Governor Brown Signs Legislation to Clarify California's Ban on Salary History Information

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As many of you will recall from last year, Governor Brown signed legislation to prevent employers from asking about or relying on salary history information when making hiring decisions. That legislation, Assembly Bill 168 (Eggman) went into effect on January 1, 2018. Check out our recap of that bill here.

That legislation raised a number of questions among employers, especially regarding key terms that were undefined, vague or unclear.

Acknowledging these concerns, the author introduced a follow-up measure, Assembly Bill 2282, to define some key phrases and provide further guidance to California employers.

Governor Brown recently signed AB 2282 into law, which will go into effect on January 1, 2019.

Additional Clarity by Defining Key Terms
Last year's bill prohibited employers from seeking or relying on salary history information about an "applicant" for employment. However, the law did not define "applicant," leaving many employers to question whether it prohibited them from asking or relying upon such information with respect to current employees (such as internal candidates for promotions or lateral transfers).

AB 2282 clarifies this by defining the term "applicant" or "applicant for employment" to mean an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position. Therefore, the new law clarifies that the prohibitions contained in AB 168 do not apply with respect to current employees.

AB 168 also required employers, upon reasonable request, to provide the pay scale for a position to an applicant applying for employment. Again, the terms "reasonable request" and "pay scale" were not defined, leading to many unanswered questions for employers. What is a reasonable request? Could someone thinking about applying for a job ask for pay scale information? Could this be used by plaintiffs' attorneys on fishing expeditions searching for companies to sue? Could this be used by competitors seeking to "poach" your employees by offering them more pay?

AB 2282 clarifies some of these issues as well. First, the bill defines "pay scale" to mean a salary or hourly wage range. Second, the bill defines a "reasonable request" to mean a request made after an

applicant has completed an initial interview with the employer. Therefore, the new legislation clarifies that employers need only provide pay scale information to an applicant who has completed an initial interview, not any person off the street who might theoretically be interested in applying for the job. Or to plaintiff lawyers or competitors.

Finally, a common question by employers following enactment of AB 168 was whether it was still permissible to ask an applicant about their expected salary. While several local ordinances adopting salary history bans had specifically addressed this (and allowed it), AB 168 was silent on this topic. Therefore, AB 2282 specifically provides that the law does not "prohibit an employer from asking about his or her salary expectation for the position being applied for."

Use of Salary History and Recent 9th Circuit Decision

A related question is whether, and to what extent, an employee's prior salary can ever be used to justify any disparity in compensation. Recent legislation provided that, under California law, prior salary shall not, "by itself," justify any disparity in compensation based on sex, race or ethnicity. The import of this language was thrown into some question with the enactment of AB 168, which prevents employers from seeking or relying upon salary history information.

Moreover, in a recent landmark decision involving the federal Equal Pay Act, the Ninth Circuit Court of Appeals became the latest federal court to rule that employers cannot justify a wage differential between men and women by relying on prior salary. Specifically, the Court held that "prior salary alone or in combination with other factors cannot justify a wage differential. To hold otherwise—to allow employers to capitalize on the persistence of the wage gap and perpetuate that gap *ad infinitum*—would be contrary to the text and history of the Equal Pay Act, and would vitiate the very purpose for which the Act stands." *Rizo v. Yovino*, 9th Cir. No. 16-157372, 10 (April 9, 2018).

AB 2282 further addresses this issue under state law as well. As a recent committee analysis of the bill quotes the author as stating:

"[W]hile recent legislation has made great strides towards eliminating the use of prior salary to justify paying (employees) a lower wage rate, it remains unclear the extent to which prior salary may be used at all. This bill makes clear that prior salary simply cannot be used to justify a wage differential, whether used on its own or in combination with a lawful factor under the Equal Pay Act."

Therefore, the bill provides that prior salary shall not justify *any* disparity in compensation.

However, the language provides an important carve-out. This exception allows an employer to consider the existing salary of a current employee for setting a new salary for that employee, so long as any wage differential resulting from that compensation decision is justified by one or more specified factors, including a seniority system, merit system, or other bona fide factor other than sex, race or ethnicity.

Employer Takeaways

This new legislation provides some needed clarity to many of the provisions of last year's ban on salary history information, and should help guide California employers regarding which inquiries are permissible or off-limits. All staff involved in the hiring process should review these clarifications closely and make any necessary changes to the hiring process and/or job applications or new hire packets.

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