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CALIFORNIA'S NEW SALARY HISTORY INQUIRY BAN: WHAT EMPLOYERS CAN – AND CANNOT – DO

As we discussed in our recent [Alert](#), Governor Brown recently signed into law A.B. 168, which adds section 432.3 to the California Labor Code to prohibit all public and private employers, regardless of size, from requesting a job applicant's salary history. The law takes effect on January 1, 2018. The rationale behind it, and similar laws in some states and cities across the nation, is that basing current pay on past compensation perpetuates gender and race-based pay inequities.

To help employers prepare for compliance with California's new salary history inquiry ban, here's an overview of what is and isn't permissible under the new law.

Employers *cannot*:

- Seek salary history information – which includes compensation and benefits – about a job applicant, whether orally or in writing, personally or through an agent. Thus, employers and their agents (managers, recruiters, etc.) cannot ask applicants or former employers about the applicant's salary history.
- Rely on salary history information as a factor in determining whether to offer the applicant employment. This restriction applies even if an applicant voluntarily discloses their prior salary.
- Rely on salary history information as a factor in determining the salary for the applicant (unless the applicant voluntarily and without prompting provides the information – see below).

The restrictions on seeking and using salary history information do not apply when the information is publicly available, such as under the California Public Records Act or federal Freedom of Information Act.

Employers *can*:

- Receive salary history information that the applicant provides *voluntarily* and *without prompting*.
- Use such voluntarily disclosed salary history information to determine the applicant's compensation and other benefits. However, the information *cannot* be used to determine whether to hire the applicant.

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In addition, although not specifically called out in the new law, examples of inquiries that also would appear to be permissible include: 1) asking applicants about their salary expectations; 2) inquiring of an applicant for a commissioned sales position about gross amount of past sales (but not about commissions earned or rates); and 3) discussing true-ups of bonuses and equity and other compensation left on a prior employer's table – but only if the issue is raised by the applicant first. In any of these scenarios, employers should make clear to the applicant that they are not asking for salary history. Also, remember that salary history information provided voluntarily cannot be used in determining whether to offer employment. For example, if an applicant voluntarily discloses that they are earning significantly more than the current position offers, a prospective employer cannot use this information to deny employment based on the assumption that the employee will not accept an offer at the lower salary.

Providing “Pay Scale”

Employers also should note that the new law specifies that “upon reasonable request” from an applicant, the employer must provide the “pay scale for a position” to the applicant. Unfortunately, the law does not define “pay scale,” what’s a “reasonable request,” or how the information must be provided. Until the legislature, administrative agencies, or courts provide further guidance, employers should consider preparing an appropriate “pay scale” (e.g., pay range, specific wage or salary level, compensation formula, etc.) for the position in question. Also, employers should consider providing pay scale information in writing to have a record of compliance.

Finally, A.B. 168 includes a reminder that, consistent with California’s Fair Pay Act, reliance on prior salary cannot by itself justify a disparity in compensation based on gender, race, or ethnicity for employees who are performing substantially similar work.

Getting Ready

Revise job applications and other hiring paperwork to remove questions that could seek salary history, and revise hiring procedures and interview/screening guidelines to make clear that the organization does not request salary history and will not use salary history unless otherwise permitted by law. Train personnel involved in hiring about the restrictions imposed by the new law. And, implement procedures to ensure delivery of pay scale information upon an applicant’s request. Finally, employers hiring in San Francisco should note that a similar city ordinance takes effect in July 2018.

Contact us for a flat rate to update your employee handbook for 2018 – we’d be happy to help.

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