

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2017

PHILADELPHIA, WEDNESDAY, MAY 9, 2018

VOL 257 • NO. 90

An **ALM** Publication

EMPLOYMENT LAW

Court Decision Enjoining Salary History Ordinance Leaves Employers in Limbo

BY SID STEINBERG

Special to the Legal

Laws prohibiting prospective employers from asking applicants about their prior wage history have been part of a growing trend across the country. Philadelphia joined that trend in late 2016 when the city council passed an ordinance prohibiting employers from inquiring about a prospective employee's wage history and making it illegal for an employer to rely on wage history at any stage in the employment process when setting the employee's salary.

Shortly after passage, the Chamber of Commerce for Greater Philadelphia, joined by a number of prominent local businesses, brought suit to enjoin implementation of the ordinance. In *Chamber of Commerce for Greater Philadelphia v. City of Philadelphia*, No. 17-1548, 2018 LEXIS 72758 (E.D. Pa. April 30, 2018), the court granted the chamber's motion for a preliminary injunction staying the implementation of the ordinance as it related to precluding employers from inquiring regarding an employee's prior salary history (referred to as the inquiry



SID STEINBERG is a principal and chair of Post & Schell's employment and employee relations and labor practice groups. Steinberg's practice involves virtually all aspects of employee relations, including litigation experience defending employers against employment discrimination in federal and state courts. He also represents employers before federal, state and local administrative agencies, and regularly advises employers in matters including employee discipline, labor relations, and the creation or revision of employee handbooks. He can be reached at ssteinberg@postschell.com.

provision). The court, however, refused to enjoin the prohibition against relying upon an employee's salary history in setting his or her future salary (the reliance provision). The decision, in effect, allows employers to inquire about an applicant's salary history but then prohibits them from doing anything with the information.

WAGE DISPARITY ACKNOWLEDGED

Initially, the court recognized that there is a significant historical wage disparity between men and women, "with women in Pennsylvania earning 79 cents for every dollar a man

earns and African-American women, in particular, earning 68 cents for every dollar a man earns." As a practical matter, the issue before the court was not whether a problem exists, but whether the ordinance appropriately targets the problem without violating the First Amendment.

FIRST AMENDMENT ANALYSIS

The court first addressed the inquiry provision finding that it constituted "commercial speech" as a matter of law. Under guidance from the U.S. Supreme Court, the court found that the inquiry "occurs in the context of a job application or job interview, both of which propose a commercial transaction with the purpose of reaching an agreement under which services will be exchanged for compensation."

Because "the state's interest in regulating commercial speech may give it a concomitant interest in the expression itself," such speech is generally subject to what is termed "intermediate scrutiny" under prevailing Supreme Court law: *Central Hudson Gas & Electric v. Public Services Commission of New York*, 447 U.S. 557 (1980). In this level of inquiry,

the court engages in a three-part inquiry. First, it determines whether the commercial speech concerns “lawful activity and is not ... misleading.” The court next looks at whether the asserted “governmental interest is substantial” and finally, whether the regulation “is not more extensive than is necessary to serve that interest.”

SUBSTANTIAL EVIDENCE IS KEY

The court easily answered the first two steps in the affirmative and advanced to the “central question” as to whether the inquiry provision “directly advances the city’s asserted interest.” It was the city’s burden to establish that “the harms it recites are real and that its restriction will in fact alleviate them to a material degree.” This step of the inquiry focuses on whether the legislature has “drawn reasonable inference based on substantial evidence.”

Again, the court acknowledged that gender-based wage disparities exist and that the city had a substantial interest in attempting to alleviate such disparity. The inquiry provision failed, however, because the court found that there was “no evidence ... referenced to support the premise that the inquiry provision would reduce that disparity.” To the contrary, while there was evidence taken from various professors and anecdotal evidence from employees as to the impact of pre-hiring wage inquiries, the court found that the city council failed to rely “upon sufficient evidence to conclude that the wage gap is a result of discrimination and that curtailing inquiry into allegedly discriminatory wage history will alleviate this gap. The court noted that “not one witness pointed to any study, data, statistics, report or any other evidence to support the proposition that

initially depressed wages reflect discrimination.” To the contrary, the “city council based its conclusion regarding the harm of ‘baked-in’ discriminatory wages on testimony that is more like an educated guess.” As such, the court found that “it is impossible to know whether the inquiry provision will directly advance the substantial interests of reducing discriminatory wage disparity and promoting wage equity.” The court, therefore, enjoined implementation of the prohibition against asking job applicants in the city of their salary history.

The court’s decision leaves employers within the city in a position where they are (at least for the moment) permitted to obtain salary history information from applicants but are prohibited from using the same.

RELIANCE PROVISION UPHELD

While the court postponed (at a minimum) enactment of the inquiry provision, it refused the enjoin that part of the ordinance making it unlawful for an employer to “rely on the wage history of a prospective employee ... in determining the wages for such individual at any stage in the employment process, including the negotiation or drafting of any employment contract.” Most importantly in its analysis, the court rejected the Chamber of Commerce’s argument that the provision implicated the First Amendment. In this regard, the

court found that the reliance provision “does not fit within the Supreme Court’s declaration that the creation and dissemination of information are speech.” The court also rejected the chamber’s argument that the ordinance’s reach was overly broad, as it found that the law applied only to jobs located within Philadelphia city limits.

PRACTICAL STATUS

The court’s decision leaves employers within the city in a position where they are (at least for the moment) permitted to obtain salary history information from applicants but are prohibited from using the same. The logical question becomes, then, of what practical value is the information? And a reasonable answer would be “none.” In fact, obtaining the information, even legally, could be evidence that a wage disparity was illegally based on such information. In that light, employers will likely be better served to never have the information to begin with. This harkens back to the practical utility of inquiring about certain protected characteristics during interviews. While an employer may be able to inquire, if the applicant is rejected, the question itself will be evidence of discriminatory intent. As such, it is almost always better not to know—and the same reasoning applies here. •