WINSTON & STRAWN LLP

CLIENT ALERT

Legislative Trends Update: Pay Equity & Inquiries

JULY 5, 2018

Last September, we examined the increasing prevalence of pay equity and inquiry legislation. See *Legislative Trends: Pay Equity & Inquiries*. Since that briefing, state and local lawmakers across the country have continued to enact these measures, which prohibit employers from inquiring about job candidates' salary history. At the same time, two states have passed opposing legislation, proactively prohibiting local governments from enacting salary history bans. Additionally, at least one federal court has found that legislation barring employers from inquiring about a prospective employee's past compensation is unconstitutional.

Proponents of salary history bans argue that such laws thwart further perpetuation of the gender pay gap (which some say stands at around 20 percent), negate implicit biases that create wage inequities, and result in employers basing salary on the role itself. Opponents of salary history bans argue that such bans amount to governmental overreach into the hiring process and violate First Amendment free-speech principles.

This update supplements our September briefing with discussions of these most recent developments.

Additional State-Enacted Pay Equity and Inquiry Legislation

California

On October 12, 2017, California Governor Jerry Brown signed into law Assembly Bill (A.B.) 168, which bars employers from directly or indirectly seeking a job applicant's salary history and from relying on an applicant's salary history when making hiring decisions or setting compensation. Previously, California law only prohibited employers from relying *exclusively* on an applicant's prior salary when making compensation decisions. With A.B. 168, protections against salary history inquiries are broadened such that employers are now prohibited from asking about an applicant's pay history or relying on that information in any way, whether during the hiring or compensation-setting process. There is an exception, however, if the applicant "voluntarily and without prompting" discloses his or her salary history, at which point an employer may consider and rely on that information in making hiring decisions and determining compensation. Under A.B. 168, which took effect on January 1, employers are also required to provide job-specific pay scale information to applicants upon reasonable request.

For more information, see our previous client briefing *California Employment Legislative Update*. Also, see below for more on the pay inquiry ordinance set to take effect in San Francisco.

Connecticut

On May 22, Connecticut Governor Dannel P. Malloy signed into law House Bill (H.B.) 5386, also known as "An Act Concerning Pay Equity." Like California's law, the Act prohibits employers from asking, directly or through a third-party, prospective employees about their salary history. The Act also includes several provisions protecting employees' rights to disclose and discuss their own salary information with other employees and to inquire about the salary information of other employees. Under the Act, employers cannot prohibit or penalize such discussions, disclosures, or inquiries, and they also cannot require employees to waive any of these rights. Employees or prospective employees are permitted to bring legal claims against employers under the Act, and employers found to have violated provisions of the Act may be liable for compensatory damages, punitive damages, or equitable relief. This legislation will take effect on January 1, 2019.

Vermont

On May 11, Vermont Governor Phil Scott signed into law H. 294, forbidding employers from asking prospective employees about their current or past compensation. The law bars employers from requiring that an applicant's past compensation satisfy a minimum or maximum threshold and from deciding whether to interview someone based on the applicant's current or past compensation. H. 294 further bars employers from seeking information about an applicant's past compensation from current or former employers. However, if a prospective employee voluntarily discloses information about his or her previous compensation, an employer may attempt to confirm the information after an offer of employment is made. H. 294 clarifies that employers are permitted to ask prospective employees about their salary expectations or requirements. This law will take effect on July 1.

For related legislation in Massachusetts and New Jersey, please see our previous client briefings, *Massachusetts Passes New Pay Equity Law* and *New Jersey Enacts Most Rigorous Pay Equity Legislation Yet*. For related legislation in Delaware, Oregon, and Puerto Rico, see *Legislative Trends: Pay Equity & Inquiries*.

Recent Local-Enacted Pay Equity and Inquiry Legislation

Albany County, NY

On November 6, 2017, Albany County Executive Daniel McCoy signed into law an amendment to the county's Human Rights Law that prohibits pay history inquiries during the hiring process. Employers in Albany County may not screen applicants based on their compensation history or request or require that applicants disclose their compensation history as a condition of being considered for employment. Employers also may not ask current or former employers of applicants about their salary history. If an applicant provides written authorization, an employer may seek to confirm prior wages, but only after an offer of employment with compensation has been made. This local legislation went into effect on December 17, 2017.

San Francisco, CA

When A.B. 168 became California law in late 2017, San Francisco had already passed its own ban on salary history inquiries through its Parity in Pay Ordinance. See *San Francisco Enacts Ordinance Banning Pay History Inquiries*. Signed by former San Francisco Mayor Ed Lee on July 19, 2017, the Ordinance is set to take effect on July 1, 2018. Many of the Ordinance's provisions overlap with A.B. 168, as the Ordinance also prohibits employers from asking about or relying on an applicant's pay history during the hiring process, when making job offers, and when setting salaries. However, the Ordinance contains one additional restriction on employers—namely, it prohibits employers from disclosing the salary history of former and current employees to prospective employers without first obtaining written authorization from the employee, except in limited circumstances.

