

Update: New York City Commission on Human Rights Issues Salary History Guidance*

October 12, 2017

The New York City Commission on Human Rights (the “CCHR”) recently released guidance on the New York City salary history law (the “Law”) in the form of frequently asked questions.¹ The guidance clarifies several aspects of the Law, including the application of the Law in the context of corporate acquisitions and the ability of employers to inquire about forfeited deferred compensation and unvested equity.

The Law, which takes effect on October 31, 2017, is one of many measures introduced in recent years by state and local legislatures aimed at mitigating the gender pay gap. The Law amends the New York City Human Rights Law, and provides that it is an “unlawful discriminatory practice for an employer, employment agency, or employee or agent thereof” to inquire about a job applicant’s salary history or to rely on an applicant’s salary history in determining the compensation that will be offered during the hiring process.² Employers are not only prohibited from asking a job applicant about his or her salary history, but are also prohibited from making inquiries of applicants’ current or former employers or agents, and from conducting searches of publicly available records, to determine an applicant’s salary history. Salary history is defined broadly as an “applicant’s current or prior wage, benefits or other compensation”.³

If you have any questions concerning this memorandum, please reach out to your regular firm contacts in the [Executive Compensation and ERISA](#) group.

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*This memorandum has been updated to reflect revised guidance issued by the CCHR. Updated sections have been marked with a red asterisk.

¹ Local Law No. 67 (2017) of the City of New York. The CCHR guidance is available at <http://www1.nyc.gov/site/cchr/media/salary-history-frequently-asked-questions.page#expectations>. See also https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SalaryHistory_KYO.pdf and https://www1.nyc.gov/assets/cchr/downloads/pdf/materials/SalaryHistory_KYR.pdf.

² Local Law No. 67.

³ *Id.*

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The Law contains a limited number of exceptions to the prohibition, most notably that (i) employers may engage in discussions with applicants about their expectations regarding compensation, including with respect to unvested equity or deferred compensation that will be forfeited or cancelled by the applicant's current or former employer, provided that the prospective employer does not inquire about salary history; and (ii) in the event an applicant "voluntarily and without prompting" discloses his or her salary history, the employer may consider salary history in determining the applicant's compensation and may verify the applicant's salary history.

The CCHR may impose a civil penalty of up to \$125,000 for an unintentional violation of the Law, and up to \$250,000 for a willful violation. Individuals may also bring civil lawsuits in state court for violations of the Law, and, if successful, may be awarded a range of remedies, including punitive damages and attorneys' fees.⁴

The CCHR guidance provides several important clarifications to the Law. A summary of certain issues addressed by the guidance is provided below.

Scope

The Law does not expressly specify the scope of covered employers and does not define the term "applicant." The CCHR guidance clarifies that the Law protects applicants for jobs in New York City, and that its prohibitions apply to all public and private employers of any size that are hiring job applicants in New York City.⁵ In addition, the guidance indicates that if a job applicant living in New York City applies for a job outside of the city, the Law may apply if the hiring employer inquires about salary history at an interview that occurs in the city. The Law will not apply where the applicant resides in New York City but is interviewed elsewhere and will ultimately work outside of the city.

⁴ N.Y.C. Admin. Code § 8-502.

⁵ The Law does not apply to public positions for which compensation is set pursuant to procedures established by collective bargaining.

The guidance does not address circumstances in which an employee works outside of New York City (*e.g.*, pursuant to a telecommuting arrangement) for a New York City employer.

Definition of Compensation

The CCHR guidance clarifies that the terms "benefits" and "other compensation" should be interpreted broadly, and indicates that those terms may include many items, such as car allowances, retirement plans or bonuses.

Additionally, the guidance states that employers should not inquire about the amount of commission an applicant earned, but may inquire about objective indicators of performance (*e.g.*, the volume, value or frequency of sales). In industries where employees are compensated based on a profit percentage, employers are also prohibited from inquiring about an applicant's current or former profit percentage, but may ask about the size of the applicant's book of business, profits generated or other objective performance indicators.

Salary History Discussions

— **"Without Prompting"**. The guidance suggests that the determination of whether an applicant's disclosure of salary history is "without prompting" will be context-specific. The guidance states that such disclosure will be considered to be given "without prompting" under the Law if an average job applicant would not believe that the employer encouraged the disclosure based on the overall context and the employer's words or actions. Where an applicant voluntarily and without prompting discloses his or her salary history, the employer is then permitted to discuss or inquire about the applicant's salary history, verify the applicant's representations about his or her salary history, and rely on the applicant's salary history information in determining the compensation that will be offered.

- ***Deferred Compensation and Unvested Equity.**** In a welcome development for employers, the guidance confirms that employers may ask whether applicants will be required to forfeit deferred compensation or unvested equity from their current employer and about the value and structure of such forfeited compensation. Employers may also request documentation to verify the applicant's representations about forfeited compensation and consider such information in making the applicant an offer.
- ***Competing Offers.*** The guidance provides that prospective employers may ask applicants about competing offers that the applicant has received, and may inquire about the value of any such offers.
- ***Foreign Laws.**** The guidance clarifies that an exemption is not available for actions taken by an employer pursuant to foreign or international law that specifically authorizes the disclosure or verification of salary history or that requires knowledge of salary history.

