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The Times They are A-Changin': More States and Cities Move Ahead of the Courts by Prohibiting the Use of Prior Salary Information in Hiring

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In the last year a number of states and major cities have passed laws prohibiting employers from obtaining past income/salary information from applicants. States with current legislation include California, Delaware, Massachusetts, New Jersey, New York, and Oregon. Cities with current legislation include: San Francisco; Chicago; New Orleans; New York City; Albany County, New York; Westchester, New York; and Pittsburgh. Not to be outdone, a number of other states, including Illinois, Maine, Maryland, Pennsylvania, Rhode Island, and Vermont, have proposed their own initiatives.

The issues then are: (1) what this means for employers who use applicant past salary information to make hiring decisions and to set employee pay rates; and (2) what do the courts have to say about it.

Like the Ban-the- Box initiative, which currently boasts 31 states, the District of Columbia, and over 150 cities and counties as implementing laws prohibiting employers from asking applicants about their criminal histories, the flood of recent past-salary prohibitions presented another sea change in hiring criteria arena.

Aside from the onslaught of state and local law changes, the anti-pay- history issue was recently supported by the Ninth Circuit in Rizo v. Yovino, No. 16-15372 (9 th Cir. Apr. 9, 2018) where the court found that employers could not use salary history to justify differences in pay.

Article By Dickinson Wright PLLC
Sara H. Jodka
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While some people have claimed that this pay disparity was to be fixed by the Equal Pay Act of 1963, which was enacted over 50 years ago, but yet there are people still indicating that women still earn less than what men do in equivalent positions. But the times, they are a-changin'.

The Equal Pay Act requires employers pay equal pay for equal work. There are four exceptions to the law that allow differing wages and those four are when payment is made under: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex.

In Rizo, Aileen Rizo sued the Fresco County Office of Education, where she was employed as a math consultant, claiming she was paid less than men performing the same job function. The county admitted to the difference in pay, but claimed the disparity was based on Rizo's prior salary. The county asked the court to throw out the case because the pay disparity was based on the "differential based on any other factor other than sex" exception to the Equal Pay Act. The court did, and at least initially, agreed with the county finding that prior salary information had always been considered one of the allowed differentials. Rizo moved for an en banc review that allowed all 12 judges in the Ninth Circuit to weigh in.

The en banc panel reversed the prior decision and limited the Equal Pay Act's affirmative defenses for "any other

factor than sex" to "legitimate, job-related factors such as a prospective employee's experience, educational background, ability, or prior job performance." As the court went on:

It is inconceivable that Congress, in an Act the primary purpose of which was to eliminate long-existing 'endemic' sex-based wage disparities, would create an
exception for basing new hires' salaries on those very disparities – disparities that Congress declared are not only related to sex but caused by sex.

The Court Further Noted:

Prior salary does not fit within the catchall exception because it is not a legitimate measure of work experience, ability, performance, or any other job-related
quality…it may well operate to perpetuate the wage disparities prohibited under the Act. Rather than use a second-rate surrogate that likely masks continuing
inequities, the employer must instead point directly to the underlying factors for which prior salary is a rough proxy, at best, if it is to prove its wage differential is
justified under the catchall exception.

The court concluded that "[p]rior salary, whether considered alone or with other factors, is not job related and thus does not fall within an exception to the Act that allows employers to pay disparate wages."

The Rizo decision puts the Ninth Circuit, not surprisingly, at one extreme end of the topical debate. The middle-of-the-road approach, which has been adopted by the Second, Sixth, Tenth, and Eleventh Circuits, and the Equal Employment Opportunity Commission allows prior salary to be considered with other factors.

So while the law in the Ninth Circuit, which governs Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington, other jurisdictions have not similarly adopted the extreme position. As such, there is a circuit split meaning the United States Supreme Court will likely take up the issue if given the chance in the future.

In the meantime, states and cities have taken the issue head on and passed their own laws banning employers from inquiring about salary histories in the hiring process. One issue with these differing laws and regulations is that they are like snowflakes in that no two are the same. This creates a patchwork of laws for employers to follow.

