

Client Alert

New York City Prohibits Salary History Inquiries

August 8, 2017 – Recently enacted New York City legislation prohibits employers and their agents from inquiring about the salary history of a prospective employee at any stage in the hiring process. The new law is set to take effect October 31, 2017.

The New York City Law

- **Generally:** The New York City legislation amends the New York City Human Rights Law (“NYCHRL”) by making it an “unlawful discriminatory practice” for any New York City employer, employment agency, employee or an agent thereof to pose salary history inquiries directly to job applicants, as well as applicants’ current or previous employers. Any independent searches conducted by employers or their agents, including, but not limited to, recruiting firms or staffing agencies (“employment agencies”), to obtain past salary information is also prohibited.
- **Exceptions:** While the law covers base salary, benefits, and other compensation, other objective measures of an applicant’s productivity such as revenue, sales, or production reports are excluded from the ban. Profit and loss statements and track records, to the extent they can be disclosed, would be excluded as well. Employers may also discuss salary, benefits, and other compensation expectations with applicants, along with any unvested equity or deferred compensation the potential employee might forfeit by leaving his or her current employment. The restrictions also do not extend to applicants’ internal transfers or promotions with their current employer, or to those public employees whose salaries are determined by collective bargaining agreements. Moreover, employers are permitted to consider an applicant’s salary history where it is *voluntarily* disclosed to them by the applicant.
- **Penalties:** Employers and their agents may be subjected to penalties of up to \$250,000 for willful, wanton, or malicious acts for violations of this law. Employers and their agents may be sued in court or through the filing of an administrative charge with the New York City Commission on Human Rights.

What New York City Employers Should Do to Avoid Liability

Employers should be vigilant in adapting their policies and practices to comply with the new law within New York City. Though this law has not yet taken effect, employers should be especially cognizant of the fact that they could also be held liable for the acts of their agents, including those employment agencies acting on their behalf. Proper policies include alerting hiring personnel and others vetting and interviewing applicants, including recruiters and headhunters working at employment agencies, to refrain from making any salary inquiries. Employers and employment agencies should also modify and update their employment applications (both in physical and digital form) to remove any requests for information on salary history. New internal processes for vetting candidates during recruitment should also be created, including a format that excludes salary history information when conducting background checks and eliminating such inquiries from any questionnaires that previously focused on an applicant's present or prior salary. Employers and employment agencies should be especially careful about questioning applicants about their salary history in New York where one party (the "applicant") is legally allowed to tape record the interview—with or without the knowledge or consent of the other party. Employers and their agents may also consider implementing a system to formally document instances where an applicant voluntarily discloses his or her previous salary history during the hiring process, so that a paper trail exists with respect to the legal manner in which this information was obtained.

Similar Legislative Efforts in Other Jurisdictions

Massachusetts became the first state or commonwealth to bar employers from inquiring about applicants' salary history when it passed the "Massachusetts Pay Equity Act" last year. The bipartisan legislation becomes effective on July 1, 2018.

Philadelphia's "Wage Equity Bill" became effective as of May 23, 2017. The law has been met with great resistance, however, as the Chamber of Commerce for Greater Philadelphia filed suit in federal court on April 6, 2017, challenging the law on First Amendment grounds. The complaint was dismissed in May with leave to re-plead to include the bases, if any, that the Chamber of Commerce or any of its members would be adversely affected by the legislation. The Chamber of Commerce filed an amended complaint on June 13, 2017, in which it highlighted 11 different businesses that would be adversely affected by the provision. An application for equitable relief to enjoin enforcement of the measure is currently pending.

Last year, California passed the "Fair Pay Act," which prohibits employers from relying on prior salary as the *sole* justification for wage differences. Although there is no restriction on inquiring about salary history under the "Fair Pay Act," San Francisco Mayor Ed Lee signed the "Parity in Pay" Ordinance last month, which bars employers from asking salary history questions to prospective employees within that city.

Most recently New Jersey advocates for barring salary history inquiries failed to pass two bills, S2536 and A3480, that would have amended the State's Law Against Discrimination ("NJLAD"). These measures (one which would have made it an "unlawful employment practice" to "screen a job applicant based on the applicant's wage or salary history," and another that

would have prohibited employers from seeking or releasing the salary history of current or former employees) both failed and neither has been enacted.

Based on the trend to implement these types of laws, however, employers and their agents must now be mindful of the impending new restrictions imposed on them to seek salary history from applicants. When in doubt, employers and their agents should seek appropriate legal advice.

If you require any additional information concerning salary history inquiries, or about any other employment-related issues, please contact:

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