



What You Need to Know about Compensation Equity Analysis

January 12, 2021

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**FARELLA
BRAUN + MARTEL** LLP

Presenters



Erin Hastings
Advisory & Assurance Partner
Seiler LLP



Holly L. Sutton
Partner
Farella Braun + Martel



Agenda

- Legal Requirements
- Compensation equity analysis basics
- Equity research
- Latest developments
- Analysis best practices
- What's next?



New Reporting Requirement on March 31, 2021

- Under SB 973/ Government Code section 12999.
 - Employers with **more than 100 employees** (ees) must submit a pay data report to the California Department of Fair Employment and Housing (DFEH)
 - Full and part-time employees
 - One employee in CA is sufficient if you have 99 employees elsewhere;
 - Guidance <https://www.dfeh.ca.gov/paydatareporting/>
- Report to include a “snapshot” of a **single pay period** between Oct 1 – Dec 31, 2020
- Snapshot pay period is **employer’s choice**

10 EEO Job Categories

- **1.1 – Executive/Senior Level Officials and Managers.**
 - Reserved for the highest level within the organization
 - Includes individuals who plan, direct, and formulate policies
 - They set the strategy, provide information to be approved by the board of directors
 - Some examples are the chief executive officer or the chief operating officer
- **1.2 – First/Mid Level Officials and Managers.**
 - These people take direction from those in the 1.1 EEO job category
 - Includes managers at the group, regional, or divisional level of the organization
 - Examples might include vice presidents, operations managers, or group directors

10 EEO Job Categories

- 1.1 – Executive/Senior Level Officials and Managers
- 1.2 – First/Mid Level Officials and Managers
- 2 – Professionals.
- 3 – Technicians.
- 4 – Sales Workers.
- 5 – Administrative Support Workers.
- 6 – Craft Workers.
- 7 – Operatives.
- 8 – Laborers and Helpers.
- 9 – Service Workers.

Required Information

- Number of employees in each of 10 specified job categories, categorized by:
 - Race/ethnicity and gender
- Similar to Federal EEO-1 reports*
 - Uses the same race/ethnic and gender categories
 - CA form will be reported electronically and will include three gender categories
- Guidance on race/ethnicity reporting is available from the EEOC

Required Information: by Pay Band

- Number of ees whose **annualized earnings** (regardless of whether the employees actually worked the full year) fell within each of the **specified pay bands** used by the U.S. Bureau of Labor Statistics in the Occupational Employment Statistics (OES) survey*,
Will now also include pay data in 12 pay bands between:
 - \$19,239 and under
 - \$208,000 and over
- For each employee included in the respective pay bands, employer must also report the **total number of hours worked** by each employee during the reporting year

Data Reporting

- Snap shot of your salary information
- May prefer to undertake a Compensation Equity Analysis in conjunction with reporting
- Understanding what that entails



What is a Compensation Equity Analysis?

- A compensation equity analysis (aka “pay equity audit”) aims to answer three questions regarding employee compensation for a point in time or over a period of time:
- Do disparities exist?
- Are they limited to certain portions of the population (one office or department)?
- Can they be explained by legitimate business justifications other than a protected class* characteristic?



*The groups protected from employment discrimination by law. These groups include men and women on the basis of sex; any group which shares a common race, religion, color, or national origin; people over 40; and people with physical or mental disabilities.

Equity Research



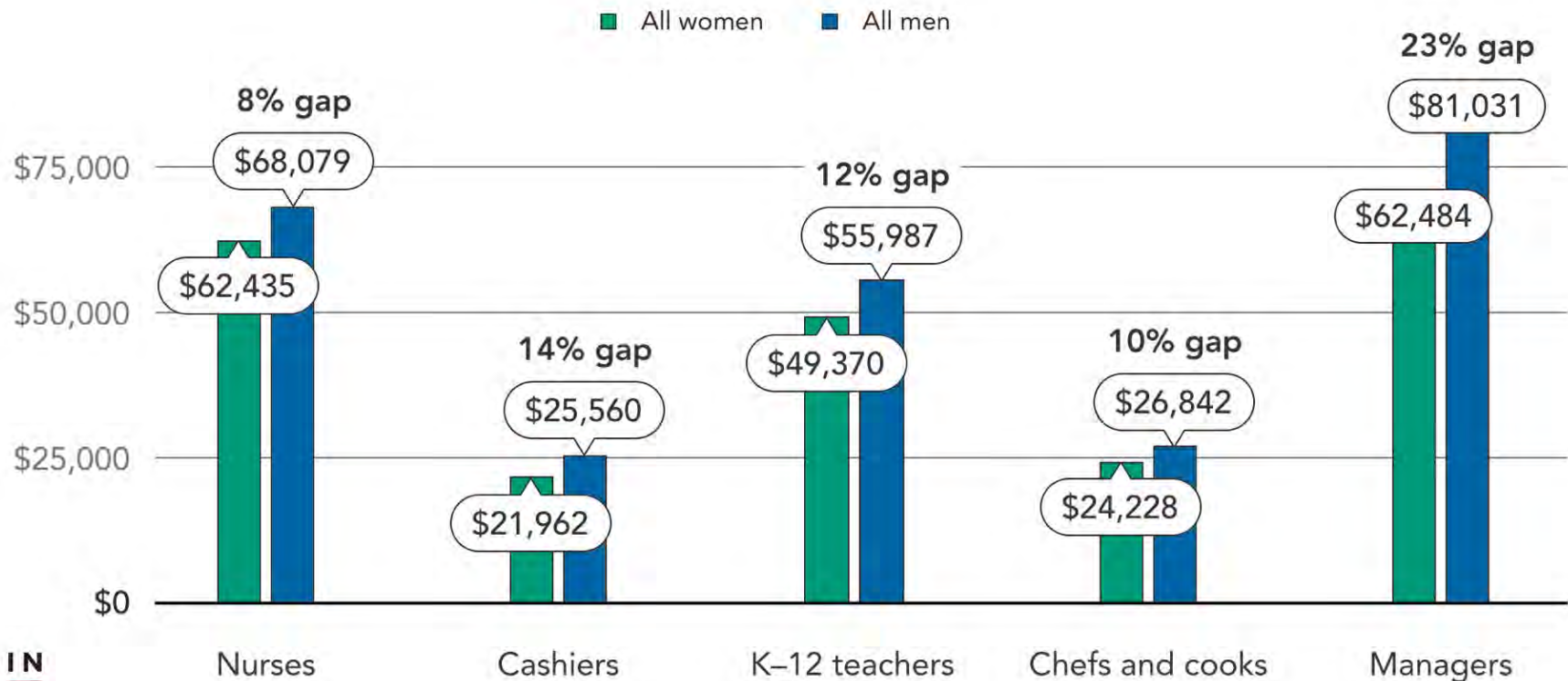
There is a gender wage
gap in 97% of occupations



