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Client Alert

New York City Salary History Law Set to Take Effect; California Enacts Similar State-Wide Law

October 25, 2017 – The tide of salary history laws prohibiting inquiry into applicants' prior compensation and aimed at mitigating the gender pay gap is rising across the nation. While New York City employers and their agents will be officially prohibited from inquiring about the salary history of a prospective employee as of October 31, 2017, California recently enacted similar state-wide legislation. This alert first provides an update on the New York City salary history law and addresses the newly signed California law and similar legislative efforts in other jurisdictions.

The New York City Salary History Law

As we noted in our prior alert, the New York City salary history law makes 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 to applicants' current or previous employers.

The New York City Commission on Human Rights ("CCHR") also recently released guidance on the law in the form of frequently asked questions ("FAQs"). The FAQs seek to clarify several aspects of the law, including its scope of coverage, employers' rights under the law, the definition of compensation, and the law's application under particular circumstances. A summary of the most notable issues addressed by the FAQs is provided below.

"Compensation" Defined

Salary history includes any benefits or compensation received from an applicant's current employer, including, but not limited to a car allowance, a retirement plan, or bonuses.

Scope of Coverage

The law protects job applicants in New York City and is applicable to all public and private employers in New York City, regardless of size.[1] The law prohibits a hiring employer from

[1] Positions for which compensation is governed by the terms of a collective bargaining agreement are excluded from coverage under the law.

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inquiring about an applicant's salary history during a job interview that occurs in New York City. However, the law will not apply where an applicant merely resides in New York City, but is interviewed outside of New York City for a role outside of New York City. Notably, the FAQs do not address a scenario in which an employee works outside of New York City (*e.g.,* through a remote connection or otherwise) for a New York City-based employer.

Employers' Rights Under the Law

Employers are permitted to consider an applicant's salary history where it is voluntarily disclosed to its representative by the applicant "without prompting." Whether an applicant's voluntary disclosure of salary history is "without prompting" will depend on whether "the average job applicant would not think that the employer encouraged the disclosure based on the overall context and the employer's words or actions."

Prospective employers may, however, ask applicants about objective indicators of performance such as revenue, sales, production reports, profits generated, or books of business. Inquiring about the value and structure of any deferred compensation or unvested equity that an applicant will have to forfeit from their current employer is also permissible.

An employer's job application may request information about an applicant's compensation expectations or demands. This includes one that informs the applicant about the position's proposed or anticipated salary or salary range. However, a boilerplate application that requests salary history information and merely adds a disclaimer that individuals in New York City or applying for jobs located in New York City need not answer the question is violative of the law.

Miscellaneous Guidance

The law does not apply to applicants for internal transfer or promotion with their current employer. Whether an employer can consider the salary history of a temporary employee or a subcontractor that is offered permanent employment in the same or comparable position will be dependent upon the facts of each case. In certain situations outlined in the FAQs, the temporary employee or subcontractor will qualify as an applicant for a new position, while others will be classified as applicants for internal transfer or promotion. Where the employer is a joint employer of the temporary employee or subcontractor, the applicant will be considered one for internal transfer and promotion and the law will not apply.

The law contains no exemption for headhunters. Thus, headhunters qualify as employers, employment agencies, or agents of an employer, or those who aid and abet a violation of the law, are subject to liability under the law. Headhunters are advised to obtain written confirmation from a job applicant that the applicant consents to the disclosure of his or her salary history. Prospective employers should obtain a copy of the applicant's written consent from the headhunter before relying on the headhunter's representations about an applicant's salary history.

Not included in the law's prohibitions is a prospective employer's ability to ask an applicant about competing offers and counter offers that the applicant has received, as well as the value of those offers.

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In the context of corporate acquisitions, a potential buyer may obtain salary information about the employees of the target company, as those employees are not "job applicants" for the purposes of the salary history law. Acquiring companies may rely on salary history information when absorbing employees from the target company and making compensation and structural decisions on a non-individualized basis. However, the acquiring company is not permitted to rely on salary history information where continuing employment is not guaranteed and such acquiring company chooses to interview target company employees for roles with the acquiring company.

The California Salary History Law and Similar Legislative Efforts in Other Jurisdictions

While various other governmental entities around the country have attempted to enact or have enacted similar salary history legislation, California's new law with statewide applicability is likely the largest. On October 12, 2017, California Governor Jerry Brown signed into law a bill that will bar all California employers—including state and local governments—from inquiring about an applicant's salary history directly or through an intermediary. The new law also requires employers to provide applicants, upon reasonable request, with a pay scale for the prospective job.

The legislation comes on the heels of San Francisco enacting its own salary history ban this past summer. Just last year, California also passed the state "Fair Pay Act," prohibiting employers from relying on prior salary as the *sole* justification for wage differences. The new state-wide salary history law is set to take effect January 1, 2018.

California joins Massachusetts, Delaware and Oregon as the only states to have passed pay equity laws. Massachusetts's legislation becomes effective on July 1, 2018, while Delaware's is set to take effect in December 2017. Meanwhile, Oregon's ban on employers seeking salary history becomes effective this month, although civil actions against Oregon employers who seek salary history are not permitted until January 1, 2024.

Philadelphia's "Wage Equity Bill" took effect in May, but the law has been met with great resistance from local business groups. In April, the Chamber of Commerce for Greater Philadelphia filed suit in federal court, challenging the law on First Amendment grounds. Last month, a coalition of local women's groups filed an amicus brief in support of the city's opposition to the chamber's bid for a preliminary injunction that would bar the law from taking effect while the challenge is litigated.

Puerto Rico has also passed its own pay equity law. The "Puerto Rico Equal Pay Act" was signed into law on March 8, 2017 and became effective immediately. The law establishes a general prohibition on pay discrimination based on gender while also prohibiting salary history inquiries.

Other states considering pay equity legislation include New York, Idaho, Maryland, Rhode Island, Texas and Virginia. We will continue to update you on any new developments in this area.

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Best Practices

As we expressed in our prior alert, employers should be vigilant in adapting their policies and practices to comply with these new laws. This includes (i) focusing questions on applicants' salary expectations, skills and qualifications, (ii) ensuring job applications and other forms do not include questions about applicants' salary history, even if those questions are framed as voluntary, (iii) modifying any written policies and educating interviewers and hiring staff on prohibiting salary history inquiries, as well as any recruiters or staffing agencies the company uses in the hiring process, and (iv) modifying agreements with staffing agencies to properly protect the company against violations of these new laws.

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

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