

NEW YORK CITY BANS EMPLOYERS FROM REQUESTING OR USING JOB APPLICANTS' SALARY HISTORY IN HIRING DECISIONS

By Glenn S. Grindlinger and Zev Singer

The New York City Council passed groundbreaking legislation that prohibits New York City employers from inquiring about or using the salary and benefits histories of prospective employees during all phases of the employment hiring process. According to the city council member who sponsored the legislation, the law was primarily enacted as a measure to close the “gender pay gap” and to reduce the likelihood that women will be prejudiced by prior salary levels. Mayor de Blasio is expected to sign the legislation and enact it into law.

The new law amends the New York City Human Rights Law to prohibit employers from: (1) inquiring about the salary history of an applicant for employment; (2) researching an applicant’s salary history; and (3) relying on the salary history of an applicant in determining the salary, benefits or other compensation for the applicant during the hiring process, including the negotiation of a contract. Thus, under the new law, an employer may not ask an applicant about their salary history, and if the employer somehow has knowledge of an applicant’s salary history, it may not be used to determine the applicant’s compensation with the employer.

The law broadly defines the term “to inquire” to include the communication of “any question or statement to an applicant, an applicant’s current or prior employer or a current or former employee or agent of the applicant’s current or prior employer,

in writing or otherwise, for the purpose of obtaining an applicant’s salary history,” and it also prohibits employers from conducting a search of publicly available records or reports for the purpose of obtaining an applicant’s salary history. The term “salary history” also contains an expansive definition in the law to include the applicant’s current or prior wage, benefits or other compensation, but does not preclude employers from making inquiries regarding objective measures of productivity, such as revenue or sales.

There are certain exceptions built into the law whereby employers can in fact consider salary history, including:

- Employers can still consider salary history for applicants for internal transfer or promotion with their current employer.
- The law does not apply to workers whose salary, benefits or other compensation are determined pursuant to procedures established by a collective bargaining agreement.
- Employers are still allowed to discuss with the applicant their expectations with respect to salary, benefits and other compensation, including but not limited to unvested equity or deferred compensation that an applicant would forfeit or have cancelled by virtue of the applicant’s resignation from their current employer.

- Where an applicant voluntarily and without prompting discloses salary history to an employer, the employer *may* consider salary history in determining salary, benefits and other compensation for the applicant, and may also verify such applicant's salary history.

The New York City Commission on Human Rights (NYCCHR) will be the entity enforcing the new law and may potentially impose a civil penalty of up to \$125 for an unintentional violation or up to \$250,000 for an intentional/malicious violation. To date, the NYCCHR has not promulgated any rules regarding the implementation or enforcement of the law. Aggrieved individuals may also file actions in court for purported violations of this new law.

The law is scheduled to go into effect 180 days after the mayor signs it, which means that it will

likely become effective in October 2017. Compliance with this law will certainly be a challenge for many employers and human resources professionals, as it is common and almost second nature for many involved in the hiring process to either inquire about or research candidates' salary histories. Over the next six months, we urge New York City employers to audit all onboarding and hiring procedures and practices, including job postings and advertisements, employment applications, interview questions and processes and job-offer and salary criteria in order to prepare for compliance with the law.

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