

CLIENT ALERT: New York City Salary History Ban Takes Effect On October 31, 2017 – By Jeffrey S. Siegel and Gabriel S. Gladstone

Effective October 31, 2017, New York City has amended the New York City Human Rights Law to make it an “unlawful discriminatory practice” for employers to inquire about the salary history of a job applicant, or to rely upon salary history unless the applicant offers the information voluntarily.

Specifically, an employer in New York City or an employer conducting an interview in New York City is prohibited from requesting salary information from an applicant or from the applicant’s prior employer, or from conducting a search of public records to obtain the applicant’s salary history. An employer may not rely upon the salary history of an applicant in determining the compensation offered.

Under the law, an employer is permitted to inform the applicant of a position’s proposed salary or salary range. An employer is also permitted, without inquiring about salary history, to “engage in discussion with the applicant” about the applicant’s expectations as to compensation, which may include discussion of unvested equity or deferred compensation that an employee would forfeit by resigning from the applicant’s current employer. An employer may also inquire regarding objective measures of the applicant’s performance, such as revenue or sales. The statute does not prohibit an employer from verifying an applicant’s non-salary information, or from conducting a background check. If a verification or background check results in the disclosure of an applicant’s salary history, however, the salary information may not be relied upon by the employer in determining compensation.

In recently-published FAQs, the New York City Commission on Human Rights states that job applications may not include a request for information about salary history for jobs or employees in New York City. The Commission warned that “simply adding a disclaimer” to a general application that individuals

in New York City or applying for jobs located in New York City need not answer the question is insufficient to comply with the law. The Commission also takes the position it is unlawful to ask for salary history on a general application even if the application states that providing the information is voluntary.

The law contains several narrow exceptions. Where an applicant “voluntarily and without prompting” discloses the applicant’s salary history to the employer, the employer is permitted to consider the salary history in determining compensation. The employer may also verify the applicant’s salary history, if provided voluntarily. The statute does not apply to applicants for internal transfer or promotion, nor does it apply to public employees whose compensation is determined by a collective bargaining agreement.

Like the other provisions of the New York City Human Rights Law, the salary history statute will be enforced by the New York City Commission on Human Rights. The Commission, on its own investigation, 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.” Individuals may bring civil actions against employers for alleged violations of the statute and recover lost wages, compensatory damages, punitive damages, and attorneys’ fees.

With the implementation of this law, New York City joins Philadelphia, San Francisco, California, Massachusetts, Oregon, and Puerto Rico as jurisdictions which are moving towards prohibiting or have prohibited questions about an applicant’s salary history. Employers are advised to review their job application, interview, and hiring policies to ensure compliance with the new law. Employers should also review their background check process to avoid requesting prior salary information, consistent with the New York City law. Finally, employers must take steps to actively train human resources and recruiting employees on the limitations set out by this new law. Employers are advised to consult with their M&J attorney discuss any specific questions about the implementation of the statute or the other locations scheduled to prohibit salary history inquiries.

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