EPSTEIN BECKER GREEN

Attorneys at Law

Privileged & Confidential

Attorney-Client Communication

MEMORANDUM

To: CLIENT **From:** Epstein Becker Green

Date: September 14, 2017

Re: Do's and Don't's – Salary History Inquiry Ban

The following is guidance for managers/HR regarding the upcoming salary history inquiry ban, which becomes effective in New York City on October 31, 2017. Similar rules have been instituted elsewhere, and, depending on the jurisdiction, the rules under those laws may slightly change our guidance. Please contact us if you hire employees in other jurisdictions where a salary history inquiry ban becomes effective.

Permissible Inquiries

Salary/Expectations

1. What are your expectations with respect to compensation[1] (to clarify, I'm not asking about your current or prior compensation, but rather, what you expect to be compensated in connection with this role here at our organization)?
2. You will be required to work overtime in connection with this position – are you OK with that requirement?
3. What salary (or hourly rate) do you expect in this role?
4. What type and/or amount of incentive compensation do you expect to earn in this role?

Other Permissible Areas

1. Do you have unvested deferred compensation or equity (including any bonus guarantee) that you would be forfeiting by resigning from your current position?
    a. If so, how much?
    b. How is that deferred compensation or equity structured?
    c. When does the deferred compensation or equity vest?
    d. Please provide evidence of the grant/conditions of forfeiture.

[1] "Salary History" under the law is defined as "current or prior wage, benefits or other compensation."

2. Please tell me about your productivity (revenue, sales, or other production reports) in your current position. This includes subjects such as:
    a. Assets Under Management
        i. Did you meet your production goals?
    b. Track Record (to the extent they can share)
    c. Tell me about how you've met (or not) your sales metrics in your current position.
        i. Were your sales goals measured on a monthly, quarterly, or yearly basis?
        ii. What was your [monthly/quarterly/yearly] sales goal at your previous job?
        iii. Did you meet that goal?
        iv. What percentage of your goal did you meet over the past __ years?
    d. [MORE? – INSERT SPECIFIC QUESTIONS RELEVANT TO YOUR BUSINESS THAT MANAGERS MAY WISH TO ASK ABOUT SPECIFIC METRICS/GOALS]
3. Have you been promoted by your current employer? From what position to what?
4. What are your job responsibilities?
5. Do you have managerial responsibilities in your role?

Impermissible Inquiries

1. What is your current salary?
2. How much did you earn when you were employed by [former employer]?
3. What is your current total compensation? (and same question about former employers)
4. Can you provide a copy of your W-2/1099 from last year (or previous years)?
5. What type of bonuses have you received from your employer? (and same question about former employers)
6. What benefits do you currently receive from your employer? (and same question about former employers)

Questionable

These May be OK with Caveats:

1. In terms of any sort of guaranteed bonus you'll need for this year, so as to make up for the bonus you'll not receive from your current employer, what are your expectations? (To be clear, I'm not asking what your last year's bonus was, or what your bonus will be for this year, but rather, what type of requirement you have in terms of a bonus payment for this year from us.)

We lean towards <u>not</u> asking these:

1. How much has your salary increased over the past five years?

2. Were you exempt or non-exempt in your prior role (in other words, were you overtime-eligible)?
3. Was your recent promotion accompanied by a pay increase?
4. How is your compensation structured at your current employer (or how was your compensation structured at your former employer(s))?
    a. Were you provided with a specific bonus target?
    b. What percentage of your compensation was base salary, as opposed to incentive compensation?

Other Considerations

1. Review your employment application and background check forms to remove salary history inquiries
2. If an applicant voluntarily discloses his or her salary, prepare a written memo to file about the disclosure (See Attachment A for sample).
3. Ensure all individuals who will participate in the interview process are aware of all of these restrictions. This includes:
    a. Hiring managers
    b. Other employees who might interview the candidate
    c. All internal HR representatives, including those tasked with:
        i. Recruiting
        ii. Hiring
        iii. Background checking
        iv. Onboarding
    d. All external representatives involved in the hiring process, including:
        i. Recruiters
        ii. Headhunters
        iii. Staffing agencies
        iv. Background screening companies
4. With respect to outside vendors, consider informing them of these restrictions in writing.
5. Also, consider including the restrictions in the contracts between your organization and these outside vendors.
6. Also, consider including indemnification clauses in the contracts, to the extent that the vendor violates the rules and your organization is sued.
7. Train managers and/or Human Resources on how to set salary rates based on the market for similar roles

Attachment A

Sample Memo to File Upon Voluntary Disclosure

On _____, _____
(date) (name of applicant)

voluntarily provided the following salary history information

☐ without any questions from me

☐ in response to the following question: _____

_____

_____

_____

The applicant disclosed the following information:

_____

_____

_____

_____

Name of Interviewer: _____

Signature of Interviewer: _____

Date: _____

LOCAL LAWS
OF
THE CITY OF NEW YORK
FOR THE YEAR 2017

No. 67

Introduced by the Public Advocate (Ms. James), Council Members Crowley, Cumbo, Rosenthal, Salamanca, Lander, Ferreras-Copeland, Williams, Richards, Palma, Dromm, Rose, Reynoso, Gibson, Espinal, Cornegy, Kallos, Koslowitz, Rodriguez, Levine, Menchaca, Constantinides, Treyger, Torres, Miller, Mendez, Maisel, Chin, Barron, Mealy, Cohen, King, Levin, Eugene, Wills and Van Bramer.

