

NYC Issues Additional Guidance on Upcoming Salary Inquiry Prohibitions

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Effective October 31, 2017, New York City employers generally may not inquire about or rely upon a job applicant's salary history in making employment decisions. The New York City Commission on Human Rights (NYCCHR) previously released an [Employer Fact Sheet](#) and a [Job Applicant Fact Sheet](#) to assist employers and employees with understanding the law.

The NYCCHR has now added a "[Salary History Law: Frequently Asked Questions](#)" section to its website. (See our article, [NYC Enacts New Law Limiting Prospective Employers' Ability to Obtain and Use Salary History](#), for details of the law.)

The following are key highlights from the fact sheet for employers:

- The law applies to all employers in New York City, regardless of size. Employers with as few as one employee must comply with the law.
- The law also is broad in regards to protection. That is, most applicants for new employment in New York City will be covered (*e.g.*, full-time, part-time, internship, and independent contractors without employees).
- However, the law does not apply to job applicants for internal transfer or promotion with their current employer and applicants for positions with public employers for which compensation is set pursuant to a collective bargaining agreement.
- In addition to prohibiting employers from inquiring about salary history on job applications or through prior employers, the law prohibits employers from searching public records for such information.
- Furthermore, employers may not rely on any earnings or benefits information uncovered accidentally (*e.g.*, while verifying non-salary information, such as work history, responsibilities, or achievements).
- Employers are still free to make statements about the anticipated salary, salary range, bonus, and benefits for a position and inquire about applicants' expectations or requirements for salary, benefits bonus or commission structure.
- If the job applicant makes a voluntary and unprompted disclosure of his or her salary history to the prospective employer, the employer may consider salary history in determining the prospective employee's salary, benefits, and other compensation, and verify the applicant's salary history.
- Further, employers are not prohibited from asking job applicants about objective indicators of work productivity, such as revenue, sales, production reports, profits generated, or books of business.
- The Commission will investigate complaints and employers may be required to pay damages or a fine, and/or be subject to mandated training or posting requirements.

The following are key highlights from the FAQs:

- *Location*: The salary prohibition will not apply if the job applicant merely resides in New York City (NYC), but is interviewed outside of NYC and will work outside of NYC.
- *Aiding and Abetting*: Third parties, such as former employers, may be held liable if they intentionally aid and abet a violation of the law. Furthermore, there is no exemption for agents or headhunters who work on behalf of job applicants, unless written consent to disclose salary history is obtained from the applicant.
- *Job Applications*: Employers with "boilerplate" job applications that request salary history information cannot avoid liability under the law by including general disclaimers for individuals applying in NYC.
- *Voluntary Disclosure*: Voluntary disclosure of salary history by the job applicant "without

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prompting” from the Employer means “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.” However, the FAQs states Employers can ask job applicants about competing offers from other prospective employers or counter offers the applicant has received.

- *Compensation*: “Benefits” and “other compensation” should be interpreted broadly and may include many factors, including but not limited to, a car allowance, retirement plan, or bonuses. In addition, Employers should avoid asking about the “amount of commission an applicant earned” and focus on performance indicators such as volume, value, or frequency of sales. Lastly, Employers may ask whether an applicant will have to forfeit deferred compensation or unvested equity from their current employer, including its value and structure. Employers may also verify this information with documentation and consider it when making an offer to the Job Applicant.
- *Corporate Due Diligence*: A company seeking to acquire another entity may obtain salary information about the employees of the target company as part of the due diligence process. In this case, the employees of the target company are not “job applicants” for purposes the law.

Prior to the effective date, New York City employers should review and modify their employment applications, interview protocols, and verification policies to exclude inquiries that relate to job applicants’ salary history.

Please contact Jackson Lewis with any questions regarding these developments, compliance, or government relations.

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