



## A New Wave in the Workplace Law

Inside Counsel Conference 2020 February 26–28, 2020

# The New Tide of Pay Equity Class Actions: Lessons From the Trenches

Cheryl Pinarchick – Fisher Phillips Boston

Megan Winter – Fisher Phillips San Diego

Adam Sloustcher – Fisher Phillips San Diego

Catherine O'Connor – Corporate Counsel, SeaSpine

February 27, 2020

# Pay Disparities Remain a National Focus

---

- Equal Pay Act has been in place for decades but the “pay gap” persists
- “Pay gap” or opportunity gap v. unlawful pay disparities
- New state legislation is primarily focused on pay disparities between protected groups of employees performing “comparable” or “substantially similar” work
- Patchwork of laws

# State Legislation Complicates Pay Equity

---

1. State agencies/courts = less predictable.
2. State agencies/courts = more plaintiff friendly.
3. Increased number of EEOC charges for equal pay violations.
4. Multi-state employers need to account for different laws across the country.

# 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

# Federal Law

---

## **Jobs must be “substantially equal”:**

- Skill
- Effort
- Responsibility

# Federal Law

---

## **Equal Pay Act – 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\*

# Federal Law Litigation

---

## Equal Pay Act Claim

- May proceed directly to court
- Statute of Limitations: 2 years/3 years if willful violation
- Damages
  - Salary differential
  - Liquidated damages
  - Attorney's fees and costs

# Compare the EPA and New Laws

---

## New state laws

- Redefining “equal work” to be much more expansive
- Expanding scope of protected classes of employees
- Requiring comparisons of employees in different facilities and geographies
- Prohibiting confidentiality
- Requiring transparency
- Limiting or eliminating exceptions for unequal pay
- Extending statute of limitations and increasing damages in successful suits



# Expansion of Protected Classes

---

- **Equal Pay Act (EPA) = Sex**
- **State Law:** Trend is to expand the classes of employees covered by pay equity laws.
  - **Florida:** Sex
  - **California:** Sex, race, ethnicity
  - **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

# Salary History Bans

---

- State laws, local ordinances prohibit, or limit, an employer from seeking salary history from applicants and/or using salary history in setting compensation.
- Rationale: pay discrimination can follow employees from job to job throughout their careers, resulting in a systemic reduction in their earning power.

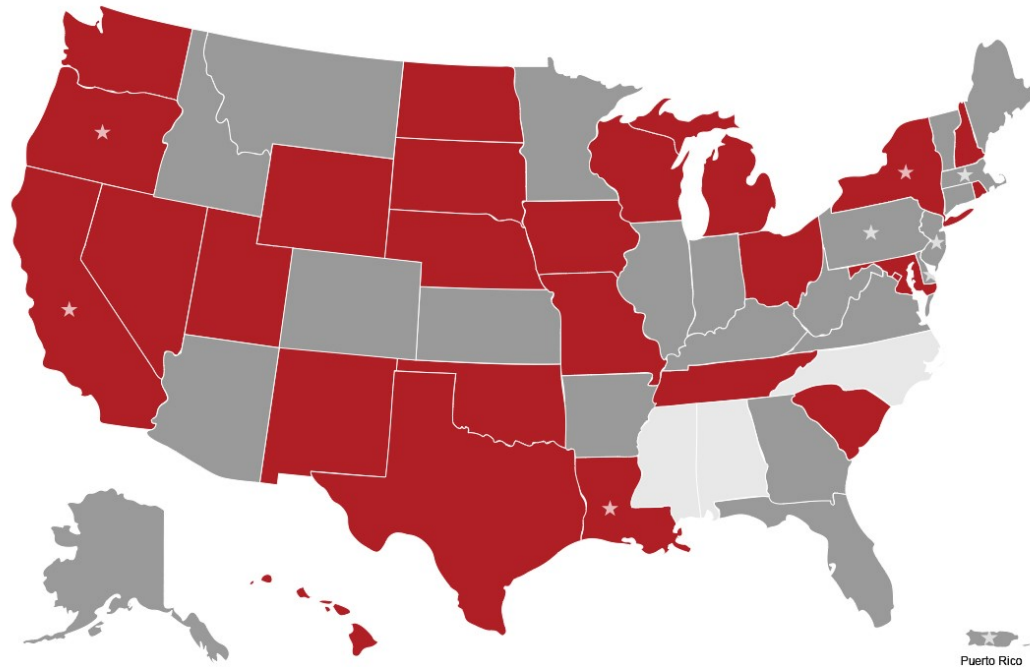
# Salary History Bans – Key Questions

---

- Does it apply to all applicants?
- Does it apply to internal and external applicants?
- What if an employee voluntarily offers the information?
- Can you confirm salary history if voluntarily disclosed?
- When can you ask? Post-offer?
  - Why?
  - Documentation is key

# Fisher Phillips' Pay Equity Interactive Map

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



**NEW YORK**

- + Statute
- + Classes protected
- + Key language on pay discrimination
- + Exceptions for pay disparities (including affirmative defenses)
- + Prohibition on salary history inquiry
- + Other key provisions
- + Related articles

Main Map

**MASSACHUSETTS**

- + Statute
- + Classes protected
- + Key language on pay discrimination
- + Exceptions for pay disparities (including affirmative defenses)
- + Prohibition on salary history inquiry
- + Anti-retaliation
- + Other key provisions
- + Related articles

Main Map

# Salary History Bans – Compliance Tips

---

- Stop asking for salary history information. Remove it from your employment application.
- Ask about **salary expectations** rather than salary history.
- Provide a salary range for the position and allow employees to self-withdraw.

