In recent years, there has been a noticeable push at the federal, state, and local level to prohibit employers—both public and private—from asking job applicants about their salary history out of fear of perpetuating discriminatorily low wages historically paid to women. This article examines New York City's new salary disclosure law against the backdrop of the federal Equal Pay Act and by comparison to similar laws passed by other jurisdictions,

salary policy. Also assume that, under the employer's prior salary policy, each new applicant who receives an offer of employment will receive a salary offer that is five percent greater than his or her previous salary. Under this policy, the employer will consider the applicant's prior salary in making the offer, and she will receive a job offer with a five percent increase on her previous salary. This is so even if the market overall for women in this position has been set at an amount less than that paid to men. The policy applies to the individual; it is not directly based on the external market. So long as the market has set the wage for women—or anyone else, for that matter—artificially low, the employer will reap most of the benefits he would have had under a traditional market force argument under the veil of a gender-neutral prior salary policy. What appears on its face to be an adaptable rule designed to factor in each person's previous salary ends up perpetuating existing market conditions, which is precisely what the traditional market force theory would have done as well. The Seventh Circuit explained it best: "The concern ... is that, although the policy of considering an employee's prior salary in setting his or her current wage is not objectionable in itself, this policy may serve to perpetuate an employee's wage level that has been depressed because of sex discrimination by a previous employer."[17]

Courts quickly realized that relying on salary history, especially as a standalone factor other than sex, could be problematic. In 1982, the Ninth Circuit directly addressed the prior salary issue. *Kouba* involved a class of female Allstate Insurance agents who believed Allstate's policy of relying on salary history in hiring new sales agents was responsible for female agents making less than their male co-workers. Allstate asserted that its prior salary policy was a factor other than sex. The Ninth Circuit held that an employer "cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason."[18] Furthermore, the Court explained that although "the Equal Pay Act does not impose a strict prohibition against the use of prior salary," "a factor like prior salary ... can easily be used to capitalize on the unfairly low salaries historically paid to women."[19]

Disagreeing 1 Tf -0233.36 Tm 7(o)-51 1 Tf0.9(t 3a15.4(s)-5.s)-74.3281.3moo36 Tm [(.36 Tm [:33.36-15.8(h)-)-8.505l phaid to woiffo

On the other hand, perhaps there is a third option. Employers can easily bypass courts that hold either of the above-mentioned two views by including other reasons in addition to the prior salary policy to justify a pay disparity as a factor other than sex—even if the salary policy is the primary reason for the disparity. In this way, prior salary policies are either harmless or a disguised version of the disfavored market force theory, but it is difficult, if not impossible, to tell one from the other. The third option recognizes that the risk of perpetuating discrimination is too great, and it seeks to address the prior salary issue at the outset: instead of prohibiting sole reliance on salary history or engaging in a case-by-case analysis at the risk of permitting past discrimination to perpetuate, city governments, state governments, and legislatures can decide to prohibit employers from seeking salary history altogether through legislation and executive34 Tw 10

applicant's previous employer, as mentioned above. Furthermore, so long as the prospective employer does not ask for the exact commission formula, which would enable him to determine the applicant's prior salary, questions about the amount of sales generated by the applicant would have likely been acceptable.

Nonetheless, the Council addressed these concerns in 1253-A. It first excluded from the definition of "salary history" "any objective measure of the applicant's productivity such as revenue, sales, or other production reports." It then expanded upon the exception that allowed employers to rely on salary history where the applicant volunteered this information; under 1253-A, where the applicant /Span <</MCID 2306 >>BDC BT /T1_.9f12.9(a)-0.8(t)-19.7(i)12

Massachusetts, there is also a retaliation provision that protects those prospective employees who fail to reply to forbidden prior salary-related inquiries.

Philadelphia's salary history law and 1253-A share similar language and structure. On balance, New York City's law appears to be more specific. For example, 1253-A does not apply to internal transfers or promotions, and the drafters went out of their way to explain that discussion concerning salary "expectations" is permissible, create an exception for objective measures of productivity, permit verification of non-salary related information, and allow background checks.

The most interesting aspect of the salary history fight in Philadelphia is the First Amendment challenge promised by Comcast, the telecommunications behemoth, and delivered by the local Chamber of Commerce. In a head-turning argument, Comcast and business groups in the area asserted that employers have a First Amendment right to ask about an applicant's wage history. If a court agrees that salary history laws' wage-gap-fighting purpose comes second to an employers' First Amendment right to ask about an applicant's salary history, a large swath of similar anti-discrimination laws that prohibit the asking of certain kinds of questions may be on the chopping block as well. So far, the Chamber has filed a federal lawsuit against Philadelphia, challenging the constitutionality of the law under the First Amendment and seeking a preliminary injunction that will bar enforcement of the new law.[37]

PART III: COMMON ARGUMENTS

Because salary history laws are primarily targeting gender-based pay disparities, most arguments for and against these laws often rely on wage gap statistics. Based on recent statistics from the U.S. Census Bureau, the "2015 female-to-male earnings ratio was 0.80, not statistically different from 2014. The female-to-male earnings ratio has not experienced a statistically significant annual increase since 2007."[38] Looking at women's earnings as a percentage of