

October 26, 2017

New York City Salary History Ban Takes Effect October 31

Effective October 31, 2017, all employers in New York City will be prohibited under the NYC Human Rights Law from inquiring about or relying upon an applicant's salary history during the hiring process. The new law applies to all employers, employment agencies, or employees or agents thereof, hiring in New York City, and expands Executive Order 21, signed into law by Mayor Bill De Blasio in November 2016, which prohibits the use of salary history for employment at city agencies. New York City joins a small, but growing, list of states and cities across the country that have enacted laws banning employers from considering an applicant's salary history during the hiring process. The stated aim of the law is to break the cycle of pay inequality in the workplace.

Scope and Meaning of the New Law

The new law makes it an unlawful discriminatory practice for employers to inquire about an applicant's prior compensation history either in person or on an application, or rely upon an applicant's current or prior salary history in determining the compensation for an applicant during the hiring process, including the negotiation of a contract. Compensation includes wages, benefits, bonuses, and commissions, but does not include objective measures of productivity, such as revenue or sales. Although an employer may not inquire about an applicant's salary history, the law encourages discussions with applicants about their salary and benefits expectations, and permits inquiry into deferred compensation or unvested equity which an applicant would need to forego to accept the new position. Employers are permitted to conduct public searches for information regarding an applicant to verify non-salary history information, but if the employer accidentally discovers compensation information in the course of such searches, the employer may not rely on such information in setting an employee's compensation. The law prohibits an employer from searching public records in an attempt to access salary history information, and from searching for information about salaries paid to individuals with the same position at their former employer. Notably, the law does not prohibit employers from verifying or considering salary history *if it is offered voluntarily and unprompted* by the applicant, in a manner in which an average job applicant would not believe the employer was encouraging the disclosure. Headhunters and search firms are expressly covered by the new law. The law does not apply to applicants for internal transfers or promotions with their current employer.

The NYC Commission on Human Rights (the "Commission") recently released a Frequently Asked Questions bulletin that provides guidance on the scope and meaning of the law.¹ In the bulletin, the Commission has specifically addressed how the new law applies to corporate acquisitions and due diligence disclosures. In the context of a merger or acquisition of a target company, employees are not

considered “job applicants,” and thus do not fall under the ambit of the new law. The Commission advises, however, that if any of the target company employees are asked to interview for positions with the acquiring company, then salary history information learned during due diligence may not be shared with the hiring managers or those making decisions about compensation.

The geographic reach of the law is still unclear, but according to the Commission’s bulletin, the new law may reach employers who are conducting interviews within New York City, regardless of where the job is based or whether the applicant is a resident of New York City. The Commission advises that the new law likely will not apply to an applicant that merely lives in New York City, if he or she is both interviewed and will work outside of the city.

The Commission is empowered to impose a civil penalty of up to \$125,000 for unintentional violations of the new salary history ban, and up to \$250,000 for willful, wanton, or malicious violations of the law. These civil penalties are in addition to the potential relief available under private lawsuits, including, but not limited to, back pay, front pay, compensatory damages, and attorneys’ and expert fees.²

What Employers Should Keep in Mind Going Forward

Employers should review their application and interview processes to ensure compliance with the new law. Questions about salary history should be eliminated from applications and personnel who may conduct job interviews should be trained on the meaning and scope of the new law. Employers should continue to ask applicants about their compensation expectations and demands, and focus on the objective indicators of an applicant’s work productivity in the current and past jobs, such as books of business, revenues, and sales. Because the salary history ban extends to compensation information that may be disclosed during a lawful background check, an employer should instruct its background reporting agency to exclude any information found regarding the applicant’s salary history. Additionally, if using a headhunter or dealing with an agent of the applicant, a prospective employer should obtain a copy of an applicant’s written consent from the headhunter or agent declaring that the applicant authorized the headhunter or agent to disclose any voluntarily obtained salary history information.

Salary history bans are a growing trend among cities and states and are not unique to New York City. While some of the particulars of the New York City law are idiosyncratic, the law is analogous to similar legislation that is already in effect in Puerto Rico, and set to take effect within the next fifteen months in Delaware, California, Massachusetts, Oregon, and San Francisco.³ Philadelphia also has a similar ordinance, which was set to take effect May 23, 2017, but has been held up in court by legal challenges brought by the Chamber of Commerce for Greater Philadelphia. California, which approved its own law on October 12, 2017, is the most recent jurisdiction to join the list of cities and states with salary history bans set to take effect.⁴ In addition to many of the same provisions as the New York law, California’s new law also mandates that an employer, upon a reasonable request from the applicant, provide an applicant

with a pay scale for the position sought. New York state,⁵ New Jersey, Pennsylvania, Illinois, and Texas are all among states that are currently considering similar laws.

We will continue to monitor the changing climate as these laws are passed and take effect in jurisdictions across the country, including the proposed Assembly Bill in New York.

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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¹ New York City Commission on Human Rights, "Salary History Law: Frequently Asked Questions," <http://www1.nyc.gov/site/cchr/media/salary-history-frequently-asked-questions.page> (last visited Oct. 23, 2017).

² Tit. 8, Admin. Code of the City of N.Y., ch. 1, Commission on Human Rights, <https://www1.nyc.gov/site/cchr/law/chapter-1.page>.

³ Delaware's law takes effect December 14, 2017 ; Massachusetts's and San Francisco's laws take effect July 1, 2018; Oregon's law goes into effect January 1, 2019.

⁴ California's law is set to take effect January 1, 2018.

⁵ Assembly Bill A2040C was advanced on June 21, 2017. This bill is more robust than Intro. 1253, and includes anti-retaliation provisions, as well as sets NYS Dep't of Labor civil penalties of \$1,000 for the first violation, \$2,000 for a second, and \$3,000 for any subsequent violations. Assemb. B. A2040C, 2017-2018 Regular Sessions (Jan. 17, 2017), <http://legislation.nysenate.gov/pdf/bills/2017/A2040C>.