A LOCAL LAW

To amend the administrative code of the city of New York, in relation to prohibiting employers from inquiring about or relying on a prospective employee's salary history

Be it enacted by the Council as follows:

Section 1. Section 8-107 of the administrative code of the city of New York is amended by adding a new subdivision 25 to read as follows:

25. Employment; inquiries regarding salary history. (a) For purposes of this subdivision, "to inquire" means to communicate any question or statement to an applicant, an applicant's current or prior employer, or a current or former employee or agent of the applicant's current or prior employer, in writing or otherwise, for the purpose of obtaining an applicant's salary history, or to *conduct a search of publicly available records or reports for the purpose of obtaining an applicant's salary history, but does not include informing the applicant in writing or otherwise about the position's proposed or anticipated salary or salary* range. *For purposes of this subdivision, "salary history" includes the applicant's current or prior wage, benefits or other compensation. "Salary history" does not include any objective measure of the applicant's productivity such as revenue, sales, or other production reports.*

(b) Except as otherwise provided in this subdivision, it is an unlawful discriminatory practice for an employer, employment agency, or employee or agent thereof:

1. To inquire about the salary history of an applicant for employment; or

2. To rely on the salary history of an applicant in determining the salary, benefits or other compensation for such applicant during the hiring process, including the negotiation of a contract.

(c) Notwithstanding paragraph (b) of this subdivision, an employer, employment agency, or employee or agent thereof may, without inquiring about salary history, engage in discussion with the applicant about their expectations with respect to salary, benefits and other compensation, including but not limited to unvested equity or deferred compensation that an applicant would forfeit or have cancelled by virtue of the applicant's resignation from their current employer.

(d) Notwithstanding subparagraph 2 of paragraph (b) of this subdivision, where an applicant voluntarily and without prompting discloses salary history to an employer, employment agency, or employee or agent thereof, such employer, employment agency, or employee or agent thereof may consider salary history in determining salary, benefits and other compensation for such applicant, and may verify such applicant's salary history.

(e) This subdivision shall not apply to:

(1) Any actions taken by an employer, employment agency, or employee or agent thereof pursuant to any federal, state or local law that specifically authorizes the disclosure or verification of salary history for employment purposes, or specifically requires knowledge of salary history to determine an employee's compensation;

(2) Applicants for internal transfer or promotion with their current employer;

(3) Any attempt by an employer, employment agency, or employee or agent thereof, to verify an applicant's disclosure of non-salary related information or conduct a background check, provided that if such verification or background check discloses the applicant's salary history, such disclosure shall not be relied upon for purposes of determining the salary, benefits or other compensation of such applicant during the hiring process, including the negotiation of a contract; or

(4) Public employee positions for which salary, benefits or other compensation are determined pursuant to procedures established by collective bargaining.

§ 2. This local law takes effect 180 days after it becomes law, provided that the commission on human rights may take such actions as are necessary to implement this local law, including the promulgation of rules, before such date.

THE CITY OF NEW YORK, OFFICE OF THE CITY CLERK, s.s.:

I hereby certify that the foregoing is a true copy of a local law of The City of New York, passed by the Council on April 5, 2017 and approved by the Mayor on May 4, 2017.

MICHAEL M. McSWEENEY, City Clerk, Clerk of the Council.

CERTIFICATION OF CORPORATION COUNSEL

I hereby certify that the form of the enclosed local law (Local Law No. 67 of 2017, Council Int. No. 1253-A of 2016) to be filed with the Secretary of State contains the correct text of the local law passed by the New York City Council and approved by the Mayor.

STEPHEN LOUIS, Acting Corporation Counsel.

EMPLOYER FACT SHEET:
Protections Against Inquiries into Job Applicants' Salary History

Starting October 31, 2017, employers in New York City cannot ask about salary history during the hiring process.

Q. Does this new law apply to my business?

A. Yes. This new law applies to all employers in New York City, regardless of size. If you employ at least one employee in New York City, you must comply with this law.

Q. Who is protected?

A. Most applicants for new jobs in New York City are protected, except:

- Applicants for internal transfer or promotion with their current employer.
- Applicants for positions with public employers for which compensation is set pursuant to a collective bargaining agreement. However, City government agencies are prohibited from inquiring about or relying on job applicants' salary history pursuant to Mayoral Executive Order 21 signed on November 4, 2016.

Q. What is prohibited?

A. Employers cannot:

- Ask applicants questions about or make statements intended to solicit information about applicants' current or prior earnings or benefits.
- Ask applicants' current or former employers about applicants' current or prior earnings or benefits.
- Search public records to learn about applicants' current or prior earnings or benefits.

Q. What is not prohibited?

A. Employers can:

- Make statements about the anticipated salary, salary range, bonus, and benefits for a position.
- Inquire about applicants' expectations or requirements for salary, benefits, bonus, or commission structure.
- Ask about objective indicators of applicants' work productivity in their current or prior jobs, such as revenue, sales, production reports, profits generated, or books of business.
- Make inquiries to applicants' current or former employers or search online to verify non-salary information, such as work history, responsibilities, or achievements. However, if this results in the accidental discovery of current or prior earnings or benefits, the employer cannot rely on this information in making salary or benefits decisions.
- Make inquiries about salary history that are authorized or required by federal, state, or local law.
- Verify and consider current or prior earnings or benefits **if** offered voluntarily and without prompting by the applicant during interview process.

Q. What are the consequences for employers who violate the law?

A. They may be required to pay damages, a fine, and/or be subject to additional affirmative relief such as mandated training and posting requirements.

To learn more about your responsibilities as an employer in New York City under the NYC Human Rights Law, visit NYC.gov/HumanRights. You can sign up to attend a training on the Law and access materials with helpful information on how to comply.

NYC
Commission on Human Rights
Carmelyn P. Malalis, Chair/Commissioner
Office of the Mayor
NYC.gov/HumanRights
@NYCCHR

JOB APPLICANT FACT SHEET:

Protections Against Inquiries into Job Applicants' Salary History

Starting October 31, 2017, employers in New York City cannot ask about your salary history during the hiring process.

Q. Who is protected?

A. Most applicants for new employment in New York City are protected, regardless of whether the position is full-time, part-time, or an internship. Independent contractors who do not have their own employees are also protected.

