**States and Localities Step into the Breach on Pay Equity: New and Proposed Prohibitions on the Disclosure of Salary History**

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It is a well-known political axiom – and unfortunate reality – that women continue to earn, on average, less than 80 cents for every dollar earned by men. As federal efforts to address equal pay issues continue to stall, states and localities have stepped into the breach to take meaningful action to try to address pay disparities. One of the tools they have recently relied upon is prohibiting employers from asking applicants about their current salary or salary history – an effort to prevent existing pay discrimination or disparities from infecting applicants' future pay.

Last year, Massachusetts became the first state or locality to pass a law banning employers from asking applicants about their salary histories. Since then, a veritable wave of laws has been passed restricting employer inquiries into applicants' salary histories. Following Massachusetts' lead, states and localities including California, Delaware, New York City, Oregon, Philadelphia,[1] Puerto Rico, and San Francisco have enacted similar restrictions.[2] Additionally, numerous other states and localities (including Maryland, New York, Rhode Island, Texas, the District of Columbia and Virginia) are currently considering similar bans.

Generally speaking, salary history bans prohibit employers from asking applicants about their prior compensation during the hiring process. In addition, many salary history bans prohibit employers from using information concerning applicants' prior compensation in making and negotiating salary offers. Although each jurisdiction's law varies, the common intention of these bans is to minimize or eliminate pay disparities between male and female workers. By eliminating prior compensation as a factor in hiring decisions and salary negotiations, the laws seek to prevent employers from inadvertently perpetuating historical pay bias or discrimination.

A report by the New York City Council's Committee on Civil Rights concerning the city's salary history ban legislation, for example, notes that "[r]enewed focus on closing the gender wage gap has led many states, including New York, to pass legislation strengthening equal pay provisions by targeting some of the factors that perpetuate the gender pay gap." The report goes on to state that, "[w]hile these measures increased transparency and made it more difficult for wage differentials to remain

[1] Philadelphia's law is currently stayed pending a federal lawsuit by the Philadelphia Chamber of Commerce alleging that it violates the First Amendment, the Due Process Clause, the Commerce Clause, and Pennsylvania's Constitution.

[2] In August 2017, the Illinois legislature passed a statute which would have prevented employers from: (1) screening job applicants based on their wage or salary history; (2) requiring that an applicant's prior wages satisfy minimum or maximum criteria; or (3) inquiring about or requiring the disclosure of a job applicant's salary history (including benefits or other compensation). On August 25, 2017, Governor Bruce Rauner vetoed the bill. On October 25, 2017, the Illinois House voted to override the Governor's veto. On November 9, 2017, however, the Illinois Senate failed to override the Governor's veto. Other jurisdictions, including Pittsburgh and New Orleans, have enacted laws or issued executive orders prohibiting salary history inquiries in the public sector only.

undetected, many advocates have endorsed prohibiting employers from seeking prospective employees' salary histories as a means of proactively addressing the 'anchoring effect' that salary histories, which follow women throughout their careers, can have on the gender pay gap."

Philadelphia's salary history ban also addresses this "anchoring effect" in its findings, observing that "[s]ince women are paid on average lower wages than men, basing wages upon a worker's wage at a previous job only serves to perpetuate gender wage inequalities and leave families with less money to spend on food, housing, and other essential goods and services." Similarly, the synopsis of Delaware's salary history ban notes that "[w]hen employers ask prospective employees for their wage or salary history, it perpetuates disparities in pay based on gender from one job into another." Many other salary history bans also discuss – either in the text of the bans themselves or in their legislative history – current wage disparities and the potential perpetuation of such disparities as a result of routine employer salary inquiries.

**Big Apple Ban**

Last spring, New York City became the third state or locality to impose prohibitions on employer salary history inquiries, amending the New York City Human Rights Law to prohibit employers, employment agencies, and their agents from: (1) inquiring[3] about an applicant's salary history[4]; and/or (2) relying on an applicant's salary history in determining the salary, benefits or other compensation[5] for that applicant during the hiring process, including as part of the negotiation of a contract. The law went into effect on October 31, 2017.

