Illinois Employers Barred From Salary History Inquiries

Insights
8.01.19

Joining the ranks of several other states and local jurisdictions that have taken similar steps in the fight against pay disparity, Illinois will soon prohibit employers from asking job applicants about their salary history as part of the hiring process. The new law – signed into law yesterday and set to take effect on September 29, 2019 – also includes other pay equity provisions that will require you to immediately adjust your hiring practices. What do Illinois employers need to know about this significant new development?

Ban On Salary History Inquiries
The cornerstone of HB 834 is the salary history ban. Illinois legislators had twice passed similar laws, but former Governor Bruce Rauner vetoed both. This time around, however, Governor J.B. Pritzker signed off on the law and hailed the impact it is intended to have on pay disparities. Once effective, Illinois employers will be prohibited from:

- Requesting or requiring wage or salary history from an applicant as a condition of being interviewed, considered for a job, or hired;
- Requesting or requiring that an applicant disclose their wage or salary history as a condition of employment;
- Screening job applicants based on their current or prior wages or salary histories by requiring that the history satisfy a minimum or maximum level; and
- Seeking a job applicant's wage or salary history from any current or former employer. However, this subsection does not apply if the applicant is a current employee seeking another position within the same organization, or if their salary history is available as a matter of public record.

It would not be considered a violation if the applicant voluntarily and without prompting discloses their current or prior salary history, so long as you do not consider or rely on the voluntary disclosure as a factor in determining whether to extend a job offer or in determining that individual's wages or salary upon hire.

Upon a showing that an employer violated the new salary history ban, an affected worker could recover damages (including special damages up to $10,000), compensatory damages, injunctive relief, and costs and reasonable attorneys' fees.

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The new law provides for other protections related to wage and salary information. Once effective, it will be unlawful to require an employee to sign a contract or waiver that would prohibit them from disclosing or discussing information about their wages or salary to anyone else.

However, the law does contain an exception that would permit you to prohibit human resources representatives, supervisors, and anyone else whose job responsibilities give them access to other employees' wage or salary information from disclosing such information (unless the employee in question provides prior written consent).

Miscellaneous Provisions

The law also makes a few other seemingly minor tweaks to Illinois' existing Equal Pay Act that could result in an increased number of claims filed against employers, and a heightened bar for defending such claims once filed. The current law states that, in pay equity claims filed on the basis of gender or race (limited to claims filed by African-Americans), employers must ensure they are paying equal wages to those performing the same or substantially similar work where the performance requires "equal" skill, effort, and responsibility. The new law replaces the word "equal" with "substantially similar," making it easier for workers to succeed in equal pay claims.

Further, the new law will significantly expand the kinds of damages available to workers under the state Equal Pay Act. The current law simply permits workers to recover the amount of underpayment they should have been entitled to without pay discrimination in place along with costs and reasonable attorneys' fees. The new law adds compensatory damages, punitive damages, and injunctive relief to the menu of options available to those succeeding in equal pay claims against employers.

What Should You Do?

Employers with operations in Illinois should take steps now to ensure compliance, as the new law will go into effect in just a few short weeks. You should immediately amend your employment applications to eliminate questions about pay history. You also should update your procedures for conducting reference and background checks to ensure they do not request salary history. Additionally, all human resources personnel, as well as any other employees involved in the interviewing and hiring process, must be educated and trained on the new law to avoid violations.

The good news is that the law expressly permits you to engage in a discussion with a candidate about their salary expectations. Therefore, you should amend your application to include a question about the candidate's desired compensation, and instruct your hiring team to inquire about that topic during the interview process.

Further, while the law explicitly states that it would not be a violation if the applicant voluntarily and without prompting discloses their salary history, you should take concrete steps to ensure you receive the law's protections should this occur. You should document in your hiring notes that the applicant disclosed such information of their own accord, perhaps even documenting the specific question you posed that led to the disclosure in order to prove that it was truly voluntary. In such

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question you posed that led to the disclosure in order to prove that it was truly voluntary. In such situations, you may even want to ensure that you have internal documentation prepared on a contemporaneous basis that shows the method you used to derive the salary level you end up offering to the candidate, preemptively building a case to show that you did not use the voluntarily disclosed data as part of your process.

We will continue to monitor any further developments and provide updates on this and other labor and employment issues affecting Illinois employers, so make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our Chicago office.

This Legal Alert provides an overview of a new state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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