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## C A S E A L E R T

### **NJ LEGISLATION PASSED PROHIBITING EMPLOYERS FROM INQUIRING ABOUT SALARY HISTORY**

On July 25, 2019 Lt. Governor Sheila Oliver signed into law [legislation A-1094](#), which prohibits New Jersey employers from inquiring about an applicant's salary history. The law, which takes effect on January 1, 2020, prohibits employers from screening a job candidate based on salary history, which also includes benefits and other compensation, or from requiring an applicant's salary history to satisfy any minimum or maximum criteria.

An employer that violates this new law will be subject to a civil penalty from the Commissioner of Labor and Workforce Development of up to \$1,000 for the first violation, \$5,000 for the second violation, and \$10,000 for each subsequent violation. If the applicant is a member of a protected class, the violation will be considered an "unlawful employment practice" under the New Jersey Law Against Discrimination. However, the law explicitly provides that punitive damages, attorney's fees, and treble damages would not be available remedies.

An employer is permitted to consider salary history if a candidate voluntarily provides the information. However, if Candidate A voluntarily provides the information and Candidate B does not, the employer may not consider Candidate B's refusal to volunteer the information in

deciding which candidate to select. Additionally, an employer may request that a candidate provide written authorization to confirm salary history in a prior job if the employer has already made an offer of employment that includes an explanation of the overall compensation package that is being made to the applicant. If the employer is seeking to fill a position which includes incentive and/or commission plans, the employer may inquire about the applicant's experience with commission and incentive plans so long as the employer does not require that the applicant report the amount of earnings that s/he made through such a plan.

Employers who are considering a candidate who had previously worked for a public entity must exercise caution, because even though the applicant's prior salary may be a matter of public record, it is still impermissible for the employer to consider that information unless it is voluntarily provided by the applicant.

If an entity employs workers in states other than New Jersey and is desirous of using a common application which requests salary history, the application must have an instruction that if the person is applying for a position that will be substantially based in New Jersey s/he is

not to provide salary history information.

This law is not applicable to internal transfers or promotions; nor does it prohibit employers from considering salary information it possesses as a result of an applicant's prior employment with the employer. In the course of verifying an applicant's non-salary background information, the employer must specify to all prior employers contacted that salary information is not to be disclosed. If such information is inadvertently disclosed the employer must not retain that information, and is prohibited from considering it in determining the salary, benefits, or other compensation offered to the applicant.

Over the course of the next six months it is imperative that all employers undertake a review of their new hire applications and train all employees involved in candidate interviews and background checks about what questions may and may not be asked and what information may and may not be considered. In particular, we would recommend that employers refrain from asking an applicant any version of "What is your desired salary?" - that question invites the applicant to respond by

informing the employer as to what his or her currently salary is, and a question could arise as to whether that disclosure was voluntary.

We expect the immediate impact to be more drawn out salary negotiations. It is also important to remember that this law does not exist in a vacuum. This comes following the enactment of the New Jersey Equal Pay Act, which requires **equal compensation for substantially similar work**. We expect to see the State of New Jersey, as well as plaintiffs' lawyers, to pursue claims under both laws. A violation of the salary history law could expose an employer to a larger investigation into the employer's compensation practices.

Methfessel and Werbel's [labor and employment group](#) is ready to help employers of all sizes to draft and implement policies and practices that are in compliance with these new laws. Contact [Eric Harrison](#) or [Brent Pohlman](#) with any questions.

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