



## U.S. and EU Pay Equity and Transparency Update – What Employers Need to Know

**National Industry Liaison Group**

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# FEDERAL LAW – THE FOUNDATION

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## Equal Pay Act of 1963

- Employers cannot discriminate on the basis of sex by paying lower wages when an employee performs equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions within the same establishment.

## Title VII of the Civil Rights Act of 1964

- Prohibits employers from discriminating against employees on the basis of race, color, religion, sex (including pregnancy and sexual orientation), and national origin including to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to **compensation, terms, conditions, or privileges of employment**.

# THAT WAS LARGELY IT

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## That was, until around 2016 Then COVID

- Unadjusted pay gap actually got WORSE
- In 2021 – 84 cents
- In 2022 -- 82 cents
- In 2023 – 84 cents
- In 2024 – 81 cents
- ADJUSTED remains around 99%

## What has really changed?

- Landscape much more complex

# COMMON GOAL, DIFFERENT APPROACHES

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Protected classes

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Cohorts

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Compensation

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Justification

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Transparency

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# KEEP IN MIND

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- Title VII and its state counterparts address intentional discrimination.
- The EPA and state counterparts do not require a finding of discriminatory intent.
- While the laws are similar and share a common purpose, the details can make a difference for exposure.



# PROTECTED CLASSES

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**Equal Pay Act** – sex

**Title VII** – sex (including pregnancy), sexual orientation, race, color, religion, national origin

**State laws** – vary

**CA** – sex, race, ethnicity (but note CA defines sex as male, female, and nonbinary)

**OR** – gender, race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age

**NY** – age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, familial status, marital status, or domestic violence victim status

**Other states** to watch for: AL, IL, IA, MD, NJ, OH

# WHY THIS MATTERS

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First determine the parameters of your audit

- Sex, race, age?
- What about ethnicity, religion, disability, sexual orientation?
- Non-binary?

Guidance of data collection on non-binary employees is emerging

- In 2019, the EEOC FAQs for completing the EEO-1 instructed employers to use the comment box to report data for non-binary employees. (No longer active.)
- In 2020, CA pay data reporting guide requires that non-binary employees be reported in the same manner as male and female employees
- In 2020, OFCCP FAQs indicated employers may exclude data for nonbinary employees from the gender-based analysis.
- Predominantly a state-law driven data governance issue

# COMPARATORS & COHORTS

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Under the EPA, an employee must show that the jobs being compared – not the individuals who hold them – “substantially equal”

States have different ideas:

- **Equal work** – AL, CT, DE, FL, GA, HI, IN, IA, KS, NM, MN, NE, NV, NH, NM, OH, PA, RI, VT, VA, WY
- **Equivalent / similar work** – MT, WA
- **Same work** – AZ, IL, MD
- **Substantially similar work** – CA, CO, IL, NY, MA, NJ, OR
- **Comparable work** – AK, ID, KY, ME, MD, MO, ND, OK, OR, PR, SD, TN, WV

\* Multi-state employers cannot run a single “one-size fits all audit methodology anymore



# WHAT DOES THIS MEAN?

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When facing a lawsuit, these are nuanced differences.

Key concepts:

- Jobs do not have to be identical
- But at their core be similar
- Look at skill, effort and responsibility, and conducted under similar working conditions

When conducting an analysis or audit, look at groupings that make sense for your organization

- Job titles, families, or levels
- May need further refinement based on job requirements
- Want appropriate comparators with good sample sizes

# SUBSTANTIALLY EQUAL

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Full professors in university psychology department all conducted research, taught classes, advised students and actively served on university committees.

- Differences in the classes taught, number or types of students they supervised, or centers managed did not change this

## *But are they?*

Not all professors are interchangeable “like widgets”

- Differences in departments, courses taught, types of students supervised were important distinctions

# NOT SUBSTANTIALLY EQUAL

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- Employee's male replacement did not perform substantially similar work as right before he was hired, the position was restructured and required new skills the employee did not have.
- Contract manager positions not substantially equal where dollar value and number of tasks orders were different
- Delegation of some duties or temporarily filling a higher level position do not create comparable jobs

# COMPENSATION

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## Wages



## Broader compensation

Wages, equity, benefits, incentive comp, commissions, other remunerations (such as shift differential, geographic premiums)



## Reporting obligations have different terms

Which box?

