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FEDERAL DISTRICT COURT ENJOINS PHILADELPHIA ORDINANCE PROHIBITING EMPLOYERS FROM ASKING APPLICANTS ABOUT THEIR WAGE HISTORY

To Our Clients and Friends:

On April 30, 2018, a federal judge in the Eastern District of Pennsylvania preliminarily enjoined enforcement of a Philadelphia Ordinance prohibiting employers from asking applicants about their wage history.^[1] Although over a dozen states and localities have recently enacted similar wage-history laws, this is the first court decision to rule on whether such laws violate employers' First Amendment rights.

Aimed at reducing the wage gap between men and women, the Ordinance imposes two prohibitions on Philadelphia employers: It prohibits employers from inquiring about an applicant's wage history and from relying on wage history to make a salary determination unless that history was knowingly and willingly disclosed by the applicant.^[2]

In a 59-page opinion, the District Court concluded that the plaintiff—the Chamber of Commerce for Greater Philadelphia, represented by Gibson Dunn—was entitled to a preliminary injunction prohibiting enforcement of the Ordinance's inquiry provision. The Court determined that the Chamber was likely to prevail on the merits of its First Amendment challenge for two reasons. First, the Court held that wage-history inquiries do not concern unlawful activity under the first prong of the *Central Hudson* test for restrictions of commercial speech.^[3] "[W]hile using wage history to formulate salaries is made illegal" by the Ordinance, the Court reasoned, "other uses of wage history are not illegal."^[4] The Court concluded that the City's contrary position "would stand *Central Hudson* on its head."^[5]

Second, the District Court held that the City had failed to show that the Ordinance "directly advances" a substantial government interest, as required under the third *Central Hudson* prong.^[6] Although the City had asserted a substantial interest in reducing discriminatory wage disparities, the Court ruled that the City's evidence was "riddled with conclusory statements, amounting to 'various tidbits' and 'educated guesses.'"^[7] "[M]ore is needed," the Court emphasized.^[8] Without substantial evidence "that inquiry into salary history results in lower salaries for women and minorities," it is "impossible to know whether the Inquiry Provision will directly advance the [City's] substantial interests."^[9]

The District Court also concluded that the other requirements for a preliminary injunction had been met. The Court explained that the Chamber had demonstrated irreparable harm by "alleg[ing] a real and actual deprivation of its and its members' First Amendment rights through declarations," and that "the City cannot claim a legitimate interest in enforcing an unconstitutional law."^[10]

The District Court did uphold the Ordinance's provision prohibiting employers from relying on an applicant's salary history in making a salary determination unless that history is knowingly and willingly disclosed.^[11] The Court reasoned that reliance on wage history is not speech for First Amendment purposes.^[12] Nonetheless, the Court's decision preliminarily enjoining the Ordinance's inquiry provision will enable employers to use wage-history information to ascertain prevailing market wages and to identify potentially unaffordable applicants at the outset of the hiring process. The decision may also prompt employers to mount a First Amendment challenge to similar wage-history laws in other jurisdictions.

[1] *Chamber of Commerce for Greater Phila. v. City of Philadelphia*, No. 17-1548, slip op. at 54 (E.D. Pa. Apr. 30, 2018).

[2] Phila. Code §§ 9-1131(2)(a)(i)–(ii).

[3] *Chamber of Commerce for Greater Phila.*, No. 17-1548, slip op. at 12 (discussing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)).

[4] *Id.* at 14.

[5] *Id.* at 15.

[6] *Cent. Hudson*, 447 U.S. at 566.

[7] *Chamber of Commerce for Greater Phila.*, No. 17-1548, slip op. at 30.

[8] *Id.*

[9] *Id.* at 30, 33–34.

[10] *Id.* at 46.

[11] *See* Phila. Code § 9-1131(2)(a)(ii).

[12] *Chamber of Commerce for Greater Phila.*, No. 17-1548, slip op. at 40.

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