

# Pay Up or Shut Up?: Navigating the Equal Pay Minefield

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# Agenda

- ◆ Provide overview of current law
- ◆ Discuss how individual claims morph into class claims
- ◆ Review spectrum of options to deal with risk
- ◆ Scenario-based training to apply principles learned



# **CURRENT LAW AND KEY THEMES**

# Existing Federal Laws

## Equal Pay Act (1963)

Sex

Equal pay for  
equal work in  
same workplace

## Title VII (1964)

Race, color,  
religion,  
national origin,  
sex

No  
employment  
discrimination

## Executive Order 11246 (1965)

Race,  
ethnicity,  
sex

No employment  
discrimination or  
for inquiring about,  
disclosing or  
discussing pay

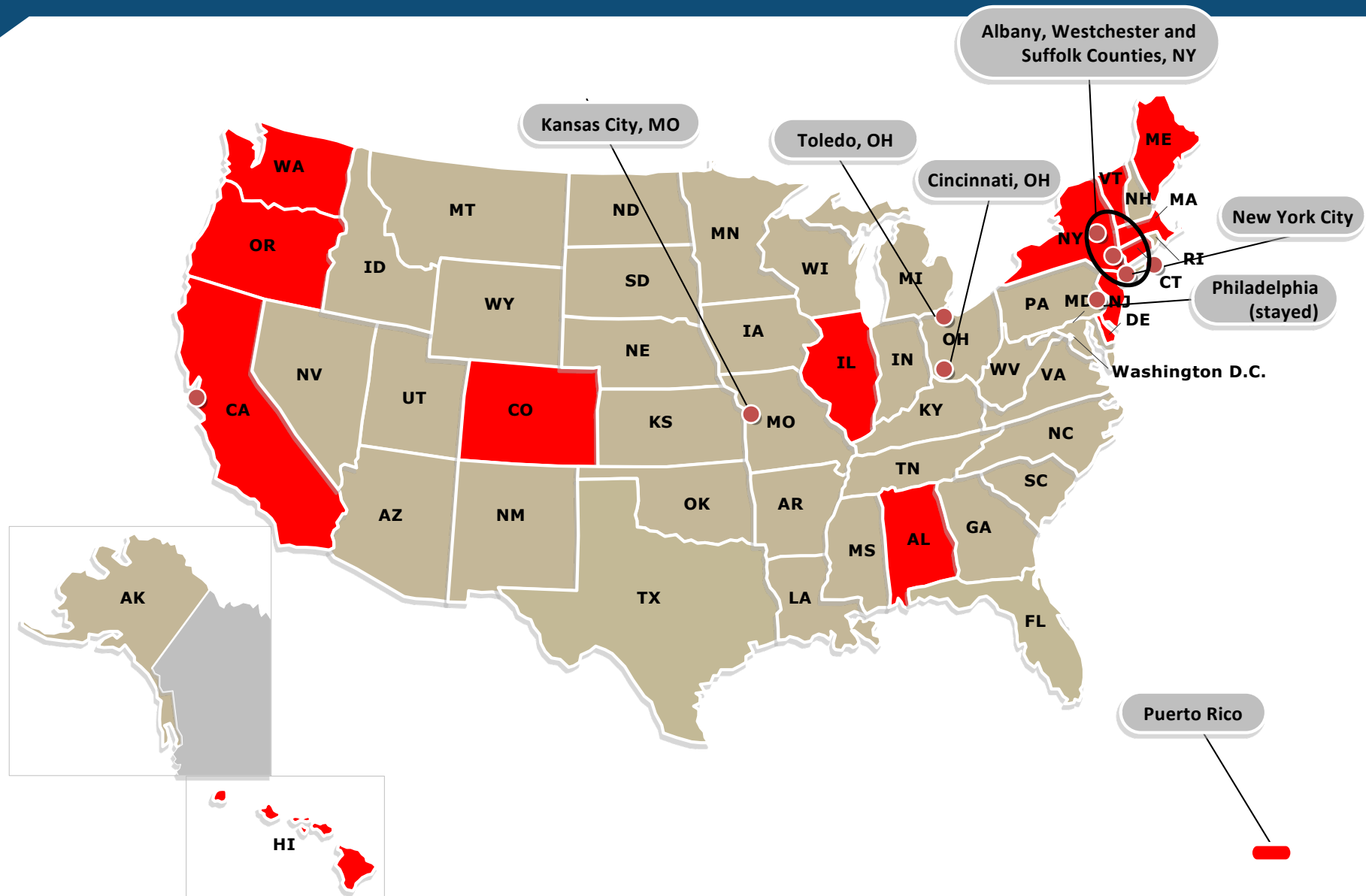
# EEO-1 Pay Reporting is Back –For Now

- ◆ Obama Administration EEOC passed regulation requiring pay disclosures on EEO-1 report by job category, race, and gender
- ◆ Trump Administration stayed reporting requirement indefinitely
- ◆ A federal judge reinstated the pay reporting requirement
- ◆ Pay reporting not yet closed
- ◆ EEOC will not collect pay data in 2020

# Cities and States with Pay History Bans

Alabama	Oregon
California San Francisco	Puerto Rico
Colorado	Vermont
Connecticut	Washington
Delaware	Illinois
Hawaii	<b>CITIES:</b>
Maine	Kansas City
Massachusetts	Cincinnati
New Jersey	Toledo
New York New York City Suffolk County Westchester County	Philadelphia (stayed)

