



Pay Transparency 2023

# Living with SB 1162 and What to Expect Next

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# Pay Equity

## 2023 – Be Prepared for Full Transparency

- Job Postings
- Interview Process
- Upon Request by Applicant
- Upon Request by Employee
- Disclosure to the State
- To Shareholders
- And Beyond....



# Pressure for Pay Transparency

## Internal Stakeholders

- Employees
- DEI Committees/ERGs
- Board Requests/Leadership Commitments

## External Stakeholders

- Activist Investor Groups (Arjuna)
- ESG proposals
- Competitor Surveys/Reporting
- Customer Demand



# BioSpace's 2023 U.S. Life Sciences Salary Report

Overall, industry salary growth continues, albeit at a slower pace

## Racial gender gap

- Whites most likely to receive a salary increase 67% v. 53% for Blacks/African-Americans
- Blacks/African-Americans at 70% of earnings of Whites

**Gender gap went backwards to the 2021 level - women earn 87% of what men earn based on averages of FT earnings**

- Men more likely to receive a merit-based raise
- Men more likely to receive bonuses and equity



# Causes of Pay Gaps → Legislative Policy

(NWLC Reports)

Women are less likely to be hired for high-wage jobs

Women offered less money than men

Using salary history to set starting pay perpetuates wage gaps

Pay secrecy policies perpetuate pay disparities

Mothers are perceived as less committed to work

Lack of access to good childcare

Under review: restrictions on access to reproductive care



# Trends in Legislation

Expansion of  
Protected Classes  
Beyond Gender

Pay Parity for  
“Substantially  
Similar” work vs.  
“Equal work”

