

New York City Commission on Human Rights Salary History Law

November 1, 2017

The New York City Commission on Human Rights (CCHR) enacted [Local Law 67](#) in May 2017, which prohibits employers from inquiring into the salary history of job applicants when interviewing in New York City or hiring for a position in New York City. The law, which went into effect yesterday, provides that it is an unlawful discriminatory practice to inquire about a job applicant's salary history or to rely on an applicant's salary history in determining the compensation that will be offered during the hiring process.¹

In early October 2017, the CCHR released guidance in the form of "[frequently asked questions](#)" regarding the implementation of the law.

Inquiries and Actions that are Prohibited

Under the law, employers may not:

- "inquire" about a job applicant's salary history, or
- rely on a job applicant's salary history to determine his or her salary, benefits or other compensation during the hiring process, including in the negotiation of a contract.

To "inquire" is broadly defined under the law and not only prohibits direct inquiries of the applicant concerning his or her salary history (which in addition to salary includes benefits and other compensation such as commissions), but prohibits employers from seeking to uncover an applicant's salary history by using publicly available information (such as through internet searches or public records inquiries). Even if an applicant's salary history is *accidentally* uncovered by the potential employer, the employer may not rely on that information in determining the salary, benefits and other compensation offered (subject to the exceptions discussed below).

The law also covers headhunters and placement agencies, and the CCHR guidance provides that headhunters should obtain written consent from applicants before sharing their salary history, and prospective employers should obtain a copy of this consent before discussing an applicant's salary history with a headhunter.

Inquiries and Actions that are Permitted

The law does not prohibit employers from:

- requesting information regarding the applicant's *expectations or demands* with respect to salary and compensation;
- considering salary history in determining the applicant's compensation if the applicant has "voluntarily and without prompting" disclosed his or her salary history;

¹ Local Law No. 67. According to the legislative history, the CCHR indicated that it believed allowing employers to rely on salary histories to determine compensation perpetuates the gender pay gap, and in adopting the law, the CCHR was seeking to "reduce the likelihood that women will be prejudiced by prior salary levels and help break the cycle of gender pay inequity."

- making inquiries of the applicant's current and former employers for purposes of verifying voluntarily disclosed information;
- asking an applicant about objective indicators of performance at prior jobs, including volumes, value or frequency of sales for commission-based positions;
- discussing unvested equity or deferred compensation that an applicant may forfeit from his or her current employer if the applicant were to accept a new job;
- asking an applicant about competing job offers and counter-offers and the pay level of those offers;
- conducting general searches for industry compensation standards for particular job applicants; or
- using an applicant's salary history when an applicant applies for internal transfers or promotions with his or her current employer.

Employers Covered by the Law

The guidance released by the CCHR also clarified that the law applies to all public and private employers, regardless of size, that are interviewing or hiring employees in New York City. While residency of the applicant in New York City alone is generally not enough to establish jurisdiction for purposes of enforcing the law, the law could be implicated if an employer conducts interviews in New York City even if the employment location will be elsewhere. The guidance also notes that a boilerplate job application that includes a request for salary history cannot comply by adding a disclaimer that New York City applicants do not need to answer the question.

Impact on Corporate Transactions

In the context of corporate acquisitions, the CCHR guidance provides that salary history can be disclosed to the potential buyer as part of due diligence since the employees of the target company are not "job applicants". However, the buyer may only use that salary information to set the going forward compensation of the target company employees on certain conditions, and may rely on the salary history information regarding the target company employees for integration and structural decisions only on a non-individualized basis.

If the buyer is asking employees of the target company to interview for their positions, the law may be implicated and, in this case, the CCHR guidance suggests that salary information learned in the diligence process should not be shared with the hiring managers making compensation decisions.

Penalties for Noncompliance

Violations of the law will result in penalties ranging from \$125,000 to \$250,000 depending on the severity and willfulness of the violation, and could also include additional affirmative relief such as mandated training. Individuals also have a private right of action for violations of the law.

Implications of the Law

In order to ensure compliance with the law, any employer with employees in New York City, or who conducts interviews in New York City, should consider taking the following actions:

- Training hiring personnel with respect to the law and its restrictions and implementing policies to ensure disallowed inquiries are not made and documenting any voluntary disclosures made by prospective employees.
- During the hiring process, focusing questions on applicants' salary requests rather than salary history. Hiring personnel can and should take into account in setting pay, the duties of the job, the

scope of employment at the applicant's last job, his or her experience and skills, as well as survey data for compensation for particular job profiles.

- Reviewing all job application materials that may be used in New York City to remove questions about an applicant's compensation history, even if these questions are framed as "voluntary".
- If salary history is provided by headhunters, obtaining a copy of the prospective employee's consent as to the sharing of this information.
- In the context of corporate transactions, analyzing whether target company employees are being interviewed for jobs with the buyer, or whether they are transferring over automatically. If there is a hiring process, ensuring that going forward compensation decisions are made by individuals who did not conduct individualized diligence on the target. The structure of a transaction (whether an asset, stock or merger) may also affect the implication of the rule.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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