



## New Legal Rules for Identifying and Fixing Pay Discrimination

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**Scott Pechaitis**

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### Jackson Lewis' Pay Equity Group

- ◆ Our Pay Equity Group is comprised of approximately **35 attorneys** partnering with a team of **15 Ph.D.- and Master's-level Statisticians and Economists**
- ◆ Our comprehensive pay equity expertise includes:
  - Defending employers in agency investigations and in litigation under Title VII, the Equal Pay Act and state fair pay laws
  - Conducting proactive, privileged pay analyses
  - Helping employers identify and address "pay gaps"
  - Providing advice and counsel regarding how to design, implement, and improve pay systems to provide equity and minimize liability

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### Scott Pechaitis

SCOTT is a Principal in Jackson Lewis' Denver office.

Scott works with a team of statisticians, computer programmers, data analysts, and attorneys who use cutting edge data and statistical analyses to evaluate risk and legal strategies for employers.

Scott assists employers with proactive "self audits" of company data and records, including Pay Equity Analyses. In these projects, Scott works closely with HR and legal teams to evaluate legal risks under the maximum protection of the attorney-client privilege.

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### What Are We Talking About Today?

- ◆ The (New) Equal Pay Movement
- ◆ How Federal and State Governments are Working to Close the "Pay Gap"
- ◆ Trends in New Equal Pay Laws
- ◆ Best Practices for Mitigating the Risk of Pay Discrimination Claims

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Why Are We Talking About This?

- ◆ **Substantial increase in pay discrimination claims being filed**
  - Greater employee awareness
  - "Tack on" claims from plaintiffs' attorneys seeking attorneys' fees
  - EEOC added pay discrimination questions to charge intake
- ◆ Easy to "convert" to class action
- ◆ Claims are hitting **employers of all sizes in all industries**
- ◆ Which positions are most at risk of big \$\$ claims?
  - Highly compensated positions
  - Highly populated positions

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#MeToo #TimesUp #EqualPay



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#MeToo #TimesUp #EqualPay



**Exclusive: Wahlberg got \$1.5M for 'All the Money' reshoot, Williams paid less than \$1,000**

Andrea Nardoni, USA TODAY Published 8:41 p.m. ET Jan. 9, 2018 | Updated 11:28 p.m. ET Jan. 10, 2018



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**It's all about the "Pay Gap"**

For every \$1 paid to men, how much is paid to . . .

Group	Nationwide
Women	80¢
African-American Women	63¢
Hispanic Women	54¢

Over the course of a 40-year career, a Hispanic woman can expect to earn at least **\$1 Million** less than a man

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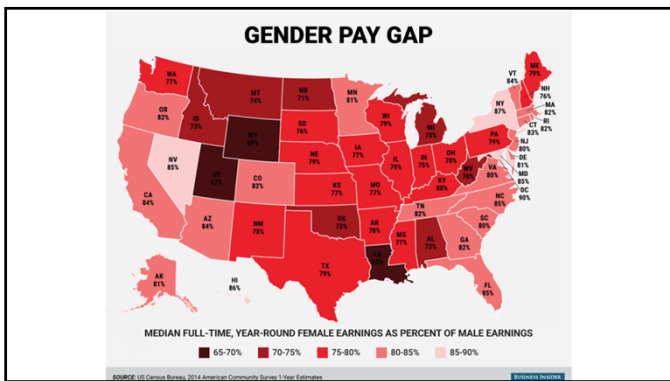
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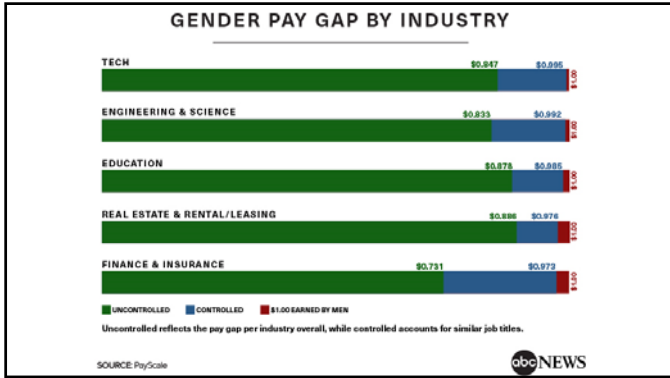
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### Recent EEOC Settlements

