

# NYC Law Prohibits Employers from Asking Job Applicants for Salary History

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New York City recently enacted a law prohibiting employers from asking about a job applicant's salary history during all stages of the employment hiring process. The law, which was adopted on May 4, 2017, also prohibits an employer who knows of a job applicant's salary history from relying on that information in the determination of future salary. The law, which goes into effect October 31, 2017, has been heralded by lawmakers as a bellwether event in the pursuit for pay equality and will likely have a great practical impact on both employers and employees in New York City.

## Key Provisions of the Law

Introduction 1253-A, "Prohibiting employers from inquiring about a prospective employee's salary history" was first proposed in 2016. It is a follow-up to Mayor Bill de Blasio's Executive Order No. 21 enacted in November 2016, which prohibits city agencies from asking questions regarding the salary history of job applicants. Intro. 1253-A expands the prohibition to private employers, making it an "unlawful discriminatory practice for an employer, employment agency, or employee or agent thereof" to ask about a prospective employee's salary history.

The law does not prohibit employers from having a "discussion with the applicant about their expectations with respect to salary, benefits and other compensation." An applicant's salary history does not include "any objective measure of the applicant's productivity, such as revenue, sales or other production reports." If a job applicant voluntarily discloses his or her salary history, employers "may consider salary history in determining salary." The law also states that if a job applicant's salary history is provided to an employer in a background check, the employer cannot use such salary history in the "hiring process, including the negotiation of a contract."

## Practice Point

There are many practical considerations of which employers must be aware as a result of this New York City law. While the law does not take effect until October 31, 2017, employers in New York City may best be served by modifying their hiring practices now, including any recruitment handbook or guidelines. This includes training human resources personnel and recruiters about the change in the law and removing salary history questions from job applications. The law applies not only to employers asking questions about salary history but also impacts employers' use of a third party who

screens and interviews candidates. Under the new law, employers, without addressing salary history, can still discuss with an applicant “their expectations with respect to salary, benefits and other compensation.” Still, caution is needed when addressing these salary expectations to avoid even the appearance of trying to seek an applicant’s salary history. Employers also should consider adopting procedures in the event an applicant does voluntarily disclose salary history and that information is recorded in the job application.

Once the law goes into effect, applicants who are asked about their salary history or believe that an employer is relying on their salary history to determine their salary within the hiring process can file a complaint with the New York Commission on Human Rights (CHR). In general, the CHR can fine employers with civil penalties of up to \$250,000 for willful and malicious violations of the law. The CHR also can award compensatory damages, including for emotional distress. Training staff members involved in the hiring process to be mindful of avoiding salary history questions will be a key component of avoiding such administrative actions.

## Legislative Trends

This growing trend of legislation addressing a job applicant’s salary history is often set in the context of wage equality. Differences in one’s initial wage become compounded over time if each subsequent employer relies on the prior wage rate. New York City is now one of three jurisdictions, along with Massachusetts and the City of Philadelphia, that prohibit employers from inquiring about salary history. California last year amended its Fair Pay Act to prohibit using prior salary as the sole justification for any disparity in compensation; and various other states are considering similar bills. The proposed Paycheck Fairness Act pending in the United States Congress also would prohibit employers from asking a job applicant about his or her pay history during the application process.

Legislative history for this new law reflects an effort to address the gender wage gap, noting studies that have found that women are still paid less than men for similar positions. With new laws such as Intro. 1253-A and the prohibition on NYC employers asking prospective employees about salary history, employers have to be aware of the changing landscape in employment law to stay in compliance.

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