

**IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA**

THE CHAMBER OF COMMERCE FOR
GREATER PHILADELPHIA, individually
And on behalf of its members,

Plaintiff,

v.

CITY OF PHILADELPHIA and
PHILADELPHIA COMMISSION ON
HUMAN RELATIONS,

Defendants.

Civil Action No. 17-1548

**BRIEF OF *AMICI CURIAE* THE AFRICAN-AMERICAN CHAMBER OF COMMERCE
OF PENNSYLVANIA, NEW JERSEY AND DELAWARE
AND THE LATINO COALITION IN SUPPORT OF
PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

Amici—representing African American, Latino and Hispanic-owned businesses across Philadelphia and the United States—strongly oppose the wage history Ordinance enacted by the City of Philadelphia. The Ordinance outlaws the long-standing and universally-accepted practice of inquiring about and relying on the wage history of prospective employees in hiring and making wage determinations. To be sure, ameliorating wage discrimination is a worthy goal, but the Ordinance is a misguided and ill-conceived means of attempting to achieve that goal. The Ordinance is not only illegal for all of the reasons advanced by the Chamber of Commerce for Greater Philadelphia, but the Ordinance will fail to achieve its stated goal and, at the same time, wreak havoc on the employers it regulates.

Amici oppose the Ordinance because it will have an especially pernicious impact on African American, Latino and Hispanic-owned businesses. The reality is that these businesses

are predominantly small businesses and many of them are upstarts that struggle to survive. While the Ordinance will have a substantial adverse impact on hiring at even large, sophisticated public corporations with labor forces in the tens of thousands, the adverse impact on small minority-owned businesses will be even greater. For example, these small businesses lack human resources or other management personnel who are devoted to hiring; lack consistent or reliable wage data for their own businesses and the market at large; and often hire to fill hybrid positions that require employees to wear multiple hats, thus making wage decisions all the more difficult. By outlawing inquiries into and reliance on wage history, the Ordinance will make it almost impossible for these small minority-owned businesses to determine a fair and appropriate market-based wage.

Amici also oppose the Ordinance because it threatens to subject small minority-owned businesses to potentially ruinous—even bankrupting—regulatory and criminal enforcement actions and civil suits. The Ordinance allows employers to rely on wage history that is “knowingly and willingly disclosed.” But this standard is so vague and imprecise that employers following the law could easily become ensnared in regulatory actions and civil suits. Small minority-owned businesses lack the financial and human resources to fight these actions and seek vindication. Indeed, the cost of defense or a small judgment could cripple or even bankrupt a small business.

And, finally, *Amici* oppose the Ordinance because of the harm it will inflict on minority communities. Minority-owned businesses are particularly community-based. The Ordinance creates a disincentive for a minority-owned business to locate in Philadelphia. This harms the minority community in two ways: first, by depriving the community of the goods and services

offered by the business and, second, by depriving the community of employment opportunities generated by the business.

While *Amici* support the goal of reducing wage discrimination, the Ordinance will do far more harm than good. Small minority-owned businesses face enormous challenges each and every day in their struggle for economic viability—the last thing they need is an Ordinance that deprives them of critical information in making wage determinations and threatens to ensnare them in a thicket of regulatory actions and civil litigation. For all of these reasons, *Amici* support the request for a preliminary injunction preventing the City of Philadelphia and the Philadelphia Commission on Human Relations from giving effect to or enforcing the Ordinance.

STATEMENT OF INTEREST

The African-American Chamber of Commerce of Pennsylvania, New Jersey and Delaware (the “AACC”) is the representative of a diverse group of African-American-owned businesses across Pennsylvania, New Jersey, and Delaware. The AACC was incorporated in 1993 in response to the legal challenges confronted and discrimination experienced by African-Americans in connection with contracting opportunities with the City of Philadelphia. The AACC was formed as a non-profit entity for the purpose of promoting the sound economic well-being and empowerment of African-American-owned businesses, the African-American business community, and the economic status of the African-American community in general through educational and other charitable means.

The AACC is the leading advocate for minority-owned businesses in the Delaware Valley and Southeastern Pennsylvania. Its purpose is to enhance the growth and effectiveness of African-American owned businesses in the Delaware Valley, and thereby, to improve the economic conditions within the regional African-American community. Its primary goal is to

further the interests of businesses by responding to the needs of the business community and serving as an advocate for the purpose of increasing economic opportunities for the African-American community. The AACC's membership spans a wide spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees, which become part of an extensive network enabling engagement with policy-makers and business leaders across the region, exposure to valuable marketing opportunities and participation in programming that helps grow businesses.

The Latino Coalition (the "Coalition") was founded in 1995 by a group of Hispanic business owners from across the country to research and develop policies relevant to Latinos in the United States. The Coalition addresses policy issues that directly affect the well-being of Hispanics in the United States, focusing on fostering economic equivalency and enhancing overall business, economic and social development of Latinos.

