

## New Jersey Takes Steps to Increase Pay Equality by Banning Salary History Inquiries

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On July 25, 2019, New Jersey joined the movement to increase pay equality across the country when Acting Governor Sheila Oliver signed a law instituting a ban on all salary history inquiries in New Jersey. The legislation, which goes into effect on January 1, 2020, will expand the current ban on salary inquiries for prospective public employees to include all private sector employees in New Jersey.

### **What is Prohibited**

The new law makes it illegal for an employer to screen a job applicant based on the applicant's salary history, including, but not limited to, the applicant's prior wages or benefits. Employers are also forbidden from requiring that an applicant's salary history satisfy any minimum or maximum criteria. Finally, employers are prohibited from considering an applicant's refusal to volunteer compensation information as a factor in any employment decision.

### **What is Allowed**

If an applicant voluntarily and "without prompting or coercion" offers salary history information, an employer may consider that salary history in determining salary, benefits, and other compensation, and to verify the applicant's salary history. The new law also permits an employer to ask an applicant to provide written authorization to confirm salary and benefits history after the employer has made an offer of employment that includes an explanation of the overall compensation package.

The new law does not apply to applications for internal transfer or promotion, or the employer's use of previous knowledge obtained from an applicant's prior employment with that employer. Employers are also not prevented from acting in compliance with federal laws or regulations that expressly require the disclosure or verification of salary history for

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employment purposes, or that require knowledge of salary history to determine an employee's compensation.

Background checks seeking non-salary information do not fall within the purview of the new law's prohibitions, as long as employers specifically inform all external vendors that salary history information is not to be disclosed. Additionally, if the employer inadvertently receives salary information during a background check, it must not be considered and should be discarded. Salary information that is publicly available is fair game to any employer, however, employers are prohibited from retaining and considering such information when determining the compensation package offered to an applicant.

Salary history inquiries made to employment agencies are permitted, provided the applicant executes proper written authorization allowing this information to be disclosed. Employers may also inquire into incentive and commission plan history if incentives or commissions are a component of compensation.

Multi-state employers may continue to include salary history inquiries on multi-state employment applications, provided the application states that New Jersey applicants should not answer that question.

### **Potential Consequences for Violation**

The New Jersey Department of Labor and Workforce Development has authority to enforce the new law by imposing penalties of up to \$1000 for a first violation, \$5000 for a second violation, and \$10,000 for each subsequent violation.

The new law also amends the New Jersey Law Against Discrimination (LAD) to make it a violation for employers to screen job applicants based on salary history (including wages, salaries, or benefits), or to require that an applicant's salary history satisfy any minimum or maximum criteria.

Attorneys' fees will generally be available to anyone that prevails in an action under the new law, however punitive damages and attorneys' fees are not recoverable in actions arising from unlawful inquiry into an applicant's salary history brought under the LAD.

### **Next Steps for Employers**

New Jersey employers seeking to avoid liability under the new law are advised to take the following actions:

- Review your employment application to eliminate questions concerning an applicant's salary history or, if you are a multi-state employer, include clear instruction that New Jersey applicants should not provide this information.
- Ensure that instructions to external vendors conducting background checks expressly direct those vendors not to ask for (or if obtained, not to share) an applicant's salary history information.
- If you are an employment agency, make certain not to share salary history information unless written authorization from the former employee is provided.

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- Train recruiters and hiring managers to ensure that they do not ask applicants for salary history information prior to making an offer of employment that includes the proposed compensation package, and instruct them on appropriate responses if an applicant volunteers the information.
- Develop internal procedures for deleting/discarding/redacting any salary information that you receive but are prohibited from considering.

This Alert is intended to serve as an initial education on the new law. For a full review of the legislation as signed into law, see [Ban on Salary Inquiries](#).

To learn more about the impacts the new law may have on your business, or if you have questions regarding the legal sufficiency of your employee manuals or policies, please contact **Joel Clymer**, the author of this Alert and a member of the firm's **Employment Law Practice Group**.