SULLIVAN & CROMWELL LLP

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New York City Council Passes Bill Banning Inquiry Into Salary History in Hiring

Amendment to the NYC Human Rights Law Makes It an Unlawful Discriminatory Practice for Employers to Ask Applicants to Disclose Salary History, but Employers May Consider Such Information if Volunteered by Candidate Without Prompting

SUMMARY

On April 5, 2017, the New York City Council passed an amendment to the New York City Human Rights Law that will make it an unlawful discriminatory practice for employers to inquire about the salary history of an applicant for employment or to rely on the applicant's salary history in determining the compensation to be offered. Mayor Bill de Blasio is expected to sign the bill within the next week, and the law will take effect 180 days thereafter. The law contains a number of exceptions. Its prohibition will not apply if an applicant "voluntarily and without prompting" discloses his or her salary history; in that situation, an employer may consider the volunteered information in determining anticipated compensation and also may verify the proffered salary history. Employers also will be permitted to engage in a discussion with an applicant about his or her "expectations with respect to salary, benefits and other compensation," including amounts of "unvested equity or deferred compensation that an applicant would forfeit" by virtue of leaving his or her current employer. The rationale for the law is the belief by its proponents that employers' reliance on salary history to set compensation exacerbates a gender wage gap. This law represents a significant, government-mandated restriction on what have been fairly commonplace employer practices. A similar salary-history ban passed by the Philadelphia City Council has been challenged on constitutional grounds; this law may face a similar challenge. During the 180-day period before effectiveness, New York City employers will need to review their hiring practices and

documentation carefully, as well as to advise those engaged in hiring on compliance with the new restrictions.

PROHIBITION ON INQUIRY INTO, OR RELIANCE ON, SALARY HISTORY

The salary history law makes it an "unlawful discriminatory practice for an employer, employment agency, or employee or agent thereof: 1. To inquire about the salary history of an applicant for employment; or 2. To rely on the salary history of an applicant in determining the salary, benefits or other compensation for such applicant during the hiring process, including the negotiation of a contract."[1]

The law defines "to inquire" as "to communicate any question or statement to an applicant, an applicant's current or prior employer, or a current or former employee or agent of the applicant's current or prior employer, in writing or otherwise, for the purpose of obtaining an applicant's salary history." "To inquire" also means to "conduct a search of publicly available records or reports for the purpose of obtaining an applicant's salary history." Notably, "to inquire" does not include "informing the applicant . . . about the position's proposed or anticipated salary or salary range."

"Salary history" is defined as "the applicant's current or prior wage, benefits or other compensation." It does not include "any objective measure of the applicant's productivity such as revenue, sales, or other production reports."

The salary-history ban does not apply in four circumstances, the two most salient of which are: "(2) Applicants for internal transfer of promotion with their current employer"; and "(3) Any attempt by an employer . . . to verify an applicant's disclosure of non-salary related information or conduct a background check, provided that if such verification or background check discloses the applicant's salary history, such disclosure shall not be relied upon for purposes of determining the salary, benefits or other compensation of such applicant during the hiring."[2]

VOLUNTARY DISCLOSURE OF SALARY HISTORY AND DISCUSSIONS AS TO EXPECTATIONS ARE BOTH PERMISSIBLE

The law provides that, notwithstanding its general prohibition on using salary history to determine a compensation offer, "where an applicant *voluntarily and without prompting* discloses salary history," the employer *may* "consider salary history in determining salary, benefits and other compensation for such applicant, and may verify such applicant's salary history."[3]

The law also provides that, notwithstanding the general prohibition on inquiry into, or reliance on, salary history, an employer may, "without inquiring about salary history, engage in discussion with the applicant about their expectations with respect to salary, benefits and other compensation, including but not limited to unvested equity or deferred compensation that an applicant would forfeit or have cancelled by virtue of the applicant's resignation from their current employer."

REMEDIES AVAILABLE TO EMPLOYEES

Because the law is an amendment to the New York City Human Rights Law, it provides employees with the procedural and substantive rights set forth therein. An employee asserting discriminatory treatment based on the use of his or her salary history thus may file a complaint with the New York City Commission on Human Rights or bring suit in State Court. Should the employee succeed with a claim in State Court, the Human Rights Law provides for significant employer liability, including punitive damages and attorneys' fees.[4]

IMPLICATIONS

Employers should consider reviewing their recruiting procedures and employment documents for compliance.

Employers may wish to review their hiring policies and employment application documents to determine the extent to which they call for, or rely on, applicants' salary history. Also, large employers that depend on professional recruiters or other employment agencies to identify and make initial determinations as to applicants may need to work closely with those entities to review and revise their policies in light of the fact that the salary-history ban also applies to employers' agents.

The law's exemptions for voluntary disclosures of salary history and discussions as to salary expectations remain unclear.

The law's exemptions for voluntary disclosure of salary history by an applicant and discussions as to salary expectations between the applicant and the employer raise significant uncertainties. "Voluntary" is not defined in the law; it is possible that a voluntarily provided salary history disclosure, if relied upon by an employer, may nevertheless be subject to challenge down the line on the grounds that it was not voluntary in a true sense. Likewise, the scope and nature of "discussion . . . about . . . expectations with respect to salary" is left vague. A discussion about expectations may unwittingly or unintentionally result in discussions about an applicant's current compensation. Whether such a discussion would fall within the prohibitions of the law is uncertain. The NYC Commission on Human Rights is authorized by the law to promulgate rules concerning the law and there may be forthcoming guidance on these points.

New York City employers with workplaces in other jurisdictions may be subject to inconsistent requirements.

Neither the federal government nor New York State prohibits the use of salary history in hiring decisions. Accordingly, if employers wish to continue to gather salary history information where permitted, they should consider whether to implement separate policies for New York City employees. Employers nonetheless should remain alert for the passage and implementation of similar policies in other jurisdictions. For example, both the city of Philadelphia and the state of Massachusetts have passed salary-history bans and legislation is being considered in California, as well. The Philadelphia salary-history ban was enacted by a unanimous city council in January and is set to take effect in May; earlier

this month, however, the Chamber of Commerce for Greater Philadelphia filed a lawsuit in federal district court seeking to block the law on the grounds that it violates businesses' freedom of speech and will not be effective in closing the gender wage gap.

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ENDNOTES

1 N.Y.C. Council Bill Number 1253-A.

2 *Id.* at § 1(e). The ban also does not apply to: "(1) Any actions taken by an employer . . . pursuant to any federal, state or local law that specifically authorizes the disclosure or verification of salary history for employment purposes, or specifically requires knowledge of salary history to determine an employee's compensation; . . . or (4) Public employee positions for which salary, benefits or other compensation are determined pursuant to procedures established by collective bargaining."

3 *Id.* at § 1(d) (emphasis added).

4 N.Y.C. Admin. Code § 8-502.

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