- ◆ **June 2018** – University of Denver – Law School – **\$2.88 million** to eight female professors; statistical analysis showed women paid on average \$19k less than men
- ◆ **July 2016** – Qualcomm – the tech giant agreed to pay **\$19.5 million** to settle claims that the company denied female employees equal pay and job opportunities
- ◆ **March 2016** – Daiichi Sankyo – **\$8.2 million** to settle pay discrimination claims by a class of female pharmaceutical sales representatives

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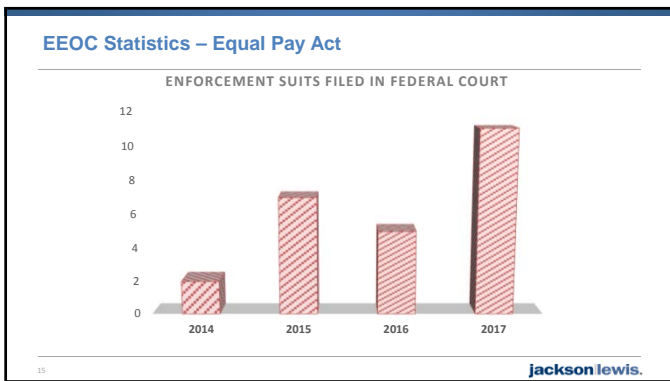
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**EEOC Enforcement Trends**

- ◆ Equal pay is a top enforcement priority in Strategic Enforcement Plan for 2017 - 2021
- ◆ EEOC generally finds probable cause in 3% of all charges they receive
- ◆ **EEOC found probable cause in 33% of Equal Pay Act charges**
- ◆ EEOC can issue Commissioner's Charges and directed investigations (no employee claim needed!)

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**The Gender Pay Gap In Developed Nations Visualized**

% difference in full-time earnings between men/women in selected OECD nations\*



\*As a % of the earnings of men, latest available year  
© Statista 2018. Source: OECD

**statista**

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**Countries With Equal Pay Regulation**

(As Of September 2018)

- ◆ Australia
- ◆ Austria
- ◆ Belgium
- ◆ Canada (Quebec)
- ◆ Denmark
- ◆ Finland
- ◆ France
- ◆ Germany
- ◆ Iceland
- ◆ Italy
- ◆ Norway
- ◆ Portugal
- ◆ Switzerland
- ◆ United Kingdom

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**U.S. Equal Pay Act**

- ◆ Applies to **wage rate differences** between sexes. . .
  - *Title VII addresses race/ethnicity*
- ◆ . . . working at the same establishment . . .
- ◆ . . . doing **“equal work.”**
- ◆ Employers have an affirmative defense if based on:
  - A seniority system,
  - A merit system,
  - Quantity or quality of work, or
  - Any factor other than sex

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**California Fair Pay Act of 2015**

◆ Applies to **wage rate differences** between sexes **and races**. . .

◆ . . . **working at the same establishment** . . .

◆ . . . doing "**equal substantially similar work**."

◆ Employers have an affirmative defense if based on:

- A seniority system,
- A merit system,
- Quantity or quality of work, or
- Any factor other than sex *such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity.*

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State	Effective Date
California	January 1, 2016 (amendments effective January 1, 2017)
Maryland	October 1, 2016
Massachusetts	July 1, 2018
New Jersey	July 1, 2018
New York	January 19, 2016 (NYC - October 31, 2017)
Oregon	January 1, 2019
Puerto Rico	March 8, 2017 (penalties not recoverable until March 8, 2018)
Delaware	December 1, 2017
Washington	June 1, 2018

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**Aggressive New Standards for Pay Comparisons**

- ◆ California – substantially similar
- ◆ Oregon – work of a comparable character
- ◆ Massachusetts – comparable work
- ◆ New Jersey – substantially similar
- ◆ Washington – similarly employed

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**States With Safe Harbors for Proactive Analyses**

- ◆ Massachusetts – 3-year affirmative defense to pay discrimination claims
- ◆ Oregon – 1-year limitation on available damages for successful pay discrimination claims
- ◆ Puerto Rico – 1-year limitation on liquidated damages for successful pay discrimination claims

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**New State Laws Make it Easier for Employees to Bring Successful Claims**

- ◆ Broader definitions of who can be compared against whom for pay purposes
- ◆ Requiring pay differences be based on job-related factors
- ◆ Requiring employers to demonstrate explanations for pay differences with consistent data
- ◆ Authorizing attorneys' fees for successful claims

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## Same job, different pay?

