



You Can Ask About It, But You Can't Rely Upon It: Finally, a Resolution to the Constitutionality of Philadelphia's Wage Equity Ordinance Seeking to Ban the Misuse of Salary History Information

Insights

5.11.18

According to the late great Tom Petty, “the waiting is the hardest part.” The United States District Court for the Eastern District of Pennsylvania (the “Court”), however, begs to differ with The Heartbreakers’ leading man. After waiting for over a year to receive a decision from the aforementioned Court with respect to the constitutionality of Pennsylvania’s Wage Equity Ordinance (the “Ordinance”), employers are left with more questions than answers.^[1]

In short, the Court boiled down the Ordinance to two relevant parts: (1) prohibiting employers from asking a prospective employee about his or her salary history (the “Inquiry Provision”); and (2) prohibiting employers from relying on a prospective employee’s wage history, at any stage in the employment process, to determine that person’s salary (the “Reliance Provision”). The Court ruled that the Inquiry Provision violates the First Amendment’s free speech clause because it implicates speech. Conversely, the Court ruled that the Reliance Provision is *not* unconstitutional because it does *not* implicate speech.

Pursuant to the Court’s ruling, therefore, when it comes to a prospective employee’s salary history, a Philadelphia employer can ask about it, *but*, may not do anything with that information.

This decision, of course, forces employers to ask *themselves* a new set of questions – do we even *want* to ask this question now? If we do ask the question, why are we asking it? What possible use can we have for this information outside of setting salary levels (which is *expressly prohibited* by the Ordinance)? Additionally, it should be noted that, from the time the Ordinance was signed into law (January 23, 2017) and the time it was ruled upon by the Court (April 30, 2018), several state and local governments passed and/or enacted similar bans on wage history inquiries. Thus, employers with operations in both Philadelphia and beyond must ask themselves if they should just scrap the salary-history-question altogether.

In its opinion, the Court notes several examples of *lawful* uses of salary history information, including for the purpose of gathering market information or identifying applicants whom an employer can and cannot afford. But, again, employers must weigh the reward of having this information against the potential risks of misusing it or creating the perception of misuse.

As always, if you have any questions regarding how the Ordinance could affect your business, or regarding best practices in light of the Court's ruling on the Ordinance, please consult your Fisher Phillips attorney.

[1] On December 8, 2016, Philadelphia City Council passed Philadelphia Bill No. 16084 which was the Ordinance in its original iteration. The Ordinance was signed into law by Mayor Jim Kenney on January 23, 2017. It was to take effect on May 23, 2017. On April 6, 2017, The Chamber of Commerce for Greater Philadelphia filed a federal lawsuit challenging the Ordinance as unconstitutional in violation of businesses' First Amendment rights, and also sought a Preliminary Injunction enjoining enforcement of the Ordinance. Thereafter, the Court entered a stay as to enforcement of the Ordinance, and, after extensive briefing and oral argument on the matter, the Court issued its ruling on April 20, 2018.