



STRATEGIES IN MANAGING TODAY'S WORKFORCE



South Florida Labor & Employment Conference

# Pay Equity

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#FPFL19

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## Pay Disparities Remain a National Focus



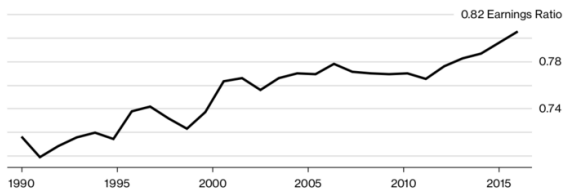
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- > The Equal Pay Act has been in place for decades but the “pay gap” persists.
- > Median female workers with a full-time, year-round job made **80.5 cents** for every man-earned dollar in 2016 (Sept. 12, 2017) – Census Bureau

### Women Gain Ground

The gap between men and women's earnings has been narrowing, and the annual change in the ratio was statistically significant in 2016

■ Female-to-Male Ratio, Year-Round, Full-Time Workers



Source: Census Bureau

Bloomberg

## Changing Legal Landscape



- > States and cities are enacting laws and ordinances to try to close the "pay gap."
- > Result: patchwork of inconsistent laws and compliance challenges.



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## State Legislation Complicates Pay Equity



1. State agencies/courts = less predictable.
2. State agencies/courts = more plaintiff friendly.
3. Increased number of EEOC charges for equal pay violations.
4. Multi-state employers need to account for different laws across the country.

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## Overview Agenda



- > Existing legal landscape
  - > Federal—Historical and trending
  - > State—Examples of common issues and unique perspectives
- > Litigation
  - > Federal and state
  - > Class and collective actions
- > Compliance and proactive self-analyses

## Federal Law



### **Equal Pay Act (EPA) 29 U.S.C. § 206(d) – 1963**

**Equal Pay Act requires that men and women in the same workplace be given equal pay for equal work.**

*Prima facie case:*

- > Lower wages paid to employees of the opposite sex in the same establishment
- > Employees perform substantially equal work
- > Jobs performed under similar working conditions

Key: no intent to discriminate required

## Federal Law



Compensation includes all forms of remuneration:

- > Commissions
- > Bonuses
- > Profit sharing
- > Deferred compensation
- > Paid time off
- > Expense accounts
- > Car and gas allowances
- > Retirement plans
- > Insurance
- > Other benefits

## Federal Law



**Jobs must be "substantially equal":**

- > **Skill:** experience, training, education and ability necessary to perform the job
- > **Effort:** amount of physical or mental exertion needed to perform the job
- > **Responsibility:** degree of discretion or accountability involved in performing the job, duties regularly required to perform the job, amount of supervision received, whether employee supervises others, degree employee is involved in decision making
- > Compare the compensation of employees working in the same workplace or establishment

## Federal Law



### EPA: Exceptions for unequal pay

- > A seniority system
- > A merit system
- > A system which measures earnings or quantity or quality of production
- > A differential based on *any other factor* other than sex\*

Key: These must be shown by employer

**\* There is a split among the circuits as to whether salary history is a lawful justification under the EPA.**

## Federal Law Litigation



### EPA Claim

- > May proceed directly to court
- > Statute of Limitations: 2 years/3 years if willful violation
- > Damages
  - > Salary differential
  - > Liquidated damages
  - > Attorney's fees and costs

## Class & Collective Actions Under the EPA & Title VII



- > **Campbell v. Chadbourne & Parke LLP**, No. 1:16-cv-06832 (S.D.N.Y. class complaint filed 8/13/16): female partners at top law firm seeking over \$100 million for claims of discrimination and retaliation under Title VII and EPA. Settled: \$3.1 million court approval requested March 14, 2018.
- > **Scott et al. v. Family Dollar Stores**, No. 3:08-cv-00540 (WDNC) \$45M settlement approved for 15-year old pay bias suit by more than 37,000 female employees on March 14, 2018.
- > **Smith v. Merck & Co, Inc.**, 2016 WL 1690087 (D.N.J. Apr. 27, 2016): conditional certification in a lawsuit brought by 5 former female sales representatives bringing a \$250 million gender bias suit. Conditional certification granted.

