



Pay Equity & Transparency Laws

WEBINAR



Today's Presenters



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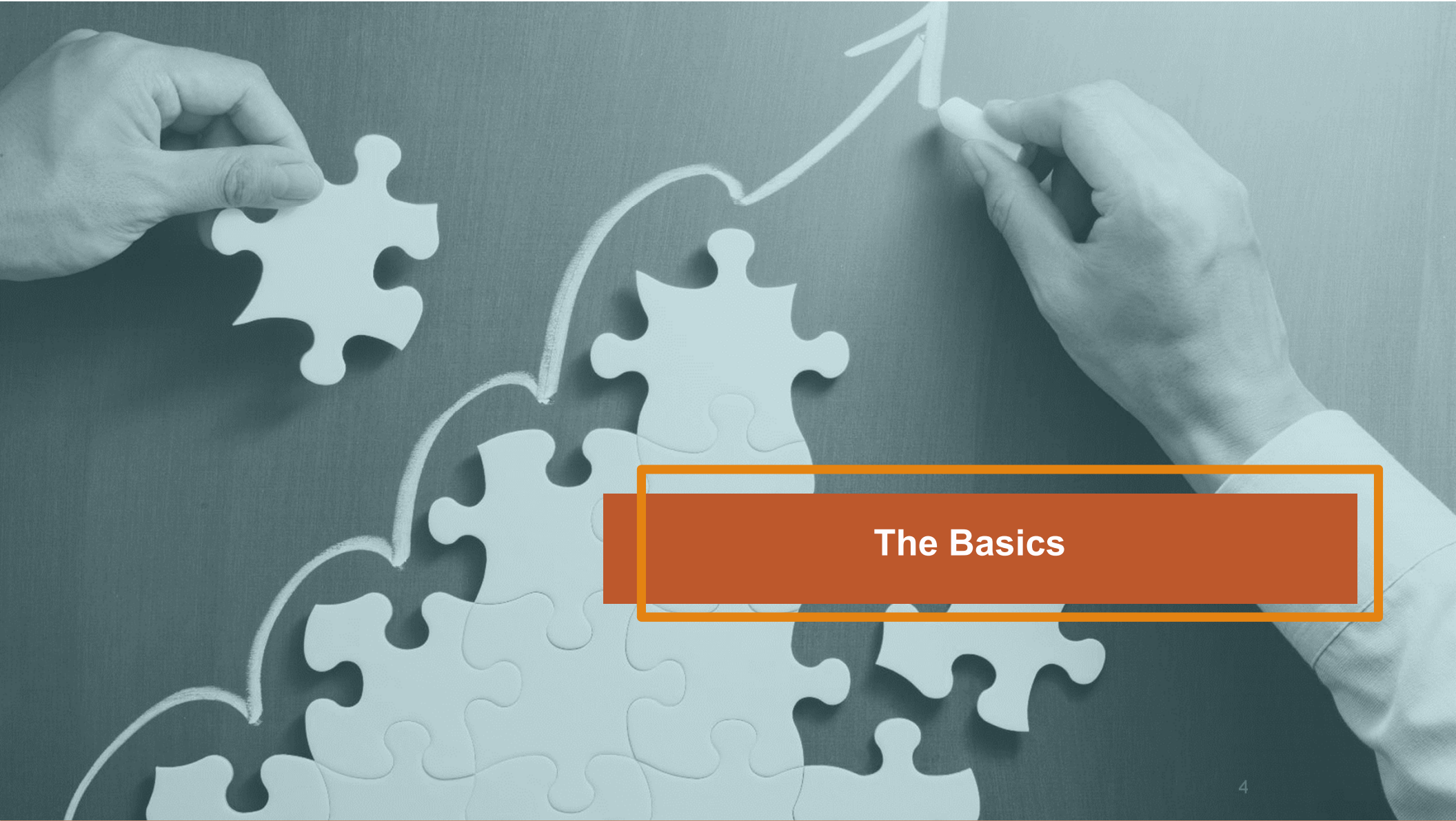
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Today's Topics