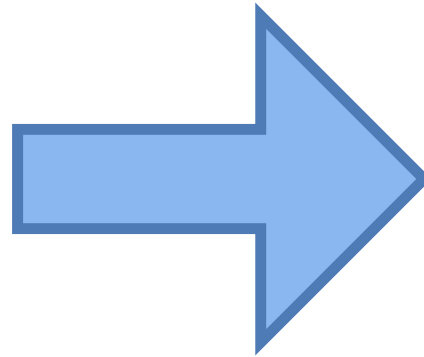
# “State” of Play: Salary History Bans



# State Fair Pay Laws- Themes

## Equal Pay Act

Equal Pay for **Equal Work**



## State Laws

Equal Pay for “**substantially similar**” or “**comparable**” work

### What's the Effect?

Expands pool of comparators – increased risk

Different across states

Differences in location of comparators



# State Fair Pay Laws- Themes

- ◆ Prohibits reliance on salary history
- ◆ Limits the reasons acceptable to explain pay differences –e.g., market defenses
- ◆ Requires “dollar for dollar” explanation of pay gap
- ◆ Expands recoverable damages available
- ◆ Allows broad disclosures of pay bands
- ◆ Protects employees against retaliation
- ◆ Encourages self-analysis

# What Explanations Are Sufficient?

- ◆ Seniority system/Tenure
- ◆ Geographic location in which a job is performed
- ◆ Education, if job-related
- ◆ Experience, but clearly defined with pay steps and limited discretion
- ◆ Significant differences in job duties and levels of responsibility

# Individual Claims Morph Into Group or Class Claims

- ◆ Many claims involve job titles, grades, levels
- ◆ Systemic issues driving pay gaps
- ◆ When one female employee complains, often attracts others to join
- ◆ Agencies investigate across large groups
- ◆ Often presented as nationwide claim
- ◆ In CA, seeing threatened PAGA claims