Annual or annualized pay?

What does that tell us?



# JUSTIFICATIONS & AFFIRMATIVE DEFENSES

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Under the EPA:

- Seniority system
- Merit system
- System that measures earnings by quantity or quality of production
- Any other factor other than sex

Keep in mind – the justification:

- Must *actually motivate* the decision
- Must account for the entire differential
- Can be rebutted

# JUSTIFICATIONS & AFFIRMATIVE DEFENSES

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Most state laws mirror federal law

- Examples of other permissible factors – shift, geography, training, travel, existence of lifting or movement restrictions

New trend – limit the scope of the “bona fide factor other than sex”

- Permit employee to show the existence of an alternate practice that would not create a disparity
- For example: New York, California

New trend – eliminate catchall “bona fide factor other than sex”

- For example: Colorado, Massachusetts

# JUSTIFICATIONS & AFFIRMATIVE DEFENSES

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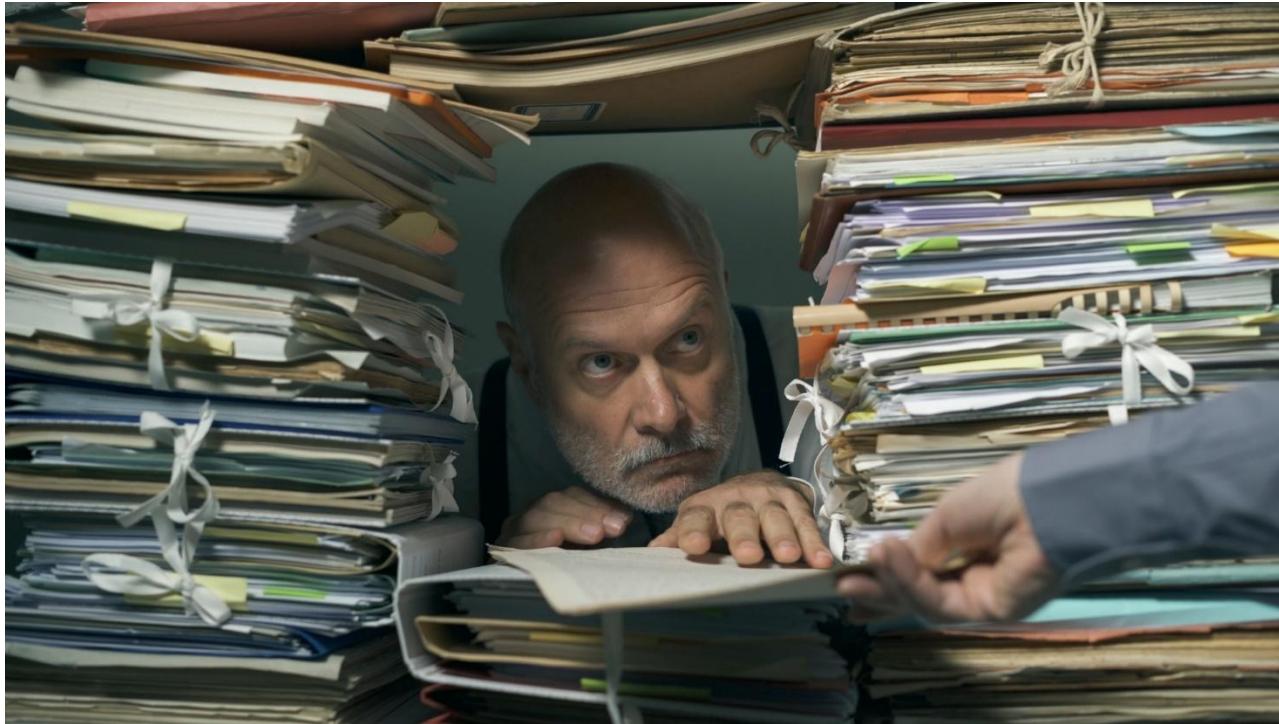
- **Some states now require:**
  - The factor be job related
  - Be consistent with business necessity
  - Be narrowly tailored
  - And that no less discriminatory alternative exists
- **Potential death of the Catch-All defense**
  - CA, CO, MA, NY tightening acceptable defenses
  - Burden shifts to employer
  - Allows plaintiffs to propose alternative practices

