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# Employment Law Bulletin

December 2017

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## **New Prohibition Against Salary Inquiries in Hiring Process**

Effective January 1, 2018, California employers can no longer ask about an applicant's salary history, and are prohibited from considering any past salary information in making a hiring decision or as the sole factor in setting the salary for any applicant. In addition, employers must provide any applicant with a pay scale for the position upon reasonable request. Nothing in the new law defines what is meant by "pay scale."

The law is intended to promote pay equity without intentionally or unintentionally perpetuating any past discriminatory or unfair pay practices.

If an applicant voluntarily and without prompting from the employer discloses her or his pay history, nothing in this law prohibits the employer from considering or relying on that information as one factor when setting the salary for that applicant.

This new law specifically references California's Equal Pay Act (Labor Code section 1197.5) in emphasizing that prior salary, by itself, cannot justify any disparity in compensation.

There is no exception in the law for small employers or public entities.

As is often the case, the language of the statute raises a number of unanswered questions and elevates the need for training and appropriate documentation practices. Every person who interviews job candidates must be trained about the importance of NOT asking about salary history, and about documenting any voluntary salary history disclosures, including the fact that the disclosure was not prompted and was totally voluntary. Job applications,

postings, advertisements and recruiting materials need to be "scrubbed" to remove any references to prohibited salary history inquiries or pay practices. Employers using outside recruiters must confirm that the recruiter is following this new law, including maintaining appropriate documentation regarding its work with candidates being referred in the course of the recruiting process.

Equally importantly, employers must establish pay scales for any open positions, and make them available to applicants on request. This is an area loaded with risk, as there are no guidelines about what constitutes a pay scale, and the law will likely become effective prior to the issuance of any clarifying regulations.

Please contact one of SMT's employment law attorneys if you have questions or seek guidance on this new law or any other employment issues.

### **New Protections for Undocumented Workers**

California law adds protections for undocumented workers as of January 1, 2018, limiting federal intrusion and requiring employers to notify employees under certain circumstances when federal enforcement officers are seeking entry, inspection of documents or review of I-9s. New federal regulation on verifying eligibility through the I-9 has also changed. Employers must carefully navigate between the two rocky shores of federal immigration law obligations and state law requirements to avoid penalties.

New Under Federal Law: The federal government released a revised on July 17, 2017. Instructions for how to download Form I-9 are available on the Form I-9 page. Employers were required to start using the revised version as of September 18<sup>th</sup> and must continue following existing storage and retention rules for any previously completed Form I-9s. For further information see: <https://www.uscis.gov/i-9>.

New California law: California employers have the following new obligations:

1. *Record Inspections:* Employers can no longer simply allow a federal immigration enforcement agent to enter non-public areas of its business to "access, review, or obtain the employer's employee records without a subpoena or judicial warrant." This prohibition does not apply to I-9 Employment Eligibility Verification forms and "other documents" if the federal agency has given the employer a Notice of Inspection. A Notice of Inspection by the federal agency must be served 72 hours before the time of the inspection.
2. *Notice to Employees:* Employers must give notice to employees of any immigration review of employment records within 72 hours of a Notice of Inspection and can use a template form provided by the Labor Commissioner to be created by July 1, 2018.

If asked by a potentially affected employee, the employer must provide the employee with a copy of the Notice of Inspection it receives from the federal government. An "affected employee" is any employee who has been identified as a result of the federal inspection to be "an employee who may lack work authorization," or "an employee whose work authorization documents have been identified by the immigration agency inspection to have deficiencies." The employer must also provide an affected employee notice of the results of the inspection within 72 hours.

In addition, the employer must notify the employee in writing of the obligations of the employer and the affected employee arising from the results of the records investigation. The Notice must relate to the affected employee only and be delivered by hand at the workplace if possible. If hand delivery is not possible, it may be delivered by mail, or by email if the employee's email address is known.

3. *No Re-verification of Employment Eligibility:* Except as otherwise required by federal law, employers cannot re-verify the employment eligibility of a current employee.

4. *Potential Penalties:* Penalties for an employer's failure to provide the required notices under the new law are \$2,000, up to \$5,000 for a first violation, and \$5,000 up to \$10,000 for each subsequent violation. The penalties will be recovered by the Labor Commissioner.

Please contact one of SMT's employment law attorneys if you have questions about these new legal requirements.

## **No Se Habla Español?**

SMT's employment attorneys can provide your company with employment policies, forms and employee disciplinary documentation in Spanish. Providing such important information to employees in the language they understand is critical to employee performance, providing a welcoming diverse work environment, and protecting your company against employment claims. Contact an SMT attorney today to get started.

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