CA Commission on the Status of Women and Girls

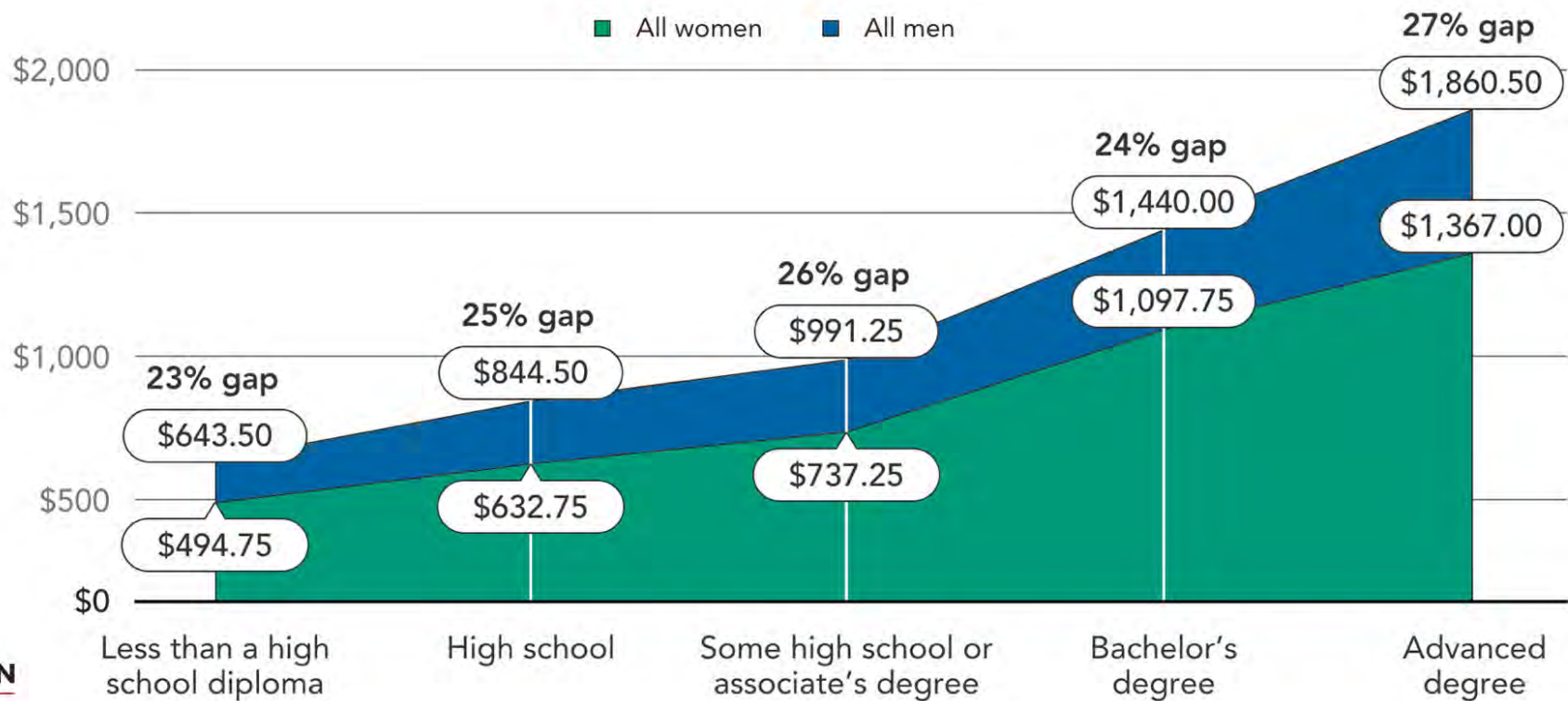
In The Same Job, Women & Men Receive Different Pay

Women are just as likely to pursue many high-paying careers. But even in the same job, women are generally paid less than men. For example, women managers earn 23% less than their counterparts, on average.



More Education, Wider Gap

Women have been graduating from college at higher rates than men for decades. But diplomas don't translate to dollars: The pay gap actually increases for women at higher education levels.



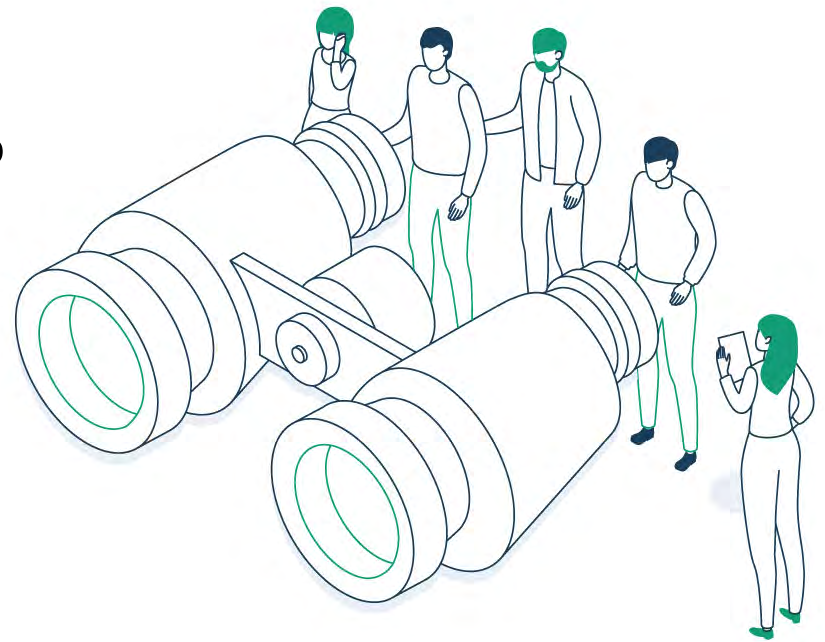
Latest Developments

Why Is This Relevant Right Now?

