

Management Alert



UPDATE: New York City Commission on Human Rights Releases Additional Guidance and FAQs on the New York City Salary History Law

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Seyfarth Synopsis: The New York City Commission on Human Rights (the “Commission”) recently issued additional guidance in the form of “Frequently Asked Questions” on the Salary History Law that goes into effect on October 31, 2017.

New York City’s Salary History Law goes into effect on October 31, 2017. It will prohibit covered employers from inquiring about a candidate’s salary history, or relying on the salary history of candidates when determining their salary, benefits, or other compensation. For more information regarding the law, see our prior alerts [here](#), [here](#), and [here](#).

With the Halloween deadline fast approaching, many employers are revising their hiring practices to comply with the law. Recently, the Commission issued guidance, which can be found on its website in a section entitled: “Frequently Asked Questions,” and [here](#). The FAQs respond to some key concerns employers have about the law.

Key Takeaways

- The FAQs provide guidance regarding deferred compensation and unvested equity. They clarify that, as part of a discussion about compensation *expectations*, employers can ask about the value and structure of deferred compensation or equity that would be forfeited.
- The Commission takes an expansive view regarding the geographic scope of the law’s coverage, and will apply the law to job applicants that live in New York City and interview in New York City, even if they apply for a job outside of New York City.
- The FAQs state that employers and consumer reporting agencies must comply with the law’s requirements even when running a background check, and suggest that it is a best practice to redact or exclude salary history from such reports.
- Employers should remove all requests for current or prior salary on their job applications, particularly where it might be sent to a candidate for a job in New York City.
- The Commission will conduct a case-by-case analysis regarding inquiries about the salary history of independent contractors and whether the employer may consider salary history when determining compensation for an offer of permanent employment in the same position or a comparable position. The Commission will primarily consider whether the temporary employee or subcontractor qualifies as an applicant for a new position or for internal transfer or promotion.

General Scope of Coverage

There were no big surprises on the scope of coverage.

- The FAQs reaffirm that the law covers applicants for jobs in New York City. The Commission acknowledges that the law will not apply where an applicant simply resides in New York City, but is interviewed and will work outside of New York City. However, the FAQs indicate that the Commission is taking the position that if the employer asks a candidate about salary history during a job interview that occurs in New York City, even for a job based outside of the City, the law may apply. Here, the Commission relies on the theory that the impact of the discriminatory conduct occurred in New York City. Courts may take a narrower view when analyzing the locus of the impact of the challenged conduct and if the law applies in this situation. Nonetheless, even employers without operations in New York City should exercise caution, particularly when interviewing in or considering applicants from New York City.
- The law generally will not apply to former employers who disclose information about salary history to the hiring employer. However, the Commission noted that others can be held liable if they intentionally aid and abet a violation of the law.
- Applicants for internal transfer or promotion are not protected by the Salary History Law.
- The salary history protections will go into effect on October 31, 2017, but they will not be retroactive to cover inquiries made prior to that date. Nonetheless, employers should exercise caution if they are formulating or communicating offers after October 31st based on salary history obtained prior to that date. Even if the information was lawfully obtained before the law went into effect, the law independently prohibits reliance on salary history in determining a candidate's compensation, including the negotiation of a contract.

What Employers Can and Cannot Do to Learn About Applicants' Salary Expectations

- The Commission confirmed that a job application can ask an applicant to state his or her compensation expectations, as long as it does not request salary history.
- Employers should review and revise their job applications, particularly where one might be sent to a candidate applying for a job in New York City, to remove all requests for current or prior salary. Retaining or including a question on a job application that asks for salary history may violate the law. Employers who use an application that requests salary history cannot avoid liability simply by adding a disclaimer stating that individuals in New York City or applying for jobs in New York City need not answer the application's question about current or prior salary.
- Inquiries made to a candidate's current or former employers, or searching public records, for the purpose of learning an applicant's salary history, are prohibited. However, in cases of accidental discovery if, for example, an employer stumbles upon a candidate's salary history while searching publicly available information for another purpose, the employer would not have violated the Salary History Law. In such a situation, however, the employer may not rely on that accidentally discovered salary history to formulate the compensation details of an offer.
- If an applicant volunteers information about his or her salary history without being prompted to do so, the employer may discuss and inquire about the applicant's salary history, verify the applicant's representations, and rely on the applicant's salary history in determining an offer.
- A voluntary disclosure of salary history is "without prompting" if the average job applicant would not think that the employer encouraged the disclosure based on the overall context and the employer's words or actions. While the Commission is articulating an objective "reasonable person" test, rather than a subjective standard, this "voluntary and without prompting" safe harbor remains vague. Employers should exercise caution and train hiring managers and recruiting professionals not to prompt disclosure of salary history.

Background Checks and the Implications of the Credit Reporting Laws

- In circumstances where an employer is legally permitted to perform a background check before a conditional offer has been made, or runs a background check after a conditional offer, the Commission recommends that employers specify to reporting agencies that information about salary history be excluded from the report. Inquiries into salary history would violate the law regardless of whether such inquiries are made before or after a conditional offer, unless the employer makes the inquiry to verify information the applicant disclosed voluntarily and without prompting.
- Consumer Reporting Agencies (“CRA”) should consider no longer verifying salary information for applicants in New York City or applicants for jobs in New York City. In addition, where CRAs collect W-2 or other tax reporting forms from candidates, they should redact salary history.

