

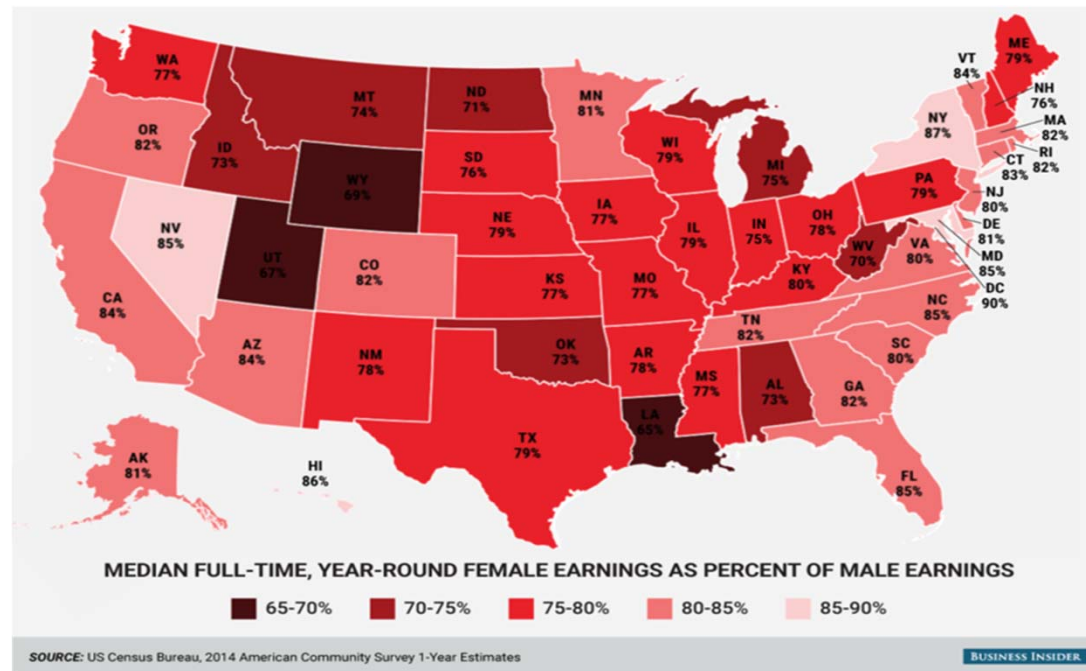
How to Manage the Pay Equity Requirements – In-House Counsel Best Practices - Session 006

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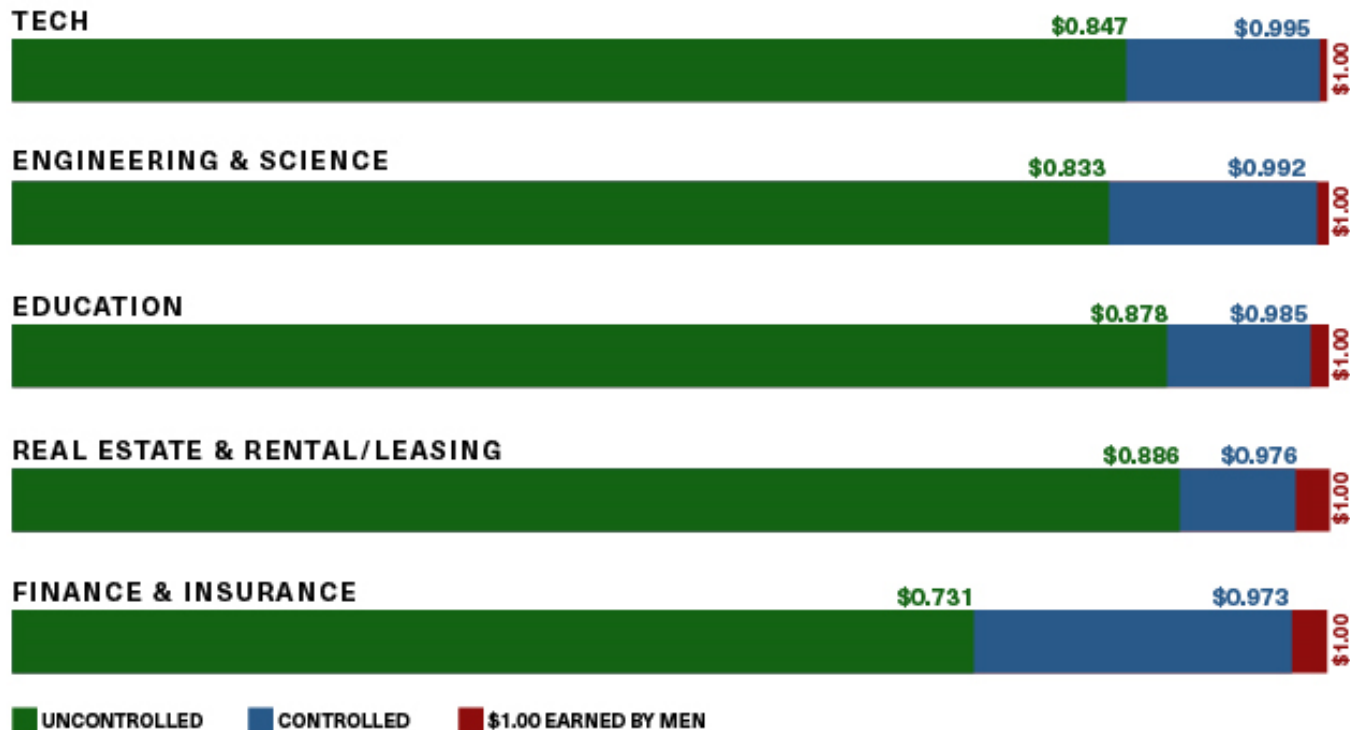
What we will cover

