



SHANNON D. AZZARO

New York City's Salary History Law and Employer Compliance

On May 4, 2017, Mayor Bill DiBlasio signed a bill amending the New York City Human Rights Law to prohibit New York City employers from inquiring into a prospective employee's salary history during the hiring process or relying on the salary history of an applicant in determining salary, benefits or other compensation for such applicant during the hiring process, including the negotiation of a contract. The New York City Commission on Human Rights (CCHR) will be enforcing this new provision.

This law will go into effect on October 31, 2017 and it is important for employers, employment agencies, recruiters, and those who do business or engage in any part of the hiring process in NYC to understand the law's requirements.

What is Not Allowed?

- Communicating 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 former employer in writing or otherwise, for the purpose of obtaining an applicant's salary history, benefits or other compensation. This includes bonuses, commissions, profit percentages, and all other forms of compensation at the applicant's current or former place of employment.
- Conducting a search of publicly available records or reports for the purpose of obtaining an applicant's salary history. This includes searching for salaries paid to individuals with the applicant's specific title at the applicant's current or former place of employment on websites that collect salary information.
- Applications, application portals, and other application materials may not inquire into the salary history of a candidate, even if the question is voluntary. Employers may not use boilerplate applications which request salary history, even if they use a disclaimer advising individuals applying to New York City jobs not to answer the salary history question.

What is Allowed?

- Employers may "inform[] the applicant in writing or otherwise about the position's proposed or anticipated salary or salary range."
- Employers may "engage in a discussion with the applicant about 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".
- Employers may also inquire into any "objective measure of the applicant's productivity such as revenue, sales, or other production reports."

Please Contact

Shannon D. Azzaro
sazzaro@pecklaw.com
201.343.3434

- Employers who are specifically authorized by any federal, state or local law that specifically authorizes the disclosure or verification of salary history may still do so.
- Applicants for internal transfer or promotion with their current employer may be asked about salary history.
- Employers may still verify an applicant's disclosure of non-salary related information or conduct a background check, provided that if the verification or background check discloses salary history, the disclosure shall not be relied upon for the purposes of determining the salary, benefits or other compensation of such applicant during the hiring process, including the negotiation of a contract.
- Further, "where an applicant voluntarily and without prompting discloses salary history to an employer, employment agency, or employee or agent thereof, such employer, employment agency, or employee or agent thereof may consider salary history in determining salary, benefits and other compensation for such applicant, and may verify such applicant's salary history."
- Employers may inquire into any counter-offers or competing offers that are made to applicants during the recruiting process, including counter-offers made by the applicant's current employer to retain the employee. As the law defines "salary history" as the "applicant's current or prior wage, benefits or other compensation", other offers are not covered by the law.

Who is Affected?

- The law applies to all employers in NYC, regardless of size.
- The law applies to most applicants for new employment in NYC, including those applying for full-time, part-time, or internship positions. The law also applies to independent contractors who do not have their own employees.
- Even if you or the job are not located in NYC, this law may still apply to you if the job being performed is partially in NYC, you engage recruiting professionals in NYC, or perform the interviews in NYC.
- It is our understanding that the CCHR is planning on applying an impact test, meaning that if the job or the recruitment process touches NYC, they will construe the law as applying. Cases outside of NYC will likely be evaluated on a case by case basis; however, we understand the CCHR's position to be that if any activity occurs within NYC, even if the job is not based within the city, it is safer to avoid the salary history question.
- Employment agencies, recruiters, headhunters, staffing agencies, and other outside contractors who might act as an agent of the employer are covered under the law. Employers who outsource any of these functions may also be held liable for any actions of their agents.

- The law does not apply to public employee positions for which salary, benefits or other compensation are determined pursuant to procedures established by collective bargaining. However, City agencies are prohibited from inquiring about or relying on job applicants' salary history pursuant to Mayoral Executive Order 21, signed on November 4, 2016.

Potential Penalties

The CCHR may impose a civil penalty of up to \$125,000 for an unintentional violation, and up to \$250,000 for a "willful, wanton or malicious act" and can award compensatory damages to victims, including emotional distress damages and other benefits. In addition, individuals may be entitled to a private right of action for violations of the law and may be entitled to damages including backpay, compensatory damages, and attorneys' fees.

What Next?

1. Anyone engaged in the hiring of new employees should receive mandatory best-practices training on the new requirements, including internal and external recruiters, human resources staff, and hiring managers. As with any training, the training should be documented and employees should sign in and out and acknowledge that they read and received the training materials.
2. Employers should set a salary range for each job opening and engage in a conversation with candidates regarding their salary expectations. Questions such as, "This job pays \$50,000 per year, is that acceptable to you?" or "What are your salary expectations for this job?" are permissible and can allow the employer and applicant to meaningfully discuss salary without violating the law.
3. Employers should review, modify, alter, and/or amend their existing application forms, including online applications, and interview questions to ensure that any questions about past and current salary are no longer included.
4. Employers should not request pay stubs or W-2's during the hiring process.
5. Employers should also examine their agreements with any outside contractors they engage during the recruiting process including recruiting and background check agencies and notify such agencies that they want to exclude salary history inquiries as part of their process. This might include examining any indemnity agreements or other remedies included in such agreements.
6. Employers should speak with their professional liability insurance brokers to ensure that they have adequate coverage under their EPLI or D&O policies to cover any violations. However, employers should note that civil monetary fines and penalties are generally policy exclusions.
7. Where a candidate has made a voluntary disclosure of salary history information to a recruiter, headhunter, or other agent of the employer, it is recommended that written confirmation

of the candidate's consent to disclose their salary history be obtained prior to communicating such to the prospective employer. Employers are likewise cautioned to obtain a copy of any written consent authorizing a head-hunter to disclose the information before relying on the headhunter's representations.

Final Thoughts

While employers can turn to the text of the law and obtain limited guidance from fact sheets and FAQ's issued by the CCHR, we anticipate that the CCHR will be issuing further guidance as the law goes into effect and new enforcement questions arise.

Employers should also be mindful that this issue is not limited to New York City, as salary history laws have been passed in Massachusetts, Delaware, Oregon, Puerto Rico, and San Francisco (which are set to go into effect over the next year and a half). Philadelphia's law was set to go into effect in May 2017; however, its enforcement is currently stayed pending litigation. Additionally, there are numerous proposed state and local measures.

Peckar & Abramson's Labor Law and Employment Practices Group is actively tracking the issuance of guidance and the progress of other state and local laws related to salary history as they go into effect around the country. If you have any questions about compliance with New York City's salary history law or other similar laws, please contact us.

The information provided in this Bulletin does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Bulletin without first seeking legal advice.