Is there any harm in asking? Applicant pay privacy in German and American law

por Matthew W. Finkin

1. Introduction

Most American workers believe that employers should not ask applicants about their current wage. But, overwhelmingly, American law does not prohibit the question from being asked. German law does. This invites a comparison of how these two countries conceive of what is at stake.

2. German Law

German law accords a right to "informational self-determination" that gives the individual a meaningful degree of control over the information collected about her: whether it can be acquired; how acquired; for what purpose; and with what consequences. More than thirty years ago, the Federal Labor Court held that inquiry into an applicant's current pay could be asked only if it was relevant to the employee's qualifications for the job; the question may not be asked simply to establish a baseline to negotiate the applicant's wage[1]. Subsequent commentary and judicial opinion added a further caution: as the information could weaken the applicant's bargaining position, the question should only rarely be allowed[2]. The commentators agree that the question can be if as it would be indicative of the applicant's level of job qualification[3].

3. U.S. Law

A prospective American employer is free to inquire of an applicant into whatever it will, unless the question is prohibited. The sources of prohibition are found either in the common law of privacy or in a specific legislative prohibition. Either of these could confront the federal constitution's prohibition of the state's abridgment of freedom of expression.

---

[1] BAG urt. 19.5.1983, 2 AZR 171/81.

[2] Heinz Peter Moritz, *Fragerecht des Arbeitsgebers sowie Auskunfts-und/oder Offenbarungspflicht des Arbeitnehmers bei der Anbahnung von Arbeitsverhältsnissen?*, NZA 1987, 329, 333. A distinctly minority view would reverse the analysis: the question would ordinarily be lawful and only exceptionally unlawful. Joussen *in* BeckOk/ARBEITSRECHT § 611. But that view has been challenged. *E.g.* Maties *in* BeckOGK, § 611. I am indebted to Philipp Fischinger for bringing these to my attention.

[3] Ulrich Preis in ERFURTER KOMMENTAR ZUM ARBEITSRECHT § 511 (17th ed. 2017). Accord: Wisskirchen & Bissels, *Das Fragerecht des Arbeitgebers bei Einstellung unter Berücksichtigung des AGG*, 2007 NZA 169, 174; Richardi & Fischinger *in* Staudinger, BGB § 611 (2016).

3.1. Sources and Substance

3.1.1. Privacy in General

The gravamen of common law's conception of a "wrongful intrusion" into one's "seclusion," as it is termed, is that it must be "highly offensive to a reasonable person." Though the idea of offensiveness plays a role in extraordinarily intrusive employer questioning, whether a question can be asked in the employment setting has come to turn less on offensiveness than on relevance to the business purpose the question serves. Merely "innocuous" questions that are not offensive but serve no business interest are not considered privacy-invasive. Thus it has fallen to the legislatures to decide whether the scope of inquiry should be narrowed. This they have done, piecemeal.

3.1.2. Specific Legislative Restriction

Laws prohibiting employment discrimination set out characteristics that are out of bounds for consideration in hiring -race, sex, and the like. Inquiry of applicants that bear on these attributes are not expressly prohibited, but inasmuch as questions relating to them could evidence an unlawful act the very asking is prohibited in practice.

However, some laws insulating an attribute from consideration do couple it with an express prohibition on inquiry, as a prophylactic. If, for example, it a law forbids a refusal to hire an applicant for having filed a workers' compensation claim, the law has forbidden an employer to ask whether the applicant had ever filed a claim[4]. Alternatively, a state may shrink from prohibiting reliance on a suspect characteristic, but seek to discourage its consideration; for example, though long-term unemployment may not be a prohibited ground for a refusal to hire, the advertising of jobs stating that current employment was a qualification has been prohibited[5].

It is also possible for the law to require respect of an applicant's informational privacy per se. A recent spate of laws prohibit employers from requesting applicants to supply access to their password protected social media accounts[6]. These laws do not prohibit employers from making hiring decisions based on the contents of an applicant's social media; they require respect of the applicant's privacy by disallowing the securing of account information from the applicant.

