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SOUP TO NUTS – A COMPREHENSIVE DISCUSSION OF COUNSELING & COMPLIANCE HOT TOPICS FOR IN-HOUSE COUNSEL

ACC Association of Corporate Counsel

July 11, 2019

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ANTITRUST COMPLIANCE COUNSELING: HOT TOPICS

Lisa Phelan

Department of Justice's "Evaluation of Corporate Compliance Programs" Guidance document (updated April 2019)

U.S. Department of Justice
Criminal Division

Evaluation of Corporate Compliance Programs

(Updated April 2019)

1. "Is the corporation's compliance program well designed?"
2. "Is the program being applied earnestly and in good faith?" In other words, is the program being implemented effectively?
3. "Does the corporation's compliance program work" in practice?

See JM § 9-28.800.

In answering each of these three "fundamental questions," prosecutors may evaluate the company's performance on various topics that the Criminal Division has frequently found relevant in evaluating a corporate compliance program. The sample topics and questions below form neither a checklist nor a formula. In any particular case, the topics and questions set forth below may not all be relevant, and others may be more salient given the particular facts at issue.[1] Even though we have organized the topics under these three fundamental questions, we recognize that some topics necessarily fall under more than one category.

I. Is the Corporation's Compliance Program Well Designed?

The "critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct." JM 9-28.800.

Accordingly, prosecutors should examine "the comprehensiveness of the compliance program," JM 9-28.800, ensuring that there is not only a clear message that misconduct is not tolerated, but also policies and procedures – from appropriate assignments of responsibility, to training programs, to systems of incentives and discipline – that ensure the compliance program is well-integrated into the company's operations and workforce.

A. Risk Assessment

The starting point for a prosecutor's evaluation of whether a company has a well-designed compliance program is to understand the company's business from a commercial perspective, how the company has identified, assessed, and defined its risk profile, and the degree to which the program devotes appropriate scrutiny and resources to the spectrum of risks.

Prosecutors should consider whether the program is appropriately "designed to detect the particular types of misconduct most likely to occur in a particular corporation's line of business" and "complex regulatory environment[]." JM 9-28.800.[2] For example, prosecutors should consider whether the company has analyzed and addressed the varying risks presented by, among other factors, the location of its operations, the industry sector, the competitiveness

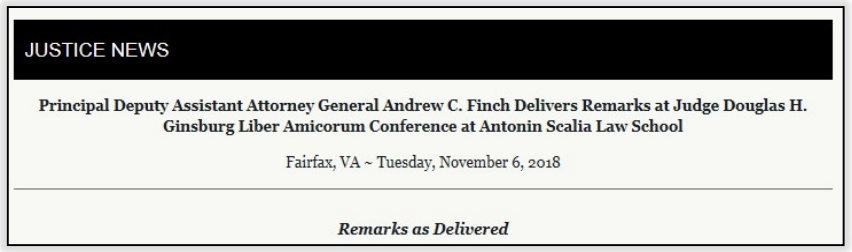
URL: https://www.justice.gov/criminal-fraud/page/file/937501/download

The Antitrust Division is considering a potentially significant policy shift to credit companies with compliance programs in charging decisions

- Principal DAAG Andrew Finch announced on Nov. 6 that the Division is "carefully examining" how to take into consideration the existence of compliance programs, "whether at the charging stage or at sentencing."

- This follows a prior, recent policy shift by the Division to credit the existence of compliance programs at the sentencing stage.

- It is more important than ever for companies to have in place comprehensive and tailored antitrust compliance programs.



JUSTICE NEWS

Principal Deputy Assistant Attorney General Andrew C. Finch Delivers Remarks at Judge Douglas H. Ginsburg Liber Amicorum Conference at Antonin Scalia Law School

Fairfax, VA ~ Tuesday, November 6, 2018

Remarks as Delivered

mlex | Global Antitrust

Comment: In praise of Barclays' compliance program, antitrust enforcers offer insights

By Richard Vanderford on 9 Dec 16 | 22:55 GMT

Five of the world's largest banks will appear before a Connecticut federal judge next week to face sentencing over involvement in manipulating key financial benchmarks. Of those, only Barclays has received credit for its efforts to improve its culture in the wake of the bank's wrongdoing, a development that prosecutors recently attributed to significant improvements to its compliance program and "dramatic" changes to its corporate culture.

Enhanced risk of probation or imposition of monitor for corporate offenders who do not have a compliance program

- Corporate offenders that do not demonstrate a commitment to antitrust compliance face the risk of the additional consequence of probation:
  - Earlier this year, the Antitrust Division required a capacitors manufacturer (Japan-based Nippon Chemi-Con) to agree to a five-year period of probation during which the company would develop a corporate compliance program and submit annual reports regarding its compliance.
  - In 2017, the Antitrust Division required a shipping service company to agree to a three-year probation period that included the installation of an independent corporate monitor.
- Companies would be wise to proactively enhance their compliance programs, to internally identify problems before the Antitrust Division begins an inquiry, and to show the Antitrust Division their compliance efforts in order to obtain favorable credit for those efforts.

