



October 2017

What Employers Need To Know About NYC'S New Ban On Inquiries Into Salary History

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As we reported back in [April](#) 2017, the New York City Council enacted an amendment to the New York City Human Rights law that prohibits New York City employers from asking about a job applicant's salary, benefits, or other compensation history, and/or relying on that information to make hiring decisions. Notably, the new salary history law applies to employers of all sizes, including those with only one employee. As such, this amendment will cause headaches for employers and human resources professionals, and all employees involved in the hiring, recruiting, and interviewing of prospective employees should be trained on the parameters of the new law.

Recently, the New York City Commission on Human Rights (NYCCHR) issued new [FAQs](#) that provide guidance regarding the NYCCHR's interpretation of the new law, as well as fact sheets geared toward both [employers](#) and [employees](#). Although the NYCCHR has not formally issued proposed rules in connection with the new law, the recently published materials are expected to guide the NYCCHR's enforcement policies. Potential penalties for violating the salary history provisions of the New York City Human Rights Law include damages, civil penalties ranging from \$125 for unintentional violations to \$250,000 for intentional or malicious violations, and/or other relief, such as mandated training and posting requirements. Further, aggrieved individuals may also file a claim in court for alleged violations of this new law.

Set out below are some important reminders outlined by the NYCCHR's new guidance.

- **New Limits on Employers:** Employers may not ask about an applicant's current or former salary, benefits or other compensation on a job application or during an interview, by independent research (such as searching online), or through any other means.
 - "Benefits" and "other compensation" are broadly defined and may include car allowances, retirement plans, commissions, profit percentages and bonuses.
 - Employers may not rely on existing or other knowledge of the applicant's prior or current salary and benefits information (even if inadvertently acquired, as when the information is provided by a headhunter or disclosed by the applicant) to set compensation.
 - Job applications containing disclaimers and/or language indicating that divulging salary and benefits information is voluntary will not avoid liability. Indeed, according to the NYCCHR, it is a *per se* violation of the law to ask for such information from applicants even if the applicant is not required to provide the information.
 - Salary and benefits inquiries are also prohibited even after a conditional offer of employment is made.

- ***Reach of New Limitations:*** As long as the inquiry or violation impacts a private sector interview or employment in New York City, then the law applies. According to the NYCCHR, the law applies to all interviews that occur in New York City, even if the job is located outside of the City. The law also applies to job interviews that take place outside New York City for a job that will be located within the City.
 - The law applies to all positions, including part-time, full-time, executive, management, hourly and internship positions, but does not apply to applicants applying for internal transfers or promotions with their current employer.
 - Third parties, such as former employers, headhunters, employment agencies, managers and agents of an employer may be liable for aiding and abetting where they intentionally disclose or seek the disclosure of an applicant’s salary or benefits information to a prospective employer.
- ***Permissible Statements & Inquiries:*** While employers may not inquire, research, or rely on information regarding an applicant’s prior and current benefits and salary, employers may obtain or convey some other information, such as by:
 - Communicating the anticipated salary, salary range, bonus, and benefits associated with a specific position.
 - Asking applicants about their expectations or requirements regarding salary, benefits, bonus or commission structure.
 - Discussing invested equity or deferred compensation that the applicant would forfeit or cancel if the applicant resigns from their current employer.

- Asking applicants to provide objective indicators of their work productivity throughout current and prior positions, such as revenue, profits generated, sales, production reports or “books of business.”
- Verifying non-salary information, such as work history, responsibilities or achievements (while making clear, and ideally in writing, to any prior and current employers or other sources contacted, that salary and benefits information should NOT be disclosed).
- Asking about offers made by other prospective employers and any counter-offers.
- Determining salary information of employees employed by a company that is a target for acquisition.
- An employer, will also NOT violate the law if the applicant *voluntarily*, and *without prompting*, provides such information during the hiring process. The standard for this exception is that “the average job applicant would not think” such disclosure is “encouraged.” Therefore, an employer should not state or imply that an applicant “may voluntarily disclose salary history.”

In light of this new law, New York City employers should implement the following best practices:

- 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.
- Revise job applications that request salary history (disclaimers for NYC employees or language indicating that such disclosure is voluntary are not permitted).
- Train interviewers to comply with the law, focus on salary demands and objective

performance indicators and use industry-wide data to inform hiring decisions.

- Prevent the inadvertent disclosure of current or previous benefits and salary by:
 - Explicitly asking prior employers and other information sources not to include information regarding an applicant's prior salary and benefits when verifying non-salary information, such as work history, responsibilities, performance metrics or achievements.
 - Documenting whenever an applicant voluntarily discloses payroll information without prompting during the interviewing process.
- If a headhunter or third party-agency is engaged, inform the headhunter or agency, in writing, that the headhunter or agency should not disclose any applicant's salary or compensation information to the employer.

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