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## RE: Comment from Legal Momentum, The Women's Legal Defense and Education Fund, on Advancing Pay Equity in Governmentwide Pay Systems, RIN 3206-AO39.

Thank you for the opportunity to comment on the Office of Personnel Management's (OPM) proposed rule on advancing pay equity in governmentwide pay systems. Founded in 1970, Legal Momentum, The Women's Legal Defense and Education Fund, is the nation's first and longest-serving civil rights organization dedicated to advancing women's rights and gender equality. For over fifty years, we have led pioneering initiatives to challenge gender discrimination in the workplace and advance pay equity.

We applaud OPM and the federal government for their efforts to address pay equity, including by analyzing gender and racial pay gaps and increasing efforts to advance pay transparency and salary-setting practices within the federal government. The reliance on salary history in setting pay is not gender-neutral or race-neutral. It embeds and perpetuates existing disparities for women and people of color, who have long been paid less based on discrimination. Prohibiting the use of salary history in setting a candidate's pay therefore furthers state and national efforts to promote pay equity, particularly for historically marginalized populations like women and people of color. The proposed rule offers an important opportunity for the federal government to lead efforts to eliminate discriminatory pay practices and to provide a model for advancing equal pay as well as diversity, equity, inclusion, and accessibility in the workplace.

Overall, we express support for proposed rule prohibiting the use of salary history in setting pay (RIN 3206-AO39), as it promotes pay equity. Meanwhile, we would discourage OPM from relying on voluntary disclosure of salary as well as other factors which similarly undermine objective gender-neutral salary-setting. Additionally, we support measures in the proposed rule that increase transparency and documentation of agencies' pay setting authority above the minimum rate, which are key to eliminating bias. We also suggest ways for OPM and the federal government to strengthen efforts to address occupational segregation and advance pay equity by increasing the value of work performed by women and people of color.

### The positive impact of salary history bans on pay equity

*The use of salary history in setting pay is known to perpetuate pay inequities and discrimination.*

OPM rightly acknowledges that using salary history for pay setting can perpetuate pay inequities.<sup>1</sup> Additional evidence emphasizes the importance of ending this practice to advance pay equity. Gender and racial pay gaps exist in the federal government but are

<sup>1</sup> Advancing Pay Equity in Governmentwide Pay Systems, 88 Fed. Reg. 30251, 30257 (proposed May 11, 2023) (to be codified 5 C.F.R. pts. 531, 532, 534, and 930).

generally smaller than those in the private sector.<sup>2</sup> Women in the executive branch earn six percent less than men.<sup>3</sup> Pay gaps are even larger among racial and ethnic minorities. Black men and women earn over 15 percent less than white men.<sup>4</sup> Among American Indian and Alaskan Native race/ethnicity group, men earn 18 percent less and women over 27 percent less than white men.<sup>5</sup>

Research confirms that a number of core factors contribute to the pay gap. Occupational segregation drives persistent gender and racial pay gaps.<sup>6</sup> OPM recognizes that occupational segregation continues to be a strong driver within the federal government, where women are concentrated in lower paying positions.<sup>7</sup> Gender and racial discrimination, including the influence of unconscious bias, continue to result in significant pay disparities. A 2012 experiment presented scientists with identical resumes that differed only in a male or female name for the applicant, and the male applicant received a higher salary offer by nearly \$4,000.<sup>8</sup> The lack of pay transparency coupled with antiquated practices like use of prior salary, embed this discrimination and make it difficult to uncover and address. The disproportionate burden of unpaid care responsibilities results in number of financial penalties for women and is a leading contributor to the wage gap. Women are more likely to reduce hours or leave the workforce due to care responsibilities, accounting for roughly 10 percent of the gender pay gap.<sup>9</sup> The coronavirus pandemic exacerbated care-related wage penalties,<sup>10</sup> and revealed the vicious cycle of pay inequity with women more likely to be earning less and thus more likely to be the ones to leave the workforce to take on added childcare. Within the federal government, another contributing factor is pay setting practices that affected an employee's step position.<sup>11</sup> This underscores the importance of the proposed rule, since salary history is part of current pay setting practices and contributes to pay inequities.