- ◆ Continued focus on pay discrimination
- ◆ What is the basis for pay equity claims?
- ◆ What do new laws tell us about how to respond to these problems?
- ◆ How does your company respond?
- ◆ Key takeaways in pay equity audits

The Gender Pay Gap



Gender Pay Gap By Industry



Uncontrolled reflects the pay gap per industry overall, while controlled accounts for similar job titles.

SOURCE: PayScale



More Gender Pay Disparity Statistics

- ◆ In 2017, women earned 82% of men's earnings, based on median hourly earnings of both full-time and part-time workers. (Pew Research Center)
- ◆ For younger women, the pay disparity is slightly smaller. For workers ages 25-34, the disparity is \$0.89 to the dollar.
- ◆ In 1980, the pay disparity was \$0.64 to the dollar.

What is the difference?



Pay Gap

Pay differences in gender and race groups among all jobs



Pay Equity

Equitable pay for individuals in similar positions

Sources of Pay Equity Requirements

- ◆ **Equal Pay Act of 1963, 29 USC 206** – requires equal wages for men and women who perform jobs that require substantially equal skill, effort, and responsibility, and are performed within the same establishment under similar working conditions.
- ◆ **Title VII – broader than EPA** – similar tasks, skill, effort, responsibility, working conditions, and similarly complex or difficult. Need not be same department or location.
- ◆ **Minnesota Human Rights Act – broader than EPA too**
- ◆ **Executive Order 11246** – federal contractors and subcontractors – cannot discriminate in rates of pay or other forms of compensation.
- ◆ **OFCCP Directive 2018-05** – requires desk audit analysis, and relies on pay analysis groups of similarly situated employees, look for disparities using statistical analysis to control for legitimate factors other than sex or race.
- ◆ **EEO-1 Component 2 reporting** - now requires pay data be reported by race, ethnicity, and gender by September 30, 2019 for 2018 year.

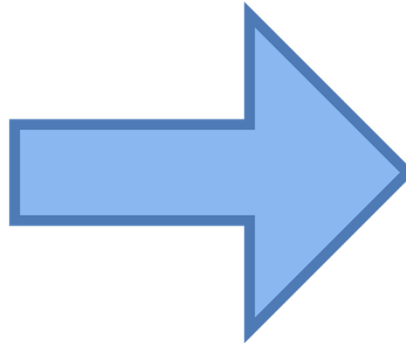
Other State Laws

- ◆ Most states have some type of fair employment practices law that prohibits sex discrimination, which can include compensation.
- ◆ Many states have equal pay laws
 - some are modeled after EPA
 - but some newer equal pay laws are broader than EPA
 - new CO legislation as example
 - MA, CA, NY, OR, many others

Equal Pay for (_____) Work?

Equal Pay Act

Equal Pay for **Equal Work**



State Laws

Equal Pay for “**substantially similar**” or “**comparable**” work

What’s the Effect?

