

Mixed Results for Employers in Legal Challenge to Philadelphia's Salary History Ban Ordinance

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The City of Philadelphia was the first city in the United States to enact an ordinance barring employers from making inquiries into applicants' salary history in the hiring process. The Chamber of Commerce of Greater Philadelphia sued for a preliminary injunction to prohibit enforcement. The Chamber argued, among other things, that the ordinance violated the First Amendment of the United States Constitution because it forbade employers from asking questions on a specific topic. The city agreed to stay enforcement of the new ordinance while the motion challenging the ordinance was pending.

The court issued an order on April 30, 2018 denying the Chamber's motion for preliminary injunction, in part, and granting it in part. The court denied the Chamber's motion to the extent that it challenged the portion of the ordinance that provides that employers may not rely on the wage history of a prospective employee in determining the individual's wages (the "Reliance Provision"). Under the Reliance Provision, it is unlawful for an employer "to rely on the wage history of a prospective employee from any current or former employer of the individual in determining the wages for such individual 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 to the employer, employment agency, employee or agent thereof." Accordingly, the court's ruling upholds the ordinance's prohibition on using an applicant's wage history to determine the wage rate.

On the other hand, the court granted the Chamber's motion to enjoin the city from implementing the portion of the ordinance that makes it unlawful to inquire about an applicant's wage history. That portion of the ordinance, the "Inquiry Provision," would have made it unlawful "to inquire about a prospective employer's wage history, require disclosure of wage history, or condition employment or consideration for an interview or employment on disclosure of wage history, or retaliate against a prospective employee for failing to comply with any wage history inquiry or for otherwise opposing any act made unlawful by this Chapter." Thus, the portion of the ordinance that forbids employers from asking applicants about their wage history cannot be enforced. The court based its injunction on the First Amendment of the United States Constitution.

Philadelphia employers can take some comfort in the fact that wage history inquiries in the hiring process are not unlawful. Nevertheless, it is unlawful to *rely* on an applicant's wage history in setting the wage rate. Employers will be hard pressed to come up with a legitimate reason for asking an applicant his or her wage history, given that the employer is barred from using this information. Thus, as a practical matter, the court's ruling means that even though employers are not prohibited from asking about an applicant's wage history, they would be prudent not to do so.

It remains to be seen if this ruling will be appealed. We will provide updates as events unfold.

If you have questions or would like additional information, please contact Tanya Salgado (salgadot@whiteandwilliams.com; 215.864.6368) or another member of our Labor and Employment Group.

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