- Federal Framework
- California
 - SB 1162 Pay Transparency and Pay Data Reporting
- Other States: Recent Amendments and What's On the Horizon
- Agency Focus and Updates
- Litigation and Class Claims
- Pay Equity and Transparency: Best Practices



The Basics

Federal Law: The Equal Pay Act of 1963

- **Equal Pay for Equal Work:** prohibits employers from paying different wages to men and women who work in jobs that require substantially equal skill, effort, and responsibility, that are performed under similar working conditions within the same establishment.
 - **"Equal"** work does not mean identical jobs; rather, the jobs must be "substantially equal" in overall job content, even if the position titles are different.
 - **Establishment** is a distinct physical place of business rather than an entire business or enterprise consisting of several places of business.
- Four affirmative defenses: (1) seniority system, (2) merit system, (3) a system that measures earnings by quantity or by quality of production, or (4) any factor other than sex.
- No exhaustion of administrative remedies.

Other Federal Laws

- Since passing the EPA, Congress has expanded federal protection against compensation discrimination through a variety of additional laws:
- Title VII of the Civil Rights Act of 1964
- Age Discrimination in Employment Act of 1967
- Section 501 of the Rehabilitation Act of 1973
- Lily Ledbetter Fair Pay Act of 2009:
- Each paycheck that contains discriminatory compensation is a separate violation regardless of when the discrimination began.
- Overturned the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007), which severely restricted the time period for filing complaints of employment discrimination concerning compensation.



California

State Law: California

- **California's Equal Pay Act (1949)**

- Required employers to pay men and women equally for doing the same job (equal pay for equal work)

“No employer shall pay any individual in the employer’s employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions”

California – Fair Pay Act

- **California Fair Pay Act (Cal Labor Code 1197.5) (effective January 1, 2016)**
 - Prohibiting unequal rates of pay for employees of the opposite sex who perform “substantially similar work” instead of “equal work;”
 - Eliminating the requirement that employees’ wage rates only be compared to those of other employees working in the same physical location or office (the “same establishment”);
 - Making it more difficult for employers to justify paying an employee of one sex less than another when they do substantially similar work by narrowing the defenses available;
 - Requiring that whatever factors an employer relies on to justify a difference in pay be job-related, used reasonably, and account for the entire pay difference;
 - Specifically making it illegal to retaliate or discriminate against employees who discuss or ask about pay, or take some step to enforce their own or a co-worker’s equal pay rights;
 - Prohibits retaliation against employees who disclose their wages, discuss or inquire about the wages of others; employees are free to disclose or discuss.
 - Extending the number of years that employers must maintain records related from two to three years

California – Fair Pay Act

- **Further Amendments to the California Fair Pay Act (Cal Labor Code 1197.5) con't:**
 - Effective January 1, 2017 – prohibits unequal pay for employees of different race or ethnicities.
 - Effective January 1, 2018 – the Act applies to public and private employers.
 - Effective January 1, 2018 – § 432.3 added to the Labor Code – **Salary History Ban**
 - Prohibits employers from relying on salary history of an applicant as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant
 - Prohibits employers from seeking salary history from applicants
 - Requires employers, upon reasonable request, to provide the pay scale for a position to an applicant
 - Effective January 1, 2019 – employer cannot justify pay differences between employees of the opposite sex, or different races or ethnicities, based on previous salaries.

California – Fair Pay Act

- Exemptions/Defenses
- Burden has shifted to the employer
- Any wage differential must be based upon one or more of the following:
 - A seniority system
 - A merit system
 - A system that measures earnings by quantity or quality of production
 - A bona fide factor other than sex, such as education, training, or experience – must be job related and consistent with business necessity, and does not apply where employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential

Factors must account for the entire differential!

California – Pay Transparency Law

- **Pay Transparency**
- Employees cannot be retaliated against for:
 - Disclosing their own wages
 - Discussing the wages of others
 - Inquiring about another employee's wages
- Employers are prohibited from forbidding employees from discussing or disclosing wages
- Civil cause of action for retaliation with one year statute of limitations.

