

## Third Circuit Upholds Philadelphia Wage History Ordinance

On February 6, 2020, the U.S. Court of Appeals for the Third Circuit upheld a City of Philadelphia ordinance that prohibits employers from inquiring after and/or relying upon a prospective employee's wage history in any aspect of hiring (the ordinance). See *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, \_\_\_ F.3d \_\_\_, 2020 WL 579733 (3d Cir. Feb. 6, 2020).

The Philadelphia ordinance was first enacted in 2017, in response to the undeniable wage gap that exists between female and male employees. Although Philadelphia was the first city in the United States to enact such legislation, it has spent the three years since litigating the constitutionality of the ordinance. During that time, a number of states and municipalities passed similar laws. As of this writing, there are 17 state-wide bans related to employer inquiries about or use of an applicant's wage history. Some laws, such as Alabama's, prohibit employers from discriminating against applicants based upon wage history (see AL ST § 25-1-30, et seq.), while others, such as California's, prohibit employers from inquiring after and from using wage history in the hiring process (see Cal. Labor § 432.3).

The Philadelphia ordinance has essentially two parts: (1) an Inquiry Provision, which prohibits employers from asking a prospective employee about his/her wage history; and (2) a Reliance Provision, which prohibits employers from relying upon a prospective employee's wage history in any aspect of the hiring process (including, but not limited to, setting/negotiating initial salary). See Phila. Code. § 9-1131.

The Philadelphia Chamber of Commerce (the Chamber), on its own behalf and on behalf of its members, sought to enjoin the ordinance, arguing that it constituted an unconstitutional infringement on free speech. The U.S. District Court for the Eastern District of Pennsylvania (the District Court) partially enjoined the ordinance, holding that the Inquiry Provision violated the Chamber's members' First Amendment right to free speech. However, the District Court decided that the Reliance Provision did not implicate the First Amendment and was, therefore, a constitutional exercise by the municipality to address a matter of public concern. Both sides appealed, and now the Third Circuit has upheld the District Court's decision regarding the Reliance Provision (i.e., agreeing that the Reliance Provision did not implicate a free speech right under the First Amendment and was, therefore, constitutional), while reversing the District Court's decision regarding the Inquiry Provision.

During legislative debate and again at the District Court, the City of Philadelphia presented voluminous evidence regarding the existence of a gender pay gap, and the Chamber did not offer any evidence to refute the City's position in this regard. Specifically, the City showed that, according to the 2015 U.S. Census, overall, female employees in Pennsylvania earned \$.79 for every \$1.00 earned by similarly situated male employees. The evidence presented by the City showed that this pay gap was even wider for female minority employees, with African-American female employees earning \$.68 on the dollar and Latina employees earning just \$.56 on the dollar, when compared to similarly situated male employees. As the Third Circuit noted, the Chamber did not contest this evidence but, rather, while admitting that the pay gap exists, the Chamber argued that the City did not sufficiently show that the ordinance would be successful in closing the gap.

In reviewing the ordinance, both the District Court and the Third Circuit Court rather quickly dispatched with the Reliance Provision — both courts agreed that the provision does not implicate free speech and, as such, does not violate the First Amendment. Any injunctive relief blocking the Reliance Provision was therefore denied and the ordinance upheld. However, with regard to the Inquiry Provision, the courts reached opposite results. The District Court did not believe that the City produced sufficient evidence to establish that the Inquiry Provision would advance the



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municipal interest of mitigating racial and gender-based pay gaps, and thus granted the injunction with regard to the Inquiry Provision. The Circuit Court disagreed.

On appeal, the City argued that the ordinance implicated commercial speech and that, as such, intermediate scrutiny should apply. The Chamber argued that, even if the speech implicated by the ordinance was commercial speech, strict scrutiny should apply because the ordinance restricts the content and the speaker.

In reversing the District Court's holding regarding the Inquiry Provision, the Third Circuit determined that the speech implicated thereby is, indeed, "commercial speech" — i.e., "expression related solely to the economic interests of the speaker and its audience" — and, as such, that it deserved intermediate-level scrutiny, applying the First Amendment test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980). See *Greater Philadelphia Chamber of Commerce*, 2020 WL 579733, at \*13.

The Third Circuit reasoned that, while it may be appropriate to apply strict scrutiny to certain commercial speech restrictions where those restrictions are view-point based, that is not what was intended, nor accomplished, by the ordinance. In accordance with the test set forth in *Central Hudson* (and applied by the court to the ordinance), commercial speech is constitutional if it (a) concerns a lawful activity and is not misleading, (b) if the court determines that there is a substantial governmental interest in the restriction, (c) if the restriction directly advances the interest, and (d) if the restriction is more restrictive than necessary to serve interests. With regard to the District Court's conclusion that the City had not sufficiently proved that the ordinance would mitigate a pay gap, the Circuit Court held that the test set forth in *Central Hudson* allows speech restrictions based only on history, consensus, and common sense. *Id.*, at 43. The record in this case had ample support to meet this test.

The Third Circuit held that the ordinance indeed pertained to lawful activity and was not misleading, and that there was a substantial governmental interest (i.e., closing the gender pay gap) in the restriction. The court noted that, the final prong of *Central Hudson* is not a "least restrictive means" test, but that rather the proper standard requires a "reasonable fit between the legislature's ends and the means chosen to accomplish those ends." *Id.* The court determined that the City had drawn a reasonable inference between its information regarding the gender pay gap and the ordinance to support its constitutionality as commercial speech. On this basis, the Third Circuit partially reversed the District Court, restoring the ordinance to its full force and effect.

The City of Philadelphia has not yet announced when the ordinance will become effective and the Chamber, for its part, appears to be considering further appeal.

With a growing number of states and municipalities passing similar laws, employers — particularly those operating in multiple locations — should be sure to check the applicable state/local law for restrictions on their ability to inquire or use an applicant's wage history information in the hiring process.

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