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New Jersey Imposes New Restrictions on Salary History Inquiries by Private Employers

On July 25, Lieutenant Governor Sheila Y. Oliver (acting on behalf of Governor Phil Murphy while he was out of the country on vacation) signed into law an amendment to the New Jersey Law Against Discrimination (NJLAD) prohibiting private employers from asking prospective employees about their salary history before making an offer of employment. Following the new law's January 1, 2020, effective date, New Jersey will join more than 10 states and several municipalities that have barred private employers from inquiring about applicants' salary history, including Connecticut, Massachusetts, Delaware, Vermont, New York City and New York State (effective January 2020).

Under the new law, private employers may not screen job applicants based on salary history or require that an applicant's salary history meet any minimum or maximum criteria. Further, although an employer may ask about an applicant's prior experience with incentive and commission plans (if such plans are part of the compensation for the job the applicant is seeking), it must not ask about the applicant's actual earnings under another employer's plan. Only after an employer offers a job to an applicant and explains the overall compensation package may it request that the employee provide written authorization to confirm his or her salary history.

There are some limited exceptions under the new law that will allow employers to inquire about an applicant's prior salary before making an offer of employment. If an applicant *voluntarily* discloses his or her salary history, the employer may still verify that information and consider it in any compensation decision before making an offer of employment. Employers may also consider a current employee's salary history in connection with his or her application for internal promotion or transfer. Similarly, employers may continue to rely on knowledge of a former employee's salary history. Finally, if a federal law specifically authorizes the disclosure or verification of salary history information for employment purposes, the new law will not apply.

Although the new law does not prohibit employers from utilizing background checks, when requesting information for a background check employers must specify that salary history information should not be disclosed. If an employer nonetheless obtains an applicant's salary history information as part of the background check process, it must disregard that information in making any compensation decisions. In addition, employment agencies may not share applicants' salary history with potential employers.

Employers that violate the new law can be found liable for civil penalties imposed by the commissioner of the New Jersey Department of Labor and Workforce Development of up to $1,000 for a first offense, $5,000 for a second offense and $10,000 for each subsequent violation. Employers may also be subject to individual claims for unlawful employment practices under the NJLAD if the applicant is a member of a protected class. For these claims, all of the remedies under the NJLAD are available, with the exception of punitive damages.

The new law follows on the heels of recent New Jersey legislation targeting pay discrimination against any member of a protected class under the NJLAD. In 2018, New Jersey enacted the Diane B. Allen Equal Pay Act, which prohibits both private and public employers from compensating members of any protected class less favorably than other employees. The new law targets pay discrimination from another angle by making it more difficult for new employers to perpetuate pay biases visited on applicants in their prior employment.

Employers should review their application forms and hiring practices and procedures to ensure compliance with the NJLAD. Questions relating to salary history should be removed from job application materials, including background check requests

and other verification inquiries (whether conducted internally or by third parties). Employers should consider adding an affirmative statement on hiring documents to state that they are not seeking to verify an applicant's salary at the pre-offer stage. If a multistate employer uses a standard application form, any salary history question must have a disclaimer stating that an applicant applying for a position in New Jersey is instructed not to answer the question. Employers should also train human resources personnel and all other employees involved in the hiring process to ensure compliance with the new law.

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