Broad Definition of “Compensation”

- The Commission has defined “salary” broadly. The same is true of “benefits” and “other compensation,” which extend to various forms of remuneration, including, but not limited to, a car allowance, retirement plan, or bonus. This also includes commissions an applicant earned.
- An employer is allowed to ask about objective indicators of performance such as a book of business, or the volume, production, value, or frequency of sales. However, an employer should not ask about an applicant’s current or former profit percentages, or information from which it can determine the applicant’s compensation earned on production or commissions (unless the applicant volunteered that information without prompting).
- Employers may ask about the value of a counter offer or competing offer that the candidate might also be considering, because it is not “current or prior” salary.

Deferred Compensation

- One of the most significant pieces of guidance contained in the FAQs concerns deferred compensation. In September, the Commission’s policy counsel represented to us that it would take the position that employers should not affirmatively ask candidates whether they have deferred compensation or would forfeit deferred compensation. The Commission stated that if the candidate offers information about deferred compensation as part of a discussion about compensation *expectations*, the employer can verify the value of the deferred compensation that would be forfeited, either with the prior employer or with the candidate. However, when the Commission issued Fact Sheets in September, they were silent on deferred compensation.
- The FAQs now state clearly that, in the context of a discussion with candidates to learn about their compensation *expectations*, employers may ask whether an applicant will have to forfeit deferred compensation or unvested equity upon resignation from his or her current employer, and may ask about the value and structure of the deferred compensation or unvested equity that would be forfeited. Employers may request documentation to verify the applicant’s representations, and consider such information in making an offer.

Exemptions to the Law

- There is no specific exemption in the law for actions taken by an employer pursuant to foreign or international law that specifically authorizes the disclosure or verification of salary history or requires knowledge of salary history.
- Private positions for which compensation is set pursuant to procedures established by collective bargaining are not exempt. The only exemption in this area applies to public employees where compensation is set pursuant to a collective

bargaining agreement.

- Headhunters are not exempt. Headhunters who qualify as employers, employment agencies, or agents of an employer may be liable under a direct or aiding and abetting discrimination theory. The Commission recommends that headhunters obtain written confirmation from job candidates that they consent to disclosure of their salary history. Employers working with headhunters should also obtain a copy of the applicant's written consent before relying on a headhunter's representations about an applicant's salary history.
- The Commission did little to clarify the debate surrounding independent contractors. The law does apply to independent contractors. However, the Commission hedged on whether an employer may consider the salary history of a temporary employee or a subcontractor in determining compensation for an offer of permanent employment in the same position or a comparable position. The Commission stated that this must be assessed on a case-by-case basis. The Commission will consider whether the temporary employee or subcontractor qualifies as an applicant for a new position or for internal transfer or promotion. The Commission suggests that if the employer is willing to concede that it is a joint employer of the subcontractor or temporary employee, then the application may be one for internal transfer or promotion, which would not be covered by the law.

Corporate Acquisitions

- A company seeking to acquire another company may obtain salary information about the employees of the target company as part of the due diligence process because the employees of the target company are not "job applicants" under the law.
- However, despite this corporate acquisition exemption, the FAQs explain that if employees of the target company are being asked to interview for new positions in the acquiring company, the law may apply. Accordingly, in those circumstances, the Commission recommends that any salary information that may have been shared in the due diligence process not be shared with hiring managers making decisions about compensation. Employers considering a corporate acquisition should assess the law's potential applicability.

Best Practices

The Commission recommends as a best practice:

- During the hiring process, focus questions on applicants' salary demands, skills, and qualifications.
- Employers and hiring managers change the tenor of the conversation around salary discussions in interviews, to move away from what the applicant is currently making, and instead focus on his or her salary demand. The Commission believes this is an important change to prevent current salary from being based on prior salary, which may be artificially depressed.
- Ensure that job applications and other forms do not include questions about applicants' salary history, even if such questions are framed as "voluntary."
- Modify written policies and educate interviewers and hiring staff to prohibit inquiries about applicants' salary history.

Unintentional violations of the law may lead to imposition of civil penalties of up to \$125,000, and the Commission may impose a penalty of up to \$250,000 for a willful and malicious violation. Individual applicants may also file claims under the New York City Human Rights Law for violation of the Salary History Law, and seek compensatory damages and other relief including punitive damages and attorneys' fees.

As always, we are available to answer any questions employers may have regarding the Salary History Law. If they have not done so already, employers should evaluate and reassess their practices and procedures with respect to recruiting and hiring in light of this new law and guidance.

Seyfarth Shaw is tracking this emerging area of law closely. We will keep you updated regarding any developments. For information on how this law might affect your company, contact any member of Seyfarth's Pay Equity Group, [Cameron A. Smith](mailto:Cameron.A.Smith@seyfarth.com) at casmith@seyfarth.com, [Christine Hendrickson](mailto:Christine.Hendrickson@seyfarth.com) at chendrickson@seyfarth.com, [Courtney Stieber](mailto:Courtney.Stieber@seyfarth.com) at cstieber@seyfarth.com, or [Lisa Savadjian](mailto:Lisa.Savadjian@seyfarth.com) at lsavadjian@seyfarth.com.

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