

ASSET PURCHASERS: BEWARE BANS ON SALARY HISTORY INQUIRIES

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When one employer purchases the assets of another and intends to employ some or all of the seller's employees, it is very common for the asset purchase agreement to require the seller to disclose certain personnel information regarding those employees. Often this disclosure includes such items as name, title, hire date, current salary, and other compensation and benefit information. However, such provisions may violate state and local bans on salary history inquiries.

To date, fourteen states and Puerto Rico have prohibited or restricted private sector employers from seeking information about a prospective employee's past compensation. In some of those states, employers are permitted to ask about compensation history only at a certain point in the hiring process. But in most, employers are never allowed to seek this information. Many local governments have also enacted their own bans.

Colorado's new statute is typical. Effective January 1, 2021, it will be unlawful for employers to "seek the wage rate history of a prospective employee or rely on the wage rate history of a prospective employee to determine a wage rate." The statute defines "wage rate" broadly to mean (a) for hourly employees, the hourly rate plus the value per hour of all other compensation and benefits received, and (b) for salaried employees, the total of all compensation and benefits received. Given the remedial purpose of the statute – to eliminate pay gaps based on gender and race – it is likely that courts will construe the statute broadly in favor of employees and against employers.

If an asset purchaser intends to offer employment to some or all of the seller's employees in Colorado, and the purchase agreement requires disclosure of compensation and benefit information regarding specific employees, the purchaser would appear to be "seeking" the "wage rate history" of "a prospective employee." And that would violate the statute, exposing the purchaser to liability for the compensation differential, double damages, attorney fees and costs.

The solution? In jurisdictions that ban salary history inquiries, asset purchasers should consider requiring the seller to disclose compensation and benefit information only on an aggregated or anonymized basis. Otherwise, along with the assets, the purchaser could be buying a lawsuit.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers review their employee policies. If you or your organization would like more information on any state-specific laws or any other employment issue, please contact an attorney in the Employment and Labor practice group.

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