The reliance on a candidate's prior salary therefore incorporates all these problematic factors and dynamics rather than providing an objective measure of candidate's quality or skill. Therefore, employers should not use this information when hiring. The Equal Employment Opportunity Commission affirms this position, stating that "prior salaries of job candidates can reflect sex-based compensation discrimination" and thus salary history alone is not a legal justification for gendered pay disparities.<sup>12</sup> Several courts have also agreed with this position.<sup>13</sup>

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<sup>2</sup> *Id.* at 30251.

<sup>3</sup> *Id.* at 30253.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Marina Zhavoronkova, Rose Khattar, & Matthew Brady, *Occupational Segregation in America*, Ctr. for American Progress (Mar. 29, 2022),

<https://www.americanprogress.org/article/occupational-segregation-in-america/>.

<sup>7</sup> Advancing Pay Equity in Governmentwide Pay Systems, 88 Fed. Reg. 30251, 30253 (proposed May 11, 2023) (to be codified 5 C.F.R. pts. 531, 532, 534, and 930).

<sup>8</sup> Corinne A. Moss-Racusin et al., *Science Faculty's Subtle Gender Biases Favor Male Students*, 109 PROC. OF THE NAT'L ACAD. OF SCIS. OF THE U.S. 16474 (2012).

<sup>9</sup> Sarah Jane Glynn, *The Gender Wage Gap Double Whammy*, Ctr. for American Progress (Apr. 16, 2012),

<https://www.americanprogress.org/article/the-gender-wage-gap-double-whammy/>.

<sup>10</sup> Felipe A. Dias, Joseph Chance & Arianna Buchanan, *The Motherhood Penalty and the Fatherhood Premium in Employment During Covid-19: Evidence from the United States*, 69 RSCH. IN SOC. STRATIFICATION & MOBILITY 100542 (2020).

<sup>11</sup> *Id.*

<sup>12</sup> U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC-CVG-2001-3, SECTION 10 COMPENSATION DISCRIMINATION (2000).

<sup>13</sup> See, e.g., *Cole v. N. Am. Breweries*, No. 1:13-CV-236, 2015 WL 248026, at \*10 (S.D. Ohio Jan. 20, 2015) (citing *Irby v. Bittick*, 44 F.3d 949, 955 (11th Cir. 1995)); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988); *Faust v. Hilton Hotels Corp.*, CIV. A. No. 88-2640, 1990 WL 120615, at \*5 (E.D. La. Aug. 13, 1990); *Angove v. Williams-Sonoma Inc.*, 70 F. App'x 500, 508 (10th Cir. 2003) (citing *Irby*, 44 F.3d at 955); *Rizo v. Yovino*, 950 F.3d 1217, 1128 (9th Cir. 2020).

Since women and people of color generally have lower wages, the use of salary history can perpetuate discrimination and wage inequality. The practice preserves the status quo of women and people of color earning less, especially when they are already less successful when negotiating their salary.<sup>14</sup> One study of employers who conducted pay equity audits found that salary history was a key driver of gender wage gaps in their companies.<sup>15</sup> The use of salary history has long-lasting ramifications, shaping not only initial salary but also subsequent raises, bonuses, promotions, retirement savings, and any decision tied to a starting salary. Therefore, we support OPM's proposed rule to end the practice of using salary history in setting pay within the federal government.

