

JacksonLewis

STRATEGIES FOR PROMOTING GENDER AND PAY EQUALITY IN THE WORKPLACE

ACC – San Diego Presentation

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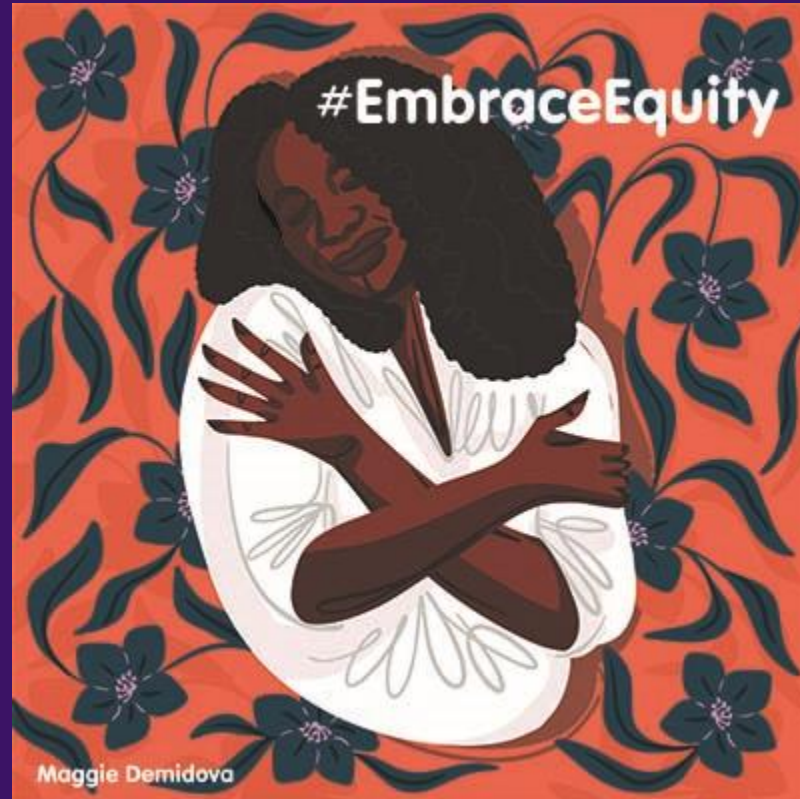
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International Women's Day



Agenda

- DEI and Implicit Bias
- Pay Equity and Pay Transparency Legislation
- Best Practices for Management

Diversity, Equity & Inclusion



DEI and Unconscious Bias

- Everything else being equal between a male and female employee, unconscious bias often results in higher pay for the male employee.
- Unconscious bias does not just go away with salary transparency. For example, a man may receive the higher end of the salary range, whereas a woman may receive the lower end. The risk of litigation still exists.
- An employer combats unconscious bias by creating objective criteria to determine salaries:
 - Market analysis
 - Geographic location
 - Job requirements and duties
- An employer can also uncover unconscious bias through a pay equity analysis.

Conducting unconscious bias training now can help to minimize these risks.

Implicit Bias in Recruitment and Employment

- Conduct *may not appear to be overt discrimination* and *is not intentional* but manifests as behavior or impacts that **demean, marginalize or harm the recipient**



Implicit Bias & Hidden Barriers

- Networking opportunities
- Information from internal networks
- Work assignments
- Mentoring and sponsors
- Training and development
- Substantive contact with customers, vendors, etc.
- Access to decision makers
- Social isolation
- Receive inadequate feedback / “soft” evaluations
- Denied advancement opportunities
- Performance evaluations, discipline, termination

Best Practice - Lead with Inclusion

- Foster engagement by remembering two hallmarks of inclusion:

BELONGING

VALUING UNIQUENESS

- Lead with Intention
 - Intentionality around psychological safety
 - Intentionality around participation of whole work group
 - Communicate your investment in team
- Audit your decisions for bias
- Imbed structure in processes

Best Practice - Structural Changes

- Hiring processes
 - Expand pool
 - Revise job descriptions and requirements
 - Interview teams with subject/topic assignments
- Work assignment processes
- Mentorship programs
- Performance review oversight
- Promotion criteria
- Pay audits
- Training

