

One Minute Memo®



The Baton Passes Back to the East Coast: Prior Salary Ban Passed in Delaware and Philadelphia Law Suit Challenging Prior Salary Ban Back On

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Seyfarth Synopsis: There have been two big updates on the prior salary front. First, Delaware joins the growing number of states and local jurisdictions with its enactment of a law preventing employers from requesting salary history of job applicants. The law will take effect in December 2017. Second, the Chamber of Commerce for Greater Philadelphia revived its constitutional challenge to Philadelphia's pay equity ordinance. The United States District Court for the Eastern District of Pennsylvania had previously concluded that the Chamber could not pursue a suit seeking to block the ordinance because the Chamber, in the court's eyes, did not allege that it or any of its member companies would suffer specific harm if the ordinance went into effect. In response, the Chamber has filed an amended complaint, alleging that the ordinance would interfere with the employee hiring by both the Chamber itself and by a number of its members. The ordinance remains on hold. Stay tuned for further developments.

Delaware Passes Prior Salary Ban

Last week, Delaware's Governor, John Carney, signed into law [legislation](#) that will prevent employers from requesting the salary history of job applicants. Similar bans have been passed in [New York City](#), [Massachusetts](#), [Philadelphia \(under challenge\)](#), Puerto Rico, and earlier this month, [Oregon](#). The law will go into effect in December 2017, right on the heels of New York City's law, which goes into effect this Halloween.

The Delaware law will make it an unlawful employment practices for an employer or an employer's agent to "seek" the compensation history from an applicant or the applicant's current or former employer. As with laws in other jurisdictions, employers are still permitted to ask about salary expectations and, as they are in some jurisdictions, employers are permitted to confirm compensation history after an offer of employment with terms of compensation has been extended to the applicant and accepted.

The Delaware law will also make it illegal to screen applicants based on their compensation histories (i.e., to disposition a candidate because their prior salary was either too high or too low).

One novel approach taken by the Delaware law is that it provides a safe harbor for actions taken by the employer's agent. If the employer can demonstrate that the employer's agent was informed of the requirements of the Delaware law, and instructed to comply, then the employer is not liable for actions taken by an agent in violation of this section. Therefore, employers may wish to consider revising their contracts with staffing agencies and recruiting companies to include terms obligating the staffing or recruiting company to comply with the requirements of the Delaware law.

The civil penalties for violations of the Delaware law are between \$1,000 and \$5,000 for the first offense, and between \$5,000 and \$10,000 for each subsequent violation.

Revival of Lawsuit Challenging Philadelphia Salary History Ban Ordinance

In other pay equity news, the lawsuit challenging the Philadelphia salary history inquiry ban has been revived following its dismissal earlier this month.

The City of Philadelphia passed an Ordinance that prohibits inquiries into salary history. The Ordinance was slated to go into effect on May 23, 2017, as we have previously reported [here](#).

On April 6, 2017, the Chamber of Commerce for Greater Philadelphia (the "Chamber") [filed a federal lawsuit seeking to enjoin the law](#). On April 19, 2017, the United States District Court for the Eastern District of Pennsylvania entered a stipulated order that stayed the effective date of the new law until resolution of the motion for preliminary injunction. On May 30, 2017, the court dismissed the Chamber's complaint with prejudice, finding that Supreme Court and Third Circuit precedent "require the identification of a member who has suffered or will suffer harm in cases brought by an association on behalf of its members," but granting the Chamber the ability to file an Amended complaint.

Last week, the Chamber [filed an amended complaint](#) and moved for [another preliminary injunction](#). The City's opposition to the motion is due August 4, 2017. In the amended complaint and the new motion for preliminary injunction, the Chamber claims that the Chamber has legal standing because both the Chamber itself and a number of its member companies will be harmed by the Ordinance.

We will continue to track this lawsuit as it moves through the courts.

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