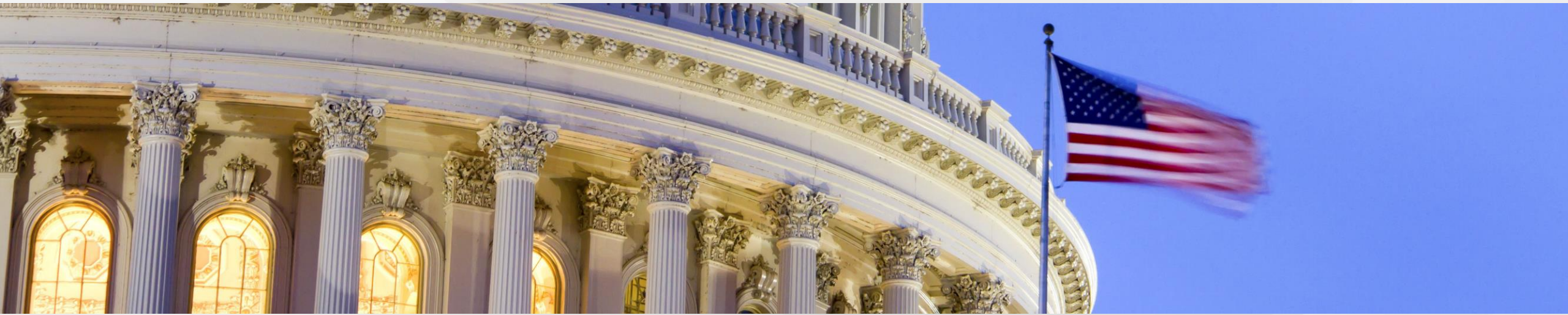


# Massachusetts Legislative Wrap-Up

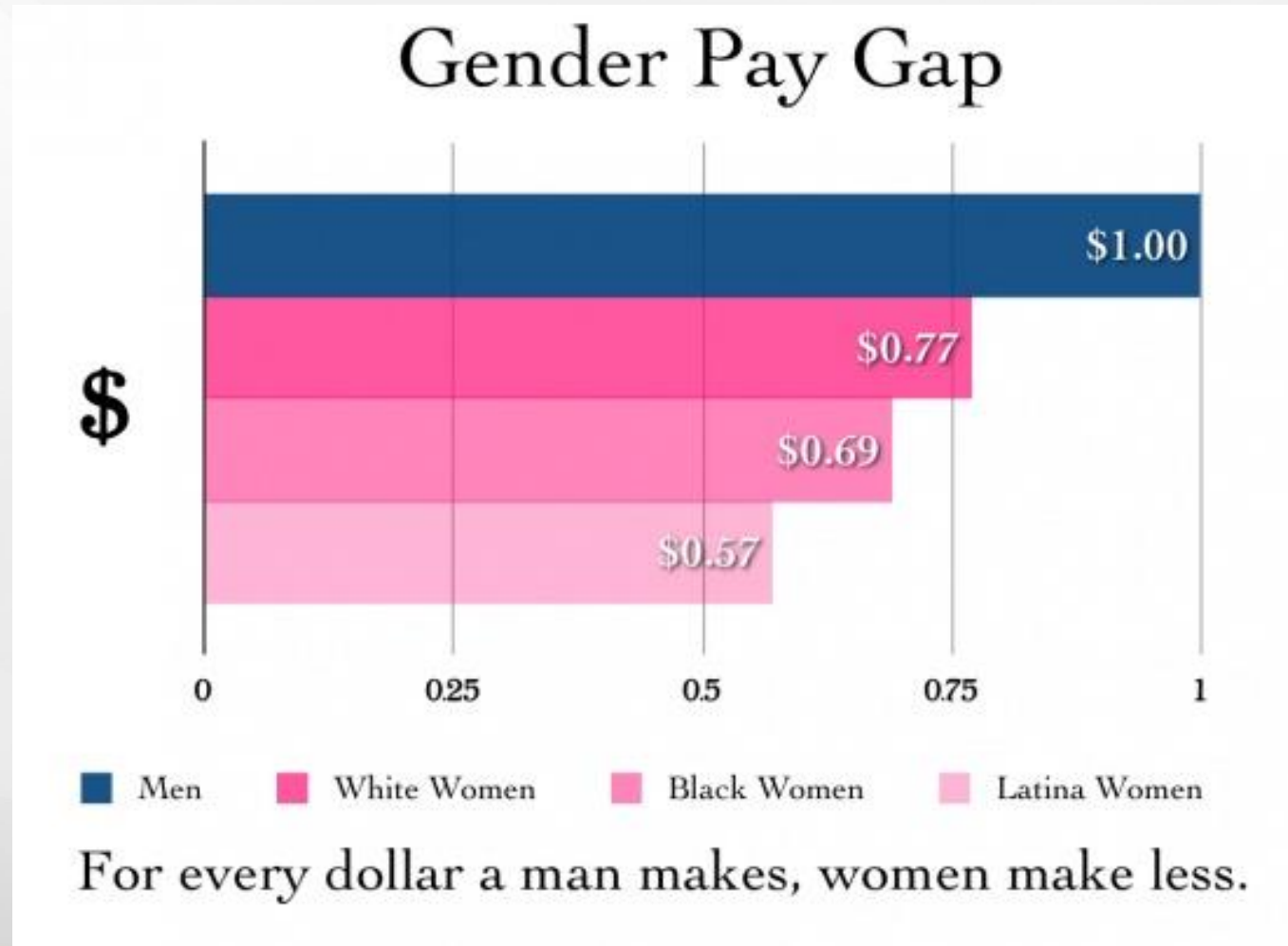


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# Agenda

- Pay Equity
- Transgender Accommodation
- Future of Non-Competes

# Background and Social Context



# Pay Discrimination is Already Illegal!

- **Pay Discrimination** – Intentionally paying a man more than a woman for doing the same job ***because*** she is a woman
- Title VII and Equal Pay Act
  - Back Pay
  - Injunctive Relief
  - Liquidated Damages
  - Attorneys' Fees
- M.G.L. c. 151B and most state anti-discrimination laws

# Pay Discrimination

- **Ledbetter v. Goodyear**, 550 U.S. 618 (2007)
  - Over her nineteen-year career, consistently given low rankings in annual performance-and-salary reviews and low raises relative to other employees.
  - Ledbetter sued Goodyear for Title VII gender discrimination, alleging that the company had given her a low salary because of her gender.
  - \$3.5 million jury verdict, later reduced to \$360,000

**BUT** Supreme Court ruled that the 180 day statute of limitations barred her claims

# Pay Discrimination

## Lilly Ledbetter Fair Pay Act 2009

- Effective January 29, 2009
- Nullified previous Supreme Court ruling
- Allows an employee to seek damages for pay discrimination ***each*** time a discriminatory compensation practice occurs
  - i.e., statute of limitation restarts with every discriminatory paycheck

# Pay Equity

Simply stated, the difference between the two statutes is that the Equal Pay Act requires a plaintiff to prove that “I was paid less than a comparable man **and** I am a woman,” while Title VII requires a plaintiff to prove, even in the absence of a comparable man, that “I was paid less than I deserved **because** I am a woman.”

McMillan v. Massachusetts Society for Prevention of Cruelty to Animals, 880 F.Supp. 900 (D.Mass. 1995)

# Massachusetts Pay Equity

- **Massachusetts Pay Equity Bill (S.2119)**
  - Signed into law August 1, 2016
  - Goes into effect July 1, 2018
  - Amends Massachusetts Fair Pay Act
  - Attorney General may, but is not required to, issue regulations, including templates for self-evaluation



# Pay Equity

- Goes beyond “equal pay for equal work”
- Not just same pay for the same job, same pay for ***comparable work*** in ***different jobs***
  - “Substantially similar” in skill, effort, responsibility, and performed under similar working conditions
  - Job description “alone shall not determine comparability”
- New laws in California, New York and now Massachusetts

