

How Wage Equity Laws Change the Hiring Process



Richard Reice, Partner

Enacted to help address the historical gender gap in salaries, laws now on the books in a handful of major cities pose challenges for hiring managers in real estate and other sectors, Hoguet Newman Regal & Kenney Partner Richard Reice tells *GlobeSt.com*.

New York City is among a handful of cities that have enacted laws prohibiting job interview questions about salary history.

A handful of major cities, including New York, have enacted laws prohibiting potential employers from asking job candidates about their salary histories. The Commonwealth of Massachusetts has done the same, with a statute that is set to take effect in 2018. What are the ramifications for hiring managers in professional services sectors, including commercial real estate, where beating an existing compensation package is among the most important elements in recruitment? Will these laws stand up to legal challenges, such as those that have been filed against Philadelphia's law? *GlobeSt.com* recently spoke with Richard Reice, partner with law firm Hoguet Newman Regal & Kenney, for his take.

***GlobeSt.com*: A few major cities have enacted laws prohibiting prospective employers from asking about salary history. What is the rationale behind these laws? That question has been an element of job interviews for quite some time.**

Richard Reice: It certainly has been, and there has been a growing recognition of historical pay disparity between men and women. In asking about salary histories of male and female candidates, you're going to get an answer that reflects that pay disparity. Those sorts of disparities get repeated time and again. To break the cycle of suppressed wages for women, it was decided that if you eliminate the inquiry about salary history, then you won't be able to perpetuate that cycle. Not knowing what the woman makes or what the man makes, you're simply going to have to offer a neutral salary, not predicated on historical patterns of pay disparity.

GlobeSt.com: It would seem as though one of the counter-arguments to be made against such laws is that salary history may reflect a particular level of experience, regardless of whether the candidate is a man or woman.

Reice: While we each bring to a particular job our unique set of experiences and skills, the fact is that these historical patterns continue to exist. An employer is certainly free to ask about the candidate's experiences, job history and even performance, and can even inquire about the indicia of the candidate's performance, particularly if there are some metrics that can be applied in a given field. What the employer cannot do is base salary determination in part on your prior salary.

GlobeSt.com: I understand that if an employer in New York tries to circumvent this restriction, for example by looking up publicly available salary information in the case of a publicly traded company, it may be fined up to \$250,000. Are there any other avenues available to them in seeking out this information?

Reice: Any attempt to obtain data on employee salary history, in view of the New York City law, is going to be viewed very negatively. The chances of discovery are not very high, but should it happen, there is potential risk for the employer.

Of course, there's nothing to prevent an applicant from disclosing salary. In the real estate business, this law may not be applicable, because a number of agents are classified as independent contractors. So you can certainly ask about their sales history. In fact, you could probably ask a regular job applicant about their sales history: the number of closings that they've had and the value of the properties they've closed. You could probably even ask about commissions, if you did so in a neutral enough way. If the broker was an employee, you certainly could not ask about their final earnings in a given year, but you could extrapolate from their activity roughly what sort of income bracket they're in.

GlobeSt.com: In the real estate sector, obviously it's a more sensitive area if they're employed in a strictly managerial capacity as opposed to sales. Then it goes back into the realm of discussing their performance.

Reice: Right, and if their salary is based on the performance of their agents, then you have to get there sideways. "Tell me about the office; tell me about the volume of sales; tell me about the number of people who were in the office." You can find out all kinds of environmental factors that might provide you with an educated guess, but again, you cannot ask a direct question.

GlobeSt.com: The laws in New York City, Philadelphia and New Orleans are on the books. Have they gone into full effect?

Reice: My understanding is that they have. There is pending litigation in Philadelphia that is challenging the law, based in part on First Amendment grounds. But that case has a ways to go.

GlobeSt.com: Do you anticipate that on the one hand there could be challenges to the New York and New Orleans laws, and that on the other hand these laws could become a template for other jurisdictions?

Reice: I think everybody's going to wait and see what's happening with the Philadelphia litigation. You're going to see other jurisdictions very interested in what happens to the Philadelphia suit, but this is an appealing piece of legislation, in that it costs a city very little money, and in the more progressive cities I don't think there will be a tremendous uproar over this sort of law and it's a potential cure for past pay disparities. You're going to see a lot of chambers of commerce paying attention to the Philadelphia suit, and I think you will see business groups filing protests against the New York law. It's really going to depend on whether the law is constitutional and whether the City Council followed proper process in enacting the law.

Richard Reice is a Partner of Hoguet Newman Regal & Kenney LLP, a New York City-based litigation boutique. The firm focuses on commercial litigation and dispute resolution; insurance recovery litigation and counseling; labor and employment litigation and counseling; white collar defense and governmental investigations; construction law; and intellectual property litigation.