

FIRST CHAIR

EQUAL PAY SUMMIT

*Advancing the Equal Pay
Equation for the Legal Industry*

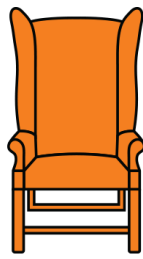
An Analysis of Pay Equity Laws and Legislation in the United States

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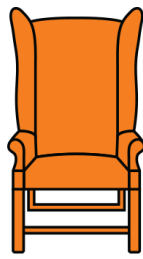
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History - The Equal Pay Act is Signed

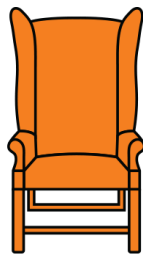
- John F. Kennedy signed the Equal Pay Act on June 10, 1963, remarking that it “prohibits arbitrary discrimination against women in the payment of wages” and is a “significant step forward,” but “much remains to be done to achieve full equality of economic opportunity” for women.
 - Eleanor Roosevelt chaired Kennedy’s Presidential Commission on the Status of Women and was a vocal supporter of the EPA
 - Opposed by the U.S. Chamber of Commerce
 - Opposed by the Retail Merchants Association





The Equal Pay Act of 1963

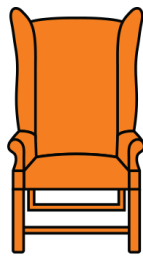
- Amended the Fair Labor Standards Act
- Prohibits sex-based discrimination in the same establishment between men and women who perform jobs that require “equal skill, effort and responsibility, and which are performed under similar working conditions.” 29 U.S.C. §206(d).
 - Employee must show the work was equal and a pay disparity exists
 - No proof of discriminatory intent needed
- What justifies a pay disparity? Seniority and merit systems, a system that measures earning by quantity or quality of production, and *any other factor other than sex* are acceptable explanations
 - These are affirmative defenses
 - Employer has burden of proof



Other Pay Protections

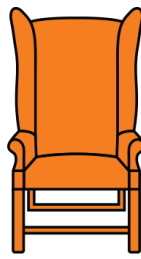
Independent Causes of Action

- Title VII of the Civil Rights Act of 1964, as amended
 - **Pregnancy Discrimination Act, an amendment to Title VII**
- The Age Discrimination in Employment Act (ADEA)
- State and local laws



Statistics

- In 1963, ~25M women in the workforce, and the average woman earned 60% of what a man earned
- By 1980, the gap closed by merely 4%, with the average woman earning \$.64 for every \$1.00 a man earned
- Today, ~75M women in the workforce, and the average woman earns 80% of what a man earns
- In 2014, the average African-American woman earned \$.64/\$1.00, and the average Latina earned \$.55/\$1.00 compared to white men
- If equal pay were instituted today, across the board, there would be a \$447.6 billion annual gain nationally for women
- Over 15 years, the average woman loses \$499,101 due to pay inequality



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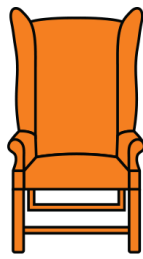
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RECENT HISTORY OF EVENTS

2009	<ul style="list-style-type: none">▪ Lilly Ledbetter Fair Pay Act<ul style="list-style-type: none">– Extends Statute of Limitations to file Title VII Pay Claim
2014	<ul style="list-style-type: none">▪ E.O. 13665 for Federal Contractors<ul style="list-style-type: none">– “Non-Retaliation” for Disclosure of Compensation Information▪ Presidential Memo: Advancing Pay Equity Through Compensation Data Collection
2016	<ul style="list-style-type: none">▪ New EEO-2 Report Requires Collection And Reporting of Pay Data by Gender, Race and Ethnicity by 3/1/2018▪ “Fair Pay and Safe Workplaces” E.O.: Limit Government Contracts to Bad Actors▪ Paycheck Transparency and Ban Arbitration for Discrimination Claims▪ White House Summit to Announce Equal Pay Pledge/100 Companies Sign
2017	<ul style="list-style-type: none">▪ Equal Pay Pledge Removed from Website (1/17)▪ Fair Pay and Safe Workplace E.O. Revoked (3/17)▪ Freeze New EEO-2 Reporting Obligation (8/17)

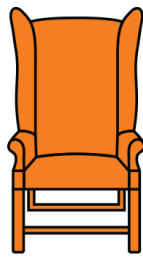
Key: Obama Trump

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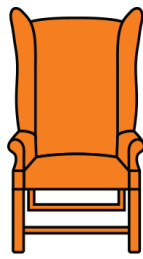
Impact of #MeToo on Equal Pay

- State and Municipality Legislative Activity on Steroids
 - New/Updated Laws Likely to Impact 50% of Workforce
- Companies On Record to Implement Pay Parity
 - Citigroup, Salesforce, Starbucks, Whole Foods
- 1/2018 Survey of HR Executives (Challenger, Gray & Christmas)
 - Movements Pushed **48%** of Companies to Review Pay Policies
- Lawsuits are Being Filed
- EEOC identified Gender Pay Equity as a Priority in 2017-21 Strategic Enforcement Plan



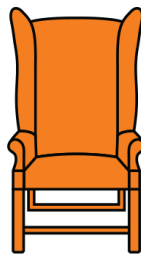
Legislative Trends - Impact on Defenses

- Provides “Safe Harbor” Defense for Self-Audits
 - **MA, OR**
- Salary History Will Not Justify Pay Disparity
 - **MA, WA** (and growing)
- Geographic Scope - Beyond Same Establishment
- Prohibits Agreement to Lesser Wage as a Defense
 - **Approx. 25 States**
- Expanded Statutes of Limitations + Available Damages
- Narrowing “Catchall”/”Any Other Factor” Defenses
 - Job-related/consistent with business necessity/not class-based differential defeated if alternative practice that meets same business purpose



