

CLIENT ALERT

San Francisco Enacts Ordinance Banning Pay History Inquiries

AUGUST 3, 2017

On July 19, San Francisco Mayor Ed Lee signed Parity in Pay Ordinance (Ordinance), making it unlawful for San Francisco employers to ask about or rely on an applicant's pay history during the hiring process, when making job offers, and when setting the salaries of new hires. The Ordinance is part of a growing, national trend aimed at closing the pay gap between men and women (see our client briefing New York City Bans Salary History Inquiries). The Ordinance will become effective on July 1, 2018.

Coverage

The Ordinance applies to applicants for employment with all private employers, regardless of size, whose work would be performed in whole or in part in San Francisco. The Ordinance does not cover workers who are properly classified as independent contractors or current employees who submit applications for alternative positions with a current employer.

Prohibited Practices

California state law currently prohibits employers from relying on prior salary, by itself, when making compensation decisions-but it does not prohibit relying on past salary in part. Additionally, in general, California employers may ask applicants questions about current or past salary and are not required to obtain permission before disclosing pay history details, about current and former employees, to prospective employers.

The San Francisco Ordinance is more restrictive than state law, and expressly prohibits employers from:

- Inquiring directly or indirectly about an applicant's salary history (note that "salary history" includes any wages, commissions, monetary emolument, or other financial compensation in exchange for labor, with any current or past employer);
- Considering or relying on an applicant's salary history in determining how to compensate an employee;
- Considering or relying on an applicant's salary history in determining whether to offer employment;

- Disclosing current or past salaries of former and current employees to prospective employers without first obtaining written authorization from the employee (unless such disclosure is required by law, part of a publicly available record, or subject to a collective bargaining agreement); and
- Refusing to hire, disfavoring, or retaliating against applicants who do not disclose current or past salary.

Permitted Practices & Exceptions

Under the Ordinance, employers may only consider salary history during the hiring process in limited circumstances. For example, if an applicant voluntarily discloses his or her current or former salary without prompting by the employer, the employer will not violate the Ordinance by considering voluntarily disclosed data when making decisions about salaries.

So long as the employer makes no direct or indirect inquiry into an applicant's current or former salary, the Ordinance allows employers to engage in discussion about an applicant's expectations with respect to salary, including about any unvested equity or deferred compensation or bonus that the applicant would forfeit by resigning from the applicant's current employment. Moreover, the Ordinance does not prohibit employers from inquiring into objective measures of an applicant's productivity, such as revenue, sales, or other production reports.

Enforcement & Damages

The Office of Labor Standards Enforcement (OLSE) is tasked with implementing and enforcing the new law. For all violations occurring between July 1, 2018 and June 30, 2019, the OLSE will issue employers a warning and notice to correct. But starting July 1, 2019, employers may be subject to the following progression of penalties to be paid to the City:

- First Violation: Warning and Notice to Correct
- Second Violation: no more than \$100 per employee/applicant
- Next Violation: no more than \$200 per employee/applicant
- Each Subsequent Violation: no more than \$500 per employee/applicant

The Ordinance further authorizes the OLSE to initiate administrative enforcement and the City Attorney to initiate a civil action within one year of the suspected violation. To help employers comply with the Ordinance's posting and notice requirements, the OLSE will publish and make available a notice for employers to conspicuously post in the workplace and send to labor union representatives. The Ordinance does not provide for a private right of action.

Next Steps

San Francisco employers should begin taking steps to ensure application and hiring documentation, procedures, and policies are in compliance with the Ordinance by July 1, 2018.

3 Min Read

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