Q. Who is not protected?

A. The law does not apply to:

- Applicants for internal transfer or promotion with their current employer.
- Applicants for positions with public employers for which compensation is set pursuant to a collective bargaining agreement. However, City agencies are prohibited from inquiring about or relying on job applicants' salary history pursuant to Mayoral Executive Order 21 signed on November 4, 2016.

What is prohibited?

A. Employers cannot:

- Ask you questions about or make statements intended to solicit information about your current or prior earnings or benefits.
- Ask your current or former employers about your current or prior earnings or benefits.
- Search public records to learn about your current or prior earnings or benefits.

Q. What is not prohibited?

A. Employers can:

- Make statements about the anticipated salary, salary range, bonus, and benefits for a position.
- Inquire about your expectations or requirements for salary, benefits, bonus, or commission structure.
- Ask about objective indicators of your work productivity in your current or prior job such as revenue or profits generated, sales, production reports, or books of business.
- Make inquiries to your current or former employers or search online to verify non-salary information, such as work history, responsibilities, or achievements. However, if this results in the accidental discovery of current or prior earnings or benefits, the employer cannot rely on this information in making salary or benefits decisions.
- Make inquiries about your current or prior earnings or benefits that are authorized or required by federal, state, or local law.
- Verify and consider current or prior earnings or benefits **if** offered voluntarily and without prompting by the applicant during interview process.

Q. What are the consequences for employers who are found to violate the law?

A. They may be required to pay damages, a fine, and/or be subject to additional affirmative relief such as mandated training and posting requirements.

If you have experienced salary history discrimination, we can help. Contact the NYC Commission on Human Rights by calling 311 or call the Commission's Infoline directly at (718) 722-3131. For more information, visit NYC.gov/HumanRights.

NYC
Commission on Human Rights
Carmelyn P. Malalis, Chair/Commissioner
Office of the Mayor
NYC.gov/HumanRights
@NYCCHR

EPSTEIN BECKER GREEN | labor and employment
ACT NOW ADVISORY

California Legislature Passes Fair Pay Act Aimed at Closing Pay Gap Between Men and Women

September 17, 2015

By Susan Gross Sholinsky and Tazamisha H. Imara

Citing the pay gap between men and women in California, and noting that the gap increases for women of color, the California Legislature recently passed a bill that would prohibit employers from paying an employee at wage rates that are less than the rates paid to employees of the opposite sex who are performing substantially similar work, unless the pay differential is justified by gender-neutral factors and consistent with business necessity. Governor Jerry Brown has promised to sign the bill and voiced his support on Twitter even before the bill's August 31, 2015, passage. The bill is entitled the "Fair Pay Act" and would amend California's existing equal pay law, Labor Code Section 1197.5. If signed, the Fair Pay Act would go into effect on January 1, 2016. The Fair Pay Act is intended to address persistent pay disparities between women and men, narrow the pay gap, and make it easier for employees to prove equal pay violations.

While the current equal pay law requires that men and women employed in the "same establishment" be paid the same wages for equal work, the Fair Pay Act would eliminate the "same establishment" language and would further require that men and women receive equal pay for performing "substantially similar" work, regardless of whether they are employed at the same physical location or share identical job titles. The determination of whether employees are performing substantially similar work for purposes of the Fair Pay Act would entail a comparison of the "skill, effort, and responsibility" that the work requires, as well as each employee's working conditions.

Under the Fair Pay Act, any pay discrepancy between employees of the opposite sex in substantially similar jobs must be warranted by one or more of the following:

- a seniority system;
- a merit system;
- a system that determines pay based on the quantity or quality of production; or
- another factor, such as education, training, or experience.

To successfully defend against a claim under the Fair Pay Act, the employer would need to demonstrate that the factors that explain the pay differential are gender neutral, job related, and consistent with business necessity. The factors justifying the difference in pay would need to be reasonably applied and account for the entire wage difference.

The Fair Pay Act would further prohibit employers from retaliating against an employee because he or she pursues a claim under the equal pay law or assists another employee in doing so. Also, and significantly, an employee could not be prohibited from discussing his or her wages, talking or inquiring about the wages of other employees, or encouraging other employees to pursue claims under the equal pay law. The Fair Pay Act would also expand the period that employers are required to retain records relating to employee wages and other employment terms from two years to three years.

Under the Fair Pay Act, employees could file administrative claims alleging violation of the law with the California Department of Labor Standard Enforcement or pursue a civil action in court. Employers found to have violated the law would be liable for unpaid wages and interest, and an equal amount of liquidated damages. In a civil lawsuit, the employee could also recover costs and reasonable attorneys' fees.

What California Employers Should Do Now

In anticipation of the Fair Pay Act becoming effective, employers should do the following:

- With the assistance of counsel in order to preserve confidentiality and privilege, conduct a review of job titling and compensation methodology to ensure compliance with the Fair Pay Act.

- Work with recruiters and others tasked with hiring new employees, so that the pay expectations for open positions are consistent with the Fair Pay Act.

- Review existing policies and training materials and update them as necessary to reflect the anti-retaliation provisions of the Fair Pay Act.

- Ensure that supervisors are aware of the anti-retaliation protections, particularly as they concern employee discussions of wages.

* * * *

For more information about this Advisory, please contact:

Susan Gross Sholinsky
New York
212-351-4789
sgross@ebglaw.com

Tazamisha H. Imara
Los Angeles
310-556-8861
timara@ebglaw.com

with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

EPSTEIN BECKER GREEN | Employment, Labor & Workforce Management

ACT NOW ADVISORY

Massachusetts Passes Legislation Aimed at Correcting Gender-Related Pay Imbalances

August 9, 2016

By Barry A. Guryan, Susan Gross Sholinsky, Nancy L. Gunzenhauser, Ann Knuckles Mahoney, and Alyssa Muñoz*

Massachusetts will join California and New York in attempting to close the pay gap between men and women in the workplace. The Massachusetts Legislature unanimously passed a pay equity law ("Pay Equity Law") that was signed by Governor Charlie Baker on August 1, 2016. The Pay Equity Law will become effective on July 1, 2018.[1]

Pay Equity for Comparable Work

The Pay Equity Law completely replaces the current equal pay law and attempts to provide greater clarity regarding the state's stance on equal pay. Under the Pay Equity Law, it will be unlawful for employers to discriminate based on gender in wages, including all forms of remuneration, and to pay an employee less than an employee of the opposite gender for "comparable work." The current law on pay equality in Massachusetts bars employers from discriminating based on gender for work of "like or comparable character." The Pay Equity Law attempts to refine this concept by defining "comparable work" as "work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions; provided, however, that a job title or job description alone shall not determine comparability."[2] Further, the Pay Equity Law will prohibit employers from reducing any employee's pay in order to comply with the law.