Best Practice - Structural Interrupters

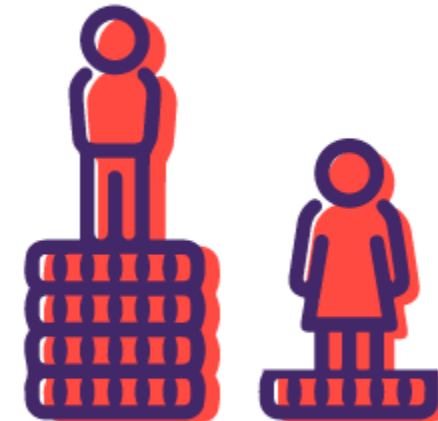
- Embed interrupters into your organization's processes and procedures.
- Examples:
 - Name blind resumes, panel interviews; cast a wide net in recruiting
 - Formal mentorship and sponsorship programs
 - A more formal work assignment process
 - More established criteria for job postings, promotions, management training and educational opportunities
 - More oversight of performance reviews; additional reviewers

Pay Equity

What is Pay Equity?

“Pay Fairness”

- Legal term of art referring to an employer’s obligation under federal, state, and/or local law to base pay rates on legitimate factors
 - Legally permissible factors vary from law to law
 - Must apply factors consistently and reasonably among comparable peers
- **Need not** pay everyone the same amount
 - *Not even everyone doing the same job*



Pay Gap vs. Pay Equity



Pay Gap

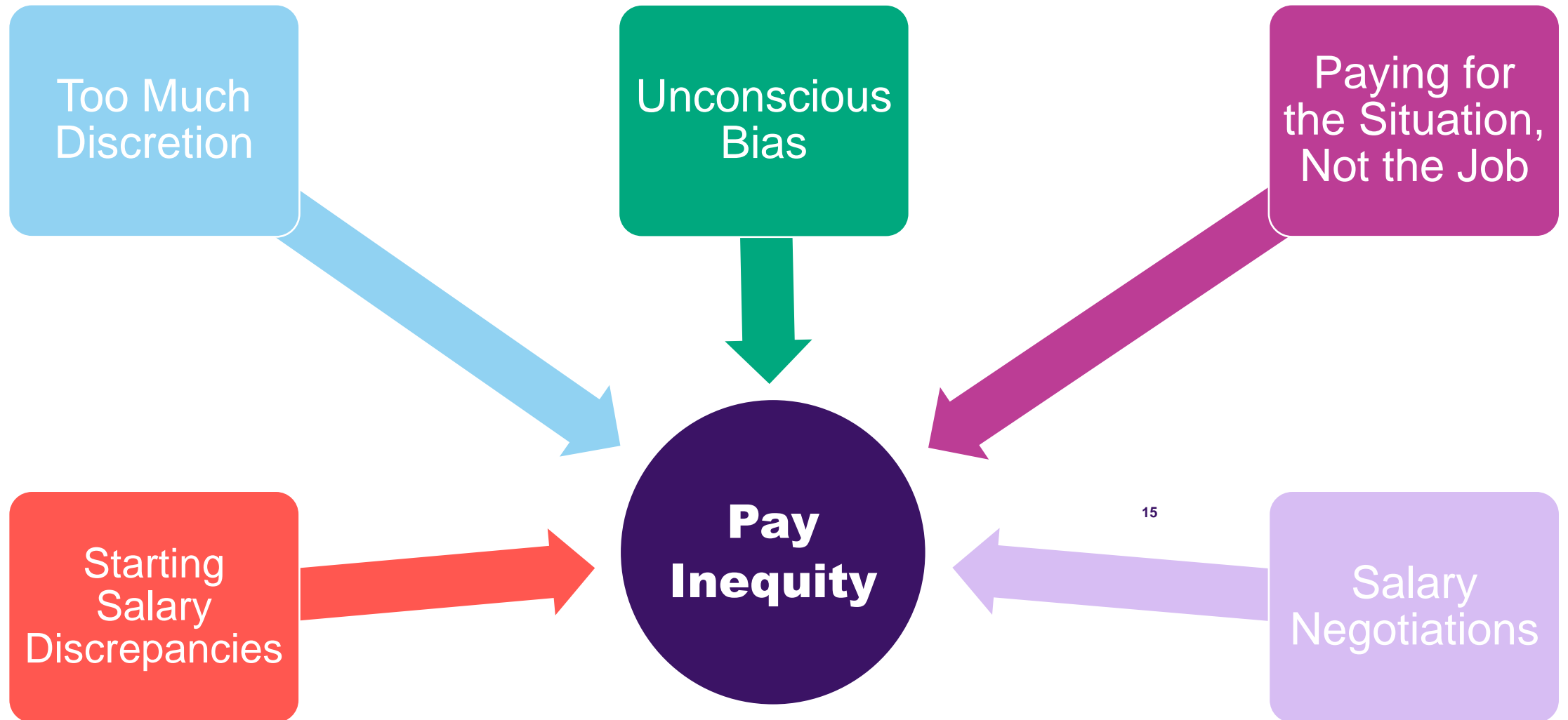
Pay differences in gender and race groups among all jobs