Fundamental Competition Law Issues

- **Antitrust laws are intended to promote and facilitate competition and prohibit activities that hamper or harm competition:**

Anticompetitive agreements	• Collective action • Agreements that unreasonably restrain trade • Conduct can be **criminal**
Unreasonable monopoly behavior	• Unilateral action • "Exclusionary" conduct or abuses of a dominant market position
Anticompetitive transactions	• Mergers, acquisitions, joint ventures that substantially reduce competition

Most jurisdictions around the world have comparable laws on these issues.

Elements for Violation of the Sherman Act (15 U.S.C. § 1)

✓ Agreement

- No formal/written agreement necessary

✓ Restraint of trade

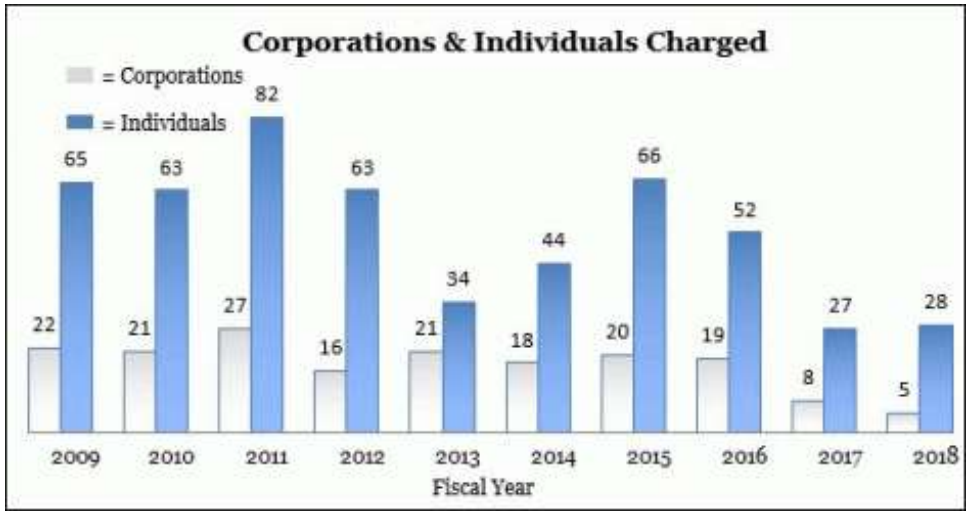
- Price Fixing
- Market Allocation
- Bid Rigging

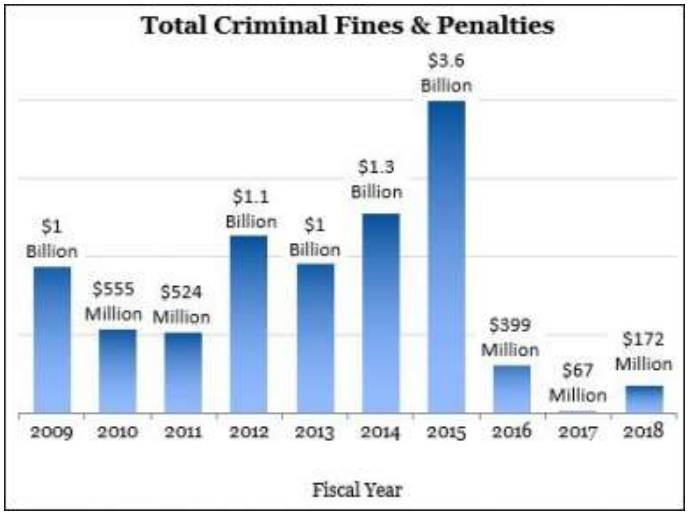
✓ Interstate or foreign commerce

- Individuals from over 25 countries have been jailed in the U.S. for antitrust violations

- Statute of Limitations: 5 years from *last act* in furtherance of conspiracy

U.S. Criminal Antirust Enforcement Statistics





Source: https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts

- Criminal resolutions started to fall in 2016, the year prior to the change in administration.
- The Trump Administration continues to devote significant resources to criminal antitrust enforcement, although with a greater focus on US companies and executives recently.
- In CY 2018, the DOJ has:
  - Obtained $170M in criminal fines & restitution.
  - Filed charges against 4 companies & 16 individuals.

Antitrust and Employees

- Antitrust laws, including criminal antitrust laws, apply to labor and wage conduct.
- Employers **compete to hire or retain** employees
  - The antitrust laws apply to hiring and compensation practices
  - Companies might compete for employees even if they do not make the same products or provide the same services
- Competition for employees will typically result in higher employee wages or better benefits

Agreements Not to Compete for Employees

- The biggest antitrust pitfall with hiring practices is an illegal agreement not to compete
  - **Wage-fixing agreements:** Agreements with other companies about wages, salaries, or other benefits
  - **No-poaching agreements:** Agreements with other companies not to hire or solicit their employees
- Agreements not to compete can now lead to a criminal indictment and penalties against the company and individuals