The Pay Equity Law also offers further protections for both employees and employers. The current law only allows for pay variations between employees of opposite sexes for comparable work based on seniority. The Pay Equity Law will allow greater flexibility for employers by permitting pay variations between employees of different genders who perform comparable work when the pay difference is due to:

---

[1] Based on earlier versions of the bills leading to the Pay Equity Law, there have been conflicting news articles regarding the effective date of the Pay Equity Law. The office of Massachusetts State Senator Daniel A. Wolf confirmed that July 1, 2018, is the effective date.

[2] "Working conditions" is defined as "the environmental and other similar circumstances customarily taken into consideration in setting salary or wages, including, but not limited to, reasonable shift differentials, and the physical surroundings and hazards encountered by employees performing a job."

- a seniority system, provided that an employee's parental, family, or medical leave, including leave due to a pregnancy-related condition, does not reduce seniority;

- a merit system;

- a system that measures earnings by quantity or quality of production or sales;

- geographic location;

- education, training, or experience to the extent that such factors are reasonably job-related; or

- travel, if the travel is a regular and necessary part of the job.

Pay Transparency

The Pay Equity Law includes a pay transparency provision that will make it unlawful for employers to prohibit employees from inquiring about, discussing, or disclosing their wages with each other. However, employers may prohibit human resources staff, supervisors, or any other employee whose job involves access to other employees' compensation information from disclosing such information without prior written consent from the employees in question. Further, the Pay Equity Law contains an anti-retaliation provision that, among other prohibited practices, will bar retaliation against an employee who has disclosed his or her wages, or inquired about or discussed the wages of another employee.

Restrictions on Inquiring About Applicants' Salary History

Applicants are also protected by the Pay Equity Law. Employers will be prohibited from screening applicants by requiring that an applicant's prior salary or wage history meet certain criteria. Further, employers cannot seek or confirm the wage or salary history of an applicant unless (i) the applicant voluntarily discloses the information or (ii) an employment offer with compensation has been negotiated and made to the applicant.

Violations

Actions by applicants or employees under the Pay Equity Law must be brought within three years of the alleged violation. Similar to the federal Lilly Ledbetter Act, employees may claim a continuing violation based on each allegedly unfair payment of wages or provision of benefits or other compensation. Actions can be brought by applicants or employees, on their own behalf or on behalf of others similarly situated, and by the Massachusetts Attorney General. Further, a plaintiff will not be required to first file a charge with the Massachusetts Commission Against Discrimination.

An employer found to have violated the equal pay provision of the Pay Equity Law will be liable for the employee's unpaid wages, including benefits or other compensation; an equal amount of liquidated damages; and costs and reasonable attorneys' fees.

Voluntary Audits as an Employer's Affirmative Defense

Significantly, the Pay Equity Law will provide employers with an affirmative defense in actions alleging gender discrimination in compensation. To take advantage of this defense, an employer will need to (i) have completed a self-evaluation of its pay practices within the three years prior to the commencement of litigation, and (ii) demonstrate that reasonable progress has been made toward rectifying any identified gender-based wage differentials. An employer may design the self-evaluation on its own, provided that the self-evaluation is reasonable in detail and scope relative to the employer's size.[3]

While a voluntarily audit is recommended, employers will not be subject to any penalty for not engaging in a self-evaluation. To further encourage such affirmative steps by employers, however, the Pay Equity Law provides that evidence of a self-evaluation or remedial steps taken pursuant to the self-evaluation will *not* be considered admissible evidence of a violation that occurred (i) prior to the self-evaluation, (ii) within six months thereafter, or (iii) within two years thereafter, provided that an employer demonstrates that it developed and implemented a good faith plan to address any gender-based wage differentials.

Impermissible Defenses

Employers are not permitted to use either (i) an employee's previous wage or salary history or (ii) an agreement with the employee to work for less than the employee would otherwise be entitled to under the Pay Equity Law, as a defense to any action brought under the law.

What Massachusetts Employers Should Do Now

In anticipation of this legislation being implemented, employers should do the following:

- With the assistance of counsel, to preserve confidentiality and privilege, consider conducting an evaluation of pay methodology and job titles, as well as determining which jobs will be deemed "comparable" for purposes of the Pay Equity Law.

- Document progress made toward eliminating wage differentials based on gender for comparable work.

- Review existing policies and training materials and then update them as

[3] If an employer conducts an audit that is found to be unreasonable in detail and scope, the employer may not use the audit as a defense but will not be liable for liquidated damages.

necessary regarding the anti-retaliation and pay transparency provisions of the Pay Equity Law.

- Work with recruiters, human resources professionals, and other employees and managers involved in the recruiting and hiring processes to ensure compliance with the restrictions on inquiring into the compensation history of prospective employees.

- Review application materials to ensure that they do not improperly request the prior compensation history of applicants for jobs in Massachusetts.

- Ensure that human resources professionals and supervisors are aware of, and receive training on, the Pay Equity Law, including the anti-retaliation and pay transparency provisions.