Comparator Can  
Work In Another  
Establishment

No Retaliation For  
Efforts to Obtain  
Equal Pay -  
Discussing Wages

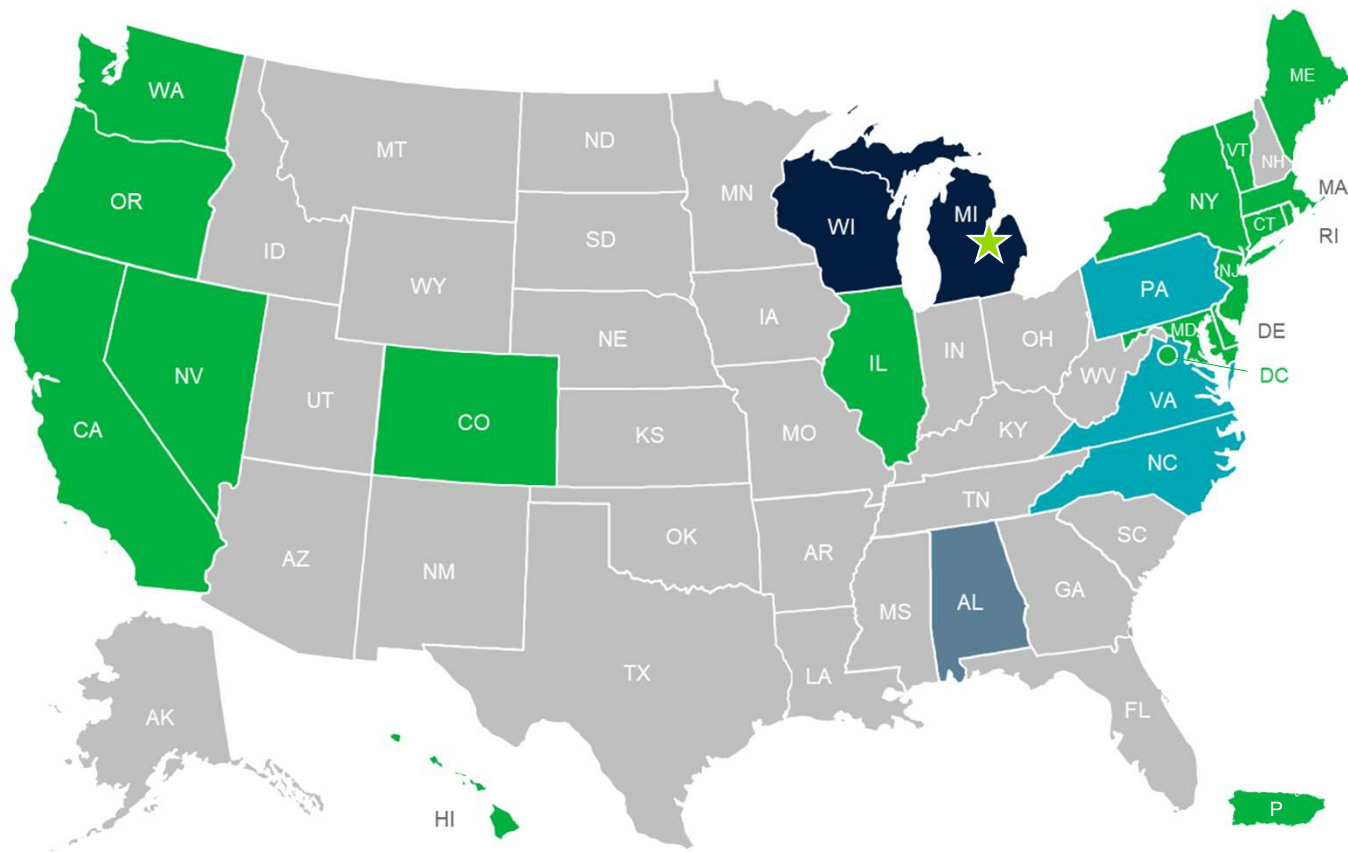


Pay Transparency

# Trend 1: Salary History Bans



# Salary History Ban Laws: States

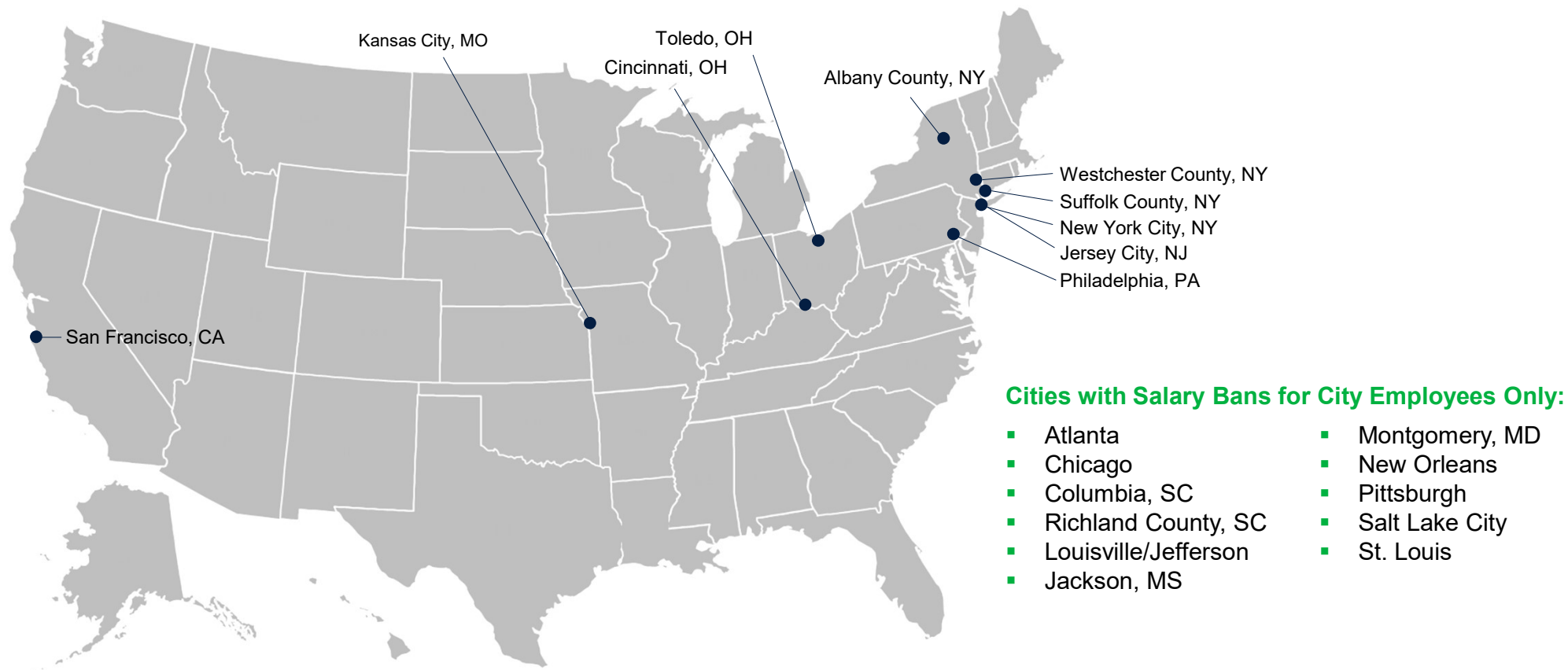


Banned
Banned for State Employees Only
Prohibits Local Salary Ban
No Ban, but Can't take Adverse Action
★ Governor Whitmer issued a subsequent salary ban E.O. in 2019.