# Equal Pay for “Comparable Work”

- Employers cannot “discriminate in any way on the basis of gender” in the payment of wages or salary “for comparable work”
  - “Comparable” – “substantially similar skill, effort and responsibility and is performed under similar working conditions; provided, however, that a job title or job description alone shall not determine comparability”
  - “Wages”—“all forms of remuneration for employment”
    - Not clear if this extends to benefits
  - “Working conditions”—includes “environmental and other similar circumstances” including shift differentials, physical surroundings and hazards
- Cannot “reduce the wages of any employee **solely** in order to comply”

# “Variations in Wages”

- Allows for “variations in wages” based on
  - “A system that rewards seniority with the employer”
    - Time spent on leave “due to a pregnancy related condition” and “protected parental, family and medical leave” shall not reduce seniority
  - “A merit system”
  - “A system which measures earnings by quantity or quality of production, sales, or revenue”
  - “The geographic location in which a job is performed”
  - “Education, training, or experience to the extent such factors are reasonably related to the particular job in question”
  - “Travel, if the travel is a regular and necessary condition of the particular job”

# Agreements and Salary History Not A Defense

- “Any agreement between the employer and any employee to work for less . . . . **shall not** be a defense to an action”
- “[E]mployee’s previous wage or salary history shall not be a defense to an action”
- Not clear whether this would apply to decisions made **before** this law was passed

# Salary Transparency

- Employers cannot require, “as a condition of employment” that employees “refrain from inquiring about, discussing or disclosing” either their pay or another employee’s pay
  - ***BUT*** employers ***are not obligated*** “to disclose an employee’s wages to another employee or third party”

# Salary History

- Employers may ***not***
  - “seek the wage or salary history of a prospective employee from the prospective employee or a current or former employer” or
  - “require that a prospective employee’s prior wage or salary history meet certain criteria”
- Two exceptions
  - “if a prospective employee has ***voluntarily disclosed*** such information, a prospective employer may confirm prior wages or salary or permit a prospective employee to confirm prior wages or salary”
  - “a prospective employer may seek or confirm a prospective employee’s wage or salary history ***after an offer of employment with compensation has been negotiated and made*** to the prospective employee.”