# Recent Pay Discrimination Class Actions

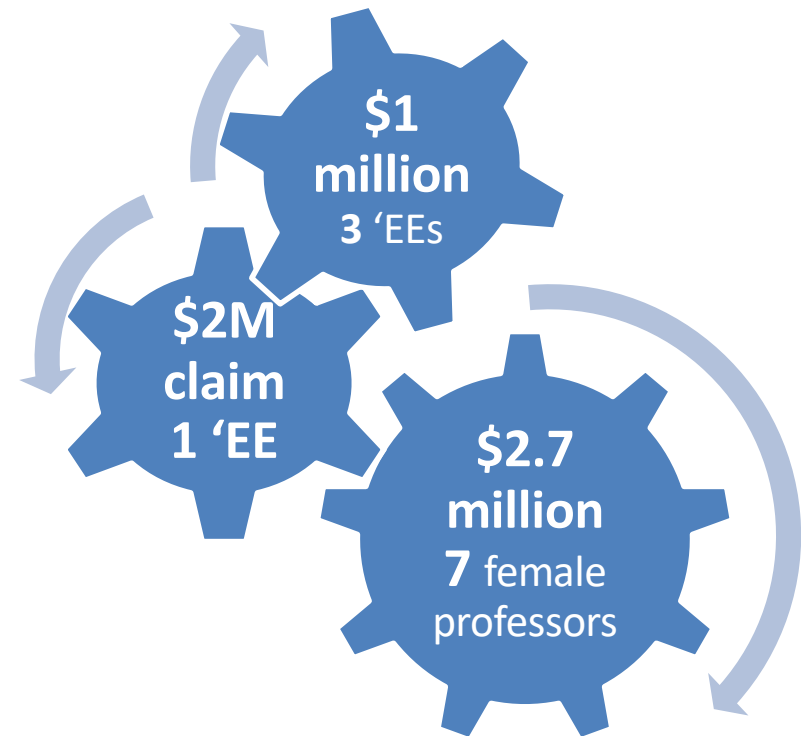
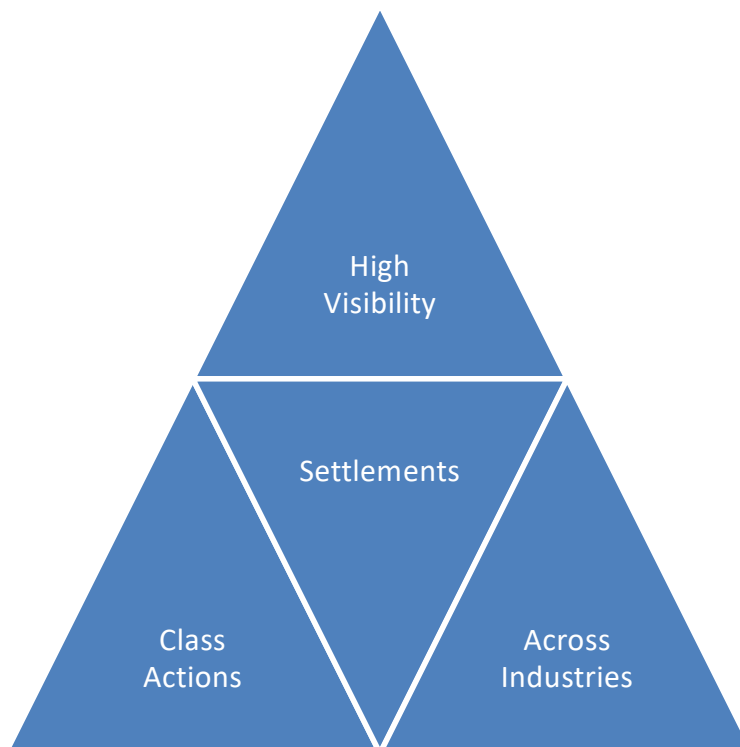
- ◆ "A gender discrimination lawsuit against Microsoft could see new light as court agrees to reconsider class action status for **8,600 current and former employees**"



# Pay Discrimination Litigation Crosses All Industries

- ◆ Retail and Hospitality
- ◆ Pharmaceutical and Life Sciences
- ◆ Professional Services
- ◆ Media and Entertainment
- ◆ Insurance
- ◆ Technology
- ◆ Higher Education

# Recent Pay Suits: Common Elements



# Key Takeaways

- ◆ More risk
  - Claims, reputational, positioning in markets, Board and shareholder concerns
- ◆ State laws require re-thinking how comp system addresses starting pay
  - How does your organization address starting pay?
- ◆ Need a strategy to position the organization in terms of historical pay gaps and to establish a defensible pay system moving forward



# WHAT IS YOUR ORGANIZATION'S STRATEGY?



# Offense as a Defense

*Everything is connected to everything else*

- ◆ Benchmarking – basis for structure
- ◆ Transparency – inhibits rogue managers ability to make lousy pay decisions
- ◆ Accountability – Limit decision-making to those capable and trained
- ◆ Training – Talent Acquisition, HR, Supervisors/Managers
- ◆ Regular data analysis and policy review
- ◆ Quantify a call to action
- ◆ Current environment – incorporate best practices

# Addressing Historical Pay Gaps

- ◆ What do you do about historical problems existing in compensation system?
- ◆ For historical, there are a variety of options to “fix” pay gaps based on your organization’s risk tolerance.

