

Employers Beware: Pay History Ban Is Trend Picking Up Steam

Labor & Employment Newsletter - July 2017

Insights for Employers Alert | 4 min read

Jul 25, 2017

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It may seem like second nature to the hiring process to ask a candidate what his or her current salary is, often used (or mis-used) by employers as a measure of what compensation should be offered to the prospective employee. Whether this practice is a sound means to value the true worth of the position in the organization or valuable for market understanding is certainly debatable. But this practice is becoming problematic for employers beyond this debate as more jurisdictions look to ban employers from seeking a candidate's pay history in the hire process.

This January, with the signing of the Philadelphia Wage Equity Ordinance, Philadelphia's Fair Practices Ordinance was amended to prohibit employers from asking about an applicant's wage history at any point during the hiring process, making Philadelphia the first City to enact such a prohibition.

The Philadelphia ordinance was scheduled to take effect on May 23, 2017, but enforcement has been stayed until a federal judge issues a ruling on a petition to block the law filed by the Chamber of Commerce for Greater Philadelphia. As enacted, the law would prohibit covered employers from: inquiring about a prospective employee's wage history; requiring disclosure of wage history; conditioning employment or consideration for an interview on disclosure of wage history; or retaliating against a prospective employee for failing to comply with any wage history inquiry.

The Ordinance also makes it unlawful for an employer to rely on the wage history of a prospective employee from any current or former employer when determining the wages for such individual at any stage in the employment process, including in the negotiation or drafting of any employment contract. An employer, however, is permitted

to rely on any wage information that is “knowingly and willingly” disclosed by the applicant.

Following suit, in April of this year, New York City passed a bill that makes it an “unlawful discriminatory practice” for employers to inquire about the salary history of prospective employees or to rely upon salary history unless the applicant offers the information voluntarily. Specifically, an employer cannot make a salary inquiry of an applicant, the applicant’s current or former employer, or an agent of the applicant’s current or former employer. Going further, the law prohibits an employer from conducting any form of search through publicly available information for a prospective employee’s salary information. NYC employers may find themselves navigating a fine line, as the law does not prohibit the employer and applicant from talking about salary expectations (sensibly, one may say), which can apparently include a discussion about unvested equity or deferred compensation that may be forfeited if the applicant leaves his or her current employer. The bill is awaiting signature by the Governor, which is expected. Once law, the measure would expand New York City’s current ban (in place due to a December 2016 Executive Order from the Governor) prohibiting city agencies from inquiring about salary history of job applicants prior to making a conditional offer of employment.

These local efforts followed on the heels of state-wide efforts taken in 2016 in Massachusetts and California, both of which enacted state-wide laws prohibiting employers from inquiring about pay history. The Massachusetts’ law, passed in August of 2016, takes effect in 2018 and will prohibit managers from screening applicants based on pay history as well as inquiring into prospective employees’ past or current compensation, except to confirm information that the applicant volunteered or where the employer has already made an offer of employment that includes compensation.

Effective January 1, 2017, California’s statute bans employers from using an applicant’s pay history information to justify wage disparities between men and women who do substantially similar work. Though California’s law does not ban inquiries into pay history, it does restrict how employers can use that information.

Is this really a trend? Well, lawmakers in Illinois, Maine, Maryland New Jersey, New York, Pennsylvania, Rhode Island and Washington DC have proposed similar bills to regulate how employers obtain and use pay history information. A trend is certainly afoot and employers with operations in these jurisdictions should be aware of the regulations that may be coming.

These laws are aimed at eliminating what supporters say is a practice that perpetuates the wage gap between men and women and are part of a growing national trend intended to close the gender pay gap. The rationale behind these legislative measures is that basing pay decisions on pay history will perpetuate past pay disparities, and banning inquiries into an applicant’s pay will encourage employers to base salary on job requirements and market rates.

As with several recent trends in the employment arena, action is occurring on this issue at the state and local level. As a patchwork of similar laws continue to emerge, it will be important for employers to pay close attention

to developments in this regard in all jurisdictions in which operations are located to assess how these laws may impact hiring practices. Of course, consulting with employment counsel is always recommended.

Published in Illinois Banker, May/June 2017, pp. 6-7.

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