TO: Conference Ministers of the United Church of Christ

FROM: Office of General Counsel

DATE: April 7, 2017

RE: Laws on The Prohibition on Salary History Inquiry In Hiring

MEMORANDUM

I. Introduction

Recently, some state and local jurisdictions have adopted laws which prohibit prospective employers from inquiring about an applicant's salary history during the job interview process. These laws aim to make the hiring process and salaries paid fairer by not allowing an employer to base a salary decision on the salary history of an applicant. Lawmakers and other proponents of these prohibitions believe that, by eliminating the question of salary history in an interview, there is a greater likelihood that candidates for a position will be paid the market rate for a position, and any biases that may have been present in an applicant's salary history would not be perpetuated. Additionally, Washington, D.C. has passed a law that prohibits inquiry into a

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candidate's credit reporting history. It is likely we will also see this kind of law passed in additional jurisdictions. These laws vary from jurisdiction to jurisdiction in language, requirements, and covered employers. Presented in Section IV is a summary of laws that have been passed to date that cover private employers, which may include Conferences and Local Churches. Employers should review the laws carefully to ensure that they are in compliance.

This memorandum is not intended to comprehensively cover all employment situations. If you have questions about the law in your jurisdiction please consult with qualified counsel. ***These prohibition of inquiry into salary history laws are rapidly being enacted in many states and cities. Even if your jurisdiction is not represented in Section IV, a law may have been proposed or enacted since the circulation date of this memorandum.***

II. Application of Salary History Laws to Conferences and Local Churches in Hiring Clergy

Like recent Ban the Box laws that have been enacted in jurisdictions across the country, laws on the prohibition of inquiry into an applicant's salary history may apply to Conferences and Local Churches.[1] These laws typically do not include exemptions that are applicable to non-profits, religious organizations, or specifically to ministers. This legislation is new and the Office of General Counsel is not aware of any legal challenges to these laws.

Under the First Amendment, churches have the right to determine who their ministers are and the qualifications of those ministers.[2] Accordingly, Conferences and Local Churches who hire a minister to perform the functions of a minister can likely continue to inquire into a minister's salary history if such an inquiry is necessary in the hiring process. Religious and other nonprofit organizations, apart from Conferences and Local Churches, may need to comply with these laws prohibiting the inquiry into an applicant's salary history, even when hiring ordained clergy.

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1 *See* Office of General Counsel, Memorandum Re: Ban the Box Laws, July 11, 2016.

2 Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 132 S. Ct. 694, 699 (U.S. 2012).

III. Lay Employees

Conferences and Local Churches who are hiring lay employees should be aware of any prohibition from inquiring into an applicant's salary history in their state or local jurisdiction and follow the requirements of the law. For some Conferences and Local Churches that have these laws in their jurisdictions, there may be an exemption that would apply in their particular circumstance. The particulars of a potential exemption and whether it applies to a Conference or a Local Church could be very narrow and confusing. Examples of potential exemptions are often the total number of employees the Conference or Local Church has, state requirements for a particular position, the nature of the position, or based on the individual candidate. Conferences may seek further guidance from the Office of General Counsel if they have questions about how a law prohibiting applicant salary history inquiry applies in any particular situation.

IV. Jurisdictions with Prohibitions on Salary History Inquiry in Hiring for The Private Sector

A. Federal Government

Rep. Eleanor Holmes Norton introduced to the U.S. House of Representatives H.R.6030 on September 14, 2016, which proposed to update the Fair Labor Standards Act of 1938 to make it unlawful for employers to seek the previous wage or salary history of any prospective employee from any current or former employer of the employee. The Department of Labor would have responsibility for enforcement and would have the authority to assess fines up to $10,000, plus any of the plaintiff's attorneys' fees. The bill, as of the date of this memorandum, as not passed. The Office of General Counsel will continue to monitor this bill's progress.

B. States

- California – (A.B. 1676): This bill was signed by Governor Brown on September 30, 2016 and is effective as of January 1, 2017. The bill provides that salary history

cannot, by itself, justify a wage disparity in employees that do substantially the same work.

- Maryland – (H.B. 1003): This bill took effect on October 1, 2016, and provides that no employee should be required to disclose the employee's salary to an employer.
- Massachusetts – ("Equal Pay Act"): This act is effective July 1, 2018, and prohibits employers from seeking the wage or salary history of a prospective employee or a current or former employee or to require that a prospective employee's wage or salary history meet a certain criteria. If a candidate volunteers this information, the employer may verify it. Further, the prohibition on asking candidates only applies until the employer extends a conditional offer of employment that includes proposed compensation.
- Texas – (Proposed H.B. 290, has not yet passed): This bill proposes to make it unlawful for an employer to include a question about salary history on an employment application, inquire into or consider an applicant's wage history information, or to obtain an applicant's wage history from a previous employer. After a written offer of employment with compensation information, however, an employee may sign an authorization form from the employer for disclosure of this information. The proposed bill provides that aggrieved candidates may file a complaint with the Texas Workforce Commission.

C. Counties, Municipalities, and Federal Districts

- New York, NY – (Int. No. 1253): This bill was approved by New York City Council on April 5, 2017, and goes into effect 120 days after Mayor de Blasio signs it, which he is expected to do in the coming days. This law applies to public and private employers in New York City and prohibits the inquiry into an applicant's salary history "in writing or otherwise, or to conduct a search of publically available records

or reports." It also prohibits the employer relying on any salary data in setting the compensation of a prospective employee, unless the candidate willingly and without prompt volunteered the information. There is an exemption in the rule for any federal, state, or local law which authorizes the consideration of a candidate's prior salary.

- Philadelphia, PA – (Bill No. 160840): This bill makes it illegal for an employer to inquire about or require disclosure of a prospective employee's wage history; condition employment or consideration for an interview on disclosure of wage history; rely on wage history at any stage in the employment process to determine the wage of a new hire; and retaliate against a prospective employee for failing to comply with a wage history inquiry. There are exemptions for any federal, state, or local law which allows the disclosure of salary history.

V. Jurisdictions with Prohibitions on Credit History Inquiry in Hiring for The Private Sector

- Washington, D.C. – (D.C. Bill 21-0244, involving a candidate's credit history): On December 20, 2016, the Washington D.C. Council unanimously passed this bill, the "Fair Credit in Employment Amendment Act of 2016." This bill makes it a discretionary practice for employers to directly or indirectly require, request, suggest, or cause an employee (prospective or current) to submit credit information, or, use, accept, refer to, or inquire into an employee's credit information. There are certain exemptions to this requirement, primarily for District of Columbia employees. The bill could take effect as early as spring 2017, after the D.C. mayor signs it and after a 30 day waiting period.