Pay Equity

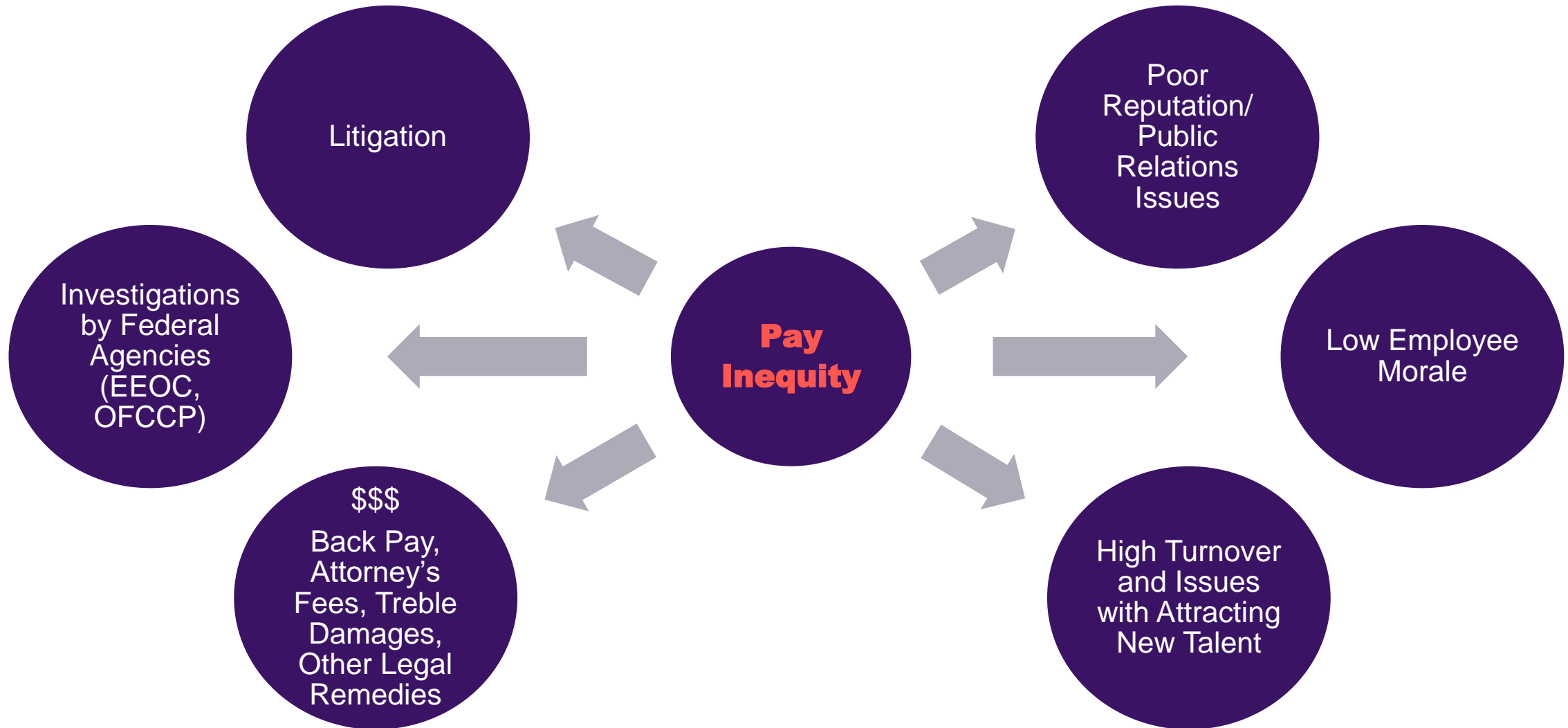
Equitable pay for individuals in similar positions