California – Pay Transparency Law

- **California’s New Pay Transparency Law: SB 1162, effective January 1, 2023**
- Changes to the “Salary History Ban”: Labor Code § 432.3
 - All employers with more than 15 employees must include a pay scale in all job postings (and must provide that information to third parties who post those jobs)
 - All employers, regardless of size, must provide a pay scale for a current employee’s position at the employee’s request
 - Employers must maintain records of the job title and wage rate history for each employee for the duration of employment plus three years.

CA Pay Transparency: DIR Guidance

In December 2022, the Department of Industrial Relations (DIR) released FAQs (https://www.dir.ca.gov/dlse/california_equal_pay_act.htm) for employers regarding compliance with the new pay transparency obligation.

29. Is an employer required to include the pay scale on job postings?

As of January 1, 2023, an employer with 15 or more employees must include the pay scale for a position in any job posting. If an employer with 15 or more employees engages a third party to announce, post, publish, or otherwise make known a job posting it must provide the pay scale to the third party and the third party must include it within the job posting.

The Labor Commissioner interprets this to mean that the pay scale must be included within the job posting if the position may ever be filled in California, either in-person or remotely.

31. How is “pay scale” defined?

Section 432.3, as amended, defines “pay scale” to mean the salary or hourly wage range the employer reasonably expects to pay for a position. An employer who intends to pay a set hourly amount or a set piece rate amount, and not a pay range, may provide that set hourly rate or set piece rate.

CA Pay Transparency: DIR Guidance

32. Must the pay scale include bonuses, tips, or other benefits?

No. Any compensation or tangible benefits provided in addition to a salary or hourly wage are not required to be posted...A legally compliant job posting only requires the “salary or hourly wage range that the employer reasonably expects to pay for the position.”

33. Must the pay scale include piece rate or commission wages?

Yes. State law allows employers to compensate employees, in whole or in part, on a task, piece, or commission basis. (Labor Code § 200) If the position’s hourly or salary wage is based on a piece rate or commission, then the piece rate or commission range the employer reasonably expects to pay for the position must be included in the job posting.

34. Can employers link to the salary range in an electronic posting?

No. The pay scale shall be included within the posting.

California – Pay Data Reporting

- **California Pay Equity Reporting (Effective January 1, 2021)**
- Private employers (with 100 employees) who are required to file EEO-1 reports must file a report with the DFEH that includes the number of employees and the hours they worked
 - By race, ethnicity, and sex
 - In each of the job categories in the federal EEO-1 report
 - Whose annual earnings fall within each of the pay bands used by the U.S. Bureau of Labor Statistics in the Occupational Employment Statistics Survey

California – Pay Data Reporting

- **SB 1162: Changes to Pay Data Reporting (Effective January 1, 2023)**
 - Revises reporting deadline to the second Wednesday of May 2023, and annually thereafter
 - Requires a separate pay data report from private employers employing 100 or more employees hired through labor contractors, and requires employers to disclose on the pay data report the ownership names of all labor contractors used to supply employees
 - Within each job category, requires employers to report the median and mean hourly rate by each combination of race, ethnicity and sex.
 - <https://calcivilrights.ca.gov/paydatareporting/faqs/>

California – Pay Data Reporting

- **SB 1162: Changes to Pay Data Reporting (Effective January 1, 2023)**
 - For multiple-establishment employers with establishments inside and outside of California, the employer reports to CRD on its California establishments, all of its employees assigned to those establishments whether or not teleworking (including any employees working outside of California), and any other California employee (including those teleworking from California but assigned to an establishment outside of California).
 - **Important update:** Unlike in years past, employers should not report on employees who are working outside of California and are assigned to an establishment outside of California.

