



## Don't Ask: N.J. Law Soon To Ban Salary-History Inquiries



By Amy E. Hatcher

It may seem second nature to employers that they ask job applicants their previous wage when trying to arrive at a compensation offer. But that practice—deemed unfair to those whose salaries have been artificially depressed because of gender or other factors—

is soon to disappear. By next year, New Jersey employers may no longer ask New Jersey job applicants to disclose their current or past salary, under legislation amending the New Jersey Law Against Discrimination (NJLAD) signed by Lt. Gov. Sheila Oliver on July 25, 2019.



### ***When does the law go into effect?***

Jan. 1, 2020.

### ***What are employers prohibited from asking applicants?***

New Jersey employers may not:

1. Screen a job applicant based on the applicant's salary history, including, but not limited to, wages, salaries or benefits; or
2. Require that the applicant's salary history satisfy any minimum or maximum criteria.

### ***What is the stated reason for the salary inquiry ban?***

The sponsor's statement, included in the original version of *A-1094*, provides that the bill is intended "to strengthen protections against employment discrimination and thereby

promote equal pay for women.” Supporters of the measure contend that using an applicant’s prior salary to determine future salary may perpetuate the existing pay gap between women and minorities and their white, male peers.

This statewide ban follows a similar prohibition, enacted last year through executive order by Gov. Phil Murphy, which applied only to job applicants seeking work with the New Jersey state government.

New Jersey is the latest in a string of states and localities to enact such salary history inquiry bans. Others include California, Connecticut, Delaware, Hawaii, Maine, Massachusetts, Oregon, Vermont, Washington, New York City, Albany County, NY, and Westchester County, NY.

***What if an applicant voluntarily discloses her current or prior salary?***

Employers may consider past salary if the applicant voluntarily discloses it “without prompting or coercion.” But, an applicant’s refusal to volunteer the information may not be considered in any employment decision.

***May an employer inquire about salary history after a job offer is extended?***

Under the new law, after a job offer has been made and the compensation package has been explained, employers are permitted to ask the applicant to confirm salary history and benefits in writing.

***How does the salary history inquiry ban affect New Jersey employers’ out-of-state operations?***

The law does not prohibit New Jersey employers who take applications for employment in at least one other state from including an inquiry regarding salary, so long as immediately preceding the inquiry, the application instructs that a candidate for a position based entirely or substantially in New Jersey is not to answer that question.

***May an employer consider a job applicant’s publicly available salary history information in its hiring decisions?***

Although the law does not prohibit an employer from acquiring an applicant’s publicly available salary history information, it does prohibit employers from retaining such information or using it in connection with any compensation decisions, unless the applicant voluntarily discloses it to the employer “without employer prompting or coercion.”

***Are there exceptions to the law’s application?***

Yes. The law does not apply to applications for internal transfer or promotion or use of knowledge obtained through prior employment with the employer. It also does not apply to employers who are following federal laws or regulations that require salary disclosure or verification.

And it does not apply to an employer's attempt to verify an applicant's disclosure of non-salary-related information when conducting a background check. In that case, the employer must specify that salary information is not to be disclosed and, in the event it is transmitted anyway, the employer shall not retain it or consider it when determining compensation.

Additionally, the law does not apply when an employer inquires about an applicant's *experience* with incentive and commission plans—so long as the applicant is not required to report the *amount* of earnings in connection with the plans and the job includes an incentive or commission component.

***What are the penalties for employers who violate the salary inquiry ban?***

The law distinguishes the penalties based on whether the affected job applicant is a member of a protected class, as defined in the NJLAD (N.J.S.A. 10:5-12).

If the affected job applicant *is not a member of a protected class*, the employer will be liable for a maximum \$1,000 civil penalty for the first violation, \$5,000 for the second violation and \$10,000 for each subsequent violation collectible by the Commissioner of Labor and Workforce Development in a summary proceeding.

If, however, a job applicant who *is a member of a protected class* has a private right of action under the NJLAD and may seek compensatory damages in the form of lost wages and emotional distress damages. Punitive damages and attorney's fees, however, are specifically excluded from the available remedies.

***What should New Jersey employers do to prepare before the law goes into effect?***

- Review and revise all employment applications to remove any request for salary history information, or in the case of employers who accept applications for employment outside of New Jersey, amend job applications to include language immediately preceding the request to instruct that an applicant for a position, based entirely or substantially in New Jersey, is not to answer the salary history question.
- Train human resources personnel, and managers involved in the hiring process or compensation decisions, regarding the updated salary history inquiry requirements and prohibitions.

McCusker Anselmi Rosen & Carvelli P.C. (MARC Law) provides employment counseling, performs internal investigations and defends management in employment litigation of all types in New Jersey and New York. If you have a question regarding the new law or any other employment-related issues, contact our employment group attorneys directly at 973-635-6300 or 212-308-0070 and ask for John McCusker (jmcusker@marc.law), Michael Futterman (mfutterman@marc.law) or Amy Hatcher (ahatcher@marc.law).