# Salary History Bans: Local

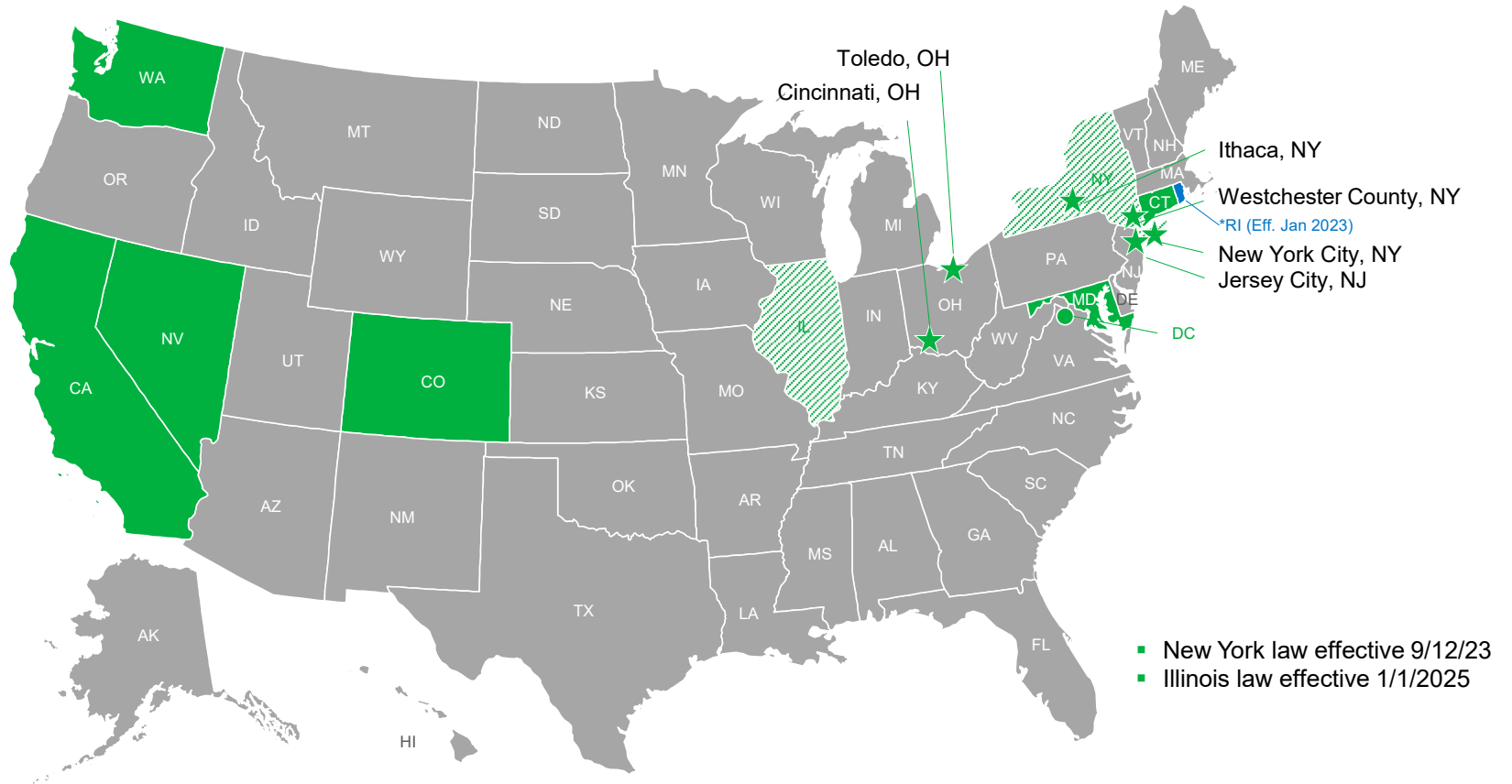


## Pay Transparency

# Trend 2: Mandatory Salary Range Disclosure for Recruiting and Internal Transfers/Promotions



# Pay Band/Range Disclosure Laws:



# Where You Have to Disclose When Job Is Posted:

- ✓ California
- ✓ Colorado
- ✓ Jersey City, New Jersey
- ✓ New York state (eff. 9/17/2023)
- ✓ New York City
- ✓ Westchester County, NY
- ✓ Ithaca City, NY
- ✓ Washington





# What if You Allow Remote or Hybrid Work?

If the work can be done remotely in these locations, then you must comply with the applicable salary disclosure law:

- **California**
- **Colorado**
- **New York City**
- **Washington**
- **Westchester County, NY**

Note: Connecticut DOL requires CT law to apply to CT employers for employees outside of CT



