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Professional Perspective

Why to Avoid Considering Salary History in Compensation Decisions

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Since 2016, a number of state and local jurisdictions have passed legislation most commonly referred to as "salary history bans." Typically, this legislation limits an employer's ability to solicit information from a job applicant regarding that applicant's salary history. In some instances, the legislation permits an employer to consider applicants' salary history information in making compensation decisions for the applicants, if, and only if, they voluntarily disclose their salary history.

These permissions granted by the salary history bans are misleading, however. They overlook existing equal pay legislation, which in many instances expressly or impliedly limit an employer's ability to rely on salary history information in making compensation decisions, even when this information is voluntarily disclosed.

In the wake of this legislation, employers across the country have been forced to ask themselves whether and when they can consider an applicant or current employee's salary history in making compensation decisions. The answer to this question is nuanced, but in short, consideration or reliance upon the salary history of an applicant or current employee carries inherent risk and should be avoided.

The Relevant Legislative Landscape

Twenty-five state and local jurisdictions have passed salary history bans that expressly limit an employer's ability to inquire about job applicants' salary history. As discussed above, in some instances, these salary history bans—including those in California, Hawaii, New Jersey, and New York—provide that employers can consider or rely upon salary history information if the applicant voluntarily discloses their salary history information during the interview process. Other salary history bans—for example those in Illinois and Oregon—expressly provide that reliance upon applicant salary history, even if voluntarily disclosed, runs afoul of the salary history ban itself.

Regardless of whether a particular jurisdiction has enacted a salary history ban, however, federal law and most states have some form of equal pay legislation, which is relevant to whether and when employers should consider salary history when making compensation decisions. The federal Equal Pay Act (EPA) prohibits employers from paying employees less for equal work because of gender.

And generally speaking, state equal pay statutes prohibit unequal pay for comparable, or substantially similar work, between employees of opposite protected categories (e.g., race, gender, ethnicity). Many state equal pay laws provide that a pay disparity between comparable employees of opposite protected categories will be excused only if it falls within one of a small handful of statutory exceptions, which are typically pleaded as affirmative defenses.

Similar to state legislation, the federal EPA provides that a disparity between employees of the opposite sex who perform comparable work will be excused only if it falls into one of the four enumerated statutory exceptions. Some state equal pay legislation, including for example, the laws in California, New York, Massachusetts, Illinois, Colorado, Oregon, and Washington, expressly or impliedly provide that reliance upon employee salary history is insufficient to excuse a pay disparity between comparable employees of opposite protected characteristics.

To complicate matters further, under the federal EPA there is presently a split among the federal courts of appeal as to whether and under what circumstances salary history can lawfully excuse a pay disparity between comparable employees of the opposite sex. Typically, this question arises where the employer at issue attempted to utilize the federal EPA's fourth statutory exception, which provides that a pay disparity between comparable employees of the opposite sex will be excused if it is based on "any other factor other than sex."

The question most frequently posed is whether an employee's salary history constitutes a gender-neutral factor consistent with the fourth exception, and more generally, whether the gender-neutral exception must be job-related. The majority of federal appellate courts to consider this question—the Ninth, Tenth, Second, Fourth, Sixth, and Eleventh—have held, or suggested in dicta, that in order to avail themselves of the "factor other than sex" affirmative defense, employers must establish that the gender-neutral factor relied upon was job-related with respect to the position in question. The Seventh

and Eighth Circuits have held the opposite and determined that prior salary can be considered a lawful gender-neutral factor consistent with the EPA's fourth exception.

Consider Job-Related Factors

Against this landscape, can employers lawfully rely upon the salary history of applicants or current employees in making compensation decisions? Although it has been a long-established practice upon which employers have historically relied in making compensation decisions, it is inadvisable for employers to consider or rely upon applicant or employee salary history in setting compensation. Depending on the jurisdiction or claim alleged, such reliance could run afoul of a state salary history ban or equal pay law, and could further preclude an employer from avoiding liability for an equal pay claim pursuant to myriad equal pay statutes, including but not limited to the federal Equal Pay Act.

So where does this leave employers? As an initial matter, employers should take stock of their existing compensation systems to determine how they operate in practice. If the existing compensation system relies upon employee salary history, or, inconsistently applies compensation metrics between employees who perform substantially similar work, employers should reexamine their compensation systems to ensure that the compensation systems depend instead on job-related factors.

For example, with respect to newly hired employees, employers can make compensation decisions related to the applicant's education, experience, and training, and rely on factors related to the work that the employee is being hired to perform—whether the employee will be managing any employees, the geographic location in which the work is performed, whether the position involves significant travel, or other job-related factors.

Employers should also consider implementation of a salary or wage range for the positions within their organization. Creation of a salary or wage range will, ideally, provide the employer with time to reflect and make an organizational decision regarding those job-related factors and values that it wishes to incentivize. Further, once a salary range is in place, the employer can better protect against discretionary (and potentially inconsistent) compensation decisions made by recruiters or hiring managers, and create a unified compensation system that better ensures those performing substantially similar work are paid within the same range.

Additionally, the range should be based upon job-related factors, such as relevant industry experience or supervisory authority, which explain why employees are paid at the bottom or top portions of the range itself. Employers should be sure to compensate employees within the prescribed ranges, however. If employers maintain salary ranges but pay comparable employees of opposite protected categories differently from the prescribed ranges, an employer could face increased risk within the context of an equal pay claim.

Finally, employers can consider conducting a privileged pay equity audit to determine whether there are any pay differentials between employees of opposite protected categories who perform substantially similar work. If the employer learns that any wage disparities exist between comparable employees of opposite protected categories, the audit will provide the employer with an opportunity to discreetly address or cure any such disparities, for example, during a typical annual review process.

Likewise, employers could consider an audit of the organization's job descriptions and organizational practices to determine whether it needs to reevaluate existing organizational charts, job descriptions, or the manner in which work is assigned to particular departments or job positions. While job descriptions are not dispositive as to whether employees are comparable for purposes of an equal pay claim, employers should review job descriptions and related documentation that describe job duties to ensure they adequately correspond to the work performed by the relevant employees in practice. If two employees have the same job description but perform vastly different work, this can cause confusion for a number of reasons, including with respect to equal pay concerns, and should be reexamined.

Overall, employers should strive to maintain consistent compensation practices that compensate similarly situated employees equally based on the work the employees perform and other relevant job-related factors.