Amici have a strong interest in the wage history Ordinance, because *Amici*'s members do business in the City of Philadelphia and would be subject to the Ordinance. The Ordinance will substantially affect how *Amici*'s members conduct their businesses. Additionally, *Amici* strive to advance the economic interests of African-Americans, Latinos and Hispanics; when a law negatively affects African-American, Latino and Hispanic-owned businesses, it negatively affects their economic interests and the economic interests of these communities at large.

ARGUMENT

As demonstrated by Plaintiff and *Amici* the U.S. Chamber of Commerce, the Pennsylvania Chamber of Business and Industry, the Pennsylvania Manufacturers' Association, and the National Federation of Independent Business, the Ordinance unconstitutionally restricts speech, is overly broad, and would impose significant burdens on businesses of all sizes. *Amici*

here write to add how the Ordinance will impose significant burdens on and negatively affect minority-owned businesses.

Data on business ownership among different populations in the United States demonstrates that minority-owned businesses tend to be smaller and newer.¹ While it can by no means be said that all minority-owned businesses are small businesses,² the majority of them are. The effects of the Ordinance will be felt acutely by small businesses. The Ordinance will require small businesses to spend more time and money researching the salary and labor market for a position, prolonging and increasing the expense of the hiring process. These burdens of the Ordinance will disproportionately harm small, new, and minority-owned businesses.

I. Minority-owned businesses, which are increasing nationally and locally, tend to be smaller businesses.

Nationwide, the number of minority-owned businesses is quickly increasing and constitutes a significant share of the United States economy.³ As of 2012, minority-owned businesses represented 29% of businesses nationally, contributing \$1.38 trillion in revenue and

¹ Minority Business Ownership: Data from the 2012 Survey of Business Owners (Sept. 14, 2016), U.S. Small Business Administration Office of Advocacy, at 3, 8, *available at* <https://www.sba.gov/sites/default/files/advocacy/Minority-Owned-Businesses-in-the-US.pdf>.

² What qualifies as a small business depends on the industry in which the business operates. The U.S. Small Business Administration has developed size standards for what businesses can be considered a small business for Federal government programs. *See* U.S. Small Business Administration, Contracting, <https://www.sba.gov/contracting/getting-started-contractor/make-sure-you-meet-sba-size-standards/guide-size-standards>. Codified in the Code of Federal Regulations, these standards are based upon maximum annual receipts or number of employees. 13 C.F.R. § 121.201. For example, in the manufacturing sector, a business can have from 500 to 1,250 employees, depending on the sub-sector, and still be considered a small business. *Id.* A bakery is a small business if its receipts are under \$7.5 million. *Id.* Considering the average receipts and number of employees for minority-owned businesses, discussed *infra*, it is clear the vast majority would qualify as small businesses under Federal government standards.

³ Minority Business Ownership, *supra* n.1, at 1.

7.2 million jobs to the economy.⁴ Minority-owned businesses weathered the recent recession well, growing in number during the recession. While the United States economy lost a net of 1 million non-minority-owned businesses from 2007 to 2012, net 2 million minority-owned businesses were created during this same time.⁵

These minority-owned businesses, a vital and growing portion of the nation's economy, tend to be smaller and newer businesses. Data from the Survey of Business Owners, conducted by the U.S. Department of Commerce, shows that minority-owned businesses have fewer employees and smaller revenues. The average receipts, or revenue, of businesses with employees⁶ is \$5,990,509 for all businesses in the United States responding to the survey.⁷ However, the average revenue for minority-owned businesses is \$1,227,983.⁸ The average minority-owned business with employees employs fewer than eight people, while the average for all firms with employees is more than twenty-one.⁹

Minority-owned businesses also tend to be newer, or younger, businesses. This of course goes hand-in-hand with the increase in minority-owned businesses in recent years. When the number of minority-owned businesses increases, it stands to reason that many of these minority-owned businesses would be new businesses. Minority businesses are 41% more likely than non-

⁴ *Id.*

⁵ *Id.*

⁶ Data for businesses with employees excludes data for businesses that have no employees, where the business owner operates alone. While these businesses are vital to the economy and could in the future hire employees, they are best excluded when considering the scope of the Ordinance's effect on hiring practices.

⁷ Fact Sheet, U.S. Minority-Owned Firms, Minority Business Development Agency (Jan. 2016), *available at* https://www.mbda.gov/sites/mbda.gov/files/migrated/files-attachments/2012SBO_MBEFactSheet020216.pdf.

