

Employment Law Experts Question Bill Banning Salary History Questions for Job Applicants

New York Law Journal, by Joel Stashenko. (jstashenko@alm.com)

April 7, 2017 Employment law experts questioned April 7 whether a New York City bill banning the city's private employers from asking job applicants about their salary histories would narrow the wage gap among male and female workers and those of different races, as hoped for by the bill's proponents.

[The bill](#), No. 1253, was approved April 5 by the New York City Council. It awaits approval by Mayor Bill de Blasio before it goes into effect.

California, Massachusetts and the city of Philadelphia have also enacted laws since 2016 [prohibiting employers](#) from inquiring about job applicants' salary histories.

The New York City legislation was submitted to the City Council by Public Advocate Letitia James, who has promoted the idea of eliminating employer reviews of job applicants' salary histories based on her argument that using employment histories as a factor in hiring perpetuates existing wage disparities.

In [a 2016 report](#), James found that women in New York City earn approximately \$5.8 billion less than men in wages each year, or 87 cents for every dollar that men make. The discrepancies were greater between earnings by white males and minority females, the public advocate's report found.

A major factor in the discrepancies was that prospective employees were often paid wages based on what they earned in their old jobs, the report found.

"Asking questions about salary history during the hiring process perpetuates a cycle of wage discrimination," James said in a statement just before the City Council vote.

The new bill allows prospective employees to volunteer information to their would-be bosses about how much they are currently paid.

As of April 7, the legislation had not yet been signed by the mayor, but his approval is expected.

On Nov. 4, 2016, de Blasio signed an [executive order](#) prohibiting any New York City agency from inquiring about the pay history of prospective city employees. When he did so, de Blasio said initiating the ban on employment histories could help narrow the pay gap between men and women among the city's workforce of about 300,000.

De Blasio also said at that time he would support the James bill to extend a ban against inquiring about pay history to all employers in the city.

Christine Hendrickson, a senior counsel at Seyfarth Shaw in Chicago and co-chair of the firm's pay equity group, said in an interview April 7 that the New York City bill "is a policy solution [that] looks a lot better on paper than it will be in practice."

Hendrickson questioned how not asking about an applicant's pay history will automatically translate into higher salaries for employees if they are hired.

"What an employer wants to have is a structure that pays their employees both for their skills and also for their performance," she said. "Removing this objective standard—of what they are currently making—is not necessarily going to get into a spot where it will eliminate the inequity that the New York City Council is seeking to eliminate."

Without salary histories as a guide, factors such as the individual aggressiveness of applicants at seeking higher pay could be even more prominent than they are now, Hendrickson said.

Jeffery Tobias Halter—president of a Roswell, Georgia-based workforce consulting firm, YWomen, and former director of diversity strategy for Coca-Cola—said studies confirm the premise of the New York City legislation that women and minorities often get jobs that pay less than white males because pay history inquiries perpetuate the salary inequities from previous jobs.

"This is great for women and minorities," Halter said in an interview April 7. "Specifically, these two classes are underpaid in their previous jobs for a whole host of reasons."

But Halter said there are other reasons for pay inequities that are not affected by eliminating the mention of job candidates' previous salary levels during the hiring process. For instance, he said studies have shown that women are more reluctant to negotiate their pay levels in new jobs than men are, often resulting in less advantageous salary terms for females.

"It is a pretty commonly accepted fact that only about 6 percent of women negotiate their salary levels versus about 60 percent of men," Halter said.

Marc Zimmerman, a Phillips Nizer partner in Manhattan who focuses on law and labor relations issues, said the New York City legislation seemed to him to contain potential land mines for "unwary" employers, such as those with small or nonexistent human resources departments. He said the provision that allows job applicants to voluntarily discuss their previous salary levels could become a source of claims by potential employees who said that while they did talk about their previous pay levels with prospective employers, they did not really do so voluntarily.

"Additionally, such inquiries may be less important for larger companies, who likely would be in a better position than smaller ones to access and analyze market compensation metrics for particular positions," Zimmerman said.

Jessica Walker, president of the Manhattan Chamber of Commerce, said the legislation would subject employers to potential penalties for violations either through a proceeding before the New York City Human Rights Commission or a private legal action filed by a worker.

"We have concerns about smaller employers, in particular," she said. "Is it going to make hiring more difficult for them and is this going to drive penalties for them?"