Percentage of female workers (blue), male workers (red) and median weekly earning (USD).



Source: US Bureau of Labor Statistics

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### “Steering”

- ◆ “Steering” is the slotting of men and women into job positions with different earning potentials
- ◆ Classic example = uniform laundering companies
  - Male Jobs: warehouse, packager, loader, route driver
  - Female Jobs: launderer, presser, sewer, mender
- ◆ *Miller v. City of New York* (SDNY April 2018)
  - Female plaintiffs alleged City steered female applicants into school crossing guard job, while male applicants were more often given higher-paying jobs as traffic enforcement agents.
  - Federal district court held that school crossing guards were not similar situated due to different job responsibilities

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## PROHIBITIONS ON THE USE OF PRIOR SALARY INFORMATION

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**Not All Salary History Bans Are the Same**

- ◆ Does the ban apply only to applicants *living in* those cities or states?
- ◆ Does it apply only to applicants who apply for *jobs in* the cities and states?
- ◆ Is the ban just for external applicants, or does it apply to internal applicants too?
- ◆ Can you just not ask or can you also not rely on salary history even if voluntarily offered?
- ◆ Can you confirm salary history if an applicant voluntarily discloses it?
- ◆ At what point in the process can you ask for salary history? Post-offer, only post-offer after an offer that includes pay?

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**Prior Salary Tips & Workarounds**

- ◆ Request applicant salary *expectations*
- ◆ Provide applicants a salary range for the position; let them self-select out
- ◆ Set fixed starting salaries by position
- ◆ “Matrix approach” that puts a dollar value on job-related attributes, such as years of prior experience
- ◆ Prepare analyses and make pay adjustments where prior salary explains pay gaps

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**Rizo v. Yovino (9<sup>th</sup> Cir.) – April 2018**

- ◆ Holding: Prior salary is not a “factor other than sex”
- ◆ Prior salary alone, or in combination with other factors, cannot justify a wage differential between male and female employees under the Equal Pay Act.
- ◆ EEOC submitted *amicus* brief
- ◆ 2018 decision overturned 1982 decision by same court
- ◆ Created a split in federal circuit courts, which means it may be ripe for Supreme Court

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**City of Philadelphia – A Test Case**

- ◆ The City of Philadelphia adopted an ordinance that prohibited both (1) inquiries about and (2) reliance on prior salary information.
- ◆ **April 2018 – Federal District Court struck down the provision prohibiting *inquires* about prior salaries as being unconstitutional on first amendment grounds**
- ◆ Provision prohibiting *reliance* on prior salary information was not struck down
- ◆ Is this a possible road map to additional changes? Or has the ship already sailed?

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**On the Opposite End of the Spectrum**

- ◆ Michigan and Wisconsin passed legislation prohibiting restrictions on employers’ ability to request and rely on prior salary information.
- ◆ Applies only to public employers (for now).

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### “Pay Transparency”

- ◆ Unlawful to take adverse action against employee for asking or discussing compensation
- ◆ Goal is to bring pay “out in the open”
- ◆ Concept is rooted in *Lilly Ledbetter* case
- ◆ Many states and municipalities are enacting
- ◆ Federal contractors have Executive Order requiring
- ◆ National Labor Relations Act also prohibits retaliation against employees for discussing terms or conditions of employment

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### HOW DO EMPLOYERS RESPOND?

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### Ostrich Defense?