# Is Pay Scale/Salary Disclosure Required Other Than Posting During The Recruiting Process?

Upon request after the applicant's initial interview	<b>Maryland</b> <b>Rhode Island</b> or (i) upon request by the applicant at any time and (ii) before discussing comp and (iii) see below
Automatically after the initial interview (even if no request)	<b>Nevada</b>
Upon request after conditional offer of employment	<b>Washington state</b> <b>Toledo</b> <b>Cincinnati</b>
When offer is made, or when requested, whichever occurs first.	<b>Connecticut</b> <b>Rhode Island</b>



# When Do You Have to Provide Salary Ranges To Current Employees?

<b>In any posting for a possible transfer or promotion opportunity</b>	<b>Colorado, Ithaca, Jersey City, NYC</b>
<b>If they are being transferred or promoted</b>	<b>Connecticut, Rhode Island</b>
<b>If they ask for it as part of a transfer or promotion</b>	<b>Washington, Westchester County, Rhode Island Nevada (if employee has applied and completed an interview)</b>
<b>If they ask for it at anytime, including for their current role</b>	<b>California, Maryland, Rhode Island, Washington</b>





# What Do You Have to Provide?

- Minimum and maximum salary employer reasonably expects to pay for the position at time of posting – range cannot be open ended
  - California, Colorado, New York, Washington
  - Ithaca, Jersey City, New York City, Westchester County
- Applicable pay scale, previously determined range of wages for the position, actual wages for employees who currently hold comparable positions, or budgeted amount for the position
  - Connecticut, Rhode Island
- Benefits/commissions/bonuses/other compensation
  - Colorado, New York (general statement that comp. will be based on comm. ok), Washington
- Job description
  - New York
- No definition of pay scale/range provided
  - Maryland, Nevada
  - Cincinnati, Toledo





# What if we post for remote work but say the job can't be done from NYC or Colorado?

## **Rejected:** Colorado Labor Department

- Sent warning letters that Coloradans must not be excluded from remote work opportunities
- Has fined at least 3 businesses for failure to come into compliance
  - Note: one fine waived after company came into compliance

## **Washington State's DOL 2023 Guidance cites to Colorado:**

- *“Employers also cannot avoid these obligations by stipulating that residents of a particular state or locality are not eligible for an advertised rule”*
- *Colorado's Department of Labor and Employment has considered and flatly rebuked such efforts to circumvent Colorado law, and employers should anticipate similar enforcement in other states.*



**We have standardized our job postings and use nationwide hourly wage/salary ranges - so the range is wide because pay will be impacted by geographic location and level of experience?**

## **Washington DOL Practical Guidance 2023:**

- Posting can include qualifying language explaining that where the applicant will ultimately fall within the range depends on a variety of factors including geographic range and level of experience
- Notes: where disclosure of variable comp (discretionary bonus/equity grants) is outside of disclosure requirements, employer has flexibility to go outside of range



## We target 20% over budgeted amount for a position and use that to post the top of the range

- How are you creating your range?
- May generate a very wide range
- May not be considered a “good faith” range if too wide
- How do you explain the range to current employees?
- How are you qualifying your ranges?
- Presents challenges when disclosing data to states/agencies/litigation

### Design Manager, Supercharger (New York)

Job Category	Charging
Location	Brooklyn, New York
Req. ID	145009
Job Type	Full-time

Apply

Telex participates in the [E-Verify Program](#)

#### What to Expect

The Supercharger Design Manager role entails active program coordination of all deployment phases of Telex's Supercharger projects, including construction feasibility diligence, layout and design, utility design and assessments, permitting, construction, site commissioning, and closeout. The ideal candidate has relevant hands-on experience managing infrastructure projects (up to thirty projects at one time across multiple states/provinces) and demonstrates a bias to action, logical problem solving, and mastery of a project's technical details. Finally, s/he brings high energy and an optimistic approach to fully completing projects in a swift and quality manner.

