

Illinois and New Jersey Enact Pay Inquiry Legislation

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Illinois and New Jersey are the latest participants in the wave of pay inquiry legislation that is sweeping the nation. Both states recently enacted measures that prohibit employers from inquiring about job candidates' salary history. The Illinois legislation goes further and contains amendments that significantly broaden its pay equity and anti-retaliation protections.

Illinois

On July 31, 2019, Illinois Governor J.B. Pritzker signed into law a bill that expands and amends the state's Equal Pay Act ("IEPA"). The amendments, which take effect September 29, 2019, broaden the statute's pay equity protections and prohibit Illinois employers from asking job applicants or their previous employers about salary information.

Pay Equity Amendments

The amendment provides two key changes that broaden the IEPA's pay equity protections. First, prior to the amendment, the IEPA generally required that Illinois employers compensate employees equally, regardless of sex or race, where the employees performed "the same or substantially similar work," the performance of which required *equal* skill, effort, and responsibility. The amendment broadens the statute's application by now requiring employers to compensate employees equally where they perform "the same or substantially similar work," the performance of which requires "*substantially similar*"—not equal—skill, effort, and responsibility. The amendment now renders the protections afforded by the Illinois statute significantly broader than those found in the federal Equal Pay Act, which generally requires equal pay for "equal work," the performance of which requires *equal* skill, effort, and responsibility.

Second, like the federal Equal Pay Act, the IEPA had provided that a pay differential was lawful if, among other things, it was attributed to any factor other than sex, race, or another protected characteristic. The amendments significantly narrow the application of this catchall exception, which may now only be invoked if the factor (1) is not based on or derived from a differential in compensation based on sex, race, or other protected characteristic, (2) is job-related with respect to the position in question *and* consistent with business necessity, and (3) accounts for the *entire* wage differential.

Salary History Ban

The IEPA amendments include provisions prohibiting employers from (i) screening applicants based on their salary history by requiring that applicants satisfy a minimum or maximum compensation criteria, (ii) conditioning an interview or offer on the disclosure of salary history, or (iii) seeking salary history from applicants or applicants' current or former employers. These restrictions do not apply if the applicant's salary history is a matter of public record or if the applicant is a current employee applying for a position with his or her current employer.

Employers may continue to provide information about the wages, benefits, compensation, or salary offered in relation to a position. Employers may also discuss with an applicant his or her "expectations" with respect to compensation and benefits. If an applicant voluntarily discloses his or her current salary, or salary history, an employer will not be deemed to violate the IEPA if it does not consider or rely on the disclosure in determining whether to offer the job applicant employment, in making an offer of compensation, or in determining the future wage or compensation of the applicant.

Anti-retaliation Amendments

The amendments also strengthen the IEPA's anti-retaliation protections. The IEPA continues to prohibit retaliation against employees who wish to inquire about or discuss their own wages or the wages of other employees. As amended, the IEPA also makes it unlawful for Illinois employers to require an employee to sign a contract or waiver that would prohibit the employee from disclosing or discussing the employee's own compensation information. This new prohibition does not extend to human resources employees, supervisors, or any other employees whose job responsibilities require or permit them access to employee wage or salary information. Employers may prohibit these employees from disclosing that information without the prior written consent from the employee whose information is sought.

Penalties

Under the IEPA, employees remain entitled to recover the entire amount of any underpayment with interest and other potential compensatory damages. If an employer violates the salary history ban or engages in prohibited retaliation, an employee may recover actual damages, special damages not to exceed \$10,000, injunctive relief, and attorneys' fees.

New Jersey

More than one year after New Jersey signed into law one of the nation's most robust pay equity laws—the "Diane B. Allen Equal Pay Act"—New Jersey Governor Phil Murphy signed a salary history ban into law. Effective January 26, 2020, New Jersey employers may not screen applicants based on their pay history or require that an applicant's salary history meet any minimum or maximum criteria.

These restrictions do not apply to applications for internal transfer or promotion under the same employer; an employer's use of previous knowledge acquired as a result of an applicant's prior employment with the employer; or inquiries regarding an applicant's previous experience with incentive and commission plans, provided that the compensation package for the position for which the applicant is being considered includes an incentive or commission component and the employer does not seek information regarding the applicant's previous earnings in connection with any incentive or commission plan.

Notably, if an applicant voluntarily discloses his or her salary history, an employer may verify the salary history *and* consider it in determining the applicant's salary, benefits, and other compensation. After an offer of employment that includes an explanation of the overall compensation package has been made to the applicant, an employer may also request that the applicant provide the employer with written authorization to confirm pay history. New Jersey employers that operate outside of New Jersey may continue to include a salary history inquiry on a job application if the application contains a notice immediately preceding the inquiry that instructs New Jersey applicants not to answer.

Employers that violate the salary history ban are liable for a civil penalty of \$1,000 for the first violation; \$5,000 for the second violation; and \$10,000 for each subsequent violation. If the applicant is a member of a protected class under the New Jersey Law Against Discrimination (“LAD”), a violation of the salary history ban will also constitute an unlawful employment practice under the LAD.

Guidance

Considering the increasing prevalence of pay equity and inquiry legislation 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 enacting their own nuanced pay equity and inquiry legislation, and courts are likewise reaching differing conclusions concerning such legislation. Given this patchwork of laws and judicial rulings, 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 also essential that employers educate and train recruiters and managers on compliance with new requirements as they relate to the recruitment and interviewing process. 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 comply with new laws.

Illinois employers should consider conducting a pay equity review to ensure their compliance with the IEPA in advance of the September 29, 2019 effective date. In particular, employers should, at minimum, review compensation records per job category to identify any pay disparities, and if so, determine whether the disparity is justified under the amended law.

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