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New York City Law Prohibits Employers from Making Salary Inquiries

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Client Advisory
August 24, 2017 by Judith A. Lockhart and Elaine Nguyen

Beginning on October 31, 2017, New York City employers will be prohibited from inquiring about, relying upon, or verifying a job applicant's salary history. With the enactment of Local Law 67 (the Law), New York City joins the Cities of Philadelphia and San Francisco, and the states of Oregon, Massachusetts, and Delaware in limiting a new employer's ability to ask about salary history. The Law, signed by Mayor Bill de Blasio on May 4, 2017 as a step towards wage equality, makes it an unlawful discriminatory practice to ask about an applicant's salary history. It was designed to address the common practice of using of an applicant's salary history as a benchmark in determining starting salaries — a practice that the Law's supporters say has historically led to suppressed wages for women and people of color. Specifically, the Law prohibits employers, employment agencies, and employees/agents from: (1) inquiring about the salary history of an applicant for employment, or (2) relying on the salary history of the applicant in determining the salary, benefits, or other compensation for the applicant at any time during the hiring process, including during the negotiation of a contract.

The Law defines "inquire" broadly to include any written, oral, or other form of communication with the applicant, or his or her current or prior employer, for the purpose of obtaining information on salary history. The Law also prohibits employers from independently conducting searches in publicly available records for the purpose of obtaining an applicant's salary history. Salary history is defined as the applicant's "current or prior wage, benefits or other compensation," but does not include any objective measure of the applicant's "productivity, such as revenue, sales, or other production reports." If the applicant's salary history is revealed during the course of verifying an applicant's non-salary related information, the employer *may not* rely on that salary information during the hiring process, the contract negotiation stages, or when determining the applicant's salary, benefits, or other compensation.

Employers should note several caveats. First, the new Law does not prohibit an employer from using information that is provided by an applicant "voluntarily, without prompting." In other words, if an applicant makes an unprompted and willing disclosure of his or her salary history to the prospective employer, the employer may then consider salary history in determining the applicant's salary, benefits, and other compensation, and verify the applicant's salary history. Second, the Law does not prohibit prospective employers from discussing an applicant's compensation expectations and any unvested equity or deferred compensation that would be forfeited if the applicant were to resign his or her current employment.

Local Law 67 also contains several exemptions. The ban on salary inquiry does not apply to: (1) New York City employers acting pursuant to any federal, state, or local law authorizing the disclosure or verification of salary history, or requiring knowledge of salary history for employment purposes; (2) current employees applying for an internal promotion or transfer; or (3) public employee positions where compensation is determined through collective bargaining.

The Law does not create new remedies for a violation. Instead, it relies on the standard remedies provided for under the New York City Human Rights Law (NYCHRL). If an employment applicant alleges discriminatory treatment under Local Law 67, the applicant may file a complaint with

the New York City Commission on Human Rights. The Commission is empowered to investigate complaints made under the Law. Civil penalties up to $125,000 for intentional violations and up to $250,000 for willful, wanton, or malicious violations may be imposed. The NYCHRL provides for significant additional employer liability, including the potential award of punitive damages and attorney's fees. A private right of action is also available under the NYCHRL.

There are some initial steps that employers should take to prepare for the implementation of Local Law 67:

- Employers should shift from asking about salary history to informing an applicant about the position's salary or salary range or discussing the applicant's expectations about salary, benefits, and other compensation.
- Employers should review and revise existing policies and practices to ensure compliance with the new legislation. Reference policies should be revised to eliminate the provision of salary information.
- Employers should work closely with human resources personnel, outside employment agencies, recruiters, and anyone else involved in the interview and hiring process to ensure understanding and compliance with the new Law. All employees who interview applicants should be advised in writing not to inquire about an applicant's current salary.
- If employers intend to continue gathering salary history in jurisdictions where permitted, employers should consider implementing clear and separate policies for New York City and the other cities and states that have enacted a salary inquiry ban.
- Employers should also review and revise job applications, postings, and advertisements to eliminate requests regarding salary history.
- Employers should implement a procedure to document voluntary disclosure of salary history by an applicant or, at a minimum, include a clear and obvious statement on the application that providing salary information is voluntary and a decision not to provide salary information will not be considered in employment decisions.
- Separation agreements should provide for verification of dates of employment and title or job descriptions only unless a signed authorization is provided by the former employee.

For more information concerning the matters discussed in this publication, please contact the authors Judith A. Lockhart (212-238-8603, lockhart@clm.com), Elaine Nguyen (212-238-8623, nguyen@clm.com), or your regular Carter Ledyard attorney.

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