DOJ Enforcement of No-Poach Agreements

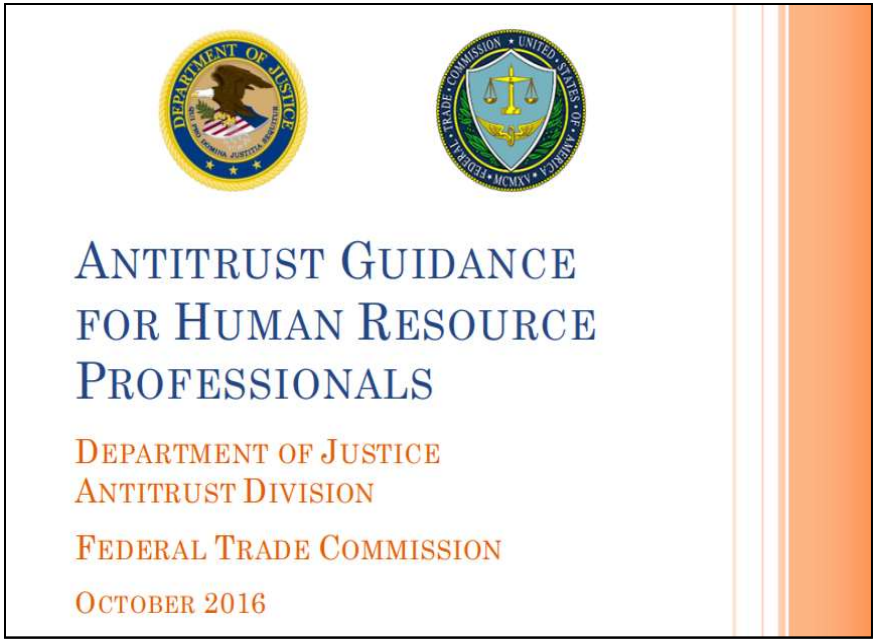
- Historically, the DOJ and FTC did not focus their attention or resources on the market for labor/employees as a place where employer conduct could be considered per se illegal.

- Agreements among companies engaged in a joint activity often included terms precluding solicitation of one another's employees.

- View changed after finding explicit agreements among media and tech companies not to hire one another's employees, separate from any joint activity. *See* U.S. v. Adobe Systems, Inc. et al., Final Judgment, 10-cv-01629 (N.D. Cal.).

Antitrust Guidance Regarding "No-Poach" Agreements

- DOJ will criminally prosecute **naked horizontal agreements** between employers not to solicit employees or on setting wages.
  - Conduct being investigated in healthcare industry – *Publicly confirmed by DAAG Nigro in May 2018 speech.*
  - "Several active investigations" -- *DOJ AAG Makan Delrahim, January 2018 & November 2018.*



The antitrust laws establish the rules of a competitive employment marketplace.

Agreements among employers not to recruit certain employees or not to compete on terms of compensation are illegal.

No Poach Agreements in Broader Business Agreements

- **Rule of reason standard**
  - Agreements that are **ancillary or reasonably related** to otherwise pro-competitive agreements, including, *e.g.*:
    - Joint ventures
    - Supplier agreements
    - M&A activity
    - Other business collaborations
  - DOJ Guidance clearly articulated this approach

Issue Spotting for Counsel

- ✓ **What is the rationale for entering the non-solicitation agreement?**
  - Non-solicitation agreements must serve as a means to support a broader, legitimate, and procompetitive goal, not be the goal.
- ✓ **To which employees does the agreement apply?**
  - Associated antitrust risk will be lower if it is narrowly tailored to employees who may have key know-how, training, or talent, are otherwise considered necessary or valuable for the continuation of the business.
- ✓ **May restricted employees still apply to job postings by the company to whom the provision applies?**
  - This fact would help to minimize antitrust risk because restricted employees would still have the ability to compete for openings.
- ✓ **What is the duration of the non-solicitation agreement?**
  - The shorter the period of time, the less antitrust risk. A provision that applies only during the duration of the contract or collaboration will be subject to less scrutiny than one that continues to apply after the contract or collaboration has ended.

Other factors will be relevant to evaluating antitrust risk associated with non-solicitation provisions. Counsel should be consulted when considering such an agreement.

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NOTEWORTHY GOVERNMENT DATA SECURITY AND CYBERSECURITY COMPLIANCE CONSIDERATIONS

Tina Reynolds

Overview

- FAR Basic Safeguarding Rule – most basic protections for contract-related information
- Controlled Unclassified Information (CUI) – non-classified information that needs special protection
- Covered Defense Information (CDI) and the DFARS network penetration and cybersecurity rule
- Cyber incident reporting
- Supply chain considerations
- Conducting assessments of cybersecurity compliance
- The role of the new Defense Counterintelligence and Security Agency
- Potential liability for noncompliance with cyber requirements

Cybersecurity Protection Required for. . .