- **Recent sociopolitical events and business trends**

- Remote workforce
- More women and BIPOC serving on boards
- More philanthropies are committing money to funding equity initiatives
- Pressure for pay transparency
- Companies are taking action

And legal changes...



Legal Changes

- 2016 California's Fair Pay Act (Equal Pay Act amendments) (SB-358)
- In 2019, New York passed a similar law
- Similar laws in the U.K. specific to gender where pay gap metrics are made public
- Companies must provide pay scale to applicants (AB-168)



Simple metrics may not tell the whole story...

CA Fair Pay Act (SB-358)

- Requires equal pay for employees who perform “**substantially similar work**”
 - when compared to employees of the opposite sex or of another race or ethnicity, and
 - when viewed as a composite of skill, effort, and responsibility

“Substantially similar work” refers to work that is mostly similar in skill, effort, responsibility, and performed under similar working conditions

- **Skill** refers to the experience, ability, education, and training required to perform the job
- **Effort** refers to the amount of physical or mental exertion needed to perform the job
- **Responsibility** refers to the degree of accountability or duties required in performing the job
- **Working conditions** has been interpreted to mean the physical surroundings (temperature, fumes, ventilation) and hazards

CA Fair Pay Act (SB-358)



- Eliminates the requirement that the employees being compared have to work at the “same establishment”
- Makes it more difficult for employers to justify pay inequities using the “bona fide factor other than sex” defense
- Ensures that any legitimate factors relied upon by the employer for pay inequities are applied reasonably and account for the entire pay difference

CA Fair Pay Act (SB-358)



- Makes it illegal for employers to retaliate against employees who seek to enforce the law
- Makes it illegal for employers to prohibit employees from discussing or inquiring about their coworkers' wages
- Requires employers to maintain wage and other employment related records for three years (previously two years)

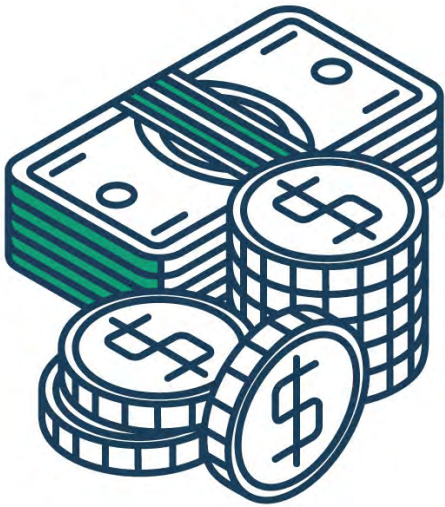
CA Fair Pay Act (SB-358)



- An employer can defeat an Equal Pay Act claim by proving that the difference in pay for “substantially similar work” is due to:
 - seniority;
 - merit;
 - a system that measures production; and/or
 - a “bona fide factor other than sex, race, or ethnicity”
- Employer must show that it applies the above factor(s) reasonably and that the factor(s) accounts for the entire difference in wages

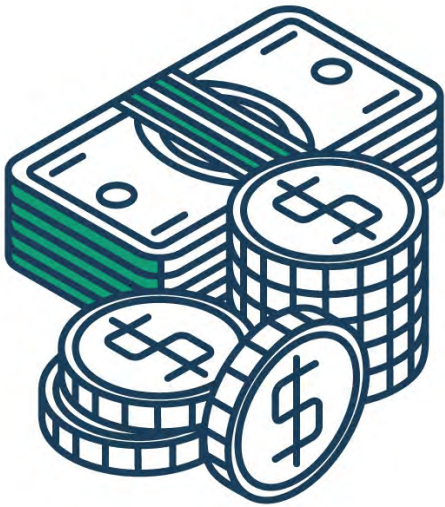
Under the **current** law...

Prior salary doesn't matter



- Under the Equal Pay Act (as amended effective January 1, 2019), an employer may not justify any pay difference between employees of the opposite sex, of different race or ethnicity based on an employee's prior salary
- An employer may make a compensation decision based on a current employee's existing salary, however, any wage differential resulting from that compensation decision must be justified by one or more of the factors listed on the prior slide

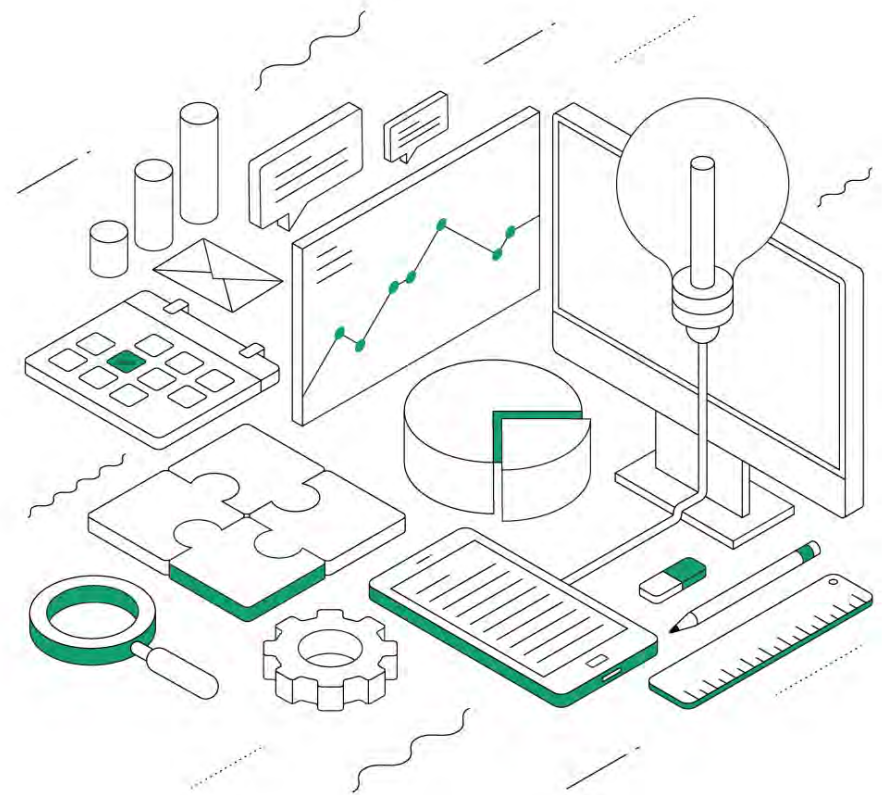
Under the **current** law...

