

Management Alert



UPDATE: New York City Commission on Human Rights Issues Fact Sheets Regarding the NYC Salary History Ban

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Seyfarth Synopsis: On September 12, 2017, the New York City Commission on Human Rights released two eagerly-awaited Fact Sheets to aid in the interpretation of the NYC salary history ban, which goes into effect on October 31, 2017. Seyfarth also obtained additional guidance from the Commission on its interpretation of this law.

On May 4, 2017, New York City Mayor Bill De Blasio [signed into law the legislation](#) that bans New York City employers from inquiring about or seeking the salary history of job candidates. Just as many employers are revising their hiring processes and forms, the Commission issued the additional guidance.

The Commission issued two Fact Sheets, [one for Employers](#) and one for [Job Applicants](#). The Commission has advised us that it does not plan to issue any other formal Enforcement Guidance.

What Do The Fact Sheets Say?

Although there were no big surprises, the Fact Sheets confirm the Commission's interpretation of several components of the salary history law as noted below.

The Coverage is Broad but a Key Question Remains Unanswered

The Fact Sheets suggest that the Commission intends the law to cover "most applicants" for jobs that are based in NYC, regardless of whether the position is full-time, part-time, or an internship. The law applies to any employer with at least one employee in NYC.

The Fact Sheets do not clarify whether the law will extend to NYC residents who apply to jobs outside of NYC. New York Courts generally apply the "impact test" when considering the geographic reach of the NYC Human Rights law, which focuses on where the impact of the discriminatory conduct occurs. While a candidate's NYC residency alone is unlikely to be sufficient to trigger application of the law, the Commission or the Courts may take the position that the law extends to employers outside of NYC who, for example, interview NYC residents in NYC, even if the role they are filling is outside NYC.

The Fact Sheets clarify that the law will extend to independent contractors. Candidates for internal transfer or promotion with their current employer and candidates with public employers for which compensation is set pursuant to a collective bargaining agreement are, however, excluded from the law.

No Surprises on Prohibited Conduct

In the Fact Sheets, the Commission provides a variety of examples of prohibited conduct:

- It is unlawful to ask candidates questions about or make statements intended to solicit information about the candidates' current or prior earnings or benefits.
- It is unlawful to ask candidates' current or former employers about candidates' current or prior earnings or benefits.
- It is unlawful to search public records to learn about candidates' current or prior earnings or benefits.

The Fact Sheets Discuss Permissible Conduct Without Clarifying Deferred Compensation

The Fact Sheets state that employers can:

- Make statements about the anticipated salary, salary range, bonus, and benefits for a position;
- Ask about objective indicators of work productivity in the candidate's current or prior job, such as revenue or profits generated, sales, production reports, or books of business;
- Make inquiries to a candidate's current or former employers or search online to verify non-salary information, such as work history, responsibilities, or achievements. The Fact Sheets, like the law, note that if current or prior earnings or benefits are accidentally discovered during such a review, the employer cannot rely on this information in making salary or benefits decisions;
- Make inquiries about a candidate's current or prior earnings or benefits that are authorized or required by federal, state, or local law;
- Verify and consider current or prior earnings or benefits if this information is offered voluntarily and without prompting by the candidate during interview process.

Unlike the text of the law itself, the Fact Sheets do not discuss deferred compensation. The law provides that "without inquiring about salary history," an employer can "engage in discussion with the applicant about their expectations with respect to salary, benefits and other compensation, *including but not limited to unvested equity or deferred compensation that an applicant would forfeit or have cancelled by virtue of the applicant's resignation from their current employer.*" (Emphasis added.) As the salary expectations carve-out is in a separate section of the law's text than the carve-out that allows an employer to consider compensation history when a candidate provides the information voluntarily and without prompting, this suggests that employers may engage in a discussion about unvested equity or deferred compensation in connection with the discussion about the candidate's salary expectations and, if the candidate provides information about deferred compensation that may be cancelled or forfeited upon resignation, the employer can verify those amounts. The Fact Sheets provide only that employers can "inquire about applicants' expectations or requirements for salary, benefits, bonus, or commission." The Commission has clarified to us that the list of permissible conduct noted above is not exhaustive. The law is, however, not a model of clarity and employers should be careful in how these questions are asked to candidates. However, the Commission has provided further information about this point as noted below.

Seyfarth's Discussions with the Commission

Despite this welcome guidance from the Commission, some aspects of the law remain ambiguous. Seyfarth Shaw spoke with Policy Counsel at the Commission to obtain clarification regarding other aspects of the law.

Deferred Compensation

Though not addressed by the Fact Sheets, the Commission's working interpretation of how employers should deal with verifying deferred compensation that is cancelled or forfeited when a candidate resigns his or her current employment is that employers cannot affirmatively ask candidates whether they have deferred compensation or would forfeit deferred compensation. However, if the candidate offers information about deferred compensation as part of a discussion about

compensation expectations, the employer can verify the value of the deferred compensation that would be forfeited, either with the prior employer or with the candidate. The Commission will take the same position regarding other aspects of prior compensation such as benefits, perks, and salary.

The Commission also confirmed that asking for a candidate's salary expectations is permissible, and that as a "best practice," an employer can quote the law itself. For example, in an application or interview seeking such information, an employer could quote the law as follows: "without inquiring into your salary history, please inform us of your expectations with respect to salary, benefits and other compensation, including but not limited to unvested equity or deferred compensation that you would forfeit or have cancelled by virtue of your resignation from your current employer."

The Commission also suggested notifying candidates that such information may be subject to verification with language such as "Please note that replacement awards, if applicable, for cancelled or forfeited deferred compensation will be subject to verification."

Counter Offers

The Commission has taken the position that the law does not extend to competing counter offers by other potential employers the candidate is also considering. The Commission does not view a counter offer as "current or prior wages" as defined in the law.

Bid Backs

Though the Commission advised that it had not yet fully considered bid backs, it compared them to counter offers and stated the Commission's preliminary view that the law does not apply to bid backs. For example, if an employee currently works at Company A, interviews with Company B and receives an offer, and Company A then makes an offer to retain the employee, the law would not prohibit Company A from asking how much Company B offered the employee. Like counter offers, bid backs do not implicate "current or prior" salary, but rather, are offers to increase the employee's compensation at Company A if the employee rejects Company B's competing offer.

Definition of "Without Prompting"

The law currently allows an employer to verify and consider a candidate's salary history if it is disclosed "voluntarily and without prompting." This undefined and broad phrase provides little comfort to employers looking for clarity on the scope of such a safe harbor. The Commission said that it intends to adopt an "objective test" to determine whether a violation has occurred, and stated its view that "if the average candidate would not think that the employer encouraged the disclosure," the disclosure of salary history is "without prompting."

No Recordkeeping Requirement

The Commission does not plan to advise companies on a best practice for documenting when a candidate volunteers salary information. There will be no record keeping requirement or number of years employers must maintain any record of a voluntary disclosure, as there is with the Fair Chance Act.

Seyfarth Shaw is tracking this emerging area of law closely. We will keep you updated regarding any developments. For information on how this law might affect your company, contact any member of Seyfarth's [Pay Equity Group](#), [Cameron A. Smith](#) at casmith@seyfarth.com, [Christine Hendrickson](#) at chendrickson@seyfarth.com, [Annette Tyman](#) at atyman@seyfarth.com, or [Lisa Savadjian](#) at lsavadjian@seyfarth.com.

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