

# New York City Commission on Human Rights Publishes FAQ Guidance on NYC Salary History Law

**Law and the Workplace Blog** on **October 10, 2017**

On the heels of its [recently issued fact sheets](#), the NYC Commission on Human Rights (the “Commission”) has published a [frequently asked questions page](#) on the New York City salary history inquiry law, which goes into effect on October 31, 2017.

The FAQs address a number of details about the law, which restricts the ability of employers and their agents to inquire about and/or rely on a job applicant’s salary history during the hiring process, including for purposes of determining compensation. The following are some of the key takeaways from the new guidance:

## “Salary History” Defined

The law broadly defines “salary history” as including an applicant’s “current or prior wage, benefits or other compensation.” Salary history does not, however, include “any objective measure of the applicant’s productivity such as revenue, sales or other production reports. The FAQs address several additional details about how “salary history” is defined, including:

- The terms “compensation” and “benefits” are defined broadly under the law and “may include many factors, including, but not limited to, a car allowance, retirement plan, or bonuses.”
- With regard to commission-based compensation, employers *may not* ask about the percentage or amount of commission an applicant earned (absent the candidate’s voluntary disclosure of such information), but *may* ask about “objective indicators of performance such as the volume, value, or frequency of sales.”
- For industries in which employees are compensated based on a profit percentage, employers *may not* ask about an applicant’s current or former profit percentage (again, absent the candidate’s voluntary disclosure of such information), but *may* ask about “the size of the applicant’s book of business, profits generated, or other objective indicators of performance.”

- Prospective employers may ask about the value of competing offers that the applicant has received without running afoul of the law's prohibitions.

## Scope of Coverage

- The FAQs note that the law governs the hiring context only and does not address inquiries about salary history that are made after an individual has been hired and his/her compensation has been set. Thus, an employer *may* make salary history inquiries of individuals who are currently employed by the employer.
- With regard to geographic scope of coverage, if an applicant is asked about salary history during a job interview *that occurs in* New York City, the Commission states that there likely *will be* coverage under the law, regardless of whether or not the job is substantially based in NYC or whether the applicant is a resident of NYC. The law likely *will not* apply, however, where the applicant simply resides in New York City but is both interviewed and will work outside of NYC. The Commission states that entities should apply the same jurisdictional analysis in the context of the salary history law as they would for coverage under other aspects of the NYC Human Rights Law.
- The FAQs note that the law governs salary history inquiries by hiring employers and their agents only, and therefore does not place any express prohibitions on former employers with regard to disclosing salary history about a current or former employee. This said, entities and individuals that are not directly subject to the law's prohibitions may nonetheless be liable under the law if they "intentionally aid and abet a violation of the law." For this reason, employers should consider instituting policies under which compensation information regarding current or former employees will only be disclosed upon the express written consent of such individuals.
- Headhunters and search firms are expressly covered by the restrictions of the law, and the FAQs note that headhunters who qualify as employers, employment agencies, or agents of an employer, or who aid and abet a violation, may be liable under the law. As such, headhunters and search firms *may* inquire about applicant's salary expectations or demands, but *may not* ask about salary history (absent the candidate's voluntary disclosure of such information). The FAQs further state that, to protect against liability, headhunters should obtain written confirmation from job candidates that they consent to the disclosure of their salary history before the headhunter shares it with a potential employer (for example, where an applicant may want to voluntarily disclose his/her current or prior salary as part of negotiations with a potential employer and instructs the headhunter to offer that information on their behalf). Further, to protect against employer liability in this regard, the FAQs state that prospective employers should obtain a copy of

the applicant's written consent authorizing the headhunter to disclose that information before relying on a headhunter's representations about an applicant's salary history.

- Agents working on behalf of *applicants* may only disclose salary history information to a prospective employer if the applicant has consented to such disclosure. The FAQs state that such agents may be liable for aiding and abetting an unlawful discriminatory practice if they disclose salary history without the prospective employee's permission.
- While the law exempts *public* employee positions for which compensation is set pursuant to collective bargaining agreements, the FAQs note that no such equivalent exemption exists for *private* positions subject to collective bargaining of compensation, and such private positions therefore are covered by the law.
- The law exempts internal transfers and promotions from coverage. For temporary employees or contractors who are subsequently offered permanent employment in the same or comparable position, the FAQs state that the Commission will consider whether such an individual is considered an applicant for a new position (and therefore covered by the law) or a candidate for an internal transfer/promotion (and therefore exempted from coverage) "based on the facts of each case."
- In the context of a corporate acquisition, employees of the target company are not considered "applicants" for purposes of the law. An acquiring company *may* therefore seek compensation information about employees of the target company as part of its due diligence process. An acquiring company may only use such information, however, in setting the compensation of acquired employees when compensation decisions are being made on a non-individualized basis. If employees of the target company are being asked to interview for positions with the acquiring company, the law may be implicated. Compensation information obtained during the due diligence process should therefore not be shared with hiring managers making compensation decisions.
- With regard to the interplay of international law, the FAQs state that there is *no* specific exemption 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.

### Salary History in Public Records and Background Checks

The FAQs emphasize that the law prohibits employers from seeking salary history not only from an applicant's current or prior employer, but also through searches of public records or background checks.

- While employers *may* conduct public record searches for general information about industry compensation standards, employers *may not* search for information that is intended to uncover the compensation of a specific applicant, including by searching websites or other public records for information about the compensation paid to individuals with the applicant's specific title at the applicant's current or former place of employment.
- Salary history information obtained via background check is covered by the law, regardless of what stage in the hiring process the background check is conducted. As such, "the Commission recommends that employers specify to reporting agencies that information about salary history be excluded from the report." The FAQs confirm that if an employer accidentally uncovers information about an applicant's salary history in the course of running a background check (or otherwise), the employer *may not rely* on that information in determining what compensation to offer the applicant.

### Salary Expectations and Deferred Compensation/Unvested Equity

While the law places broad prohibitions on inquiries into salary history, it does permit employers to ask about compensation expectations. To that end:

- While a job application can request information about an applicant's compensation expectations or demands, it *may not* include a request for information about applicants' salary history, *even if* the employer makes clear that a response is voluntary. Therefore, an employer who uses a multistate application that requests salary history information in other jurisdictions may not avoid liability under the law by adding a disclaimer that New York City applicants need not answer the question.
- As part of the permissible scope of discussion about salary expectations, employers *may* ask whether an applicant will have to forfeit deferred compensation or unvested equity from their current employer *and* the value and structure of the deferred compensation or unvested equity. The employer may further request documentation to verify the applicant's representations, and consider such information in making the applicant an offer.

### Voluntary Disclosure of Salary History Information

The law provides that if an applicant "voluntarily and without prompting" discloses salary history information, the employer may then discuss and verify the representations about salary history, as well as rely on the voluntarily disclosed information in determining compensation.

- The FAQ states that a disclosure will be considered to be “without prompting” where “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.”

\* \* \*

We will continue to report on updates regarding this law and any guidance issued by the Commission as they develop.

*NOTE* – This post was updated on October 12, 2017 to reflect additional guidance from the Commission in the FAQs on: (i) the exclusion from the law of salary history inquiries made once an individual is currently employed by the employer; (ii) geographical scope of coverage of the law; (iii) permissible inquiries regarding deferred compensation/unvested equity; (iv) headhunter coverage; and (v) the interplay of international law.

[View Original](#)

#### [Related Professionals](#)

---

- **Allan S. Bloom**  
Partner
- **Evandro C. Gigante**  
Partner
- **Laura M. Fant**  
Special Employment Law Counsel