⁸ *Id.*

⁹ *Id.*

minority businesses to be less than five years old.¹⁰ While over 26% of non-minority-owned businesses are over twelve years old, only 13% of African-American, Asian and Hispanic-owned firms have been operating for that long.¹¹ The numbers for minority-owned businesses generally ring true for the business constituencies represented by *Amici*. African-American-owned businesses have average receipts of \$947,905, while Hispanic-owned businesses have average receipts of \$1,321,717.¹² African-American firms with employees employ, on average, nine employees while Hispanic firms employ eight.¹³ Because African-American and Hispanic-owned businesses tend to be smaller businesses, *Amici*'s members are more likely to feel the negative effects of the Ordinance.

II. The Ordinance will have a disproportionately negative effect on minority-owned businesses because it would impose more and unique monetary and resource burdens on hiring for small and new businesses.

Hiring often presents a challenge for small businesses. According to one survey, 50% of small businesses reported that hiring new employees was a top challenge facing their business in 2017.¹⁴ In another survey of small business owners, 32% reported that they do not have the time and resources to devote to finding the best candidates for their hiring needs.¹⁵

In barring inquiries about or reliance on wage history during the hiring process, the Ordinance would make it even more difficult and time-and-resource-consuming for small business owners to hire the best candidates for available positions. Small business owners may

¹⁰ Minority Business Ownership, *supra* n.1, at 8.

¹¹ *Id.*

¹² Fact Sheet, U.S. Minority-Owned Firms, *supra* n.7.

¹³ *Id.*

¹⁴ 2017 State of Small Business Report, Wasp Barcode Technologies, *available at* <http://www.waspbarcode.com/small-business-report>.

¹⁵ Wells Fargo survey: Small business optimism holds steady in second quarter (May 4, 2017), *available at* <https://wellsfargoworks.com/insights/press-release/small-business-optimism-holds-steady-in-second-quarter>.

not have hired for the position before (and therefore lack internal wage data) and be unable or unwilling to spend resources on external recruiters or costly wage data. They therefore are more likely to lack information about the labor market for a position before posting the position and gathering applicants. The suggestion made by the Executive Director of the Philadelphia Commission on Human Relations that employers should “set a base salary for the job before they start hiring,”¹⁶ may, in practice, be impossible or cost prohibitive for small business employers.

When a business is hiring for a new or previously unfilled position, setting a base salary for the position poses significant challenges. Without the ability to inquire about or survey applicants’ previous salaries, the onus is put on the small business to perform some kind of research to come to a proper and competitive salary. A large company may have a history of employing dozens of people in a position, and can thereby ascertain the appropriate salary range based on its own internal history. But a small or new businesses may be hiring for a certain position for the first time, lacking its own historical data to use in setting salaries.

Without its own historical data for a position or, under the Ordinance, historical wage history from applicants, small and new businesses must either devote internal resources to researching salary for the position involved, outsource that research to external sources at a cost, or do a combination of the two. Otherwise, the employer would be taking a “shot in the dark,” potentially derailing a job search when inappropriate candidates respond to the position.

But often, small and new businesses do not have the internal resources to spend researching labor markets. While a large firm can rely on the personnel in its human resources department to perform research on the labor market for a position and use that data to set an

¹⁶ Hearing on Bill No. 160840 before the Philadelphia City Council Committee on Law and Government at 28:5-7 (Nov. 22, 2016) *available at* <http://bit.ly/2kOuRPp>.

appropriate salary, many small businesses do not have this option. Any resource available to conduct hiring or investigate the labor market is likely to be wearing multiple hats at the small business. Time spent researching salary for a new hire is time away from that person's other functions. So the task may instead fall to the small business owner. But any time spent by the small business owner on salary research, particularly when such information could easily be obtained through learning of applicants' salary histories, is time spent away from growing and developing the business.

Lacking internal resources to devote to analyzing the labor market for a particular position at the outset of the hiring process, money must be spent on obtaining that information externally or outsourcing the process. It should come as no surprise that small businesses do not have large budgets to spend on hiring.¹⁷ While larger businesses might have the ability and inclination to turn to external resources for salary information, the expense associated with these external resources would be particularly burdensome for a small business with lower receipts. Recruiters would have experiential information about appropriate salaries for various positions, but a recruiter's fee may be cost-prohibitive for a small business. And data may be available on salary ranges for positions by industry and by location, but the better, more reliable, more specific data may have to be purchased. And even if data could be obtained for free, some resource—whether a consultant, the small business owner, or an employee—must spend time analyzing that data to apply it to the position in question.

