

The Evolving Salary Ban Minefield

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In recent years, laws prohibiting employers from requesting compensation information spread rapidly at the state and local levels. The resulting statutes, ordinances, and regulations vary widely in their scope, application, and penalties. This patchwork of laws creates a minefield for employers and recruiters. Notably, many of the new laws are accompanied by substantial fines and penalties.

Worse yet, because many of the restrictions went into effect only recently, cases interpreting them are few and far between. Recruiters and their clients thus need to be aware of the evolving legal landscape to ensure they do not run afoul of these new laws, which are often referred to as “salary bans,” “salary inquiry bans,” or “salary history bans.”

Salary Bans Come in All Shapes and Sizes

The newly enacted bans vary in key respects. Several examples of the different requirements imposed in different jurisdictions include:

- i) **Anti-Retaliation Only:** In Alabama, an employer may request and rely on compensation information, but is prohibited from retaliating against an employee who refuses to provide it.
- ii) **Voluntary Disclosure:** In Philadelphia and California, employers may rely on voluntarily disclosed compensation information, but in New York City and Colorado, employers are prohibited from relying upon it.
- iii) **Reactive Disclosure Requirements:** In California, employers must provide a pay scale upon request.
- iv) **Proactive Disclosure Requirements:** In Colorado, employers must include expected compensation in their job postings and disseminate openings internally and externally on the same date.

Notably, even among similar bans there can be variation, and associated risk for recruiters and their clients. For example, while California bans requesting compensation information, it permits discussion of salary expectations. In other jurisdictions, an inquiry into salary expectations may expose an employer to the claim that it is attempting to circumvent the ban on requesting compensation information by phrasing it as a request for compensation expectations.

Further, in many cases it is unclear which rules apply; those of the employer’s location, the employee’s location, or both. This issue can become particularly complicated, as with many employment rules, with the rise of remote work and videoconference interviews.

When is “Voluntary” Truly Voluntary?

As referenced above, many jurisdictions included carveouts to salary bans which allow an employer to consider voluntarily disclosed information when making employment decisions. A critical question thus becomes: When is a disclosure “voluntary?” In sum, it depends. The inquiry is very context dependent.

We expect different jurisdictions will develop different tests for evaluating whether a disclosure is in fact voluntary. In general, the following tests and factors may be applied: (a) whether the disclosure was prompted by the employer, (b) if the disclosure was in response to an employer’s question, and/or (c) whether the applicant was led to believe that disclosure was expected or required by the employer.

Recruiters and employers, therefore, should carefully consider whether a candidate disclosed compensation information for their own benefit, or if they felt the employer wanted it, before relying on the disclosure. If an employer is using compensation information against a candidate to offer reduced compensation, or as a factor against making an offer, then it should strongly consider consulting with counsel first.

Cost of Violations

The penalties for violations also vary—and can become quite costly for intentional and repeated violations. Several examples include:

- **New York City:** Fines range from \$125 for unintentional violations to \$250,000 for intentional violations.
- **Philadelphia:** Fines of up to \$2,000 per violation, and up to 90 days of imprisonment for repeated violations.
- **California:** No specific penalty.

Each of these jurisdictions also created a private right of action, allowing the candidate themselves to sue.

Conclusion: When in Doubt, Check with Counsel

Employers and recruiters face a rapidly evolving landscape with respect to salary bans—both as new bans are enacted and existing bans are interpreted through caselaw and regulations. Accordingly, to avoid substantial fines, we recommend conferring with counsel before presenting a question that could be considered soliciting compensation information, and particularly before relying on “voluntarily” disclosed information in a manner that is detrimental to a candidate.

Although this article is informational only, does not constitute legal advice or create an attorney-client relationship, and may not be relied upon, we would be happy to assist with any questions as they arise.



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