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Pay Equity: Navigating the New Landscape

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Gender Pay Disparity Statistics

- In 2017, women earned 82% of what men earned, based on median hourly earnings of both full time and part time workers. (Pew Research Center)
 - It would take an extra 47 days of work for women to earn what men did in 2017.
 - Today, for younger women, the pay disparity is smaller. For workers ages 25-34 only, the disparity is \$0.89 to the dollar.
- In 2016, women earned 80% of what men earned for full-time workers.
- In 1980, the pay disparity was \$0.64 to the dollar.
- <http://www.pewresearch.org/fact-tank/2018/04/09/gender-pay-gap-facts/>





Oracle Litigation

- Case still pending
- Began with routine OFCCP audit in 2014
- The OFCCP first sued Oracle in January 2017
 - Initially the parties had disputes over submitting data to OFCCP
- OFCCP claims Oracle shorted women and minority workers \$400 million in wages
 - steering them into jobs at lower-level positions
 - imposing an “extreme preference” for immigrant visa holders
- NYC pension funds overseer urging SEC to investigate whether Oracle Corp. misled investors about alleged pay bias across its workforce.



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Google Pay Equity

- Class action alleges Google denied career opportunities to women and systematically paid them less than men performing similar work
- Suit dismissed in December 2018
 - judge ruled proposed class was overbroad
- Refiled recently and more clearly defines employee categories allegedly subject to unfair pay practices
 - includes engineers, managers, sales personnel, and teachers in early childhood education centers
- March 4, 2019: Google announces on blog post that it was underpaying more men than women for doing similar work



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Federal Law: Equal Pay Act 1963

- **29 U.S.C.S. § 206**
- **Requires equal wages to men and women who perform jobs that:**
 - Require substantially equal skill, effort, and responsibility; and
 - Are performed within the same establishment under similar working conditions.
- **The job content determines “skill,” “effort” and “responsibility.”**
 - Definitions for “skill,” “effort” and “responsibility” are outlined by the EEOC.



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Federal Law: Equal Pay Act 1963

- **Justifications for pay differences (affirmative defenses that employer has to prove)**
 - Seniority
 - Merit system
 - System measuring earnings by quality or quantity of production
 - Bona fide factor other than sex, such as education, training or experience
- **If there is a pay differential found, the pay has to be increased for the lower paid employee.**



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Federal Law: Equal Pay Act 1963

- Collective actions are limited to “similarly situated” employees who affirmatively choose to join the suit
- Governed by the Fair Labor Standards Act
- Compares employees whose jobs require equal skill, effort and responsibility and are performed under similar working conditions
- EEOC charges involving EPA claims – around 1-1.1% each year consistently
 - Was higher from 1997-2005 (1.3-1.6%)



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Paycheck Fairness Act

- Amends Equal Pay Act
 - Limits employer’s “bona fide factor” defense by adding new subsection B:
 - “(B) The bona fide factor defense described in subparagraph (A)(iv) shall apply only if the employer demonstrates that such factor (i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; (iii) is consistent with business necessity; and (iv) accounts for the entire differential in compensation at issue. Such defense shall not apply where the employee demonstrates that an alternative employment practice exists that would serve the same business purpose without producing such differential and that the employer has refused to adopt such alternative practice.
 - Modifies “same establishment” requirement



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Paycheck Fairness Act

- Provides for enhanced penalties
- Broadens types of potential protected activity
- Includes funding for negotiation training for girls and women
- Approved by House Committee on Education and Labor on February 26, 2018
 - Some version has been introduced in each Congress since 1997, without success



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Federal Law: Title VII and Fair Employment

- Title VII and the Minnesota Human Rights Act
 - Both prohibit discrimination in compensation and other terms and conditions of employment (hiring, firing, etc.)
- Broader reach than the EPA
 - Similarly Situated
 - Similar tasks, similar skill, effort, responsibility, working conditions, and are similarly complex or difficult
 - Need not be in the same department or location



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Federal Law: Title VII Standard

- **Pay discrimination *on the basis of sex***
- ***McDonnell Douglas* burden shifting framework**
 - (1) Prima facie case requires proof that employer pays different wages “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions”;
 - (2) Burden shifts to the employer to produce a legitimate, non-discriminatory reason for the disparity;
 - (3) Burden then shifts back to plaintiff to show the proffered reason is merely a pretext for discrimination.