- Federal contract information ("FCI")
- Controlled unclassified information ("CUI")
- Covered defense information ("CDI")

Federal Contract Information

- Broadest category
- FAR 52.204-21, "Basic Safeguarding of Covered Contractor Information Systems" (Jun 2016)
- Applies to nearly all information related to a contract
- Lays out 15 specific safeguarding requirements for IT systems
- Required in all solicitations for contracts that may require contract-related information to reside in or transit through a contractor's (or a subcontractor's) IT systems

Controlled Unclassified Information

- Federal Information Security Management Act of 2002
  - OMB directed to develop framework for the creation and maintenance of minimum security controls to protect federal information systems
  - Since then dozens of statutes, executive orders, regulatory updates
- NARA Final Rule issued Sept 14, 2016; effective Nov. 14, 2016
  - Clarifies and makes uniform the treatment of CUI
  - Establishes CUI Registry as central repository for all guidance, policy, instructions, and information pertaining to CUI
- Directly applies only to federal agencies, but requirements indirectly extend to contractors

Controlled Unclassified Information (cont.)

- Anticipated draft and final FAR clause will further implement this directive for federal contractors
- Under NARA final rule, information provided by or developed for the government falls into one of four classifications:
  - Classified Information
  - CUI Basic
  - CUI Specified
  - Uncontrolled Unclassified Information
- CUI requires a "banner marking"
  - Facilitates uniformity between agencies, contractors, and other entities
  - Consists of 3 parts: control, category or subcategory, and limited dissemination markings

CUI Categories and Protections

- CUI Registry further breaks down these classifications into 23 categories and 82 subcategories
- NARA final rule incorporates by reference various Federal Information Processing Standards (FIPS) and National Institute of Standards and Technology (NIST) Special Publications (SP):
  - These standards must be applied to systems that involve CUI in conjunction with the framework established by FISMA
- NIST SP 800-171, "Protecting Controlled Unclassified Information in Nonfederal Information Systems and Organizations"
  - List of security requirements and recommended relevant controls for protecting CUI on non-federal systems
  - 30 "basic" and 79 "derived" requirements

Covered Defense Information

- DFARS 252.204-7012, , "Safeguarding Covered Defense Information And Cyber Incident Reporting" (Oct. 2016)
- Requires implementation of NIST 800-171 standards
  - full compliance by December 31, 2017
  - DoD clarified that compliance means System Security Plan (SSP), plus a Plan of Actions and Milestones (POAM) to correct deficiencies.
- *Covered defense information* means unclassified controlled technical information or other information, as described in the [CUI Registry], that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Governmentwide policies, and is—

  (1) Marked or otherwise identified in the contract, task order, or delivery order and provided to the contractor by or on behalf of DoD in support of the performance of the contract; or

  (2) Collected, developed, received, transmitted, used, or stored by or on behalf of the contractor in support of the performance of the contract.

Cyber Incident Reporting

- No specific FAR requirement for non-DoD agencies – each has its own unique requirements
- DoD "network penetration" rule (DFARS 252.204-7012)
  - expands the types of cyber incidents that must be reported
  - extends to all covered defense information
- "*Cyber incident* means actions taken through the use of computer networks that result in a compromise or an actual or potentially adverse effect on an information system and/or the information residing therein."
  - If there is a compromise, an adverse effect is not necessary

Supply Chain Considerations

- FAR 52.204-23 Prohibition on Contracting for Hardware, Software, and Services Developed or Provided by Kaspersky Lab and Other Covered Entities (July 2018)
- May 2019 - The U.S. Department of Commerce (Commerce) has added Huawei Technologies Co. Ltd. (Huawei) and its affiliates to the Bureau of Industry and Security (BIS) "Entity List," a move that effectively cuts off Huawei from directly or indirectly acquiring U.S.-origin hardware, software, and technology.
- Who's next? ZTE, Lenovo, others?

Assessments of Cybersecurity Compliance

- Currently no formal third party assessment organization
- Defense Contract Management Agency (DCMA) given authority to review as part of audit process.
- DoD Inspector General also to conduct period audits
- Expectation that DoD, potentially through the new Defense Counterintelligence and Security Agency (formerly Defense Security Service) will be charged with this role.

Potential Consequences of Noncompliance

- To date, no additional penalties or remedies for non-compliance beyond traditional breach of contract remedies have been imposed.
- Recent decision *U.S. ex rel Markus v. Aerojet Rocketdyne* out of Eastern District of California confirms potential False Claims Act liability for failure to meet government cybersecurity standards.

Sources of Additional Information

- NARA final rule: 81 FR 63324
- CUI registry: https://www.archives.gov/cui/registry/category-list
- NIST 800-171: http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-171.pdf

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DEVELOPING GENDER ISSUES IN THE WORKPLACE

Andrew Turnbull

Agenda

1. Compliance Challenges in the #MeToo Era
2. Increasing Compliance Risks for Pay Equity

COMPLIANCE CHALLENGES IN THE #METOO ERA

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Allegations of workplace misconduct dominate the 24/7 news cycle	All industries are impacted	Companies & boards have to answer to the courts and the public

- For the actions of their executives
- For looking the other way
- For not making a harassment-free workplace a priority