*Prohibiting the use of salary history in determining pay advances pay equity.*

In recognition of the impact on pay equity, 21 states and 22 localities have already enacted laws prohibiting employers' use of salary history in setting pay.<sup>16</sup> Early evidence indicates that these salary history bans have helped narrow pay gaps.<sup>17</sup> For example, a study of California's salary history ban found that pay gaps narrowed, and the greatest effect were for women over 35 and women with children over 5, with wages increasing by two percent and nearly six percent respectively.<sup>18</sup> Another study found that these state salary history bans led to four percent higher wages on average for workers who changed jobs, with even greater increases for women (6.4%) and minorities (7.7%).<sup>19</sup>

Salary history bans can also improve hiring processes by attracting and hiring more diverse and qualified candidates. Many private sector employers have already stopped using salary history in recognition that it is neither necessary nor beneficial for business practices.<sup>20</sup> The use of salary history may even drive away top candidates.<sup>21</sup> When prohibited from using salary history, employers collect more information, and better information, to gauge a candidate's skill.<sup>22</sup> The proposed rule incentivizes agencies to use objective, job-related measures to assess a candidate's special skills or the agencies' superior needs for setting pay above the minimum rate. By eliminating reliance on prior salary, OPM creates incentives for agencies to focus their decision-making in objective criteria like skill and

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<sup>14</sup> See Hannah Riley Bowles, Linda Babcock, & Lei Lai, *Social Incentives for Gender Differences in the Propensity to Initiate Negotiations: Sometimes It Does Hurt to Ask*, 103 ORGANIZATIONAL BEHAV. AND HUM. DECISION PROCESSES 84 (2007); Morela Hernandez, Derek R Avery, Sabrina D Volpone, & Cheryl R Kaiser, *Bargaining while Black: The Role of Race in Salary Negotiations*, 104 J. OF APPLIED PSYCH. 581 (2019).

<sup>15</sup> *Navigating the Growing Pay Equity Movement: What Employers Need to Know About What to Do*, HARV. BUS. REV. ANALYTIC SERVS. (2019), <https://resources.trusaic.com/pay-equity-downloads/harvard-business-review-trusaic-pulse-survey>.

<sup>16</sup> *Salary History Bans: A Running List of States and Localities that Have Outlawed Pay History Questions*, HR Dive (Apr. 20, 2023), <https://www.hrdiver.com/news/salary-history-ban-states-list/516662/>.

<sup>17</sup> James E. Bessen, Chen Meng, & Erich Denk, *Perpetuating Inequality: What Salary History Bans Reveal About Wages* (B.U. Sch. of L., Pub. L. and Legal Theory Paper 20-19, 2020); Benjamin Hansen & Drew McNichols, *Information and the Persistence of the Gender Wage Gap: Early Evidence from California's Salary History Ban* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27054, 2020); Sourav Sinha, *Salary History Ban: Gender Pay Gap and Spillover Effects* (Oct. 2, 2019) (unpublished manuscript) (available at <https://dx.doi.org/10.2139/ssrn.3458194>); Jason Sockin & Michael Sockin, *A Pay Scale of Their Own: Gender Differences in Variable Pay*, (Jan. 17, 2023) (unpublished manuscript) (available at <https://dx.doi.org/10.2139/ssrn.3512598>).

<sup>18</sup> Hansen & McNichols, *supra* note 17.

<sup>19</sup> Bessen et al., *supra* note 17.

<sup>20</sup> NAT'L WOMEN'S L. CTR., *ASKING FOR SALARY HISTORY PERPETUATES PAY DISCRIMINATION FROM JOB TO JOB* 4 (2022).

<sup>21</sup> Liz Ryan, *When Someone Demands Your Salary History, Give Your Salary Requirement Instead*, Forbes (Jan. 16, 2017, 6:38 AM), <https://www.forbes.com/sites/lizryan/2017/01/16/when-they-demand-your-salary-history-give-your-salary-requirement-instead/>.

<sup>22</sup> Moshe A. Barach & John J. Horton, *How Do Employers Use Compensation History?: Evidence From a Field Experiment* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26627, 2020).

experience and to eliminate factors that can serve as proxies for discrimination and bias or that result in schemes that are arbitrary and unfair.

