Governor Brown Signs Legislation Banning Salary History Inquiries

Insights
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California joins other states and municipalities in banning inquiries into salary history of applicants. AB 168 prohibits employers from seeking salary history information or relying on the salary history information regarding applicants for employment. AB 168 goes into effect on January 1, 2018.

California has joined the ranks of a growing number of jurisdictions to prevent employers from asking about salary history information. On October 12, Governor Jerry Brown signed Assembly Bill 168 (Eggman), a bill that prohibits public and private employers from seeking or relying upon the salary history of applicants for employment.

A number of states (Delaware, Massachusetts, and Oregon) have passed similar laws which will become effective later this year or in coming years. Cities are getting in on the action as well. Philadelphia passed an ordinance which was to go into effect in May, but is currently under legal challenge. New York City recently adopted an ordinance that will become law on October 31. San Francisco Mayor Ed Lee signed an ordinance in July that will go into effect on July 1, 2018.

What's The Rationale?
Gender pay equity has been a hot topic nationally and in California in recent years. According to federal data from 2015, the median wages for women in California are 84.8 percent of those for men.

Two years ago, Governor Brown signed into law SB 358 (Jackson) to strengthen California's Equal Pay Act to require equal pay for "substantially similar" work. And just last year, the Governor signed AB 1676 (Campos), which provides that salary history cannot, by itself, be used to justify pay inequities.

Proponents of salary history bans generally argue that they are necessary to eradicate the gender pay gap, which they contend is exacerbated when employers base compensation on prior rates of pay which may reflect historic inequities.

However, employers have generally argued that they utilize salary history information for legitimate, non-discriminatory reasons, such as matching their job offers to current market rates. In addition, employers have argued that prohibiting them from reviewing salary history information will result in wasted time for both parties where the employee's expectations or requirements for compensation far exceed what the employer is able to offer for the position.

What *Can't* Employers Do?

AB 168 makes it unlawful for an employer to seek salary history information, orally or in writing, personally or through an agent, about an applicant for employment. "Salary history information" includes compensation and benefits.

In addition, AB 168 prohibits an employer from relying on the salary history information of an applicant as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant. This language appears to significantly undercut the language enacted last year in AB 1676. AB 1676 specifically provided that salary history cannot "by itself" be used to justify pay inequality, but presumably salary history could still be a relevant factor. However, AB 168 provides that an employer cannot rely on salary history as "a factor" at all.

AB 168 specifies that it does not prohibit an applicant from "voluntarily and without prompting" disclosing salary history information to a prospective employer. If the applicant does so, the employer may consider or rely on that information in determining the salary for that applicant.

In addition, the new law provides that it does not apply to salary history information disclosable to the public pursuant to federal or state law, such as the California Public Records Act or the federal Freedom of Information Act. Salary information for public employees is largely a matter of public record.

What *Must* Employers Do?

AB 168 also requires an employer, upon reasonable request, to provide the pay scale information to an applicant applying for employment. Therefore, if an applicant inquires as to how much a specific position pays, the employer is required to provide the pay scale for that position.

What About Other Pending Related Legislation?

Governor Brown signed AB 168 at a press conference with the California Legislative Women's Conference where he signed a number of bills touted as "supporting California's women, working parents and children."

Notably absent from the list of bills signed was Assembly Bill 1209 (Gonzalez Fletcher). That bill would require employers with 500 or more employees to compile gender pay disparity information for exempt employees and board members, and submit that information to the California Secretary of State, who would in turn publish the information on a public website. Employers have expressed concern that this "wall of shame" bill would assume the employer has violated the law, when existing law expressly allows for pay disparities based on a number of legitimate non-discriminatory reasons (none of which are taken into account in this bill).

The Governor's failure to include AB 1209 in this bill signing ceremony may be telling. But only time will tell for sure. The Governor has until October 15 to sign or veto that bill.

What Should Employers Do Next?

AB 168 goes into effect on January 1, 2018. Prior to that date, employers should carefully review their employment applications and hiring processes to ensure that they do not impermissibly inquire into, or rely upon, salary history information. In particular, job applications and new hire packets should be amended to remove any inquiries into prior salary history. In addition, all staff involved in the hiring process should be trained about the law's new requirements and how it impacts the types of inquiries and questions that are permissible and not permissible.

For more information about this new law, please contact your regular Fisher Phillips attorney, or one of the attorneys in any of our California offices:

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