



Work**Smarts** Virtual Seminar

Paywatch: Keeping a Watchful Eye on the Do's and Don'ts on Employee Pay

Paz Haynes, Partner, Nashville
Ruthie White, Partner, Houston



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- This presentation and its accompanying materials provide general coverage of its subject area and is presented **for informational purposes only.**
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Paywatch Agenda



Pay attention to:

- Pay Equity
- Pay Transparency
- Pay Inquiries
- Benefits of Pay Equity & Pay Transparency



Poll

When was the last time your company conducted a pay audit?

- A. Less than 6 months
- B. 6-12 months
- C. 1-4 years
- D. ≥ 5 years
- E. Never





Pay Equity

Pay Equity

- Pay equity is the legal concept of compensating employees who have similar job functions with comparably equal pay, regardless of their protected characteristics. Employers must weigh other factors, like the employee's education and work experience, the responsibilities of the position, and the organization's longterm financial stability.
- Pay Equity Analysis
 - Gather relevant data;
 - Define relevant factors;
 - Establish a pay equity benchmark;
 - Analyze pay data;
 - Determine the causes of disparities;
 - Develop a plan to address disparities; and
 - Monitor and update the analysis.

Pay Equity Laws

- Federal Law:
 - Equal Pay Act (EPA) –states that men and women employed at the same business should receive equal pay for equal work.
 - Title VII – offers broader protections than the EPA and prohibits pay discrimination based on not just gender, but also race, color, religion, national origin and genetic information.
 - Age Discrimination in Employment Act (ADEA) – prohibits pay discrimination against employees who are 40 or older.
 - Americans with Disabilities Act (ADA) – prohibits wage discrimination against individuals with disabilities.
 - The Lilly Ledbetter Fair Pay Act – extends the period for employees to file pay discrimination claims, stating each discriminatory paycheck is an actionable offense.
- State Law:
 - All states have an equivalent law addressing discrimination based on protected characteristics. Some states expand the characteristics, ex. marital status.
 - Almost all states have equal pay laws, some more elaborate than others. New York, for instance, has expanded the definition of equal work to include “substantially similar” work.

The Equal Pay Act

- Only applies if a pay disparity exists between men or women who perform work that is substantially equal in all material aspects.
- The law provides guidelines for when unequal pay is permitted – specifically, when there is: (a) a bona fide seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; or (d) a differential based on **any factor other than sex**. 29 U.S.C. § 206(d)(1).
- If there is an inequality in wages between men and women who perform substantially equal jobs at the same establishment, the employer is required to raise wages to equalize pay. Employers also are prohibited from reducing wages in order to comply with the Equal Pay Act. 29 USC §206(d).

Title VII

- The Title VII standard is more relaxed than the EPA standard in this regard.
- Title VII does not require conforming to the EPA “equality of work” standard, but “comparable or similar” work.
- Under Title VII, a claim of wage discrimination generally rests on “comparator” employees identified as similarly situated to the plaintiff and outside the plaintiff’s protected class in order to demonstrate that the comparators were treated more favorably.
- A violation of Title VII may not be a violation of the EPA.



Pay Transparency
(Say What You Pay)

Pay Transparency Quick Overview

- Pay transparency – openly sharing information about compensation, including salary ranges, bonuses, and other benefits with employees and job applicants.
- The goal of both pay transparency and pay equity is to promote fairness and accountability in compensation practices.
- Eight states have enacted pay transparency laws: CA, CO, CT, MD, NV, NY, RI, and WA. Other states are considering pay transparency laws: AK, GA, HI, IL, KY, MA, ME, MO, MT, NJ, OR, SD, VA, VT, and WV.
- Several municipalities have also enacted pay transparency laws, including New Jersey (Jersey City), New York (Ithaca, NYC, Westchester), and Ohio (Cincinnati, Toledo).



Pay Transparency

- Each state law is different and handles requirements differently. Depending on the jurisdiction, these laws require employers to:
 - Disclose salary ranges in job postings.
 - Disclose salary ranges to applicants at a specified point during the hiring process.
 - Disclose salary ranges to employees when there is a change in position or upon request.