In response to concerns raised by businesses and employers, NYC's law contains several important carve outs. The law does not, for example, prohibit employers from considering and verifying salary information where an applicant voluntarily and without prompting discloses his or her salary history. In addition, employers may engage in discussions with an applicant about his or her salary expectations, including asking whether an applicant will have to forfeit unvested equity or deferred compensation (and the value and structure of any forfeited deferred compensation or unvested equity) if the applicant leaves a current position. The law also does not apply to current employees of an employer, including applicants for internal transfers or promotions.

A frequently asked questions ("FAQs") page published last month by the New York City Commission on Human Rights (the "Commission") offered several additional, important details about the law's

[3] "Inquiry" is defined broadly to mean "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," as well as searching publicly available records. It does not, however, include informing an applicant about a position's proposed or anticipated salary or salary range.

[4] "Salary history" is also defined broadly to include an applicant's "current or prior wage, benefits or other compensation," though it does not include any "objective measure of the applicant's productivity, such as revenue, sales or other production reports."

[5] The terms "compensation" and "benefits" are defined broadly and "may include many factors, including, but not limited to, a car allowance, retirement plan, or bonuses."

coverage. With regard to the law's geographic scope, for example, the Commission clarified that if an applicant is asked about salary history during a job interview that occurs in New York City, there likely will be coverage under the law, regardless of whether or not the job is substantially based in NYC or whether the applicant is a resident of New York City.[6] The Commission's FAQs also made clear that the law applies to: (1) headhunters, search firms, and other agents working on behalf of employers and/o applicants; and (2) independent contractors. As a result, employers working with headhunters should obtain a copy of the applicant's written consent before relying on a headhunter's representations about an applicant's salary history.

**The Trend Goes West**

Last month, California became the largest state to adopt a salary history ban. On October 12, 2017, Governor Jerry Brown signed into law a statewide salary history inquiry ban that will largely restrict employers in the state from seeking or relying upon salary history information from applicants during the hiring process. The law, which will go into effect on January 1, 2018, will apply to all private and public sector employers. The law will prohibit employers from: (1) relying on salary history as a factor in determining whether to offer employment to an applicant or what salary to offer; or (2) seeking, orally or in writing or through an agent, salary history information about an applicant. Interestingly, the law will also require an employer, upon reasonable request by an applicant, to provide the pay scale for a position.

Like New York City's law, California's law expressly permits employers to consider salary history information disclosed voluntarily and without prompting by an applicant. Additionally, employers may review and consider salary history information that is publicly available pursuant to federal or state law. However, the law reiterates that, consistent with the state's currently existing equal pay law, employers may not rely upon applicants' voluntarily disclosed salary history, by itself, to justify any disparities in compensation.

**Federal Efforts Fall Flat**

Despite the clear momentum salary history laws are enjoying nationwide, efforts at the federal level continue to struggle to gain footing.

In September, Congresswoman Eleanor Holmes Norton once again introduced The Pay Equity for All Act. The bill seeks to amend the Fair Labor Standards Act to, among other things, prohibit employers from: (1) screening applicants based on their previous wages or salary histories; or (2) seeking the prior wages or salary history of any prospective employee from any current or former employer of such employee. Similarly, the Paycheck Fairness Act, sponsored by Connecticut Rep. Rosa DeLauro and Sen. Patty Murray of Washington, most recently introduced in April, would, among other things: (1) prohibit employers from screening job applicants based on their salary history, or requiring them to provide their salary history during the interview or hiring process; and (2) require employers to prove that pay

[6] The law likely will not apply, however, where the applicant simply resides in New York City but is both interviewed and will work outside of New York City.

disparities exist for legitimate, job-related reasons. Neither bill, however, is expected to gain traction as long as long as the Republican Party controls Congress and the White House.

