

## New York and New Jersey Ban Salary Inquiries



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The growing trend to eliminate inquiries into a job applicant's salary history continues. In July, New York and New Jersey became the latest states to enact legislation that will restrict employers from obtaining and utilizing an applicant's salary history information during the hiring process.

### **New York's Legislation**

On July 10, Governor Cuomo signed into law a salary history ban, adding a new section to New York Labor Law section 194-a.

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Under the new law, employers may not, orally or in writing, seek, request or require the salary history of an applicant or current employee as a condition to be interviewed, as a condition of continuing to be considered for an offer of employment, or as a condition of employment or promotion. The law also prohibits employers from relying on the salary history of an applicant in determining whether to offer employment or in determining the wages or salary for that individual.

Notably, the salary history ban does not prevent applicants or current employees from voluntarily disclosing their own compensation history to employers for purposes such as negotiating higher compensation. When an applicant or current employee does voluntarily disclose his or her compensation history to support a demand for higher compensation than was offered by the employer, the employer is not barred from confirming the information. The amendment also specifically states that it shall not supersede any federal, state or local law enacted before the effective date of the amendment that requires the disclosure or verification of salary history information to determine an employee's compensation.

Employers will face liability for retaliating against an applicant or current employee for refusing to provide compensation history or filing a complaint with the state's Department of Labor alleging a violation of the salary history ban. The law allows an aggrieved party to bring a civil action, and a court may grant compensatory damages, injunctive relief and reasonable attorneys' fees.

The new legislation takes effect on January 6, 2020.

### **New Jersey's Legislation**

Just weeks after New York's legislation was enacted, on July 25, the Acting Governor of New Jersey signed A1094 into law. The new law imposes on private employers a salary history ban similar to the ban that applies to New Jersey government employers under a 2018 executive order.

Under the new law, employers in New Jersey can no longer request a job applicant's salary history as part of their hiring process. Employers are prevented from using a salary history to "screen" any applicant and cannot use salary history information to make any decisions regarding compensation unless the applicant volunteers his or her history, "without employer prompting or coercion." The law also prevents employers from "requir[ing] that the applicant's salary history satisfy any minimum or maximum criteria."

The law provides that, after a job applicant has been offered a position and a compensation package, if the applicant has voluntarily disclosed his or her salary history, the employer can request that the applicant complete a written authorization so that the employer can confirm and verify the volunteered salary history information.

Although A1094 authorizes the disclosure of salary history by applicants to third-party employment agencies, it prevents those agencies from disclosing an applicant's salary history to a prospective employer unless the applicant has provided express written consent for the disclosure to the employer. The law also provides that employers using third-party agencies to conduct background checks on applicants must specify that the checks do not include salary history. If salary information is still disclosed by the third-party agency, the prospective employer cannot use or retain that information.

For multistate employers, the new law specifies that employers can include an inquiry regarding salary history on employment applications "so long as immediately preceding the salary history inquiry on the employment application it states that an applicant for a position the physical location of which will be in whole, or substantial part, in New Jersey is instructed not to answer the salary history inquiry."

Employers face civil penalties of up to \$1,000 for a first violation, up to \$5,000 for the second violation and up to \$10,000 for each subsequent violation, collectible in a summary proceeding conducted by the New Jersey Commissioner of Labor and Workforce Development.

The law also amends the New Jersey Law Against Discrimination (LAD), making it a violation to screen a job applicant based on the applicant's salary history or require that the applicant's salary history satisfy any minimum or maximum criteria. However, the LAD's remedies of punitive damages and attorneys' fees do not apply to an unlawful inquiry into an applicant's salary history.

The new legislation takes effect on January 1, 2020.

### **Philadelphia's Legislation Still on Hold**

While Pennsylvania does not currently have a statewide ban on salary inquiries for private employers, Philadelphia became one of the first cities in the United States to ban questions about a prospective employee's salary history and also made it illegal for employers to rely on salary history information to determine a salary for an employee.

Although the ordinance was originally set to take effect in May 2017, its implementation has been delayed due to ongoing challenges in court. On April 30, 2018, a federal judge for the Eastern District of Pennsylvania ruled that the provision banning questions about salary history was “at odds with the First Amendment.” However, the provision making it illegal to rely on salary history information to determine a salary was upheld by the court. Attorneys representing both parties — the Greater Philadelphia Chamber of Commerce (the business group challenging the ban) and the City of Philadelphia — appealed the decision.

Arguments from both sides were heard by the U.S. Court of Appeals for the Third Circuit in August 2019. A ruling has not yet been issued by the Court of Appeals. It is possible that this case eventually will make its way to the U.S. Supreme Court.

### **Implications for Employers**

Employers in New York and New Jersey should be mindful of these new restrictions and evaluate how the legislation will impact their hiring practices. They should proactively inform their hiring staff about the new legislation, including training any employees involved in recruitment. Employers should also consider evaluating the contents of job applications, interview questions, recruiter instructions and background-check agency instructions to ensure that no impermissible salary-history inquiries are conducted.

Although there is yet to be a final resolution regarding the applicability of Philadelphia’s salary history ban, and even though Philadelphia employers are still free to ask applicants about their salary history, those employers should consider eliminating questions about salary history from their job application process. Since the provision of the ordinance prohibiting employers from considering salary history at any point of the employment process still stands, employers that have obtained salary history will have a difficult time defending a claim and demonstrating that, although the employer asked an applicant about his or her salary history, the employer did not consider that history during the job application process.