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California Enacts Ban on Prior Salary History Inquiries Employers Required to Provide Pay Scales San Francisco Enacts Broader Ban

Precluding employers from inquiring about or relying on an applicant's prior salary history is undoubtedly an emerging employment law trend. Several states (Oregon, Massachusetts and Delaware) and municipalities (including San Francisco several months ago) have enacted such prohibitions. The prohibitions have generally been enacted to target the perceived gender-related wage gap and out of concern that prior salary history is irrelevant to the current position, and perpetuates prior discrimination.

Given this trend and California's increased focus on Equal Pay related issues, it is not surprising that Governor Jerry Brown has signed a law (AB 168) curbing an employer's ability to inquire about prior salary history information. Here is an overview of the law's provisions as well as some steps employers should consider before it takes effect on January 1, 2018, as well as an overview of the San Francisco Ordinance that takes effect on July 1, 2018.

What is Prohibited?

This law adds Labor Code section 432.3 to preclude employers from inquiring orally or in writing, personally or through an agent, about salary history information of an applicant, including about compensation and benefits. It also precludes employers from relying upon an applicant's salary history information as a factor in determining whether to offer employment to an applicant or what salary to offer that person.

However, the law *does not* preclude an applicant from voluntarily and without prompting disclosing salary history information to a prospective employer, and if that voluntary disclosure occurs, an employer is not precluded from considering or relying upon that voluntarily disclosed information in determining the salary for that applicant. This law also incorporates last year's amendments (AB 1676) to California's Equal Pay Act (Labor Code section 1197.5) to make clear that prior salary history, by itself, cannot justify any disparity in compensation based on gender, race or national origin.

In other words, an employer cannot inquire about an applicant's prior salary history, but an applicant can volunteer this information, and prior salary history by itself will not be a defense if the applicant subsequently brings an Equal Pay Act claim.

In an often less-publicized aspect of this new law, employers must, upon reasonable request, provide an applicant the pay scale for a position. These new requirements apply to all employers, regardless of size, including state and local government employers and the Legislature.

San Francisco's Prior Salary History Ban

In July 2017, the City of San Francisco enacted its own ban on prior salary history inquiries which, even though enacted first, will not take effect until July 1, 2018. The San Francisco "Consideration of Salary History Ordinance" shares many of the key provisions of AB 168, including the prohibitions on inquiring about an applicant's salary

history, and upon considering or relying upon an applicant's salary history in determining whether to offer employment or what salary to offer.

Never one to be outdone, the San Francisco version is also broader in several respects. For instance, it prohibits employers from retaliating against an applicant who refuses to disclose prior salary. It also prohibits employers from releasing a current or former employee's salary information without the employee's written authorization. Lastly, the San Francisco ordinance imposes new posting requirements, with the San Francisco Office of Labor Standards Enforcement (SFOLSE) tasked with creating a new poster, and it permits administrative enforcement by the SFOLSE and authorizes various statutory penalties for violations.

Because the statewide version (AB 168) does not contain language preempting any municipal level ordinances, San Francisco employers need to consider both versions.

What Does This Mean for Employers?

To comply with these new provisions, employers should consider taking the following steps:

- Update any applications to remove inquiries related to salary history;
- Train hiring managers and supervisors, as well as any third-party recruiters, to avoid inquiring about an applicant's salary history;
- Train hiring managers and supervisors that, to the extent an applicant voluntarily discloses salary history information and the decision is subsequently made to hire that applicant, to document the basis for any salary offer and to avoid unduly relying upon the prior salary history;
- Develop a salary range for every job posting that can be provided to applicants upon request;
- San Francisco employers should review their reference policies to ensure salary information is not disclosed for current or former employees absent written authorization; and
- San Francisco employers will need to obtain a copy of the SFOLSE's poster or develop their own version of this posting requirement, and ensure it is posted in the required conspicuous place.

A complete copy of the text of AB 168 is available at:

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB168

A complete copy of the San Francisco Ordinance is available at:

<https://sfgov.legistar.com/View.ashx?M=F&ID=5328258&GUID=A694B95B-B9A4-4B58-8572-E015F3120929>

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