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Labor and Employment Alert: Philadelphia Salary Inquiry Ban Upheld by Third Circuit

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CLIENT ALERT | 2.6.2020

In 2017, Philadelphia became the first city to prohibit private employers from inquiring about a job applicant's wage history and from relying on an applicant's wage history in setting his or her salary. Since then, approximately 17 states and 20 cities have enacted similar bans. Philadelphia's ban, however, was embroiled in litigation since its enactment.

The Chamber of Commerce of Greater Philadelphia sued the city arguing that the inquiry and reliance provisions violated the First Amendment's free speech clause. In 2018, a federal district court upheld the ordinance's prohibition on employers relying upon wage history, but held that the prohibition on employers inquiring about wage history was unconstitutional. On February 6, 2020, the Third Circuit Court of Appeals reversed the district court and held that the prohibition on salary inquiries was constitutional.

The Philadelphia ordinance makes it an unlawful employment practice for an employer or employment agency to "inquire" about or "rely" upon an applicant's wage history. Thus, employers may not:

- Inquire about an applicant's wage history, require disclosure of wage history, or condition employment or consideration for an interview or employment on disclosing wage history. "Inquire" means asking a job applicant in writing or otherwise; "wages" means all earnings of an employee (by time, task, piece, commission, or other method of calculation) and includes fringe benefits, wage supplements, or other compensation.
- Rely on the wage history of an applicant from any current or former employer of the individual in determining his or her wages at any stage in the employment process, including the negotiation or drafting of any employment contract, unless such applicant knowingly and willingly disclosed his or her wage history.
- Retaliate against an applicant employee for exercising his or her rights under the ordinance.

However, the ordinance does not apply to any actions taken by an employer or employment agency under any federal, state, or local law that specifically authorizes the disclosure or verification of wage history for employment purposes.

Given the Third Circuit's ruling, the full ordinance is now effective. Given this, employers in Philadelphia should review their hiring policies and practices (including their paper and online applications) to ensure that they comply with both of these prohibitions. Contact your Vorys lawyer if you have questions about salary history bans or other pre-employment inquiries.