



OCTOBER 2017

## New York City's New Salary History Law: What Employers Need to Know

New York City's new salary history law, which restricts employers from inquiring about and using a job applicant's salary history, goes into effect on October 31. The New York City Commission on Human Rights (NYCCHR) has established a [website](#) with information about the law, including fact sheets for employers and employees, and a set of [frequently asked questions \(FAQs\)](#).

The new law applies to all employers, regardless of size, and to all jobs located in New York City, as well as to job interviews held in New York City, even if the location of the job is outside of the city. Although the FAQs don't provide further detail, they state that if a practice prohibited by the law takes place outside of New York City, but its impact is felt in New York City, the law may apply. A job applicant's residency in New York City, alone, is insufficient to make the law apply, however.

Similar laws aimed at addressing gender-based wage disparities have been enacted by lawmakers, both state and local, around the country. Earlier this month, California Gov. Jerry Brown signed into law a measure prohibiting employers from either seeking or relying on salary history as a factor in either offering employment to an applicant or determining what salary to offer. In passing this law, which goes into effect January 1, 2018, California joins Massachusetts, Oregon and Delaware

in enacting statewide prohibitions against salary history inquiries. The cities of San Francisco and Philadelphia have also enacted similar local laws.

### Restrictions Under the New York City Law

The law prohibits an employer, employment agency, employee or agent from doing *either* of the following:

- Inquiring about the salary history of a job applicant.
- Relying on salary history in determining the salary, benefits or other compensation for an applicant during the hiring process, including the negotiation of a contract.

The law not only prohibits these inquiries made directly to a job applicant, but also prohibits inquiries made to an applicant's current or prior employers (and their employees and agents), as well as searches of publicly available records or reports for the purpose of obtaining an applicant's salary history.

Salary history is broadly construed to include an "applicant's current or prior wage, benefits or other compensation," including, for example, car allowances, bonuses and retirement benefits. In industries where employees are compensated based on a profit

*This publication may constitute "Attorney Advertising" under the New York Rules of Professional Conduct and under the law of other jurisdictions.*

percentage, an applicant's salary history also includes such profit percentage. Salary history, however, does not include any objective measure of an applicant's productivity, such as revenue, sales or other production information.

According to the FAQs, an inquiry into an applicant's salary history still violates the law even if the applicant is told he or she need not answer the question. Thus, a multistate employer may not use a job application that asks for an applicant's salary history, even if the application expressly states that the question is optional for applicants for New York City jobs.

### **Exceptions and Permitted Acts Under the Law**

- If an applicant voluntarily and without any prompting discloses his or her salary history, an employer may (1) consider the salary history in determining the applicant's compensation and other benefits and (2) verify the disclosed salary history (e.g., through an inquiry to a prior employer or a background check).
- An employer may ask an applicant about his or her expectations with respect to salary, benefits and other compensation.
- An employer may ask an applicant if he or she has unvested equity or deferred compensation that would be forfeited or canceled as a result of the applicant's resignation from his or her current employer.
- An employer may inform an applicant for a position about the position's proposed or anticipated salary or salary range.
- An employer may ask an applicant about any objective measure of the applicant's productivity, such as revenue, sales or other production information.
- The law does not apply to applicants for a transfer or promotion within their current employer.
- After an individual has been hired and his or her salary has been set, an employer may ask about his or her salary history.
- An employer may ask an applicant about competing offers and counteroffers that the applicant has received and the value of those offers.
- An employer may perform background checks if these checks do not include a request for, or confirmation of, a prior salary history (unless such salary history was provided by the applicant voluntarily and without prompting). If the background checks nevertheless reveal salary history, the employer may not use the information to determine salary, benefits or any other compensation.
- An employer may take actions pursuant to any federal, state or local law that specifically authorizes the disclosure or verification of salary history for employment purposes, or specifically requires knowledge of salary history to determine an employee's compensation.
- 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.