* * * *

For more information about this Advisory, please contact:

Barry A. Guryan
Boston
617-737-3538
bguryan@ebglaw.com

Susan Gross Sholinsky
New York
212-351-4789
sgross@ebglaw.com

Nancy L. Gunzenhauser
New York
212-351-3758
ngunzenhauser@ebglaw.com

Ann Knuckles Mahoney
New York
212-351-5521
aknuckles@ebglaw.com

***Alyssa Muñoz**, a Summer Associate (not admitted to the practice of law) in Epstein Becker Green's New York office, contributed to the preparation of this Advisory.*

About Epstein Becker Green
Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

EPSTEIN BECKER GREEN | labor and employment
ACT NOW ADVISORY

New York State Passes Five New Laws to Effectuate Gender Equality in the Workplace

November 2, 2015

By William J. Milani, Susan Gross Sholinsky, Nancy L. Gunzenhauser, and Matthew S. Aibel*

The New York State Legislature recently passed several pieces of legislation, all of which are intended to curtail gender-related employment discrimination. Among other things, this legislation strengthens existing laws, creates new causes of action, and provides for the award of attorneys' fees. All of this legislation, collectively referred to as the Women's Equality Agenda ("WEA"), was signed into law by Governor Andrew Cuomo on October 21, 2015.

Further, in his continued push on gender-related issues, at the Empire State Pride Agenda's dinner on October 22, 2015, Governor Cuomo announced proposed regulations that would ban private and public employment discrimination against transgender individuals.[1] This proposal is subject to a 45-day notice and comment period before it can be fully implemented.

Below is a summary of the amendments that make up the WEA, which will become effective on January 19, 2016.

1) Fair Pay Law Amendments (NY Bill A6075)

As we have discussed previously with respect to the California Fair Pay Act, New York has now joined the national trend of states that are bolstering their fair pay laws, so that such laws are even more robust than their federal counterpart, the Equal Pay Act of 1963. Bill A6075 modifies the following sections of the New York State Labor Law regarding equal pay:

First, the Fair Pay Law Amendments amend Labor Law Section 194's equal pay provisions from the original standard, which permitted pay differentials based on "any

---

[1] In New York City, the City Human Rights Law already protects employees from discrimination on the basis of "gender identity."

factor other than sex" to a "bona fide factor other than sex" standard, which may include education, training, or experience. The Fair Pay Law Amendments make clear, however, that such a factor must:

- not be based upon or derived from a sex-based differential in compensation,
- be job-related with respect to the position in question, and
- be consistent with business necessity.

An employee may still proceed with a claim under Section 194.1 if the employee demonstrates that, despite the factor meeting these three elements:

- the employer's particular employment practice causes a disparate impact on the basis of sex,
- an alternative employment practice exists that would serve the same business purpose and not produce such pay differential, and
- the employer has refused to adopt such alternative practice.

Second, the Fair Pay Law Amendments amend the definition of the term "same establishment" in New York State's Labor Law Section 194.1 to include more than one workplace located in the same geographical region. So, under the New York Equal Pay Act, employers must now ensure that no employee is paid a lower wage than the wage paid to an employee of the opposite sex in the same establishment for equal work on a job that requires equal skill, effort, and responsibility, and which is performed under similar working conditions (except under certain limited circumstances). This expanded definition, however, limits a "geographical region" to no larger than a county.

Third, the Fair Pay Law Amendments add a pay transparency provision, prohibiting employers from taking adverse action against an employee who inquires about, discusses, or discloses his or her wages *or* the wages of another employee. Employers may, however, establish a written policy that sets forth "reasonable workplace and workday limitations on the time, place and manner for inquiries about, discussion of, or the disclosure of wages." There are also limitations to this pay transparency scheme, including that employees may not discuss or disclose the wages of another employee without that employee's consent, and that employees who have access to wage information of other employees as a part of their essential job functions (i.e., HR staff) may not share such wage information with others who do not otherwise have access to such information, except when certain circumstances are present (e.g., an investigation or government inquiry). Employers should be mindful of the National Labor Relations Board's position regarding prohibiting covered employees from discussing wages when considering whether to create such a policy and, if so, how to craft it.

Finally, the Fair Pay Law Amendments increase the amount of liquidated damages under Section 194 from 100 percent to up to 300 percent of the total damages when a willful violation is found.

2) Sexual Harassment Protections (NY Bill A5360)

This bill amends the New York State Human Rights Law ("NYSHRL"), which generally applies only to businesses with four or more employees, so that the sexual harassment protections under the NYSHRL apply to all New York employers, regardless of the number of employees. The Sponsor's Memo to this bill indicated that the bill will affect the more than 60 percent of New York employers that employ fewer than four employees.

3) Recovery of Attorneys' Fees (NY Bill A7189)

This bill amends New York Executive Law Section 297(10) to permit plaintiffs and defendants to recover attorneys' fees in connection with claims of employment or credit discrimination on the basis of sex. The NYSHRL previously granted reasonable attorneys' fees only in the context of housing discrimination claims. This bill does not provide attorneys' fees for other types of employment discrimination under the NYSHRL.

4) Discrimination Based on Familial Status (NY Bill A7317)

This bill amends the NYSHRL, which bans employment discrimination on the basis of many protected categories, so that it now includes "familial status" as a protected classification. Familial status was already a protected category under the NYSHRL, but only with respect to housing discrimination.

The term "familial status" means:

> (a) any person who is pregnant or has a child or is in the process of securing legal custody of any individual who has not attained the age of eighteen years, or
>
> (b) one or more individuals (who have not attained the age of eighteen years) being domiciled with:
>
> (1) a parent or another person having legal custody of such individual or individuals, or
>
> (2) the designee of such parent.

The Sponsor's Memo to this bill indicates that the legislation was intended to protect women with children because that group is "less likely to be recommended for hire and promoted, and, in most cases, are offered less in salary than similarly situated men."

The bill will likely provide greater protections outside its intended group, because it also covers men and other individuals who are gaining custody of a child.