## Compare the EPA and New Laws



### New state laws

- > Redefining "equal work" to be much more expansive
- > Requiring comparisons of employees in different facilities and geographies
- > Prohibiting confidentiality
- > Requiring transparency
- > Expanding scope of protected classes of employees
- > Limiting or eliminating exceptions for unequal pay
- > Extending statute of limitations and increasing damages in successful suits

## Compare the EPA and New Laws



- > Equal Pay Act (EPA) = Sex
- > State Law: Trend is to expand the classes of employees covered by pay equity laws.
  - > California: Sex, race, ethnicity
  - > Illinois: Sex, African American
  - > Iowa: Age, race, creed, color, sex, sexual orientation, gender identity, national origin, religion, disability
  - > Maryland: Sex, gender identity
  - > New Jersey: Race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular blood trait, military service
  - > Ohio: Race, color, religion, sex, age, national origin, ancestry
  - > Oregon: Gender, race, color religion, sex, sexual orientation, national origin, marital status, disability, age

## Compare the EPA and New Laws



Examples of limiting or eliminating exceptions:

- > New York
  - > Replaces "any other factor than sex" with "**bona fide** factor other than sex" such as education, training, or experience
  - > Such bona fide factor must:
    - > Not be based upon or derived from a sex-based differential in compensation; and
    - > Be job-related with respect to the position in question and consistent with business necessity
- > Massachusetts
  - > Eliminates "any other factor than sex" altogether
  - > Adds education, training or experience
  - > Adds geography and travel

## Salary History Bans



- > Many laws, and even local ordinances, prohibit, or limit, an employer from seeking salary history from applicants and/or using salary history in setting compensation.
- > Rationale: pay discrimination can follow employees from job to job throughout their careers, resulting in a systemic reduction in their earning power.
- > If an employee experiences pay inequality in a prior job, disclosing their past salary when applying for a new job has the potential to perpetuate the effect of the past discrimination.

## Salary History Bans – Effective Dates



- |   |  |
|---|--|
| > New Orleans, Louisiana (city employees only, effective 1/25/17)   | > Connecticut (effective 1/1/19)   |
| > Pittsburgh, Pennsylvania (city employees only, effective 1/30/17) | > Hawaii (effective 1/1/19)  |
| > Puerto Rico (effective 3/8/17)                                    | > Illinois (public employees only, effective 1/15/19)  |
| > New York City, New York (effective 10/31/17)                      | > Atlanta, Georgia (employees of city agencies only, effective 2/18/19)  |
| > Delaware (effective 12/14/17)                                     | > North Carolina (employees of state agencies only, effective 4/2/19)  |
| > Albany County, New York (effective 12/17/17)                      | > Washington (effective 7/28/19)   |
| > California (effective 1/1/18)                                     | > Suffolk County, New York (effective 6/30/19)   |
| > Salt Lake City, Utah (city employees only, effective 3/1/18)      | > Montgomery County, Maryland (county employees, effective 8/14/19)  |
| > New Jersey (public employees only) (effective 2/1/18)             | > Maine (effective 9/17/19)  |
| > Louisville, Kentucky (city employees, 5/17/18)                    | > Cincinnati, Ohio (employers with 15+ employees within the city, est. 3/20)                                   |
| > San Francisco, California (effective 7/1/18)                      | > Colorado (effective 1/1/21)  |
| > Kansas City, Missouri (city employees only, 7/26/18)              | > Philadelphia (effective date to be determined; local ordinance stayed by the courts) * Current as of 5/28/19 |
| > Massachusetts (effective 7/1/18)                                  |  |
| > Vermont (effective 7/1/18)  |  |
| > Westchester County, New York (effective 7/9/18)                   |  |



