

One Minute Memo®



Update: Lawsuit Challenging Philadelphia Salary History Ban Ordinance Dismissed

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Seyfarth Synopsis: UPDATE: The United States District Court for the Eastern District of Pennsylvania dismissed the challenge to the Philadelphia ordinance on May 30, 2017 based upon the Chamber of Commerce for Greater Philadelphia's alleged failure to show it has standing to bring the lawsuit (i.e., it did not allege that a member actually makes inquiries or relies on wage history, not does it identify who will suffer specific harm as a result of the ordinance). The Chamber of Commerce has until Tuesday, June 13, 2017 to file an amended complaint, with the effective date of the ordinance remaining on hold. Stay tuned for further developments.

Following Philadelphia's passage of a pay equity Ordinance that prohibits inquiries into salary history (on which we previously reported [here](#)), businesses are challenging the Ordinance. The law was slated to go into effect on May 23, 2017, but on April 6, 2017, the Chamber of Commerce for Greater Philadelphia (the "Chamber") filed a federal lawsuit seeking to enjoin the law on numerous grounds discussed below. On April 19, 2017, the United States District Court for the Eastern District of Pennsylvania entered a stipulated order that stays the effective date of the new law until resolution of the motion for preliminary injunction.

The Chamber of Commerce for Greater Philadelphia v. City of Philadelphia and Pennsylvania Human Relations Commission, No. 17-01548 (E.D. Pa. April 6, 2017) was filed against the City and the city's Commission on Human Relations, alleging the law violates the First Amendment, the Due Process Clause of the Fourteenth Amendment, the Commerce Clause, Pennsylvania's First Class City Home Rule Act, and the state's Constitution. The challenge to the Ordinance casts doubt on its intended effect, which is to lessen the wage gap between men and women. The complaint details the burden on businesses and the relative low impact which the Chamber expects the law to have on the gender pay disparity. In fact, the Chamber claims that the Ordinance will reduce hiring within Philadelphia overall, rather than ameliorating the wage gap.

The Philadelphia Ordinance makes it unlawful for an employer or employment agency to inquire about or require disclosure of an applicant's wage history, condition employment on such a disclosure, rely on prior wages in determining the wages for that individual at any point in the hiring process (absent the applicant's "knowing and willing" disclosure), or retaliate against an applicant for refusing to provide his or her wage history to a prospective employer.

First Amendment Challenge

According to the Chamber, the Ordinance unconstitutionally limits employers' ability to inquire about or rely on an applicant's wage history, and seeks to prevent employers from communicating to employees the importance which prior salary has on employers' decisions. The complaint points out that the Ordinance does not contemplate applicants such as a high-level executive who must

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be lured away from his or her current employer, or a partner in a law firm with the “lock step” compensation structure. The Chamber contends these are examples of situations where an inquiry into and reliance on wage history “could not possibly perpetuate wage disparities caused by gender discrimination.” Further, the complaint alleges that the Ordinance is “substantially underinclusive” because employers are permitted to rely on wage history information which is disclosed “knowingly and willingly” by applicants, even if, for example, these individuals were in fact subject to gender discrimination. At bottom, the complaint alleges that the law is unconstitutional because it could have achieved its objectives through other means “more directly targeted at the problem of gender discrimination and that would have restricted far less employer speech.”

The Ordinance’s Reach Extends Outside Philadelphia’s Borders

Further, the Chamber argues that the Ordinance violates the Due Process Clause of the Fourteenth Amendment. In particular, the Chamber alleges that the language in the Ordinance which permits employers to rely on an applicant’s wage history if it is “knowingly and willingly disclosed” is impermissibly vague. The Chamber additionally alleges that the Ordinance applies beyond Philadelphia, and even Pennsylvania’s borders, since out-of-state employers may also be subject to the law if they “do business” in Philadelphia. Therefore, the Chamber contends, the Ordinance violates the Commerce Clause, since it “penalizes speech occurring wholly outside the boundaries of Pennsylvania.”

The Chamber finally alleges that the extraterritorial reach of the Ordinance violates the Pennsylvania Constitution and the Home Rule Act, which together prohibit a city from exercising its power with respect to individuals who do not live or work in the City.

The Commonwealth’s Legislative Efforts

The Pennsylvania Senate passed a [Bill](#) in February that would amend the Commonwealth’s Equal Pay Act and which would not prohibit employers from inquiring into prospective employee’s wage histories. Significantly, the Bill contains a preemption clause which provides that “[t]he provisions of this act shall preempt and supersede any local ordinance or rule concerning the subject matter of this Act.” If enacted, this preemption language also would sound the death knell to the Ordinance.

What Does This Mean for Employers?

Bans on inquiries into past wages are springing up across the country—including in [New York City](#), [Massachusetts](#), and perhaps soon in San Francisco.

Even where inquiries into prior wages are legal, allegations of disparate employment decisions which were based on an applicant’s prior salary may be problematic for employers. While prior salary may be useful for employers who are looking to hire a specific type of candidate, such as a high-level executive, due to state and local laws prohibiting such inquiries, there is a potential risk involved in relying on this information. We will continue to track this lawsuit as it moves through the courts.

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