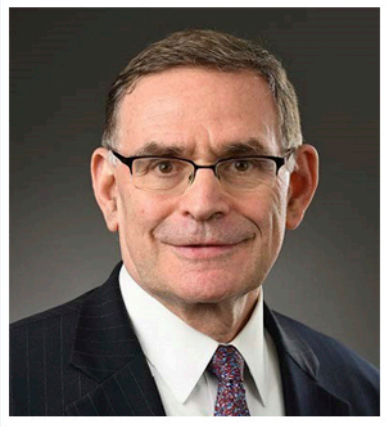


New Salary History Laws Crimp Attorney Hiring Process



By **FREDRIC S. NEWMAN**

Nearly a year ago, Massachusetts Governor Charlie Baker signed a bill requiring equal pay for equal work, which also prohibited Massachusetts employers from asking prospective hires for their salary history. (The law goes into effect July 1, 2018). California, Pennsylvania, Puerto Rico, New Orleans and New York City have quickly followed suit.

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While each local law differs slightly, overall, the intent of each is to promote salary equality regardless of gender, race or disability. In prohibiting employers from asking potential hires about their previous salaries, lawmakers seek to "level the playing field." Workers who might have accepted a low salary for one job would have an opportunity to "catch up" to the marketplace in a subsequent position, rather than be held to previous earnings.

Effective Oct. 31, 2017, the New York City Human Rights Law, for example, prohibits employers from making any inquiry into an applicant's salary history or taking an applicant's salary history into consideration when making a hiring decision. Employers may not have an agent, such as a recruiting firm, seek out an applicant's salary history information for them, nor may they seek out an applicant's salary history information, even if readily available online or in public records (as it is for many public employees). Rather than requesting an employee's current or past salary, employers are permitted to ask applicants for a targeted salary range.

Failure to comply carries significant penalties. In New York City, for example, the Commission on Human Rights, charged with enforcing the NYC Human Rights Law, can impose penalties of \$125,000 for an unintentional violation, and up to \$250,000 for a "willful, wanton or malicious" violation. The law is widely applicable. It applies to any business or professional services firm with at least four employees. Enforcement, however, may be difficult. The Commission on Human Rights must rely on job applicants to file a complaint reporting a potential employer's violation. Additionally, there is a private right of action, and the applicant may bring a civil lawsuit if she believes a potential employer has violated this salary history law. As with other provisions of the Human Rights Law, a prevailing plaintiff can be entitled to back pay, compensatory damages, and attorneys' fees.

More Laws Roll Out

Expectations are that similar laws will eventually spread through every state. However, there has been some pushback. In Philadelphia, grumbles have been heard from companies like Comcast Corp., and the Chamber of Commerce has challenged that city's law as unconstitutional. Originally set to take effect on May 23, 2017, a lawsuit filed by Philadelphia businesses has put that on hold. (Notably, the Philadelphia law permits consideration of salary history information only if voluntarily disclosed by the applicant).

Until nationwide laws have been enacted, there will also be questions about employers with multiple locations. For example: May a firm headquartered in Philadelphia with an office in Indianapolis ask Indiana hires about their salary history? If you're interviewing an Indiana attorney for your New York City office, are you precluded from making the same inquiry? A loophole perhaps, but definitely not in keeping with the spirit of the law.

Problems with Salary History Laws

There are real problems with the practicality, legality and enforceability of many of the salary history laws. Employers will be caught somewhere between "shooting in the financial dark" and missing out on a good candidate or overpaying in the hope of closing a promising hire. Furthermore, employers' First Amendment rights are infringed when the legislature prohibits them from seeking out public information, as the NYC salary history law will, when it goes into effect on Oct. 31.

Law firms argue these new laws put them under considerable pressure in making the most cost-appropriate hires. Asking about an attorney's previous salary is a standard hiring practice in attorney recruitment. Knowing a lawyer's current/former salary can be useful to establishing a benchmark, staying competitive, and/or determining the interviewee's value in the legal marketplace. Moreover, without salary history information, how is it possible to attract, lure or persuade an attorney to change jobs? How does one make a "better" offer when all that remains is the ability to ask a candidate about "salary expectations," which are a weak clue to what an applicant may be making currently?

Going Forward

Human resources departments in companies operating in affected locales (and perhaps eventually everywhere) will have to rethink hiring protocols and procedures. They will no longer have intel on industry compensation. Matching up salary increases with promotions will be more complicated. Worse yet, will this law have the opposite of the intended effect, leaving only those individuals who will take whatever they can get — the legal profession's equivalent of "working for food?"

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