

# Lawyer Insights

## Expert Analysis: 3<sup>rd</sup> Circ. Philly Pay History Ruling May Set National Bar

By Reilly Moore and Robert Dumbacher  
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The wage gap – labor market evidence that shows white men earn more money at work on average than their similarly situated female or minority counterparts – caught the attention of state and local governments in recent years, and resulted in dozens of laws aimed at reducing disparity

Earlier this month, the [U.S. Court of Appeals for the Third Circuit](#) upheld the city of Philadelphia's use of one now-commonly used method aimed at attempting to close the gap.<sup>1</sup>

In *Greater Philadelphia Chamber of Commerce v. City of Philadelphia*, the [Third Circuit ruled](#) that Philadelphia could move forward with its enforcement of a city law prohibiting employers from asking job applicants about their salaries or wages at their previous job. The decision, which overturned a preliminary injunction issued by the [U.S. District Court for the Eastern District of Pennsylvania](#), upheld the constitutionality of the Philadelphia law under the First Amendment of the U.S. Constitution.

While the court's ruling was particular to the application and implementation of Philadelphia law, it is relevant to how courts may assess similar salary history bans across the country, and the type of evidence governments must put forth to justify laws that restrict employer free speech rights.

### The Legal Challenge to the Philadelphia Statute

The Philadelphia law contains two elements — an inquiry provision and a reliance provision. The inquiry provision bans employers from asking about an applicant's previous salaries or wage history during the application process. The reliance provision prohibits employers from relying on any salary information it learns about an applicant at any point in the process of setting or negotiating a prospective employee's wage. Only the inquiry provision was at issue before the Third Circuit.

The Philadelphia Chamber of Commerce argued that the city failed to consider or prove sufficient evidence when it enacted the law, and therefore could not justify its infringement on employer speech.

Specifically, the chamber argued that the five witnesses who testified before the Philadelphia City Council in support of the statutory measures did not provide enough factual basis to show that the salary history law would improve wage gap issues. Because the city enacted the law based on a limited record and without objective proof of efficacy, the chamber argued, it could not show that the speech restriction imposed by the law actually furthered the government interest it asserted — to close the wage gap.

While the district court agreed with the chamber and found that the witnesses did not present sufficient objective evidence to prove the salary inquiry ban would help close the wage gap,<sup>2</sup> the Third Circuit

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reversed, finding that the city relied on more than enough empirical evidence to support the law. Specifically, the witnesses testified before City Council about why the law would help address the wage gap, and why other legislative attempts to address the disparities in pay had failed to date.

The city also submitted an affidavit in the case from an expert asserting why the salary history ban would help close the wage gap. Even though the evidence could not conclusively prove the law would reduce wage inequity, it showed enough connection between the inquiry provision and the city's stated goal to justify the speech restriction.

The court analyzed the law under First Amendment principles, because it was undisputed that the law restricted the free speech rights of employers by outlawing certain types of questions to applicants. The court applied intermediate, rather than strict, scrutiny in analyzing the law because it implicated commercial speech and was viewpoint-neutral.

Thus, it applied the [U.S. Supreme Court's](#) Central Hudson test<sup>3</sup> and considered, in relevant part, three elements: (1) whether the government had a substantial interest in the restriction; (2) whether the restriction directly advanced the interest; and (3) whether the restriction was more extensive than necessary to serve the government's interest.

First, the parties did not dispute that Philadelphia had a substantial interest in "remedying wage discrimination and promotion wage equity." Second, the court found the inquiry provision directly advanced that interest.

The court held that the testimony provided by the witnesses before City Council met the Supreme Court's established standard for a government to provide evidence that a law furthered its interest. Although the evidence in the case was not decisive that the law would fix the wage gap, the court noted that when governments pursue innovative solutions to problems, it is unlikely they can provide detailed proof of efficacy because such solutions had not been explored previously.

Third, the court found the inquiry ban was not more extensive than necessary. The court analyzed the law under the so-called reasonable fit standard, which considered whether the law was narrowly tailored to achieve the desired objective. Because the inquiry provision only prohibited employers from asking about a single topic specifically relevant to the wage gap issue, the court found it tailored properly to fit its objective.

### **National Implications**

The Third Circuit decision is likely to have implications nationally, as Philadelphia's salary inquiry law is just one of many similar provisions enacted by states and localities across the country. At least a dozen states have similar laws that either restrict an employer's ability to ask about salary history, or restrict an employer's ability to eliminate a candidate from contention for refusal to provide salary history.

Based on the level of scrutiny applied by the Third Circuit, it is likely that these laws will meet the constitutional standards if the legislative records behind the laws include some evidence that the laws will address issues of wage inequality or discrimination. The quantum of evidence required to meet this burden is low, so any evidence-based discussion in the legislative history for these laws will likely allow them to withstand scrutiny.

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Moreover, most of the state and local salary history inquiry laws are limited in a similar manner to the Philadelphia statute, in that they only restrict direct questions about salary or wage history. To the extent states or localities attempt to expand the scope of the restriction on employer speech, however, they may face challenges under the reasonable fit element of the Central Hudson test.

### **Considerations for Employers**

The Third Circuit's decision is likely to support and encourage the trend to curtail employers' ability to inquire about applicant salary histories.

Employers should prepare to remove questions about applicants' salary history from their interview questions, both to comply with such laws and because it serves as a best practice for avoiding discrimination complaints under Title VII, the Equal Pay Act or similar state laws. Employers also should ensure that their internal and external recruiting teams are aware of and comply with such laws when applicants voluntarily discuss such information.

Instead, employers may consider asking other relevant questions to determine whether an applicant's salary expectations fit with the employer's budget and desired compensation for a given job. For example, employers may still ask about an applicant's salary expectations generally.

They also may ask what wage rate or salary would convince an employee to take a job offer. As long as the questions are not aimed at learning an employee's wages, they will not violate the salary inquiry ban laws in most jurisdictions. Of course, employers should consult applicable laws within their jurisdictions when formulating recruitment questions.

It is also important to remember that many salary history laws include reliance provisions. That means that even if an applicant voluntarily discloses his or her salary from a previous job, the employer may not rely on that information in crafting its salary offer to the applicant.

In our view, this is a very easy trap for even a well-intentioned employer to fall into. This is because an applicant may assume that the employer took his/her statement into consideration when making the salary offer.

To protect against this kind of violation, it is wise for employers to document a baseline salary rate or a salary range that it intends to offer to an applicant before conducting an interview. While that offer may still change based on the content of the interview or other factors (for instance, the applicant's likelihood to leave his/her current employer), doing so will provide better protection if the applicant accuses the employer of reducing its offer in reliance on the applicant's voluntary disclosure.

Employers should review their standard hiring and interview questions if they currently contain questions about salary history or are aimed at learning such information. It's important to draft salary-related questions that will allow an employer to make an informed decision about an appropriate salary offer without running afoul of these recently enacted restrictions.

### **Notes**

1. [Greater Philadelphia Chamber of Commerce v. City of Philadelphia](https://www2.ca3.uscourts.gov/opinarch/182175p.pdf), 2020 WL 579733 (3d. Cir. Feb. 6, 2020), available at <https://www2.ca3.uscourts.gov/opinarch/182175p.pdf>.

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2. [Chamber of Commerce for Greater Philadelphia v. City of Philadelphia](#), 319 F. Supp. 3d 773 (E.D. Pa. 2018).

3. The Central Hudson test also considers a fourth element: whether the legislation regulates speech that concerns illegal activity or speech that is misleading. The court quickly disposed of that element and found that the law did not regulate misleading speech or speech related to illegal activity.

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