

New York City's Impending Salary History Inquiry Ban: What You Need to Know

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By [Susan Gross Sholinsky](#), [Nancy L. Gunzenhauser](#), and [Amanda M. Gomez](#)*

On **October 31, 2017**, New York City's new [salary history inquiry law](#) ("Law") will take effect. The Law bans employers from:

- requesting a job applicant's salary history (which includes the applicant's current or prior wage, benefits, or other compensation) or
- relying on a job applicant's salary history to determine his or her salary, benefits, or other compensation during the hiring process (the "hiring process" includes the negotiation of a contract).

The New York City Commission on Human Rights ("Commission") has established a website for information regarding the Law. This website provides two Fact Sheets—one for [employers](#) and one for [employees](#)—about the Law, as well as a set of [Frequently Asked Questions](#) ("FAQs"). The one-page Fact Sheets provide a short overview of the Law. The FAQs give insight into how the Commission will enforce the Law and provide helpful guidance for employers, recruiters, and employees. Indeed, the scope of the FAQs suggests that New York City will take an aggressive approach to enforcing the Law, since several of the questions reach beyond the terms of the Law. The Commission has indicated that it will continue to update the FAQs as it becomes aware of scenarios not sufficiently addressed by the Law or FAQs. Indeed, since first publishing the FAQs in late September, the Commission has already made changes.

National Movement for Pay Equality

Similar salary history inquiry laws have already passed—but are either not yet effective or not yet being enforced¹—in Delaware, [Massachusetts](#), Oregon, [Philadelphia](#),² and San Francisco. Consistent with these other jurisdictions, New York City's Law is

¹ One exception is Puerto Rico, where a salary history inquiry ban law has been in effect since March 8, 2017.

² Philadelphia's law is already in effect, but its enforcement has been stayed pending the outcome of an ongoing legal challenge.

intended to eliminate the perpetuation of prior pay inequality for women and other groups that have historically been underpaid. Many other, similar laws are pending across the country, including the federal “Pay Equity for All Act of 2017.”³

What the Law Provides

Beginning on October 31, 2017, New York City employers **must not** inquire into the salary history of their applicants or use an applicant’s salary history to determine compensation in any way (except as provided below). The term “inquire” includes seeking an applicant’s salary history by questioning the applicant, the applicant’s current or prior employer, or a current or former employee or agent of the applicant’s current or former employer, or by conducting searches of publically available records or reports.

New York City employers **are permitted** to discuss with an applicant his or her *expectations* with respect to salary, benefits, and compensation. In addition, employers may ask whether an applicant will have to forfeit deferred compensation or unvested equity as a result of the applicant’s resignation from his or her current employer. Employers also may ask about the value and structure of the deferred compensation or unvested equity, request documentation to verify the applicant’s representations, and consider such information in making the applicant an offer.

Further, under the Law, the term “salary history” **does not** include any objective measure of the applicant’s productivity, such as revenue, sales, or other production reports (and, therefore, such objective measures can be discussed). In other words, a prospective employer may ask applicants about their successes at their prior employers in specific terms, so long as the employer does not ask how that productivity translated into compensation.

The Law does not apply to positions located outside of New York City. However, the FAQs suggest that the Law may apply to a position located outside New York City if an applicant is interviewed within New York City for the position.

Voluntary Disclosure

If an applicant voluntarily—and without prompting—discloses his or her salary history, the employer may rely upon that salary history information in determining the applicant’s compensation and other benefits, and may verify the disclosed salary.

Rules for Vendors

The FAQs directly address the role of third parties that are engaged by New York City employers, such as headhunters, recruiters, or other agents. Like employers, such

³ States with pending legislation addressing salary history inquiry bans include California, Georgia, Iowa, Nebraska, New Hampshire, New York, North Carolina, Rhode Island, Vermont, Washington, and Wisconsin.

entities are also prohibited from seeking salary history from applicants. While entities like headhunters may ask applicants about salary expectations, they may only rely upon salary history information that is disclosed voluntarily and without prompting.