Stats on #MeToo

- In 2018, the EEOC yielded nearly **$70 million** for litigation and administrative enforcement of sexual harassment issues, up from $47.5 million the prior year.
- Twenty-First Century Fox's **$90 million** #MeToo settlement on Nov. 2017 marked one of the largest payouts ever in a derivative lawsuit.
- A number of large public companies have faced shareholder derivative suits claiming that the their boards failed to act or minimized harassment by officers
- A recent study by the Harvard Business Review shows that a **single** sexual harassment claim can dramatically reduce public perceptions of an entire organization's approach to gender equity (or lack thereof) - even more so than a claim of financial wrongdoing.
- According to Temin & Co., at least **810** prominent people across industries have been publicly accused of sexual misconduct (and that number is growing)

Host of State and Local #MeToo Laws

HARASSMENT POLICIES AND NOTICES

- Require employers to include certain information in their harassment policies and provide notices about harassment laws and claims (e.g., CA, DE, ME, NY, NYC)

HARASSMENT PREVENTION TRAINING

- Provide harassment prevention training on a routine basis that meets certain standards (e.g., CA, DE, ME, NY, NYC)

RESTRICTIONS ON NONDISCLOSURES

- Ban use of nondisclosure and confidentiality provisions in agreements with employees to prevent them from disclosing harassment, sex assault, and (in some cases) discrimination and retaliation claims (e.g., CA, NJ, NY, TN, VE, WA)

LIMITING ARBITRATION AGREEMENTS

- Prohibit use of agreements mandating employees arbitrate harassment and sex assault claims (MD, NJ, NY, VE, WA)
- Possible preemption issues under the Federal Arbitration Act

MAKING IT EASIER TO ESTABLISH CLAIMS

- Expand the statute of limitations for harassment and sex assault claims (MI)
- Remove or lower the "severe or pervasive" standard required to establish harassment claims (CA, DE, NY)

REPORTING REQUIREMENTS

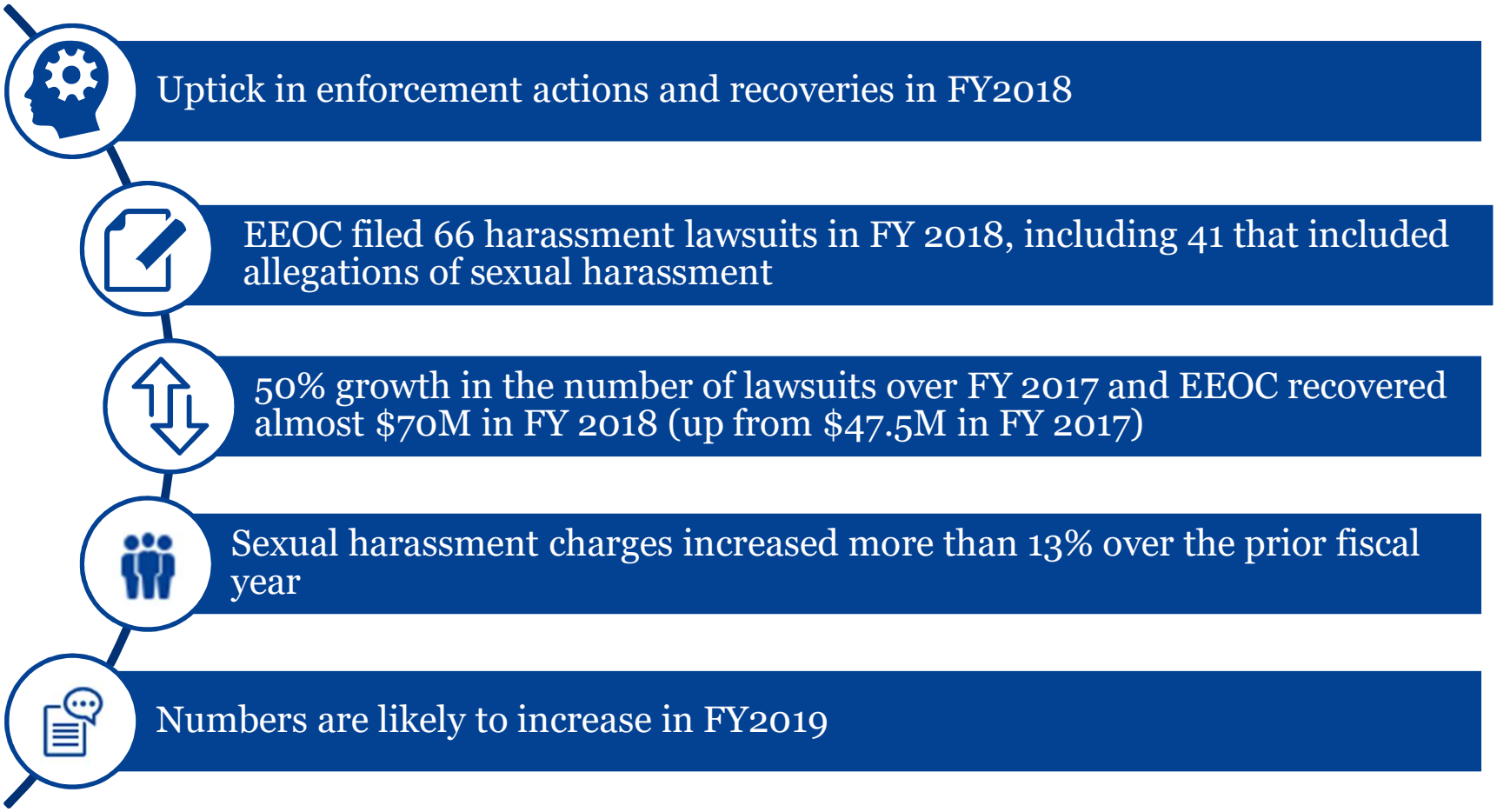
- Require reporting statistics on sexual harassment settlements to the state government (MD)