Eligible Employers

- CA, WA
 - ≥ 15 employees
- CO, CT, MD, NV, RI
 - All employees
- NY
 - ≥ 4 employees

Salary Range

- CA: “Reasonably expects to pay.”
- CO: “Good faith reasonable estimate.”
 - Includes benefits
- CT, RI: The range you “anticipate relying upon when setting the wage.”
- NY – “The minimum and maximum annual salary or hourly wage for such position”
 - Includes job description
- WA: “Most reasonable and genuinely expected” compensation range.
 - Includes benefits

Applicants

- **CA, CO, NY, WA**
 - Must disclose to applicants in job postings; includes third parties
- **CT, NV**
 - Must disclose to applicants at some point during hiring process
- **MD, RI**
 - Must disclose upon request

Employees

- **CA:** Upon request for employee's current position
- **CT, RI:** Upon hire, if change in position or upon request
- **NV:** Upon application for promotion or transfer, once completed interview, made offer or upon request
- **WA:** Upon request for promotions and transfers

Pay Reporting

- **IL, CA:** Require the collection and production of workforce pay data.
- **CA:**
 - Applies regardless of whether Employer is required to file an EEO-1 and may no longer submit an EEO-1 in lieu.
 - Must also keep records of job title and wage history for each employee for the duration of their employment and three years after termination.
 - Recertify compliance every two years thereafter.
 - Reporting Homepage: <https://calcivilrights.ca.gov/paydatareporting/>
- **IL:** Require employers to proactively verify compliance by collecting employee-level pay data.

Penalties



Jurisdiction	Civil Penalty/Fine	Enforcement
California (Pay Scale Disclosure)	At least \$100 but no more than \$10,000, per violation. Possible to avoid fine for first violation by showing updated and compliant job postings.	PAGA possible for failure to disclose pay scale, not pay data reporting or job posting requirements.
Colorado	Fine of between \$500 and \$10,000 for each violation. In practice, the Department has waived fines where employer brings postings into compliance after the first violation.	No private right of action. Employees and applicants can file complaints with Colorado Department of Labor and Employment (enforcement actions possible).
New York City	No penalty for first violation (if cured within 30 days of warning). Civil penalties up to \$250,000 for an uncured first violation and any subsequent violation.	Enforced by NYC Commission on Human Rights. Can cure violation, but proof of cure "shall be deemed an admission of liability."
	Current employees may sue for back pay, front pay, compensatory damages, punitive damages, and injunctive relief.	Private right of action also available for <i>employees only</i> (not applicants).
Washington	Actual damages or \$5000 (whichever is greater), civil penalties ranging from \$500 to \$1000 per violation, and costs and reasonable attorneys' fees	Private right of action - civil actions for damages. Penalties imposed by Department of Labor & Industry.

Best Practices

- **Develop a Framework:** Every organization should assess its current position on the pay transparency spectrum and establish its desired level. This entails reviewing existing policies and initiating discussions with leadership regarding their interactions with employees concerning salary matters.
- **Conduct an Internal Audit:** Companies can benefit from conducting an internal audit and analysis to ensure pay equity for existing employees and take incremental steps to address the findings as needed; consider privileged approach.
- **Review Objective Data:** A data-driven approach to determine salaries can help minimize potential biases inherent in managerial discretion. It is crucial for managers to be ready to justify their pay scales, ideally based on market data, and objective criteria such as experience, education, responsibilities, and performance.

Best Practices

- **Leadership Buy-in:** Companies can establish their pay transparency strategy by initially involving the leadership team. This preparation helps those in positions of leadership grasp the significance of pay transparency and facilitate meaningful conversations with employees.
- **Develop Communications Strategy** – It is essential to communicate your pay policy clearly to employees. This can be achieved through company-wide presentations and one-on-one discussions with managers who should be trained to address questions about salaries and maintain ongoing performance conversations.
- **Ongoing Training** – Train managers and supervisors and create FAQs on how to respond to pay inquiries. Consider how to respond to questions from current employees about pay ranges for their positions and how to address questions from employees in jurisdictions that do not have pay transparency requirements.
- **Monitor / Stay informed** – Keep abreast of evolving pay transparency laws to align with the goal of pay equity.



