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IN THIS ISSUE

Recently, a number of jurisdictions have considered and adopted legislation that limits the ability of employers to request or rely upon information from job applicants about past compensation. Defense counsel need to advise their clients of these developments, as well as proactive steps to ensure gender pay disparities do not exist in their organizations.

Don't Ask, Don't Tell (Me About Your Salary History): An Update on the Status of State Salary History Inquiry Bans

ABOUT THE AUTHOR

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ABOUT THE COMMITTEE

The Employment Law Committee serves members who represent employers and their insurers. Committee members publish newsletters and Journal articles and present educational seminars for the IADC membership-at-large and mini-seminars for the committee's membership at the Annual and Midyear Meetings. The Committee presents significant opportunities for networking and business referrals. The goal of the Employment Law Committee is to build an active committee with projects that will attract and energize attorneys who practice employment law on a domestic and international basis. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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Most of us are familiar with the Equal Pay Act (the "EPA"), which prohibits discrimination "on the basis of sex by paying wages to employees . . . at a rate less than the rate at which [the employer] pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."[1] Put simply, the EPA requires equal pay for equal work and was designed to stamp out pay disparities based on gender. Likely, most of us are also familiar with the persistence of the gender pay gap despite the EPA's efforts.

While the gender pay gap has narrowed since 1980, it has largely remained unchanged in the past 15 years.[2] According to a Pew Research Center analysis of median hourly earnings of both full- and part-time workers in the United States, women only earned 82% of what men earned in 2017.[3] Based on this estimate, women would have to work an extra 47 days to earn what men did in 2017.[4] Recently, states and cities[5] across the United States have begun to experiment with new equal pay laws focused on salary disclosures to try to close the gender pay gap. California, Delaware, Massachusetts, and Oregon all enacted laws prohibiting employers from relying on an applicant's salary history.

States Banning Salary History Inquiries

On October 12, 2017, Governor Jerry Brown signed AB 168, prohibiting California employers from asking job applicants about their salary histories. This law applies to all employers, regardless of size, and prohibits them from relying on an applicant's salary history in determining whether to offer employment and in determining the applicant's compensation. The California law also requires an employer to provide the "pay scale" for a position to the applicant upon a reasonable request. Nothing, however, in the California law prohibits employees from voluntarily disclosing salary history to a prospective employer. Neither does the law prohibit an employer from considering the salary history of an applicant who voluntarily discloses it.

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[1] 29 U.S.C. § 206(d)(1).

[2] Graf, Nikki, Brown, Anna, & Patten, Eileen, *The narrowing, but persistent gender gap in pay*, Pew Research Center, April 9, 2018, http://www.pewresearch.org/fact-tank/2018/04/09/gender-pay-gap-facts/ (last visited May 25, 2018).

[3] *Id.*

[4] *Id.*

[5] N.Y.C., N.Y., Admin Code § 8-107(25) (2017) (New York City); Phila., PA., Code § 9-1131(2) (2017) (Philadelphia) (Note: On April 30, 2018, a federal district court in Pennsylvania issued a preliminary injunction against the City of Philadelphia, preventing the City from implementing the portion of this law that prohibits employers from asking job applicants about their salary history. The court, however, did not enjoin the provision that bars employers from relying on wage history information in determining the salary that they offer prospective employees); New Orleans Executive Order MJL 17-01 (New Orleans) (prohibits city agencies from requesting applicant's salary histories); The city of Pittsburgh, PA also passed a law prohibiting the city from asking about a job applicant's salary history.

On June 1, 2017, Governor Kate Brown signed the Oregon Equal Pay Act of 2017 into law. Oregon's Act, like California's, prohibits employers from screening applicants based on salary history or seeking an applicant's salary history, either from the applicant or the applicant's current or former employer. Further, Oregon's law prohibits employers from "[d]etermin[ing] compensation for a position based on current or past compensation of a prospective employee."[6] This means that an Oregon employer cannot consider an applicant's salary even if the applicant voluntarily disclosed it. An employer who violates these provisions is potentially liable for back pay and for compensatory and punitive damages.[7] Oregon's law, however, does contain a safe harbor provision. If an Oregon employer has conducted an "equal-pay analysis" (i.e., an internal audit) within three years before the complaint, eliminates the pay differential for the plaintiff, and makes "reasonable and substantial progress toward eliminating wage differentials for the protected class asserted by the plaintiff," a court will grant a motion by the employer to limit an award to two years of back pay and reasonable attorney fees and cannot award further compensatory or punitive damages.[8] Importantly, information that an employer has not completed an equal-pay analysis cannot be used as evidence of a violation of Oregon's law.

