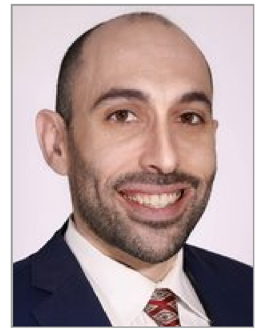
3 Hiring Hurdles Posed By Philly Salary History Ban

By **Brian Wallen and Jo Bennett** (March 10, 2020, 1:54 PM EDT)



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On Feb. 6, the U.S. Court of Appeals for the Third Circuit issued a long-awaited opinion in Greater Philadelphia Chamber of Commerce v. City of Philadelphia, regarding the enforceability of Philadelphia's Wage Equity Ordinance. The court overturned the injunction previously entered by the lower court, which had delayed implementation of the salary history inquiry provision.

Additionally, the court upheld the separate provision prohibiting employers from relying on an employee's salary history in setting compensation. The city of Philadelphia will begin to enforce the Wage Equity Ordinance in the near future. After several years of uncertainty, employers now know they must comply with the entirety of the ordinance and face the new regulatory environment for recruiting and hiring.

Background

In 2017, Philadelphia's City Council passed one of the first wage equity bills in the country under the rationale that "salary offers should be based upon the job responsibilities of the position sought and not based upon the prior wages earned by the applicant." City Council believed that employers who based salaries on prior wages earned were perpetuating wage discrimination by prior employers.

This practice, in their view, depressed wages of female and minority employees. City Council hoped to address this issue by: (1) prohibiting employers from relying on wage history in setting salary for prospective employees (absent knowing and willing disclosure of salary history by an applicant); and (2) barring inquiries about someone's salary history at any time during the preemployment process. These provisions are the reliance provision and inquiry provision, respectively.

After City Council passed the ordinance, the Greater Philadelphia Chamber of Commerce filed a lawsuit in federal court against the City of Philadelphia challenging the ordinance's constitutionality. The Chamber of Commerce also requested an injunction to prevent enforcement of the ordinance.

The Chamber of Commerce alleged that the entire ordinance restricted employers' free speech. The district court partially granted the injunction by directing the city not to enforce the inquiry provision, but the court upheld the reliance provision.

Each party appealed the decision to the Third Circuit, which has now ruled that the salary history ban can be enforced as written. Although the lawsuit is technically still pending and there is a remote chance of appeal, this decision resolved all questions regarding the enforceability of the ordinance.

Compliance Issues Under the Ordinance

Since the Wage Equity Ordinance has been upheld, compliance is crucial for employers filling positions in Philadelphia. Violating the ordinance is costly, as aggrieved individuals may pursue remedies through the Philadelphia Commission on Human Relations.

The ordinance provides for a $2,000 fine per violation. Publicity about allegations may also affect employee morale, or cause recruiting difficulties and harm to business reputation.

Since the reliance provision has been enforceable since 2017, employers should ensure that they have removed references to salary history from applications and prehire paperwork. Employers could consider basing compensation decisions on the value of the knowledge, skills and abilities needed to perform the relevant job.

Employers may look at similar positions in the enterprise for comparable salary or perform research as to the market wage rate for specific positions. Given the penalties of the ordinance, a conservative approach may be advisable, even though it involves some guesswork.

New Challenges for Hiring

Given that the inquiry provision is now enforceable, many employers have questioned how to efficiently recruit employees without using salary history. The main concerns include: (1) the inability to properly budget for vacancies given the lack of real-time salary data; (2) mismatched salary expectations between employers and applicants; and (3) an inability to measure a prospective employee's prior performance without data demonstrating salary progression in a prior job.

1. Setting a Budget for Vacancies

Without salary histories, employers may have no real-time wage data, thus making it difficult to set budgets for vacancies prior to conducting interviews. Employers traditionally adjust budgets during the recruiting process as they receive real-time salary history for applicants. This practice allows employers to accurately identify salary ranges for specific vacancies.

Since salary history is no longer usable, employers must now budget for positions using other means. One resource, requiring an additional investment, is use of a third-party compensation consultant to conduct salary surveys of similar positions to determine a market wage rate.