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### Internal Assessments

- ◆ Develop “pay groups” that mirror the company’s pay systems
  - Evaluate whether broader groups should also be reviewed
- ◆ Use statistical analyses and cohort reviews to identify actionable “pay gaps”
- ◆ Evaluate pay groups with “flags”
  - Are the gender/race-based pay differences justified?
  - Do we have the data/records necessary to demonstrate explanations for gaps?
  - What caused the pay disparity?
- ◆ Consider pay adjustments and/or practice changes

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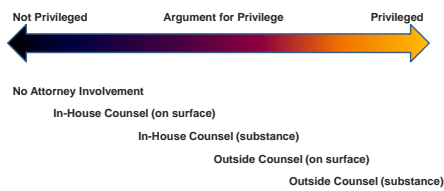
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### The Sliding Scale of Attorney-Client Privilege



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### What Defenses Are Available to Employers?

- ◆ An employer can avoid liability in some instances for the wage differential if it can show that the differential is based upon a bona fide factor other than sex, such as education, training, or experience.



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### What Defenses Are Available To Employers?

- ◆ General Examples include:
  - Seniority system
  - Merit increase system
  - System that measures earnings by quantity or quality of production
  - Geographic location in which a job is performed
  - Jobs that require the regular performance of different duties or services
  - Work that is performed on different shifts
  - Travel, if the travel is necessary condition of the particular job

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### Publishing Your Pay? Your Friends are Doing It!



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### BEST PRACTICES FOR MITIGATING RISKS OF PAY DISCRIMINATION CLAIMS

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**Best Practices for Mitigating Risk of Pay Discrimination Claims**

- ◆ **Don't base starting salary on prior salary**
  - Even if still permissible to base decisions on prior salary, doing so could create pay differences that are hard to defend
- ◆ **Limit discretion when it comes to pay decisions**
  - The government sees "discretion" as being synonymous with "discrimination"
  - Make sure there are checks and balances
- ◆ **Incorporate *narrow* bands to help control pay gaps**
- ◆ **Train managers on EEO issues relating to pay**

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**Best Practices for Mitigating Risk of Pay Discrimination Claims**

- ◆ **Avoid "pay for performance" merit increases**
  - Use bonuses to reward performance instead
- ◆ **Make sure starting salary decisions are based on job related factors**
  - Job related factors generally include experience, education, skills, certifications, etc.
  - Consider creating list of eligible factors for different positions
- ◆ **Document bases for pay decisions**
  - Require hiring managers to put a note in the employee file
  - Particularly true when paying above or below a set range

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**Best Practices for Mitigating Risk of Pay Discrimination Claims**

- ◆ **THE BIG ONE – Conduct *Privileged Pay Equity Analyses***
  - Find the pay gaps in your workforce and make sure they are defensible
    - Do you need to look at different pay groupings under different laws?
  - Will you be able to demonstrate why pay gaps are justified?
    - Do you have the data necessary to rely on things like prior experience, education, etc.
    - Are your data clean and accurate? Or do you risk exposure from poor data?
  - Take care in making equity adjustments
    - Best practice is to do it in regular merit increase cycle
    - Consider whether its better to give one person a big adjustment or multiple people small adjustments

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- Text **ASA18**
- To: 22333



 Poll Everywhere

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### The Equal Pay Act of 1963

Requires that employees performing jobs that call for substantially equal skill, effort, and responsibility, and that are performed under similar working conditions, be paid equally, regardless of race

Prohibits employers from paying unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility

Applies only to employers that have government contracts in excess of \$50,000

Prohibits employers from permitting sexual harassment of their employees

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ANSWER:

Prohibits employers from paying unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility

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FedCo is a local staffing firm that recently placed an order for 10 men to help move office furniture. The client wanted all men because it believes that men are generally stronger than women. Can FedCo be held liable for discrimination under federal Equal Employment Opportunity laws?

Yes

No

Start the presentation to see the content. Hit the content icon at the top or get help at Public.com/help

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ANSWER:

Yes

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Generally, if two equally qualified persons apply for a position, the staffing firm lawfully may

Choose the younger applicant because the employer will get more years of service

Choose the applicant who is a relative or friend

Choose the female applicant over the male applicant because it has already referred several male employees to that client

Choose the female applicant over a male applicant because she is more attractive

None of the above

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ANSWER:

Choose the applicant who is a relative or friend

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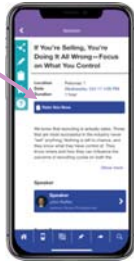
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