Westchester County, NY

On April 10, Westchester County Executive George Latimer signed an amendment to the Laws of Westchester County barring salary history inquiries. The amendment prohibits employers from relying on, requesting or requiring as a condition of employment consideration, or seeking from current or former employers, a prospective employee's salary or wage history. The amendment, however, does allow employers to rely on salary history when a prospective employee voluntarily discloses it to negotiate a higher wage. It also includes an exception allowing employers to confirm an applicant's prior wages with former employers if the applicant has been offered employment with compensation and the applicant has provided previous wage information to negotiate a higher rate of compensation. Under this local law, employers are also prohibited from refusing to hire, or retaliating against, employees or prospective employees based upon wage or salary history.

For similar legislation in New York City, see *New York City Bans Salary History Inquiries*.

Chicago, IL

On April 10, or "Equal Pay Day," Chicago Mayor Rahm Emanuel issued Executive Order No. 2018-1, prohibiting City of Chicago departments from screening applicants based on their wage or salary history. Similar local laws prohibiting city agencies or departments from inquiring about the salary history of applicants are in effect in Louisville, New Orleans, and Pittsburgh.

Litigation Involving Pay Equity and Inquiry Legislation

Philadelphia, PA

On January 23, 2017, Mayor Jim Kenney signed Bill No. 160840 into law, which made Philadelphia the first major city in the country to enact an ordinance prohibiting employers from inquiring into or relying upon the salary history of applicants unless voluntarily disclosed. See *Philadelphia Enacts Ordinance Banning Pay History Inquiry*. Although originally scheduled to take effect in May 2017, the Philadelphia Chamber of Commerce filed a lawsuit challenging the Ordinance, alleging that it violates the First Amendment rights of its members. On May 1, 2017, U.S. District Court Judge Mitchell Goldberg dismissed the suit, but allowed the Chamber leave to file an amended complaint. Judge Goldberg held that the Chamber lacked standing to challenge the Ordinance, opining that it must identify an impacted business before bringing such a suit. On June 13, 2017, the Chamber refiled its lawsuit and reasserted its request for a preliminary injunction to block enforcement of the Ordinance.

On April 30, 2018, after extensive briefing and oral argument, Judge Goldberg ruled in favor of the Chamber on the issue of pay history inquiries, finding that salary history bans violate free-speech guarantees under the First Amendment. In making this determination, the court was not convinced that there was a connection between salary history inquiries and wage disparities sufficient to justify curtailing certain speech rights of employers. However, Judge Goldberg also ruled that Philadelphia *is permitted* to bar employers from relying on a prospective employee's prior or current compensation in setting wages. According to the court, the provisions regarding reliance do not implicate the First Amendment, as they regulate conduct rather than speech.

This outcome—likely to be appealed by one or both sides—puts employers in a precarious position, as they are allowed to ask job applicants about their prior compensation but not permitted to use that information in determining salaries or wages. Even considering the dual-sided nature of the ruling, this litigation may inspire entities in other jurisdictions to challenge salary history bans on similar First Amendment grounds.

The Philadelphia Ordinance also faced potential legislative hurdles last year, but a Pennsylvania Senate bill seeking to preempt local ordinances on issues like pay discrimination and salary history inquiries has not moved forward. See below for Michigan and Wisconsin's more successful preemption efforts.

The U.S. Court of Appeals for the Ninth Circuit

On April 9, the federal appeals court for the Ninth Circuit ruled that under the federal Equal Pay Act (EPA), "prior salary alone or in combination with other factors cannot justify a wage differential between male and female employees." This means that employers cannot avoid liability under the EPA for established pay gaps between men

and women by relying upon salary history. For more on this case, its implications, and the circuit split it has created, see *Ninth Circuit Rules that Prior Salary Cannot Justify Wage Differential*.

Jurisdictions Considering Pay Equity and Inquiry Legislation

Illinois

On May 10, 2017, Illinois lawmakers passed H.B. 2462 (also called the "No Salary History Act") as an amendment to the state's Equal Pay Act. This bill would prohibit employers from screening applicants based on their salary history, conditioning an interview or offer on disclosure of their salary history, or seeking salary history from applicants' current or former employers. On August 25, 2017, Governor Bruce Rauner vetoed the bill, stating that while he supports the effort to eliminate the gender wage gap, he believes Illinois should model its legislation after Massachusetts law, which allows employers to seek pay history after they have offered an applicant a job and salary. The Illinois legislature was unable to reach the votes necessary to override Governor Rauner's veto.

This year, the Illinois legislature is considering two pieces of pay inquiry legislation. The first, H.B. 4163, mirrors the failed 2017 legislation and has already passed both the Illinois House and Senate. Proponents of the measure hope it can reach a two-thirds majority in each house of the state legislature, which would be necessary to override a likely second veto from Governor Rauner. Members of the Illinois Senate have also been considering S.B. 3100, a compromise bill that bars employers from seeking salary history information but provides an exception if the prospective employee has voluntarily disclosed that information. This bill also provides employers an affirmative defense to liability if they complete self-evaluation plans regarding their pay practices that are verified by the Illinois Department of Labor. S.B. 3100 is still under consideration in the state legislature.