Pay Inquiries –
Salary History Bans and Past Salary

Salary History Ban Quick Overview

- A salary history ban prevents employers from asking job applicants about their previous salaries or using that information to determine their current compensation.
- 28 states have enacted some form of a salary history ban: AL, CA, CO, CT, DE, GA, HI, IL, KY, LA, ME, MD, MA, MI, MO, NV, NJ, NY, NC, OH, OR, PA, RI, SC, UT, VT, VA, WA, and D.C. (includes some municipalities).
- 2 states have prohibited salary history bans: MI and WI.

Poll

Absent any regulations prohibiting prior salary inquires, will your organization revise job applications and discontinue asking applicants about their salary history?

- A. Yes, already done.
- B. Yes, in the future.
- C. No
- D. Undecided

Circuit Split - Salary History a “Factor Other Than Sex”?

- **Ninth Circuit’s Approach (AZ, CA, ID, MT, NV, OR, WA):** In the Ninth Circuit, the prevailing view is that prior salary does not qualify as a legitimate “factor other than sex” under the EPA. This interpretation was articulated in the case *Rizo v. Yovino*, where the Court held that “prior salary alone or in combination with other factors cannot justify a wage differential.” This means that employers within the Ninth Circuit are generally prohibited from using salary history as a basis for employment decisions.
- **Seventh Circuit’s Approach (IL, IN, WI):** The Seventh Circuit takes a different stance, contending that salary history should always be considered a “factor other than sex.” The court’s rationale is based on the idea that it should be up to the plaintiff to demonstrate that sex discrimination directly resulted in lower wages. Unless the plaintiff can prove such discrimination or a violation of the Equal Pay Act, employers in this jurisdiction are generally free to use salary history as a basis for compensation decisions.
- **Eighth Circuit (AR, IA, MO, MN, NE, ND, SD):** In the Eighth Circuit, employers are permitted to use prior salary as an affirmative defense. While salary history can be considered, it should not be the sole determining factor for setting pay, and the court assesses whether there is any evidence of gender discrimination in the decision-making process.

Circuit Split - Salary History a “Factor Other Than Sex”?

- **Second Circuit (CT, NY, VT):** The Second Circuit allows salary history to be used as an affirmative defense if the employer can demonstrate that a bona fide business-related reason exists for using the gender-neutral factor that results in a wage differential. In essence, employers must show that there is a legitimate and non-discriminatory business justification for considering salary history in compensation decisions.
- **Eleventh (AL, GA, FL) and Tenth (CO, KS, OK, NM, UT, WY) Circuits:** These circuits take a more restrictive stance, prohibiting employers from relying solely on prior salary to justify pay disparities. While salary history can be considered as part of the overall assessment, it cannot serve as the exclusive basis for gender pay disparities. The burden is on the employer to demonstrate that other legitimate factors, beyond just prior salary, justify the compensation differences.
- **Fifth Circuit (LA, MS, TX) – Middle Ground Approach:** Several circuit courts have adopted a middle-ground approach regarding the consideration of salary history under the EPA. This approach allows employers to take into account an applicant’s prior salary under specific conditions and limitations.

Complying with Salary History Ban Laws

While there may not be a salary history ban in your city or state, it is good practice to ensure compliance, as many legislators are moving fast to introduce bans.

- Provide training to HR personnel and hiring managers on the importance of refraining from inquiring about an applicant's salary history. Instead: Salary expectations.
- Ensure that hiring managers refrain from using salary information volunteered by applicants during interviews as a basis for job offers.
- If any historical evidence of salary discrimination is uncovered, take proactive steps to rectify and address this issue.
- Conduct comprehensive market research to establish equitable wage structures for each position, taking into account factors such as industry benchmarks, local average salaries, candidate qualifications, and the salaries of current employees in similar roles.



Benefits of Pay Equity & Pay Transparency



Employee Benefits - Pay Equity & Transparency

- Greater trust and job satisfaction
- Negotiation and career advancement
- Reduced wage discrimination
- Personal financial planning
- Increased motivation



Employer Benefits – Pay Equity & Transparency

- Improved employee morale and engagement
- Attraction and retention of talent
- Reduced gender and minority pay gaps
- Increased accountability
- Better compensation planning



Thank You!



Paz Haynes

Partner

Nashville

615.238.6324

whaynes@spencerfane.com



Ruthie White

Partner

Houston

713.212.2626

rwhite@spencerfane.com

