

Insight

IN-DEPTH DISCUSSION

OCTOBER 24, 2016

The Philadelphia Wage Equity Bill Will Ban Employers From Asking Prospective Employees About Their Past Wages and Fringe Benefits

BY DENISE MAHER AND MARTHA KEON

On December 8, 2016, the Philadelphia City Council passed a Wage Equity Bill that prohibits employers from asking about a prospective employee's wage and fringe benefits history.¹ The Bill has been publicly supported by Philadelphia Mayor Jim Kenney's Office, but has not yet been signed into law. If signed, the Bill will become effective 120 days later.

The Wage Equity Bill is intended to narrow the wage gap between men and women. The City Council cited a 2015 U.S. Census Bureau statistic that women are paid 79 cents for every dollar a man makes, and that the number is even lower for women of color. The City Council noted that federal legislation has done little to remedy this disparity, which has narrowed by less than one-half a cent per year since Congress passed the Equal Pay Act in 1963. As has become the trend in recent years, states and localities are taking matters into their own hands. In passing the Bill, the City Council recognized the Massachusetts law banning discussion of salary history that was enacted earlier this year.

In support of the Wage Equity Bill, the City Council found that allowing employers to ask about a prospective employee's wage history perpetuates the existing wage gap between men and women because, if known, an individual's wage history is considered when setting compensation for the position. In the City Council's view, compensation should be set based on the job responsibilities of the position at issue, and not based on the prior wages earned by the applicant.

Coverage

The Wage Equity Bill would add Section 9-1131 to the City's Fair Practices Ordinance, directly after a section added earlier this year regarding unlawful credit screening practices in employment. The Bill protects

¹ City of Philadelphia Bill No. 160840.

prospective employees and applicants, defined in the Fair Practice Ordinance as "any person considered for, or who requests to be considered for, employment by an employer."

The Bill applies to employers and employment agencies, defined in the Fair Practices Ordinance as including private and public employers of all sizes and their employees and agents:

- **Employer:** "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, including any public agency or authority; any agency, authority or other instrumentality of the Commonwealth; and the City, its departments, boards and commissions."
- **Employment Agency:** "any person regularly undertaking with or without compensation to procure opportunities to work or to procure, recruit, refer or place employees."

This broad definition of "Employer" requires only "doing business in Philadelphia," either through employees or employing one or more employee (excluding family members) and public entities and agencies. Given the jurisdictional reach of the Philadelphia Human Relations Commission, this definition will likely be interpreted as reaching employers seeking to hire prospective employees to work at a physical or remote location within the City of Philadelphia.

Prohibited Conduct

The Bill makes it an unlawful employment practice for an employer, employment agency or their employees and agents to:

- Require disclosure of or inquire about (by asking in writing or otherwise) a prospective employee's wage history;
- Condition employment or consideration for an interview or employment on disclosure of wage history;
- Retaliate against a prospective employee for failing to comply with any wage history inquiry or for otherwise opposing any act made unlawful by this chapter; or
- Rely on the wage history of a prospective employee from any current or former employer of the individual in determining the wages for such individual at any stage in the employment process, including the negotiation or drafting of any employment contract, *unless such applicant knowingly and willingly disclosed his or her wage history to the employer, employment agency, employee or agent thereof.*

Thus, while an employer cannot ask or otherwise require disclosure of wage and fringe benefits history, if an applicant "knowingly and willingly" discloses the information, the employer may consider it when setting compensation. Exactly what "knowingly and willingly" means in this context is not defined in the Bill. There is also a safe harbor for any action taken by an employer or employment agency or their employee or agents "pursuant to any federal, state or local law that specifically authorizes the disclosure or verification of wage history for employment purposes."

"Wages" is defined broadly and includes fringe benefits: "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.*"

Posting Requirement

The Bill requires employers to post and exhibit prominently in all places of business in the City of Philadelphia any fair practices notices prepared and made available by the Commission, which the

Commission has designated for posting. We can expect the City to provide a poster on its website if the Bill is signed into law.

Enforcement

The Philadelphia Human Relations Commission (“Commission”) will be tasked with administration and enforcement. Complaints may be initiated with the Commission by filing of a written, verified complaint within 300 days of the alleged violation. The respondent then must file an answer. If the parties are not interested in mediation, the Commission will generally investigate and come to a conclusion, either dismissing the complaint or finding probable cause, which will lead to request to engage in conciliation. In the event that conciliation fails, the Commission may conduct a public hearing and then issue a decision and order, which is subject to appeal in court.

There is also a private right of action. An aggrieved party has the right to file a complaint in the Philadelphia County Court of Common Pleas either after (1) the complaint has been pending with the Commission for one year, or (2) within two years from the date on which the Commission closes the case.

The remedies and penalties for violation of the duties set forth in the Wage Equity Bill are those available under the Fair Practices Ordinance, including compensatory damages, punitive damages, injunctive relief, reasonable attorney’s fees, and payment of hearing costs. Penalties for repeat and/or willful violations include a fine of up to \$2,000 per violation and in extreme cases, imprisonment of up to 90 days.

Practical Implications

If the Wage Equity Bill is signed into law, employers should consider the following:

- Keep in mind that the Bill prohibits asking about, or requiring disclosure of, fringe benefits as well as wages.
- While employers may not ask about, or require disclosure of, past wages and fringe benefits, applicants can “knowingly and willingly” volunteer this information. Employers should consider providing a written disclosure of rights under the Wage Equity Bill with the application, on application portals, or in the application process in order to prove that any applicant’s disclosure was made willingly with knowledge of the applicant’s rights.
- Plan to comply with the Bill’s posting requirements once the posters appear on the City’s webpage. For employers with employees working remotely in Philadelphia, consider adding the content of the poster to an employee handbook supplement, providing it electronically and/or providing a paper copy.
- The Bill will require revisions to applications and employee handbook and policy manuals relating to verification of employment, reference checks and anti-retaliation policies to ensure that prospective employees are not encouraged or required to provide past wage and benefits information, and that such information is not acquired accidentally or from a source other than the applicant.
- Management, staff and third-party providers handling recruiting and verification of employment should be informed of and trained on the new requirements. Forms used in these processes should be revised as necessary.
- The Bill will also require employers to train all those involved in the recruiting, interview and compensation setting process not to inquire about prospective employees’ past wages or fringe benefits, and to avoid conversation that may cause a prospective applicant to believe that he or she must disclose it to be considered for employment.

- Employers can still ask what an employee is looking for in terms of wages or benefits, but the issue should be carefully approached and ideally, preceded by a disclosure of the provisions of the Wage Equity Bill, to ensure that any past wage or fringe benefits information provided was disclosed knowingly and willingly.
- The Bill may cause employers to rely more on other sources of market data on wage rates and fringe benefits packages.

Littler will continue to monitor the Bill and provide updates on its expected enactment.