

New York State Department of Labor Publishes Guidance on Salary History Inquiry Law

Law and the Workplace Blog on January 14, 2020

The New York State Department of Labor (NYSDOL) has published [guidance](#) on the state's salary history inquiry law, which went into effect on January 6, 2020.

As we [previously reported](#), the law prohibits employers from:

- Relying on the wage or salary history of an applicant in determining whether to offer employment to such individual or in determining the wages or salary for such individual;
- Orally or in writing, seeking, requesting, or requiring the wage or salary history from an applicant or current employee as a condition of being interviewed, or as a condition of continuing to be considered for an offer of employment, or as a condition of employment or promotion;
- Orally or in writing, seeking, requesting, or requiring the wage or salary history of an applicant or current employee from a current or former employer, current or former employee, or agent of the applicant or current employee's current or former employer;
- Refusing to interview, hire, promote, otherwise employ, or otherwise retaliating against an applicant or current employee based on prior wage or salary history;
- Refusing to interview, hire, promote, otherwise employ, or otherwise retaliating against an applicant or current employee because the individual did not provide wage or salary history in accordance with the law; or
- Refusing to interview, hire, promote, otherwise employ, or otherwise retaliating against an applicant or current or former employee because the individual filed a complaint with the State's department of labor alleging a violation of the law.

The guidance addresses and clarifies a number of details about the new law. Below are some of the key takeaways.

Prohibited Employer Practices

Under the law, applicants and employees are permitted to voluntarily disclose their pay history, including for the purpose of negotiating compensation. The guidance clarifies that if “an applicant voluntarily and without prompting discloses salary history information, the prospective employer may factor in that voluntarily disclosed information in determining the salary for that position.” However, employers may not rely on voluntarily disclosed salary history information “to justify a pay difference between employees of different or various protected classes who are performing substantially similar work,” because such reliance would violate the state’s Equal Pay Act.

In addition, employers may not pose “optional” salary history questions on a job application seeking a voluntary response. In fact, the guidance suggests that employers may consider proactively stating in job postings that it does not collect salary history information from applicants. Employers in New York City should also be mindful of the existing prohibition under the [City’s salary history inquiry law](#) from using applications with boilerplate salary history questions, even when the application includes a disclaimer that individuals applying for jobs in the City need not answer the question.

Coverage for Current Employees and Independent Contractors

The guidance makes clear that unlike other salary history bans (including the New York City law), the state law applies to current employees. Therefore, while employers cannot ask about pay from other jobs, they “may consider information already in their possession for existing employees (i.e. a current employee’s current salary or benefits being paid by that employer).” Employers in New York City should, of course, follow the state law with respect to current employees as this law is more protective than its City counterpart.

The guidance also clarifies that applicants (including part-time, seasonal and temporary workers, regardless of immigration status) are covered by the law; however, “bona fide independent contractors, freelance workers or other contract workers” are not covered “unless they work through an employment agency.” As we [previously reported](#), the New York City Human Rights Law has recently been amended to expand protections under the law to freelancers and independent contractors. While the NYCHRL also contains prohibitions and limitations on employers’ ability to inquire or obtain salary history information about applicants, it remains to be seen whether and how such restrictions may be applied to independent contractors.

Forms of Covered Compensation

The guidance provides very little detail about which forms of compensation are covered by the law; it states broadly that employers cannot ask about “any information concerning an applicant’s salary history,” including “compensation and benefits.” On the other hand, the New York City law explicitly allows employers to ask candidates about deferred compensation or unvested equity than an applicant would have to forego in accepting a new job, and the [NYC Commission on Human Rights’ guidance](#) similarly allows employers to ask for the value of any counteroffers. Absent further guidance from the State to the contrary, inquiries about deferred compensation and unvested equity do not appear to be permitted under the state law.

Geographic Scope

The guidance clarifies that the law applies to jobs that are based in New York, regardless of whether the employer is based within or outside of the state, and even if the interview process takes place virtually, by telephone, or in another state.

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We will continue to report on updates regarding this law and any further guidance issued by the NYSDOL. In the meantime, employers in New York should review their job applications and hiring processes to ensure compliance with these new requirements.

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