Published on *The National Law Review* https://natlawreview.com

Equal Pay Update: The New York City and California Salary History Inquiry Bans

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Recently, there has been a tremendous focus on equal pay issues across many industries. Proponents of equal pay have focused, among other things, on the use of prior compensation to determine future compensation, believing that doing so maintains existing pay inequities. To prevent such results, the newest trend in equal pay has included salary history inquiry bans. Both New York City and California have recently enacted laws that prohibit employers from asking for a job applicant's salary history and from relying upon that history unless it is voluntarily provided.[1] The New York City law became effective on October 31, 2017, and the California law becomes effective on January 1, 2018. With these new laws, and financial services being heavily represented in both regions, financial services firms should take a hard look at their current hiring and compensation practices to avoid unwittingly violating the law.

Both the New York City and California laws prohibit seeking salary and other compensation information directly from employees and from recruiters or other sources (such as Internet searches and the like). Thus, it is important for the compliance effort to encompass the appropriate individuals who may be involved in the process to make them aware of the new laws.

Key Differences Between the New York City and California Salary History Inquiry Bans

The New York City law expressly allows employers to initiate discussions regarding an applicant's salary expectations and desires. Further, the New York City law allows employers to ask whether an applicant will have to forfeit deferred compensation or unvested equity as a result of the applicant's resignation from his or her current employer. In addition, in New York City, employers may ask about employee production and experience, such as revenues, sales, deals, and contacts. These questions may be key for financial services employers hiring revenue producers and other front-line personnel. New York City employers may also ask about the value and structure of the deferred compensation or unvested equity, request documentation to verify the applicant's representations, and consider such information in making the applicant an offer. The California law is silent on all these issues.

The California law requires that, upon reasonable request, employers provide a pay scale to applicants. The California law also reaffirms an aspect of California's Equal Pay Act that prohibits

employers from justifying a pay disparity on prior salary alone. Thus, while employers may consider voluntarily disclosed salary information, they may not rely on salary history alone to justify pay discrepancies between workers of different genders or ethnicities who are performing substantially similar work. The New York City law does not contain this same restriction. Further, to the extent that there is a voluntary disclosure in California, employers may not rely on the salary history information in deciding whether to hire the individual.

What Employers Should Do Now

To ensure compliance with the new bans on salary history inquiries, employers should take the following steps:

- Remove questions about salary history from employment applications, background check forms, and any other applicable forms or policies used during the hiring process.
- Train human resources staff, managers, recruiters, and any other individuals who may interview the candidates to not seek salary history information during discussions with candidates.
- Ensure that any disclosure of salary history, if it occurs, is purely voluntary and without prompting. This means that it is not permissible to pose a question about an applicant's salary history with a caveat that answering the question is not mandatory.
- Create a "memo to file" if a voluntary disclosure is made, noting the voluntary disclosure and the circumstances under which it was made.
- Coordinate with any external background-checking vendors to ensure that background check forms do not request salary history and that a vendor does not request salary history when confirming prior employment.
- Synchronize with external recruiters and headhunters to make sure that they will not provide an applicant's salary history.
- Consider amending contracts with external recruiters to place them on notice about their obligations under the new laws, require compliance with the laws, and provide for indemnification for claims made against you based on the external party's violation of the laws.
- If your organization operates in California, prepare pay scales for open job positions and identify the objective factors (such as training, education, and experience, provided that they are required for the position) that will determine where within the applicable range an offer will be made.
- If your organization operates in multiple locations, decide whether to adopt a nationwide or location-specific approach:
    - While adopting a nationwide approach for administrative or public policy reasons may simplify matters, determine whether it would also lead to problems, such as the creation of unnecessary obligations or the denial of business salary information that your organization could otherwise have access to in jurisdictions where there is no

such law.

- If adopting a nationwide approach, consider including a caveat in certain forms or training materials (where permitted) that, at a minimum, reserves the right to seek salary history information in any jurisdiction where these questions are allowed.

- If you take a location-specific approach, make sure that electronic onboarding and other tools do not inadvertently continue to ask for (or store) salary history from applicants based in New York City or California.

National Law Review, Volume VII, Number 333