# COMPENSATION AUDITS – SAFE HARBORS

- **Massachusetts**
  - Affirmative defense
  - No liquidated damages
- **Oregon**
  - No compensatory or punitive damages
- **Colorado**
  - No liquidated damages
- **Puerto Rico**
  - No liquidated damages
- **Rhode Island**
  - Affirmative defense
  - No liquidated/compensatory damages, or civil penalties after 2026
- CA does not provide privilege or safe harbor
- NY does not provide privilege

# PAY TRANSPARENCY AND REPORTING LAWS

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# **PAY TRANSPARENCY AND DATA REPORTING – A NEW FOCUS**

Employers cannot demand pay confidentiality!

But many state laws take it further:

- Employers must make pay scale available on request
  - CA, CT, MD, NV, RI, WA, Cincinnati, Ohio
  - PROPOSED: MI
- Employers must make pay scale available without request
  - CT, CO, Toledo, Ohio
- Employers must post pay ranges on job postings
  - CA, Ithaca, NY; Westchester Co., NY; New York City; NY; Jersey City, NJ; CO, WA
  - DC, effective June 2024

# **PAY TRANSPARENCY AND DATA REPORTING – A NEW FOCUS**

- Colorado Pay Transparency Updates – effective January 1, 2024
  - Exemptions:
    - Employers of 15 or fewer, all-remote, Colorado employees
      - ❖ Only required to include remote job opportunities in job opportunity notices – not all company wide
    - “Career progression” and “career development” promotions are excluded from the definition of “job opportunities” – do not trigger the obligation to provide job opportunity notices or post-selection notices
    - Job opportunity, post-selection, and career progression notices must be provided to Colorado employees only
    - AINT positions – no need for notice where the position necessitates immediate hire into an acting, interim, or temporary role
    - Confidential replacements – i.e., where the current employee is not aware of their separation
    - Employee opt-outs – must be in writing and voluntary, rename and former job title would put their health or safety at risk

# **PAY TRANSPARENCY AND DATA REPORTING – A NEW FOCUS**

- Illinois – January 1, 2025
  - 15+ employees – must include pay scales and benefits in postings
- Minnesota – January 1, 2025
  - 30+ employees – must disclose starting pay ranges and benefits description
- New Jersey – June 1, 2025
  - 10+ employees – must disclose ranges and reasonable efforts for promotion notice
- Vermont – July 1, 2025
  - 5+ employees – must include good faith wage ranges in postings

# **PAY TRANSPARENCY AND DATA REPORTING – A NEW FOCUS**

- Massachusetts – effective October 29, 2025
  - Requires employers with 25+ employees to include pay ranges in all internal and external job postings
  - Internal disclosures must provide the pay range to current employees offered a promotion or transfer
- Cleveland, OH – effective October 27, 2025
  - Private employers with 15+ employees must include salary ranges in all job postings
- Columbus, OH – effective December 3, 2025
  - Private employers with 15+ employees must include salary range disclosures in all job postings

# **PAY TRANSPARENCY AND DATA REPORTING – A NEW FOCUS**

- California
  - Pay transparency – updated definitions
    - Pay scale means the range the employers expects to pay upon hire (trying to prevent overly broad ranges)
    - Wages is now clearly defined to include all compensation (bonuses, stocks, benefits)
  - Workplace Know your Rights Act – effective February 1, 2026
    - Employers must provide a stand-alone written notice (posters) detailing workers' compensation, immigration protections, and union rights.
    - Provide notice to new hires and union reps
  - SOL – 3 years plus a 6-year look back
  - Courts required to impose civil penalties for failure to submit pay data reports

