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A Growing Number of State and Local Governments Ban Salary History Inquiries to Prospective Employees

Pay Equity

In this *Bloomberg Law* Insights article, Bracewell attorneys Robert Nichols and Eric Lai provide an overview of the laws enacted by state and local governments to restrict employer inquiries into the salary history of prospective employees. Nichols and Lai also provide a list of suggestions for how employers can assure compliance with the growing number of state and local measures banning salary history inquiries.

ROBERT NICHOLS AND ERIC LAI

According to the United States Department of Labor, in 2014, women earned on average 83 percent of men's median annual earnings. Bureau of Labor Statistics, U.S. Dep't of Labor, Highlights of Women's Earnings in 2014 (2015), <https://www.bls.gov/opub/reports/womens-earnings/archive/highlights-of-womens-earnings-in-2014.pdf>.

This substantial disparity in pay based on gender continues despite more than 50 years of legislative efforts, beginning with the Equal Pay Act of 1963, to combat this inequality. In response, a small but growing number of state legislatures and city governments have enacted laws restricting employer inquiries into the salary history of prospective employees. These states and

cities include Delaware, Oregon, Massachusetts, San Francisco, New York City, and Philadelphia.

Additionally, a variety of state legislatures such as Maryland, New York, New Jersey, and California are considering similar laws that bar or limit an employer's ability to make inquiries into an applicant's salary history.

As the Delaware legislature astutely recognized, "[w]hen employers ask prospective employees for their wage or salary history, it perpetuates disparities in pay based on gender from one job into another." <http://legis.delaware.gov/BillDetail?legislationId=25664>.

Similarly, the New York legislature noted in the preamble to its proposed legislation prohibiting salary history inquiries that "[p]ay disparities affect women of all ages, races, and education levels, but are more pronounced for women of color. Minority women make as little as 54 cents per dollar for a comparable job held by a man." The bill's sponsors further explained that "[f]air pay strengthens the security of families and eases future retirement costs while also strengthening the American economy. In order to achieve fair pay, policymakers must enact laws that prevent gender based wage discrimination from when women enter the labor force." S.B. 5532, 2017 Leg. Reg. Sess. (N.Y. 2017), <http://legislation.nysenate.gov/pdf/bills/2017/S5532>.

To achieve this goal, the bill's sponsors concluded that employers should not "base a woman's pay based on her previous pay history. Because the pay is already based on gender discrimination, allowing pay history to be requested by employers is equivalent to maintaining

For more than 25 years, Robert "Bob" Nichols, a partner with Bracewell LLP in Houston, has represented employers in litigation, administrative investigations and inspections, and other actions concerning alleged occupational safety and health violations, discrimination, retaliation, harassment, wrongful discharge, and other concerns related to employment.

Eric Lai counsels clients on employment law matters including compliance, policies and investigations. Eric also represents employers in administrative proceedings and state and federal litigation.

a standard of lower pay for women performing similar jobs as men.”

Varying Scope of Laws Enacted

The precise restrictions imposed by the state statutes and local ordinances on inquiries into salary history vary in certain respects.

For instance, in Massachusetts, it is unlawful for an employer to “seek the wage or salary history of a prospective employee from the prospective employee or a current or former employee or to require that a prospective employee’s prior wage or salary history meets certain criteria.” The Massachusetts law, however, does provide that “if a prospective employee has voluntarily disclosed such information a prospective employer may confirm prior wages or salary or permit a prospective employee to confirm prior wages or salary.” Additionally, the employer “may seek or confirm a prospective employee’s wage or salary history after an offer of employment with compensation has been negotiated and made to the prospective employee.” Mass. Gen. Laws ch. 149, § 105A (2016), <https://malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter149/Section105A>.

In Oregon, it is unlawful for an employer to “[s]creen job applicants based on current or past compensation.” In addition, employers may not “[d]etermine compensation for a position based on current or past compensation of a prospective employee.” Notably, these protections do not apply to transferees or relocated employees. As stated in the act, an employer may consider “the compensation of a current employee of the employer during a transfer, move or hire of the employee to a new position with the same employer.” H. B. 2005, 2017 Leg. Reg. Sess. (Or. 2017) (to be assigned to 2017 Or. Laws 197), <https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/HB2005/Enrolled>.

Under Delaware’s salary history ban, it is an unlawful employment practice for an employer to “screen applicants based on their compensation histories, including by requiring an applicant’s prior compensation satisfy minimum or maximum criteria.” The Delaware law also provides that it is unlawful for employers to “[s]eek the compensation history of an applicant from the applicant or a current or former employer.” Act of Jun. 14, 2017, 81 Del. Laws c. 41 (2017) (to be codified at Del. Code tit. 19, § 709B (2017), <http://delcode.delaware.gov/sessionlaws/ga149/chp041.pdf>).

