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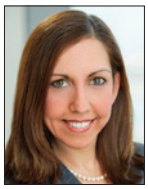
Expert Analysis

Applications and Interviews: What Not to Ask



By **David E. Schwartz**

And **Risa M. Salins**

The hiring process is risky business. Most employers know, to avoid discrimination claims, they should not ask questions on employment applications or in interviews relating to a candidate's age, race, national origin, citizenship, religion, gender identity, or marital or family status. Employers also should now think twice before asking job applicants about their salary history, as a growing number of state and local governments are passing legislation designed to prohibit inquiries into wage history, in an effort to fight wage discrimination and the gender pay gap. In addition, numerous states, counties and cities now require private employers to "ban the box" on employment applications asking about applicants' criminal conviction histories, so that employers consider a job candidate's qualifications first without the stigma of a criminal record. Furthermore, a number of states and cities have passed laws regulating use of credit information and credit reports for employment purposes, a practice that may disproportionately impact minorities, women and unemployed individuals. This month's column examines New York City's restrictions on questioning applicants about their salary history, criminal backgrounds and credit information.

Salary History

As of Oct. 31, 2017, New York City employers of any size are prohibited from inquiring, directly or through others such as recruiters, about a job applicant's salary history (including on applications or in interviews) or relying on salary history to determine compensation. Any such inquiry now constitutes an unlawful discriminatory practice under the New York City Human Rights Law (NYCHRL), even if made after the applicant has been given a conditional offer of employment.

The law defines salary history broadly to encompass not just wages but also benefits and other compensation, such as bonuses, commissions, car allowances, and retirement plans. An employer is not prohibited from inquiring about objective indicators of the applicant's productivity or performance during current or previous employment, such as sales, production and profits generated, provided the employer does not inquire about the applicant's profit percentage.

Under the new law, a job application may not include a request for information about an applicant's salary history even if the employer makes clear that a response is voluntary. Employers with locations outside New York City who use a universal application for all locations that requests salary history will not avoid liability by adding a disclaimer that New York City applicants need not answer.

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Additionally, employers may not solicit information about an applicant's salary history from the

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applicant's current or former employers or by searching public records. If an employer discovers an applicant's salary history while conducting a lawful background check or verifying the applicant's non-salary related information, the employer may not rely on that information when making compensation decisions. The New York City Commission on Human Rights (Commission), which enforces the NYCHRL, recommends employers specify to third party agencies that information about salary history be excluded from background reports.

Despite the expansiveness of the law, not all discussions are precluded. For example, an employer may ask a job applicant about unvested equity or deferred compensation the applicant stands to lose upon resignation from current employment. An employer may also ask about any competing offers the applicant may have received and the value of those offers. Discussions concerning the applicant's compensation expectations similarly are not prohibited.

Moreover, there are several noteworthy exceptions to the law's coverage. The salary history ban does not apply to applicants for internal transfer or promotion, nor does it apply to public employees whose compensation is determined by a collective bargaining agreement. In addition, in the context of an acquisition, obtaining the salary histories of the target company's employees as part of due diligence is not prohibited. However, if interviews are required, the prohibition will likely be implicated. In this situation, the Commission recommends any salary history information disclosed during due diligence be kept from the hiring managers responsible for determining compensation rates.

When the Commission finds an unlawful discriminatory practice under the NYCHRL (including violations of the salary history, criminal background and credit information restrictions discussed in this article), it may impose a civil penalty of up to $125,000 for an unintentional violation and up to $250,000 if the violation is willful and malicious. In addition, an individual who is successful in a civil lawsuit may recover back pay, front pay, compensatory damages, and attorney fees.

Legislation banning salary history inquiries also has been enacted in California, Delaware, Massachusetts, Oregon, Puerto Rico, and San Francisco. In addition, Philadelphia enacted an ordinance prohibiting inquiries into salary history which is currently being challenged in federal court.

Criminal Background

New York City's Fair Chance Act (FCA), known as the city's "ban-the-box" law, amended the NYCHRL to make any inquiry into a job applicant's criminal history prior to making an offer of employment an unlawful discriminatory practice for New York City employers with four or more employees, at least one of whom is located in New York City. There are exemptions for employers in certain industries in which employers are prohibited from hiring applicants with criminal convictions.

