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DON'T ASK, DON'T TELL

Companies are banned from asking about salary history in NYC - a law that will likely be expanded statewide

By **BERNADETTE STARZEE**

Last October, a law prohibiting employers from asking about salary history at all stages of the hiring process took effect in New York City. The law's primary aim was to close the gender pay gap, and Gov. Andrew Cuomo is pushing to pass a similar law statewide.

"I think it will be expanded," said Douglas Rowe, a partner in the labor and employment practice group at Certilman Balin Adler & Hyman in East Meadow. "We are headed in that direction. The goal of the law is to try to close the wage gap, and I think this is an effective way to do it."

Laws similar to the New York City law are already in place or will be effective soon in several nearby jurisdictions, including Westchester County, Connecticut, Albany and Massachusetts, according to John Diviney, a partner in the employment and labor practice group at Rivkin Radler in Uniondale.

"The way it usually works is that there is a snowball effect," said Avrohom Gefen, a partner in Vishnick McGovern Milizio's litigation practice in Lake Success, who also believes a statewide expansion of the salary history ban is inevitable.

Although the law is not in effect on Long Island at

this time, "the New York City Human Rights Commission is interpreting the statute expansively and inclusively," Rowe said. "The commission is taking the position that if a job position outside of New York City has an impact that is felt in New York City, the statute will apply."

For instance, Gefen said, "if you have a New York City resident who is working on Long Island, it can be argued that there's a substantial effect on New York City, so it would be prohibited for the Long Island company to ask a New York City resident questions about salary history."

Further, he noted, "if someone is working for a firm with offices in Long Island and New York City, and spending part of the time in the city, it certainly applies."

Since the passing of the salary history ban last year, "most New York City companies of any size that are getting good legal advice have updated their practices," Gefen said. "It's not that difficult to be in compliance with this law."

However, there are employers that are not aware of the statute, Rowe said.

"There have already been several cases where an



Photo by Bob Gigliore

ARTHUR YERMASH: If the law has accomplished anything so far, it has raised awareness of the issue of disparity in pay.

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Photo by Jim Lennon/Courtesy of Rivkin Radler

JOHN DIVINEY: The new law will change salary negotiation dynamics between the employer and employee, benefiting employees.

NYC law has made employers more aware of wage gap

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employer was not aware of the change of the law and continued to advertise for a position and request salary history," Rowe said.

The penalty for what is deemed an unintentional look into a person's salary history can be as high as \$125,000 for each violation, while it can reach \$250,000 for a blatant violation, according to Arthur Yermash, a senior associate focusing on labor and employment law at Ronkonkoma-based Campolo, Middleton & McCormick, who noted it's unclear if the penalties would be as stringent if a similar law were passed statewide.

Rowe said he has been counseling all clients – including those with offices on Long Island only – to update hiring processes.

"Smart clients will bring us in and have us review employment applications, interview practices, questions asked during the interview process, help-wanted ads," he said. "We'll advise on how to avoid the liability and comply with the new regulations."

In addition to not being allowed to ask the candidate about salary history, prospective employers are not allowed to ask former employers what the employee was making when they check references.

"A lot of companies have done away with giving that information out anyway," Diviney said.

The impetus behind the law is to create pay equality between men and women.

"The rationale is that since there is a pay gap for women now, if a woman is asked her current salary, that would signal to the potential employer that she is willing to accept that amount or a

'CONTINUING TO ASK FOR SALARY HISTORY WILL PERPETUATE DISCRIMINATION.'

little higher," Gefen said. "The gap will remain, rather than the playing field becoming even."

Women earn 80.5 cents for every dollar earned by men, according to the U.S. Census Bureau.

"Continuing to ask for salary history will perpetuate discrimination," Diviney said. "The purpose of the act is to stop it from being allowed to occur."

In the months that the New York City law has been in place, "we haven't seen tremendous impact" on salaries, Yermash said. "But if the law has accomplished anything so far, it is that it has raised awareness. Employers in New York City are hyper-focused on the issue of pay disparity between classes of employees. They're looking at balancing out internal procedures and determining a better way to decide what to pay folks."

"It will take time to see if the new



Photo by Bob Giglione

AVROHOM GEFEN: A law similar to the New York City salary history ban will probably be passed statewide in the near future.



Photo by Bob Giglione

DOUGLAS ROWE: The goal of the law is to close the gender wage gap, and I think it will be effective.

law will affect the pay gap," Gefen added, noting that employers generally know what other companies in the industry pay for various positions.

"I don't think they will overshoot and increase salary offers," he said. "It's not prohibited to ask what the candidate is looking for. What the candidate answers can be an indication. People usually look for a little more than they were making previously."

Diviney, however, said the bargaining position of all employees will improve with respect to negotiation of salary.

"It's changing the negotiation dynamics between the employer and employee," Diviney said. "The employer is not going to know what the salary of the applicant currently is or has been previously. It will help women, and it will also help males who were in jobs that paid less."

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