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# Overview of State and Municipal Salary Inquiry Laws
## And Practical Considerations for Staffing Firms

### Executive Summary

Staffing firms accustomed to requesting salary histories from applicants during the application and placement process face increased restrictions as states and municipalities continue to enact new laws prohibiting salary history inquiries. These laws seek to ensure pay equity among genders, under the theory that salary history inquiries perpetuate historical pay inequities. Although at least one municipal ordinance prohibiting salary history inquiries has been challenged on constitutional grounds, a patchwork of differing prohibitions has or will become effective in 2017 and throughout 2018.

As discussed more fully below, staffing firms should ensure compliance with existing state and local salary history inquiry prohibitions and be cognizant that additional such prohibitions are likely to be enacted. Given that staying on top of new laws requires diligence, and because the laws may have extraterritorial effect—meaning that they may implicate staffing firm conduct even if it falls outside the relevant state or municipality—staffing firms may want to consider moving away from salary history inquiries altogether and focus on advising candidates of the compensation offered for the particular position.

### Salary History Laws Effective in 2017

Concerns about salary equity and equal pay prompted Delaware; New York, NY; Albany County, NY; Oregon; and Puerto Rico to enact legislation generally prohibiting initial salary history inquiries. All five laws are effective this year. A brief overview of these laws is instructive:

**Delaware:** Effective Dec. 14, 2017, employers and their agents cannot screen applicants based on compensation history or seek compensation history from applicants or from their current or former employers. Employers that inform and instruct their agents to comply with Delaware law are not liable for any failure to comply on the part of the agent. Employers and agents may discuss and negotiate salary expectations independent of salary history. After an applicant accepts an offer with compensation, employers can confirm the applicant's salary history. Civil penalties for violations range from $1,000 to $10,000. The Delaware statute does not address whether a private right of action exists. See *delcode.delaware.gov/title19/c007/sc01/index.shtml*.

**New York City:** Effective Oct. 3, 2017, the ordinance contains extensive restrictions and detailed guidance. The New York Commission on Human Rights has issued FAQs available at: *nyc.gov/site/cchr/media/salary-history-frequently-asked-questions.page*. Employers, employment agencies, employees, and their agents cannot inquire about salary history, and cannot search publicly available records to obtain salary history. Salary history cannot be

used to determine salary, benefits, or other compensation. These terms are broadly defined and include commissions and car allowances. Unprompted disclosures of salary history by applicants may be considered.

Other exemptions include legally required disclosures and internal transfers. Furthermore, retaliation against those who refuse to disclose salary history is prohibited.

**The New York City ordinance contains specific provisions applicable to temporary-to-hire situations.** A staffing client may consider the fees it has paid to a staffing firm for a temporary worker's services when considering whether to make a direct hire offer to the worker. Moreover, if the client and staffing firm are joint employers of the worker, the client can consider the wages paid by the staffing firm to the worker, as a direct hire offer is akin to an internal transfer—to which the law does not apply. The law is available at *library.amlegal.com/nxt/gateway.dll/New%20York/admin/newyorkcityadministrativecode?f=templates$fn=default.htm$3.0$vid=amlegal:newyork_ny*.

**Albany County, NY**: With the November 2017 passage of a salary history ordinance, Albany County becomes the second locality in New York to enact salary history prohibitions for private employers. Effective Dec. 13, 2017, the Albany County law prohibits employers and employment agencies from screening applicants based on their current or prior wages or other compensation. Applicants cannot be asked or required to disclose salary history, nor can such information be sought from the applicant's current or former employers. The only exception is that postoffer, with the applicant's written authorization, employers can confirm prior wages, benefits, or other compensation. Enforcement of this law is overseen by the Albany County Human Rights Commission. See *app.albanycounty.com/legislature/resolutions/2017/10/16-LL_P.pdf.*

**Oregon:** Effective Oct. 6, 2017, employers are banned from seeking salary history from the applicant or from current or former employers. Additional prohibitions on screening applicants or determining compensation for a position based on current or past compensation take effect Jan. 1, 2019. Employers can request written authorization to confirm prior compensation postoffer. Salary history may be considered when a current employee is moving to a new position.

On Jan. 1, 2019, Oregon applicants or employees will be able to bring a private right of action for alleged violations of the provisions prohibiting screening or compensation determinations based on current or past compensation. A private right of action against employers that inquire about an applicant's salary history may be brought as of Jan. 1, 2024. Until then, salary history inquiry complaints will be filed with Oregon's Bureau of Labor and Industries.