Root Causes of Pay Inequity



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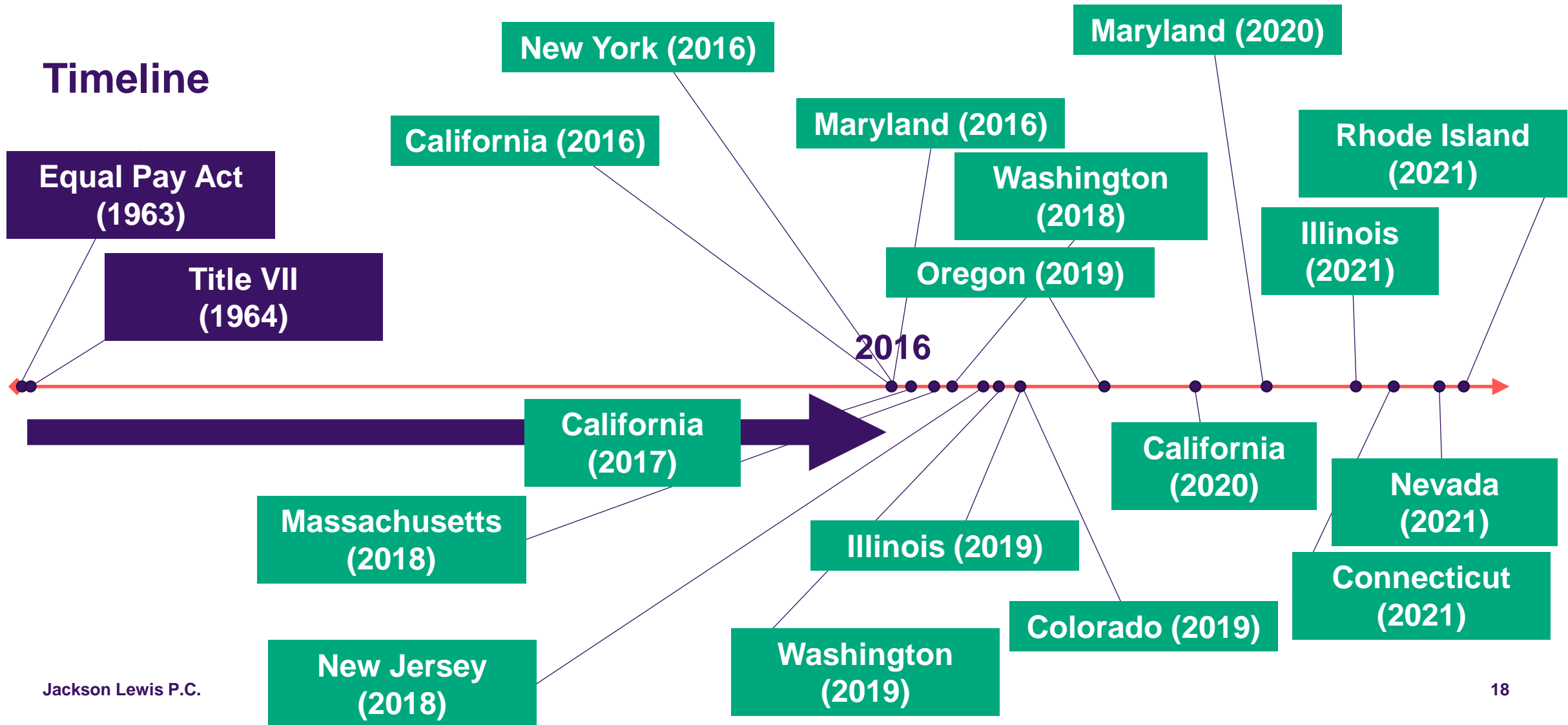
Consequences of Pay Inequity



