

[Podcast] The Proskauer Brief: New York City's New Salary History Law

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In the inaugural "[The Proskauer Brief](#)" podcast episode, senior counsel [Harris Mufson](#) and associate [Laura Fant](#) discuss New York City's new salary history law, noting that employers should be actively taking steps to prepare for October 31, 2017, when the law will go into effect. This law will place significant restrictions on the ability of employers to inquire into or rely upon job applicants' wage history during the hiring process. We tell you what you need to know about the new law and discuss the impact it will have on employers.

Harris Mufson: Welcome to the Proskauer Labor and Employment podcast. My name is Harris Mufson, I am a senior counsel in our Labor and Employment group. Today I am joined by Laura Fant, an associate in our group and Laura today is going to discuss the New York Salary History Law and we will also talk about other interesting topics around the country in Labor and Employment law. Laura, you ready?

Laura Fant: Let's get started.

Harris Mufson: Let's talk about the New York Salary History Law that goes into effect on October 31, 2017, right around the corner. Can you provide our listeners with just an overview of the law?

Laura Fant: Sure. This law really has been the talk of the New York City metro area ever since it was first passed by the New York City Council, but, certainly since it's been signed into law by Mayor DiBlasio. So, effectively, this law is going to place some significant restrictions on employers' ability to inquire about the salary history of applicants for employment. More specifically, it places restrictions on both inquiring into salary history and also relying on salary history during the entire hiring process, including when it comes to negotiating a comp package.

Harris Mufson: In terms of the law, one of the important aspects of it are the carve outs to the prohibitions into asking or inquiring about salary history. Can you talk a little about those carve-outs?

Laura Fant: Sure. What can you do under this law?

Harris Mufson: Right.

Laura Fant: The law is clear that employers can engage in discussion with applicants about what are their expectations when it comes to salary. An employer can ask “what are you looking for here . . . what are your expectations?” The law also makes clear that, if an applicant voluntarily brings up their salary history in the course of an interview or hiring discussion, then the employer is then free to consider that salary history in determining salary and compensation, and they can also go ahead and verify that salary history. The question is how much leeway does an employer have once an applicant opens that gate? Can they ask questions beyond what the applicant has already brought forward or are they limited to really only following up on the information that the applicant has voluntarily raised?

Harris Mufson: The issue is: does that now open the door, right? If an applicant volunteers and says “I made x amount of money in my prior employer,” does that mean that you can then ask about benefits and other compensation information, and what is the law saying in terms of that issue?

Laura Fant: It really is not very clear. So unfortunately, this is one of those points that we may have to wait for some guidance from the New York City Commission on Human Rights, or maybe even some case law to put some parameters on how wide is that door really being opened in that situation.

Harris Mufson: One issue that I’ve encountered in the ramp up to the enactment of this law are questions from clients about whether they can ask applicants whether or not those applicants are forfeiting any deferred compensation. Does the law address that issue?

Laura Fant: Yeah, are you leaving anything on the table when you leave? The law does in fact specifically make mention of this and I think this is really in response to concerns that were raised by employers in certain industries including the financial services industry, where deferred compensation and unvested equity are significant portions of people's compensation packages. So, the law does say that in the context of that engaging in discussion about expectations when it comes to salary, employers can address and discuss unvested equity or deferred comp. But, again, the question is really, can employers bring this up themselves; do they have to wait for applicants to open the door to it? As a practical matter, how is this really going to play out in the real life world of hiring- you know- discussions and conversations? So, I think that's another question that's a little open right now.

Harris Mufson: And so, what are we advising clients to do to get out in front of this law to ensure that their workforce is complying with it and that their documents are compliant with these statutory requirements.

Laura Fant: Well, I think you "hit the nail on the head" with the document aspect. One of the first things that employers really can be doing is take a look at their job applications and their hiring documentation, and making sure that there are no questions on there that would run afoul of any of the prohibitions under this law. I think the more challenging next step will be working with your hiring team and your recruiters to make sure that everybody fully understands what this law says, what you can and what you can't do under the law, so that everybody is on the page moving forward.

Harris Mufson: Yeah, probably preparing "do's" and "don'ts" you know- for maybe a one- pager for those employees who interview employees is a good idea.

Laura Fant: Yep, talking points.

Harris Mufson: Right

Laura Fant: Training . . . it's all going to be critical, I think, moving forward because this is a new law and it really kind of creates a whole new world when it comes to the interview and the hiring process.

Harris Mufson: So this law governs New York City employers; have you seen similar laws either, being enacted or being discussed by city state legislatures in other jurisdictions?

Laura Fant: Massachusetts was really the front runner in this area when they passed the first law of its kind in the nation placing similar restrictions on asking about and using salary history. Philadelphia has also passed a similar law, but they're an interesting situation because they recently had a legal challenge to their law- constitutional challenges in fact- so the law is currently on indefinite hold. So it will be interesting to keep an eye on that law suit and see how it progresses, because it could in fact have some implications for the New York City law going forward.

Harris Mufson: Alright, that certainly will be interesting, and we will keep an eye on that.

This is our parting shot segment, where we will talk about key developments in the law and do so no more than 30 seconds. So I will put that on the clock and I'll go first.

What I want to talk about briefly, is, family leave, which is a new New York law that will go into effect on January 1, 2018, that being paid family leave. Essentially, employees can use paid family leave to care for loved ones, for bonding time, for children, and the way that this will work is that employers will withhold from employees' wages at a certain capped amount, and then employees can then use that banked leave later on. Laura what you got?

Laura Fant: Alright. Another topic I've been keeping an eye on is: protections against sexual orientation discrimination under Title VII. This has been a topic that's been hot in the courts lately following the Seventh Circuit's decision from April of this year, where it became the first Federal Appellate Court to extend the full protections of Title VII to prohibit discrimination on the basis of sexual orientation.

Harris Mufson: Certainly an issue developing. I'd like to thank Laura Fant for joining us today and providing all of her fantastic insight. I'm Harris Mufson, thank you again for listening to the Proskauer Labor and Employment podcast and we'll be back.

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