# Steps to Address New Laws

---

- 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

# Steps to Address New Laws

---

- Consider conducting a privileged pay self-evaluation
  1. Identify goals
  2. Budget for costs of analysis and compliance
  3. Identify team and set up privilege protocols
  4. Examine pay policies and practices
  5. Identify resources and collect data
  6. Conduct a **privileged** analysis
  7. Remedy disparities, if necessary
  8. Take other corrective actions and train

# Litigation Considerations – Similar or Equal Work

---

- What are employees REALLY doing all day?
- Develop ways to distinguish jobs
  - Job descriptions
  - Performance reviews
  - Hiring announcements
  - Electronic discovery
    - Emails
    - Documents created
    - Phone logs
- Manager and co-worker testimony



# Litigation Considerations – Similar or Equal Work

---

- Bonus or incentive compensation
  - Documented basis for differentials
- How to substantiate differentials based on:
  - Handling demanding or important account
  - Volume of work
- Temporal considerations
  - Temporary coverage for employee on leave or when employee separates

# Litigation Considerations – Similar or Equal Work

---

- Expectation v. Reality
  - What are people actually doing v. what are people supposed to be doing
- Does Equal Pay change approach to medium or underperformers?

# Litigation Considerations – Bona Fide Factors

---

- Education, experience, training
  - Relevant to the position
- What did the company know at the time it set the pay?
  - Applications/resumes
  - Interview notes
  - Reference checks
  - Referral information
  - Recruiter/hiring manager communications
- Verified with subpoenas for employment records from prior employers

# Litigation Considerations – Bona Fide Factors

---

- Expectation v. Reality
  - Employee who is paid a premium based on experience, but does not deliver

# Litigation Considerations – Discovery Battles

---

- Burden – data preservation
  - Preservation issues
- Define scope to limit discovery
- Privacy
  - Pay data
  - Performance information
- Privilege
  - Audits

# Litigation Considerations – Settlement

---

- Individual Settlement
  - Risk of copy cat claims
  - Adjustments to other employees' pay
  - Confidentiality provisions may be prohibited by state law
- Class-wide Settlement
  - Payroll taxes
  - Push for Programmatic relief
  - Publicity
    - Class settlements require court approval

# Use of Experts and Statistical Evidence

---

- Use of statistical evidence at class certification
- Importance of retaining an expert early on
- Pre-lawsuit considerations and preventative strategies

# Attacking the Pleadings

---

- Are early motions to dismiss worth the time and money?
- Taking a hard look at the representative plaintiff