Pay Transparency Legislation

Pay Equity Laws

Timeline





Pay Transparency Laws Generally

- Require employers to be more transparent with salary ranges and benefits
- Depending on the jurisdiction, these laws require employers to:
 - Provide applicants with the salary range for a posted position at a specified point during the hiring process
 - Provide employees with a salary range upon request, when changing jobs, or upon hire
 - Include salary range in job postings
 - Include job description in job postings

Goals of Pay Transparency Legislation

- Pay equity (particularly reducing the gender and racial wage gaps)
- Protect against employment discrimination
- Provide workers with information to gauge their value and whether they are paid fairly, especially as compared to their peers
- Increase trust in the workplace
- Strive to facilitate an employer's ability to attract and retain talent

Federal Laws Related to Pay Transparency

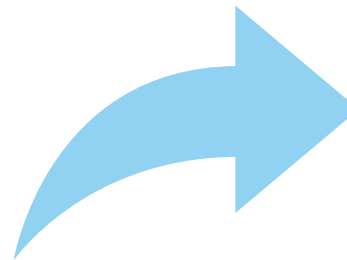
- Equal Pay Act
- Title VII and OFCCP (cover pay discrimination)
- Under the National Labor Relations Act, employees have the right to communicate (or not communicate) with other employees at their workplace about their wages, or other terms and conditions of employment. This is referred to as an employee's right to engage in "protected concerted activity."

State Pay Equity Laws



Common State Laws

1. Expand Comparator Groups
2. Limit Permissible Pay Explainers
3. Prohibit Pay Secrecy Policies
4. Prohibit Inquiries into Salary History



Laws Gaining Steam

5. Require Pay Transparency



Emerging Trend?

6. Require Opportunity Transparency
7. Require Reporting to Government

California Equal Pay Act

- Prohibits an employer from paying any of its employees wage rates that are less than what it pays employees of the opposite sex, another race, or another ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility and performed under similar working conditions.
- An employer can defeat an Equal Pay Act claim by providing that the difference in pay for substantially similar work is due to: seniority; merit; a system that measures production; and/or some other “bona fide factor other than sex, race, or ethnicity.”
- Any legitimate factors relied upon by the employer for pay inequities must be applied reasonably and account for the entire pay difference.
- Employers may not prohibit employees from discussing or inquiring about their coworkers’ wages.

California Senate Bill 1162 – Pay Transparency and Pay Data Reporting

- **Pay Transparency**
 - **Effective January 1, 2023**
 - *Employers with 15+ employees:* Include pay scale in posting for any position
 - *All employers:* Provide current employees with pay scale for current position upon request
 - *Recordkeeping Requirements:* Maintain records of job title and wage rate history for each employee throughout employment + 3 years after employment ends



California Senate Bill 1162 – Pay Transparency and Pay Data Reporting

- **Pay Data Reporting**

- Previously, employers with 100 or more employees had to submit a pay data report tabulating (A) the number of employees within each establishment (B) by race, ethnicity, and sex within each (C) job category (for example, Professionals, Technicians, Laborers, and Service Workers) and (D) the number of employees within each of 12 specific pay bands during the prior year.
- **Effective January 1, 2023**, employers with 100 or more employees will also have to:
 - Submit a separate pay data report for temporary workers showing the “ownership names of all labor contractors used to supply employees;” and
 - Report the median and mean hourly rate for each combination of race, ethnicity, and sex for each job category for both traditional employees and those hired through labor contractors.

Best Practice – Compliance with Transparency Obligations

All Employers

- ***Do not request*** or otherwise seek job applicants' salary history information.
- ***Do not rely on*** an applicant's salary history information when deciding (1) whether to offer employment to an applicant, or (2) what salary to offer an applicant.
- ***Maintain records*** of a job title and wage rate history for each employee for the duration of their employment, plus at least 3 years.
- ***Provide the pay scale*** for a position upon receipt of on an applicant's reasonable request.
- ***Provide the pay scale*** for an employee's position upon receipt of the employee's reasonable request.

