

San Francisco, New York Enact Salary History Bans

The cities of San Francisco and New York became the latest jurisdictions (joining Delaware, Massachusetts, Oregon, Philadelphia and Puerto Rico) to enact ordinances that ban employers from asking about, or considering in setting compensation, the current or past salaries of applicants. The NYC ordinance takes effect on October 31, 2017, and the SF ordinance takes effect on July 1, 2018. The ordinances contain the following key components:

- **It will be unlawful to inquire about or consider salary histories of job applicants.** This includes a prohibition on all forms of inquiries, including questions directly to the applicant, inquiries to a prior employer, searches of public records, and background checks. Employers also generally cannot set compensation based on the salary history of the applicant.
- **Except for:**
 - o **Voluntary, unprompted disclosures by an applicant.** The disclosure must truly be voluntary, and provided without prompting. For example, an employee may offer information about prior compensation to negotiate a higher salary.
 - o **Objective measures of performance such as revenue, sales, or other production reports.** This exception allows employers to verify performance for sales employees, executives or other employees paid based on performance measures. However, the requests should be narrowly tailored to avoid overreach (*e.g.*, ask for data on achievement against quota vs. a complete history of paid commissions).
 - o **Discussions with the applicant about unvested equity or deferred compensation that the applicant would forfeit or lose due to the applicant's resignation from the prior employer.**
 - o **Inquiries required by law.**
 - o **Applicants for internal transfer or promotion.**
- **Limited discussions about proposed salary or salary range are permitted.** The ordinances permit employers to "engage in discussions" with the applicant about salary expectations, as long as employers do not first ask about salary history.

- **Discriminating against an applicant for refusing to disclose salary history is prohibited.**
- **Employers generally cannot release salary history of former or current employees to prospective employers without written authorization from the individual. (SF only.)**
- **Employers must post a notice informing applicants and employees of their rights. (SF only.)** The San Francisco Office of Labor Standards Enforcement will create a template notice by the effective date of the ordinance.

In light of the ordinances, Employers with SF or NY operations should, by the effective date of both ordinances:

- Eliminate questions regarding prior salary or compensation information, except where specifically allowed.
- Inform all external recruiters, referral agencies and staffing agencies of the new requirements.
- Train all internal recruiters and interviewers on the new requirements.
- Post the required SF notice.

The state of California is also considering a similar law; the bill currently sits in the Senate. (California law currently generally prohibits setting compensation based on the prior salary or compensation of the applicant; the new law would also prohibit inquiries into salary history.)

If you have any questions or wish to discuss these new ordinances or any other matter, please do not hesitate to contact me.

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