In August 2016, Massachusetts Governor Charlie Baker signed a bill amending Massachusetts' Equal Pay Act to prohibit employers from asking applicants about their salary or wage history before making an employment offer.[9] Under the Act, if an applicant voluntarily discloses their salary or wage history, the employer may confirm this information. Otherwise, an employer can only confirm an applicant's wage or salary history after an offer of employment has been made. The Act prohibits employers in Massachusetts from asking salary history questions *and* applicants in Massachusetts from being recipients of such questions. Thus, an out-of-state employer cannot ask an applicant located in Massachusetts about their wage or salary history. A Massachusetts employer that is defending against an action under Massachusetts' Equal Pay Act that has, within the previous three years and prior to the commencement of the legal claim, completed a self-evaluation of its pay practices in good faith and can demonstrate that it has made "reasonable progress" towards eliminating gender-based wage differentials can offer that as an affirmative defense to claims under the law.

Delaware's law prohibits Delaware employers from (1) seeking compensation history from an applicant or a current or former employer or (2) screening applicants based on prior compensation histories, which includes requiring that the applicant's prior compensation satisfy a minimum or

[6] O.R.S. § 652.220.
[7] O.R.S. § 652.230.
[8] O.R.S. § 652.235.
[9] Mass. Gen. Laws ch. 149 § 105A(c) (2018).

maximum threshold.[10] After extending a job offer, a Delaware employer may request and receive the applicant's compensation history, but only for the purpose of confirming its accuracy.

States are not the only ones experimenting with best ways to close the gender pay gap. On May 11, 2017, members of the U.S. House of Representatives introduced the Pay Equity for All Act (HR 2418), which sought to amend the Fair Labor Standards Act to make it unlawful for employers to screen applicants based on previous wage or salary histories, inquire of former or current employers of the applicant about such information, or retaliate against a current or prospective employee for objecting to any practice forbidden thereunder.[11]

Salary history legislation is, or was, under consideration in approximately twenty-three states and the District of Columbia.[12] It is very likely that in the years to come additional states and municipalities will pass laws prohibiting salary history inquiries.

Rationale for Ban on Salary History Inquiries

Historically, females have made less than their male counterparts. Today, many females are stuck earning less than their male counterparts due, in part, to a history of discrimination. The argument goes that when an employer bases a pay decision on an applicant's pay history, the employer perpetuates past pay disparities, such as those based on gender. State and local governments believe that, given the pay disparities between men and women, basing compensation offers on past salaries (which might have been lower because of gender) perpetuates the pay gap throughout a person's career. This happens despite an employer's best efforts to close the gap. This creates a cycle which is hard for women to escape.

Thus, in passing legislation preventing employers from relying on past wage or salary history, states are purportedly attempting to close the pay gap by stamping out entrenched disparities based on past discrimination.

Best Practices

If your client is an employer in a state or city that has enacted a ban on salary history inquiries, you should encourage them to take proactive steps to ensure their own employment practices comport with applicable law. Encourage business clients to undertake an internal employment audit. Remind them that it is beneficial to use an attorney to conduct the audit as attorneys are more knowledgeable about the status of the law and are in the best position to scrutinize the effects, both intended and

[10] 19 Del. C. § 709B.
[11] H.R. 2418, 115th Cong. (2017).
[12] Yuki Noguchi, *Proposals Aim to Combat Discrimination Based on Salary History*, NPR, https://www.npr.org/2017/05/30/528794176/proposals-aim-to-combat-discrimination-based-on-salary-history (last visited May 28, 2018).

unintended, of employment policies. Further, by using an outside attorney a company can shield information obtained through an employment audit *vis-à-vis* the attorney-client privilege.

When conducting the audit, make sure you remember to update all employment applications to ensure they do not contain questions about previous pay. Further, encourage business clients to train management regarding conducting interviews and permissible questions. Business clients should also be encouraged to make pay and salary criteria objective and measurable and to clearly document factors used to determine salary, bonuses, and promotions. Lastly, business clients should perform an "equal-pay analysis" every two to three years to ensure wage disparities do not exist. If the audit reveals gender-based wage disparities, the client should take measures to remedy the situation.

It is unlikely that efforts such as these will slow down in the years to come. To that end, it is critical attorneys remain knowledgeable about the status of the law as it relates to bans on salary history inquiries in the states in which their clients do business. If you or your clients do business in a state that has not yet been impacted by salary history bans, remind your clients that it is never too early to begin taking proactive measures to ensure gender pay disparities do not exist in their organizations.

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