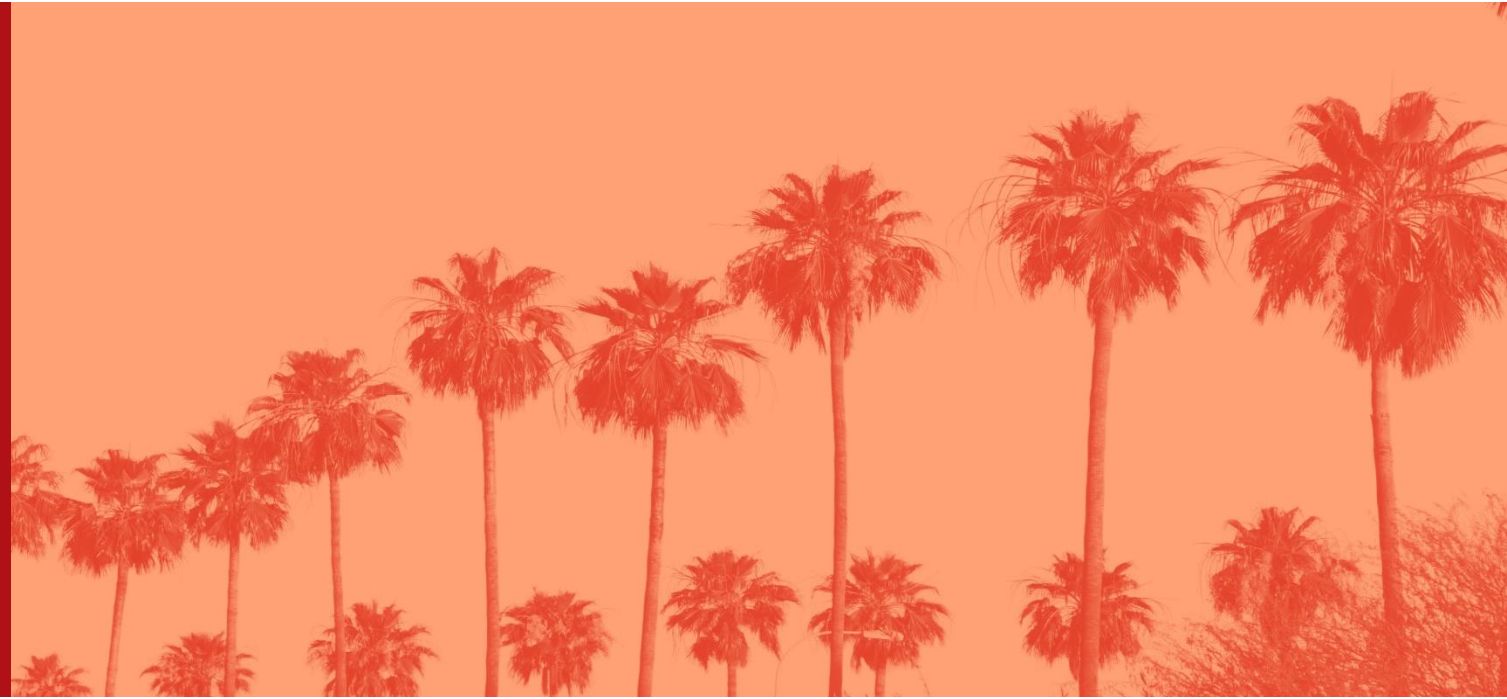


LOOKING AHEAD

- > Kathleen McLeod Caminiti – Fisher Phillips, New Jersey
- > Cheryl Behymer – Fisher Phillips, Columbia
- > Cheryl Pinarchick – Fisher Phillips, Boston



2019 FISHER PHILLIPS INSIDE COUNSEL CONFERENCE
MARCH 6-8 | SCOTTSDALE, AZ

Pay Equity: Compliance Challenges, Business Risks And Legal Ramifications

What Are We Going to Talk About?

- > Corporate social responsibility
 - > Where are the pressure points?
 - > How do we respond?
- > Existing legal landscape
 - > Federal—Historical and trending
 - > State—Examples of common issues and unique perspectives
- > Litigation
 - > Federal and state
 - > Class and collective actions
- > Compliance
 - > Requirements and proactive self-audits

Why Is Pay Equity Important To Corporate Counsel?

- > Shareholder/Board of Directors directives
- > Intersection with global concerns/requirements
- > Executive participation in initiatives
 - > Paradigm for Parity-5-Point Action plan
 - > Pledge for Parity
 - > Mansfield Rule/Rooney Rule
- > Gender equity in the boardroom

What Do You Need to Know?

Federal Law

- > **Equal Pay Act (EPA) 29 U.S.C. § 206(d) – 1963**
- > **Equal Pay Act requires that men and women in the same workplace be given equal pay for equal work.**
- > *Prima facie case:*
 - > Lower wages paid to employees of the opposite sex in the same establishment
 - > Employees perform substantially equal work
 - > Jobs performed under similar working conditions
- > Key: no intent to discriminate required

What Do You Need to Know?