5) Reasonable Accommodations for Pregnancy (NY Bill A4272)

This bill amends the NYSHRL to require employers to provide reasonable accommodations for employees with a pregnancy-related condition, which is defined as "a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques." The bill requires an employee to "cooperate" in providing medical or other information that is necessary to verify the existence of a "disability or pregnancy-related condition," meaning that employees must engage in the interactive process with the employer attempting to provide a reasonable accommodation.

The Sponsor's Memo for the bill provides a list of potential reasonable accommodations, including "a stool to sit on, extra restroom breaks, transfer away from hazardous duties, a temporary reprieve from heavy lifting, or a reasonable time for child-birth recovery." The new legislation itself, however, does not specifically reference these proposed accommodations. Employers in New York City will already be familiar with pregnancy accommodation requirements, since the City enacted a reasonable accommodation law for pregnant individuals (whether or not the individual suffers from a "pregnancy-related condition") on January 30, 2014.

What New York Employers Should Do Now

In anticipation of this quintet of legislation becoming effective this coming January, New York employers should do the following:

- With the assistance of counsel, consider conducting a review of job titles and compensation methodology to ensure compliance with Section 194.1's amended fair pay provisions.

- If you are a small employer (i.e., you have fewer than four employees), review your policies and ensure that you maintain a robust policy prohibiting sexual harassment and providing an internal complaint procedure.

- Train hiring and other managers to be sensitive to issues regarding familial status, in all phases of the employment relationship, from interview to termination.

- Train supervisors and human resources professionals to engage in an interactive process with pregnant individuals seeking workplace accommodations.

* * * *

For more information about this Advisory, please contact:

William J. Milani	**Susan Gross Sholinsky**	**Nancy L. Gunzenhauser**
New York	New York	New York
212-351-4659	212-351-4789	212-351-3758
wjmilani@ebglaw.com	sgross@ebglaw.com	ngunzenhauser@ebglaw.com

*__*Matthew S. Aibel*__, *a Law Clerk – Admission Pending (not admitted to the practice of law) in the firm's New York office, contributed significantly to the preparation of this Advisory.*

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

EPSTEIN BECKER GREEN | labor and employment
ACT NOW ADVISORY

New York State Passes Five New Laws to Effectuate Gender Equality in the Workplace

November 2, 2015

By William J. Milani, Susan Gross Sholinsky, Nancy L. Gunzenhauser, and Matthew S. Aibel*

The New York State Legislature recently passed several pieces of legislation, all of which are intended to curtail gender-related employment discrimination. Among other things, this legislation strengthens existing laws, creates new causes of action, and provides for the award of attorneys' fees. All of this legislation, collectively referred to as the Women's Equality Agenda ("WEA"), was signed into law by Governor Andrew Cuomo on October 21, 2015.

Further, in his continued push on gender-related issues, at the Empire State Pride Agenda's dinner on October 22, 2015, Governor Cuomo announced proposed regulations that would ban private and public employment discrimination against transgender individuals.[1] This proposal is subject to a 45-day notice and comment period before it can be fully implemented.

Below is a summary of the amendments that make up the WEA, which will become effective on January 19, 2016.

1) Fair Pay Law Amendments (NY Bill A6075)

As we have discussed previously with respect to the California Fair Pay Act, New York has now joined the national trend of states that are bolstering their fair pay laws, so that such laws are even more robust than their federal counterpart, the Equal Pay Act of 1963. Bill A6075 modifies the following sections of the New York State Labor Law regarding equal pay:

First, the Fair Pay Law Amendments amend Labor Law Section 194's equal pay provisions from the original standard, which permitted pay differentials based on "any

---

[1] In New York City, the City Human Rights Law already protects employees from discrimination on the basis of "gender identity."

factor other than sex" to a "bona fide factor other than sex" standard, which may include education, training, or experience. The Fair Pay Law Amendments make clear, however, that such a factor must:

- not be based upon or derived from a sex-based differential in compensation,
- be job-related with respect to the position in question, and
- be consistent with business necessity.

An employee may still proceed with a claim under Section 194.1 if the employee demonstrates that, despite the factor meeting these three elements:

- the employer's particular employment practice causes a disparate impact on the basis of sex,
- an alternative employment practice exists that would serve the same business purpose and not produce such pay differential, and
- the employer has refused to adopt such alternative practice.

Second, the Fair Pay Law Amendments amend the definition of the term "same establishment" in New York State's Labor Law Section 194.1 to include more than one workplace located in the same geographical region. So, under the New York Equal Pay Act, employers must now ensure that no employee is paid a lower wage than the wage paid to an employee of the opposite sex in the same establishment for equal work on a job that requires equal skill, effort, and responsibility, and which is performed under similar working conditions (except under certain limited circumstances). This expanded definition, however, limits a "geographical region" to no larger than a county.

Third, the Fair Pay Law Amendments add a pay transparency provision, prohibiting employers from taking adverse action against an employee who inquires about, discusses, or discloses his or her wages *or* the wages of another employee. Employers may, however, establish a written policy that sets forth "reasonable workplace and workday limitations on the time, place and manner for inquiries about, discussion of, or the disclosure of wages." There are also limitations to this pay transparency scheme, including that employees may not discuss or disclose the wages of another employee without that employee's consent, and that employees who have access to wage information of other employees as a part of their essential job functions (i.e., HR staff) may not share such wage information with others who do not otherwise have access to such information, except when certain circumstances are present (e.g., an investigation or government inquiry). Employers should be mindful of the National Labor Relations Board's position regarding prohibiting covered employees from discussing wages when considering whether to create such a policy and, if so, how to craft it.

Finally, the Fair Pay Law Amendments increase the amount of liquidated damages under Section 194 from 100 percent to up to 300 percent of the total damages when a willful violation is found.

2) Sexual Harassment Protections (NY Bill A5360)

This bill amends the New York State Human Rights Law ("NYSHRL"), which generally applies only to businesses with four or more employees, so that the sexual harassment protections under the NYSHRL apply to all New York employers, regardless of the number of employees. The Sponsor's Memo to this bill indicated that the bill will affect the more than 60 percent of New York employers that employ fewer than four employees.