Prohibiting use of voluntarily provided salary information is also necessary to advance pay equity. Men and high-wage earners are more likely to voluntarily provide salary history.<sup>23</sup> Moreover, women and people of color are also likely to ask for a lower salary expectation.<sup>24</sup> Therefore, using voluntarily provided information can perpetuate wage inequities. We have seen this first-hand when representing women in pay equity cases. In one of our more recent cases, our client was paid approximately \$20,000 less than her male colleague even though they held the same position, title, and level, and performed the same job responsibilities. The salary disparity was based on her male colleague's voluntary disclosure of his prior salary, which enabled him to secure a higher salary for the same role. We support the proposed rule in banning the use of voluntarily provided salary history, and we encourage OPM to explicitly prohibit the use of salary expectations.

*Alternative, permissible considerations for determining salary should not be based on factors that are similarly biased like salary history.*

The proposed rule allows an agency to consider the salary of a competing job offer.<sup>25</sup> Yet, a competing job offer may reflect pay inequities for the same reasons as salary history. Women and people of color likely have lower competing offers or may have none. Therefore, using this information to determine compensation could perpetuate inequality. Using a competing salary offer in combination with another factor specified 5 CFR 531.212(c)(2) and consideration of how pay was set for other employees, as the proposed rule suggests, helps to mitigate potential bias.<sup>26</sup> However, it still risks setting a salary that reflects systemic inequities rather than a candidate's skill. While it is understandable that agencies may want to consider competing offers to hire top talent, this could be reflected in evaluating the existing pay grades for all similarly qualified positions at a market-level rather than an individual candidate's competing offer. We encourage OPM to center its criteria around objective factors and recommend OPM consider this approach to ensure that this provision does not undermine OPM's stated goal of reducing pay inequities.

Similarly, consideration of labor market factors to set a higher than minimum wage rate can maintain pay inequities. The proposed rule keeps unchanged the existing provision in 5 CFR 531.212 that allows agencies to consider existing labor market conditions and employment trends, including availability of qualified candidates, success of recruiting efforts, and recent job turnover to determine a higher than minimum wage rate.<sup>27</sup> Workers who enter during a competitive labor market could earn a higher wage than workers who perform the same job but entered during a less competitive labor market. This is fundamentally at odds with the notion of equal pay. When the affected workers are women or people of color, this approach can exacerbate gender and racial pay inequities. This also encourages an unfair and arbitrary pay scheme that undermines employee trust. The proposed rule takes a step in the right direction to promote equity and fairness in pay by requiring agencies to consider how pay was set for other employees with similar qualifications who had been newly appointed to a similar position. Keeping this provision on labor market factors frustrates the goal of the proposed rule by permitting factors that can lead to unequal pay. When current pay systems are not commensurate to labor

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<sup>23</sup> Amanda Agan, Bo Cowgill & Laura Katherine Gee, *Do Workers Comply with Salary History Bans? A Survey on Voluntary Disclosure, Adverse Selection, and Unraveling*, 110 AM. ECON. ASS'N PAPERS & PROCEEDINGS 215 (2020).

<sup>24</sup> Hired, *The Weight of Expectations*, Hired (2020), <https://hired.com/wage-inequality-report/2020/#impact-expectation>.

<sup>25</sup> Advancing Pay Equity in Governmentwide Pay Systems, *supra* note 1 at 30255-56.

<sup>26</sup> *Id.* at 30255.

<sup>27</sup> 5 CFR § 531.212(c)(4)

conditions, we urge OPM to consider adjusting salaries for all workers within that position, rather than just for the new hire.

### **The impact of structured pay systems on pay equity**

*Greater transparency and documentation of pay setting outside of the minimum rate can promote pay equity.*

Structured pay systems can help address pay gaps.<sup>28</sup> They are also essential to attracting and retaining a talented and diverse workforce.<sup>29</sup> Once these systems are in place, it is important to conduct pay equity analyses to ensure these systems are not perpetuating pay gaps.<sup>30</sup> We commend OPM for undertaking this analysis already and encourage future analyses, especially in light of recent pay equity measures like state pay transparency laws and the proposed salary history ban.

