

Federal Court Partially Enjoins Philadelphia's Ban on Salary History Inquiries

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OVERVIEW

On April 30, 2018, a federal district court in Pennsylvania issued a preliminary injunction against the City of Philadelphia, preventing the City from implementing the portion of its [Wage Equity Law](#) that prohibits employers from asking job applicants about their salary history (the "Inquiry Provision"). The court found that banning such inquiries likely violated employers' free speech rights under the First Amendment. At the same time, however, the court refused to enjoin the provision of the law that bars employers from relying on wage history information in determining the salary that they offer prospective employees (the "Reliance Provision").

The ruling in the case, [The Chamber of Commerce for Greater Philadelphia v. City of Philadelphia](#), applies only to the Philadelphia law and does not affect any of the similar bans on salary history inquiries that have recently been enacted in other jurisdictions. Moreover, as we discuss below, the ruling may not provide much relief to Philadelphia employers with respect to the use of salary history in employment decisions.

THE DETAILS

Philadelphia's Wage Equity Law

The intent of the law, a 2017 amendment to the Philadelphia Fair Practices Ordinance, was to address the longstanding wage gap between men's salaries and those paid to women. The City believed that because, historically, women and minorities received lower wages, an employer's practice of inquiring into and relying on a job applicant's salary history information when making compensation decisions perpetuated pay inequity. Accordingly, the City decided to ban these practices.

Specifically, the Inquiry Provision of the law prohibits employers from:

- (1) inquiring, orally or in writing, about a prospective employee's wage history;
- (2) requiring disclosure of wage history; or

- (3) conditioning employment or consideration for an interview or employment on disclosure of wage history.

Under the Reliance Provision of the statute, employers may not rely on the wage history of a prospective employee in determining the wages for that candidate “at any stage in the employment process,” including “the negotiation or drafting of any employment contract,” unless the applicant “knowingly and willingly” discloses his or her wage history to the employer.¹

The Ruling on the Inquiry Provision

Siding with the Chamber of Commerce, which was joined in the lawsuit by a number of prominent local businesses, the court concluded that the Inquiry Provision of the law was “commercial” speech and, as such, was protected by the First Amendment. This finding, however, was not the end of the court’s analysis. The court further decided that since commercial speech is entitled to less protection than other types of speech, and because the City had a substantial interest in remedying the problem of pay inequity, the City could prevail if it established that “the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” Specifically, the City needed to convince the court that (1) the wage gap was in fact the result of discrimination, and (2) banning salary history inquiries would help close the pay gap.

Though the court expressed sympathy for the law’s objective, it found the City’s arguments on these points unpersuasive. Stressing that inquiries into salary history could have lawful purposes (such as gathering market data or identifying applicants the employer can afford), the court concluded that the City had failed to provide sufficient evidence connecting its objective (reducing pay inequity) to the prohibited activity (asking about prior compensation). As the court explained:

Not one witness pointed to any study, data, statistics, report, or any other evidence to support the proposition that initially depressed wages reflect discrimination. And, none of the testimony addressed why asking about wage history necessarily results in the perpetuation of an initial discriminatory wage. Moreover, no witness cited to evidence that prior wage history inquiry contributes to a discriminatory wage gap.

Holding that the Inquiry Provision “does not directly advance the substantial governmental interests of reducing discriminatory wage disparities and promoting wage equity,” the court preliminarily enjoined the City from implementing the Inquiry Provision of the law.²

¹ The law contains an exception for those situations where a federal, state, or local law specifically authorizes the disclosure or verification of wage history for employment purposes. For a more detailed discussion of the Wage Equity Law, see the Epstein Becker Green *Act Now* Advisory titled “[Philadelphia Joins Trend of Jurisdictions Prohibiting Inquiries on Wage History.](#)”

² A preliminary injunction is a form of temporary relief and is granted when a court concludes that, among other things, the party seeking such relief is ultimately likely to prevail on the merits, i.e., the Chamber of Commerce will prevail on its First Amendment claim.

The Ruling on the Reliance Provision

The Chamber of Commerce argued that the Reliance Provision also encroached on employers' free speech rights. Here, however, the court disagreed, ruling that an employer's reliance on salary history in making compensation decisions involves *conduct*, rather than speech. Thus, the employers did not have a First Amendment basis on which to challenge the Reliance Provision, and the court refused to enjoin the City from implementing it. As such, while employers may inquire into an applicant's salary history, they may *not* rely on that information to determine what salary they will offer the applicant.

What Employers Should Do Now

- Both the Chamber of Commerce and the City of Philadelphia [reportedly](#) are considering their options, and it is possible that one or both parties will appeal the district court's ruling to the U.S. Court of Appeals for the Third Circuit. Philadelphia employers should keep abreast of any developments in this case.
- In the meantime, as we noted earlier, the decision does not provide Philadelphia employers with the full relief they were seeking. On the one hand, they may inquire (at least for now) about an applicant's salary history, but on the other hand, they may not rely on such information in making compensation decisions. Thus, as the law now stands, it is unclear that there is any value in making salary history inquiries, notwithstanding an employer's right to do so. In fact, there may well be a risk in asking job applicants about salary history in light of the fact that the court upheld the Reliance Provision. An employer's possession of such information could be used as evidence of wage discrimination, similar to how an employer's knowledge of an applicant's age or religion may support a claim of age or religious bias.
- Employers in other localities that have banned salary history inquiries (e.g., California, Delaware, New York City, Oregon, and Westchester County, NY) also have an interest in monitoring developments in this case, as well as any such legal challenges that may be initiated in their own jurisdictions. As of now, they should abide by all applicable salary history inquiry bans.

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