#### What You'll Do

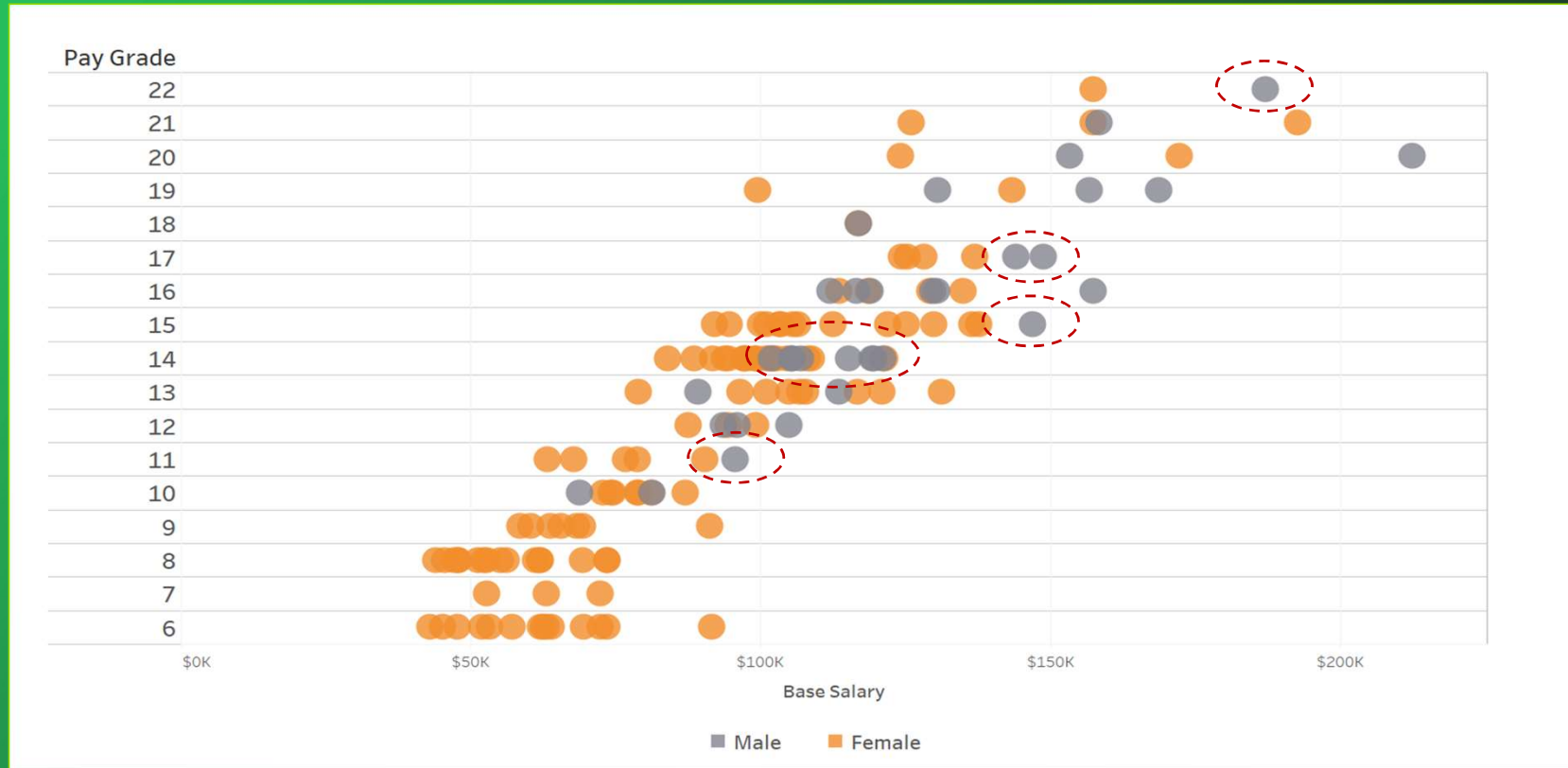
- Manage all phases of design, entitlement, and construction of Supercharger sites within a given territory. A key performance indicator is the number of sites successfully opened for public use.
- Facilitate field site visits for due diligence on construction, engineering, utility, and cost. Provide site reports and sketches as needed.
- Review title reports for ownership, encroachments, and easements; assess construction viability.
- Plan, coordinate, approve, and review legal documents and plans for right-of-way/easement/property acquisitions.
- Serve as the liaison with utility company personnel to determine the best routing of primary electrical service.
- Meet with zoning/permitting personnel to understand jurisdictional approval requirements and opportunities for timeline reduction. Represent Telex and the Supercharger program at public meetings. Track and manage status of all needed approvals.
- Review and approve construction bids and change orders. Provide support as needed to the general contractor during all phases of construction.

#### Expected Compensation

\$88,000 - \$300,000/annual salary + cash and stock awards + benefits



# How are employees distributed across your pay grades?



Pay Transparency

# Trend 3: Pay Data Reporting



# EEOC

- **2020** | EEOC asks the National Academies to examine quality of Component 2 data for its intended use and to provide recommendations for future data collections ("Study")
- **March 2022** | EEOC Chair Burrows repeats that **pay discrimination is an agency priority** – reaffirming pay equity/class action litigation is an agency focus
- **July 2022** | EEOC releases Study results that Component 2 data **“as collected have value”** but **value could be strengthened through various “short-term and longer-term improvements”**
- **Jan. 2023** | Biden re-nominates Kalpana Kotagal to EEOC: pay equity class action atty





