

Philadelphia Salary History Ordinance Upheld by Court of Appeals

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On Thursday, February 6, 2020, the Third Circuit Court of Appeals issued an order upholding Philadelphia's Salary History Ordinance (the Ordinance). Philadelphia was an early adopter of legislation prohibiting inquiries into an applicant's salary history. The stated purpose of the Ordinance is to address and rectify persistent disparities in the pay of women and minorities. The Ordinance contains two components – (1) the "Reliance Provision," which prohibits employers from relying on wage history of prospective employees in determining wages; and (2) the "Inquiry Provision," which makes it unlawful to inquire about a prospective employee's wage history.

Enforcement of the Ordinance was stayed, pending legal action taken by the Greater Philadelphia Chamber of Commerce (the Chamber) challenging the Ordinance as unconstitutional. The Chamber alleged that the Reliance and Inquiry Provisions infringed on the freedom of speech of the Chamber and its members. The district court granted the Chamber of Commerce's motion for a preliminary injunction, ruling that the Ordinance was unconstitutional to the extent that it prohibited employers from making inquiries about applicants' wage history. The district court upheld the Ordinance's Reliance Provision.

Both the City of Philadelphia and the Chamber appealed the district court's ruling. The Third Circuit's order affirmed the district court's denial of a preliminary injunction as to the Reliance Provision and vacated the district court's grant of a preliminary injunction as to the Inquiry Provision. The Third Circuit ruled that the district court erred in holding that the Inquiry Provision was unconstitutional. While the Inquiry Provision clearly regulates speech by preventing employers from asking applicants specific questions, nevertheless, the Ordinance passes the intermediate scrutiny test applicable to commercial speech.

The Third Circuit also held that the City of Philadelphia has a substantial interest in closing the wage gap, and the Ordinance directly "advances the Government's interest in a direct and material way." In this regard, the court noted that the city:

"...made a well-reasoned judgment based on the testimony presented to it and the unrefuted existence of the wage gap that banning wage history inquires would prevent further perpetuation of gender and race discrimination in this context"

The court ruled that the Inquiry Provision is narrowly tailored as it only prohibits employers from inquiring about a single topic (salary history) while leaving employers "free to ask a wide range of other questions, including qualifications, work history, skills and any other job-related questions relevant to performance or fit with the company."

Now that the preliminary injunction barring enforcement of the Inquiry Provision has been vacated, employers should proceed to comply with the Ordinance. We recommend that Philadelphia employers take the following steps:

1. Review employment applications to ensure they do not contain questions regarding applicants' salary history;
2. Train hiring managers, along with any managers involved in interviewing applicants, to refrain from asking applicants about their salary history; and
3. Establish alternative methods for setting salaries, such as those referenced by the Third Circuit: qualifications, work history, skills and job-related questions. Salary market data is another useful tool that employers may use to establish salaries.

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The Ordinance applies to employers who do business in the City of Philadelphia through employees, when considering applicants for positions located within the city. The Chamber's constitutional challenge to the Ordinance has been closely watched within other jurisdictions. It remains to be seen whether the court's ruling will embolden other states and localities to pass similar laws.

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

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