The Protected Categories

- > Federal EPA: Sex
- > State Law: trend is to expand the classes of employees covered by pay equity laws. For example:
 - > California: sex, race, ethnicity
 - > Maryland: sex, gender identity
 - > New Jersey: race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular blood trait, military service

What Do You Need to Know?

What's Included in Compensation

Viewed broadly to include all forms of remuneration:

- > Commissions
- > Bonuses
- > Profit sharing
- > Deferred compensation
- > Paid time off
- > Expense accounts
- > Car and gas allowances
- > Retirement plans
- > Insurance
- > Other benefits

What Do You Need to Know?

What is “Equal” or “Substantially Similar” Work

- > **Skill:** experience, training, education and ability necessary to perform the job
- > **Effort:** amount of physical or mental exertion needed to perform the job
- > **Responsibility:** degree of discretion or accountability involved in performing the job, duties regularly required to perform the job, amount of supervision received, whether employee supervises others, degree employee is involved in decision making
- > Federal law compares the compensation of employees working in the same workplace
- > Under certain state laws, it may be necessary to compare the compensation of employees at all of the employer's operations or facilities
- > May not be limited to employees who work within a specific geographic area or region

What Do You Need to Know?

Lawful Justifications for Pay Disparities: Federal Law

EPA: Exceptions for unequal pay

- > A seniority system
- > A merit system
- > A system which measures earnings or quantity or quality of production
- > A differential based on *any other factor* other than sex*

Key: These must be shown by employer.

** There is currently a split in the Circuits as to whether salary history falls within this exception, with the 9th Circuit recently holding it does not. See Rizo v. Yovino, 887 F. 3d 453 (9th Cir. 2018).*

What Do You Need to Know?

Lawful Justifications for Pay Disparities – New York

- > Replaces “any other factor than sex” with “**bona fide** factor other than sex” such as education, training, or experience
- > Such bona fide factor must:
 - > Not be based upon or derived from a sex-based differential in compensation; and
 - > Be job-related with respect to the position in question and consistent with business necessity
- > Employee can overcome “bona fide” factor by showing:
 - > Employer’s practice causes disparate impact on the basis of sex; and
 - > Alternative practice exists that would serve the same purpose and not cause a disparate impact; and
 - > Employer has refused to adopt the alternative practice

What Do You Need to Know?

Lawful Justifications for Pay Disparities – Massachusetts

- > Seniority system, provided that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave shall not reduce seniority
- > Merit system
- > System that measures earnings by quantity or quality of production, sales or revenue
- > 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 travel is a regular and necessary condition of the particular job

Note: The “catch-all” exception under Federal law has been completely eliminated and there is no “bona fide” exception similar to the new laws in NY and NJ.

What Do You Need to Know?

No More Confidentiality

- > Unlawful to prohibit employees from inquiring about, discussing, or disclosing their wages or wages of other employees
 - > Does not apply to those who have access as part of their jobs – e.g., HR professionals
- > Unlawful to require an employee, as a condition of employment, to sign a waiver or agree not to make these types of requests or disclosures (NJ)

What Do You Need to Know?

Salary History

- > If or when employers can request or rely upon salary history varies from state to state, even county to county in NY
 - > NY, CA and MA have restrictions that differ from one another
 - > NYC, Albany County, Westchester County and Suffolk County (effective June 30, 2019) have restrictions that differ from NY state law
 - > NJ law is only applicable to public employers
- > How laws will be interpreted when employers, applicants and/or jobs are located in different jurisdictions is an open question

What Do You Need to Do?

- > Train hiring personnel and those making compensation decisions
- > Assess the performance evaluation process and its role in pay decisions – standardize the process
- > Update policies and other employment documents to remove restrictions on discussing wages
- > Remove salary history questions from hiring documents

What Do You Need to Do?

- > Consider conducting a privileged pay audit
- > Goals of a pay audit
 - > Identify potential pay disparities among employees performing comparable work
 - > Determine whether there are lawful explanations for those disparities and/or take steps to correct the disparities as appropriate
 - > Identify and correct weaknesses in the organization's systems to protect against potentially unlawful pay disparity going forward
- > Take advantage of the affirmative defenses

What About Compensation Audits?

- Step 1:** Establish goals, get buy-in, put the right team in place
- Step 2:** Gather relevant data
- Step 3:** Identify comparable jobs
- Step 4:** Calculate whether members of a protected class are paid equally in comparison to those outside of the protected class

What About Compensation Audits?

- Step 5:** Assess whether differences in pay are justified under applicable law
- Step 6:** Remediate any unjustified pay differentials
- Step 7:** Adjust pay practices
 - > Attempt to determine the reason(s) for unjustified disparities
 - > Remedy practices and policies causing unjustified disparities

What About Litigation?