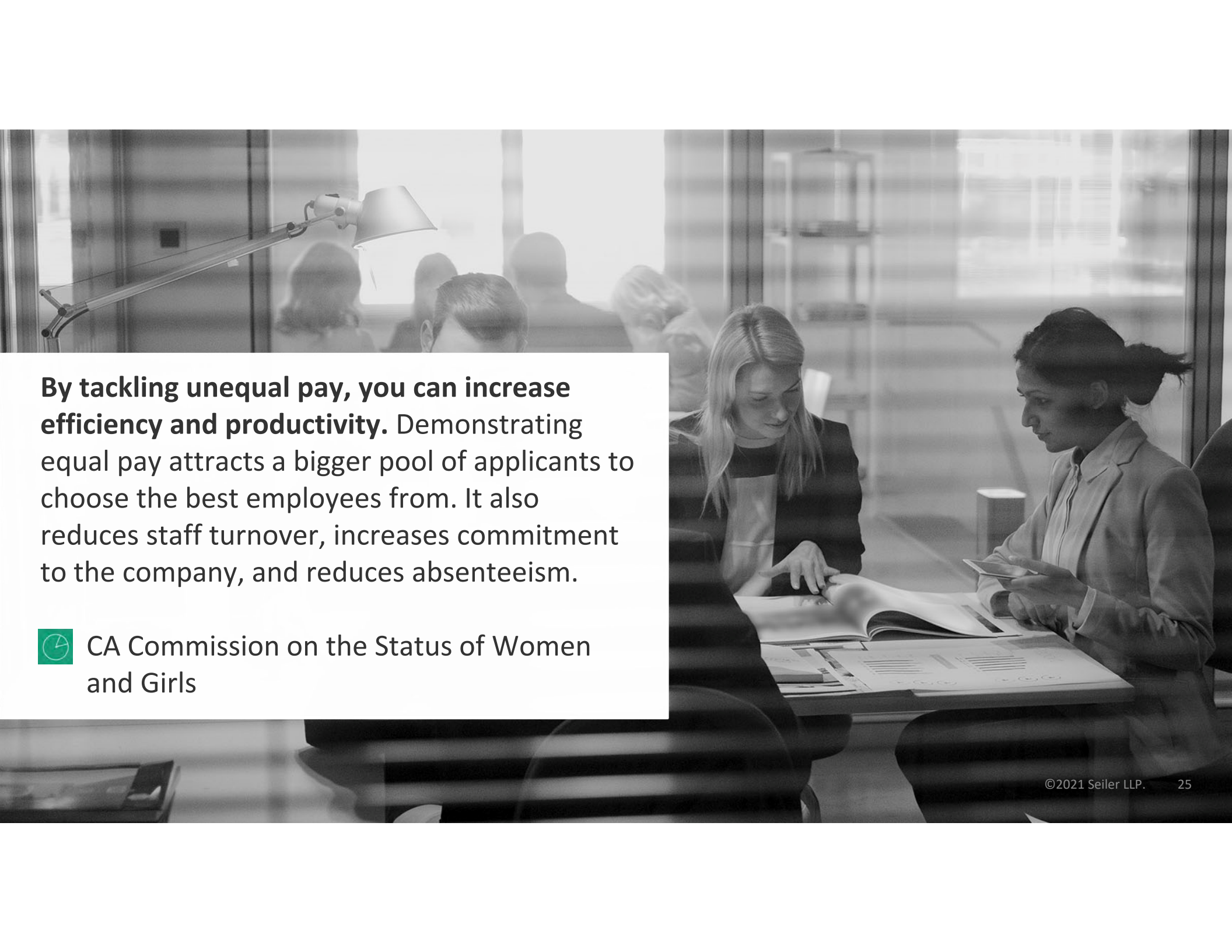


- Under Labor Code Section 432.3 (2018), employers may not seek salary history information from an applicant or rely on salary history in setting an employee's pay
- Can consider applicant's expectations
- Can be voluntarily disclosed
- Must provide pay scale information for the position

Telling the Whole Story

- Equal pay – fair pay – competitive pay considerations are important
- Disclosure requirements may be quite basic, and will not provide context for pay disparities
- A proactive analysis will give companies more control over the story – the chance to make changes and communicate effectively to head off conclusions others might draw from raw data.