# California: SB 1162



# What is Different About SB 1162?

- Amends and Expands Prior Pay Data Reporting Law
- Sec. 432.3 of the Labor Code and Sec. 12999 of Govt. Code
- Employers Must Now Report Mean and Median Hourly Rates for Each Employee Group:
  - Establishment
  - Pay Band
  - Job Category
  - Race/Ethnicity
  - Sex
- Employers Must Also File a Labor Contractors Report Containing Mean and Median Hourly Rates





# What is Different About SB 1162?

- **Not conditioned on filing an EEO-1 Report**
  - All employers with at least 100 employees have to file – even if don't file EEO-1
  - Can't use the EEO-1 report to satisfy CA data reporting
- **NEW filing date of second Wednesday in May**
  - **Reports due by May 10, 2023**
  - Feb. 1: portal, user guide, Excel templates, .CSV file examples, and other resources will be available at [www.calcivilrights.ca.gov/paydatareporting](http://www.calcivilrights.ca.gov/paydatareporting).
- **Authorizes CRD to obtain penalties for failing to timely file**
  - Against employers
  - Against labor contractors who fail to provide data to employers in time to file
  - \$100 per employee for failure to file / \$200 per employee for subsequent failures PLUS costs. Sec. 12999(f).



# SB 1162 – Mean and Median Hourly Rates – What do they "mean"?

- The mean and median hourly rates may look very different between employee groups...but they do not control for any legitimate factors. Accordingly, they are simply raw gaps and more similar to Gender Pay Gap reporting in the UK.
- Grouping employees by EEO job category is not equivalent to comparing substantially similar jobs.
  - Consider the findings of the EEOC's Study: "The 10 job categories... are outdated and encompass a wide range of job responsibilities and pay rates..."
- Due to the broad and basic nature of EEO job categories, very different jobs with very different pay scales may be grouped together, leading to large differences.
  - These differences may erroneously be attributed to race, ethnicity or sex.



## SB 1162 – Mean and Median Hourly Rates – What do they "mean"?

- Hourly rates are derived by dividing each employee's W-2 Box 5 earnings by the hours worked in the year. Thus, if an employee is hired mid-year, their hourly rate will presumably be "normalized". However, W-2 Box 5 earnings are used to place employees in a pay band, so a mid-year hire's hourly rate will be contained in a pay band that is too low.
- **Conclusion:** the mean and median hourly statistics have the potential to raise many false red flags.
- Given the risks of the CRD misinterpreting or misusing these statistics during an investigation, employers should ensure their pay practices are sound and equitable.
- Only a pay audit that properly accounts for legitimate factors can uncover remaining differences that may be correlated with a protected characteristic.



# SB 1162 – What About Remote Workers?

- **Report all employees** – including teleworkers outside of CA – assigned to **CA establishments**
- **Report all employees teleworking in CA** – even if assigned to out of state establishments
  - This includes reporting to establishments outside the U.S.
- **Same rule applies for Labor Contractor Reports**
  - Report all labor contractor employees assigned to CA establishments and/or who work from CA
- Do not report on employees working outside of CA, and assigned to an establishment outside of CA
  - If they only live in CA, but work outside of CA, do not report them



# What Will the CA DFEH Do with the Pay Data?

The stated purpose of the data collection is to “identify wage patterns and allow for targeted enforcement of equal pay or discrimination laws.”

During an August 11, 2020 hearing, the Assembly Committee on Appropriations suggested the data would “provide insight into hiring or promoting practices that perpetuate ongoing pay disparities in the workplace.”

The DFEH will oversee the collection of pay data and maintain pay data reports for at least 10 years

The DFEH is responsible “to receive, investigate, conciliate, mediate, and prosecute complaints.”

The DFEH will share pay data reports with the division of Labor Standards Enforcement (“DLSE”), which is the agency tasked with enforcing the California Equal Pay Act, to coordinate enforcement.

The DFEH has authority to seek an order requiring non-reporting employers to comply and to recover the costs associated with seeking the order for compliance.