### **Agents/Headhunters**

The law does not exempt headhunters or other agents. Headhunters and agents who work for employers are governed by the same restrictions. To the extent that a headhunter or other agent works on behalf of an applicant, the headhunter or agent may disclose an applicant's salary history only if the applicant

consents to the disclosure. To protect against liability, an employer should obtain a copy of an applicant's written consent authorizing the headhunter's or agent's disclosure before relying on the disclosed salary history.

### **Corporate Acquisitions**

The FAQs clarify that prospective buyers of a business may obtain salary information about the seller's employees as part of the due diligence process, on the basis that, in the context of an acquisition, the seller's employees are not "job applicants" within the meaning of the law. However, the FAQs indicate that whether buyers may use salary history information in setting the future compensation of the employees will depend on the facts and circumstances. In short, salary history information may be used when making compensation and structural decisions on a non-individualized basis. However, if a seller's employees are asked to interview for positions with the buyer, the law may be implicated, and the buyer's employees or agents who are privy to the salary history information should not share such information with the buyer's employees who will make the hiring decisions.

### **Temporary Employees and Independent Contractors**

According to the FAQs, whether an employer may consider the salary history of a temporary employee or an independent contractor in determining compensation for an offer of regular employment to such individual in a same or comparable position depends on the circumstances. The NYCCHR will consider whether the temporary employee or independent contractor qualifies as an applicant for a new position or for internal transfer or promotion. If the employer is a joint employer of the individual, the application may be one for internal transfer or promotion, which is not covered by the law.

### **Penalties and Remedies**

The NYCCHR may impose a civil penalty of up to \$125,000 for an unintentional violation of the law and up to \$250,000 for a willful violation of the law. Individuals may bring lawsuits in New York state court for violations of the law, in which they may be awarded damages, including compensatory damages, punitive damages and attorneys' fees.

### **What Employers Should Do Now**

- Remove salary history inquiries from employment applications and other forms used in the hiring process.
- Instruct background check vendors to not include salary history requests in their forms and to refrain from reporting any salary history information they nevertheless obtain.
- Train human resources employees, managers and all other persons involved in the hiring process (including all interviewers) on the law and its restrictions, and create policies to ensure compliance with the law.
- Coordinate with recruiters and headhunters to ensure that they will comply with the law with respect to jobs located in New York City.
- Confirm that any applicant's disclosure of salary information is voluntary, which does not include telling the applicant that such disclosure is optional.
- Document any applicant's voluntary disclosure of salary information in an internal file memo describing the circumstances of the disclosure, making clear it was voluntarily made, without any prompting.

If you have any questions about the above or seek assistance in complying with the law, please feel free to contact [Mark Goldberg](mailto:Mark.Goldberg@loeb.com) at [mgoldberg@loeb.com](mailto:mgoldberg@loeb.com) or 212.407.4925.

This alert is a publication of Loeb & Loeb and is intended to provide information on recent legal developments. This alert does not create or continue an attorney client relationship nor should it be construed as legal advice or an opinion on specific situations.

© 2017 Loeb & Loeb LLP. All rights reserved.

### *Employment and Labor Practice*

MARLA ASPINWALL	MASPINWALL@LOEB.COM	310.282.2377
IVY KAGAN BIERMAN	IBIERMAN@LOEB.COM	310.282.2327
MARC CHAMLIN	MCHAMLIN@LOEB.COM	212.407.4855
PAULA K. COLBATH	PCOLBATH@LOEB.COM	212.407.4905
MARK J. GOLDBERG	MGOLDBERG@LOEB.COM	212.407.4925
MICHELLE LA MAR	MLAMAR@LOEB.COM	310.282.2133
MICHAEL Z. MAIZNER	MMAIZNER@LOEB.COM	212.407.4176
ERIN M. SMITH	ESMITH@LOEB.COM	310.282.2113
MICHAEL P. ZWEIG	MZWEIG@LOEB.COM	212.407.4960