Also effective Jan. 1, 2019, Oregon has created a "safe harbor" from punitive and compensatory damages in civil cases where an employer is alleged to have screened applicants or determined their compensation based on salary history. This safe harbor is in effect for employers that have conducted an equal pay analysis in good faith within the prior three years and have eliminated any

specific wage differential based on a protected characteristic not limited to gender, and made reasonable and substantial progress toward eliminating wage differentials overall based on any protected class asserted by the plaintiff. See *olis.leg.state.or.us/liz/2017R1/Measures/Overview/HB2005* and *oregon.gov/boli/TA/Pages/Equal%20Pay%20Law.aspx.*

Additionally, **Puerto Rico** enacted the Puerto Rico Equal Pay Act, which is effective March 8, 2017. Information is available at *trabajo.pr.gov/det_news.asp?cnt_id=570*. The law prohibits salary history inquiries by employers and their agents, and contains antiretaliation language. Voluntary disclosures and postemployment salary confirmation are permitted. Penalties, which take effect March 2018, include lost wages, liquidated damages, and attorneys' fees.

## Salary History Legislation Effective in 2018

Three additional states and municipalities have passed salary history inquiry legislation that will become effective in 2018. Key provisions of these regulations are summarized below:

**California (Cal. Lab. Code § 432.3)**, available at *leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB168*: Statewide provisions take effect Jan. 1, 2018, with San Francisco set to implement its own ordinance in July 2018 (see below). Employers and their "agents and intermediaries" cannot use salary history information as a factor in determining whether to offer employment or what salary to offer. Seeking salary history, compensation, or benefits information is prohibited. Like in the New York City ordinance, California allows applicants to voluntarily disclose salary history without prompting, which can be considered by an employer. The law also exempts legally required salary disclosures. Notably, the law does not specifically prohibit or permit discussions of salary expectations. California's law does not set forth specific penalties, although an action may be available under the California Private Attorneys General Act (PAGA).

**San Francisco (San Fran. Police Code Art. 33J)**, available at *sfgov.legistar.com/View.ashx?M=F&ID=5328258&GUID=A694B95B-B9A4-4B58-8572-E015F3120929*: The San Francisco ordinance takes effect July 1, 2018, and covers virtually all private individuals and entities, including placement, referral, and "other employment agencies." None of these individuals or entities may inquire about, consider, or rely on an applicant's salary history as a factor in determining employment or salary offers. Retaliation against anyone who refuses to disclose salary history is prohibited. A current or former employee's salary also cannot be released to a prospective employer without written authorization. San Francisco allows voluntarily disclosed salary history to be considered. San Francisco also expressly allows the discussion of salary expectations, including unvested equity, bonus, or deferred compensation that an applicant would forfeit. Objective measures of productivity such as sales achievement are not considered salary inquiries. Penalties take effect July 1, 2019, and range from $100 per applicant for an initial violation up to $500 per applicant for third violations. The Office of Labor Standards Enforcement is charged with

enforcement of the ordinance, which currently has no private right of action.

**Massachusetts (MGL ch. 149, § 105A)**, available at *malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter149/Section105A*: Effective July 1, 2018, the law applies to employers or their agents, who cannot seek the salary history of prospective employees from current or former employers, or require that a prospective employee's prior wage or salary history meet specific criteria. Employers are also prohibited from retaliating against those who decline to disclose salary history. As with other statutes discussed above, the consideration of voluntarily disclosed information is permitted, as is confirmation of salary postoffer. The statute is silent as to whether salary expectation discussions are permitted. Penalties include the payment of unpaid wages, liquidated damages, and attorneys' fees and costs. The attorney general can bring an action to recover unpaid wages and liquidated damages. The statute provides for a private right of action in court.

## Pending Salary History Legislation

In 2017, salary history legislation was proposed in both the U.S. House of Representatives and the Senate.[1] These federal bills include the Paycheck Fairness Act, which has been introduced in every congressional session since 1997. These bills are unlikely to gain traction in the current congressional session. Legislatures in many states and Washington, DC, also introduced salary inquiry legislation in 2017, including Connecticut, Florida, Georgia, Idaho, Iowa, Maine, Maryland, Mississippi, Montana, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, and Washington. The bills generally prohibit employers from seeking salary history and relying on salary history when offering employment. For example, Pennsylvania's HB 1243, 201st Sess. (Pa. 2017), prohibits employers from relying on wage history in determining wages or requesting or requiring disclosure of wage history. The bill does have an exception allowing confirmation of wage history after an offer with employment compensation has been made.