The FCA prohibits New York City employers from inquiring about a job applicant's criminal history until after a conditional offer of employment is made. As a result, employers subject to the FCA are prohibited from asking about an applicant's criminal record on a job application or during an interview. Likewise, an employer may not request permission to conduct a background check on a job application, nor may the employer search publicly available records in an attempt to discover the applicant's criminal history. Additionally, when advertising open positions, employers may not state the position is available only to applicants with no criminal history.

Under the FCA, an employer may inquire about an applicant's criminal history after a conditional offer of employment has been made. This may include asking whether the applicant has a criminal history or pending criminal case, checking the applicant's criminal record, and asking about the circumstances that led to any criminal conviction. However, employers may not at any time inquire about arrests that did not result in criminal convictions. Any evaluation of an applicant's criminal history must be conducted according to Article 23-A of the New York Corrections Law. Article 23-A provides that an employer may decline to hire an applicant with a criminal record only if a direct relationship exists between the applicant's criminal history and the position sought, or if it can be shown that hiring the applicant would create an unreasonable risk to the employer's property, the safety of a particular individual or the general public. Article 23-A sets forth a list of factors an employer must consider in making its determination.

If an employer wishes to withdraw the conditional offer of employment due to the applicant's criminal history, the FCA mandates a certain

procedure be followed. First, the employer must provide the applicant with a copy of any background check or other documents used to determine the applicant's criminal record. Next, the employer must share its Article 23-A evaluation with the applicant. Finally, the employer must hold the job open for at least three business days to allow the applicant to respond to the employer's findings and evaluation. This three-day period is meant to give the applicant an opportunity to provide updated information about the criminal history report which could change the employer's Article 23-A analysis.

There has been widespread enactment of other ban-the-box laws in the past few years, with California, Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Vermont and approximately 15 localities (including the District of Columbia) implementing similar laws applicable to private employers.

Credit Information

New York City's Stop Credit Discrimination in Employment Act (SCDEA) amended the NYCHRL to make it an unlawful discriminatory practice for an employer with four or more employees, at least one of whom is working in New York City, to request or use a job applicant's or employee's credit history to make employment decisions, including hiring, compensation and other terms and conditions of employment. Under the SCDEA, credit history includes credit worthiness, credit capacity and payment history. Therefore, the law prohibits employers from inquiring about an applicant's credit accounts, charged-off debts, items in collections, bankruptcies, judgments and liens, as well as home foreclosures and information concerning credit card debt, child support, and student loans. The SCDEA precludes New York City employers from requesting a credit report or any information about an applicant's credit history on a job application, running a background check to determine an applicant's credit history, or searching publicly available information for the purpose of obtaining this information.

The SCDEA includes various exemptions to these prohibitions. However, the Commission cautions that such exemptions are to be construed narrowly and the employer has the burden of proof in establishing an exemption should apply. For example, the SCDEA exempts positions involving fiduciary responsibility to the employer with authority to enter financial agreements valued at $10,000 or more on the employer's behalf. The Commission interprets this exemption as applying only to executive-level positions with financial control over a company, such as chief financial officers and chief operations officers. As another example, the law exempts positions that regularly allow an employee to modify digital security systems established to prevent unauthorized use of the employer's networks or databases. However, the Commission has stated its view that this exemption also applies only to executive-level positions, such as chief technology officers and senior information technology executives.

As the number of states and cities implementing similar laws continues to grow, it is important for employers with offices in multiple states to keep a close watch on these trends and stay current on the status of legislation that may apply to their worksites.

A number of other jurisdictions have enacted similar credit history bans, including California, Colorado, Connecticut, Delaware, Washington D.C., Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont and Washington.

Conclusion

Employers are advised to review their job application, interview and hiring policies, and to properly train managers and human resources personnel, to ensure compliance with these laws. As the number of states and cities implementing similar laws continues to grow, it is important for employers with offices in multiple states to keep a close watch on these trends and stay current on the status of legislation that may apply to their worksites. Multistate employers may wish to consider making company-wide changes in order to have uniform hiring procedures that comply with the most stringent state and local laws.