

New Jersey Employers Are No Longer Permitted To Inquire About Applicants' Compensation History

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Effective January 2020, New Jersey's Law Against Discrimination (LAD) will prohibit private sector employers from asking new-hire applicants about their compensation history prior to making an offer of employment, which includes historical information pertaining to salary and benefits. This amendment is among the latest legislation intended to curb historical salary inequities faced by women and minorities. Several other states and cities, including but not limited to, California, Vermont, Massachusetts, Connecticut, New York, New York City and Philadelphia, have passed similar legislation restricting employers from inquiring about an applicant's salary history.

Interestingly, a federal judge recently invalidated the portion of the Philadelphia ordinance prohibiting employers from *inquiring* about a candidate's wage history under the First Amendment, while permitting the portion banning employers from *relying* on this information for recruitment purposes. This creates the quagmire of employers being able to inquire about salary-related information, but not being able to utilize it during the hiring process. This decision is currently on appeal. It is anticipated that additional legal challenges to these laws will follow.

Violations / Penalties

As a result of this amendment to the LAD, New Jersey employers are no longer permitted to screen applicants based on their prior compensation packages. While inquiries concerning the candidate's experience with commission/incentive plans may be permissible under certain circumstances, questions regarding actual earnings under such plans are prohibited. An applicant, however, may voluntarily provide historical salary-related information to a prospective employer that can then be considered by the employer in making an offer of employment.

Employers who violate this amendment face both civil penalties and damages actions. An employer may be fined up to \$1,000 for a first offense of these provisions, up to \$5,000 for a second offense and up to \$10,000 for any subsequent offenses by the Department of Labor. Employers will also be subject to civil actions by employees seeking compensatory damages for violations of this amendment. Unlike other provisions of the LAD, however, these actions do not include claims for punitive damages and attorneys' fees.

Best Practices

While this amendment does not go into effect for several months, employers should not delay in reviewing their recruitment practices to ensure they are compliant. First and foremost, employers must evaluate their hiring process to avoid inquiring – directly or indirectly – about an applicant's compensation history from either the individual or a third-party. For example, employers must now ensure that this information is not received as part of a response to a background check performed on a candidate. Where employers utilize employment agencies, the vendor may not share the candidate's salary history with the worksite employer. Instead, employers must now rely on alternative measures to set pay scales, which might include internal salary history and/or a market-based analysis approach. In the event that a prospective employee agrees to provide this information, employers must ensure that this was a voluntary decision and not the result of any coercion or undue pressure.

Employers should also audit their hiring forms to ensure that they do not run afoul of this amendment. Employers may choose to include an affirmative statement on their application forms stating that they do not inquire about the applicant's compensation history prior to making an offer of employment. When using multi-state application forms that request salary-related information, there should be a prominently displayed instruction that New Jersey applicants should not provide this information. Lastly, employers should provide training to their hiring personnel on avoiding salary-related inquiries and what to do in the event that a candidate voluntarily discloses such information.

If you have questions or would like more information, please contact Rob Pettigrew (pettigrewr@whiteandwilliams.com; 201.368.7210), Laura Corvo (corvol@whiteandwilliams.com; 201.368.7226) or another member of the Labor and Employment Group.

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