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Salary History Questions Are History

Prohibiting inquiries about an employment applicant's salary history is one of the latest efforts by lawmakers at various levels of government to close the wage gap between men and women and minorities and non-minorities. In addition to – or possibly in response to – a failed effort by Congress to amend the Fair Labor Standards Act to prohibit employers form asking job applicants for their salary history, a growing number of states and municipalities have enacted laws implementing various forms of pay inquiry bans. The rationale behind pay inquiry bans is that if employers set wages based on prior salary information, historic wage differences will be perpetuated to the continuing disadvantage of female and minority job applicants. As a result, setting employee pay based on the individual's salary history could have a discriminatory effect even though employers may not intentionally discriminate based on gender or race.

On the other hand, there are persuasive counterarguments and data that indicate that the persistence of the wage gap can be attributed to factors other than discrimination. And there are legitimate, nondiscriminatory purposes for which employers often rely on prior salary information. For example, employers may use prior salary data to learn about the market rate for any given position. Salary history can also inform employers about the amount and kind of compensation an applicant may expect to receive, thus informing employers about whether they can afford to hire a particular applicant. Salary histories can also be indicative of an individual's job performance with prior employers. To take advantage of these legitimate, nondiscriminatory uses for salary history, however, employers must be careful in crafting hiring policies that sufficiently screen applicants while still complying with the new pay inquiry bans.

Survey of Legislation Prohibiting Pay Inquiries

While all of the recent pay inquiry laws have the same goal – closing the wage gap – different states and municipalities have attempted to achieve that goal using different means. The current pay inquiry bans differ considerably in their scope and associated penalties, which can make compliance across jurisdictions a challenge for employers.

California

California is the latest state to ban inquiries into the salary history of job applicants. In October 2017, Governor Jerry Brown signed a bill into law that will prohibit public and private employers from seeking salary history information, including compensation and benefits, about any job applicant. However, if an applicant "voluntarily and without prompting" discloses pay history, the employer is permitted to consider or rely on that voluntary information in determining the salary for that applicant. Likewise, there is an exception that allows employers to seek out salary history information that is already publicly available or disclosable (such as under the California Public Records Act or federal Freedom of Information Act). The law also requires employers to provide the pay scale for any given position to an applicant.

The salary history ban does not apply to existing employees, so employers in California can still use an existing employee's salary to determine future pay and benefits. However, the law also expressly provides that prior salary alone is not enough to justify any disparity in compensation, meaning that California employers cannot rely on salary alone in deciding compensation for new or existing employees.

Employers will not be subject to criminal penalties under the new law, and there is no specific penalty for violation of the pay inquiry ban. However, employers in California who do not comply with the new law can still be vulnerable to civil suits under the state Private Attorneys General Act and California's unfair competition statute. The California pay inquiry ban goes into effect on January 1, 2018.

Delaware

Governor John Carney signed a bill into law in June 2017 that builds on prior legislation aimed to address the wage gap and went into effect on December 14, 2017. The Delaware law prohibits an employer from inquiring into an applicant's compensation history before an employment offer has been made and accepted. Once an offer of employment, including specific terms of compensation, has been extended *and* accepted, an employer may confirm salary history. The compensation inquiries prohibited by the law include information not only about monetary wages but also about benefits and other forms of compensation. Employers cannot seek compensation history to screen applicants or require minimum or maximum prior compensation criteria. An employer cannot seek the information from either the job applicant or his or her current or former employer.

Applicants may still voluntarily disclose pay history information, and an employer can still discuss and negotiate compensation expectations, as long as the employer or the employer's agent does not request or require the applicant's compensation history. Unlike the California pay inquiry ban, the statute does not explicitly prohibit reliance on salary history when setting compensation as long as applicants voluntarily disclose their pay history.

Notably, by the express terms of the law, employers are not liable for violation by their agents (such as recruiters) who were informed of the legal requirements of the Act and instructed to comply.

Violation of the Delaware pay inquiry ban can result in a civil penalty of between $1,000 and $5,000 for the first violation and between $5,000 and $10,000 for each subsequent violation.

Massachusetts

The Massachusetts Pay Equity Act was signed into law on August 1, 2016, and is scheduled to take effect on January 1, 2018. The law includes broad equal pay requirements, including provisions that make it an unlawful practice for an employer to seek the salary history of any prospective employee or screen applicants based on their wages. Prohibited screening includes requiring that applicants' prior wages satisfy minimum or maximum criteria. However, if an applicant gives written consent, an employer may confirm prior wages and benefits with a former employer—*after* an offer of employment with compensation terms has been made to the prospective employee. The Act prohibits inquiry about prior wages, as well as seeking information about benefits or other compensation. An employer cannot seek such information from the applicant or from the applicant's current or prior employer. Unlike the Delaware law, the Massachusetts Act does not require an employee to have also accepted the job offer. The Act also makes it unlawful to retaliate against employees who oppose an action or practice that is prohibited by law.

Also, if an employee seeks recovery for discrimination in the payment of wages, the employer cannot use an employee's prior salary as a defense. Employees are not required to file a charge of discrimination with the Massachusetts Commission Against Discrimination before bringing an action under the Act. However, there is an affirmative defense to liability when an employer has completed a good-faith self-evaluation of its pay practices and has made reasonable progress toward eliminating discriminatory compensation differentials within the previous three years before any suit for violation of the Act.