Given the sea change, employers are likely to see more circuits (and potentially the United States Supreme Court) line up along the Ninth Circuit on this issue. Employers, especially multi-state ones, are likely to see more laws requiring them to limit past salary inquiries in hiring, among other measures. Employers can try to keep up with each individual state/city mandate, but, like the ban-the- box issue before it, many employers found it far too tedious to keep up with the ever changing legal landscape and changed their hiring practices entirely. For example, directly ahead of Minnesota's ban-the- box law going into effect, Target, one of the nation's largest employers, issued a press release announcing that it would not ask for criminal history data in hiring decisions. One thing for sure is that this issue has steam and past pay history is an inquiry employers will want to start removing from their applications and from the interview dialogue.

For those keeping count, below is a summary of and links to all passed state/city legislation concerning the employer prohibition on the use of prior pay information:

California (eff. Jan. 1, 2018)

California's law prohibits private and public employers from seeking an applicant's pay history. Even if an employer already has that information or the applicant volunteers it, the information cannot be used in determining the new hire's pay rate. The law additionally requires employers give applicants pay scale information if they request it.

San Francisco, California (eff. July 1, 2018)

San Francisco's city ordinance prohibits employers in San Francisco from asking and considering an applicant's current or prior compensation in determining pay. It also bars them from disclosing a current or former employee's pay information without consent.

Delaware (eff. Dec. 14, 2017)

Delaware's law prohibits employers from screen applicants based on their past pay information and it also prohibits employers from asking about pay history. The law, however, does allow for employers to confirm such information after an offer of employment has been extended.

Chicago, Illinois (eff. April 10, 2018)

In the City of Chicago, departments are prohibited from asking applicants for their pay history.

New Orleans, Louisiana (eff. Jan. 25, 2017)

In the City of New Orleans, City agencies are prohibited from asking applicants for their pay history.

Massachusetts (eff. July 1, 2018)

Massachusetts employers are prohibited from asking about salary history information. The law, however, does allow employers to confirm prior history information if the information is volunteered by the applicant. It also does not prohibit employers from asking about prior pay information after an offer has been extended. If known, prior pay information cannot be used as a defense to a pay discrimination claim.

New Jersey (eff. Feb. 1, 2018)

New Jersey agencies and offices are prohibited from asking applicants pay history information and from investigating into the issue. New Jersey's law goes even further and prohibits employers from basing pay on any protected category of any employee, including sex.

New York (eff. Jan. 9, 2017)

New York state agencies and departments are prohibited from asking for pay history information from applicants until after a formal offer of employment has been made. If an applicant's prior pay information is already known, that information cannot be used to determine the applicant's pay, unless required by law or a collective bargaining agreement.

New York City, New York (eff. Oct. 31, 2017)

Employers in New York City are prohibited from asking applicants for pay history information, including information about benefits. If an employer already has that information, the employer is prohibited from using that information to determine the applicant's pay.

Albany County, New York (eff. Dec. 17, 2017)

Employers in Albany County, New York are barred from asking applicants about prior pay information, including information about benefits until after a job offer has been extended.

Westchester County, New York (eff. July 9, 2018)

Employers in Westchester County, New York are barred from asking for information about prior pay information. Only under limited circumstances may they confirm prior pay information and rely on that information in setting the applicant's pay.

Oregon (eff. Oct. 6, 2017)

Oregon employers may not ask an applicant about prior pay history until an offer of employment has been extended. Employers are also prohibited from using prior pay information to set pay, except for their current employees who might be moving into a new position with the same employer.

Philadelphia, Pennsylvania (eff. TBD)

Philadelphia's salary history ban is on hold waiting a judge's determination.

Pittsburgh, Pennsylvania (eff. Jan. 30, 2017)

Pittsburgh city agencies and offices are not allowed to ask applicants about their prior pay information and, if they discover it, they are not allowed to rely on it unless the applicant volunteered it.

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