CA - Pay Data Reporting Requirements

Updated FAQ (2/22/23) regarding Labor Contractor Employees

- “Labor contractor employees”: 1) on a labor contractor’s payroll; 2) for whom the labor contractor is required to withhold federal social security taxes from that individual’s wages; and 3) who performs labor for a client employer within the client employer’s *usual course of business*.
- **What is “labor . . . within the client employer’s usual course of business,” such that workers performing that labor are “labor contractor employees” who must be reported on?**
 - A “labor contractor” is an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer’s usual course of business. Gov. Code. § 12999(k)(2).
 - A client employer’s “usual course of business” means the regular and customary work of the client employer. “Regular and customary work” means work that is performed on a regular or routine basis that is either part of the client employer’s customary business or necessary for its preservation or maintenance. “Regular and customary work” does not include isolated or one-time tasks.

CA – Pay Data Reporting

- April 14, 2023: The California CRD announced that it will allow employers to request an “enforcement deferral period”. If granted, the extension will give employers until **July 10, 2023** to submit the new Labor Contractor Employee Report before the CRD seeks a court order requiring the employer to comply
 - Requests will only be granted through the CRD pay data reporting portal.
 - The due date for the Payroll Employee Report remains May 10, 2023.





Other State and Local Pay Equity and Disclosure Laws

Other Pay Equity/Transparency Laws

- **Colorado Equal Pay for Equal Work Act (Gender, Gender Identity)**

- Employers must make reasonable efforts to “announce, post, or make known all opportunities for promotion” to all current employees on the same calendar day.
- Each job-vacancy posting must disclose the hourly wage or salary, or the hourly wage or salary range, along with a general description of all benefits and other compensation offered.

- **New York State (Protected Classes)**

- Effective September 17, 2023, it will require covered employers to list salary ranges in job postings and advertisements.
- Effective November 2021, New York City employers with 4 or more employees (or one or more domestic workers), to include the minimum and maximum starting salary for any “advertised job, promotion or transfer opportunity.”

- **Illinois (Gender, Race)**

- Requires Illinois businesses to obtain an equal pay registration certificate from the state Department of Labor every two years. In order to apply for the certificate, employers must (1) send their most recent EEO-1 Report to the state; (2) compile a list of all employees (separated by gender and the race and ethnicity categories as reported in the employer’s EEO-1 Report), the county in which the employee works, the date the employee started working for the employer, and the total wages paid to each employee rounding to the nearest \$100 (the state has a form spreadsheet available for free on its website)

Other Pay Equity/Transparency Laws

- **Maryland Equal Pay for Equal Work Act (Gender and Gender Identity):** Employees who work for the same employer in the same county and who perform work of comparable character, or work in the same operation, business, or of the same type; requires employers to provide wage ranges to job applicants upon request.
- **Rhode Island Pay Equity Act (Gender)**– effective January 1, 2023, bans consideration of salary history in setting initial pay, and requires disclosure of “wage ranges” to applicants and employees upon request, and to employees for their position at time of hire or when moving to a new position.
- **Washington Equal Pay and Opportunities Act (Gender)** – effective January 1, 2023, requires employers with at least 15 employees to provide a wage scale in job postings and a description of benefits and other compensation and to provide existing employees who are promoted or offered a new position with the wage scale or salary range of the position.
- **Massachusetts Equal Pay Act (Gender):** stringent equal pay requirements, bans salary history inquiries prior to a written offer, and protects employees’ ability to discuss wages.



Agency Focus and Updates

The Biden Administration

- March 15, 2022 - Executive Order On Advancing Economy, Efficiency, and Effectiveness in Federal Contracting By Promoting Pay Equity and Transparency
- Policy of current administration to eliminate discriminatory pay practices
- Office of Personnel Management:
 - Consider whether to limit or prohibit use of salary history for federal employees
- Federal Acquisition Regulatory Council:
 - Consider whether to limit or prohibit use of salary history by federal contractors

The EEOC

- Current EEOC Chair: “Pay equity is a top enforcement priority.”
- Since 2013, combatting pay discrimination a top priority in the EEOC’s Strategic Enforcement Plan
- EEOC enforcement efforts:
 - Recovered nearly \$250M in pay discrimination-related claims in past 5 years.
 - Expecting to file more lawsuits to address systemic pay issues.
 - EEOC also focusing on outreach programs to educate workers on equal pay rights.

