation or compensation history. Additionally all job postings have to clearly disclose a position's pay scale and range.
Pennsylvania	Pittsburgh	City offices and agencies	City employers can't ask about prior pay. If they discover the information, they're prohibited from using it unless the applicant has volunteered it.
Pennsylvania	Philadelphia	City offices and agencies	City employers cannot inquire about an applicant's wage history or retaliate against an applicant for failing to provide wage history. City employers also cannot rely on wage history in determining wages for an employee unless applicant willingly disclosed wage history.
Puerto Rico		All	Employers can't request pay histories, but voluntary salary disclosures made after a job offer has been extended are allowed.
South Carolina	Columbia	City agencies	The city can't use pay history unless the applicant voluntarily provides the information.
South Carolina	Richland County	County offices	Richland County has deleted the salary history question from its applications, interviews and employment screenings.
Utah	Salt Lake City	City offices	City offices can't ask an applicant about their salary history. If the applicant voluntarily provides the information, it can't be used to determine current salary.
Vermont		All	Employers can't request pay histories. If the information is volunteered, they can only confirm after making a job offer.
Virginia		All	Salary history has been removed from state applications.

Washington		State agencies	<p>Employers can't ask for pay history. They can confirm voluntarily disclosed information before or after an offer has been extended.</p> <p>Businesses with 15 or more employees must provide the minimum salary for the position upon applicant request and after an offer has been extended.</p>
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