3) Recovery of Attorneys' Fees (NY Bill A7189)

This bill amends New York Executive Law Section 297(10) to permit plaintiffs and defendants to recover attorneys' fees in connection with claims of employment or credit discrimination on the basis of sex. The NYSHRL previously granted reasonable attorneys' fees only in the context of housing discrimination claims. This bill does not provide attorneys' fees for other types of employment discrimination under the NYSHRL.

4) Discrimination Based on Familial Status (NY Bill A7317)

This bill amends the NYSHRL, which bans employment discrimination on the basis of many protected categories, so that it now includes "familial status" as a protected classification. Familial status was already a protected category under the NYSHRL, but only with respect to housing discrimination.

The term "familial status" means:

> (a) any person who is pregnant or has a child or is in the process of securing legal custody of any individual who has not attained the age of eighteen years, or
>
> (b) one or more individuals (who have not attained the age of eighteen years) being domiciled with:
>
> (1) a parent or another person having legal custody of such individual or individuals, or
>
> (2) the designee of such parent.

The Sponsor's Memo to this bill indicates that the legislation was intended to protect women with children because that group is "less likely to be recommended for hire and promoted, and, in most cases, are offered less in salary than similarly situated men."

The bill will likely provide greater protections outside its intended group, because it also covers men and other individuals who are gaining custody of a child.

5) Reasonable Accommodations for Pregnancy (NY Bill A4272)

This bill amends the NYSHRL to require employers to provide reasonable accommodations for employees with a pregnancy-related condition, which is defined as "a medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques." The bill requires an employee to "cooperate" in providing medical or other information that is necessary to verify the existence of a "disability or pregnancy-related condition," meaning that employees must engage in the interactive process with the employer attempting to provide a reasonable accommodation.

The Sponsor's Memo for the bill provides a list of potential reasonable accommodations, including "a stool to sit on, extra restroom breaks, transfer away from hazardous duties, a temporary reprieve from heavy lifting, or a reasonable time for child-birth recovery." The new legislation itself, however, does not specifically reference these proposed accommodations. Employers in New York City will already be familiar with pregnancy accommodation requirements, since the City enacted a reasonable accommodation law for pregnant individuals (whether or not the individual suffers from a "pregnancy-related condition") on January 30, 2014.

What New York Employers Should Do Now

In anticipation of this quintet of legislation becoming effective this coming January, New York employers should do the following:

- With the assistance of counsel, consider conducting a review of job titles and compensation methodology to ensure compliance with Section 194.1's amended fair pay provisions.

- If you are a small employer (i.e., you have fewer than four employees), review your policies and ensure that you maintain a robust policy prohibiting sexual harassment and providing an internal complaint procedure.

- Train hiring and other managers to be sensitive to issues regarding familial status, in all phases of the employment relationship, from interview to termination.

- Train supervisors and human resources professionals to engage in an interactive process with pregnant individuals seeking workplace accommodations.

* * * *

For more information about this Advisory, please contact:

William J. Milani	**Susan Gross Sholinsky**	**Nancy L. Gunzenhauser**
New York	New York	New York
212-351-4659	212-351-4789	212-351-3758
wjmilani@ebglaw.com	sgross@ebglaw.com	ngunzenhauser@ebglaw.com

*__*Matthew S. Aibel*__, *a Law Clerk – Admission Pending (not admitted to the practice of law) in the firm's New York office, contributed significantly to the preparation of this Advisory.*

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.

EPSTEIN BECKER GREEN | Employment, Labor & Workforce Management

ACT NOW ADVISORY

New York City Is Poised to Prohibit Inquiries Into Salary History

April 7, 2017

By Susan Gross Sholinsky, Nancy L. Gunzenhauser, Ann Knuckles Mahoney, and Judah L. Rosenblatt

---

On April 5, 2017, the New York City Council passed a bill ("Bill") that would amend the New York City Human Rights Law ("NYCHRL") to prohibit all New York City employers[1] from (i) requesting a job applicant's salary history or (ii) using a job applicant's salary history to determine the salary, benefits, or other compensation for such applicant during the hiring process, including the negotiation of a contract. Mayor Bill de Blasio is expected to sign the Bill, which would become effective 180 days thereafter. New York City follows Philadelphia[2] and Massachusetts[3] in seeking to improve pay equity by banning inquiries into salary history on the basis that such inquiries perpetuate the wage gap based on historical pay discrimination.[4]

Prohibited Practices and Definitions

Under the Bill, it would be unlawful for an employer to inquire about the salary history of an applicant for employment. "Salary history" is defined broadly and includes wages, benefits, or other compensation. "Salary history," however, does not include any objective measure of the applicant's productivity, such as revenue, sales, or other production reports. Under the Bill, the term "to inquire" is defined broadly to mean "to communicate any question or statement to an applicant, an applicant's current or prior employer, or a current or former employee or agent of the applicant's current or prior employer, in writing or otherwise."

---

[1] Since December 4, 2016, public employers in New York City have been prohibited from making such inquiries.

[2] The Chamber of Commerce for Greater Philadelphia filed a lawsuit on April 6, 2017, challenging this law, which is set to take effect on May 23, 2017.

[3] Aside from these jurisdictions, several other states, cities, and the District of Columbia have proposed similar laws. A similar law was previously proposed in the U.S. Congress and is expected to be reintroduced later this year.

[4] Indeed, Letitia "Tish" James, New York City Public Advocate and sponsor of the Bill, recently noted that "[b]eing underpaid once should not condemn you to a lifetime of inequity."

Employers would also be prohibited from conducting a search of publicly available records or reports to seek salary history. The Bill applies to private and public employers of all sizes.

