

SPRING 2019 EMPLOYMENT LAW UPDATE

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Agenda

- ◆ Maryland’s “Disclosing Sexual Harassment in the Workplace Act of 2018”
- ◆ Fourth Circuit Update: Rumors & Gossip
- ◆ Equal Pay Day 2019—To disclose or not to disclose?
- ◆ Minimum Wage News



**PART I:
DISCLOSING SEXUAL
HARASSMENT IN THE
WORKPLACE ACT OF 2018**

Overview

1. **Restrictions on agreements.** Prohibits certain waivers related to employee's future sexual harassment claims and future retaliation claims for making a sexual harassment claim.
2. **Survey requirements.** Employers with at least 50 employees must submit a survey about sexual harassment-related matters every two years.

What Propelled the Act?

- ◆ Response to the #Metoo movement
- ◆ Pierce prior culture of secrecy
- ◆ Prevent serial predators
- ◆ Encourage open dialogue
- ◆ No such thing as “class action” arbitration
- ◆ Outcomes are less advantageous for employees
- ◆ Challenging to appeal an arbitration decision

What Propelled the Act?



Restrictions on Agreements

As of October 1, 2018, “***except as prohibited by federal law***,” any provision in an employment contract, policy or agreement that waives any “substantive or procedural right or remedy to a claim that accrues in the future of sexual harassment or retaliation for reporting or asserting a right or remedy based on sexual harassment” is null and void.

No Retaliation

Employers may not discharge, suspend, demote, discriminate against, or otherwise retaliate against an employee who refuses or fails to enter into an agreement that contains a waiver that is void under the act.

Penalties

An employer who enforces or attempts to enforce a provision that violates the Act will be liable for the employee's reasonable attorney's fees and costs.

What About Federal Preemption?

- ◆ Federal Arbitration Act reflects a “liberal policy” favoring enforcement of arbitration agreements, notwithstanding state or procedural rules to the contrary
- ◆ “When state law prohibits outright the arbitration of a particular type of claim...the conflicting rule is displaced by the FAA.” *AT&T Mobility LLC v. Concepcion*

Possible FAA Outs?

- ◆ The “affecting commerce” argument
- ◆ Transportation worker carve out
- ◆ Pending federal legislation



Reporting Requirements

- ◆ Employers with 50+ employees must submit a survey to the MCCR, containing:
 - The number of settlements made by or on behalf of the employer of an allegation of sexual harassment by an employee
 - The number of times the employer paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment
 - The number of settlements made of an allegation of sexual harassment that included a confidentiality provision

Reporting Frequency

- ◆ Employer's first report will be due on or before July 1, 2020
- ◆ Information must be submitted again two years later
- ◆ Currently sunsets without any further action on June 20, 2023

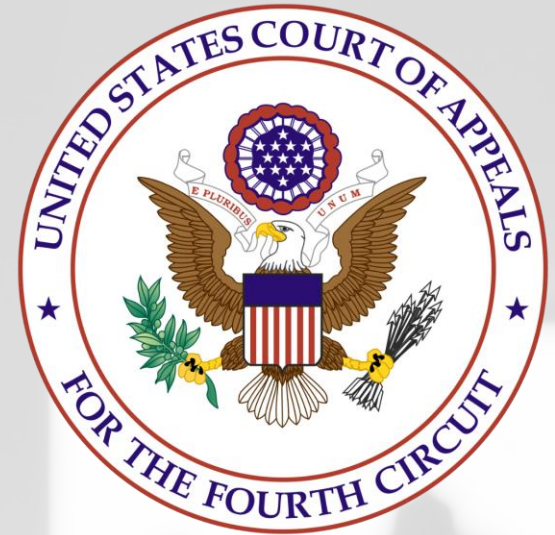
How Will the Data be Used?

- ◆ The MCCR will publish the aggregate results of the survey on line.
- ◆ Members of the public, upon request, will be able to request permission to inspect results from a specific employer regarding the number of times the employer paid a settlement to resolve a sexual harassment allegation against the same employee over the past 10 years of employment

It's Not Just Maryland!

