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Client Alert Commentary

Latham & Watkins Benefits, Compensation & Employment Practice October 16, 2017 | Number 2215

California Bans Employers from Seeking Salary History of Applicants

New law broadens Fair Pay Act restrictions, with potential implications for compensation practices nationwide.

Introduction

On October 13, California Governor Jerry Brown signed into law Assembly Bill 168 (AB 168), which further restricts employers' use of salary history information. California's Fair Pay Act currently prohibits employers from relying on an employee's salary history to justify pay discrepancies among employees of different genders, races, and ethnicities.[1] Effective January 1, 2018, the new law has significant implications for compensation practices in California — where employers should take practical steps to ensure proper compliance — as well as throughout the United States.

Reforms

1. Employers may no longer ask about salary information.

Under AB 168,[2] California prohibits employers from relying on a job applicant's salary history as a *factor* in determining: (i) whether to offer employment to an applicant, and/or (ii) what salary to offer to an applicant.[3] In addition, employers may not seek an applicant's salary history information, which includes information related to both compensation and benefits.[4] However, the law permits applicants to disclose salary history information on a voluntary, unprompted basis.[5] Accordingly, employers may consider salary history information that an applicant voluntarily offers, without prompting from the employer, in determining the salary offered to the applicant.[6]

2. Employers must provide applicants with the position's applicable pay scale upon request.

In addition to prohibiting employers from requesting and using salary history information as described above, the new law requires employers to provide applicants, upon reasonable request, with the pay scale applicable to the position the applicant is seeking.[7]

Practical Guidance for California Employers

California employers can take a number of practical steps to ensure proper compliance with the state's Fair Pay Act. Notably, employers should remember that — in addition to the new provisions that concern prospective employees — they will need to continue following provisions that apply to existing employees. In particular, California employers should:

- Develop salary or wage guidelines for each positon (if not already implemented), and confirm that existing employees fall within the guidelines. Employers should be prepared to:
  - Explain differences in compensation among employees within the applicable salary or wage range based on factors such as experience, tenure, past performance, or other objective criteria consistent with California's Fair Pay Act
  - Adjust current employee compensations that do not align with new employee offers
- Disregard assumptions about a prospective employee's current pay when determining whether or not to extend an employment offer, as well as when determining the proposed compensation. Therefore, employers should:
  - Follow pre-established compensation guidelines
  - Refrain from rejecting a job applicant based on the knowledge or suspicion that the applicant currently receives a higher compensation than the employer is prepared to offer
- Carefully consider the reliability of salary history information that a prospective employee voluntarily offers when determining the employee's proposed compensation
  - Relying on an applicant's salary history, even when permitted, could create salary discrepancies that do not comply with the Fair Pay Act

A Growing Trend

California is not the first state or jurisdiction to adopt laws that ban inquiries into an applicant's salary history. Indeed, the Commonwealth of Massachusetts,[8] Delaware,[9] Oregon,[10] Puerto Rico,[11] New York City,[12] the City of Philadelphia,[13] and the City San Francisco[14] have each adopted similar prohibitions. In addition, several other states are actively considering similar rules.[15] Latham will continue to monitor developments in compensation law that may impact employers.

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Endnotes

1 *See* Cal. Labor Code § 1197.5(a)(3), (b)(3). AB 168 cross references this prohibition and confirms that it does not create any exception to it. *See* Cal. Labor Code §432.3(i).

2 AB 168 will be codified at California Labor Code Section 432.3.

3 Cal. Labor Code § 432.3(a).

4 *Id.* § 432.3(b).

5 *Id.* § 432.3(g).

[6] *Id.* § 432.3(h). Notably, this exception to the rule against considering salary history does not mention an employer's use of such information in determining whether to make an offer of employment.

[7] *Id.* § 432.3(c).

[8] S.B. 2119, 189th Gen. Ct. (Mass. 2016).

[9] H.B. 1, 149th Gen. Assemb. (Del. 2017).

[10] H.B. 2005, 79th Leg. Assemb., Reg. Sess. (Or. 2017).

[11] Puerto Rico Act No. 16 (P.R. 2016).

[12] N.Y.C. Initiative 1253-A (N.Y.C. 2017).

[13] City of Philadelphia B. No. 160840 (Phila. 2017). Philadelphia's ordinance is currently subject to a court-imposed stay. *See The Chamber of Commerce for Greater Philadelphia v. City of Philadelphia*, No. 2:17-cv-01548 (E.D. Pa. April 19, 2017).

[14] S.F. Ordinance No. 170350 (S.F. 2017).

[15] These states include: Georgia (H.B. 345, introduced Feb. 10, 2017); Idaho (H.B. 71, introduced Jan. 27, 2017); Iowa (H. File 129, introduced Jan. 26, 2017); Maryland (H.B. 398, introduced Jan. 26, 2017); Michigan (S.B. 319, introduced Apr. 25, 2017); New York (A.B. A06707, introduced March 16, 2017); North Carolina (S. 537, introduced March 30, 2017); Rhode Island (H. 6111, introduced Apr. 13, 2017); Texas (H.B. 290, introduced Nov. 14, 2016); Vermont (H. 294, introduced Feb. 16, 2017); and Washington (H.B. 1506, introduced Jan. 23, 2017).