Expands pool of comparators – increased risk

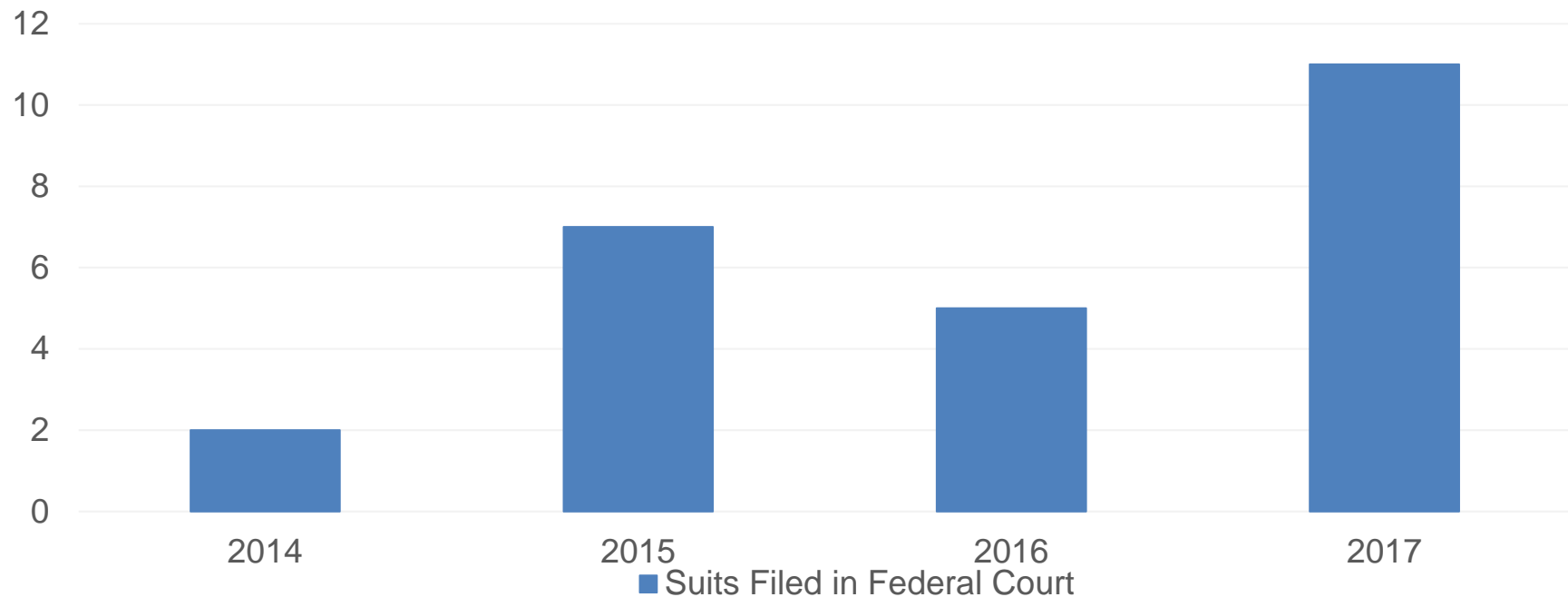
Different across states

Differences in location of comparators

Limits reasons to explain pay differences

Some encourage self-analysis

EEOC Statistics – Equal Pay Act



Pay Equity in the News

- ◆ Oracle sued by EEOC in January 2017 after routine OFCCP audit in 2014
- ◆ Class action against Google – dismissed in December 2018
- ◆ USWNT – women’s national soccer team sued US Soccer Federation for gender discrimination based on lower pay than USMNT
- ◆ #MeToo, Time’s Up movements continue to shine spotlight on inequality and mistreatment of women

Other Reasons for Pay Equity Aside from Legal Reasons

- ◆ Why might an employer want to ensure pay equity aside from being legally obligated?
 - Activist shareholders (public companies in particular)
 - Recruitment and retention of employees

Your Friends are Doing It



Note: Companies are noted here for illustration only, and are not listed here as clients of Jackson Lewis.

Pay Transparency

- ◆ National Labor Relations Act
 - Cannot fire or otherwise discriminate against employees for **asking about, discussing, or disclosing pay**
- ◆ Executive Order 11246 (includes applicants & supervisors)
- ◆ Passed: CA, CO, CT, DE, DC, IL, LA, ME, MD, MA, MI, MN, NV, NH, NJ, NY, OR, PR, VT, WA
- ◆ Proposed: HI, ID, IN, IA, NC, PA, SC, TN, WV



A graphic of a spotlight with a yellow beam of light shining from the top left towards the center of the slide.

Spotlight on Salary History

Is asking for salary history . . . history?

- ◆ Enacted salary history laws
 - California, Delaware, Massachusetts, Oregon, Puerto Rico
 - New York City, Albany County, San Francisco
- ◆ Stayed (pending litigation): Philadelphia
- ◆ Proposed (changes daily!)
 - Arizona, Florida, Idaho, Iowa, Nebraska, New York, New Hampshire, North Carolina, Pennsylvania, Rhode Island, Vermont, Virginia, Wisconsin, New Jersey

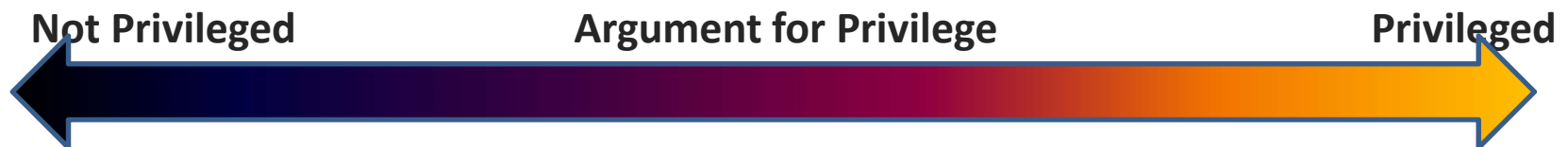
Ostrich Defense?