We support OPM's proposal that agencies establish a clear, transparent policy based on objective factors for the use of the maximum payable rate rule under the General Schedule pay system, highest payable rate under the Prevailing Rate Systems pay system, and higher than minimum pay rate for Admirative Appeal Judges (AAJs) and Administrative Law Judges (ALJs).<sup>31</sup> OPM rightly notes that "[r]equiring agencies to have a policy regarding their use of this discretionary pay authority will provide transparency and support consistent use among employees."<sup>32</sup> These proposals would align these pay setting policies with the existing transparency under the superior qualifications and special needs pay-setting authority, which provides criteria for when an agency can set a candidate's pay above the minimum rate.<sup>33</sup> We advise OPM to ensure agencies develop these pay setting policies such that are equally as objective and transparent as the criteria outlined for superior qualification and special needs pay setting authority.

Likewise, documenting the justifications for higher than minimum pay is important to curb discrimination. As OPM noted, "documentation would allow an agency to evaluate for equity purposes how pay has been set and reconstruct the action if necessary."<sup>34</sup> Agencies are already required to document factors considered for higher pay under the superior qualifications and special needs pay-setting authority.<sup>35</sup> We support OPM's proposal to require agencies to document the superior qualifications of AAJs and ALJs when setting pay above the minimum rate. These schemes advance transparency and accountability, providing an avenue to identify and address problematic pay practices that drive inequity.

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<sup>28</sup> Emilio J. Castilla, *Accounting for the Gap: A Firm Study Manipulating Organizational Accountability and Transparency in Pay Decisions* 26 ORG. SCI. 311 (2015).

<sup>29</sup> Soc'y for Hum. Res. Mgmt., *Building a Market-Based Pay Structure from Scratch*, <https://www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/buildingamarket-basedpaystructurefromscratch.aspx> (last visited June 19, 2023).

<sup>30</sup> Google re:Work, *Guide: Structure and Check for Pay Equity*, <https://rework.withgoogle.com/guides/pay-equity/steps/structure-your-pay-process/> (last visited June 19, 2023).

<sup>31</sup> *Advancing Pay Equity in Governmentwide Pay Systems*, supra note 1 at 30255-56.

<sup>32</sup> *Id.* at 30255.

<sup>33</sup> 5 CFR § 531.212(b).

<sup>34</sup> *Advancing Pay Equity in Governmentwide Pay Systems*, supra note 1 at 30256.

<sup>35</sup> 5 CFR § 531.212(e)(2).

## Addressing occupational sex segregation in federal governmentwide pay systems

*Increasing valuation of work in female-dominated sectors should be priority.*

We are pleased that OPM acknowledges that occupational segregation is a driver of inequity within the federal government and seeks ways to address it. Occupational segregation continues to be one of the leading factors contributing to the wage gap for women of color due to the widespread and discriminatory devaluation of work performed by women and people of color.<sup>36</sup> Discrimination and bias has played a significant role in artificially depressing wages in female-dominated industries. Agencies need to acknowledge the comparable value of this work by revisiting their pay structures and conduct job evaluations to revalue positions with a view towards increasing salaries in female-and minority-dominated occupations.

Many existing pay systems have undervalued work in female-and minority-dominated occupations.<sup>37</sup> A 2022 review of the federal government's factor evaluation assessment found that it undervalued work associated with female-dominated occupations, which contributed to gender pay gaps.<sup>38</sup> Conducting job evaluations is therefore one strategy to identify and remedy pay inequities so that women and people of color receive equitable compensation for their labor. Job evaluation schemes assess jobs across occupations on a range of factors to establish fair and equitable pay and promotion.<sup>39</sup> These schemes make it more likely that pay and promotion are based on performance rather than bias.<sup>40</sup> We recommend that agencies review the factor evaluation assessment to identify and remedy gender and racial biases. We recommend drawing upon models like the one developed by the National Joint Council Scheme, which was purposely built to address gender bias by accounting for job demands that might be devalued in the labor market.<sup>41</sup>

More policies are also needed to transition women and people of color into higher-paying occupations. Equitable access to higher education, workforce development programs, and apprenticeship programs are one way to support women and people of color to enter higher-paying occupations.<sup>42</sup> Strengthening anti-harassment and anti-discrimination measures and enforcement can also encourage more women and people of color to enter and remain in these positions.<sup>43</sup> Finally, setting incentives, goals, and

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<sup>36</sup> Asaf Levanon, Paula England, & Paul Allison, *Occupational Feminization and Pay: Assessing Causal Dynamics Using 1950-2000 U.S. Census Data*, 88 SOC. FORCES 865 (2009).