**The EEOC Enters The Fray**

This month, the U.S. Equal Employment Opportunity Commission ("EEOC") asked the Ninth Circuit to allow it to participate in an upcoming rehearing of a ruling allowing the Fresno County School District to pay employees based on their past salaries. The lawsuit, brought by a female math consultant who learned that she was earning less than male colleagues under the district's policy of paying new teachers 5 percent more than they earned at their previous jobs, raises the question of whether compensation policies based on past salaries may be used to establish that a pay disparity between similarly situated female and male employees is based on a "factor other than sex." It is the EEOC's position that such a practice violates the Equal Pay Act by institutionalizing the gender pay gap.

**Key Takeaways**

As discussed above, many employers are currently operating – or will soon be operating – in jurisdictions prohibiting salary history inquiries. And, employers who operate in states and localities that have not yet passed salary history bans are unlikely to be able to ignore salary history prohibitions for long. As a result, employers are well advised to invest time and resources into ensuring compliance with salary history bans now.

Although each salary history ban is unique, the salary history bans that have been passed or are currently being considered share enough commonalities to develop the following helpful guidelines.

Generally speaking, employers cannot or should not ask external applicants about, or prompt them to reveal, their salary, compensation or benefit history. Employers should also strictly avoid asking external applicants about the lowest compensation they are willing to accept or the forms of compensation they receive or have received from their current and former employers (including, for example, discretionary or nondiscretionary bonuses).

Employers may not avoid these restrictions by seeking the information from other sources. Indeed, some of the salary history bans prohibit employers from asking an external applicant's current or former employers for information about his or her current compensation or compensation history. And, some bans go so far as to prohibit (expressly or by implication) employers from conducting online or other research to try to determine an external applicant's compensation history or the compensation paid by his or her current or former employer.

Although most salary history bans allow employers to ask an applicant about his or her salary expectations, it is best practice to: (1) do so in writing; and (2) expressly state that the applicant is not being asked to disclose his or her salary history. Similarly, although some salary history bans make exceptions for salary information voluntarily disclosed by an applicant, employers are well advised to document (contemporaneously, if possible) that disclosure in writing, being sure to note that the applicant was not asked by the employer or any of the employer's agents to disclose such information.

Even when an applicant does disclose salary history information, employers should refrain from considering an applicant's current or prior compensation at ***any*** stage in the hiring process (including during initial screenings, interviews, job offers, and/or salary negotiations). And, if an applicant declines to disclose his or her current or prior compensation, employers should never refuse to hire or otherwise retaliate against the applicant.

So what else ***should*** employers do? First, employers should immediately begin taking steps to educate their recruiters, hiring managers, human resources personnel, and others involved in the interview and hiring process of the new prohibitions on salary history inquiries. Employer should also carefully review applicant screening and hiring policies, and job applications and other hiring documents now to ensure compliance with current laws. As part of this review, employers should consider whether to implement standardized interview and salary negotiation scripts that can be used by the employer and its agents (such as headhunters or job placement agencies) during the hiring process.

The use of external recruiters or job placement agencies can be risky when it comes to salary history information. Some laws, for example, make clear that an employer can be liable if a recruiter or agency violates the law during the course of its services for the employer. Accordingly, employers should explicitly address recruiters' obligations in their retainer agreement. Employers can either require recruiters to obtain written consent (on a form provided by the employer) from prospective applicants before discussing their current compensation or comply with the employers' policies prohibiting such discussions.

Finally, it is critical that employers consult with legal counsel to ensure that they comply with all applicable laws because they have important differences. Some of the laws, for example, are drafted broadly; others contain a number of specific exemptions. Some of the laws apply to internal applicants; others do not. Likewise, some of the laws apply to independent contractors and third parties such as recruiting agencies; others do not. Some – like San Francisco's law – even apply to employers providing salary history information about a current or former employee to any prospective employer. And, in California, employers now have an affirmative obligation to provide, upon reasonable request by the applicant, the pay scale for a position. As a result, employers should carefully review the salary history laws of each of the states and localities in which they operate and include legal counsel in the development of compliant policies and training programs.

Salary history laws continue to gain momentum and, given the EEOC's interest in the subject, are undoubtedly here to stay. Whether these new laws will help to address discriminatory hiring practices and reduce the gender pay gap, however, remains to be seen.