Pay Equity Audit Considerations

- ◆ Do you have buy-in from the C Suite?
- ◆ Does it matter?
- ◆ If not, should a company do a pay equity audit?

The Sliding Scale of Privilege



No Attorney Involvement

In-House Counsel (on surface)

In-House Counsel (substance)

Outside Counsel (on surface)

Outside Counsel (substance)

Communicating the Results of an Audit

- ◆ Do you communicate the results of the pay equity audit?
- ◆ If so, to whom?
- ◆ What do you disclose?
- ◆ Risk of waiving privilege?
- ◆ If you disclose this year, what about future years?

How do you fix pay equity disparities that cannot be explained?

- ◆ Do you make changes to compensation?
- ◆ If so, when and how?
 - Do you make a special adjustment?
 - Do you make it part of the annual merit or cost of living increase?
 - What to tell employees who are receiving a pay adjustment?

Where do you get help?

- ◆ Do you use outside consultants?
- ◆ Outside counsel
- ◆ Statisticians
- ◆ What are your internal resources?

What Defenses are Available to Employers?

- ◆ General examples include:
 - Seniority system
 - Merit increase system
 - System that measures earnings by quantity or quality of production
 - Geographic location where a job is performed
 - Jobs that require the regular performance of different duties or services
 - Work that is performed on different shifts
 - Travel, if the travel is a regular and necessary condition of the particular job
 - Hours worked (equitable opportunity for overtime)

Pay Analysis Example



Bob
Senior Financial Analyst
Minneapolis, MN Office
Current Pay = \$95,000



Mary
Senior Financial Analyst
Minneapolis, MN Office
Current Pay = \$75,000

Equal Pay?

No

Fair Pay?

Let's Find Out!

How?

Prepare Regression Analysis on
Senior Financial Analyst Group with
35 Total Employees

How Much Does Performance Really Impact Pay?



Bob
Outstanding Performer in 2018
Current Salary = \$95,000



Mary
Average Performer in 2018
Current Salary = \$75,000

Regression Analysis Results

Raw Pay Gap	\$20,000
Explained by Performance	\$4,000
Remaining Unexplained Difference	\$16,000
Gender Result	Significant

30% of Pay Variation Explained by Regression Model

Adding Education



Bob
Master's Degree
Current Salary = \$95,000



Mary
Bachelor's Degree
Current Salary = \$75,000

Regression Analysis Results

Raw Pay Gap	\$20,000
Explained by Performance	\$4,000
Explained by Education	\$6,000
Remaining Unexplained Difference	\$10,000
Gender Result	Significant

70% of Pay Variation Explained by Regression Model

Can We Add Salary at Prior Job?



Bob
Salary at Prior Job = \$90,000
Current Salary = \$95,000



Mary
Salary at Prior Job = \$70,000
Current Salary = \$75,000

Is Salary at
Prior Job
Acceptable?

Maybe a Proxy
for Experience?

Regression Analysis Results

Raw Pay Gap	\$20,000
Explained by Performance	\$4,000
Explained by Education	\$6,000
Explained by Salary at Prior Job	\$9,000
Remaining Unexplained Difference	\$1,000
Gender Result	Not Significant

90% of Pay Variation Explained by Regression Model

Including Prior Experience



Bob
Prior Experience = 10 Years
Current Pay = \$95,000



Mary
Prior Experience = 0 Years
Current Pay = \$75,000

Regression Analysis Results

Raw Pay Gap	\$20,000
Explained by Performance	\$4,000
Explained by Education	\$6,000
Explained by Prior Experience	\$10,000
Remaining Unexplained Difference	\$0
Gender Result	Not Significant

100% of Pay Variation Explained by Regression Model

Key Takeaways

- ◆ Identify what question/concern you are being asked to answer and why
- ◆ Consider conducting **privileged** pay equity analyses
 - On “meaningful” pay groupings and controlling for factors that influence pay
 - But, when problematic disparities exist, plan to make common-sense **pay adjustments**
 - Identify systematic fixes going forward
- ◆ Consider how to communicate the pay adjustment
- ◆ Consider whether you want to make a public disclosure about results

QUESTIONS

