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LABOR WORLD: U.S. COURT BANS ENQUIRIES ABOUT PROSPECTIVE EMPLOYEE SALARY HISTORY

The American have re-innovated again, now during the pandemic crisis.

Since the enactment of the [Civil Rights Act](#) of 1964, proposed by President J.F. Kennedy and signed by President Lyndon Johnson, Americans have been innovators in terms of equality and non-discrimination. Europe owes them the concept of disparate impact, as well as criteria for verifying whether a distinctive practice can be fully accepted without being discriminatory. In this field, the use of good faith is highlighted, through the BFOQ – Bona fide occupational qualification criterion. That is to say: if the difference in treatment is made in good faith and grounded on the type of activity to be carried out and the characteristics of the job to be filled, it can be accepted. Not going through this sieve, it is intolerable.

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On February 6, 2020, the U.S. Court of Appeals for the Third Circuit reversed a district court's preliminary injunction that prohibited the City of Philadelphia from enforcing its ban on employers asking for job applicants' salary history. The goal of the Philadelphia Wage Equity Ordinance is to tackle the wage gap for women and people of color. The Court stated that the prohibition of employers from asking about the job seekers' wage history and setting salaries based on this history is constitutional.

In the Greater [Philadelphia Chamber of Commerce v. City of Philadelphia case](#), the Court found that the Wage Equity Ordinance does not violate the freedom of expression provided for in the 1st Constitutional Amendment, and that the ordinance is an important mechanism to combat wage discrimination.

Both the lawmaker and the Court concluded that the chance given to the employer to raise questions about the wage past of job seekers was a mechanism to perpetuate wage differences that affect mainly women, particularly Afro-Americans and Latinos. By asking to candidates about their wage history and relying on that history to set a starting salary, employers felt legitimized to maintain such a status quo.

By banning such questions, the law puts an end to this practice.

According to the Court, wage growth and wage decisions should only be based on qualifications and job requirements, thus the importance of this law.

This law follows a long tradition against gender pay gap.

In the United States of America (US), the data points that for every \$1 received by men, women who do the same job receive only 80 cents. The gap tends to worsen over the years, as percentage increases are made based on unequal starting salaries.

The first law aiming at tackle the gender pay gap was the [Equal Pay Act](#) (EPA) of 1963, which prohibits any form of wage discrimination. The EPA, however, acknowledges wage differences whenever the employer requests an objective reason. And that was the problem, since the wage past had been presented as an "objective reason" to justify different salaries between men and women.



That's why the State of Philadelphia enacted that ordinance in 2017, which now was deemed constitutional.

In Portugal, the principle of equal salary for equal work is enshrined in article 59 of the Portuguese [Constitution](#) and articles 31st and 270th of the [Labor Code](#). But here too, the problem persists, with a gap around 14.4% between what men and women receive for the same type of work.

That is why other legislative solutions have also been tried in Portugal to combat this problem.

In 2018, Law [No 60/2018](#) was adopted, according to which companies must ensure that there is a transparent remuneration policy, and one may predict the enactment of new laws for this purpose.

But this question of the salary past has never been raised.

Philadelphia law and the U.S. court's recent decision can therefore bring new winds of change in this area.

In any case, it is important not to forget the essentials: more than a legal obligation, retributive equality is an ethical and social justice imperative.

The impulse must therefore go above all from companies in the name of their social responsibility.