# Additional Provisions

- “No employer shall **contract** with an employee to avoid complying with [the salary history and salary transparency provisions]”
- “Or **by any other means** exempt itself”
- **BUT** an employer “may prohibit a human resources employee, a supervisor, or any other employee whose job responsibilities require or allow access to other employees compensation information, from disclosing such information without prior written consent.”

# No Retaliation

- Cannot “discharge or otherwise retaliate” against an employee for
  - Opposing “any act or practice made unlawful by this section”
  - Making or “indicating an intent” to make a complaint or bring litigation
  - Testifying in an investigation
  - ***Disclosing their wages or inquiring about another employees wages***



# Enforcement

- Employees or Attorney General can bring litigation
  - Unpaid wages
  - 100% liquidated damages
  - Attorneys fees and costs
  - **BUT** no double dipping with federal Equal Pay Act
- Litigation can be brought by “1 or more employees” for employees “similarly situated”—opens door for class actions
- Employees **do not** have to file a charge with the EEOC or MCAD
- 3 year statute of limitations—renews with every paycheck

# Key Defense – Internal Self Evaluation

- Employers who have completed a “self-evaluation of its pay practices in good faith and can demonstrate that reasonable progress has been made towards eliminating wage differentials based on gender” is entitled to an affirmative defense
  - Pay equity claim **AND**
  - 151B pay discrimination claim
- Covers all claims filed within three years from the date of completion
- Self-Evaluation must be “reasonable in detail and scope in light of the size of the employer”
  - Even if not “reasonable”—still defense against liquidated damages

# Best Practices

- Pay equity self-evaluation– **Before** your employees start asking!
- Pay discrimination is already illegal – start with discrepancies within job descriptions
  - Don't cut your way to equal pay!
- Identify **comparable jobs** and look for discrepancies
- Look beyond hourly rate and salary – bonuses and benefits
- Hiring practices

***Involve outside counsel for attorney-client privilege protection!***

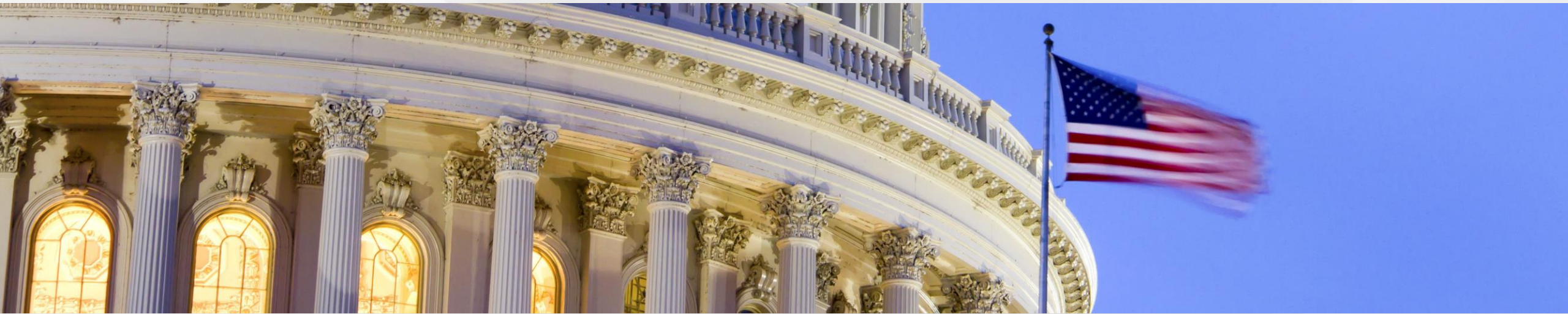
# Transgender Accommodation

- Effective October 1, 2016
  - All places of public accommodation that “lawfully segregates or separates access” based on sex “shall grant all persons admission to, and the full enjoyment of, such place of public accommodation or portion thereof ***consistent with the person’s gender identity.***”
  - Any place of public accommodation that “makes any distinction, discrimination or restriction on account of [gender identity]” is subject to fine or imprisonment or both
- Effective September 1, 2016
  - MCAD and Attorney General “shall report such rules, regulations, policies, recommendations or guidance” on the implementation of this law

# Non-Competes

- Legislature ***did not*** pass new non-compete law
- Senate bill would have included
  - “Garden leave”
  - 3 month limitation on non-compete
  - Limits on which kind of employees could validly sign a non-compete
- Next legislative session January 1, 2017—likely to be a hot issue again

# Questions?



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# Thank You



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