# **PAY TRANSPARENCY AND DATA REPORTING – A NEW FOCUS**

- Oregon – effective January 1, 2026 – wage statements
  - Employers must provide employees at the time of hire with detailed explanations of payroll codes itemized deductions, and pay rates, including how and why each deduction may occur (such as allowances claimed as part of minimum wage and employer-provided benefits)
  - Must review and update this information by January 1 each year

# **PAY TRANSPARENCY AND DATA REPORTING – A NEW FOCUS**

- Looking to **2027**
  - Delaware – effective June 30, 2027
    - 25+ employees – must disclose salary ranges in postings
  - California – for 2027 pay filing
    - Reclassify job categories
      - Move from 10 general categories to 23 specific Standard Occupational Classification (SOC)
    - Vendor Coordination
      - Ensure HRIS systems (ADP, workday, etc.) are tracking these 23 categories for the current 2026 work year

# DATA REPORTING AND COMPENSATION AUDITS

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## Required Data Reporting

- California - 2021, amended 2023
  - Covered employers: private employers with 100+ employees
  - Required Data: Employee counts by race, ethnicity, and gender across 10 categories (23 in 2027)
  - Deadline: second Wednesday in May
  - Filing process: California Civil Rights Department's online portal
  - Penalties: civil penalties up to \$200 per employee for failure to report (now mandatory)

# DATA REPORTING AND COMPENSATION AUDITS

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## Required Data Reporting

- Illinois
  - Covered employers: private employers with 100+ employees and are also required to file an EEO-1 report
  - Required Data: Employee demographic and compensation data, along with an Equal Pay Compliance Statement signed by a corporate officer.
  - Deadline: Employers are notified by Illinois Department of Labor of required submission date, generally every 2 years
  - Filing process: Illinois Department of Labor portal
  - Penalties: up to \$10k for failure to obtain a certificate

# DATA REPORTING AND COMPENSATION AUDITS

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## Required Data Reporting

- Massachusetts
  - Covered Employers: Employers with 100+ more employees at any time in the prior calendar year and are already subject to federal EEO disclosures (either EEO-1, EEO-3, EEO-4 or EEO-5 reporting requirements)
  - Required Data: Employers must report workforce demographic by race, ethnicity, sex, and job category.
  - Deadlines: First report was due on February 1, 2025, and annually thereafter every February 1.
  - Filing Process: Employers file through MA's portal (referenced above). Penalties: warning for the first offense, a maximum fine of \$500 for the second offense, and a maximum fine of \$1,000 for the third offense. Further violations could be subject to civil fines of \$7,500 to \$25,000, depending on the violation.

# DATA REPORTING AND COMPENSATION AUDITS

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## Required Data Reporting

- Minnesota
  - Covered Employers: companies with 40+ employees who are bidding on state and municipal, contracts worth \$500,000 or more
  - Political subdivisions: must comply if contracts exceed \$1,000,000
  - Required Data: Equal Pay Certificate application, which contains a statement of compliance and details how compensation is reviewed by the contractor to ensure compliance.
  - Deadlines: Certificate must be valid prior to contract award and renewed every four years
  - Filing Process: Submit application through the state and make an online payment of \$250 on the state's website
  - Penalties: Ineligibility to bid on or renew contracts; possible fines for misrepresentation.

# WHAT NEXT?

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## Understand State and Local Laws

- Possibly the wave of the future
- Most employers are now subject to multiple, conflicting, non-harmonized pay equity regimes simultaneously
- Legal compliance, statistical defensibility, and employee relations risk are no longer aligned

## The best offense is a good defense

- Understand your job structure
- Conduct internal audit on your terms
- Evaluate your pay and performance review practices

## Address issues promptly

- Individual complaints
- Red flags from audits

# PRESENTER CONTACTS

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# ADDITIONAL RESOURCES

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**Hunton Employment & Labor Perspectives Blog:**  
Analysis and Development in Employment & Labor Issues  
<https://www.huntonlaborblog.com/>

**HuntonAK Insights**

<https://www.huntonak.com/en/subscribe-to-publications.html>





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