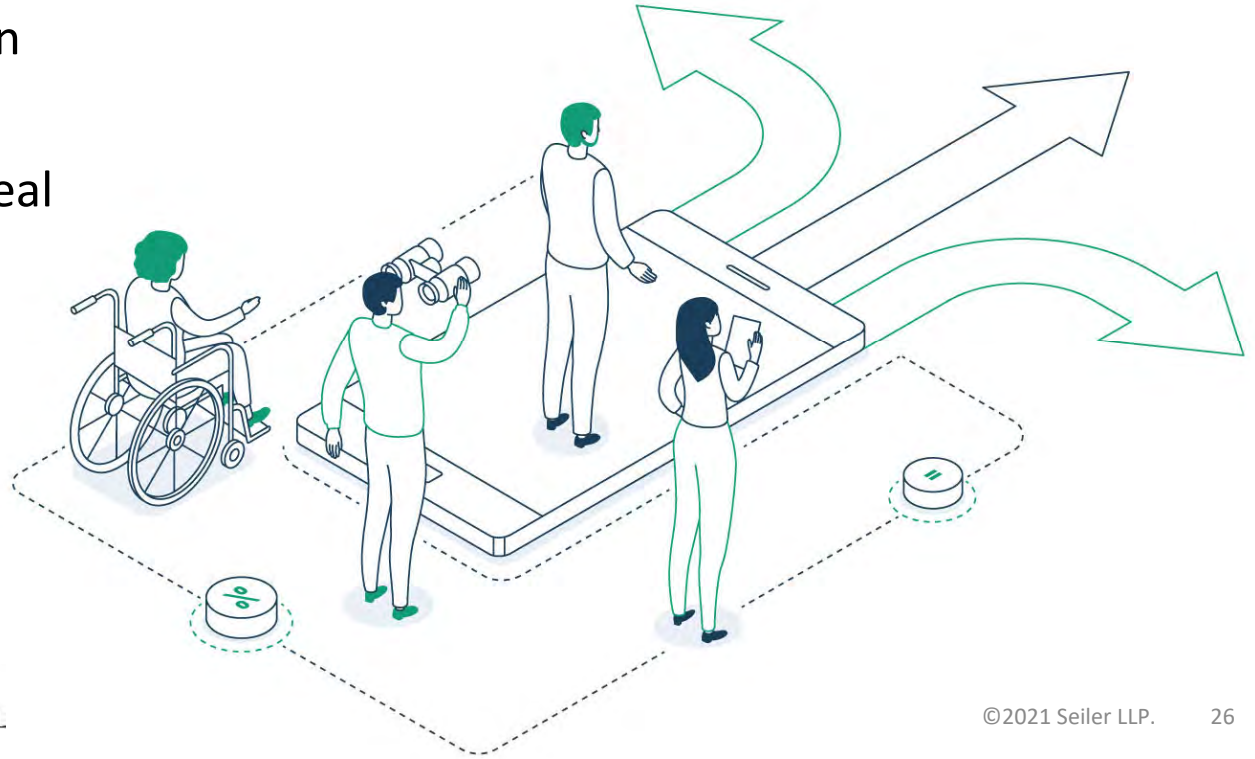
By tackling unequal pay, you can increase efficiency and productivity. Demonstrating equal pay attracts a bigger pool of applicants to choose the best employees from. It also reduces staff turnover, increases commitment to the company, and reduces absenteeism.



CA Commission on the Status of Women and Girls

Why Analyze Compensation Equity?

- **It's the right thing to do:** confirm with data that values are aligned with practices
- Promote a fair working environment
- Improve recruiting and retention
- Boost employee morale
- Prepare for a successful M&A deal
- Stay ahead of regulations
- Respond to a specific risk
- Legal compliance





emphasis added

“[There's] no question that every company has a gender pay gap. But every CEO today can look at their own data and say, 'Am I paying men and women equally?’

And everyone should come forward and ask their CEOs, 'Hey, do we pay men and women equally for equal work?’

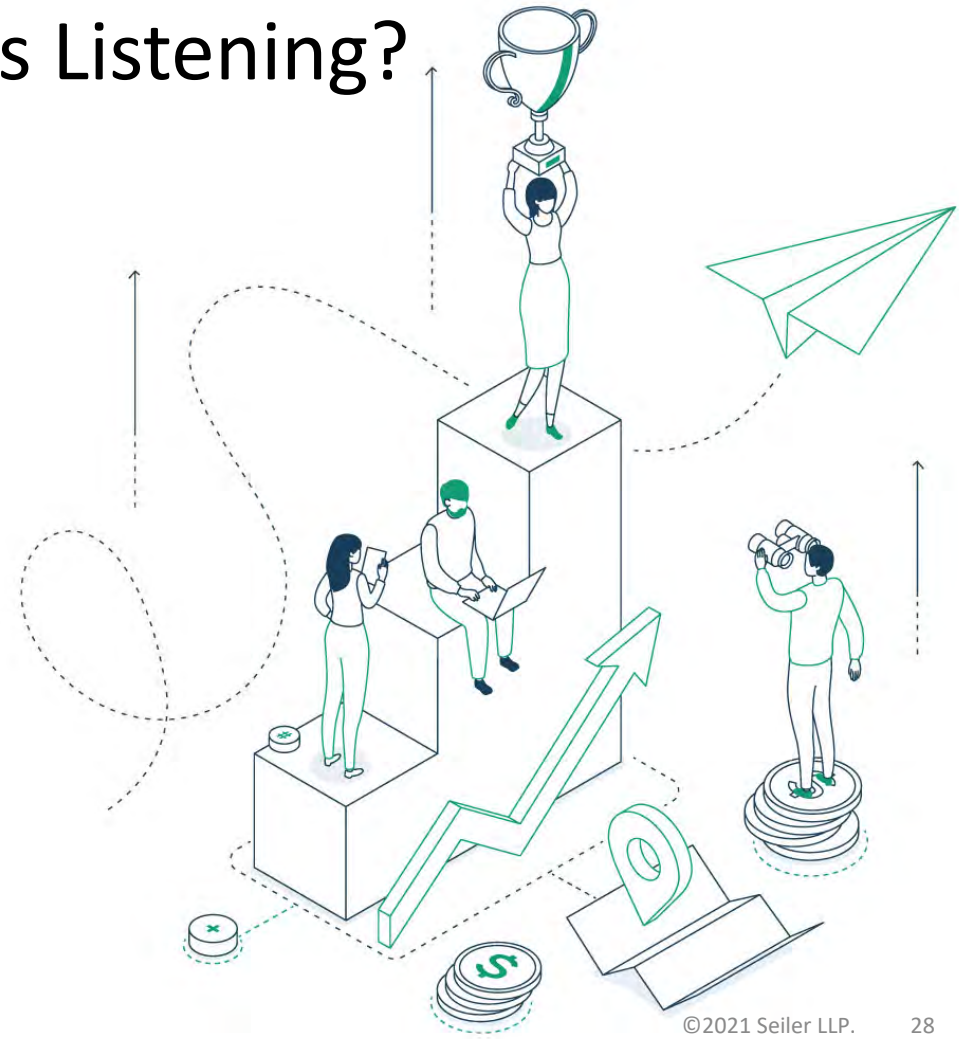
...Because that is what we're really talking about — **Why are we not treating people equally?’**”



