

111 West 19th Street
5th Floor
New York, NY 10003



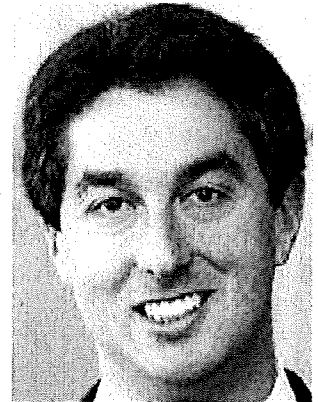
[Follow us on Twitter](#)

Philly Sets Stage For More Local Workplace Legislation

By Jonathan Krause, Klehr Harrison Harvey Branzburg LLP

Law360, New York (December 19, 2016, 11:43 AM EST) --

On Dec. 8, 2016, the Philadelphia City Council became the first legislative body of a major city to pass an ordinance prohibiting all employers from asking prospective employees about their wage history during the application process and prohibiting retaliation against candidates who refuse to disclose this information. The ordinance, supported by Philadelphia Mayor Jim Kenney and anticipated to be signed into law shortly by the mayor, is significant both for the requirements it imposes upon employers in Philadelphia and as a harbinger of future pay equity and workplace legislation taking place at a local level.



Jonathan S. Krause

The Philadelphia Ordinance

The ordinance itself is a first-in-the-nation effort by a large municipal legislature to address pay equity. Specifically, Philadelphia's City Council unanimously amended the Philadelphia Fair Practices Ordinance to prohibit employers from asking applicants about wage history, condition employment on wage history disclosure or retaliate against candidates for failing to disclose their wage history. Further, unless the applicant knowingly and willfully discloses wage history, the ordinance makes it unlawful for an employer to rely on a prospective employee's wage history in determining wages at any stage of the employment process.

Unlike some municipal ordinances which have carveouts for small businesses or are limited only to private sector employers, "employer" is defined broadly to include "[a]ny 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."

The agency tasked with enforcing this ordinance is the Philadelphia Commission on Human Relations (PCHR), which is the municipal equal employment opportunity agency that has a similar function to the U.S. Equal Employment Opportunity Commission or state agencies like the Pennsylvania Human Relations Commission. A candidate who believes a company has violated the ordinance can file a complaint with the PCHR within 300 days of the alleged violation. If the PCHR fails to resolve the complaint within one year of filing, the individual can initiate a private cause of action in court. The ordinance authorizes redress of violations through injunctive and equitable relief, compensatory damages, punitive damages and reasonable attorney fees. The ordinance will go into effect 120 days after it is signed by the mayor.

Philadelphia's City Council passed the ordinance to address concerns related to pay equity.

The ordinance's preamble explains the council's views that "basing wages upon a worker's wage at a previous job only serves to perpetuate gender wage inequalities." As "women are paid on average lower wages than men," the council concluded that prohibiting past wage information could serve as an effective tool to mitigate wage inequality. The council further concluded that compensation issues should be based on the position for which the candidate was applying, rather than the candidate's past wages.

Takeaways

In taking this step, Philadelphia followed the lead of Massachusetts and California, which have already passed similar legislation regarding the use of wage history. Indeed, the Philadelphia City Council specifically acknowledged the Massachusetts Equal Pay Act as a model for its actions. Similar legislation is being considered by other municipalities and states, primarily on the East Coast.

To comply with the ordinance, Philadelphia employers should: (1) revise application forms that provide for the identification of wage history; (2) communicate with any third-party recruiters that wage history should no longer be sought; (3) revise policies that speak to the use of wage history in setting pay; and (4) train those involved in hiring decisions not to inquire into wage history. Employers also should use this opportunity to evaluate the factors used to determine initial pay given the spotlight on pay equity issues and activity in that space by legislatures, administrative agencies and plaintiffs in private actions.

Broader Implications

The Philadelphia City Council's actions follow a broader trend of local governments passing workplace legislation that is unlikely or more difficult to enact at the federal or state levels. Other examples of local government activism include Portland, Oregon's, surtax on companies whose chief executives earn more than 100 times the median pay of employees, Charlotte, North Carolina's, LGBT nondiscrimination ordinance (which ended up being overridden by the North Carolina Legislature's controversial HB2), and various municipalities' acts to increase minimum wage beyond state and federal rates and/or require mandatory paid sick leave for covered employees. In these and other examples, local governments took workplace-related action that the state legislature would not prioritize or went further than could be expected at the state level.

Companies should expect increased local government action on workforce issues that are typically perceived as being pro-worker. City-based governments and voters tend to be more democratic and willing to take up issues such as pay equity, minimum wage, background checks, anti-discrimination protections and enhanced leave benefits. Particularly after the most recent election which will leave Republicans in control of both the White House and Congress, as well as 32 state legislatures, companies should expect pro-worker activists and organizations to focus more on the local government level where they stand a greater chance of getting legislation enacted.

This likely increase in local government action will require companies, particularly those with national operations such as retailers, restaurants and financial services, to monitor closely government action in the municipalities where they have employees or risk not being in compliance with applicable law. Companies will also be forced to consider whether local-based requirements should be applied company-wide or if they should have different practices and procedures based on geographic location. Companies may conclude that administrative convenience and competitive advantage support consistent treatment of employees and candidates across its locations, or decide that some local requirements are

so onerous or are outliers that do not warrant implementation beyond the legally required population. Suffice it to say, Philadelphia's wage history ordinance will not be the last of its kind and companies will need to stay aware of local developments where they maintain employees.

Jonathan S. Krause is a partner in the labor and employment and litigation practice groups at Klehr Harrison Harvey Branzburg LLP, resident in the Philadelphia and Cherry Hill, New Jersey, offices. Krause concentrates his practice in representing clients on restrictive covenant, wage and hour, anti-discrimination and leave issues, both in litigation and counseling.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.