

WHAT IS PERMITTED UNDER NYC'S BAN ON SALARY HISTORY?

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Come Oct. 31, 2017, employers in New York City will face a scary new reality: They will no longer be permitted to ask job candidates about their salary history. This mandate follows the New York City Council's decision to pass legislation in April 2017 in an effort to address gender-based wage gaps. The law seeks to break the cycle of pay inequity by reducing the likelihood that women and people of color will be prejudiced by prior salary levels. Instead, the law encourages employers to set compensation based on applicants' qualifications. For businesses new to this concept, here's a "roadmap" of what is and is not permitted.

What conduct is prohibited under the law? On the effective date, it will be an unlawful, discriminatory practice under the New York City Human Rights Law (NYCHRL) to inquire about the salary history of a job applicant during the hiring process. This includes direct questions or statements to: the applicant, the applicant's current or former employers and any search of publicly available records for the purpose of obtaining information about prior salary. The law also prohibits employers from relying on the pay history of an applicant in determining salary, benefits or other compensation during the hiring process. If a background check or verification of an applicant's non-salary history-related information reveals this information, it cannot be relied upon for purposes of determining compensation.

For purposes of this law, salary history includes the applicant's current or prior wages, benefits, or other compensation, but it does not include any objective measures of productivity, such as revenue, sales, or other production reports.

Related People



Melissa Camire

Partner

[212.899.9965](tel:212.899.9965)

What conduct is permitted under the law? Businesses will be required to abide by these restrictions during the hiring process, but employers won't be held accountable in all circumstances. Employers are permitted to inquire about salary expectations, including any unvested equity or deferred compensation that an applicant stands to lose if the applicant resigns from their current employer. Further, if a job applicant voluntarily and without prompting discloses his or her salary history to a prospective employer, it is not unlawful for the employer to consider the salary history in determining compensation. The employer is then permitted to take actions to verify the applicant's voluntarily disclosed salary history.

Accordingly, under the law, employers can:

Make statements about the anticipated salary, salary range, bonus and benefits for a position;

Inquire about an applicant's expectations or requirements for salary, benefits, bonus, or commission structure;

Ask about objective indicators of an applicant's work productivity in their current or prior jobs, such as revenue, sales, productive reports, profits generated, or books of business;

Make inquiries to an applicant's current or former employers or search online to verify non-salary history information. If this results in the accidental discovery of current or prior salary, the employer cannot rely on this information in making compensation decisions; and

Verify and consider current or prior salary history if the applicant offers the information voluntarily and without prompting.

However, it's important to note this law doesn't apply to internal transfers or promotions with a current employer. It also does not cover public employees whose salaries are determined by collective bargaining agreements. Finally, the law does not extend to competing offers by other potential employers the applicant is considering because they are not considered "current or prior wages."

Who is covered by the law? The law covers all employers in New York City, regardless of size, and applies to applicants for new employment in New York City, regardless of whether

the position is full-time, part-time or an internship. Wage history of New York City's 1.3 million freelancers is also off-limits— independent contractors who do not have their own employees are protected under the law.

At this time, it is unclear whether the law will extend to New York City residents who apply for jobs outside of New York City, or to non-residents who interview in New York City for a position outside of the City. When considering the geographic reach of the NYCHRL, courts have typically held that the law applies whenever the impact of the discriminatory action is felt or experienced in New York City. New York City residency alone is not likely to be sufficient to trigger protection of the law. However, there is a risk that an employer interviewing a candidate for a position based outside of New York City could be held liable for a violation of the law if an employer conducts the interview itself within New York City.

What are the penalties for non-compliance? Under the NYCHRL, an aggrieved prospective employee may either file a complaint with the New York City Commission on Human Rights or file a lawsuit directly in New York State court. A wide range of relief is available to successful claimants, including punitive damages and attorney's fees. Additionally, civil penalties will range from \$125,000 for an unintentional violation, and up to \$250,000 for a willful, wanton or malicious act. The Commission may also impose mandated training or posting requirements.

Are there any other measures that address pay equity? The City law dovetails on New York State's Women's Equality legislation enacted in October 2015, which expanded protections for women in the workplace statewide. One of those new laws, the Pay Equity Act attempts to narrow the wage gap between men and women. The Pay Equity Act amended New York State's equal pay law by narrowing the instances in which an employer can justify salary discrepancies between male and female employees, thereby increasing the burden on employers to justify wage differentials. The Pay Equity Act also bars employers from prohibiting their employees from discussing or disclosing wages. Proposed legislation has been introduced on the state level to ban inquiries regarding salary history, similar to the New York City law.

The legislation has caused somewhat of a ripple effect with NYC joining Massachusetts and Philadelphia, which each

passed similar salary history bans. Following New York City's passage in April, Delaware, Oregon and the City of San Francisco all followed suit, and states and cities throughout the country are considering similar measures.

What steps do employers need to take to comply with the law? New York City employers need to take immediate steps to ensure compliance with the new legislation. First, employers must review their application materials to ensure they do not include a request to disclose their salary history. Employers must also remove any salary history questions from background checks or other verification inquiries.

Second, employers must make sure to train their human resources personnel and anyone involved in interviewing candidates regarding the new law.

Third, employers will want to consider how they will inquire about and document a candidate's salary expectations. Employers should also consider implementing a process to document any instances where an applicant voluntarily discloses salary history.

Fourth, if employers use external recruiters or other third party services in their hiring process, employers should confirm their awareness of, and compliance with, the New York City law.

Finally, because many other states and municipalities have introduced similar legislation or are planning to do so, employers from across the country should keep a close watch for further developments.

Now is the time for employers to revisit their hiring processes and ensure all staff are compliant with this latest legislation.

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