



October 31, 2017

NEW NYC EMPLOYMENT DISCRIMINATION LAW TO TAKE EFFECT

The New York City Human Rights Law (NYCHRL) has been amended to prohibit employers, when hiring or negotiating employment contracts, from asking about job applicants' wages, salary, benefits, and other compensation history. The goal of the amendment, new Local Law 67, is to combat the gender and racial wage gap. It will take effect on October 31, 2017. Failure to comply with the NYCHRL amendment may subject employers to unlimited compensatory and punitive damages and attorneys' fees. Further, the New York City Commission on Human Rights, when prosecuting wrongdoers under the amendment, may impose a civil penalty for violations and seek punitive damages for willful violations, including civil penalties of up to \$125,000 for intentional violations and up to \$250,000 for "intentional malicious violations."

In brief, the NYCHRL amendment makes it an "unlawful discriminatory practice" for an employer, employment agency, or any employee or agent thereof, to inquire about the salary history of an applicant for employment, search publicly available records for an applicant's salary, or rely on the salary history of an applicant when determining his or her prospective salary, benefits, or other compensation.

The NYCHRL amendment contains four exceptions. First, the amendment will not override any federal, state or local law that specifically authorizes the disclosure or verification of salary history for employment purposes. Second, employers may consider the salary history of applicants for internal transfers or promotion, such as promoting a low-level employee to a managerial position. Third, employers may verify an applicant's disclosure of non-salary related information or conduct a background check, provided they do not rely on any resulting salary disclosures. Fourth, the amendment does not apply to public employee positions for which salary, benefits, or other compensation are determined pursuant to procedures established by collective bargaining.

The NYCHRL amendment is not a strict ban on all salary-related conversations with job applicants. Critically, the amendment does not prohibit an employer from asking an applicant about his or her expectations regarding salary, benefits and other compensation, including

unvested equity or deferred compensation that the applicant would forfeit by resigning from his or her current employer. The amendment also does not prohibit an employer from considering an applicant's salary history when the applicant "voluntarily and without prompting" discloses that information.

To comply with the new law, employers should add salary history to the list of proscribed topics for interview purposes, which currently includes a candidate's age, national origin, sexual orientation, genetic information, marital or familial status, and political or union affiliation. Employers also should eliminate questions about salary history from their application forms and update their management training accordingly.

New York City Human Rights Commission and New York Supreme Court decisions will dictate the best practices going forward. Until those decisions are issued, however, there will be a period of uncertainty as to the scope and repercussions of the new law, and how zealously the New York City Human Rights Commission will prosecute alleged wrongdoers.

As always, Warshaw Burstein will continue to monitor this situation, including the New York City Human Rights Commission's implementation of the NYCHRL amendment and any pivotal New York City Human Rights Commission or New York Supreme Court decisions, and will keep our clients updated.

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If you have any questions regarding Local Law 67 of 2017 and the implications for hiring and negotiating employment contracts, please call Martin R. Lee, any of the undersigned, or your regular Warshaw Burstein attorney.

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