

Beware: NYC Ban on Asking for Salary History Effective on Halloween: Employers Receive Guidance on Implementation

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As we wrote about in [April](#), starting on October 31, 2017, a NYC law will make it unlawful for employers of any size to inquire about a job applicant's salary history during the hiring process by either: (1) asking about compensation history on a job application or during the interview process; or (2) conducting internet or other searches, contacting prior employers or running background checks in an effort to determine the applicant's compensation history. Employers can only use an applicant's compensation history to build a job offer if the applicant "unprompted" and "willingly" discloses that information.

The NYC Commission on Human Rights has now published [Frequently Asked Questions](#) to guide employers on application of the law. First, the Guidance indicates that the ban applies to candidates interviewing in NYC, and to candidates applying for jobs in NYC. Therefore, if a candidate interviews in NYC for a job in New Jersey, the ban applies. On the flip side, if an interview is conducted in Connecticut for a NYC based job, the ban would also apply. However, the Guidance signals that the ban does not apply where the applicant simply resides in NYC, but is interviewed, and will work, outside of NYC. The Guidance also clarifies that the law applies to new hires and is not intended to apply to applicants for internal promotions or transfers. Also, in the M&A context, a company can seek salary history from the target as part of due diligence, but can only use that information if the acquirer will hire the employees without requiring them to interview. The Guidance also recommends that the prior salary history not be shared with hiring managers making compensation decisions.

Other key takeaways from the Guidance are below:

What information is an employer permitted to ask?

A job application can request information about applicants' compensation *expectations* or *demands*, but may not include a request for prior salary history, even if the employer makes clear that a response is voluntary. And for multistate employers seeking to use one application form, the Guidance cautions that employers will not avoid liability by using a disclaimer that individuals interviewing in NYC, or applying for jobs in NYC, need not answer the salary history questions. Also, employers can only ask for a W-2 to verify voluntary, unprompted salary disclosures. Otherwise, a request for a W-2, even after a conditional offer is made and compensation is set, is not allowed unless otherwise required by law. Prospective employers are allowed to ask applicants about competing offers. Employers can also ask if the candidate will forfeit deferred compensation or unvested equity, and the value and structure of same, as well as

request verifying documentation. That information can be considered in making the applicant an offer.

What is a “voluntary” and “unprompted” disclosure?

The average job applicant would not think that the employer encouraged the disclosure based on the overall context and the employer’s words or actions.

How is “compensation” defined?

Compensation should be interpreted broadly and includes more than base salary: a car allowance, retirement plan or bonuses are also deemed to be part of compensation. For commission salespeople, prospective employers should not ask about the amount of commission earned, “but may ask about objective indicators of performance such as the volume, value, or frequency of sales.” Similarly, in industries where employees are compensated based on a profit percentage, employers may not ask about an applicant’s current or former profit percentage, but can ask about the size of the applicant’s book of business, profits generated and other objective indicators of performance.

Are there any exemptions?

Generally, no. For example, there are no exemptions for actions taken pursuant to foreign or international law that specifically authorizes the disclosure or verification of salary history or requires knowledge of salary history. There is no exemption for headhunters or agents, and the Guidance cautions employers to have the headhunter obtain, and provide, a copy of the applicant’s written consent authorizing the disclosure of prior compensation history before relying on the headhunter’s representation that consent was obtained, or the information was voluntarily provided.

Best Practices

The Guidance emphasizes the importance of staying away from any salary history questions, and recommends questions relating to applicants’ salary demands, skills and qualifications. Training and modification of hiring policies is also recommended.

A growing number of states and cities are enacting salary history laws that make it unlawful for employers to ask job applicants their salary history during the hiring process in an effort to stop the perpetuation of wage gaps as individuals change jobs. Delaware, Massachusetts, Oregon, Puerto Rico, San Francisco and Philadelphia (ban stayed pending challenge) have all passed legislation banning employers from asking applicants about their compensation history. Most recently, on October 12, 2017, California’s governor, Jerry Brown, signed a similar law that will become effective January 1, 2018. Connecticut, New Jersey, Pennsylvania, Rhode Island, Berkeley and Washington D.C. are considering salary

bans.



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