Legislative Trends - Preventative Measures

- Requires Employer Recordkeeping
- Employers Must Collect Pay Gap Data
 - **Primarily for Public Contracts: MN, NJ**
- States To Adopt Advisory Committees On Pay Equity
 - **Approximately 25 states**
- State Sponsored Programs on Pay Equity
 - **KS, MA, MO**
- Narrowing “Catchall”/”Any Other Factor” Defenses
 - Job-related/consistent with business necessity/not class-based differential defeated if e’ee proves alternative practice that meets same business purpose



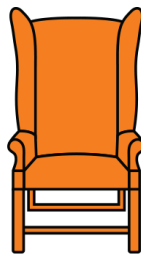
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Salary Ban Laws: States

- California [1/1/18](#)
- Connecticut [1/1/19](#)
- Colorado [1/1/21](#)
- Delaware [12/14/17](#)
- Hawaii [1/1/19](#)
- Illinois [1/15/19](#) (state employees only)
- Maine [9/17/19](#)
- Massachusetts [7/1/18](#)
- Michigan [1/8/19](#) (state employees only)
- New Jersey [2/1/18](#) (state employees only)
- New York [1/9/17](#) (state employees only)
[1/6/20](#) (expands to all employers)
- North Carolina [4/2/19](#) (state employees only)
- Oregon [10/6/17](#)
- Pennsylvania [9/4/18](#) (state employees only)
- Puerto Rico [3/8/17](#)
- Vermont [7/1/18](#)
- Washington [7/28/19](#)



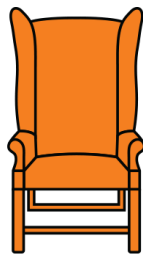
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Salary Bans: Local

- Atlanta (via press release issued [2/18/19](#)) (city employees)
- San Francisco [7/1/18](#)
- Chicago [4/10/18](#) (city employees)
- Cincinnati [3/13/20](#)
- Louisville [5/17/18](#) (city employees)
- New Orleans [1/15/17](#) (city employees)
- Kansas City [7/26/18](#) (city employees)
- New York City [10/31/17](#)
- Albany County (NY) [12/17/17](#)
- Westchester County (NY) [7/9/18](#)
- Suffolk County (NY) [6/30/19](#)
- Philadelphia (TBD)
- Pittsburgh [1/30/17](#) (city employees)
- Salt Lake City [3/1/18](#) (city employees)



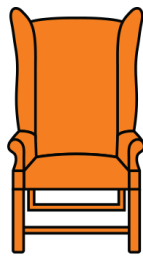
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REGULATORY UPDATE: EEO-1 COMPONENT 2

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How Did We Get Here

2010

EEOC joined other agencies to identify ways to improve enforcement of federal laws prohibiting pay discrimination

- EEOC commissions a study to identify efficient means to collect pay data

9/2016

Revised EEO-1 Form Approved by OMB

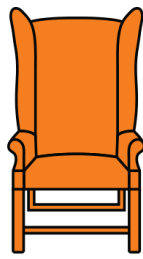
- Under new Component 2 - Employers to report pay data and hours worked by race/ethnicity and gender by March 31, 2018

11/2016

Trump is Elected

8/2017

OMB issues a stay of EEOC's collection of pay data under Component 2



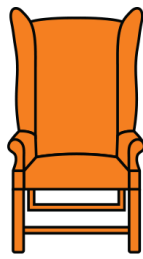
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The Lawsuit To Lift The Stay

- National Woman's Law Center and Labor Council for Latin American Advancement sued to vacate the stay and reinstate the collection of pay data
 - NWLC wants pay data reports to focus efforts where intervention most needed and LCLAA wants data to help negotiate with and educate employers to improve condition of Latinos in the workforce
- NWLC and LCLAA argued that the Stay Violated OMB's Regulations and Was Arbitrary and Capricious
 - Nothing changed since the EE0-1 was approved in 2016 so no "good cause" for the stay



LCLAA



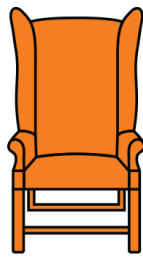
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Judge Chutkan's March and April 2019 Orders (D.C. Cir.)

- Vacates Stay of Collection of Component 2 Pay Data
- EEOC must collect data by **September 30, 2019** for 2017 and 2018
- EEOC to provide “progress reports” to Court on steps to implement collection efforts to reach **target response rate of 72% of filings**
- As of September 25, only 39.7% of eligible employers had filed.



The Aftermath...

May 3

DOJ files appeal of Judge Chutkan's Order

August 19

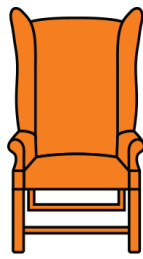
DOJ files brief in support of appeal: No stay of 9/30 filing deadline

Sept. 11

EEOC announces it will not seek collection of pay data for 2019 due to (grossly) underestimating cost of compliance

Sept. 27

EEOC extends 9/30 deadline until target reached so long as court order is in effect



What Did We Learn From the Court Filings?

- EEOC had to hire a consultant, NORC, to manage the entire process
- Chief Data Officer and Director of the Office of Enterprise Data and Analytics (OEDA), Dr. Samuel (Chris) Haffer certified:

That even if a contractor did collect Component 2 data by September 30, the proposed expedited timeline also **“raises significant issues with data validity and data reliability.”** The EEOC has not conducted a true pilot study of the Component 2 data collection measures, instrument, or processes, and there are “sures.” Dr. Haffer warned that there exists a **“significant risk that employers would not be reporting comparable data that can be used by the government or others in meaningful comparisons or analyses.”**