
Philadelphia Employers Can No Longer Ask About an Applicant's Salary History

By Amy C. Lachowicz / Dec 13, 2016

"How much were you paid at your last job?" This question, often a staple in employment applications, soon will be prohibited in Philadelphia. On December 8, 2016, the Philadelphia City Council unanimously passed legislation that bans Philadelphia employers from asking about an applicant's salary history at any stage in the hiring process.

The proposed ordinance, which Mayor Kenney is expected to sign, not only prohibits employers from asking about or relying on an applicant's salary history in the hiring process, but also bars employers from performing independent research to find the salary history for an applicant. There are some exceptions, including situations when an applicant chooses to divulge his or her prior wages, and when action is taken by an employer pursuant to any Federal, State or Local law that authorizes the disclosure or verification of wage history for employment purposes.

This legislation is part of an emerging trend aimed at decreasing the wage gap between women and minorities, and their white male colleagues. Studies have shown that income inequality persists between women and minorities, and their white male co-workers. For example, according to the proposed ordinance, for every dollar earned by white men in Pennsylvania, women are paid 79 cents, African-American women are paid 68 cents, Latinas are paid 56 cents and Asian women are paid 81 cents. Supporters of the legislation cite to the importance of evaluating a candidate based on their qualifications and the job responsibilities of the position sought, and not based upon prior wages or salary history.

Massachusetts was the first state to pass a law barring employers from requiring a prospective employee's wage history in August 2016, and similar legislation is being considered state-wide in Pennsylvania, as well as in New Jersey. However, the Philadelphia ordinance is significantly narrower than the Massachusetts law for several reasons.

Initially, unlike the Massachusetts law, the Philadelphia law does not prohibit "pay secrecy policies," which are policies prohibiting employees from asking about or discussing information about their own wages or the wages of their co-workers. However, such policies do violate the National Labor Relations Act according to a number of recent decisions from the National Labor Relations Board. Full disclosure of salaries certainly would encourage employers to pay women and minorities on the same scale as their male counterparts.

Second, the Massachusetts law goes a step further than the Federal Equal Pay Act (which requires employers to pay men and women with the same qualifications, the same for doing the same job) by requiring employers to pay men and women the same amount for doing different but *comparable* jobs. The Philadelphia ordinance does not contain a similar provision. Whether City Council proposes additional legislation to address these issues remains to be seen.

The Philadelphia Human Relations Commission will enforce the ordinance, and the penalties for violations are stiff. The Commission may issue a cease and desist order, provide injunctive relief, order payment of compensatory damages and attorneys' fees, as well as punitive damages up to \$2,000 per violation. Complainants will have the right to file a private action in Court if the Commission does not issue a remedy after one year.

The law will take effect within 120 days after it is signed by Mayor Kenney. Therefore, Philadelphia employers will need to remove any questions regarding salary history on job applications, and advise their hiring team of the prohibition on asking questions related to prior wages. The ordinance also requires employers to post any fair practices notice prepared and made available by the Philadelphia Human Relations Commission.

Employers who have a multi-jurisdictional presence undoubtedly will face challenges in applying this law. For example, there is a significant risk that an employer could be viewed as treating two candidates for the same position unequally if, in the context of a position with a salary range, a non-Philadelphia office is permitted to rely upon an applicant's wage history in setting the salary for a particular position, whereas the Philadelphia office is not permitted to rely upon an applicant's wage history in setting the salary for the same position.

If you have any questions about this legislation, please contact Amy C. Lachowicz at (215) 640-8504 | alachowicz@clarkhill.com, or another member of Clark Hill's Labor and Employment Practice Group.