## Challenged and Unsuccessful Salary History Legislation

Salary history legislation has not gone unchallenged. Illinois and New Jersey laws intended to prohibit salary history inquiries were vetoed by their respective governors this past summer. New Jersey Gov. Chris Christie explained that he vetoed the New Jersey bill because "this bill encompasses much more than discriminatory conduct. In fact, this bill's language would punish, as discriminatory, otherwise innocuous conduct done with neither discriminatory intent nor a discriminatory impact." (See "Assembly Committee Substitute for Assembly Bill No. 3480 and 4119 Veto Message of New Jersey Gov. Chris Christie, July 21, 2017," available at

1. HR 2418, 115th Congress (First Sess. 2017), introduced May 11, 2017; HR 1869, 115th Congress (First Sess. 2017), introduced April 4, 2017; S 819, 115th Congress (First Sess. 2017), introduced April 4, 2017. HR 2418 prohibits screening employees based on previous wages or salary history or seeking previous wages or salary history. HR 1869 and S 819 propose prohibiting reliance on or seeking wage history except after an employer makes an offer of employment with an offer of compensation.

nj.gov/governor/news/news/552017/pdfs/20170721a/A3480AV.PDF.) On Nov. 9, 2017, attempts to override the veto of a similar bill by Illinois Gov. Bruce Rauner fell short by one vote in the Illinois State Senate.

Philadelphia's attempt to legislatively limit wage history inquiries has been halted while a federal court considers constitutional challenges raised by the local chamber of commerce. The ordinance's May 23, 2017, effective date has been delayed pending resolution of a preliminary injunction proceeding.[2] The Philadelphia ordinance seeks to prohibit employers, employment agencies, or their agents from making wage history inquiries, requiring wage history disclosures, or conditioning the application and hiring process on wage history. The ordinance further prohibits any consideration of salary history unless willingly disclosed by an applicant. The ordinance allows questioning applicants about salary requirements and expectations. In sum, the Philadelphia ordinance is similar to the state and municipal regulations described earlier. See phila.legistar.com/LegislationDetail.aspx?ID=2849975&GUID=239C1DF9-8FDF-4D32-BACC-296B6EBF726C.

Amicus briefs filed in opposition to the Philadelphia ordinance claim that it will make business more difficult for smaller, diverse employers that rely on salary history to make cost-effective hiring decisions, without discriminatory intent or effect. Others argue that salary history inquiries are not the primary cause of, nor will they eliminate, gender-based wage discrimination. Another argument questions why willing disclosures of salary history are permitted if the same disclosures, made involuntarily, are presumed to engender salary inequity. As of this month, injunction briefing is complete and now awaits court action. Given the Philadelphia ordinance's similarity to other current and pending salary history legislation, the decision is likely to be closely watched by other states and municipalities.

## Takeaways for Staffing Firms

With the first salary history legislation effective in 2017, staffing firms should keep the following points in mind:

**1.** Staffing firms should exercise equal caution whether hiring directly or recruiting on behalf of clients for direct hire placements.

**2.** Most statutes affirmatively permit discussions about salary expectations. Many pending bills also would permit salary expectation discussions. However, California's and Massachusetts' laws are silent as to whether salary expectation discussions are permitted.

**3.** California law requires that an employer disclose the pay range for a position if an employee or applicant requests such information.

**4.** Many statutes and ordinances allow employees to knowingly and voluntarily

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2. *Chamber of Commerce for Greater Philadelphia v. City of Philadelphia and Philadelphia Commission on Human Relations*, 2:17-cv-01548-MSG (E.D. PA 2017)

disclose salary history. However, it is unclear how agencies or courts will assess what constitutes a knowing and voluntary disclosure, and thus staffing firms should consider not taking into account such voluntarily disclosed information.

**5.** Some of the statutes and ordinances may have the effect of applying to jobs outside the city or state where the law is in effect; without court guidance, their ultimate reach remains unclear. For example, if an interview occurs in New York City for a job in New Jersey, this may be enough to trigger New York City's law. New York's FAQs take a broad view of jurisdiction, stating, "[I]f an unlawful discriminatory practice, including an inquiry about salary history, occurs during an in-person conversation in New York City, there will likely be jurisdiction because the impact of the unlawful discriminatory practice is felt in New York City."

The Philadelphia Commission on Human Relations has attempted to address its ordinance's reach by stating that an employer must be interviewing a prospective employee for a position located within Philadelphia for the ordinance to be applicable. *regulations.phila-records.com/pdfs/Commission%20on%20Human%20Relations%208-24-17.pdf*.

**6.** In New York City, an employer cannot avoid liability simply by adding a disclaimer to applications stating that individuals in New York City or applying for jobs located there need not answer a question about salary history. Even if the salary history question states that a response is voluntary, this is not sufficient. Applications can request information about salary expectations, which may be the best approach in New York City.

**7.** Given the uncertainty regarding the laws' extraterritorial effect—and given that more laws and local ordinances are expected—it may be advisable to refrain from discussions and inquiries regarding salary history altogether and remove application questions about salary history.

**8.** Where permitted, staffing firms should focus inquiries on salary and pay rate expectations. Given the uncertainty in the law, staffing firms should avoid creating "voluntary" disclosure acknowledgements that could in fact be deemed to imply that disclosure of salary history will be viewed more favorably than no disclosure.