Turning to pay privacy, it would not be a violation of the common law to ask an applicant what she is currently paid. But, four states and several cities, including Philadelphia, prohibit inquiry into an applicant's wage history[7]. These laws also variously allow, restrict, or prohibit the employer's use of that information in making offers of employment. The Philadelphia ordinance falls into the latter category. The ordinance is being challenged as an infringement of the employer's constitutional right to free speech, to which attention next turns.

3.2. Constitutional Restriction on the Restriction of Speech

A question is speech. The constitution forbids laws abridging freedom of expression. Whether the constitution nevertheless allows a prohibition on asking an applicant about her current wage opens on to an evolving -and bewildering- body of law in which judicial guidance on this specific issue is non-existent thus far. The paucity of constitutional guidance is due to the fact that only recently has business turned to the first amendment as a means of blunting regulation, which effort has been

---

[4] *E.g.* 820 ILCS 50/10(a) [Illinois].

[5] N.J. Dept. of Labor v. Crest Ultrasonics, 82 A.3d 258 (N.J. App. Div. 2014).

[6] These are compiled in Matthew Finkin, PRIVACY IN EMPLOYMENT LAW 437 (4th ed 2013).

[7] Cal. Lab. Code § 432.3; Del. Code Ann., tit. 19, Ch. 7, § 709B; Mass. Gen. L. ch. 149, § 105 A(c); Or. Rev. Stat. § 652.220(1); N.Y.C. Admin. Code § 8-107(25); Phil. Code. Ch. 9-1103.

encouraged by a sympathetic Supreme Court[8]. The suit in Philadelphia can be seen accordingly as a vehicle, using a novel municipal speech prohibition, one not yet deeply rooted historically nor as widespread and popular as the restriction on social media, to press or test the constitutional limit.
The prohibition of wage inquiry has been justified on the connection of wage history to sex discrimination: that existing gaps between male and female wages are perpetuated by reliance on female applicants' current wage; that women tend to negotiate on wages less often than men. Even if these assumptions can be proven to be well grounded, the constitutionality of the prohibition on asking about an applicant's current wage would depend on the intensity of judicial scrutiny the constitution requires, which is a complex area of evolving constitutional doctrine.

4. In Comparative Perspective

Now let us put the interview question in comparative perspective. German law flows from an axiomatic principle of respect for the individual's right freely to determine what personal information to disclose. When a claim of business need is made against it, a balance must be struck; but, the state's hand is on the balance in favor of the individual. In the United States, the common law of privacy flows from social norms that favor business against which legislative restriction for the better protection of individual privacy would hit a constitutional headwind of as yet undetermined intensity.
Consequently, when it comes to asking a job applicant what she is being paid the laws become mirror images. In Germany, the employer bears the burden to prove the *question* is necessary under a strict standard of relatedness to job qualification. In America, the state bears the burden to prove the *restriction* is necessary to further a public end, with more or less stringency depending on the level of judicial scrutiny.
Might that public end, as in Germany, be privacy alone? The prohibition on asking an applicant for her social media password, for example, rests solely on the protection of privacy. Were the legal insulation of applicant pay to fall to the employer's freedom to inquire, despite the law's having a connection to privacy in addition to its primary grounding in another public policy, it would remain to be seen whether laws prohibiting employers from requesting access to employee social media could survive constitutional challenge. As much would also be in prospect for other laws insulating from inquiry specific applicant information that employers seek out of business interest, but which the state may wish to deny as privacy invasive. In other words, in the battle in Philadelphia more maybe in play than pay.

Matthew W. Finkin
Prof. Dres h.c., University of Illinois (USA)

[8] *See* John Coates, *Corporate Speech and the First Amendment: History, Data, and Implications*, 30 Const. Comment 223 (2015).