The OFCCP

- Federal contractors are required to conduct an “in-depth” pay equity audit.
 - Determine if gender-, race-, or ethnicity-based pay disparities exist.
 - OFCCP may request this information as part of a compliance evaluation.
 - Information provided to the OFCCP is subject to public disclosure through FOIA requests.
- What about the attorney-client privilege or attorney-work product doctrine?
 - In August 2022, the OFCCP issued a revised directive, which explicitly reaffirmed OFCCP’s position that it does not require the production of privileged communications or attorney work product.
- **Documentation of compensation analysis must demonstrate:**
 - When the compensation analysis was completed;
 - Number of employees the compensation analysis included;
 - Which forms of compensation were analyzed and, where applicable, how the different forms of compensation were separated or combined for analysis;
 - That compensation was analyzed by gender, race, and ethnicity; and
 - The method of analysis employed by the contractor.

LITIGATION

Litigation

Pay Equity Class Actions

- ***Morgan v. United States Soccer Federation, Inc.***, 445 F.Supp.3d 635 (C.D. Cal. 2020)
 - EPA claim dismissed on summary judgment, largely due to CBA. Title VII claims of sex discrimination allowed to go forward. Case ultimately settled for \$24 million.
- ***Moussouris v. Microsoft Corp.***, 799 Fed.Appx. 459 (9th Cir. 2019)
 - Motion for class certification of nationwide class (8,600 women) denied. Title VII pay and promotion claims.
 - Case dismissed.
- ***Chen-Oster v. Goldman, Sachs & Co.***, 449 F.Supp.3d 216 (S.D. NY 2020)
 - Class certification granted in 2018. Motion for decertification unsuccessful. In 2020, half of the 3,000-plus class members compelled to arbitrate their claims.
 - Goldman Sachs recently announced settlement for \$215 million.

Pay Equity Class Actions

- ***Cahill v. Nike, Inc.***, 3:18-cv-1477-JR (D. Or. Oct. 9, 2020)
 - Gender discrimination in pay and promotions. Pre-certification. Ruling of Note: internal pay equity analysis privileged.
- ***Jewett, et al. v. Oracle America, Inc.***, 17-CIV-02669, at 3 (Apr. 30, 2020, Cal. Super. Ct.)
 - California EPA - class of more than 4,100 female employees certified.
 - Court then de-certified; on appeal.
- ***Rasmussen, et al. v. Walt Disney Company, et. al.***, Case No. 19STCV10974 (Los Angeles Superior Court)
 - California EPA - pay and promotion, pay secrecy claim added in March 2021. Pre-certification.
- ***Ellis, et al., v. Google, Inc.***, Case No. CGC-17-561299 (San Francisco Superior Court)
 - California EPA - pay and promotion, class of approximately 11,000 women certified.
 - Settled for \$118 million.

ESG and Pay Equity

- Environmental, social and governance (ESG) issues have become more complex and challenging than ever before.
- The “Social” prong has become increasingly a key component of ESG.
 - Pay/Wage Equity
 - DEI Issues
- The Board has ultimate accountability for pay equity/DEI.
- Setting the corporate culture tone – reporting and activist attacks

Best Practices: Pay Equity/Transparency

- Document relative skill, effort, responsibility of positions to differentiate roles
- Evaluate permitted factors under applicable law that influence pay
- Analyze pay and benefits (including stock options)
- Modify policies and practices
 - Remove old language from handbooks and other policies prohibiting discussion of pay
 - Update applications to delete questions about salary history
 - Update job postings to include salary ranges (and benefits where required)
 - Limit discretion in pay decisions/review & adjust incumbent pay if new hires are brought in at higher salaries
- Train HR, managers and supervisors regarding the pay transparency provisions-no one should be disciplined or chastised for asking about pay or others' pay

Thank You