

“Hiring Hazard” – NY City Employers May Soon Be Prohibited From Asking Applicants About Salary Histories

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On April 5, 2017, the New York City Council approved a bill which – once signed by the Mayor (a virtual certainty) – will prohibit private employers in the City from **asking about, relying on, or verifying** a job applicant’s salary history. Proponents of the bill argue that this will help to close the wage gap for women.

This bill follows an executive order signed by Mayor DeBlasio in November 2016, which prohibits New York City agencies from inquiring about the pay histories of job applicants for city positions.

Closing the wage gap is a laudable goal, but this bill will clearly make hiring more difficult. Indeed, when combined with other City laws that prohibit background checks (the Fair Chance Act) and asking about “employment status” – one begins to wonder - what can a prospective employer ask a job applicant?

It is also notable that this bill amends the New York City Human Rights Law, and thus creates a new claim for any disgruntled applicant to now file, which can be pursued at the City Commission on Human Rights, or directly in court. As with other New York City Human Rights Law violations, an employer found to have violated this law could be liable for compensatory damages, punitive damages, and attorneys’ fees and costs. Additionally, if an employer is found to be acting “willfully” or “maliciously,” it may be slapped with a civil penalty of up to \$250,000.

Thus, this is an area where employers will need to tread very carefully.

The Bill

The bill prohibits employers from “inquiring about” an applicant’s salary throughout the entire employment process, including when making an offer of employment or during contract negotiations.

The bill even prohibits employers from searching **publicly available records** to obtain an applicant’s salary history.

So, how do you legally hire and how do you understand an applicant’s salary expectations? You need to look carefully at the exceptions which the law creates:

(1) An employer may consider an employee's salary history if the applicant makes a **voluntary and willing** disclosure.

(2) An employer may discuss salary, benefits and other compensation **expectations** with the employee as long as the employer does not inquire about salary history.

(3) Further, the definition of "salary history" does not include any "objective measure" of the applicant's productivity, such as revenue, sales, or other production reports.

The bill also excludes: (1) employers acting pursuant to a law authorizing the disclosure or verification of salary history for employment purposes, (2) current employees applying for internal promotions or transfers, or (3) public employee positions for which compensation is determined pursuant to procedures established by collective bargaining.

So, what do you do?

This is not a law - yet - and will not be a law until 6 months after it is signed by the mayor. So, you have some time to get ready for it.

Here are some ideas:

- Review - Start by reviewing your applications, background check documents, and hiring procedures to remove any questions explicitly seeking information about an applicant's salary history. This includes a review of any information you may request via online portals.
- Train - It is essential to inform not just Recruiting and those in HR, but everyone who gets involved in the interview process, to refrain from directly questioning applicants about their salary histories.
- Inform contractors and vendors - You need to communicate this information to third parties or outside vendors who participate in the hiring process, such as placement firms, temp agencies and recruiters.
- Look at your online presence - if you are posting on job sites like Monster, etc, make sure there are no requests for salary information on those sites.

The overall takeaway is that while the new law does make it unlawful to request salary information, there are lawful ways that you can talk about salaries during the interview process, just as long as you do not demand or "prompt" the disclosure of the applicant's salary. You can explain the salary you are offering and ask if that is acceptable. If an applicant discloses that it is lower than a current salary that is a voluntary disclosure.

The trick will, of course, be "proving" that disclosure was "voluntary," especially if you decide not to hire that applicant. It may be a good idea to ask any applicant who does volunteer salary information to sign a form acknowledging the disclosure was voluntary. There is nothing in the bill that precludes such a 'waiver' form, and it would protect the company from claims or provide a clear defense to a claim. This would have to be handled carefully to make sure that an applicant does not feel they are under duress.

The Mayor is expected to sign the bill soon. Once signed, the bill will become effective 180 days later.