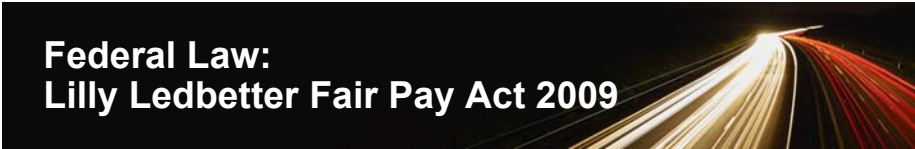
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Title VII vs. EPA

- **Charge Requirement**
 - EPA does not require EEOC charge
 - Title VII does
- **Time Frames**
 - EPA time limit is within 2 years of discriminatory practice
 - Title VII charge must be filed within 180 or 300 days (depending on state)
- **Burden of Proof**
 - Under EPA, employer has burden of proof (not just a burden of production as with Title VII) to establish its defense (seniority system, merit system, production-quota system, or any factor other than sex)



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Federal Law: Lilly Ledbetter Fair Pay Act 2009

- First piece of legislation Obama signed in response to the Supreme Court's ruling in *Ledbetter v. Goodyear Tire & Rubber Co.*
- The Act restored and reset the 180 day limit to file a claim for each paycheck (instead of the original employer decision).
 - An employee has 180 days (or 300 in jurisdictions with local or state law prohibiting compensation discrimination) to file a charge with the EEOC.



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Federal Contractors & Subcontractors

- **OFCCP Requirements**
 - **Executive Order 11246**
 - The contractor will not discriminate ... because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.
 - No “Steering”



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Federal Contractors & Subcontractors

- **OFCCP Directive 2018-05**
 - Rolls back earlier directive issued under prior administration
 - Continues to rely on Pay Analysis Groups of “similarly-situated employees”
 - (a) job similarity (e.g., tasks performed, skills required, effort, responsibility, working conditions and complexity); and
 - (b) other objective factors such as minimum qualifications or certifications
 - Will use EEO groups if contractor does not have its own grouping system



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Federal Contractors & Subcontractors

- **OFCCP Directive 2018-05 requires Desk Audit Analysis:**
 - (1) develop pay analysis groupings (PAGs) of comparable employees; and then
 - (2) statistically control for structural differences among employees in the PAG (e.g., division, business unit, product line, location) & individual employee characteristics like company tenure, prior experience, education, grade level.
- **Statistical analysis:**
 - May use comparative analysis or retrogression models
 - Control for legitimate factors other than sex (or race)



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EEOC Data Collection Federal Contractors & Subcontractors

- **EEOC Pay Data Collection:**
 - **Fall 2016: New Rule approved to require employers to provide pay data with the EEO-1 forms**
 - Set to take effect 2018
 - **Requires employers with 100+ employees and all federal contractors to report annual salaries for employees by job category, sex, and race/ethnicity**
 - first-tier subcontractors with 50 or more employees and at least \$50,000 in contracts) also required to report
 - **Current Administration blocked rule in 2017**
 - **Nat'l Women's Law Ctr. v. OMB , 2019 BL 72131, D.D.C., No. 17-2458**
 - Monday March 4 – overturned agency and allows reporting rule to go forward



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Equal Pay Act: Class Actions

- **EEOC Initiated - No need to meet class action requirements**
- **Equal Pay Act - Opt in procedures of the Fair Labor Standards Act**
- **Class Certification**
 - First step requires nothing more than substantial allegations that the putative class members were together the victims of a single decision, policy, or plan
 - FLSA requires “collective action” and the opting in of class members



