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End of an era? Growing list of laws is ending the use of comp history in hiring

By Robert Nichols, Esq., and Lauren West, Esq., *Bracewell LLP*

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With his signature Oct. 12, 2017, Gov. Jerry Brown made California the latest state to adopt a ban on the acquisition and use of an applicant's salary history in making hiring decisions. In conjunction with that signing ceremony, the bill's primary sponsor, Assembly Member Susan Eggman, emphasized the importance of the new legislation to the equal treatment of women.

"The practice of seeking or requiring a salary history of job applicants helps perpetuate wage inequality that has spanned generations of women in the workforce," Eggman said. "[This law] is a needed step to ensure that my 9-year-old daughter, and all women, can be confident that their pay will be based on their abilities and not their gender."

This new legislation from the country's most populous state took effect Jan. 1. For corporate America, it plainly signals an unavoidable reality: The era of using salary and benefits history in hiring is ending.

LIST IS EXPANDING

Shortly before the California ban took effect, Delaware's salary history statute became effective Dec. 14, 2017. A Massachusetts statute will apply to employment actions occurring on or after July 1, and Oregon's ban went into effect Oct. 6, 2017 (with state enforcement to begin Jan. 1, 2019).

Additionally, Puerto Rico adopted a salary history ban that became effective March 8, 2017, as part of a broader piece of employment legislation known as the Puerto Rico Equal Pay Act.

A variety of local governments, including those in New York City, San Francisco, Philadelphia and Albany County, New York, have also enacted similar laws, although a federal court has stayed the Philadelphia ordinance pending litigation initiated by the local chamber of commerce.

Importantly, a wide variety of other state and local governments are also considering salary history ban legislation.

WHAT IS THE JUSTIFICATION?

The California Senate's official bill analysis observed: "Today, women working full-time in the United States typically are paid just 80 percent of what men are paid. ... The wage gap is even larger for women of color." The California Legislature further noted that this "gender pay gap has lifelong financial effects including contributing to women's poverty."

It also cautioned that the "pay gap follows women even after they leave the workforce where you will see the impact in lower retirement benefits as well as lower benefits for other programs based on earnings."

The California Legislature's analysis concluded that "gender wage discrimination is destructive not only for female workers but for our entire economy and closing the wage gap starts with barring employers from asking questions about salary history so that previous salary discrimination is not perpetuated."

> Maintaining separate hiring documentation and interview approaches for jurisdictions with and without these bans is not practical for many employers.

SCOPE AND SPECIFICS VARY WIDELY

While each of these state and local laws generally aims to remedy the same perceived inequities, the laws on salary history are by no means identical and, in some respects, are very different.

For instance, the Massachusetts statute prohibits employers from seeking "the wage or salary history of a prospective employee from the prospective employee or a current or former employer" and prohibits the employer from requiring that the prospective employee's prior wage or salary history meet certain criteria. Mass. Gen. Laws ch. 149, § 105A (2016) (effective July 1, 2018).

By contrast, the New York City ordinance prohibits employers from communicating "any question or statement to an applicant, an applicant's current or prior employer, or 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." N.Y.C. Admin. Code § 8-107(25)(a).

The reach of the New York City law is especially broad. For instance, an employer that asks one of its employees who used to work with

a job applicant how much the applicant earned in salary and benefits at their past job would be violating the city ordinance and could face substantial penalties.

The New York City measure, like most of the prohibitions enacted in various jurisdictions, specifically includes a ban on inquiries concerning "benefits" history in addition to questions concerning salary, wages and other compensation. So, for example, an employer would violate the law by asking about the applicant's current or past level of health insurance or 401(k) match.

The New York City law not only prohibits inquiries; it also makes it unlawful "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." N.Y.C. Admin. Code § 8-107(25)(b)(2).

Similarly, the California statute that became effective Jan. 1 prohibits employers not only from seeking an applicant's salary history and other compensation and benefits history but also from relying "on the salary history information of an applicant for employment as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant." Cal. Lab. Code § 432.3(a) (2017).

Notably, a number of these laws, including the New York City and Delaware statutes, specifically allow employers to inquire about an applicant's salary expectations — as opposed to salary history. N.Y.C. Admin. Code § 8-107(25)(c); Del. Code Ann. Tit. 19, § 709B(d) (2017).