# Ostrich Defense?



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# Option #1: Identify and Correct Indefensible Pay Gaps with a Privileged Pay Audit

- ◆ What is a **privileged pay audit**?
  - Identify appropriate comparison groups with individuals in similar role (“**Role to Role**” comparison)
    - May want to start with **Job Titles, Grades, Levels** depending on organization
    - Important to compare **similar functions** (remember state law key themes)

# Option #1: Identify and Correct Indefensible Pay Gaps with a Privileged Pay Audit

- ◆ Review **total compensation** and **components of compensation** for group over a period of time (**Year to Year** pay comparison)
- ◆ Determine if there is a **pay difference** between women and men or different races among those in similar functions
- ◆ Investigate **reasons for difference**
  - Are they acceptable explanations?
  - Can the company prove the reason?
- ◆ **Address** unexplained pay gaps

# Establishing Privilege

Not Privileged

Argument for Privilege

Privileged



**No Attorney Involvement**

**In-House Counsel (on surface)**

**In-House Counsel (substance)**

**Outside Counsel (on surface)**

**Outside Counsel (substance)**

# Practice Pointers for Privileged Pay Audits

- ◆ Generally should be conducted on annual basis
- ◆ Differences between “Role to Role” comparison’s versus enterprise-wide comparison
- ◆ What is best way to calculate pay differences?
- ◆ How much of a pay gap is acceptable?
- ◆ Can you use HR to “look under the hood” and run some quick numbers for you?

# What Do We Mean By “Remediate”?

The CEO of Salesforce Found Out His Female Employees Were Paid Less Than Men. His Response Is a Priceless Leadership Lesson



[https://www.youtube.com/watch?v=-uU\\_vliWe9A](https://www.youtube.com/watch?v=-uU_vliWe9A)



## Option #2: Smaller Scope and/or Less Frequent Privileged Pay Audits

- ◆ May want to identify a smaller group of employees initially to evaluate
- ◆ Potentially start with higher-level positions or higher-risk locations (CA, Northeast, etc.)
- ◆ Consider less frequent pay audits (2-3 year cycle)

## Option #3: Use Consultant for “Benchmarking”

- ◆ Many organizations are engaging consultants to conduct pay analyses
- ◆ Important to understand what you are getting
- ◆ For example, a consultant may identify benchmarking above, within, and below mean/median compensation ranges by position
- ◆ Differences between this type of analysis and privileged pay discrimination audit

# Example Benchmarking Analysis

Pay	Gender		Mean is:
		Mean	
Annual Salary	Male	\$99,052	Above Predicted Range
	Female	\$73,541	Below Predicted Range
Total Cash Compensation	Male	\$112,893	Within Predicted Range
	Female	\$79,993	Within Predicted Range

## Option #4: Respond to Individual Complaints

- ◆ Many companies are taking a case-by-case approach
- ◆ Danger with this approach is opportunity for individual claims to become larger group/class claims
- ◆ Can be much more expensive to solve individual complaints with merit than take strategic, proactive steps to mitigate risk across broader groups outside the context of any complaint

# **CASE-BASED SCENARIOS: TEST YOUR KNOWLEDGE**

# Scenario #1: “Whatever it Takes”

- ◆ Your business wants to make an offer to Steven for an engineer position in San Diego, California. They say it is harder to get talent in this market in California and they suspect he is making \$85,000 at his current company. They have asked for approval to set his starting pay at \$90,000. Susan was hired last month for an engineer position in San Francisco making \$75,000, but she came from a part-time position so the business did not have to offer as much to her since she was making less.
- ◆ How do you address the request to pay Steven \$90,000? Is this a defensible pay gap?

## Scenario #2: “Time’s Up”

- ◆ There are internal complaints by multiple female VPs in NJ saying they are paid less than other; male VPs doing similar work. You have asked HR to help you investigate and have found there is not a good explanation for the difference, but it appears the pay gaps may be because of everyone’s starting pay. The women started in lower level positions and have historically been brought up at similar percentages as the men, but they have not caught up over time. You do not have any historical records for how starting pay was set at the time.
- ◆ How do you advise the business to address the pay complaints?

## Scenario #3

- ◆ You are recruiting for a high-level executive position and have identified two candidates-one female, and one male. Both would have to forfeit deferred compensation or unvested equity if they leave their current employer.
- ◆ Can you ask the value and structure of the deferred compensation or unvested equity and consider such information in making the applicant an offer?



## Scenario #4

- ◆ There is a SR VP male executive, Rob, who the company wants to move into a lower-level role for development and training purposes. The business feels strongly he should not have his pay reduced when moving to the lower-level role.
- ◆ There are several women in the lower-level role who are doing the same thing that Rob will be doing who will make \$25,000-\$50,000 less than Rob if his pay is “red-circled.”
- ◆ What advice do you give the business?

# Questions?

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# Thank You

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