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Salary History or Minimum Salary Questions Will Land Employers in Hot Water

What if an interviewer asks “are you married?” or “is this your maiden name?” or “do you prefer Mrs. or Ms.?” If the interview is taking place for a job in Philadelphia, each of those questions would be impermissible under the Fair Practices Ordinance.

By **Jeffrey Campolongo,** | February 20, 2020 at 11:07 AM

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Implicit bias has a way of working itself into even the most mundane things. Take, for example, job interviews. It's fairly common knowledge at this point that in a job interview, an employer may not ask an applicant's age, or if he has a disability, or what country the person is from. These prohibitions are finite and easier to enforce. But what if an interviewer asks "are you married?" or "is this your maiden name?" or "do you prefer Mrs. or Ms.?" Each one of these questions could be code for eliciting the applicant's marital status. If the interview is taking place for a job in Philadelphia, each of those questions would be impermissible under the Fair Practices Ordinance. (Philadelphia Code Section 9-1100).

When it comes to gender bias, woman have long faced interview questions about marriage, children, pregnancy, day care and a myriad of other questions angling toward information about the applicant's "availability" and "suitability" for work. Sometimes the subtle way in which the questions are asked would leave some to let their guard down and offer an answer. One common trap is for the interviewer to lead with information about himself. "Oh, I'm so sorry for starting our meeting a little later than planned. I was on the phone with my daughter's day care and she is sick again. Ugh. Do you have any kids of your own? It just seems like it's impossible to avoid getting sick from these little germ-mongers." The natural inclination is for the applicant to join in and respond with "well yes, I have a toddler in day care too and she's just getting over the flu" and so it goes.

Why does the information matter? Isn't it safe to assume that many folks have kids? Why is it so bad to kibitz about kids while trying to break the ice? Well, the short answer is, because you just opened the door to implicit bias. Now that Mr. Hiring Partner knows you have a young child, he can move on to the applicant who does not have kids, or won't constantly be late, or need time off or call out sick, etc. This is exactly how gender bias creeps into the hiring process.

Fortunately, the city of Philadelphia has enacted an ordinance designed to combat another form of gender bias—salary history. In 2017, the city of Philadelphia enacted its version of a wage equity ordinance to address the disparity in the pay of women and minorities that is often called the "pay gap." The ordinance contains two provisions: the "inquiry provision," which prohibits an employer from asking about a prospective employee's wage history, and the "reliance provision," which prohibits an employer from relying on wage history at any point in the process of setting or negotiating a prospective employee's wage. I **first wrote about the law back in 2016 (https://www.law.com/thelegalintelligencer/almID/1202775422400/businesses-will-no-longer-be-able-to-ask-applicants-about-prior-salary/)**.

Once the law went into effect, it was immediately challenged by the Greater Philadelphia Chamber of Commerce alleging that both provisions of the ordinance infringe on the freedom of speech of the Chamber and its members. While the Chamber conceded that the pay gap exists, and that the City has a substantial governmental interest in addressing it, the Chamber argued that the City passed the ordinance "with only the barest of legislative records" and, therefore, did not present sufficient evidence to establish that the ordinance would satisfy the city's objective.

The district court agreed that one of the law's two components, the "inquiry provision," violated First Amendment rights and granted a preliminary injunction blocking the provision. The court allowed the "reliance provision" to stand. On appeal, the U.S. Court of Appeals for the Third Circuit upheld the district court's approval of the reliance provision, but vacated the inquiry provision injunction. The appeals court said the district court applied a higher standard than was required in its analysis, and that the City had presented sufficient evidence to support the ordinance. See *Greater Philadelphia Chamber of Commerce v. Philadelphia,* Nos. 18-2175 & 18-2176 (3d Cir. Feb. 6, 2020)).

The *Greater Philadelphia Chamber of Commerce* case was very closely watched throughout the nation. So much so that the Chamber hired high-profile appellate lawyer, Miguel Estrada, of Gibson Dunn & Crutcher, to argue the case to the Third Circuit. Clearly, big businesses were going all in to defeat the ordinance knowing that its breadth, if valid, could be substantial.

Many states and municipalities have passed similar laws banning employers from asking about salary history. The laws, mostly aimed at women, are premised on the idea that women are paid less from the start, saddling the female applicant with her lower paying salary at every new job. Thus, making it impossible for her to catch up. There are currently 17 statewide salary history bans (including Puerto Rico), 20 local bans and two laws prohibiting bans.

Here in Pennsylvania, Gov. Tom Wolf signed an executive order on June 6, 2018, (Equal Pay for Employees of the Commonwealth, Number: 2018-18-03) prohibiting state agencies from asking about a job applicant's current compensation or compensation history at any stage during the hiring process. Applicants are not prevented from volunteering information about their current compensation level or salary history in negotiating a salary; however, no agency can request that an applicant disclose current salary or salary history information. In addition, applicants can refuse to disclose current compensation level and/or history without negative repercussions by the agency in its employment decisions. Further, all job postings must clearly disclose a position's pay scale and pay range.

At the beginning of this year, a new law in New Jersey (A.B. 1094) went into effect banning employers from screening applicants based on their pay history. Private employers may not require that an applicant's prior wages, salaries or benefits meet minimum or maximum criteria. If an applicant voluntarily, without employer prompting or coercion, discloses pay history, an employer may verify the applicant's pay history and may also consider pay history in determining the applicant's salary, benefits and other compensation. After an offer of employment that includes an explanation of the overall compensation package has been made to the applicant, an employer may request the applicant provide the employer a written authorization to confirm pay history. New Jersey previously had an Executive Order signed by Gov. Phil Murphy that prohibited state agencies and offices from asking job applicants for their compensation history, or investigating the prior salaries of applicants.

In the first state, Delaware passed its own version of the salary ban in 2017 (H.B. 1). All employers are prohibited from screening applicants based on past compensation and from asking about salary history. They may, however, confirm that information after an offer is extended. Unlike other salary history laws, Delaware's law does not specifically prohibit employers from setting compensation based on prior salary history, if the job applicants voluntarily disclose their prior compensation history.

States like California and New York go even further. In California, private and public employers are banned from seeking a candidate's pay history. Even if an employer already has that information or an applicant volunteers it, it still cannot be used in determining a new hire's pay. The law also requires employers to give applicants pay scale information if they request it. In New York employers are only allowed to confirm an applicant's salary if the applicant discloses it in order to negotiate higher wages. And if you are an employer in New York City, you have the additional prohibition on asking job applicants about their compensation history through all

stages of the employment process and you are prevented from using an applicant's salary history to set pay, even if the employer is already aware of an applicant's salary history.

Now that the Philadelphia wage equity ordinance has been upheld by the Third Circuit (assuming no further appeals to the U.S. Supreme Court), businesses would be wise to review their policies and procedures with hiring managers and human resources personnel to ensure that the forbidden questions are not being asked. The days of asking "how much did you make in your last job?" are a thing of the past.

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