Employer Update

Weil

June 2017

New York City Bans Employers' Inquiries Into and Use of Salary History

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In This Issue

In our April *New York Law Journal* article we discussed the federal circuit split over the interpretation of the Equal Pay Act ("EPA") and the growing number of state and local jurisdictions enacting legislation that restricts an employer from inquiring into or using an employee's salary history.[1] Shortly thereafter, on April 5, 2017 the New York City Council passed a bill to amend the New York City Human Rights Law ("NYCHRL"),[2] which will impose similar restrictions on New York City employers. On May 4, 2017, Mayor Bill De Blasio signed the bill, which will become effective on October 31, 2017. Accordingly, Halloween could become a very scary day for New York City employers. In this article, we will review additional recent developments in the law governing employer inquiries into and reliance on the compensation history of prospective employees and analyze the New York City ordinance within this greater context.

Background

The federal Equal Pay Act prohibits employers from paying employees of different sexes different wages for "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Under the EPA, one basis on which an employer may justify paying employees of different sexes different wages for equal work is by demonstrating that the wage differential is based on "any other factor other than sex." Our April article discussed the circuit split on the question of whether an employee's compensation history is a "factor other than sex." Just after publication, the U.S. Court of Appeals for the Ninth Circuit issued a decision on April 27, 2017 holding that prior salary can be a "factor other than sex" under the federal Equal Pay Act if the decision to use prior salary was both "reasonable" and "effectuated a business policy."[3] The Ninth Circuit agreed with the Seventh and Eighth circuits and departed from the Sixth, Tenth, and Eleventh circuits.

Making matters even more complicated, in addition to the conflicting federal case law, a number of jurisdictions (California, Massachusetts, Philadelphia, and Puerto Rico[4]) have enacted legislation which limits or precludes employers from basing new employees' compensation on salary history.[5] These legislatures have justified these new rules on the theory that the practice of relying on salary history perpetuates gender discrimination in the form of unequal pay.

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Employers have registered objections to the Philadelphia ordinance, which was passed by the Philadelphia City Council in December 2016 and bans employers not only from asking prospective employees about their wage history, but also from relying on such information in setting the prospective employee's compensation. On April 6, 2017, the Chamber of Commerce of Greater Philadelphia (the "Chamber") filed a lawsuit challenging the constitutionality of the ordinance. The Chamber argued that the ordinance imposes content-based and speaker-based restrictions on speech and that it is not narrowly tailored to achieve the goal of "eliminating pay disparities attributable to gender discrimination." Instead, the Chamber argued that the ordinance addresses the pay gap only indirectly and without citation to empirical evidence connecting the supposed cause and effect.

The effective date of the Philadelphia ordinance was set for May 23, 2017, though the City of Philadelphia agreed to postpone its implementation pending the court's resolution of the motion for preliminary injunction. On May 30, 2017, the court granted the City of Philadelphia's motion to dismiss the complaint without prejudice, stating that the Chamber "must identify a member who will suffer specific harm as a result of the ordinance," but granted the Chamber leave to amend its complaint within 14 days.

New Ordinance

Like the Philadelphia ordinance, New York City's ordinance provides that employers may not "inquire about" or "rely on" a prospective employee's salary history. *See* N.Y.C. Admin. Code §§ 8-107(25)(b)(1)-(2). Although the new law speaks in terms of "salary history," it defines "salary history" broadly to "include[] the applicant's current or prior wage, benefits or other compensation," but explicitly excludes "any objective measure of the applicant's productivity such as revenue, sales, or other production reports." *Id.* § 8-107(25)(a). Making an "inquiry" is defined broadly as "communicat[ing] 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." *Id*. The law's definition of "inquiry" also includes "[conducting] a search of publicly available records or reports for the purpose of obtaining an applicant's salary history." *Id*.

This prohibition does not extend to "informing the applicant in writing or otherwise about the position's proposed or anticipated salary or salary range," which is expressly excluded from the definition of "inquiry." *Id*. Additionally, employers may "engage in discussion with the applicant about their expectations with respect to salary, benefits and other compensation," which includes discussion of "unvested equity or deferred compensation that an applicant would forfeit or have cancelled by virtue of the applicant's resignation from their current employer." *Id.* § 8-107(25)(c).

Furthermore, employers may not "rely on the salary history of an applicant in determining the salary, benefits or other compensation for such applicant." *Id.* § 8-107(25)(b)(2). This prohibition applies "during the hiring process, including the negotiation of a contract." *Id.* This prohibition is not absolute. The law contains a carve-out permitting an employer to use a prospective employee's wage history in determining his or her compensation in circumstances where the prospective employee offers the information "voluntarily and without prompting." *See* § 8-107(25)(d). In such a case, the employer may verify the salary information provided by the prospective employee. *Id.* However, the law does not define what constitutes "voluntarily," thus leaving open the possibility of subsequent challenges as to whether any purported consent was truly "voluntary."