The Delaware law does allow employers to discuss and negotiate compensation expectations “provided that the employer or employer’s agent does not request or require the applicant’s compensation history.”

The Delaware law also provides protections similar to Massachusetts law. For example, in Delaware, employers are not prohibited from “seeking the applicant’s compensation history after an offer of employment with terms of compensation has been extended to the applicant and accepted, for the sole purpose of confirming the applicant’s compensation history.”

Most recently, the City of San Francisco adopted a “Parity in Pay Ordinance.” In adopting that ordinance on July 19, 2017, the city government made a number of findings. In particular, the City determined that the “gender wage gap [had] narrowed by less than one and one-half a penny per year in the United States since 1963, when Congress passed the Equal Pay Act, the first

law aimed at prohibiting gender-based pay discrimination.”

The City’s Board of Supervisors also found that “[w]hen employers make salary decisions during the hiring process based on prospective employees’ current or past salaries or require employees to disclose current or past salaries as part of the application process or during salary negotiations, women applicants often end up at a significant disadvantage.”

To combat these disadvantages, the City of San Francisco enacted the Parity in Pay Ordinance to bar employers from inquiring “about an applicant’s history” and to prohibit employers from considering “an applicant’s salary history as a factor in determining what salary to offer an applicant.” Significantly, the city’s ordinance allows applicants to “voluntarily disclose salary history following an employer’s initial salary offer in order to negotiate a different salary.”

Approximately two months prior to the adoption of the San Francisco ordinance, the City of New York passed a law prohibiting salary history inquiries with somewhat different provisions. Specifically, the New York enactment bars employers from inquiring “about the salary history of an applicant for employment” or relying 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.”

Notably the New York City law does provide that an employer “without inquiring about salary history, [may] engage in discussion with the applicant about their expectations with respect to salary, benefits and other compensation, including but not limited to unvested equity or deferred compensation that an applicant would forfeit or have cancelled by virtue of the applicant’s resignation from their current employer.”

Other Laws Related to Pay Equity

In addition to states and local governments enacting salary history bans, other jurisdictions have enacted related measures that restrict certain pay practices. For instance, the California state legislature last year adopted A.B. 1676, a bill that amended the California Fair Pay Act, effective Jan. 1, 2017, to provide that prior salary in and of itself cannot constitute a justification for a disparity in compensation. Generally, the California Fair Pay Act mandates equal pay for employees engaged in substantially similar work. However, prior to the passage of A.B. 1676, a disparity was acceptable under the Act if it was based on a bona fide factor such as salary history. The California state legislature sought to eliminate such behavior and enacted A.B. 1676 to clarify that salary history would no longer, in and of itself, constitute a bona fide factor to justify a pay disparity.

While the federal government does not prohibit inquiries into salary history as part of the hiring process, the Equal Employment Opportunity Commission has expressed concerns that the use of salary history perpetuates pay disparities based on gender. In its compliance manual, the EEOC cautions that “prior salary cannot itself, justify a compensation disparity” to avoid potential liability under Title VII of the Civil Rights Acts of 1964 and the Equal Pay Act.

It is important to note that irrespective of the new laws limiting or barring salary history inquiries, the fed-

eral government and essentially every state government prohibits disparities in pay based on gender. Accordingly, in addition to focusing on compliance with salary history restrictions, employers need to continue their efforts to ensure pay practices consistent with equal pay laws generally.

Suggested Action Items for Employers

- In light of the various laws affecting employer conduct during the hiring process, employers should evaluate whether they operate in any states or cities that have adopted laws limiting or barring inquiries into pay history. In applicable states, employers should modify their practices to comply with relevant law.

- Employers should remain aware of pending legislation in jurisdictions which may ultimately affect their operations.

- Employers should recognize that in addition to state or local salary history bans, a variety of other jurisdictions like California prohibit employers from justifying pay disparities solely on the basis of salary history. Accordingly, employers should adopt policies and practices to ensure that any pay disparities are based on factors other than salary history.

- Employers should conduct training of any personnel involved in the hiring process to ensure consistency with state or local laws. For example, in applicable jurisdictions, interviewers should understand that they cannot make inquiries into an applicant's salary history. Additionally, in no jurisdiction should managers base a new hire's pay level solely on prior salary; instead the manager should look to other legitimate factors to establish an applicant's pay level.