Federal Legislative Efforts

Tax Cuts and Jobs Act of 2017 – prohibits tax deductions for sex harassment claim settlements and attorney fees if the agreement contains nondisclosure provisions

Pending legislation that is unlikely to pass given the gridlock in Congress

Uptick in EEOC Filings



Requiring Women on Boards

CA became first U.S. state to require companies to have women on their boards

- Only applies to publicly-held companies headquartered or incorporated in California
- December 31, 2019, must have at least 1 female on board
- December 31, 2021, must have:
  - 3 females if six or more directors
  - 2 females if five directors
  - 1 female if four or fewer directors
- No grace period for privately held companies going public (need to plan)
- $100K fine for first violation and $300K fine for second or subsequent violation

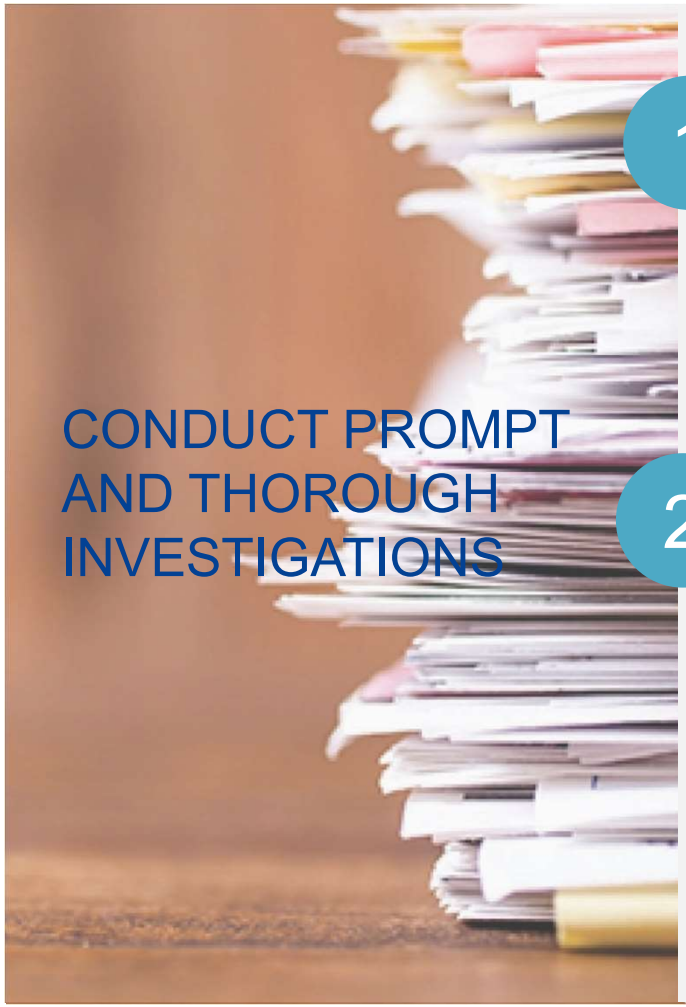
IL, MA, and PA have issued non-binding pronouncements encouraging companies to have women and diverse representation on their boards

Best Practices for Compliance

ENHANCE HARASSMENT TRAINING AND POLICIES

1. Routinely evaluate and update current corporate training programs, policies, and programs in light of legislative developments
2. Develop targeted trainings with practical and real life scenarios for different employee levels (e.g., different training for sales force, home office, supervisors, and C-suite/Board)
3. Use various training techniques to improve training participation (i.e. live, online, role-playing, and one-on-one trainings)
4. Include by-stander intervention training
5. Male employees, particularly managers, should know that avoidance of female co-workers is not allowed or effective

Best Practices for Compliance



CONDUCT PROMPT AND THOROUGH INVESTIGATIONS

1

Acknowledge all complaints promptly and set tone that the company takes harassment allegations seriously

2

Develop investigation plan

- ✓ Determine privilege issues
- ✓ Choose appropriate investigator (HR, in-house legal, outside legal)
- ✓ Interview complainant, witnesses, and accused
- ✓ Protect confidences to extent possible and afford due process
- ✓ Review and preserve evidence
- ✓ Reach conclusions
- ✓ Report results to complainant and accused
- ✓ Take appropriate action
- ✓ Report to management (formal or informal report)

Best Practices for Compliance

Set the tone at the top

- C-Suite/Board publicly support culture of anti-harassment and respect
- Hold C-Suite and star employees accountable (e.g., allow for "Cause" terminations and clawbacks of pay for violations of harassment policies)

