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Philadelphia Bans Wage History Inquiries

JUNE 14, 2017 LEGAL UPDATE:

The Philadelphia Chamber of Commerce filed a lawsuit challenging the legality of the Philadelphia Ordinance banning employers from making wage history inquiries. Although the Court initially dismissed the legal challenge due to the Chamber's failure to specifically identify a member harmed by the Ordinance, on June 13, 2017 the Chamber filed an Amended Complaint seeking to cure this procedural defect by detailing the harm the Chamber and specifically identified members will sustain as a result of the Ordinance. The case is captioned *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).

New York City's salary inquiry ban will take effect on October 31, 2017, absent a successful legal challenge.

Effective May 23, 2017, the City of Philadelphia will prohibit employers from inquiring about applicant wage histories. The stated intent of the new ordinance (see http://www.stradley.com/~media/Files/Publications/2017/01/Bill_No_16084001_As_Amended.pdf) is to remedy the historical wage gap between men and women. Philadelphia is the first city in the United States to enact such a ban, with Massachusetts being the only other jurisdiction with a similar prohibition.

Specifically, the new Philadelphia ordinance bans employers and employment agencies from:

- asking a prospective employee, whether in writing or otherwise, about wage history (broadly defined as “all earnings of an employee, regardless of whether determined on a time, task, piece, commission or other method of calculation and including fringe benefits, wage supplements or other compensation whether payable by the employer from employer funds or from amounts withheld from the employee’s pay by the employer”);
- making employment or consideration for employment, or even consideration for an interview, conditional on a prospective employee’s disclosure of wage history;
- retaliating against a prospective employee for not providing wage-

history information or otherwise opposing conduct prohibited by the new law; and

- relying on the wage history of a prospective employee to determine wages at any stage in the employment process, unless the prospective employee “knowingly and willingly” discloses such history.

The new ordinance applies to “any person who does business in the City of Philadelphia through employees or who employs one or more employees exclusive of parents, spouse, Life Partner or children,” and employment agencies. It is possible that this broad definition will be interpreted to include not only businesses with an office in Philadelphia but also those based elsewhere that do business in the city through remote workers. The ordinance’s protections cover “any person considered for, or who requests to be considered for, employment by an employer.” The law makes a narrow exception for wage-history inquiries that an employer makes “pursuant to any federal, state or local law that specifically authorizes the disclosure or verification of wage history for employment purposes.”

Individuals may file complaints with the Philadelphia Commission on Human Relations if they believe the ordinance has been violated, and the Commission

may order compensatory damages, punitive damages, injunctive relief, attorneys’ fees and costs and, for willful violations, a fine of up to \$2,000 per violation and imprisonment of up to 90 days. Additionally, an employee also may file a lawsuit in court.

Educating employees about the new prohibition will be critical, given that wage history inquiries are generally considered a standard part of the hiring process. Employees must be instructed that the ordinance prohibits inquiries not only about prior salary but all other compensation, including but not limited to bonus terms, commission structure and fringe benefits. Other compliance actions include:

- revise job applications and other hiring materials to remove any items that ask applicants for wage history;
- revise interview policies or protocols to advise interviewers or other participants in the hiring process that questions about wage history are not allowed;
- train employees on interviewing and hiring practices to ensure their understanding of and compliance with the new law; and
- adjust interviewing techniques to gather

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other information about applicants' experience that may inform decision-making without regard to wage history.

The City Council's decision to make wage-history questions illegal has generated substantial controversy. Members of the Philadelphia business community, including Comcast and the Greater Philadelphia Chamber of Commerce, publicly voiced objections to the law and warned Mayor Kenney that the new ordinance would draw legal challenges if enacted. While it remains to be seen whether a formal legal challenge will be filed, employers should still act now

to prepare for the May 23, 2017 compliance deadline.

Philadelphia followed the lead of Massachusetts in enacting a wage-history ban, but similar bills are under consideration in other jurisdictions, including California, New York, New Jersey, and at the state level in Pennsylvania. In light of the recent flurry of legislative activity in this area, restrictions on inquiries into wage history (and laws addressing pay inequities in general) are likely here to stay. Prudent employers should assess their hiring and compensation practices to stay ahead of the curve. ■