Best Practice – Compliance with Transparency Obligations

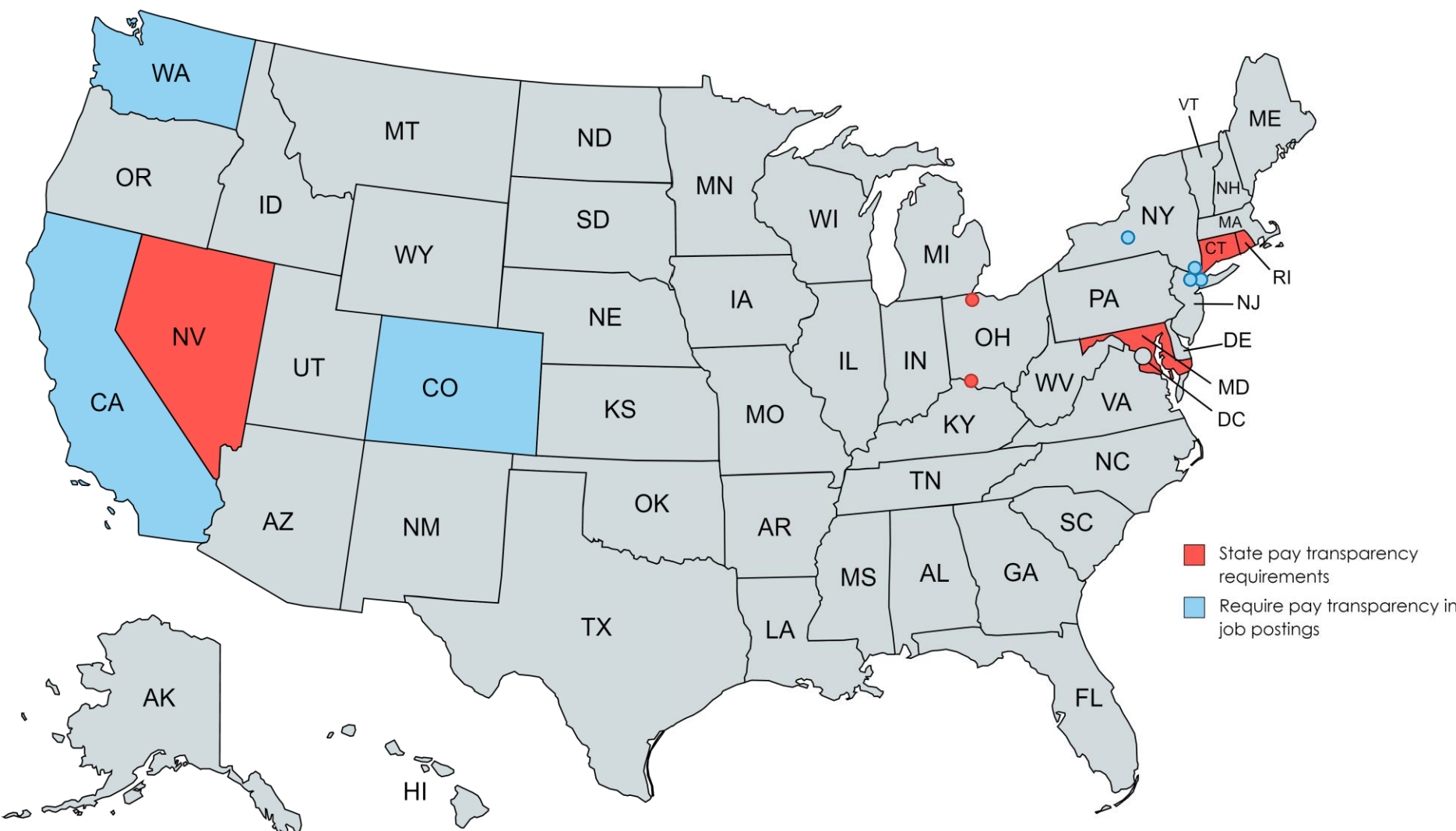
Employers with 15 or More Employees

- ***Include the pay scale in any job posting*** (the salary or hourly wage range that the employer reasonably expects to pay the position).
- ***Provide the pay scale to any third-party you engage*** to announce, post, publish, or otherwise make known a job posting, so the third party can include the pay scale in the job posting.

