

LEGAL ADVISORY

FROM: Paul H. Pincus
TO: Clients and Friends
DATE: December 20, 2019
RE: New York Enacts Statewide Ban on Salary History Inquiries



On July 10, 2019, Governor Cuomo signed into law bills A. 5308-B and S. 6549 (the “State Law”) that amends New York State’s Labor law to prohibit, statewide, employers from inquiring about or relying on the salary history of a job applicant or current employee in determining whether to offer employment to an individual or in determining the compensation of an individual. The State Law follows and supplements similar laws previously passed in New York City, Albany County, Suffolk County, and Westchester County, of New York State, and **will go into effect on January 6, 2020.**

Pending the issuance of any guidance by New York State about which job applicants and current employees the State Law will apply to, we believe the State Law will apply to job applicants and current employees who will physically work in New York State.

What is Prohibited

Employers and staffing firms may not:

- Rely on the salary history of a job applicant in determining whether to offer employment to an individual or in determining the compensation of an individual, except as permitted by the first exception below; or
- Orally, or in writing, seek, request, or require the salary history from a job applicant or current employee as a condition of being interviewed, or as a condition of continuing to be considered for an offer of employment, or as a condition of employment or promotion; or
- Orally, or in writing, seek, request, or require the salary history of a job applicant or current employee from a current or former employer, current or former employee, or agent of the job applicant or current employee’s current or former employer, except as permitted by the second exception below; or
- Refuse to interview, hire, promote, or otherwise employ, or retaliate against a job applicant or current employee based on his or her prior salary history; or

- Refuse to interview, hire, promote, otherwise employ, or retaliate against a job applicant or current employee because the job applicant or current employee did not provide his or her salary history information; or
- Refuse to interview, hire, promote, otherwise employ, or retaliate against a job applicant or current or former employee because the job applicant, current or former employee filed a complaint with the New York State Department of Labor alleging a violation of the State Law.

What are the Exceptions

- An employer may rely on the salary history of a job applicant or current employee if he or she voluntarily, and without prompting, discloses or verifies his or her salary history; and
- An employer may confirm the salary history of a job applicant or current employee if, **but only if**, at the time an offer of employment with compensation is made, the job applicant or current employee responds to the offer by providing prior salary information in support of his or her negotiations to obtain higher compensation than offered by the employer.

Penalties

A job applicant, current or former employee may bring a private action for relief. Remedies include compensatory damages, injunctive relief and an award of attorneys' fees.

Analysis

The State Law supplements but does not supersede any federal, state or local law enacted prior to the State Law's effective date (January 6, 2020). Therefore, to the extent there are any differences between the existing New York City, Albany County, or Suffolk County salary history ban laws,¹ and the State Law, the broadest provisions contained in any of the applicable laws must be complied with.

For example, the New York City law prevents employers from searching publicly available records or reports for the purpose of obtaining a job applicant's salary history. This is not prohibited by the State Law. On the other hand, the New York City, Albany County, and Suffolk County, laws apply only to job applicants, while the State Law applies to job applicants and to current employees.

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Companies should review their hiring, background check practices (as well as the practices of any third-party background screening companies they use), salary review and promotion policies, to ensure they comply with the new State Law, including reviewing all of their application, salary

¹ The Westchester County ban on salary history inquiries will, by its own terms, become null and void on the effective date of this statewide Law.

review and promotion forms to eliminate any requests for a job applicant or current employee to disclose his or her salary history. Companies also should consider implementing a procedure to document those instances where a job applicant or current employee voluntarily discloses his or her salary history or responds to a job offer containing compensation by providing prior salary information in furtherance of negotiations for higher compensation, so as to protect themselves in the event of a future dispute about whether the job applicant's or employee's disclosure of salary history was "voluntary" or "in response to a job offer containing compensation".*

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For more information about this Legal Advisory or assistance with compliance, please contact Paul Pincus at (212) 588-0022 or php@orllp.legal.

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