Others states that have passed similar laws:

- ◆ Arizona
- ◆ California
- ◆ New Jersey
- ◆ New York
- ◆ Tennessee
- ◆ Vermont
- ◆ Washington



PART II: FOURTH CIRCUIT UPDATE

Parker v. Reema Consulting Services

Factual Overview

- Plaintiff was hired as a low-level clerk
- She was promoted six times, ultimately rising to Assistant Operations Manager
- Two weeks after her last promotion, male employees began circulating false rumors that she obtained her position because she had sex with a high ranking manager

Parker v. Reema Consulting Services

- ◆ The highest-ranking manager at the facility allegedly participated in spreading the gossip
- ◆ In another meeting Plaintiff was blamed for bringing gossip into the workplace
- ◆ One month later, Plaintiff was terminated.
- ◆ She asserted claims for sexual harassment and retaliation

Parker v. Reema Consulting Services



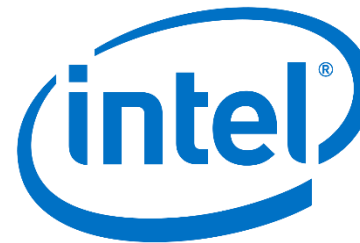


PART III: THE PRESSURE TO DISCLOSE PAY INFORMATION

Everyone is Talking About Pay



Your Friends are Going Public



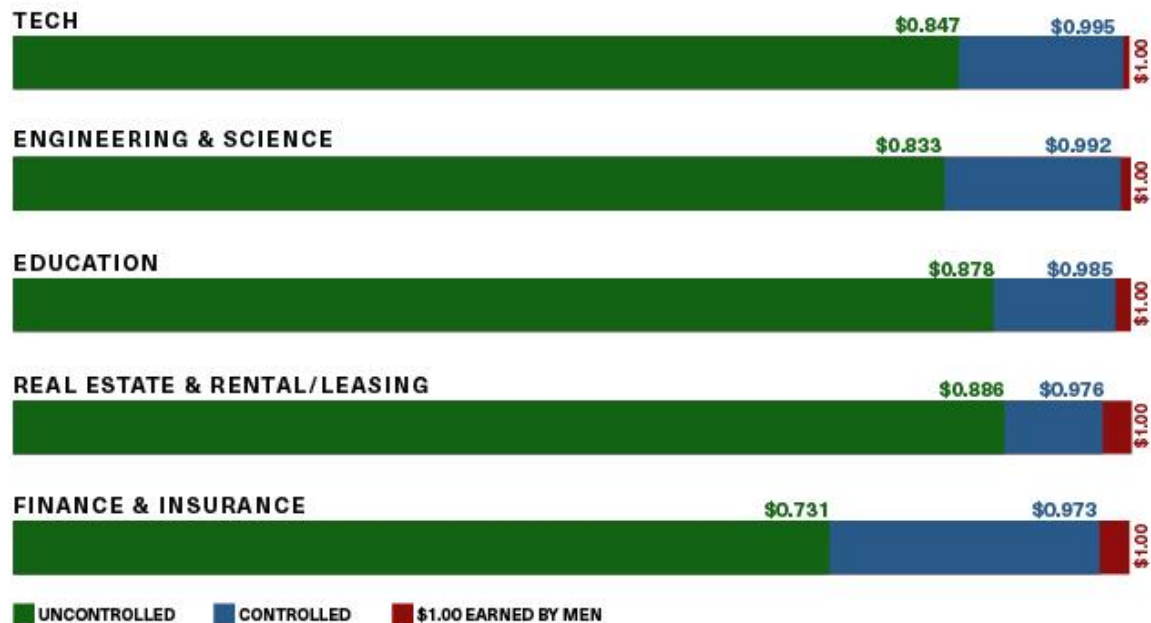
What Are They Saying?

99.8¢

earned by women for every \$1
earned by men with the same job
title and level in the U.S.

What Do the Public Disclosures Mean?

GENDER PAY GAP BY INDUSTRY



Uncontrolled reflects the pay gap per industry overall, while controlled accounts for similar job titles.