Focus on Real Diversity

- Monitor and identify opportunities for attracting greater diversity in company leadership (i.e., mandate diverse slates, increase diverse recruiting efforts, develop unconscious bias training)
- Establish affinity groups focusing on gender issues in the workplace

Monitor

- Have multiple reporting mechanisms, including anonymous hotlines
- Conduct exit interviews
- Consider employee satisfaction surveys
- Screen for harassment issues at hire or during acquisitions

Best Practices for Compliance

REVIEW NONDISCLOSURE AND ARBITRATION AGREEMENTS

1. Review agreements with nondisclosure and arbitration provisions to ensure they comply with new laws

2. Even if lawful, weigh possible negative reaction and other drawbacks from using these agreements against benefits of retaining them

INCREASING FOCUS ON PAY EQUITY

The Pay Gap Problem

For every $1.00 paid to men, how much is paid to:

Group	Nationwide
Women	$0.80
African American Women	$0.63
Hispanic Women	$0.54

Taking Aim at the Pay Gap

State and local laws

- Amending laws to lower bar for establishing pay discrimination claims
- Banning use of prior pay to make pay decisions
- Requiring employers to affirmatively disclose pay information

Increased enforcement

- OFCCP and EEOC
- Class claims

Pressure from shareholders, employees, and the public

Federal Pay Discrimination Laws

TITLE VII AND EO 11246

- Prohibits discrimination on basis of sex, race/ethnicity, color, national origin, religion (EO 11246 also includes sexual orientation and gender identity)
- Comparator Group: Employees who are similarly-situated in terms of job tasks, requires similar skills, efforts, and responsibility, performed under similar working conditions, and are similarly complex or difficult
- Discriminatory intent usually required (show statistically significant pay disparity to raise inference of discrimination)

EQUAL PAY ACT

- Prohibits pay discrimination on basis of sex
- Comparator Group: Employees who perform equal work on
  - On jobs requiring equal skill, efforts, and responsibility (i.e., substantially identical)
  - Performed under similar working conditions
  - At the same establishment
- No discriminatory intent required

AFFIRMATIVE DEFENSES

- Seniority system
- Merit system
- System measuring earnings by quantity or quality of production
- Differential based on any other legitimate non-discriminatory factor

State Pay Equity Laws

Lower bar for establishing pay claims

- Comparison group
  - Substantially similar work that is "mostly similar in skill, effort, responsibility"
  - Work of comparable character
- Limits factors used to justify disparity and requires additional showing to use factor (e.g., business necessity)
- Requires justification of entire pay differential
- No requirement that are employees located in same establishment or even close by
- Discriminatory intent not required
- Damages are more significant and includes attorney fees

Safe harbors (MA and OR)

- Vary on time periods, whether analysis is "reasonable," and whether complete defense