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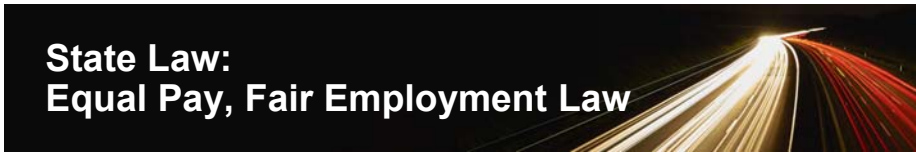
Equal Pay Act: EEOC Enforcement

EEOC EPA Lawsuits

- Heritage Bank (insurance relationship managers)
- Spec Formliners (sales representatives)
- Denton County (physicians) G4s Youth Students (investigators)
- Pizza Studio (servers)
- Maryland Insurance Administration (fraud investigators)
- First Metropolitan Financial (branch managers)
- Fastenal (sales support)
- Kansas County School District (principals)



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State Law: Equal Pay, Fair Employment Law

- Nearly all states have *some kind of* fair employment practices law that prohibits discrimination on the basis of sex. This can include compensation.
 - Alabama and Mississippi provide *no* protections for pay discrimination
 - See Minnesota Human Rights Act
- Many states have equal pay laws – i.e. employers cannot pay employees of one sex at rates lower than rates paid to employees of the opposite sex.
 - Most modeled after EPA



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Minnesota Equal Pay

- **Equal Pay for Equal Work (Minn. Stat. Ann. § 181.66, et. seq.)**
 - “No employer shall discriminate between employees on the basis of sex by paying wages to employees at a rate less than the rate the employer pays to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions”
 - EXCEPT for decisions based on:
 - Seniority, merit system, a system which measures earnings by quantity or quality of production, or a differential based on any other factor other than sex.



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Trends in State Equal Pay Laws

- **Broadening definition of comparable work by moving from “equal work” to “similar work.”**
- **Defining bona fide reasons for pay disparities, such as education and tenure.**
- **Providing pay transparency so employees know how their wages compare to the target range for the job.**
- **Ban salary-history inquiries to prevent the perpetuation of historic pay discrimination.**



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Equal Pay Act: Employee Pay History

- **Only two federal circuits allow past salary to be a legitimate factor**
 - Seventh (Illinois, Indiana, Wyoming)
 - Eighth (Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota)
- ***Rizo v. Yovino*, 854 F.3d 1161 (9th Cir. 2017)**
 - “Reliance on past wage simply perpetuates the past pervasive discrimination that the Equal Pay Act seeks to eradicate. Therefore, we readily reached the conclusion that past salary may not be used as a factor in initial wage setting, alone or in conjunction with less invidious factors.”



Salary History Bans: State Law

- **California**
- **Connecticut**
- **Delaware**
- **Hawaii**
- **Illinois (state agencies)**
- **Massachusetts (1st)**
- **New Jersey (state agencies)**
- **New York (state agencies)**
- **Oregon**
- **Pennsylvania (state agencies)**
- **Puerto Rico**
- **Vermont**





Salary History Ban: California

- **Effective January 2018**
- **Prohibits employers from asking job applicants about their salary histories**
 - Applies to outside recruiters used by employers
 - If the employee voluntarily discloses salary history, employer can rely on that information as long as it's not the only factor justifying a disparity
 - If an applicant asks for the pay scale range for the applied-to position, employers have to provide a pay scale



Salary History Ban: Oregon

- **Effective January 2019**
 - Employers cannot seek salary history information from employees, applicants or former employers. They can ask to confirm salary history once an offer has been made which includes compensation.
 - Employers cannot screen applicants or determine compensation based on applicant's prior salary history.
 - Limited safe harbor from pain and suffering and punitive damages if employer has conducted an internal audit in the last 3 years and has made reasonable progress.

Salary History Bans: Local Law

- Atlanta, GA (city agencies)
- Albany County, NY
- Chicago, IL (city agencies)
- Kansas City, MO (city agencies)
- Louisville, KY (city agencies)
- New Orleans, LA (city agencies)
- New York City, NY
- Philadelphia, PA
- Pittsburgh, PA (city agencies)
- San Francisco, CA
- Suffolk County, NY
- Westchester County, NY



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Salary History ANTI-Bans: State Law

- Michigan
 - Prohibited salary history bans in the state. Local governments may not regulate the information that employers must request, require, or exclude on an application for employment or during the interview process.
- Wisconsin
 - Local governments may not prohibit employers from soliciting the salary history of prospective employees.
- Iowa, Tennessee, and North Carolina – preemption legislation already exists that would prevent salary history bans from being passed.