Pay Transparency Laws Across the Nation

- 14 jurisdictions (states and localities) have passed pay transparency laws and four others (Massachusetts, Montana, South Carolina, and West Virginia) have proposed bills:
 - New York (eff. September 17, 2023)
 - New York City
 - California
 - Cincinnati, OH
 - Colorado
 - Connecticut
 - Ithaca, NY
 - Jersey City, NJ
 - Maryland
 - Nevada
 - Rhode Island
 - Toledo, Ohio
 - Washington
 - Westchester County, NY

Pay Transparency



CLE Attendance Verification Code

8462

Benefits and Effects of Pay Transparency

Benefits for Employees due to Pay Transparency

- Improved trust
- Sense of fairness
- Increased job satisfaction
- Improved performance
- Improved morale among workforce

Reducing the Gender Wage Gap

- Denmark's 2006 Act on Gender Pay Statistics
 - Denmark passed a law requiring companies of 35-50 employees (“mandatory reporting firms”) to report gender-segregated salary data.
 - Results?
 - Gender pay gap in the mandatory reporting firms shrank by 7%, whereas there was no change in the non-mandatory reporting firms.
 - More women were employed and promoted in mandatory reporting firms.

Source: BER Staff, *Pay Transparency*, BERKELEY ECONOMIC REVIEW (Nov. 21, 2022), <https://econreview.berkeley.edu/pay-transparency/#:~:text=Pay%20transparency%2C%20which%20refers%20to,attention%20amongst%20organizations%20and%20scholars.>

Success Story – Verve

- In 2018, Verve, a U.K.-based tech firm allowed all their employees to access the pay of peers, supervisors, and even the CEO.
- This complete transparency was successful because Verve used objective measures of job scope and market value of the position to determine pay which allowed rational explanations for pay discrepancies.
- Results?
 - No turnover
 - Greater diversity in the workforce
 - Streamlined hiring process

Source: Kim Elsesser, *Pay Transparency Is The Solution To The Pay Gap: Here's One Company's Success Story*, FORBES (Sept. 5, 2018), <https://www.forbes.com/sites/kimelsesser/2018/09/05/pay-transparency-is-the-solution-to-the-pay-gap-heres-one-companys-success-story/?sh=38e113425010>.

The Unintended Effects of Pay Transparency

- Pay compression
 - Often, employers are “forced” to pay closer to the high end of a salary range
- Demand and supply effects
 - Employees with outside options will demand higher wages, while those with fewer options will demand lower wages
- Increased employee turnover
- Idiosyncratic deals (“i-deals”)
 - Employees are being treated differently due to individualized deals with their employers