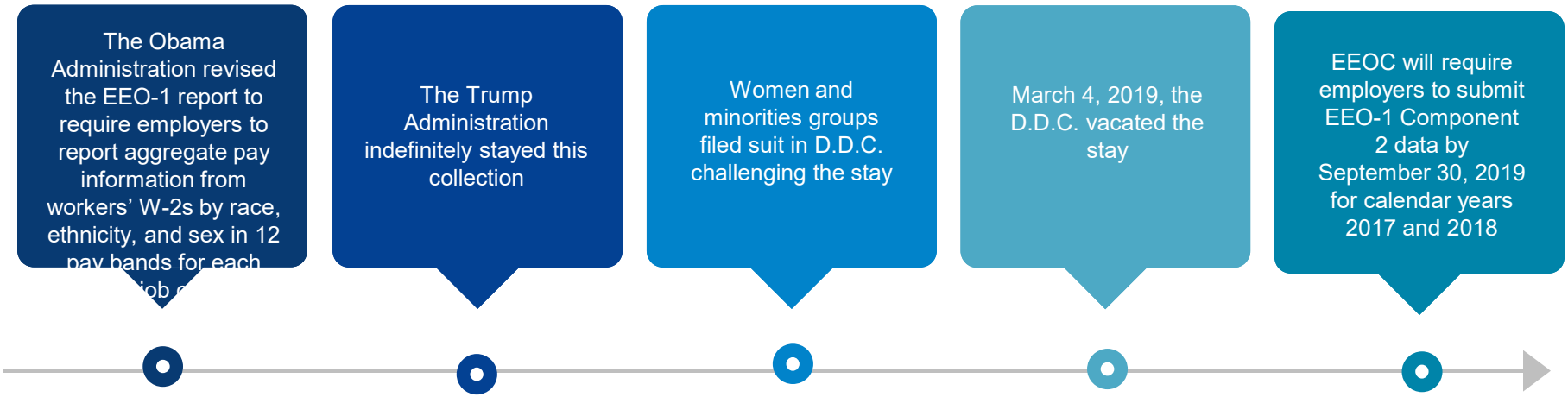
Equal Pay Laws

	Title VII and EO 11246	Federal Equal Pay	New York Achieves Pay Equity	Maryland Equal Pay for Equal Work	New Jersey Equal Pay Act	Massachusetts Pay Equity Law	Oregon Equal Pay Act	California Equal Pay Act
Protected Classes	Sex, race, religion, national origin	Sex	Sex	Sex or gender identity	Gender, race, national origin, color, religion, sex orientation, marital status, disability, etc.	Gender	Gender, race, national origin, color, religion, sex orientation, marital status, disability, etc.	Sex and race/ethnicity
Comparator Group	Similarly situated	Equal work and similar working conditions	Equal work and similar working conditions	Work: (1) of comparable character; (2) same operation; (3) same business; or (4) of same type	Substantially similar work	Substantially similar work and working conditions	Work of comparable character	Substantially similar work and performed under similar conditions
Same Establishment	No (EO 11246 same establishment)	Yes	No (but no larger than same county)	No (same county)	No	No	No	No
Factors Considered	Seniority, merit, quantity or quality, education, experience, training	Seniority, merit, quantity or quality, education, experience, training	Seniority, merit, system measures quantity or quality of production	Seniority, merit, system measures quantity or quality of production, jobs that require different skills, duties, or shifts	Seniority or Merit	Seniority, merit, system measures quantity or quality of production, geography, education, experience, training, travel	Seniority, merit, quantity or quality, geography, education, experience, training, travel	Seniority, merit, system measures quantity or quality of production
Bona Fide Factor Other Than Protected Basis	Yes	Yes	Yes, education, training, or experience	Yes, education, training, or experience	Yes	No	No	Yes, skills, education, training, shift, or geography

Pay History Bans

- Numerous states and localities passed laws generally prohibiting employers from asking job candidates about their pay history
- CA, CT, DE, HI, MA, OR, VE, WA, NYC, Philly, and San Francisco (and many other states and localities have proposed similar bans)
- Rationale – pay decisions based on previous salary just perpetuate the pay gap
- Laws differ in requirements
- Can still ask what candidates expect to be paid

Pay Disclosure - EEO-1 Component 2 Data



Pay Disclosure Laws

- States and localities are starting to pass laws requiring employers to disclose pay information

California

  - If requested, must provide external applicants (not current employees) with "pay scale" information after the initial interview
  - Pay Scale = salary or hourly wage range for the position

Washington

  - If requested, must provide applicants the minimum wage or salary for the position for which the applicant is applying after an offer has been extended
  - Must provide current employees being promoted or transferred wage scale or salary range for the new position (if no wage scale or range, then must provide minimum wage or salary)

Cincinnati

  - Requires pay scale information for applicants, if requested, after conditional offer

- Some states are requiring state contractors to provide pay information on employees during the term of their contract (e.g., NY, NJ, MN)

OFCCP Vigorously Pursues Pay Cases

OFCCP has become more effective at investigating and pursuing compensation discrimination cases

- FY2017 was record year for financial recoveries - $23.9M (out of 47 settlements, 19 were for pay discrimination)
- FY2018 recovered $16.4M (Out of 58 settlements, 18 were for pay discrimination)
- OFCCP Director Leen said that FY2019 could set new financial recovery records
- OFCCP sued Oracle for $400M based mostly on claims of compensation discrimination against females and minorities

OFCCP overhauled compensation audit process (Directive 2018-05)

- Some clarity on statistical method and analytical approach with discretion to deviate
- Mirror contractors compensation system, but discretion to use Pay Analysis Groups
- Consider anecdotal evidence in most cases
- Provides some information on disparity findings

Shareholder, Employee, and Public Pressure on Pay Equity

- Activist investors and employees pressure companies to achieve pay parity and transparency
- Companies feel pressure to conduct pay parity analyses and publish results
    - Several large banks and tech companies have published results of median pay gap
- Should a company publish its pay studies?
    - If the results of the analysis are positive, publishing may garner a positive image and trust from employees and the public and allow the company to control the narrative
    - Downside – results could be misinterpreted if not properly explained and could be used by employees in pay discrimination claims

Best Practices for Compliance

CONDUCT ANNUAL PROACTIVE PAY EQUITY ANALYSIS UNDER *PRIVILEGE*

- Consider comparison groupings based on differing state law standards
- Understand pay disparities and create defenses
- Set aside budget and make pay adjustments for unexplained disparities (adjust at annual merit cycle, if possible)

DO NOT ASK APPLICANTS FOR SALARY HISTORY

- Inquire about salary expectations
- Set fixed starting salaries or establish salary ranges by position
- Data approach - develop tool to determine amount to offer based on salaries of incumbent employees

DEVELOP FORMAL POLICIES ON PAY DECISIONS WITH CLEAR STANDARDS AND GUIDELINES

- Establish appropriate salary ranges and minimums
- Create formal approval process for out -of-range pay decisions (starting pay, merit increases, and promotional pay)
- Update job descriptions with an eye towards which jobs are comparable

TRAIN MANAGERS AND RECRUITERS ON PAY EQUITY LAWS AND MAKING APPROPRIATE PAY DECISIONS

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