Marc Benioff, CEO of Salesforce

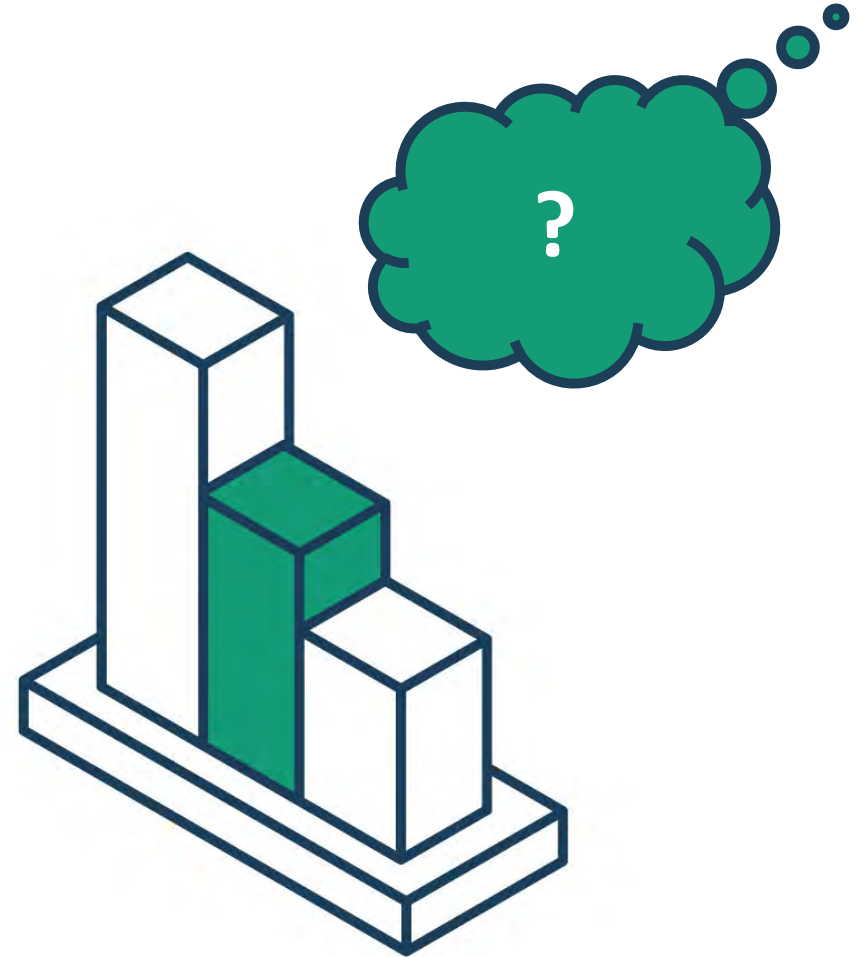
Independent Analysis – Who's Listening?

- Investors, boards, executives, and other key stakeholders who want to incorporate pay gap tracking into their KPI analysis
- Employees, recruits, recruiters who recognize best-in-class practices around equity and inclusion



The **How** Matters

- For companies that have compiled the data without strong quantitative and qualitative support, **the data may be inaccurate or lack credibility**
 - Prepared internally without QC
 - Disconnected from reporting best practices
 - Lack of data source validation



Company Lifecycle Considerations

- For M&A, both targets and acquirers should understand the risks and rewards – including pay gap data – before a transaction
 - Pay gaps can be a risk
 - Strong equity compensation practices can be a benefit
- For companies with fewer than 100 employees – but who may soon have 100 or more – this may be a first look at the data
 - What story does the data tell?
 - What needs to change before this information becomes publicly reported?

Know Better, Do Better



Know your potential pay gap and salary bands



Drive better recruiting and promotion outcomes with smarter, faster decisions about equitable compensation



Gain insight beyond the numbers and stay one step ahead of regulations



Keep employees happy and make the idea of eventual compensation transparency less daunting



Make sure the analysis is a secure process with appropriate privileges and controls in place



Save time and money by getting straight to the numbers – allow benchmarking and diversity consultants to start their projects with hard data in hand