<sup>37</sup> See DONALD TOMASKOVIC-DEVEY, GENDER AND RACIAL INEQUALITY AT WORK: THE SOURCES AND CONSEQUENCES OF JOB SEGREGATION (1993); R.J. STEINBERG ET AL., THE NEW YORK STATE PAY EQUITY STUDY: A RESEARCH REPORT (Ctr. for Women in Gov't 1986); James N. Baron & Andrew E. Newman, *Pay the Man: Effects of Demographic Composition on Prescribed Wage Rates in the California Civil Service*, in PAY EQUITY: EMPIRICAL INQUIRIES 107 (Robert T. Michael et al. eds., 1989); Paula England, *The Case for Comparable Work* 39 Q. REV. OF ECON. & FIN. 743 (1999).

<sup>38</sup> Rashmi Chordiya & Larry Hubbell, *Fostering Internal Pay Equity Through Gender Neutral Job Evaluations: A Case Study of the Federal Job Evaluation System*, 52 PUB. PERSONNEL MGMT. 25 (2022).

<sup>39</sup> WAGE EQUITY STUDY TEAM, WAGE EQUITY FOR NON-PROFIT HUMAN SERVICES WORKERS: A STUDY OF WORK AND PAY IN SEATTLE AND KING COUNTY (Univ. Wash. 2023) (available at [https://socialwork.uw.edu/sites/default/files/WageEquityStudy\\_Summary\\_0\\_0.pdf](https://socialwork.uw.edu/sites/default/files/WageEquityStudy_Summary_0_0.pdf)).

<sup>40</sup> See Iris Bohnet, Alexandra van Geen, & Max Bazerman, *When Performance Trumps Gender Bias: Joint Versus Separate Evaluation*, 62 MGMT. SCI. 1225 (2016).

<sup>41</sup> Wage Equity Study Team, *supra* note 39 at 23.

<sup>42</sup> Hande Inanc, *To Address the Gender Pay Gap, We Have to Address Occupational Gender Segregation*, *Mathematica* (Apr. 10, 2018), <https://www.mathematica.org/blogs/to-address-the-gender-pay-gap-we-have-to-address-occupational-gender-segregation>.

<sup>43</sup> Zhavoronkova et al., *supra* note 8.

requirements for employers to hire equitably increases women and minority representation in these occupations, which can also combat discrimination.<sup>44</sup>

## **Conclusion**

For the reasons outlined above, Legal Momentum enthusiastically supports OPM's efforts to advance pay equity within the federal government. We urge OPM to finalize the proposed rule with the suggested revisions on the use of voluntary disclosure, competing salary offers, and other proposed alternatives for setting pay so that the rule does not run counter to its goal of addressing pay inequity. We also encourage OPM and the federal government to continue advancing pay equity by considering ways to address occupational sex segregation and increase the value of women's work.

For any additional questions or guidance, please contact Seher Khawaja, Deputy Legal Director & Senior Attorney for Economic Empowerment, at [skhawaja@legalmomentum.org](mailto:skhawaja@legalmomentum.org).

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<sup>44</sup> *Id.* See also Will McGrew, *Gender Segregation at Work: "Separate but Equal" or "Inefficient and Unfair,"* Washington Ctr. for Equitable Growth (Aug. 18, 2016), <https://equitablegrowth.org/gender-segregation-at-work-separate-but-equal-or-inequitable-and-inefficient/>.