The Ordinance would impose an additional challenge for small and new businesses as they may be hiring for unique or hybrid positions. A small business cannot necessarily have

¹⁷ Jason Whitman, Hiring for Small Business—Overcoming Challenges and Tips for Success, Huffington Post, *available at* http://www.huffingtonpost.com/jason-whitman/hiring-for-small-business_b_5319215.html.

dedicated staff members for every department; instead, a business might combine multiple functions or duties into one position.¹⁸ For example, a small business may be hiring one person expected to cover sales, marketing and social media for the company. Reliable labor market information for such a position simply may not be readily available, even through costly external resources. And setting salaries for hybrid jobs, encompassing the tasks and duties of two or more job titles, is more complicated than just averaging out the market value for each piece of the job.¹⁹ Wage history is a particularly informative factor in salary negotiations for these hybrid positions. Wage history can be used to set a baseline for the position, based on one of the components of the position, and be increased to reflect the additional responsibilities for the other components of the position.²⁰

III. Subjecting small minority-owned businesses to lawsuits and penalties under the Ordinance could be ruinous.

If a small business employer even mistakenly violates the Ordinance, the business could become involved in both administrative and private actions. The Ordinance makes it illegal for an employer to rely on wage history unless the applicant “knowingly and willingly” discloses that wage history.²¹ But the Ordinance does nothing to further elucidate when an applicant’s disclosure is knowing and willing. Under these circumstances, an employer could be attempting to follow the ordinance and yet still be accused of an unintentional violation.

¹⁸ See 7 Hiring Challenges for Small Business Owners, Boss Magazine, *available at* <https://thebossmagazine.com/hiring-challenges-small-business-owners/>.

¹⁹ Rita Patterson, 3 Ways to Approach Benchmarking Hybrid Jobs, Payscale (Feb. 27, 2017), *available at* <http://www.payscale.com/compensation-today/2017/02/3-ways-approach-benchmarking-hybrid-jobs>.

²⁰ For example, a business could use a sales manager’s current salary of \$60,000 per year as a base line in setting the salary, and increase it to compensate for the additional marketing and social media responsibilities.

²¹ Phila. Code § 9-1131(2)(a)(ii).

Such a violation could subject the otherwise innocent business owner to significant administrative penalties and civil litigation. Violations of the Ordinance subject employers to penalties of up to \$2,000 per violation.²² Repeated violations could bring an additional penalty of \$2,000 per violation or imprisonment of up to ninety days.²³ In addition, after administrative proceedings, individuals have the power to bring a private right of action against employers, which could subject employers to compensatory and punitive damages, attorneys' fees, and court costs.²⁴

These lawsuits and penalties could be ruinous for a small business. More than half of lawsuits brought against businesses involve companies with revenues under \$1 million.²⁵ To compensate for the losses caused by litigation, small businesses report cutting operating expenses.²⁶ One way of cutting expenses is hiring fewer employees, which means less work getting done and ultimately lower profits and less ability to compensate for the losses caused by litigation.²⁷ Subjecting small businesses to these additional lawsuits and penalties under the Ordinance could have disastrous effects, even leading to bankruptcy for some. Before passing the Ordinance, the Chamber of Commerce for Greater Philadelphia proposed reducing the Ordinance's penalties "so that small businesses would not be forced to close if found in violation of [the Ordinance's] ambiguously defined prohibitions," and defining "knowingly" to avoid

²² *Id.* § 9-1105(d).

²³ *Id.* at § 9-1121(2).

²⁴ *Id.* at § 9-1122.

²⁵ Anita Campbell, What the Rise in Lawsuits Means to Your Small Business (Nov. 16, 2012), *available at* <https://www.americanexpress.com/us/small-business/openforum/articles/what-the-rise-in-lawsuits-means-to-your-small-business/>.

²⁶ Impact of Litigation on Small Business, Klemm Analysis Group Washington, DC (October 2005), *available at* <https://www.sba.gov/sites/default/files/files/rs265tot.pdf>.

²⁷ Margaret Jacoby, How Employment Lawsuits Can Ruin Your Small Business, *Huffington Post* (July 7, 2015), *available at* http://www.huffingtonpost.com/margaret-jacoby/how-employment-lawsuits-c_b_7737362.html.

confusion about when an employer may rely on wage history.²⁸ But the City ignored these suggestions, which would have greatly reduced the risk of unknowing violations by employers and the accompanying crippling liability. As it stands, the Ordinance exposes small businesses to devastating risks of penalties and lawsuits for undefined action. This is yet another reason that the Ordinance should be struck down.

CONCLUSION

It hardly needs to be said that *Amici* generally support measures that seek to narrow the wage gap and establish equal pay for all. But there are means to address the pay gap and move towards pay equity that do not harm businesses, in particular, small and minority-owned businesses. Before imposing such a draconian prohibition on salary inquiries, the City should investigate other less restrictive, less burdensome means of achieving pay equity. For these reasons, along with those in Plaintiff's and other *Amici*'s briefs, the Court should grant Plaintiff's motion for a preliminary injunction.

Dated: July 25, 2017

Respectfully submitted,

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²⁸ First Am. Compl., ¶ 6, Doc. No. 29.