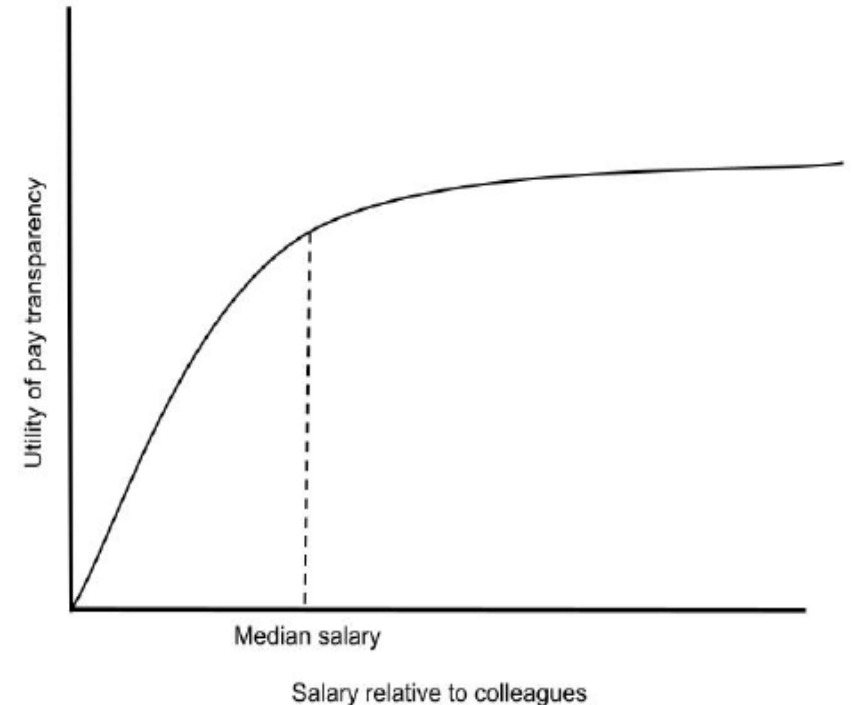
Pay Compression

- Pay compression occurs when there is minimal difference in pay between tenured employees and new hires, or managers and their direct reports, despite differences in their respective knowledge, skills, experience, or abilities.
- Examples:
 - In 2010, California made city managers' pay transparent. In 2012, among top managers, such disclosure led to an approximately 7% decrease in average compensation and a 75% increase in their quit rate, related to managers in cities that had already disclosed salaries.
 - A study using compensation data of approximately 100,000 U.S. academics from 1997 to 2017 showed that pay transparency led to academics being paid more similarly to their peers.
 - Researchers for the Harvard Business Review also found that supervisors in companies with pay transparency tend to address employee complaints and salary adjustment requests by reducing differences in compensation (e.g., performance-based incentives) within the same job level, which results in pay compression.

Source: Leon Lam, et al., *Research: The Unintended Consequences of Pay Transparency*, HARVARD BUSINESS REVIEW (AUG. 12, 2022), <https://hbr.org/2022/08/research-the-unintended-consequences-of-pay-transparency>.

Increased Employee Turnover

- Pay transparency can also lead to increased employee turnover by cultivating a negative culture of competition and comparison among employees.
- Many employees will be dissatisfied to learn they make less than the median salary, despite feeling that they provide great value to the company.
- Transparency has a negative impact on those earning below the median salary, and little to no impact on those earning above.



Source: BER Staff, *Pay Transparency*, BERKELEY ECONOMIC REVIEW (Nov. 21, 2022), <https://econreview.berkeley.edu/pay-transparency/#:~:text=Pay%20transparency%2C%20which%20refers%20to,attention%20amongst%20organizations%20and%20scholars.>

Idiosyncratic Deals (“i-deals”)

- Employees may respond to transparency-induced pay compression by negotiating “i-deals.”
- “i-deals” are personalized and unique deals that are negotiated one-on-one with a supervisor and serve as a feasible way to redress perceived inequities (due to pay compression) through non-monetary means.
 - Example: Employees negotiate “less-visible remuneration” (e.g., perks in the workplace) to combat their difficulty in receiving a pay increase.
- Supervisors are also more likely to grant employees’ requests in order to maximize team performance and reduce the risk of turnover due to pay dissatisfaction.

Best Practice - Competition in the Marketplace

- Salary transparency allows competitors to better assess where they fall within the market (assuming each competitor provides a “good-faith” range).
- If another company invariably provides higher salaries, it may hinder your company’s ability to recruit and retain talent
- To attract and retain talent, focus on:
 - Workplace Culture
 - Quality of Life
 - Work-Life Balance
 - Flexible Work Options
 - Other Benefits



Best Practice – Pay Equity Analysis

- A pay equity analysis is a statistical way of identifying pay gaps within an organization. It does so by cross referencing pay scales against any number of criteria – gender, age, ethnicity, education, seniority, etc.
- Allows employers to identify discrepancies that cannot be explained by legitimate, non-discriminatory reasons, get ahead of the “problem,” and fix it before it becomes a larger issue.
- How is it conducted?
 - Collect workforce data
 - Compare employees with similar job functions
 - Review and interpret findings
 - Correct wage gaps that are not justified



Pay Equity and Discrimination Claims

- When pay data becomes public, employees and applicants will have access to sensitive data that can lead to a pay equity or discrimination claim.
- Disparate treatment claims
 - Employees may allege they are receiving a lower salary or hourly wage due to their membership in a protected class (sex, age, race, etc.).
- Disparate impact claims
 - Even if an employer uses objective criteria, an employee may argue that the criteria negatively impacts workers of a certain protected class. For example, the objective criteria results in employees of one gender being compensated more than those of another gender.

A pay equity analysis is a great way to identify and mitigate potential pay equity and discrimination claims!

Best Practice – Develop an Action Plan



- Establish pay scales for each position.
- Review existing job postings to ensure they include pay scale.
- Develop an internal process to provide employees the pay scale for their position upon request.
- Ensure all external recruiters and employment agencies have pay scale information.
- Review your organization's records retention policy and update as necessary.

Questions?

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Thank you.