Job Applications and Salary History Searches

The CCHR guidance confirms that job applications may not include requests for information about an applicant's salary history, even if the application makes clear that the response is voluntary.

In addition, the guidance provides that while an employer is prohibited from conducting searches of public records to obtain an applicant's salary history, including searching for specific information that is intended to determine the compensation of a specific applicant, an employer is *not* barred from searching for general information about industry compensation standards. In the event an employer inadvertently uncovers information about an applicant's salary history, that information may not be relied upon in determining the compensation that an applicant will be offered.

While background checks are permitted under the Law, the CCHR recommends that in circumstances

where an employer is legally permitted to conduct a background check prior to a conditional offer or conducts a background check after a conditional offer is made, employers should request that reporting agencies exclude information about salary history from their reports. If an applicant's salary history is discovered as a result of a background check, the employer may not rely on that information in determining compensation.

Agent Liability*

The CCHR guidance clarifies that there is no exemption available under the Law for headhunters or agents who work on behalf of applicants.

Headhunters who qualify as employers, employment agencies or agents of an employer, or who aid and abet a violation of the Law, may be liable under the Law. The guidance suggests that headhunters should obtain written confirmation that an applicant consents to the disclosure of his or her salary history in order to protect against liability. In addition, the guidance indicates that prospective employers should obtain a copy of the applicant's written consent authorizing the headhunter to disclose salary history information prior to relying on a headhunter's representations about an applicant's salary history.

Agents are permitted to disclose salary history in negotiations with prospective employers with the consent of the applicant. In the event an agent discloses salary history information without an applicant's consent, the agent may be liable for aiding and abetting an unlawful discriminatory practice.

Corporate Acquisitions

Prior to the CCHR guidance, the Law was unclear as to whether prospective employers or their agents could inquire about salary history in the context of corporate acquisitions. Target companies frequently provide prospective acquirors and their legal and financial advisors with compensation information related to the target's employees during due diligence.

The guidance clarifies that prospective acquirors may obtain salary information about target employees as

part of the due diligence process, on the basis that, in the context of an acquisition, target employees are not “job applicants” within the meaning of the Law.

However, the guidance indicates that the question of whether acquirors may use salary information in setting the compensation of employees it will be absorbing from the target company will depend on the facts and circumstances. Salary history information may be relied upon when making compensation and structural decisions on a non-individualized basis. In contrast, if target company employees are asked to interview for positions with the acquiror, the Law may be implicated. In this circumstance, the CCHR guidance recommends that salary history information about target employees that is disclosed during due diligence not be shared with hiring managers making compensation decisions.

The guidance suggests that the Law should generally not be implicated in a typical stock sale where all employees of the target entity will, by operation of law, continue their employment with the surviving company following consummation of the transaction. The guidance is less clear, however, regarding the Law’s application in the context of an asset sale. It appears that if the acquiror can determine to which of the seller’s individual employees it will offer employment and the compensation it will offer to each such employee, the Law may be implicated and a violation might occur if the due diligence information is shared with individuals at the acquiror who are responsible for making the hiring and compensation decisions. On the other hand, if the asset acquiror is required, pursuant to the terms of the asset purchase agreement, to offer employment to all employees of the acquired business and/or to offer employment to each employee at their current compensation levels, one could argue that the Law is not implicated because the acquiror is not asking target employees to interview with the acquiror nor is it using the compensation information on an individualized basis to make compensation decisions, as such decisions are dictated by the terms of the asset purchase agreement. Absent further clarifying guidance, however, taking any such position is not without risk.

Key Takeaways

In light of the CCHR guidance, we recommend that employers and agents take the following actions in order to ensure compliance with the Law’s prohibitions on salary history inquiries.

— ***Hiring Practices.***

- Employers should consider whether to implement a standardized script or other process to be used by hiring managers during applicant interviews in order to ensure compliance with the Law when engaging in discussions regarding an applicant’s compensation expectations.
- Employers conducting background checks should consider providing the applicant with an offer that includes an offer of compensation, contingent on successful completion of a background check, in order to mitigate the risk that any salary history information revealed during the course of the background check is considered to have been taken into account in making the offer.

— ***Policies and Procedures.*** Employers should conduct a careful review their policies and procedures, including any job application forms, for potential inconsistencies with the Law.

— ***M&A Transactions.*** Employers should ensure they consider the Law’s potential implications in an acquisition context and, where necessary, establish proper firewalls between internal and external teams conducting due diligence and internal managers making hiring and compensation decisions.

— ***Applicant Consent.*** Employers should, as an initial matter, request that headhunters or other agents produce written consent from their clients prior to engaging in discussions about salary history. Agents and advisors (including legal advisors) representing management in the course of employment negotiations should ensure that they have obtained their client’s written consent prior to disclosing compensation information.

If you have any questions or would like to discuss this further, please do not hesitate to contact your regular contacts in the [Executive Compensation and ERISA](#) group.

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