New York

On April 10, Governor Andrew Cuomo proposed legislation that, if passed by the state legislature, would bar both public and private employers from asking prospective employees about their salary history and from relying on such information when making hiring or salary decisions. This follows Governor Cuomo's 2017 executive order prohibiting state government departments from asking job applicants about their compensation history.

Governor Cuomo's announcement also comes on the heels of a failed legislative effort on salary history bans in New York. Last year, the New York State Assembly voted in favor of A.B. A2040C, which would have amended the New York Labor Law and limited inquiries into or about a job applicant's salary history, among other provisions. However, the New York Senate never reached a vote on the bill.

Washington

The Washington state legislature is considering H.B. 1533—a bill that would prohibit employers from seeking an applicant's salary history from the applicant or a current or former employer of the applicant, among other provisions. H.B. 1533 has yet to make it out of committee.

Meanwhile, on March 21, Governor Inslee signed into law the Equal Pay Opportunity Act (EPOA), a pay equity measure that does not include a salary history ban. Under the EPOA, pay discrimination based on gender is a misdemeanor offense. The law forbids employers from depriving employees of career advancement opportunities based on their gender. Employers also may not bar employees from discussing their wages or inquiring about others' wages, though there is a narrow exception for employees who have access to other employees' compensation information as part of their job function. An employee who brings a complaint under the EPOA is protected against retaliation, firing, or other discrimination arising from the complaint, while employers alleged to have violated the EPOA must submit to an investigation by the Director of the Washington Department of Labor. Employers found to have violated the Act may then be liable for compensatory damages, statutory damages, or other appropriate relief. This legislation went into effect on June 7.

Numerous other states have considered, or continue to consider, enacting similar pay equity and inquiry legislation, including Hawaii, Maine, Maryland, New Hampshire, North Carolina, and Virginia, among others.

States that Have Barred Local Governments from Enacting Pay Inquiry Bans

Michigan

On March 26, Michigan moved in the opposite direction of the above jurisdictions when Governor Rick Snyder signed into law S.B. 353, a measure that prevents local governments in the state from enacting salary history bans. S.B. 353 includes broad language barring local governments from adopting or administering any legislation regulating information employers may request or require during the application or interview process. The law became effective on June 24.

Wisconsin

Following Michigan's lead, on April 16, Wisconsin Governor Scott Walker signed Act 327, which specifically grants employers the right to request prior salary information from prospective employees. Act 327 also prohibits local government bodies from enacting salary history bans and preempts any such legislation.

Pay Equity and Inquiry Legislation At The Federal Level

House of Representatives

In May 2017, Representative Eleanor Holmes Norton (D-D.C.) presented H.R. 2418—or the "Pay Equity for All Act of 2017"—seeking to make it unlawful for employers to screen prospective employees based on their salary history or to ask former employers about the salary history of prospective employees. Under the bill's provisions, violators would be subject to civil penalties and potential special damages. The bill has garnered 30 co-sponsors but has not progressed to a committee vote.

Guidance

As our previous client briefing advised, considering the amount of legislation being introduced throughout the country, employers should continue monitoring how state and local laws impact their recruiting and hiring practices. This is particularly true considering that many jurisdictions are moving in different directions on pay equity and inquiry legislation, and courts are likewise reaching differing conclusions concerning such legislation. Given this patchwork of laws and judicial rulings, some employers with broader geographic footprints may consider developing uniform procedures that simultaneously comply with the more stringent applicable requirements.

Employers in jurisdictions with salary history bans should promptly audit and review their recruitment and hiring processes, including job postings, applications, policies, and procedures, to ensure they do not include salary disclosure requirements or inquiries concerning salary history. It is further essential that employers educate and train recruiters and managers on compliance with any new legislation during interviews and when extending offers. For example, recruiters and managers may be instructed to ask, "What salary range do you expect?" rather than inquiring about an applicant's previous salary. In addition, recruiting and hiring personnel should be instructed to consider the role, job responsibilities, skills, and experience, along with current market rates and a candidate's job expectations, when setting salary. Human resources professionals likewise will need to confirm that third-party companies in charge of background checks and screenings are in compliance with new laws.

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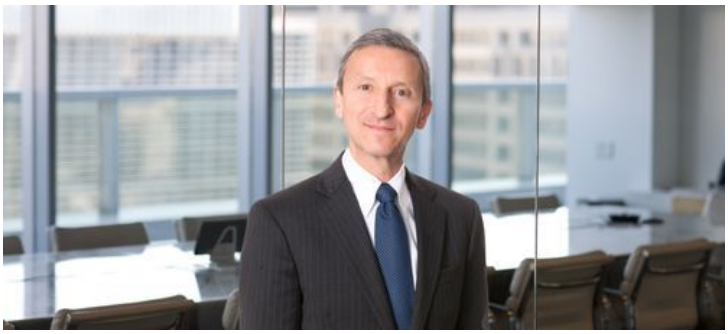

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