

## Third Circuit Reinstates Philadelphia's Salary History Inquiry Ban

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On February 6, 2020, the U.S. Court of Appeals for the Third Circuit upheld the Philadelphia Wage Equity Ordinance (“Ordinance”) by reactivating the Ordinance’s prohibition on employer inquiries into an applicant’s salary history (the “Inquiry Provision”). The Third Circuit also affirmed the lower court’s decision that the Ordinance’s separate prohibition that prevents employers from relying upon salary history in setting or negotiating wages (the “Reliance Provision”) is valid.

By enacting the Ordinance on January 23, 2017, Philadelphia was the first U.S. city to ban employers from asking job applicants about prior pay under the theory that salary history inquiries perpetuate the wage gap. Thereafter, the Greater Philadelphia Chamber of Commerce argued, in a lawsuit, that the Ordinance (i) violated the First Amendment of the U.S. Constitution because the City could not show that the resulting restriction on speech was necessary, and (ii) imposed an unfair burden on businesses to gauge the labor market. As we [discussed previously](#), a federal district court in Pennsylvania issued a preliminary injunction against the City on April 30, 2018, preventing the City from implementing the Inquiry Provision, after finding that it likely violated employers’ free speech rights. The district court also denied a preliminary injunction as to the Reliance Provision.

The Third Circuit opinion [vacated](#) the district court’s grant of a preliminary injunction as to the Inquiry Provision by applying intermediate scrutiny, and not strict scrutiny (due, in part, to the commercial nature of the speech in question), and held that the City was only required to show that (i) it had a “substantial interest in the restriction,” and (ii) the challenged restriction directly advanced that interest. The Third Circuit rejected the district court’s finding that the City had failed to produce “sufficient evidence to establish that the Inquiry Provision would advance its substantial interest in mitigating the racial and gender-based pay gap.” The Third Circuit further held that the City did not need to provide empirical evidence to prove that the Ordinance would have the intended effect of eliminating pay bias, and stated that “[t]he Chamber provided no testimony to refute the existence of the wage gap, the role of discrimination in the wage gap, or the conclusion that prohibiting inquiry into one’s wage history could help mitigate the wage gap.”

As a result of this ruling, effective February 6, 2020, the City of Philadelphia may enforce provisions of the Ordinance that prohibit employers from:

1. inquiring, orally or in writing, about a prospective employee's wage history;
2. requiring disclosure of wage history;
3. conditioning employment or consideration for an interview or employment on the disclosure of wage history; and
4. relying on the wage history of an applicant (with certain [exceptions](#)), in determining the wages for a candidate "at any stage in the employment process," including "the negotiation or drafting of any employment contract," unless the applicant "knowingly and willingly" discloses his or her wage history to the employer.

### **What Philadelphia Employers Should Do Now**

- Remove questions about salary history from employment applications, background check forms, and other applicable forms or policies used during the hiring process.
- Confirm that external recruiters will comply with the Ordinance when seeking applicants for employment in Philadelphia.
- Train human resources staff, internal recruiters, hiring managers, and any other individuals involved in the hiring process on the requirements of the Ordinance.
- If your organization also operates in [California](#), [Illinois](#), [New Jersey](#), [New York](#), and/or other localities with salary history inquiry bans, make sure your organization abides by those bans as well.
- Expect to see similar laws passed in other jurisdictions around the country; some view the outcome of this case as a litmus test for similar salary history bans nationwide.

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