

PUBLICATION

The Trend Continues: New York City Passes Salary History Ban

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New York City is the third jurisdiction to pass a ban on salary history inquiries, following Massachusetts and Philadelphia. Philadelphia's law was set to take effect in May 2017, however, the constitutionality of Philadelphia's ban was challenged when the Chamber of Commerce of Greater Philadelphia filed a lawsuit in federal court on April 9, 2017, claiming the ban deprives businesses of their First Amendment rights. Read our recent article outlining the provisions of Philadelphia's ban. New York City's law will take effect 180 days after the Mayor signs it, which is expected because the Mayor has expressed approval of the ban.

Employers May Not Make Inquiries About Salary History

Employers may not make any salary inquiry of an applicant, or the applicant's current or former employer, or a current or former employee or agent of the applicant's current or prior employer. Employers also may not be also prohibited from conducting any form of search through publicly available information for a prospective employee's salary history. "Salary history" includes an applicant's current or prior wage, and benefits and any other form of compensation the applicant may have received, such as bonuses and commissions.

Employers May Not Consider Salary History in Determining Compensation

New York City's law also prohibits an employer from considering an applicant's salary history in determining salary, benefits, or other forms of compensation for that applicant. If, however, an applicant *voluntarily and without prompting* provides salary history, then an employer may use that information to determine the salary, benefits, and other compensation. In such a case, the employer may also verify the salary history. Employers should tread carefully here to avoid perceived or actual violations of the ban.

Employers May Discuss Salary and Benefits Offered to Applicants

The ban does not prohibit employers and applicants from discussing salary, and other forms of compensation and benefits being offered. Employers may inform applicants about the salary for the job to which the applicant has applied, and employers may ask about and discuss applicants' pay expectations.

Penalties for Violations of the Ban

The New York City Commission on Human Rights will enforce the ban. Employers will be subject to a civil penalty of up to \$125,000 for one *unintentional* violation and up to \$250,000 for a willful violation. The ban also provides applicants with a private right of action, which allows individuals to sue employers for violations of the ban. In addition, an individual may bring a civil lawsuit for violations of the law. Back pay, compensatory damages, and attorneys' fees constitute available remedies.

Even though it is possible that the New York City ban, like the Philadelphia ban, will be challenged in court, New York employers should start preparing now. At a minimum, employers should:

- Remove salary inquiries from paper and online application forms.
- Update policies and hiring procedures to ensure that questions regarding salary history are eliminated and that written policies comply with the law.

Hiring managers, Human Resources, recruiters, and any others involved in the hiring process must be trained on the law's requirements. Although the ban allows for voluntarily disclosure of salary history, employers must consider ways to avoid claims that the interviewer prompted or prodded the applicant for his or her salary history.