Court Revives Philadelphia's Salary History Ban

Insights
2.06.20

A federal appeals court just resurrected the salary history ban that will now prevent Philadelphia employers from asking job applicants about how much they are paid or setting new salaries based on pay history. Thanks to today's 3rd Circuit Court of Appeals ruling, employers in Philadelphia must immediately alter their hiring practices and cease the practice of asking questions about compensation history on applications, in interviews, and at any stage during the hiring practice. You must also ensure that you do not use this forbidden information when setting new salary levels. What do employers need to know about today's ruling and how best to come into compliance?

New Law, Explained

Salary history bans are quickly becoming more commonplace across the country and Philadelphia was among the first with it attempted to enact such a ban three years ago, before it became the subject of a legal battle. These laws aim to reduce pay inequality among gender and racial lines by reducing the chance that unfair past pay practices can be perpetuated as employees move from employer to employer. With today's news, Philadelphia now joins the rank of at least 17 other states and 20 local jurisdictions that restrict the use of pay history.

The wage equity ordinance will now prohibit Philadelphia employers from taking any of the following steps:

1. inquiring about a prospective employee's wage history;
2. requiring disclosure of wage history;
3. conditioning employment or consideration for an interview on disclosure of wage history;
4. retaliating against a prospective employee for failing to comply with any wage history inquiry; and
5. relying on the wage history of a prospective employee in determining their wages unless they "knowingly and willingly" disclosed their wage history to the employer.

Brief History Of The Law

If all of this sounds familiar, it's because we warned you about this new law back when it was about to take effect in 2017. But before the effective date, the Chamber of Commerce for Greater Philadelphia launched a legal campaign and argued that the law would violate the free speech rights of businesses. A lower federal court agreed that the law should be put on ice while the case

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

was being litigated and blocked the portion of the law preventing employers from inquiring about pay history. However, the portion of the ordinance preventing employers from *using* the salary information remained.

Today, a three-judge panel on the 3rd Circuit Court of Appeals overturned the injunction that had blocked the inquiry rule from taking effect and resurrected the pay history ban in its entirety with immediate effect. The court conceded that the new law does act to limit employers' speech, but that is "only because that limitation prevents the tentacles of any past wage discrimination from attaching to an employee's subsequent salary." Therefore, the court concluded that the goal of pay equity outweighed any free speech rights that are now placed on employers.

What Should Employers Do?

The Chamber of Commerce's lawsuit against the new city law continues, and although there is a chance that the litigation could take another twist and the court could rule that the salary history ban is unconstitutional, or the U.S. Supreme Court could step in to review the matter, you should not rely on these possibilities. Instead, now is the time to adjust to the new business reality and revise your hiring practices.

You should carefully review your employment applications and hiring processes to ensure that they do not impermissibly inquire into, or rely upon, salary history information. In particular, job applications and new hire packets should be amended to remove any inquiries into prior salary history. You may want to consider replacing such questions with inquiries about salary expectations, making sure that information doesn't lead any hiring personnel into a conversation that could veer into illegal territory.

In addition, all staff involved in the hiring process should be trained about the law's new requirements. You will want to specifically cover with your hiring personnel how the new law impacts the types of inquiries and questions that are permissible and not permissible.

While it might be fairly easy to comply with the prohibition barring you from inquiring about wage history during the interview process, the prohibition against using wage history information in determining the amount of compensation to be offered to the candidate is a bit trickier to navigate. Under the new law, you may only use this information if the candidate "knowingly and willingly" disclosed the information to you. If, however, you came upon the wage history information by other means, you still cannot consider it. It will be important for you to document any voluntary disclosures clearly and contemporaneously in the event you are questioned about the situation at a later point.

We'll continue to monitor the litigation and the new law as it begins to take effect, so make sure you are signed up for our legal alert service to stay up to date. For more information about how this legislation will affect your workplace, contact any attorney in our Philadelphia office , your Fisher Phillips attorney, or any member of our Pay Equity Practice Group.

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

This alert provides an overview of a specific city law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

Copyright ©2020 Fisher Phillips LLP. All rights reserved.

Related People

Samantha Sherwood Bononno
Partner
610.230.2172
Email

Service Focus

Pay Equity

Counseling and Advice

Wage and Hour

Related Offices

Philadelphia

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.