# SB 1162 – Aggregate Results Are Available

- **2022 – CA Civil Rights Dept. (CRD) published results from 2020**
  - In 2023 will report from 2021
- **CRD “encourages employers to review these results, as well as to assess their own pay data reports and pay practices, in light of California’s anti-discrimination and equal pay laws”**
  - Note: CRD will maintain pay data reports “for not less than 10 years” Sec. 12999(j)
- **In 2023, employers will be provided with visualizations of the certified data it submitted to the CRD**
  - NOTE: CA Legislature voted to require pay data reporting to encourage employers to self-assess pay disparities on basis of gender/race/ethnicity and promote voluntary self-compliance with equal pay and anti-discrimination laws
  - Pay data is intended to allow CRD to more efficiently identify wage patterns and allow for effective enforcement activity



# SB 1162 – 2020 Results Are Published

- Detailed reports are available by industry and Metropolitan Statistical Area
- Industry categories are very high level.
- Examples:
  - Accommodation and food services
  - Educational services
  - Finance & insurance
  - Healthcare/social assistance
  - Professional, scientific and technical services



CONTINUED

## SB 1162 – 2020 Results Are Published

### What can be observed?

- Proportion of employees in each EEO job category, by gender and race/ethnicity
- Proportion of employees in each pay band, by gender and race/ethnicity

### What will future reports contain? Potentially...

- An aggregated hourly rate by industry and Metropolitan Statistical Area





An aerial photograph of a city skyline, likely Chicago, featuring several prominent skyscrapers. A large green rectangular overlay is positioned on the left side of the image, containing white text. The sky is clear and blue, and the water in the foreground is a deep blue with several small boats.


# Illinois Equal Pay Act – Reporting Updates



# EPRC: Equal Pay Compliance Statement

## What are you certifying??

- Corporate officer or authorized agent to certify accuracy
- Certify females and minorities are **on average** paid at a rate not consistently below males and non-minorities, and **disparities are corrected** when identified
- Identify frequency of wage/benefit reviews
- Identify method used to set wages
- **Certify compliance with Title VII, EPA, IHRA, et al.**

  
**ILLINOIS DEPARTMENT OF LABOR**  
JB PRITZKER GOVERNOR      JANE R. FLANAGAN ACTING DIRECTOR

**Equal Pay Act Registration Certificate Compliance Statement**

*This compliance statement shall be signed by a corporate officer, legal counsel, or authorized agent of the business for which this compliance statement is being submitted. For businesses that have more than one location in Illinois, this form shall be submitted only once, regarding all operations in Illinois.*

Pursuant to the requirements of the Equal Pay Act of 2003 (820 ILCS 112/11(c)(1)), as an authorized representative of \_\_\_\_\_, hereby known as the "Business," I certify that:

- The Business is in compliance with:
  - Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e);
  - The Equal Pay Act of 1963 (29 U.S.C. § 206);
  - The Illinois Human Rights Act (775 ILCS 5);
  - The Equal Wage Act (820 ILCS 110); and
  - The Equal Pay Act of 2003 (820 ILCS 112);
- The average compensation for female and minority employees at the Business is not consistently below the average compensation for male and non-minority employees within each of the major job categories in the Employment Information Report (EEO-1), taking into account factors such as length of service, requirements of specific jobs, experience, skill, effort, responsibility, working conditions of the job, education or training, job location, use of a collective bargaining agreement, or other mitigating factors;
- The Business does not restrict employees of one sex to certain job classifications, and makes retention and promotion decisions without regard to sex;
- Wage and benefit disparities are corrected when identified to ensure compliance with the wage laws listed in section 1;
- Wages and benefits of employees are evaluated on the following basis to ensure compliance with the wage laws listed in section 1 (Circle one. If methods of calculation are different in different counties, describe the methods for each county):
  - Every \_\_\_\_\_ months/years (circle); or
  - Other (describe): \_\_\_\_\_; and
- The Business utilizes the following method(s) to determine employee compensation and benefits (Circle all that apply. If methods of calculation are different in different counties, describe the methods for each county):
  - A market pricing approach;
  - State Prevailing Wage or collective bargaining agreement requirements;
  - A performance pay system;
  - An internal analysis;
  - An alternative approach (describe): \_\_\_\_\_; and

**Certification**

The undersigned hereby certifies that they are a corporate officer, legal counsel, or authorized agent of the Business and that the information contained in this Equal Pay Act Registration Certificate Compliance Statement is true and accurate at the time of the signing.

Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Title: \_\_\_\_\_

Business Name: \_\_\_\_\_



# EPRC: Requested Wage Records

## What happens after submission?

- IDOL reviews and identifies any pay disparity issues
- IDOL can share the wage data it receives with the Illinois Department of Human Rights and Illinois Attorney General
- IDOL will compile aggregate reports that are not confidential
- Employees can request anonymized data from IDOL regarding the employee's classification and pay



# EU Pay Transparency Directive: **Adopted April 2023**

**Salary range postings required**

**Salary history ban**

**Pay secrecy ban** - will require review of employee non-disclosure agreements, confidentiality policies and manager/HR training

**Employers with 50+ employees must provide objective, gender-neutral criteria used for pay, pay levels and career progression**

**Employees can request individual pay level and on average pay level data, by sex, for workers doing equal value**

**Pay data reporting**

**Mandatory joint pay assessment/audit in cooperation with their workers' representatives if can't prove pay parity**

**Provides remedies for workers and member states can impose sanctions**



# EU Pay Transparency Directive: **Adopted April 2023**

## **Member States must conduct a joint pay assessment, in cooperation with worker’s representatives, when:**

- “The pay reporting demonstrates a difference in the average pay level between female and male workers of at least 5 % in any category of workers;
- and*
- The employer has not justified such a difference in the average pay level on the basis of objective, gender-neutral criteria.”

