This past year, a growing number of states and municipalities banished the Ghost of Christmas Past from haunting job applicants. As a result, employers in those jurisdictions must resolve now to bid auld lang syne to asking applicants about their salary and criminal histories. Employers should take a fresh look at their job applications, and hiring practices, policies and procedures and update them now to remain in compliance in the New Year.

**Salary History Bans**

Aimed at remedying the gender pay gap, a growing number of jurisdictions have banned private employers from asking a job applicant about her or his salary or wage history. While some of these laws have already taken effect, a new batch will take effect in 2018.

For example, California’s law will become effective on January 1, 2018. It prohibits an employer from relying on the salary history information of a job applicant as a “factor” in determining whether to offer employment to an applicant or what salary to offer. The law also prohibits an employer from seeking salary history information, including information about compensation or benefits. In addition, upon an applicant’s “reasonable” request, an employer must provide the applicant with the “pay scale” applicable to the position.

The law does not prevent employers from considering or relying upon salary history information where an applicant voluntarily — and “without prompting” — discloses salary history information to a prospective employer.

While the law clarifies that the previous amendments to California’s Fair Pay Act, which prohibit prior salary alone from justifying disparity in compensation, remain in place, it also makes clear that the criminal penalties provided for in Labor Code 433 will not apply to a violation of this new subsection. Because the new Labor Code provision does not carry specific penalties for its violation, it is another target for PAGA claims. Read our colleague Jen Rubin’s detailed prior post for more on California’s ban of salary history inquiries.

Note these additional jurisdictions where salary history bans have already taken effect or will take effect: New York City (October 31, 2017), Delaware (December 2017), Puerto Rico (March 2018), Massachusetts (July 2018), Oregon (January 2019), Philadelphia (unknown, subject to litigation).

**Ban the Box**

Surprise! – California has even more changes in store for employers in 2018. California acted twice in 2017 to expressly prohibit employers from inquiring about an applicant’s criminal history prior to a conditional offer of employment and to strictly limit an employer’s use of an applicant’s criminal history following a conditional offer.
This law – and similar ones passed in other jurisdictions – aim to give applicants with a criminal history a shot at getting past initial applicant screening, but they don't require employers to hire just anyone regardless of criminal history. Our colleague Paul Huston offered a thoughtful analysis of California’s recent legislation that will take effect on January 1, 2018.

You should also be aware that a number of other states and municipalities have already banned questions about criminal history on a job application. This list includes, but is not limited to, Connecticut, the District of Columbia, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Vermont, New York City, Los Angeles, San Francisco, Chicago (and Cook County), Baltimore, Montgomery and Prince George’s Counties in Maryland (suburban DC), Buffalo, Rochester, Portland, Philadelphia, Austin, and Seattle.

So before you chill the champagne and turn on your TV to watch Anderson Cooper and Andy Cohen ring in the New Year, go ahead and take care of business now to ensure you’re off to a good start in 2018.

An Employer’s Resolutions for the New Year – A Mini-Series: Resolution #1: Don’t let your Workplace be the Next Headline: Review and Refresh your Non-Harassment Policies and Training.

New Year’s Resolution #2: New Year, New Leave Policies – Don’t Get Left Behind on Compliance!

New Year’s Resolution Series – Ringing Your Post-Employment Covenants into the New Year

©1994-2019 Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. All Rights Reserved.