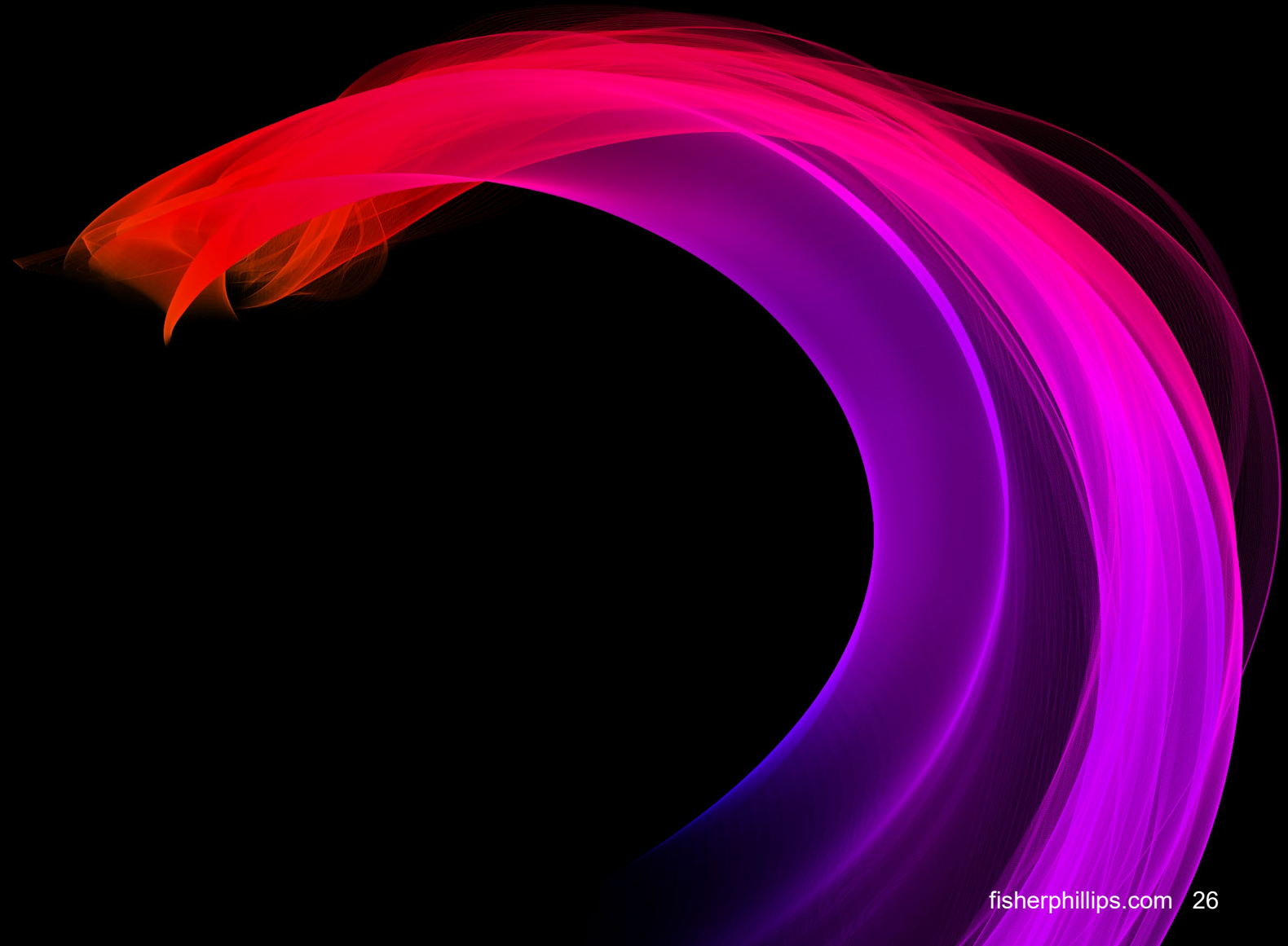


# Attacking Class Certification

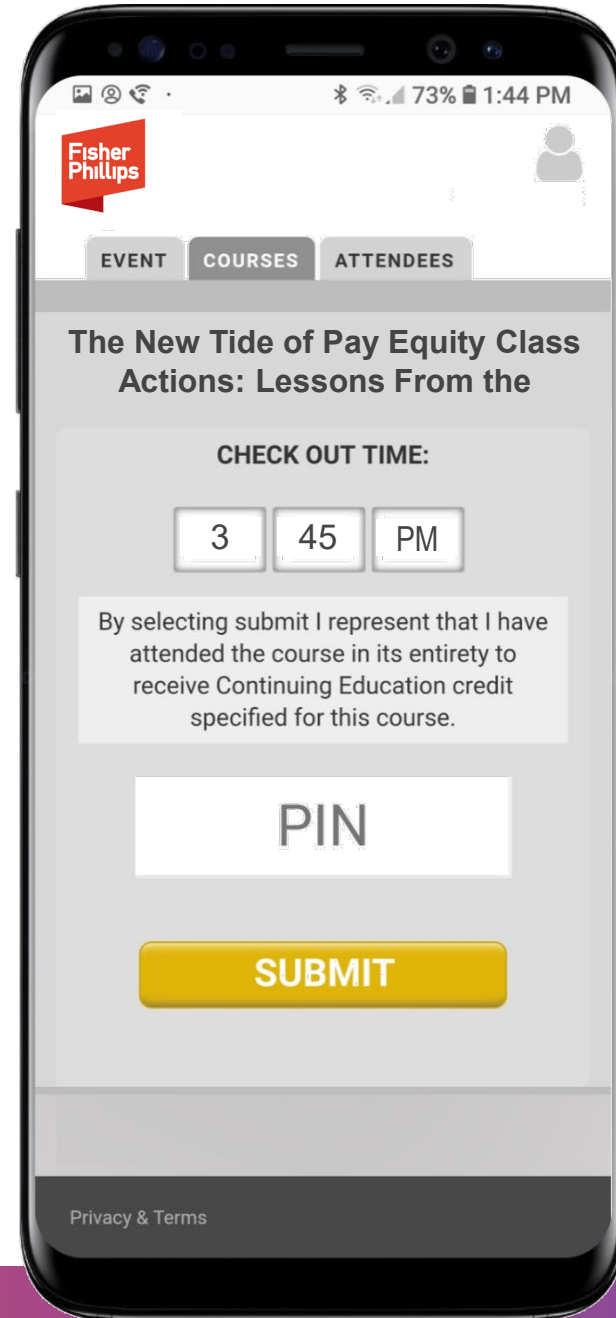
---

- What arguments have been working?
- What arguments have not been working?
- Arbitration agreements with class waivers

# Questions?



PIN#  
**2552**





## A New Wave in the Workplace Law

Inside Counsel Conference 2020 February 26–28, 2020

# Thank you

Cheryl Pinarchick  
cpinarchick@fisherphillips.com  
617.532.8215

Megan Winter  
mwinter@fisherphillips.com  
858.597.9622

Adam Sloustcher  
asloustcher@fisherphillips.com  
858.597.9620

Catherine O'Connor  
catherine.o'connor@seaspine.com