

YEAR-END REMINDER: NEW JERSEY'S SALARY HISTORY BAN TAKES EFFECT JANUARY 1, 2020

Insights
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In just a few short weeks, New Jersey employers will no longer be allowed to ask prospective employees about their salary history during the application or interview process or rely upon salary history in setting compensation. The rationale for the new statewide law is that setting compensation based on prior salary may perpetuate an unlawful pay disparity. By excluding salary history from the mix, employers will only be able to set compensation based on lawful considerations, including the specific job duties of the position and the applicant's skill, education, training, and experience.

BACKGROUND

Pay equity measures have been at the forefront of New Jersey Governor Phil Murphy's agenda since taking office in January 2018. His first act as governor was to [sign an executive order](#) prohibiting public employers from inquiring about a job applicant's current or prior salary.

Thereafter, New Jersey [enacted the most sweeping pay equity law in the country](#), which went into effect on July 1, 2018. Under the Diane B. Allen Equal Pay Act, it became unlawful for employers to pay any employee who is a member of a protected class less than what is paid to an employee who is not a member of the protected class and who performs substantially similar work.

Earlier this year, New Jersey joined the ranks of other states (including California and New York) and municipalities that

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have enacted laws prohibiting inquiries about salary history. This [new law](#), effective January 1, 2020, is designed to rectify unlawful pay gaps and ensure that compensation is determined based on lawful factors unrelated to an applicant's membership in a protected group (such as gender or race).

WHAT CAN'T EMPLOYERS ASK?

Starting January 1, it will be an unlawful employment practice for a New Jersey employer to:

- Screen a job applicant based on the applicant's salary history, including their wages, salaries, or benefits; or
- Require that an applicant's salary history satisfy any minimum or maximum criteria.

This means that job applicants can no longer be asked about their compensation or benefits at their current or former places of employment in an application or during an interview. If these types of inquiries are made, the applicant can bring a private right of action in court, and the company could face civil penalties ranging from \$1,000 to \$10,000 per violation.

WHAT ARE EMPLOYERS PERMITTED TO DO?

While the law restricts inquiring about and considering salary history when setting compensation, it is not without exceptions. There are certain circumstances where salary history may be considered, including to verify information about compensation that was volunteered without employer prompting or coercion, or to confirm salary history after an offer of employment that includes an explanation of the overall compensation package has been made.

Additionally, the law makes clear that its restrictions do *not* apply to:

- Applications for internal transfer or promotion;
- Use by the employer of previous knowledge obtained as a consequence of prior employment;
- Actions taken pursuant to any federal law or regulation requiring the disclosure or verification of salary history for

employment purposes, or require knowledge of salary history to determine an employee's compensation;

- Any attempt to verify disclosure of non-salary related information when conducting a background check (so long as the employer specifies that salary history information should not be disclosed);
- Inquiries about an applicant's previous experience with incentive and commission plans and the terms and conditions of those plans;
- Applicants providing salary history information to an employment agency contacted by the applicant for assistance with the job search;
- Offering applicants information about salary rates for the job set by collective bargaining agreements or by law; and
- Acquiring salary history information that is publicly available.

Importantly, this new law will not prohibit asking a job applicant about their salary expectations, and allows employers to offer applicants information about wage or salary rates for the job.

WHAT SHOULD EMPLOYERS DO?

First and foremost, New Jersey employers should review their employment applications to ensure that any questions regarding salary history are removed. For multistate employers, New Jersey law permits the question to remain on the application. However, the application must be updated to instruct that the question should not be answered by applicants seeking to work at a New Jersey location. Given the [trend of states and local jurisdictions](#) prohibiting these types of inquiries, however, multistate employers should consider removing these types of questions altogether.

Additionally, employees involved in the hiring process must be trained to understand the prohibitions against seeking salary history. During the interview process, no questions should be asked about salary history or to coerce an applicant to divulge this information. Instead, the discussion should be limited to salary expectations and the permitted inquiries outlined above.

If you need any assistance preparing for this new requirement, or have any other questions about complying with New Jersey's pay equity laws, contact the [Fisher Phillips New Jersey office](#) at (908) 516-1050 or a member of the [Fisher Phillips Pay Equity Practice Group](#).

This Legal Alert provides an overview of a specific 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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