An employer in violation of the Act will be liable to the affected employee for the difference between the wages he or she earns and the wages earned by a comparator, including benefits or other compensation, as well as an equal amount of liquidated damages, reasonable attorneys' fees, and court costs.

New York City

On October 31, 2017, a local ordinance went into effect making it an unlawful discriminatory practice for New York City employers to inquire about an applicant's salary history *or* rely on salary history in determining the salary, benefits, or other compensation during the hiring process. The prohibition against inquiring about pay extends to negotiation of a contract, but employers are permitted to engage in discussions with an applicant about his or her expectations for salary, benefits, and other compensation as long as the employer does not inquire about salary history. Employers are not permitted to conduct any public information search to gain information about an applicant's salary history. Employers can verify salary and use salary history to determine compensation if salary history was supplied by the applicant willingly and without any prompting by the employer.

The New York City pay inquiry ban still permits an employer to inquire about and rely on prior salary of applicants for internal transfer or promotion with their current employer. It also allows employers to conduct a background check as long as any salary information obtained in a background check is not used to determine salary during the hiring process.

The New York City Commission on Human Rights will implement and enforce the pay inquiry ban. Violations of the law can result in civil penalties of up to $125,000 for an unintentional violation and up to $250,000 for a "willful, wanton or malicious act."

Oregon

The Oregon Equal Pay Act of 2017, effective October 2017, prohibits employers from asking about an applicant's salary history. Employers cannot ask an applicant about current or prior salary and may not base a newly hired employee's pay on past compensation. With written authorization of the prospective employee, employers can ask about past compensation after an employment offer is made with proposed compensation.

Like the Massachusetts law, Oregon provides a safe harbor for employers who have assessed their pay practice and made efforts to identify and eliminate discriminatory pay practices. To fall within the safe harbor, assessment of pay practices must be completed within three years of the filing of any lawsuit, and the employer must show reasonable efforts based on the analysis to eliminate any prohibited wage disparity. An aggrieved employee may, but is not required to, exhaust administrative remedies with the Oregon Bureau of Labor and Industries (BOLI) before filling suit. Finally, employers that violate the Equal Pay Act may be liable to employees for unpaid wages, although civil actions against employers who impermissibly seek salary history will not be permitted until January 1, 2024.

Philadelphia

In December 2016, Philadelphia enacted the Fair Practices Ordinance. The Philadelphia ordinance bans employers from inquiring about or relying on salary history when hiring a new employee unless the applicant knowingly and willingly discloses salary history. Employers can ask applicants about compensation history where state, local, or federal law allows for the verification of pay history. Philadelphia's pay inquiry ban was set to go into effect in May 2017, but the city has delayed enforcement due to a lawsuit by the Chamber of Commerce for Greater Philadelphia challenging the ordinance.

Puerto Rico

Puerto Rico enacted the Puerto Rico Equal Pay Act (Act 16) in March 2017. Among other requirements, Act 16 prohibits employers from inquiring into an applicant's salary history. An employer can inquire or confirm salary history if an applicant has voluntarily disclosed that information. The penalty provisions of Act 16 will go into effect on March 8, 2018.

San Francisco

The San Francisco Pay in Parity Ordinance prohibits employers from relying on salary history to determine whether to make an employment offer or what salary to offer an applicant. The ordinance also prohibits retaliating or refusing to hire an applicant who will not disclose salary history. Additionally, employers cannot, without written authorization from the employee, release salary information of current or former employees to prospective employers. Employers can consider salary information if an applicant discloses the information voluntarily and without prompting. Still, salary history alone cannot justify wage disparities for substantially similar work. The ordinance will be enforced by the Office of Labor Standards Enforcement (OLSE). Employers will receive a warning and notice to correct for the first violation, with escalating fines between $100 and $500 per subsequent violation. The ordinance will become operative on January 1, 2018.

Recommendations

Given the scope of the various pay inquiry bans, implementation of processes compliant with the new laws can be difficult for employers who want to implement uniform policies across jurisdictions. However, there are steps that employers can take to mitigate exposure to liability.

First, employers in jurisdictions with pay inquiry bans need to review employment applications and practices to ensure that there is no prohibited inquiry into, or reliance upon, prior salary information. Salary history questions must be removed from job application forms and new hire packets, both on paper and online.

Second, managers, human resources staff, and other employees and outside agents (such as recruiters) involved in hiring need to be trained on these requirements. Employers will need to develop new criteria and benchmarks for hiring decisions and setting compensation for new hires other than relying on salary history to inform decisions. Employers should determine compensation based on the current value of a given position in the market to set a predetermined range rather than relying on an applicant's past salary. Employers can use a candidate's education, experience, or unique skills to place the candidate higher or lower in the predetermined salary range. Instead of using pay history to determine a candidate's salary expectations, employers should inform the candidate of the predetermined range and ask the candidate directly about salary expectations.

Third, to the extent that employers in pay inquiry ban jurisdictions engage in inquiries that are permitted under applicable law, they should carefully document such communications in writing to avoid disputes after the fact about the nature and content of such communications.

Finally, employers should seek help from outside counsel to ensure their hiring policies, forms, and practices are in compliance with municipal, state, and federal pay equity laws.

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