The purpose of the joint pay assessment is to “identify, remedy and prevent differences in pay between female and male workers which are not justified on the basis of objective, gender-neutral criteria”.



# EU Pay Transparency Directive: **Adopted April 2023**

## **A joint pay assessment will include, in part:**

- “An analysis of the proportion of female and male workers in each category of workers;
- Any differences in average pay levels between female and male workers in each category of workers;
- The reasons for such differences in average pay levels, on the basis of objective, gender-neutral criteria, if any, as established jointly by the workers’ representatives and the employer;
- Measures to address differences in pay if they are not justified on the basis of objective, gender-neutral criteria”

The results of a joint pay assessment must be available to workers and their representatives.





# Overview: Goldman Sachs Class Action

- **May 8, 2023** - \$215 Million Settlement of Gender Pay Case Announced on Eve of Trial
  - Allege performance evaluation metrics not gender neutral - actually systematically placed women at lower rankings than men resulting in lower pay and less promotions for equally or more qualified women
  - Managers disproportionately allocated resources (admin support, training and informal mentoring) to men over women
  - 3 separate classes including female VPs
  - Settlement also requires ongoing pay equity analysis/studies



# Themes in Gender Pay Litigation

- “Male Dominated” Culture/Decision-Makers Including on Comp. Committee and Management Teams
  - Sex bias influences decision-making/perpetuates disparities
- Prior Salary History Perpetuates Disparities
- Male With Less Exp. Hired at Higher Salary Than More Exp. Female Incumbent
- Pay Disparities Supported by Expert Statistical Analysis
- Lack of Equal Opportunity for Promotion
- Promotions Delayed for Women – Result Pay Gaps vs. Male Peers
- Bonuses are Lower
- Requests for Comp Adjustments Result in Retaliation
- Subjective or Secretive Comp./Promotion Process Contributes to Ongoing Disparity
- Familial Relationship Discrimination
- Sexual Harassment/Discrimination





# Questions to Consider Now

- **Compensation decisions:**
  - Does your compensation system accurately document how wage and salary amounts are determined for new employees/promotions?
  - Does salary history impact decisions on what you are offering job candidate? Does it result in compensation outside established ranges? What factors justify the decision other than prior salary history?
  - Do your managers actually apply the factors you are telling employees govern how their salaries/compensation is determined?
  - Consider qualifying language in job posting/factors impacting ultimate salary.
  - Train recruiters/check what your external recruiters are posting.
  - Dealing with range compression for existing employees? May not be a “bona fide” factor.
- **Do you have formal wage/salary ranges for all positions?**
- **Are job descriptions updated to define comparators/factors differentiating comp?**
- **Processes to provide ranges for promotions/transfers?**
- **Update handbooks and record retention policies**
- **Where are your workers working? (inc. remote workers) Where are you hiring?**
  - Are your remote workers formally assigned to the right establishment for proper counting/reporting purposes?
    - Note: assignment in the “Snapshot Period” governs for CA.
- **Where do you use 1099s/Staffing Agencies/PEOs/Labor Contractors?**
  - CA: Put labor contractors on notice NOW to provide timely and accurate data.
  - Review labor contractor agreements/SOWs for relevant amendments.



# Benefits of a Privileged Pay Audit

- Document legitimate business reasons for disparities
- Proactively implement remedial measures given increased transparency
- Understand where incumbents are at – or close to – new hires
- If raising salaries at every level, know why you are adjusting employees – what factors are driving decisions for alignment
- Address outliers/unicorns
- Establish privilege vs. non-privileged OFCCP audit per Directive 2022-01
- Establish guardrails to document when "coloring outside the lines"
- Evaluate bonus programs/align with performance management and other relevant factors
- Help reinforce importance of performance management protocols





# Questions

For further analysis and information on matters related to labor & employment, particularly **pay equity**, visit and sign up for our blog.

## Timely Alerts from **Faegre Drinker**

[LaborSphere.com](https://www.laborsphere.com)



### Select recent posts about pay equity:

- [Employers, It's Happening! New York State Enacts Pay Transparency Law](#)
- [New Guidance Released for SB 1162 – California's Pay Scale Disclosure Requirements](#)





# National Footprint, Global Reach