Safe Harbor Under MA Law

- > An employer who, within the previous 3 years and prior to the commencement of a lawsuit:
 - > Has completed a “good-faith” self-evaluation, “reasonable in detail and scope,” of its pay practices; and
 - > Can demonstrate “reasonable progress” in eliminating gender-based compensation differentials
- > Has an affirmative defense to liability under MEPA and to any pay discrimination claim under the MA state discrimination statute.
- > Oregon and Puerto Rico also have safe harbors available.

What About Litigation?

- > Avalanche of litigation in the area of pay equity under federal and state laws
- > High profile lawsuits against technology companies, law firms, pharmaceutical companies and retail chains
- > Collective and class actions
- > Multi-million dollar settlements
- > **#TimesUp** movement suggests more on the horizon

What About Litigation?

> EPA

- > Statute of Limitations: 2/3 years
- > Damages
 - > Pay differential
 - > 100% liquidated damages unless employer can prove it acted in good faith
 - > Attorneys' fees and costs

> Title VII

- > Statute of Limitations: 180/300 days
- > Damages
 - > Pay differential
 - > Compensatory damages
 - > Punitive damages
 - > Attorneys' fees and costs

What About Litigation?

Damages and SOL Under State Laws

- > New York
 - > Statute of Limitations: 6 years
 - > Damages
 - > Salary differential
 - > **300%** liquidated damages unless there is a good faith basis for the employer to believe it complied with the law
 - > Attorney's fees and costs

What About Litigation?

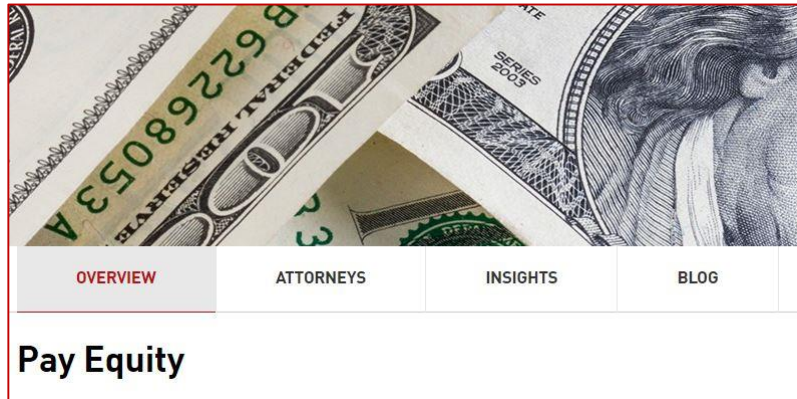
Damages and SOL Under State Laws

- > California
 - > Statute of Limitations: 2 years; 3 years willful; possibly 4 years (restitution) under Unfair Competition claim (Bus. & Prof Code §17200).
 - > Damages
 - > Salary differential
 - > Liquidated damages
 - > Interest
 - > Attorney's fees and costs

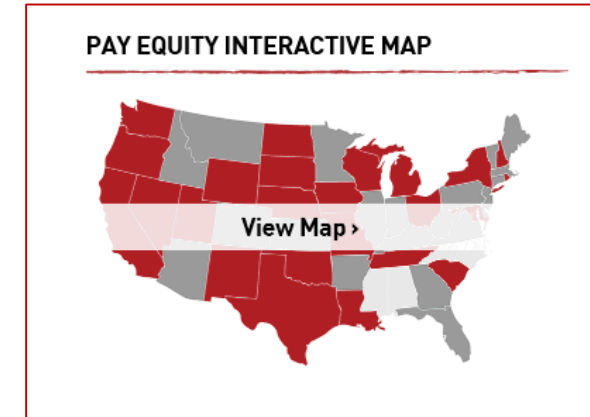
What Is the Government's Position on Pay Equity Issues?

- > USDOL's Office of Federal Contract Compliance Programs (OFCCP):
 - > Federal contractors/subcontractors required to periodically self-audit
 - > Compensation is defined very broadly
 - > "Similarly situated" employees
 - > Pay Analysis Groups/Job Groups/EEO-1 categories
 - > Regression analyses
 - > Anecdotal evidence preferred but not required
 - > Electronic evidence
 - > Consider HRIS database requirements
 - > Top priority for OFCCP

What Are Fisher Phillips' Resources?



<https://www.fisherphillips.com/services-pay-equity>



<https://www.fisherphillips.com/equity>



<https://www.fisherphillips.com/pay-equity-blog/>



FINAL QUESTIONS



Inside
Counsel
Conference
2019





Inside
Counsel
Conference
2019

THANK YOU

FOR JOINING US

Cheryl Behymer
cbehym@fisherphillips.com
(803) 255-0000
Columbia, SC

Kathleen McLeod Caminiti
KCaminiti@fisherphillips.com
(908) 516-1050
New Jersey, NJ

Cheryl Pinarchick
cpinarchick@fisherphillips.com
(617) 532-8215
Boston, MA