## Salary History Bans – Key Questions



- > Does it apply to all applicants?
- > Does it apply to internal and external applicants?
- > What if an employee voluntarily offers the information?
- > Can you confirm salary history if voluntarily disclosed?
- > When can you ask? Post-offer?
  - > Why?
  - > Documentation is key

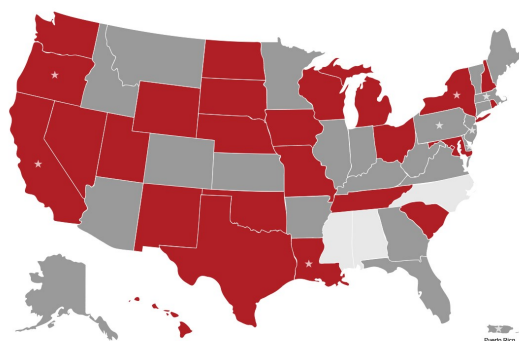
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## Fisher Phillips' Pay Equity Interactive Map



<https://www.fisherphillips.com/equity>



NEW YORK	
<input checked="" type="checkbox"/>	Statute
<input checked="" type="checkbox"/>	Classes protected
<input checked="" type="checkbox"/>	Key language on pay discrimination
<input checked="" type="checkbox"/>	Exceptions for pay disparities (including affirmative defenses)
<input checked="" type="checkbox"/>	Prohibition on salary history inquiry
<input checked="" type="checkbox"/>	Other key provisions
<input checked="" type="checkbox"/>	Related articles

MASSACHUSETTS	
<input checked="" type="checkbox"/>	Statute
<input checked="" type="checkbox"/>	Classes protected
<input checked="" type="checkbox"/>	Key language on pay discrimination
<input checked="" type="checkbox"/>	Exceptions for pay disparities (including affirmative defenses)
<input checked="" type="checkbox"/>	Prohibition on salary history inquiry
<input checked="" type="checkbox"/>	Anti-retaliation
<input checked="" type="checkbox"/>	Other key provisions
<input checked="" type="checkbox"/>	Related articles

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## Salary History Bans – Compliance Tips



- > Stop asking for salary history information. Remove it from your employment application.
- > Ask about **salary expectations** rather than salary history.
- > Provide a salary range for the position and allow employees to self-withdraw.

## Steps to Address New Laws



- > Train hiring personnel and those making compensation decisions
- > Assess the performance evaluation process and its role in pay decisions – standardize the process
- > Update policies and other employment documents to remove restrictions on discussing wages
- > Remove salary history questions from hiring documents

## Steps to Address New Laws



- > Consider conducting a privileged pay self-evaluation
- > Goals
  - > Identify potential pay disparities among employees performing comparable work
  - > Determine whether there are lawful explanations for those disparities and/or take steps to correct the disparities as appropriate
  - > Identify and correct weaknesses in the organization's systems to protect against potentially unlawful pay disparity going forward
- > Take advantage of the affirmative defenses

## 7 Steps for Conducting a Pay Equity Analysis



1. Budget for costs of analysis and compliance
2. Identify your team and set up privilege protocols
3. Examine pay policies and practices
4. Identify resources and collect data
5. Conduct a privileged analysis
6. Determine corrective actions, if necessary
7. Revise compensation policies and human resources forms

# New EEO-1 Reporting Requirement



This is the proposed EEO-1 Form to collect pay data.