Separately, the employer may research and verify information unrelated to salary history that the employee provides, but if the background check turns up prior salary information, the employer may not use that information to set compensation. *See id.* § 8-107(25)(e)(3). The ordinance provides no exception for highly compensated employees.

These aforementioned restrictions apply to employers, employment agencies, and employees and agents thereof, *id.* § 8-107(25)(b), but not to

"[p]ublic employee positions for which salary, benefits or other compensation are determined pursuant to procedures established by collective bargaining." Furthermore, the provisions protect only prospective employees, and do not apply to job "[a]pplicants for internal transfer or promotion." *See id.* § 8-107(25)(e)(2).

The New York City ordinance does not create any new remedies for a violation of the provisions of the new law. Rather, the standard remedial provisions in the NYCHRL apply, which include compensatory and punitive damages, reasonable attorneys' fees, costs, injunctive relief, and to vindicate the public interest, a civil penalty up to $125,000, or up to $250,000 if the employer's conduct is willful, wanton, or malicious.

Applicability

The New York Court of Appeals has held that the NYCHRL is meant to protect "those who work in the city." *See Hoffman v. Parade Publications*, 933 N.E.2d 744, 747 (N.Y. 2010). The court also recognized that the NYCHRL protects non-resident employees who work in the city but only if the employee can establish an "impact" within the city. *Id.* at 746–47. Additionally, some courts have applied the NYCHRL to employees who reside and work outside the city in narrow circumstances such as where an employee who had transferred from the New York City office of her company demonstrated that her work remained sufficiently connected to the city in that she serviced primarily New York City clientele and remained under the management and supervision of the company's New York City office, *see Regan v. Benchmark Co. LLC*, No. 11 CIV. 4511 CM, 2012 WL 692056, at *14 (S.D.N.Y. Mar. 1, 2012), but not where an employee could only demonstrate that she occasionally worked out of the company's New York City office, had some clients based in the city, and that some adverse actions were executed from the New York City office. *See E.E.O.C. v. Bloomberg L.P.*, 967 F. Supp. 2d 816, 865–66 (S.D.N.Y. 2013). Based on the above case law, employers with operations located outside of New York City but that are managed from locations within the city should give careful consideration to whether their practices may be scrutinized under the NYCHRL.

Practice Pointers

Employers must navigate an often conflicting patchwork of federal, state, and local laws governing whether they may inquire into or use prior salary information. In our April article, we suggested that national employers be cognizant of these rules to the extent they seek to create nationally uniform policies or practices. That advice remains directionally correct, although uniformity becomes more difficult given the number of jurisdictions imposing additional restrictions.[6] Companies subject to the New York ordinance should consider taking the following additional measures to ensure compliance with the new ordinance:

- Implement protocols for when and how compensation may be discussed with prospective employees. Instruct personnel involved in hiring, including internal and external recruiters, and staffing agencies, to refrain from asking about a prospective employee's current or prior salary.
- Refrain from conducting research into a prospective employee's salary history from public resources.
- Consider maintaining records documenting a candidate's voluntary offer of salary information.
- Remove questions from job applications related to salary history.
- Articulate a defined compensation structure and methodology for establishing starting pay. Thereafter, work with counsel to periodically conduct pay equity audits.

Given the changing legal landscape, employers should remain current on any new laws and review their policies and procedures to ensure compliance.

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[1] Jeffrey S. Klein and Nicholas J. Pappas, *New Restrictions on Using Earnings History to Set Compensation*, NEW YORK LAW JOURNAL (Apr. 4, 2017), http://www.newyorklawjournal.com/id=1202782943333/New-Restrictions-on-Using-Earnings-History-to-Set-Compensation.

[2] New York City Bill Int. No. 1253-A will be codified at N.Y.C. Admin. Code § 8-107(25) *et seq.*

[3] *See Rizo v. Yovino*, 854 F.3d 1161, 1163 (9th Cir. 2017).

[4] In March, Puerto Rico enacted its own Equal Pay Act, Act 16, which includes provisions banning employers from making inquiries into prospective employees' current or prior salary.

[5] On May 22, 2017, the Oregon Legislative Assembly passed HB 2005, which contains provisions prohibiting a prospective or current employer from inquiring into the salary history of a job applicant or current employee.

[6] Before entering recess on May 30, 2017, the Texas House of Representatives was considering House Bill 290, which includes provisions prohibiting employers from asking about, obtaining, or considering an applicant's wage history. Furthermore, the California State Senate is currently considering AB 168, which would prohibit employers from seeking salary history and require employers to provide a pay scale for a position to job applicants upon request. The bill passed the California State Assembly on May 22, 2017.

Employer Update is published by the Employment Litigation and the Executive Compensation & Benefits practice groups of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, www.weil.com.:

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