SOURCE: PayScale



EEO-1 Pay Reporting is Back

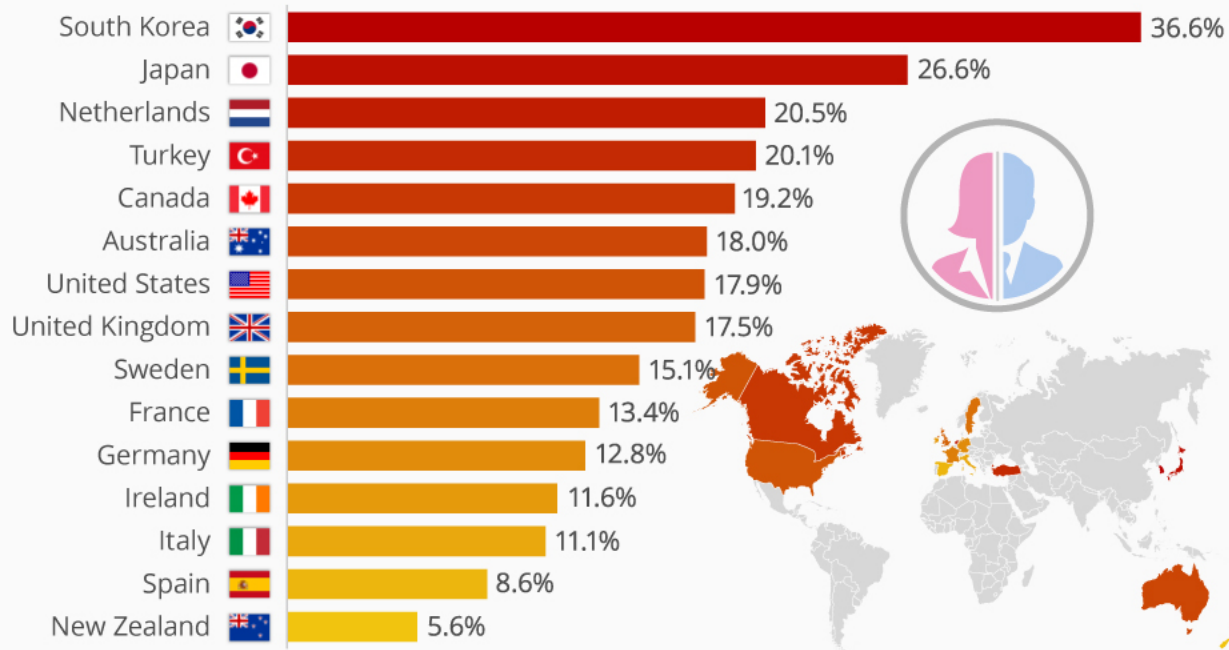
- ◆ Obama Administration EEOC passed regulation requiring pay disclosures on EEO-1 report by job category, race, and gender
- ◆ Trump Administration stayed reporting requirement indefinitely
- ◆ A federal judge recently reinstated the pay reporting requirement
- ◆ Next steps?

The Gender Pay Gap in Developed Nations Visualized

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

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
@StatistaCharts Source: OECD

statista

Countries with Equal Pay Regulations (As of January 2019)

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

State and Local Equal Pay Initiatives

- ◆ Increasing number of states/local governments enacting aggressive fair pay laws
 - Promote transparency
 - Require state/local contractors to report pay information
- ◆ Local initiatives encouraging voluntary pay reporting
 - 100% Talent: The Boston Women's Compact
 - Participating employers agree to contribute pay data to a report compiled by a third party on the Compact's success

How to Respond to Pressure to Go Public?



Pay Equity Internal Assessments: Global Analysis v. “Pay Group” Analysis

- ◆ Global Analysis
 - Expresses pay differences in percentages: “We pay women 98% of what we pay men.”
 - Often controls for the “usual suspects” (grade, time in position, tenure with company)
- ◆ Pros:
 - Good “sound bites”
 - Can identify global patterns across groups that may not be apparent in specific pay group analyses
- ◆ Cons:
 - Does not identify specific “problem areas”
 - Likely not useful in defending pay discrimination claims

Pay Equity Internal Assessments: Global Analysis v. “Pay Group” Analysis

- ◆ “Pay Group” Analysis
 - Develop/compare “pay groups” that reflect the company’s comp system
 - Address each group separately
 - What caused the pay disparity? **Do we have defensible practices?**
- ◆ Pros
 - Useful in identifying specific problem areas
- ◆ Cons
 - Smaller groups may not “flag”
 - Doesn’t produce good “sound bites”

What Explanations are Sufficient for Pay Differences?

- ◆ Different jobs
- ◆ Examples of valid explanations for differences within similar jobs include:
 - Education, experience, performance
 - Seniority system
 - Geographic location where a job is performed
- ◆ Employer must be able to **prove** the reason for the pay difference.

Strategic Decisions: To Say or Not to Say

- ◆ Strategic considerations in going public:
 - What do you disclose? Gender data? Race data? Methodology?
 - To whom do you disclose?
 - Employees?
 - Shareholders?
 - General public?
 - Are you risking waiver of privilege?
 - If you disclose this year, what are your “obligations” to disclose in future years?

A blurred background image of an office interior. On the left, a window shows a reflection of the 'jackson lewis' logo. In the center, a desk and office chair are visible, and on the right, a large window looks out onto a building. The overall scene is out of focus, creating a professional and modern atmosphere.

PART IV

MINIMUM WAGE UPDATE

Maryland Joins the \$15 Club

Date	Minimum Wage
January 2020	\$11.00
January 2021	\$11.75
January 2022	\$12.50
January 2023	\$13.25
January 2024	\$14.00
January 2025	\$15.00

Thank You

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