

NYC Human Rights Law Prohibits Inquiries About Past Pay

Designed to help break the cycle of gender pay disparity, the New York City Human Rights Law will prohibit employers operating in New York City from asking applicants for job positions in New York City about their current or prior salary, benefits or other compensation information. Nor will employers be permitted to seek such information from an applicant's current or former employers, or current or former agents or employees of former employers, or search for former compensation information through publicly available sources including internet searches.

The purpose of the law is to address the persistent wage disparity between men and women in the workforce by preventing an employer from basing compensation decisions on a job applicant's compensation history. Proponents argue that such disparity is perpetuated when employers base starting salaries on applicants' prior compensation, and that the new law will reduce the likelihood that women will be prejudiced by lower salaries.

The bill was passed by the New York City Council on April 5, 2017 and signed into law by Mayor Bill DeBlasio on May 4, 2017. It will take effect on October 31, 2017. The Mayor previously issued an executive order in November 2016, prohibiting NYC agencies from asking job applicants about their salary history.

More specifically, the new law makes it an "unlawful discriminatory practice" for an employer, employment agency, or employee or agent thereof to "inquire about the salary history of an applicant for employment," or to "rely on the salary history of an applicant in determining the salary, benefits or other compensation for such applicant during the hiring process, including the negotiation of a contract." "Salary history" is defined to include the applicant's past or current wages, benefits and other compensation. The law is an amendment to the NYC Human Rights Law and applies to employers in New York City with four or more employees.

The law broadly defines "to inquire" as "communicate any question or statement to an

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applicant, an applicant's current or prior employer, or a current or former employee or agent of the applicant's current or prior employer, in writing or otherwise, for the purpose of obtaining an applicant's salary history, or to conduct a search of publicly available records or reports for the purpose of obtaining an applicant's salary history."

The "inquiry" definition has practical implications for employers who routinely perform background checks on potential new hires. Although the law does not prohibit any "attempt by an employer . . . to verify an applicant's disclosure of non-salary related information or conduct a background check," there is risk that an employer may unintentionally come across an applicant's compensation history in the course of such background check. In such event, the law requires that such disclosure not be relied upon "for purposes of determining the salary, benefits or other compensation . . . including the negotiation of a contract."

Exceptions apply. When a job applicant reveals -- voluntarily and without prompting -- his or her salary history, the prospective employer may consider salary history in determining the prospective employee's salary, and may verify such salary history. Nor is an employer prevented from discussing an applicant's expectations regarding compensation, including uninvested equity or deferred compensation that the applicant would forfeit upon leaving the former employer, or informing the applicant about the position's proposed or anticipated salary or salary range. A prospective employer also may ask for objective measures of the applicant's past productivity such as revenue, sales or other production reports. Applicants for public employee positions, where compensation is determined pursuant to procedures established by collective bargaining, are also exempted. Employers also do not violate the new law if any federal, state or local law specifically either authorizes the disclosure of salary history or requires knowledge of salary history when setting an applicant's compensation. The law does not apply to applicants for transfer or promotion within their current employer.

Remedies.

An individual may assert a private right of action against any employer based on violation of the law, and seek monetary damages, compensatory damages, injunctive relief, punitive damages and/or attorney's fees. The law will become an additional unlawful practice under the NYC Human Rights Law and will be enforced by the NYC Commission on Human Rights, and an employee alternatively can file a complaint with the Commission. Among other remedies, the Commission may impose civil penalties of up to \$125,000 for an unintentional violation of the law and up to \$250,000 for a "willful, wanton or malicious" violation of the law.

Practical Tips.

To ensure compliance with the new law, employers operating in New York City should

- review their policies, procedures and materials, and modify those that include questions regarding salary history, including job applications and other hiring related documents.

- train Human Resources personnel, hiring managers, recruiters and others involved in the interview and hiring process, so that they avoid making inquiries into an applicant's salary history and know how to handle an applicant's voluntary disclosure of prior salary information (so that the applicant doesn't later claim that he or she was prompted to do so).
- make clear in any interview related records that compensation decisions were not related to an applicant's salary history or an applicant's refusal to disclose such history.
- when conducting a background check on a job applicant, exclude inquiries into the job applicant's salary history, and ensure that information regarding the applicant's salary history is not relied upon in determining future compensation.

New York City follows Massachusetts and Philadelphia in enacting such legislation. (The Philadelphia chamber of commerce has challenged its new law in court, alleging that the law violates the first amendment, due process clause, commerce clause and state constitution.) Various states and municipalities are planning to introduce similar laws, including California. Employers throughout the country should closely monitor future developments.