Of course, not every employer has resources to spend on outside consultants. As an alternative, the U.S. Bureau of Labor Statistics houses large data sets regarding median compensation for specific occupations and industries in certain locations. The Bureau of Labor Statistics also measures annual compensation increases by percentage.

This data can allow employers to make their own estimates for salary budgeting. While this data is imperfect, it can serve as a real-world, low-cost solution in appropriate situations.

Alternatively, businesses could consider using publicly accessible prevailing wage data as published by states and municipalities. Prevailing wage rates are often calculated to be competitive in the local economy. The downside of this option is that prevailing wage rates cover a limited number of occupations and industries.

Although the outlined approaches have limitations, it is worth noting that asking job applicants about salary history can also result in inaccuracies. And seeking to improve accuracy by asking for a prospective applicant's wage statements or W-2 was always a risky practice.

2. Making Salary Offers

Prohibiting salary history inquiries may place employers at a knowledge disadvantage. Employers may not know about a mismatch between their salary plans and an applicant's expectations until engaging in post-offer negotiations.

There is a simple approach to address this concern. The ordinance does not restrict employers from continuing to ask applicants about salary expectations.

Salary expectations specifically refer to future salary and not salary history. If an employer were especially worried that asking this question could create liability under the ordinance, a cautionary advisement to applicants directing them not to disclose salary history would be appropriate.

Employers can also include the position's salary range in job announcements. Similarly, on digital or paper applications, employers could offer the range of salaries an interested candidate could select from. Below is an example for a position where the budgeted salary is $15 per hour:

What is your desired hourly salary?

- $10.00 - $12.49
- $12.50 - $14.99
- $15.00 - $17.49

In advertising ranges to candidates, employers are dictating the ranges acceptable to them prior to discussing employment with an applicant. If a range does not garner enough applicants within a certain amount of time, employers can revise the advertised range.

An added benefit to this approach is employer transparency, a quality valued by applicants. Prospects applying for a position with an advertised salary range are explicitly stating that they are interested in the job within that range. There is less ambiguity going into negotiations as the employer and candidate have similar expectations.

3. Assessing Past Performance

Employers may find it challenging to assess someone's qualifications without reviewing their salary history. Many employers believe prior salaries, bonuses and raises are a referendum on employee performance.

Employers can often attain similar information by asking applicants to provide references from a current or prior job, including a contact number so that employers can speak to an individual. Such verification is not always possible, especially with new entrants to the workforce who may have just completed their education or for prior employers who have gone out of business.

In lieu of references, an employer may request academic transcripts. If transcripts are not accessible, employers can ask for an applicant's most recent performance review from the current employer.

Employers can also design the interview process to more effectively measure an applicant's skills and abilities. For example, a retailer may ask applicants how they would deal with difficult patrons or the volume of sales a cashier applicant previously handled.

A landscaper could ask detailed questions about an applicant's ability to plant sod, mow grass or use heavy machinery. These various methods can potentially be as effective at measuring someone's past performance as the use of salary history.

Conclusion

Further appeals in this case may be unlikely. Thus, employers should take heed of Philadelphia's ban on salary history usage, but alternative approaches to hiring can help to ensure this ordinance will not derail the recruitment process.

Employers' goals have always been and always will be to hire the most qualified applicants at an appropriate wage rate. Although salary history prohibitions may be here to stay in Philadelphia and are being implemented in other jurisdictions nationwide, employers can still achieve the goals previously accomplished with salary history via alternative lawful strategies. As the ordinance is fully implemented and employers develop new hiring procedures, input from employment and legal specialists may help to avoid costly mistakes.

As employment counsel in Philadelphia, we understand that some employers may feel that this ordinance presents another regulatory hurdle. Clients have asked questions about why the ordinance was not written to provide more flexibility. It remains to be seen how aggressively Philadelphia enforces the ban.

However, most employers have always recognized the value added by paying employees a fair wage for their skills and abilities. Businesses will strive to meet their obligations under this ordinance and minimize any unintended negative impact to their recruiting needs and their balance sheets. It is in everyone’s interest for the new rules to be implemented in ways that enhance the overall business climate in Philadelphia.

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