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Asking Employment Applicants for Their Salary History Soon Illegal in California

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"What did you make at your last job?" is becoming another question prospective employers cannot ask in more and more places. Effective January 1, 2018, California public and private employers will not legally be allowed to ask applicants about their salary history and must provide a position's pay range if asked. The bill, signed into law on October 12, 2017, makes it illegal for employers to rely on an applicant's salary history in deciding whether to offer employment or in setting a salary. The bill also prohibits employers from seeking out an applicant's salary history from outside sources, such as public records or the Internet. An applicant can still voluntarily disclose her salary history, as long she is not responding to the employer's prompting; but the employer can only use the information for limited purposes.

Although California's law does not specifically mention "pay equity" or "pay discrimination," its aim is to combat discrimination in pay, especially the so-called "documented" wage gap between men and women. The theory behind the new law is that pay gaps are perpetuated over time: if an applicant's salary at her last job was discriminatory, then basing her staring salary on her salary history compounds the pay discrimination that she has already suffered over the course of her career. Although California's Fair Pay Act and the federal Equal Pay Act already prohibit pay disparity based on gender, neither prohibited employers from asking about an applicant's pay history.

Some say laws like California's will have unintended consequences. These may include lowering pay for men as opposed to increasing pay for women, eliminating a valuation tool of an applicant's prior performance, and dissuading employers from offering salary premiums to entice an applicant to accept an offer. There are First Amendment free speech concerns. And without knowing a woman's prior salary, some believe employers will simply guess and guess it was low.

California joins states including Delaware (effective December 2017), Massachusetts (July 2018), and Oregon (January 2019) with similar laws restricting or prohibiting salary history questions. Other states have proposed laws on the books. Some cities, like New York City (October 31, 2017), also have laws against using salary history for both public and private employers, and plenty of other cities have ordinances or orders that apply to public sector employers.

Employers in affected states or cities can do two things to prepare for salary history ban laws:

- Revise application materials. Application forms and interview scripts should eliminate questions about salary history. Consider replacing them with more substantive questions, like descriptions of duties performed in and accomplishments at previous jobs.

- Train interviewers and managers. Teach them about questions they can still ask without reference to salary history, like the applicant's present salary expectations. Base conversations on researched market rates relevant to the position and geography, rather than on salary history. Also, consider publishing salary ranges for open positions to help potential applicants assess ahead of time whether their expectations are in line with the company's.

Employers should also consider California's new law and others like it when interviewing applicants for positions in jurisdictions where those laws exist and not where the company or the interviewer are located.

For more information on this topic, contact a member of Benesch's Labor & Employment Practice Group.

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