The Independent Analysis

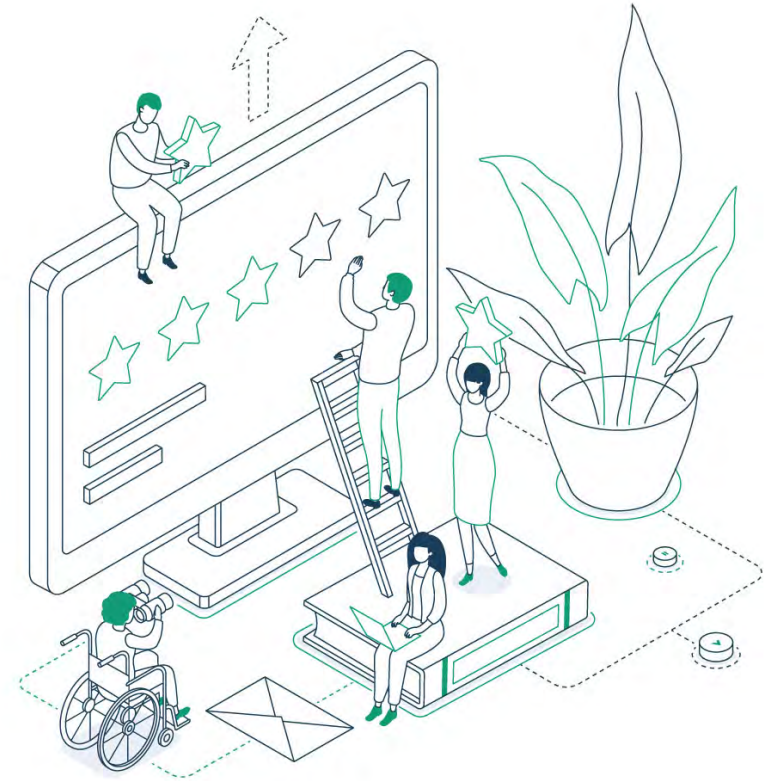
Attorney's Role

- Though the ultimate decisions are driven by management, often attorneys are the ones encouraging analysis
- The legal team is an integral part of the process
- Legal considerations:
 - Taking a proactive approach v. waiting until there is a complaint
 - Outside counsel expertise in pay equity
 - Levels of disclosure and privilege
 - Applicable laws
 - Risk of suit
 - Remediation plans



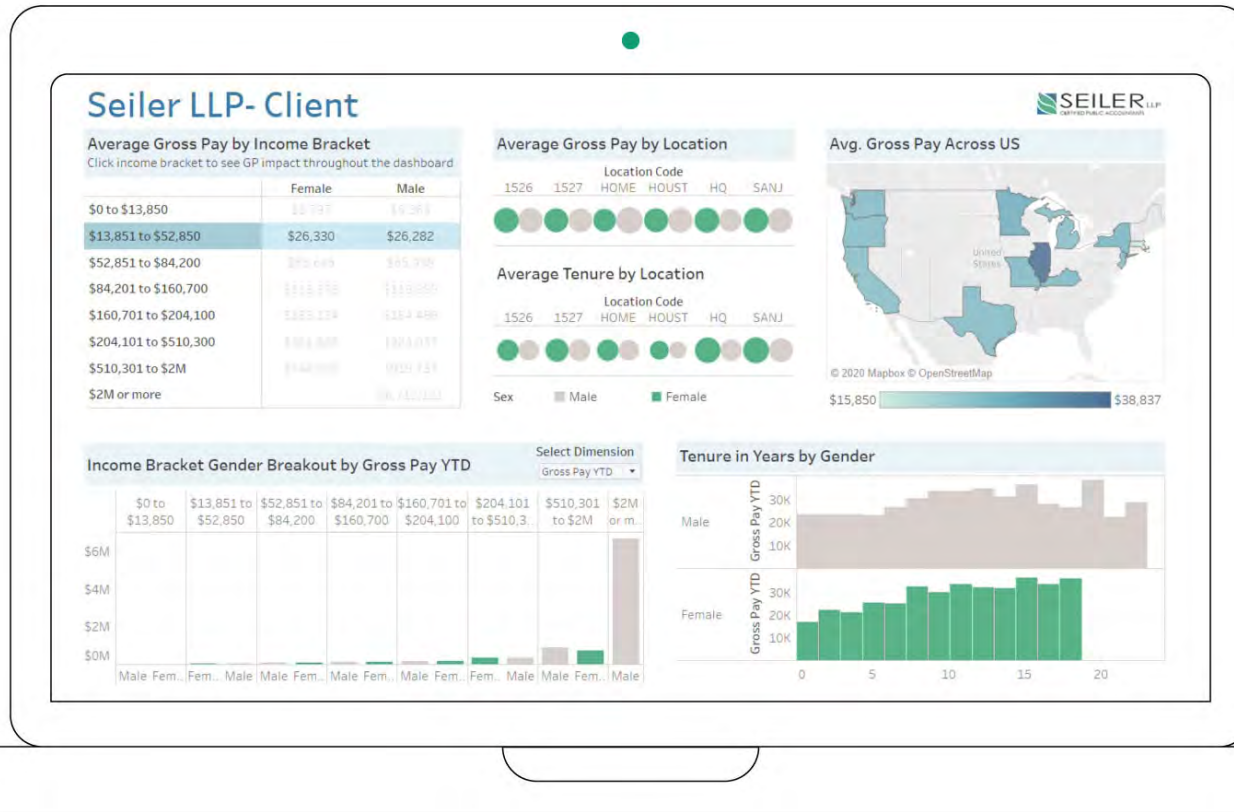
Getting Started

1. Make sure employee data is up to date
2. Potentially implement compensation management software if none exists
3. Prepare for an investment in pay equity
4. Anticipate entering a remediation phase in cooperation with legal team, finance, HR, and communications team to fix any issues that arise (this is why the analysis is important in the first place, and worth doing)
5. Define the questions you want to answer



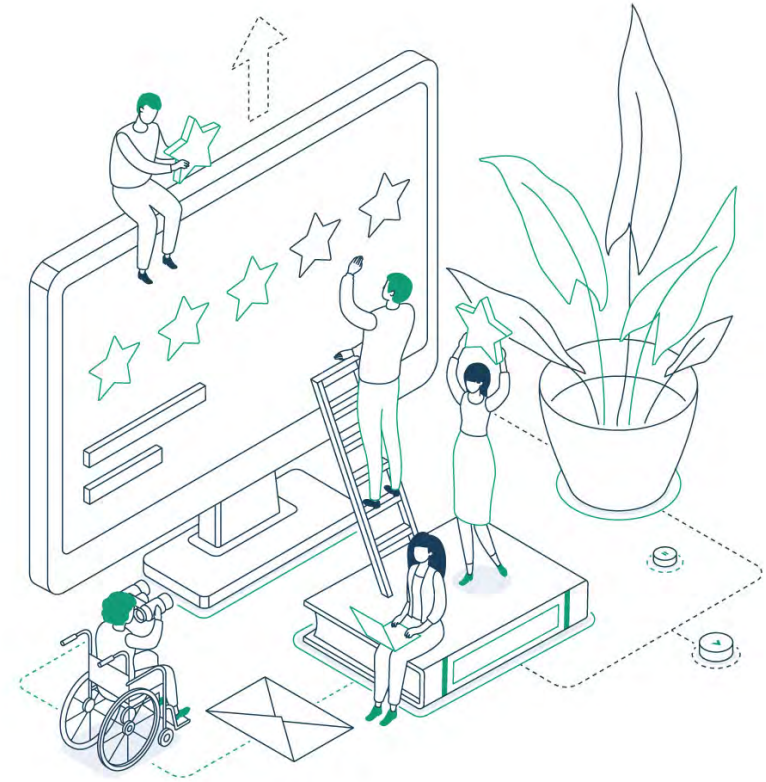
The Seiler Analysis – An Interactive Dashboard