And the California statute imposes an affirmative obligation on employers wholly separate and apart from a salary or benefits history ban. Under the California statute, an "employer, upon reasonable request, [must] provide the pay scale for a position to an applicant applying for employment." Cal. Lab. Code § 432.3(c) (2017).

This unusual aspect of the California statute appears to effectively impose on employers an obligation to have specific pay scales and, presumably, to adhere to them.

A significant and unique facet of the New York City law is detailed in the city's Salary History Law: Frequently Asked Questions publication, which is available at http://on.nyc.gov/2DsqqCX.

"An employer who uses a boilerplate application that requests salary history information," the FAQ says, "will not avoid liability simply by adding a disclaimer that individuals in New York City or applying for jobs located in New York City need not answer the question."

The same FAQ document suggests that municipal law could affect corporate transactions by prohibiting purchasers of businesses from using salary and benefits history information obtained in the transaction, such as during due diligence, to make individualized decisions about which of the target's employees to hire and how much to pay them.

While this restriction generally would not affect stock acquisitions when all workers remain employed through closing, it could have an impact when the buyer hires some of the employees, based upon individual interviews and assessments. The city's FAQ suggests that managers at the purchasing company who will be making hiring and compensation decisions not get access to salary and benefits information obtained in due diligence.

Additionally, the applicability of the salary ban laws is not always strictly limited to companies that maintain operations in a jurisdiction; a prospective employer could be found to have violated the state or city law even though it does not have a facility there.

HOW TO STAY COMPLIANT

Employers should take action now in light of current and potential future salary history bans.

Specifically, they should take these steps:

(1) Ascertain what laws exist in locations where the employer operates or recruits. Employers must remember that the restrictions and requirements of individual jurisdictions are not uniform.

(2) Be aware of requirements in the salary history laws that may create unique and affirmative obligations for employers, like the California requirement that employers give applicants a pay range for job positions upon request.

(3) Remove salary history inquiries from all employment applications and other recruiting or hiring documentation, whether in electronic or paper form.

(4) Train human resource professionals, managers and other company representatives involved in interviews or hiring decisions on what not to ask during interviews or other communications with job candidates. Instruct them to avoid suggesting in emails and notes that salary history was a basis for decisions on hiring or initial pay level or benefits.

(5) Ensure that outside recruiters the employer uses do not violate the salary history laws, some of which provide for employer liability based upon the actions of employer agents.

CONCLUSION

Maintaining separate hiring documentation and interview approaches for jurisdictions with and without these bans is not practical for many employers, particularly those with multistate operations or recruiting practices.

Already wrestling with the daunting task of assuring that their hiring and other employment practices comply with

all potentially applicable state and local employment laws, employers are not realistically in a position to maintain multiple approaches, including differing instructions for hiring managers, on the acquisition and use of salary and benefits history based on location.

Further, given the fact that the interviewing and the hiring processes often occur electronically across state and municipal geographical boundaries, employers would struggle to ascertain what state and local salary history laws might apply to communications with applicants located in different parts of the country.

Consequently, the only practical option for corporate America ultimately will be to end compensation-history-related inquiries. But, even then, differences in the legislation among the states and municipalities make complying with these laws particularly burdensome.

For that reason, to ensure compliance with the new laws and those already in effect, businesses must possess a clear understanding of the unique aspects of those laws with regard to scope of their restrictions and any specific affirmative obligations they may impose.

Therefore, even if an employer adopts a nationwide ban on salary history inquiries and use, consideration of applicable state and local laws is still in order.

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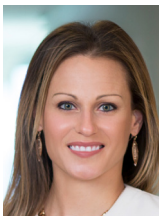
ABOUT THE AUTHORS



Robert Nichols (L) is a partner in **Bracewell LLP**'s Houston office. He represents employers in litigation, administrative investigations and inspections and other actions concerning alleged occupational safety and health violations. He also represents employers in cases involving alleged discrimination, retaliation, harassment, wrongful discharge and other employment-related concerns. He can be reached at bob.nichols@bracewell.com. **Lauren West**, (R) an associate in the firm's labor and employment practice in Dallas, represents employers in federal and state court litigation, arbitrations and before federal and state administrative agencies. She has experience defending employers in employment discrimination, retaliation and harassment cases, and in collective wage-and-hour actions, breach-of-contract disputes and whistleblower actions. She can be reached at lauren.west@bracewell.com.