Permissible Activities

Importantly, an employer may still:

- inform the applicant in writing or otherwise about the position's proposed or anticipated salary or salary range;
- engage in a discussion with the applicant about his or her *expectations* with respect to salary, benefits, and other compensation;
- inquire about unvested equity or deferred compensation that an applicant would forfeit or have cancelled by virtue of the applicant's resignation from his or her current employer;
- consider the prior salary of a current employee who is seeking an internal transfer or promotion; and
- perform a background check, so long as:
    - the check does not include a request for, or confirmation of, prior salary history, and
    - the employer does not, if the background check does disclose such information, utilize same for purposes of determining the salary, benefits, or other compensation of the applicant.

Voluntary Disclosure

Under the Bill, if an applicant voluntarily *and without prompting* discloses salary history information to an employer, then the employer could consider salary history in determining salary, benefits, and other compensation for such applicant. The employer could also verify the applicant's voluntarily disclosed salary history. However, the employer should ensure that any disclosure of salary information is truly voluntary and unprompted.

Exemptions

The restrictions under the Bill would not apply if federal, state, or local law specifically authorizes the disclosure or verification of salary history for employment purposes, or specifically requires knowledge of salary history to determine an employee's compensation.

Enforcement

The Bill would be enforced by New York City's Commission on Human Rights ("Commission"). An employee alleging a violation of the Bill could either bring a complaint with the Commission or proceed directly to court. As with other claims brought under the NYCHRL, actions would need to be brought to the Commission within one year or filed in court within three years of the alleged violation.

Under the NYCHRL, civil penalties may be imposed for violations, with greater penalties (up to $250,000) available for willful, wanton, or malicious acts. If a claim were brought in court, the plaintiff could seek damages, including punitive damages, injunctive relief, attorneys' fees, and costs.

What New York City Employers Should Do Now

If the Bill becomes effective, New York City employers should do the following:

- Remove questions about salary history from employment applications, background check forms, and any other applicable forms or policies used during the hiring process.

- Unless an applicant has voluntarily disclosed salary history information, do not seek salary history during the background check process[5] to make sure that such information is not used in determining compensation.

- Coordinate with any outside background-checking vendors to ensure that background check forms do not request salary history and that a vendor does not request salary history when confirming prior employment.

- Confirm that external recruiters are complying with the Bill when seeking applicants for jobs in New York City.

- Train human resources staff, internal recruiters, hiring managers, and any other individuals involved in the hiring process (i.e., those conducting interviews or setting compensation levels at the organization) on the requirements of the Bill.

- Make certain that any interviewers who will inquire about an applicant's compensation expectations explicitly state that the inquiry pertains to the applicant's compensation *expectations* for the given role and does not relate to his or her current or past salary.

[5] Employers should keep in mind that the New York City Fair Chance Act prohibits employers with four or more employees from conducting criminal background checks prior to making a contingent offer of employment. For more information on this law, please see our *Act Now Advisory* titled "Now That New York City's Credit Check and "Ban the Box" Laws Are in Effect, How Do Employers Comply?"

- Ensure that any disclosure of salary history is done on a purely voluntary basis. If an applicant voluntarily discloses salary history information at any point during the hiring process, create a "memo to file" (or other internal documentation) noting that the applicant voluntarily disclosed this information and the circumstances surrounding such disclosure.

* * * *

For more information about this Advisory, please contact:

Susan Gross Sholinsky
New York
212-351-4789
sgross@ebglaw.com

Nancy L. Gunzenhauser
New York
212-351-3758
ngunzenhauser@ebglaw.com

Ann Knuckles Mahoney
New York
212-351-5521
aknuckles@ebglaw.com

Judah L. Rosenblatt
New York
212-351-4686
jrosenblatt@ebglaw.com

EPSTEIN BECKER GREEN | Employment, Labor & Workforce Management

ACT NOW ADVISORY

NYC Mayor Signs Bill Prohibiting Inquiries Into Salary History

May 5, 2017

By Susan Gross Sholinsky, Nancy L. Gunzenhauser, and Judah L. Rosenblatt

---

On May 4, 2017, Mayor Bill de Blasio signed into law a bill that amends the New York City Human Rights Law to prohibit all New York City employers from (i) requesting a job applicant's salary history or (ii) using a job applicant's salary history to determine his or her salary, benefits, or other compensation during the hiring process, including the negotiation of a contract ("Law"). The Law will take effect on October 31, 2017.

The Law makes it unlawful for an employer to inquire about the salary history of an applicant for employment. "Salary history" is defined broadly and includes wages, benefits, or other compensation. "Salary history," however, does not include any objective measure of the applicant's productivity, such as revenue, sales, or other production reports. Under the Law, the term "to inquire" is defined broadly to mean "to communicate any question or statement to an applicant, an applicant's current or prior employer, or a current or former employee or agent of the applicant's current or prior employer, in writing or otherwise." Employers are also prohibited from conducting a search of publicly available records or reports to seek salary history. The Law applies to private and public employers of all sizes.

In anticipation of the October 31, 2017, effective date, New York City employers should take the action steps that we outlined in our earlier advisory.

* * * *

For more information about this Advisory, please contact:

Susan Gross Sholinsky
New York
212-351-4789
sgross@ebglaw.com

Nancy L. Gunzenhauser
New York
212-351-3758
ngunzenhauser@ebglaw.com

Judah L. Rosenblatt
New York
212-351-4686
jrosenblatt@ebglaw.com

This document has been provided for informational purposes only and is not intended and should not be construed to constitute legal advice. Please consult your attorneys in connection with any fact-specific situation under federal law and the applicable state or local laws that may impose additional obligations on you and your company.

About Epstein Becker Green

Epstein Becker & Green, P.C., is a national law firm with a primary focus on health care and life sciences; employment, labor, and workforce management; and litigation and business disputes. Founded in 1973 as an industry-focused firm, Epstein Becker Green has decades of experience serving clients in health care, financial services, retail, hospitality, and technology, among other industries, representing entities from startups to Fortune 100 companies. Operating in offices throughout the U.S. and supporting clients in the U.S. and abroad, the firm's attorneys are committed to uncompromising client service and legal excellence. For more information, visit www.ebglaw.com.