### SECTION D - EMPLOYMENT DATA

Employment at this establishment - Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

Job Categories	Annual Salary in Thousands	Number of Employees (Report employees in only one category)														Total Col A-N	
		Race/Ethnicity															
		Hispanic or Latino		Non-Hispanic or Latino							Female						
		Male	Female	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races		
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O			
Executive/Senior Level Officials and Managers 1,1	1. \$19,239 and under																
	2. \$19,240 - \$24,439																
	3. \$24,440 - \$30,679																
	4. \$30,680 - \$38,999																
	5. \$39,000 - \$49,919																
	6. \$49,920 - \$62,919																
	7. \$62,920 - \$80,079																
	8. \$80,080 - \$101,919																
	9. \$101,920 - \$128,999																
	10. \$128,999 - \$163,799																
	11. \$163,800 - \$207,999																
	12. \$208,000 and over																
	13. \$19,239 and under																
	14. \$19,240 - \$24,439																
	15. \$24,440 - \$30,679																
	16. \$30,680 - \$38,999																

SAMPLE

# New EEO-1 Reporting Requirement



## EEOC collects workforce data from employers

- > Generally, employers with 100 or more employees are required to file an EEO-1 report annually.
- > Regulations published September 2016 required employers to provide detailed information about pay practices on the EEO-1 to address pay discrimination. Data collection requirement on hold under the Trump administration.
- > April 25, 2019: District Court ordered EEOC to collect new EEO-1 data by September 30, 2019.
- > April 30, 2019: EEOC reinstated Component 2 and will collect data for years 2017 and 2018 **beginning this month.**

## What is Required to be Filed on Component 2?



- > Pay information (based on W-2 Box 1 income) and hours reported for entire year
- > Employees must be reported by job category and further broken down across 12 "pay bands" within each job category
- > Compensation and hours worked reported by job category, race, ethnicity and gender
- > Hours worked reported on an annual basis:
  - > For non-exempt employees: Hours worked data must be reported
  - > For exempt employees: Employers may either:
    - > Report actual hours worked if the employer maintains accurate records of this information; or
    - > Report a proxy of 40 hours per week for full-time exempt employees and 20 hours per week for part-time exempt employees multiplied by the number of weeks the individuals are employed during the EEO-1 reporting year.

## New EEO-1 Reporting Requirement

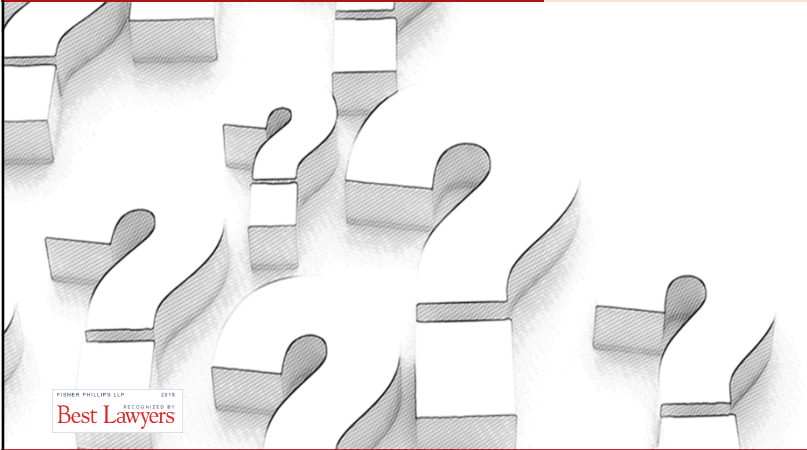


- > Submit the traditional "Component 1" data by May 31
- > Start collecting "Component 2" data in preparation for the September 30, 2019 reporting deadline
  - > Data for 2017 and 2018 must be reported
  - > This includes:
    - > **Summary pay data:** Total number of full and part-time employees by demographic categories in each of 12 pay bands listed for each EEO-1 job category based on W-2 wages; and
    - > **Aggregate hours worked data:** Number of hours worked that year by all the employees accounted for in each pay band.
  - > For exempt employees, either:
    - > Report 20 hours per week for each part-time employee and 40 hours per week for each full-time employee
    - > Report actual number of hours worked by exempt employees, full or part-time

# FINAL QUESTIONS



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# THANK YOU

FOR JOINING US

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