

# Business Group Challenges Constitutionality of Philadelphia Wage History Ordinance

By Stephanie J. Peet and Timothy M. McCarthy

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The Chamber of Commerce for Greater Philadelphia is challenging the constitutionality of Philadelphia's Wage History Ordinance in the U.S. District Court for the Eastern District of Pennsylvania. It also seeks a preliminary injunction of the Ordinance, which is scheduled to take effect on May 23, 2017.

The Ordinance prohibits employers in Philadelphia from inquiring about the wage history of prospective employees. It was passed unanimously by the Philadelphia City Council in December and signed into law by Mayor Jim Kenney on January 23. (For more on the Ordinance, see our article, [Philadelphia to Restrict Wage History in Hiring Decisions](#), and blog post, [Philadelphia Mayor Signs into Law Legislation to Ban Inquiries into Wage History](#).)

The Ordinance makes it an unlawful employment practice "for an employer, employment agency, or employee or agent thereof" to "inquire about a prospective employee's wage history, require disclosure of wage history, or condition employment or consideration for an interview or employment on disclosure of wage history."

It also includes an anti-retaliation provision, prohibiting employers from taking adverse action against an applicant or employee who does not comply with a wage history inquiry.

Employers who fail to comply with the Ordinance can be subject to a private court action once administrative remedies are exhausted. Employers found in violation of the Ordinance would face compensatory and punitive damages, attorneys' fees, court costs, injunctive relief, and administrative penalties. In addition, employers with repeat, willful violations could face jail time that includes up to 90 days' imprisonment.

## The Lawsuit

The Chamber argues the Ordinance suppresses the free speech rights of employers in violation of the First Amendment to the United States Constitution. *The Chamber of Commerce for Greater Philadelphia v. City of Philadelphia and Philadelphia Commission on Human Relations*, No. 17-01548 (E.D. Pa. filed Apr. 6, 2017).

The Chamber contends the Ordinance only "indirectly" addresses the gender wage-gap, the legislation's prohibitions are not narrowly tailored to achieve its overall goal, and there is no substantial basis for restricting speech. The lawsuit further alleges the employer penalty provisions, which allow punitive damages, fines, and jail time, violate the Due Process Clause of the Fourteenth Amendment.

In addition, the Chamber takes issue with the geographic reach of the Ordinance, which ostensibly applies to any employer doing business in Philadelphia. The Chamber argues generally that because the Ordinance regulates activity that may occur outside of Philadelphia, it violates the U.S. Constitution's Commerce Clause, the Pennsylvania Constitution, and the Pennsylvania Home Rule Act. Along with its Complaint, the Chamber filed a motion for a preliminary injunction seeking to postpone the effective date of the Wage History Ordinance pending the outcome of the litigation.

## Implications for Employers

Other localities to have passed laws banning inquiries into salary history include Massachusetts, Puerto Rico, and New York City. (See our articles, [Massachusetts Governor Signs Tough Pay Equity Bill](#), [Puerto Rico Enacts Equal Pay Law, Prohibits Employers from Inquiring about Past Salary History](#), and [New York City Council Approves Legislation Limiting Prospective Employers' Ability to Obtain and Use Salary History Information](#).) How the court decides in the case against the Ordinance likely will be watched closely.

Meanwhile, employers with operations in Philadelphia should continue to prepare for the new obligations and potential penalties by reviewing their policies and practices to ensure compliance by the May 23 effective date.

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