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State Pay Transparency

- **Laws that bar employers from prohibiting employees to inquire, discuss, or disclose their own wages**
 - California, Colorado, Connecticut, Delaware, D.C., Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Hampshire, New Jersey, New York, Oregon, Vermont, Washington, Puerto Rico



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Minnesota Wage Disclosure

- **Minnesota Statute 181.172**
- **An employer shall not:**
 - (1) require nondisclosure by an employee of his or her wages as a condition of employment;
 - (2) require an employee to sign a waiver or other document which purports to deny an employee the right to disclose the employee's wages; or
 - (3) take any adverse employment action against an employee for disclosing the employee's own wages or discussing another employee's wages which have been disclosed voluntarily.



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Minnesota Wage Disclosure (cont.)

- **Employees may not:**
 - Disclose proprietary information, trade secret information, or information that is otherwise subject to a legal privilege or protected by law
 - Disclose wage information of other employees to a competitor of their employer
- **An employer that provides an employee handbook to its employees must include in the handbook notice of employee rights and remedies under the Wage Disclosure statute.**



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Internal Pay Equity Audits

- **Frequent question: what is the discoverability of the results from an internal audit?**
 - Does publication of the results waive the AC privilege?
 - Probably yes.
- **The D.C. circuit found that the attorney-client privilege did not apply to documents for an internal investigation prepared by non-attorneys if they were not made for soliciting legal advice. See *United States v. ISS Marine Servs.*, 905 F. Supp. 2d 121, 128-29 (D.D.C. 2012).**
 - **Can analyses become evidence of intentional discrimination?**
 - Question for the jury.



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Internal Pay Equity Audits

- **HOW TO CONDUCT**
 - Required for federal contractors under 41 CFR 60-2.17(b)
 - Recommended for EPA and Title VII compliance
- **Review job descriptions and qualifications required for positions**
- **Review compensation philosophy and practices**
 - Is pay based on performance?
 - Are performance reviews calibrated and consistent across managers/supervisors?
 - Is individual negotiation permitted?
 - Is pay increased because of tenure/experience?



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Internal Pay Equity Audits

- **Determine appropriate segmentation of positions.**
- **Are there any obvious outliers in same position?**
- **Are there job groups with similar requirements that have clear discrepancies?**
 - Potential indicator of disparate impact claims
- **Conduct statistical analysis.**
 - Cohort analysis; regression analysis
- **Identify pay practices that may be creating structural pay disparities**
- **Do legitimate compensation philosophies and practices explain discrepancies?**



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Practical Tips for Fair Pay Compliance

- Set position compensation ranges ahead of hiring process
- Remove inquiries regarding salary history from job applications
- Train hiring personnel and recruiters on how to negotiate salary without inquiring about salary history
- Regularly review and update job descriptions
- Conduct annual reviews of market/industry compensation



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Practical Tips for Fair Pay Compliance

- Undertake *privileged pay analysis*
 - Assess for pay disparity by gender, race, and other characteristics
 - Develop appropriate segmentation of positions
 - By job function (segments of substantially similar roles)
 - Consider geographic region
 - Conduct Analysis
- Undertake *privileged* decision-making process of how to address disparities revealed
- Determine appropriate remediation, either enterprise-wide or in specific organizational or functional areas
 - Craft timing and messaging of remediation



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Practical Tips for Fair Pay Compliance

- **Update written policies and procedures**
 - Revise existing handbooks, policies, and harassment trainings to: (1) prohibit gender-based, race and ethnicity pay discrimination for similar work; (2) delete policies that prohibit employees from discussing their wages; (3) add a formal complaint procedure; and (4) prohibit retaliation against employees who “invoke or assist” in the enforcement of equal pay requirements or discuss their wages
- **Consider creating formal policies describing process for determining position compensation and classification**



Questions?

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