

NYC Poised to Ban Salary History Inquiries

Earlier this year, New York City enacted a law that restricts employers from asking applicants about their compensation and benefits history during the hiring process. The New York City Commission on Human Rights recently issued guidance for employers and applicants on the new law that will take effect on October 31. Employers should update their applicant screening and hiring practices, and train employees involved in the hiring process, to ensure compliance.

Background

Last year, New York City Mayor de Blasio signed an [executive order](#) prohibiting city agencies from making pre-offer inquiries about an applicant's pay history. On May 4, he signed into law [legislation](#) that places similar restrictions on private employers. The new law will bar employers from relying on salary history to screen applicants, evaluate their candidacy, or formulate job offers when it goes into effect on October 31. (See our [May 10, 2017 For Your Information](#).)

New Restrictions

The New York City Commission on Human Rights (NYCCHR) recently posted on its [website](#) guidance on the new restrictions on salary history inquiries. The site contains two one-page fact sheets that answer questions from the perspective of [employers](#) and [job applicants](#), as well as a set of [Frequently Asked Questions](#) (FAQs) that suggest the law will be aggressively enforced. The following are some of the key highlights and important clarifications for employers from the guidance.

Who's Covered

The law applies to employers of any size that are hiring in NYC. Its salary history protections extend to most applicants for full-time, part-time or internship positions that are based in the city, as well as to independent contractors who do not have their own employees. Applicants for internal transfer or promotion with their current employer, and applicants for public employee jobs for which compensation is set pursuant to collective bargaining, are not covered by the new law. However, the mayor's 2016 executive order more broadly restricts city agencies from inquiring about or relying on applicants' salary history.



Comment. Earlier this year, the NYC Freelance Isn't Free Act went into effect, creating new rights and extending certain employee-like protections against wage theft to freelancers and independent contractors who work in the city. (See our [May 4, 2017 For Your Information](#).) By extending protections against salary history inquiries to independent contractors, NYC has further blurred the distinction between employee and independent contractor.

While the new law unquestionably applies to NYC employers interviewing NYC residents applying for jobs in the city, it is not entirely clear whether it will protect applicants in other common scenarios. The NYCCHR recognizes that the law would not apply where the applicant lives in NYC, but is interviewed and will work outside the city. However, it suggests that the law may apply if a prospective employer asks about salary history while interviewing candidates in NYC even if the job is based outside the city.

Prohibited Practices

With certain limited exceptions, the new law prohibits an employer from seeking, considering or relying on an applicant's salary history information during the hiring process, and makes it a discriminatory employment practice for an employer or an employment agency to:

- Ask applicants or their current or former employers (or the employers' agents or employees) about an applicant's compensation and benefits history
- Search public records to obtain salary history
- Rely on applicants' salary history in determining their salary, benefits or other compensation during the hiring process, including the negotiation of a contract

The salary history ban will not apply when:

- Federal, state or local law specifically authorizes the disclosure or verification of salary history
- Applicants are seeking internal transfers or promotions with their current employer, or public employee positions for which salary, benefits or other compensation are determined pursuant to collective bargaining
- Applicants voluntarily and without prompting disclose their compensation history
- Verifying applicants' disclosure of non-salary related information or background checks, provided the employer does not rely on any salary history disclosed during that process in determining or negotiating a job offer

Permissible Practices

The new law will not prevent an employer from informing an applicant of a position's anticipated salary or salary range. Nor will it bar an employer from discussing the prospective hire's expectations with respect to "salary," "benefits" and "other compensation," including the value and structure of any deferred compensation or unvested equity that the applicant would forfeit or have cancelled by switching jobs. Employers may also ask about any competing or counteroffers. The NYCCHR defines benefits and other compensation broadly to include car allowances, retirement plans, and bonuses, among other things.

While an employer may not request salary history during the hiring process, it may ask for objective measures of an applicant's past productivity, such as revenue or sales. However, the FAQs caution that employers should not ask

about the amount of earned commissions. Once the applicant has been hired and compensation set, the restriction on salary history inquiries no longer applies.

Job Applications

While a job application may ask for compensation expectations or demands, it cannot request applicant salary history, even if it makes clear that a response is voluntary. Under the new law, employers that use a standard or multistate form that requests salary history information will not avoid liability by indicating that applicants in NYC or applying for jobs in NYC need not provide it.

Background Checks

The NYC Human Rights Law limits when and under what circumstances employers may conduct criminal and credit history background checks. While the new law does not bar background checks, the NYCCHR recommends that employers advise reporting agencies to exclude salary history from their reports. Whether salary history inquiries are made before or after a conditional job offer, they will violate the new law unless made to verify the accuracy of disclosures made by the applicant “voluntarily and without prompting.”

Similarly, employers may only ask for a W-2 to verify an applicant’s freely given representations about salary history. However, unless otherwise required by federal, state or local law, an employer would not be permitted to ask for a W-2 in all other circumstances, even after a conditional offer is made and compensation levels are set.

Voluntary Disclosures

To the extent that applicants “voluntarily and without prompting” disclose compensation history, employers may verify its accuracy and rely on the volunteered information in formulating a job offer.

Acquisitions

The FAQs clarify that, in the acquisition context, the target company’s employees are not considered applicants under the NYC law. Thus, a company seeking to acquire another may obtain salary information about the target company’s employees as part of the due diligence process, and use the information when absorbing employees from the target company and making compensation and structural decisions on a non-individualized basis. However, the NYCCHR suggests that the law may be implicated if employees of the target company are being asked to interview for positions with the acquiring company. In those situations, it suggests that salary information disclosed during due diligence not be shared with hiring managers making compensation decisions.

In Closing

With limited exceptions, NYC employers will be barred from requesting or relying on an applicant’s salary history to formulate a job offer during the hiring process. Employers should update their employment applications and hiring practices, and train employees involved in the hiring process, to ensure compliance.

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