Authorized users drill down into data to find patterns, draw conclusions



Forms of Compensation

- Base pay
- PTO
- Bonus
- Stock
- Stock option awards
- Commissions
- Medical
- Retirement
- Commute allowance
- Tuition reimbursement
- 1025 benefit coverage
- FSLA advantages
- Other non-financial benefits:
 - Time away from work
 - Flexible starting times
 - Special training opportunities
 - Childcare assistance/provision



Independent Analyst Meeting

- Initial considerations
 - Purpose and parameters
 - Level of analysis – groups, individual, cohorts
 - Data sources
 - Privilege considerations
 - Post-analysis remediation plans
- Logistics
 - Key participants
 - Privacy and data security
 - Data collection plans
 - Data presentation options
- Early planning recommendations



Independent Analysis Process

- Gather, merge
- Verify
- Process, iterate
 - Identify significant differences
 - Identify comparable cohorts
 - Examine employee files for standouts
- Present
- Remediate



The Seiler Advantage

Independent, appropriate, and accurate statistical analysis of pay equity requires analytical expertise and experience that software alone cannot provide.

Our team is led by public accounting professionals who approach compensation equity analysis and remediation strategies using a lens focused on business risk, practicality, efficiency, cost savings, and quality.



- We work with our experts and your management teams to **connect the final data with decisions**, providing meaningful advice along the way
- We collaborate with your team to **focus on areas of interest and risk**
- We **verify data integrity** along with the financial statement audit, or using separate procedures
- We make communication and data transmission **secure and simple**; our final presentation is interactive and data-driven

The Farella Advantage

Farella's Employment Law Team provides guidance and advice on payroll audits with goals and expectations customized to each client. As a component of annual corporate responsibility programs or when litigation has surfaced, using Farella to conduct the audit provides the employer with confidence they can satisfy legal requirements and utilize the protections of confidentiality through the attorney-client privilege.



Our clients obtain the following significant benefits:

- **Recruiting and Retention:** demonstrate active compensation review to ensure parity in role, tenure, and protected status; satisfy California salary band disclosure requirements.
- **Litigation Avoidance:** provide crucial evidence in defending or avoiding equal pay claims before costly discovery occurs in the litigation process.
- **Transparency and Market Comparison:** demonstrate to current employees that the grass is not greener across the street.
- **Brand and Culture:** protect an organization's brand and culture by documenting employee respect and fair compensation.



Thank You



Erin Hastings

Advisory & Assurance Partner, Seiler LLP

ehastings@seiler.com | 415.392.2123 | [LinkedIn Profile](#)

Erin is a Certified Public Accountant with 20 years of experience providing advisory and assurance services for privately-held companies, private foundations, and non-profit organizations. She holds expertise in the following disciplines:

- Regulatory auditing requirements for broker-dealers, registered advisors, and investment funds
- Governance matters for non-profits and private companies
- Financial statement forecasting and analysis
- Business strategy and planning
- Internal control reviews and best practices recommendations
- Temporary accounting and reporting oversight
- Fraud examinations

Erin joined Seiler in 2011, and became a Partner in 2016. Previously, she was a Senior Manager at Scott B. Price & Company, CPAs. Erin started her career as an accountant at a big four firm.

Education and Certifications

- Bachelor's degree in Accounting, Spanish Minor, University of Tennessee, Knoxville
- Certified Public Accountant, California
- Certified Fraud Examiner (CFE)

Professional Affiliations

- American Institute of Certified Public Accountants
- California Society of Certified Public Accountants
- Association of Certified Fraud Examiners

Community Involvement and Board

Memberships

- Director and Finance Committee Chair, Treasurer, Headlands Center for the Arts
- Director and Member, Governance Committee, Stern Grove Festival
- Member, Audit Committee, Contemporary Jewish Museum





Holly L. Sutton

Partner, Farella Braun + Martel

HSutton@fbm.com | 415.954.4476 | [LinkedIn Profile](#)

Holly Sutton guides businesses, compensation committees, and boards in managing the critical employment matters they face, with an eye toward both practical solutions and risk management. A theoretically flawless solution that is unworkable is of no value—Holly provides approaches that work in the real business world in which her clients operate. In this role, she frequently advises on policies or measures at the planning stage—proactive involvement in employment issues is almost always preferable to devising responses ex post facto. Holly is the chair of Farella's Employment Practice.

Holly has worked with clients in a range of industries, including media, insurance, wine, agriculture, technology, retail, banking, construction, manufacturing, cannabis, and professional services, where she counsels on the following to minimize the risk of employment litigation:

- Personnel policies
- Payroll audits
- Wage and hour laws
- EEO compliance
- Hiring and termination practices
- Harassment and discrimination investigations
- Non-competition clauses
- Conflict of interest
- Trade secret matters

Education

- Stanford University (J.D., 1993) Associate Editor, Stanford Law Review; Co-chair, Women of Stanford Law
- University of California, Berkeley (B.A.) summa cum laude, Phi Beta Kappa

Distinctions

- Labor & Employment Star, *Benchmark Litigation* (2019-2021)

Memberships and Affiliations

- Member, Employment Rights & Responsibilities Committee, ABA Labor & Employment Law Section

