

The Salary Scare – The City’s Salary Ban Law Takes Effect

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Happy Halloween New York City Employers!

Just in time to scare even large employers, **beginning October 31, 2017**, it will be against the law for employers in New York City to ask about, rely on, or verify a job applicant’s salary history during the hiring process. As discussed in detail in our prior [posts](#), this new legislation also permits disgruntled applicants to pursue claims against an employer for violations of the law either with the New York City Commission on Human Rights or directly in court.

With only a few weeks left before the law goes into effect, employers in New York City should take care in reviewing their hiring policies and practices to ensure compliance with the law.

The New Law First, this law applies to **all employers**, regardless of size, in New York City.

The new law prohibits employers from:

- (1) **“Inquiring about”** an applicant’s salary history throughout the entire employment process; and/or
- (2) **“Relying”** on the salary history of a job applicant, when determining an applicant’s salary amount at any stage in the employment process, including when negotiating a contract.

The law defines “salary history” broadly to encompass not just wages but also benefits and any other form of compensation.

It also bans employers from searching **publicly available records** to obtain an applicant’s salary history.

There are limited exceptions to the ban:

- First, an employer may consider an employee’s salary history if the applicant **voluntarily disclosed** his or her salary history **“without prompting.”**
- Second, an employer may discuss salary, benefits and other compensation expectations with the employee as long as the employer does not inquire about salary history.
- Third, 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 amendment 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.

If an employer is found to have violated the law, the New York City Commission on Human Rights may impose a civil penalty of up to \$125,000 for an unintentional violation and up to \$250,000 if the violation is willful and malicious. In addition to civil penalties, an individual who is successful in a civil lawsuit may recover compensatory damages and attorney's fees.

New York City Commission on Human Rights Fact Sheets With the effective date of the amendment looming, the New York City Commission on Human Rights issued two fact sheets—one directed to [employers](#) and one directed to [job applicants](#) – summarizing the key provisions and exceptions to the law. The fact sheets do provide a few illustrative examples that aid in interpreting the law:

- The employer fact sheet clarifies that the law applies to all employers in New York City regardless of size.
- The “job applicant” fact sheet states that “most applicants” are protected, regardless of whether the position is full-time or part-time.
- The law applies to internships as well as independent contractors who do not have their own employees.
- The fact sheet does not clarify whether the law applies to nonresident applicants. However, we would not advise taking a chance on this. **All New York City job applicants should be considered covered.**

Guidance for Employers In advance of the law's October 31, 2017, effective date, employers should do the following:

- **Review and Revise Forms and Portals** – Remove any inquiries regarding salary history from employment applications, background check forms, online portals, or any other forms used during the hiring process.
- **Train** – 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** – Employers need to communicate these new obligations to third parties or outside vendors who participate in the hiring process, such as placement firms, temp agencies and recruiters and confirm that contractors and vendors are in compliance with the law.
 - **Put these instructions in writing**, so you have proof you have told your contractors they need to comply with the law.
- **Background Checks** – It is imperative that background checks exclude any inquiries regarding salary history. This is particularly important, since employers who use third-party vendors for background checks typically only see the results of the background check rather than the initial inquiries posed to an applicant. Again, tell your vendors to follow the law.
- **Job postings** – If you are posting on job sites like Monster, etc., make sure there are no requests for salary information on those sites.

Due to the growing trend of local and state legislatures enacting similar laws, employers who have

offices in multiple states should consider making company-wide changes regarding salary history inquiries during the hiring process. Other than New York City, legislation banning salary history inquiries has been enacted in Oregon, Delaware, San Francisco, Massachusetts and Puerto Rico. Philadelphia has also enacted an ordinance prohibiting inquiries into salary history; however, the ordinance is currently being challenged in federal court.

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 law 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 signing the waiver under duress.

At the very least, if an applicant voluntarily discloses salary history at any point during the hiring process, the employer should document the applicant’s voluntary disclosure in a writing.

This law is very new and we will be following new guidance as it appears.