Neither the FAQs nor the Law explicitly permit or preclude headhunters, recruiters, or other vendors from sharing with prospective employers the salary history information that was provided to them by an applicant. The FAQs state, however, that agents working on behalf of an applicant may share salary history information in negotiations with a prospective employer only if they have the consent of the applicant to do so. Absent such permission, these agents may face liability for aiding and abetting an unlawful request for salary history.

Summary of Permissible Activities

Employers may continue to engage in the following activities (those with asterisks come from the FAQs and are not directly addressed in the Law itself):

- informing the applicant in writing or otherwise about the position's proposed or anticipated salary or salary range;
- participating in discussions with the applicant about his or her *expectations* with respect to salary, benefits, and other compensation;
- inquiring about unvested equity or deferred compensation that an applicant would forfeit or have cancelled by the applicant's resignation from his or her current employer;
- asking about objective productivity measures (e.g., revenue, sales, book of business, profits generated, or production reports);
- considering the salary history of a current employee who is seeking an internal transfer or promotion;
- asking about salary history *after* an individual has been hired and the salary has been set;*
- asking an applicant about the value of competing offers from other prospective employers or about counteroffers from the applicant's current employer;*
- considering salary information of employees of a target company in an acquisition as a part of the due diligence process;*
- performing background checks, provided that:
 - such checks do not include a request for, or confirmation of, prior salary history (unless such salary history was provided by the applicant voluntarily and without prompting), and

- if the background checks reveal salary history, the employer may not use such information to determine salary, benefits, or any other compensation; and
- relying on and confirming voluntarily provided salary histories.

Summary of Prohibited Practices

Employers **must not** continue to engage in the following activities (again, those with asterisks come from the FAQs and are not directly addressed in the Law itself):

- asking about salary history, benefits, or any other form of compensation (including, commissions; car, housing, and other allowances; retirement plans; and bonuses);
- seeking salary history through any third party, such as employment agencies, external recruiters or headhunters, or an applicant's current or former employer (including its current or former employees and agents);
- conducting searches for an applicant's salary history on any publicly available records (e.g., Google, Glassdoor, LinkedIn, and Monster);
- using a multistate application that asks for salary history information but includes a disclaimer that individuals applying for jobs in New York City need not answer the question;*
- requesting a Form W-2 to verify representations about salary history, unless the applicant, voluntarily and without prompting, offers such information;* and
- relying on an applicant's salary history to determine the salary, benefits, or any other compensation during the hiring process, including the negotiation of a contract.

Note: The restrictions under the Law do not apply if federal, state, or local law specifically (i) authorizes the disclosure or verification of salary history for employment purposes or (ii) requires the knowledge of salary history to determine an employee's compensation. However, an exemption is not available for actions taken in accordance with foreign or international law.*

What New York City Employers Should Do Now

In anticipation of the Law, 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.

- 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.
- Unless an applicant has voluntarily and without prompting disclosed salary history information, refrain from seeking salary history during the background or reference check process.
- Confirm that external recruiters and headhunters will comply with the Law when seeking applicants for jobs in New York City.
- Consider creating salary ranges for jobs within the organization so that offers will be consistently made, and identify factors (such as experience and education) that will determine where within the applicable range an offer will be made.
- 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 Law.
- 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.
- Ensure that any disclosure of salary history is done on a purely voluntary basis (and without prompting). This means that it is not permissible to pose a question about an applicant's salary history with a caveat that answering the question is not mandatory.
- 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.
- Consider amending contracts with a vendor to:
 - place the vendor on notice of its obligations under the Law,
 - require the vendor to agree that it will comply with the Law, and
 - provide for indemnification for claims made against you based on the vendor's violation of the Law.
- To the extent your organization operates in locations outside of New York City, consider whether (for administrative ease or public policy reasons) the organization will comply with the Law nationwide, and, if so, take all of the above

steps in all of the organization's U.S. locations. Note that a uniform practice nationwide may make compliance more likely.

- If you do operate in multiple jurisdictions and opt not to comply outside of New York City, make sure that electronic onboarding and other tools do not inadvertently continue to ask for (or store) salary history for New York City-based applicants.

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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

****Amanda M. Gomez**, 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.*

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