

# ADVANCED EMPLOYMENT LAW ISSUES IN EMPLOYMENT DISCRIMINATION CASES

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PREPARED BY

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WEST

# ROADMAP OF TOPICS

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- PAY EQUITY
- DISTINCTIONS BETWEEN THE  
EQUAL PAY ACT AND TITLE  
VII OF THE CIVIL RIGHTS ACT  
OF 1964
- GENDER IDENTITY  
DISCRIMINATION
- PAID FAMILY LEAVE

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# PAY EQUITY



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# AGENDA

- Summary of the Laws on the Books:
  - Salary History Bans
  - Pay Equity Statutes
- Which Jurisdictions Are Next?
- What Should You be Doing to Comply?
- You've Done an Audit, Now What?

# SALARY HISTORY BANS



Delaware



Oregon



California



City of San Francisco



Albany, Westchester, and New York City, NY



Philadelphia, PA



Massachusetts



Puerto Rico



Hawaii (awaiting governor's signature)

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# GENERAL PROHIBITIONS

- Off-limits - employment application, hiring process
- Off-limits - salary history-based job offers or salaries



# COMMON ISSUES

- Salary *expectations* ok?
- "Volunteering" applicants
- Vested compensation
- Verifications and background checks
- Promotions/transfers
- Recruiters



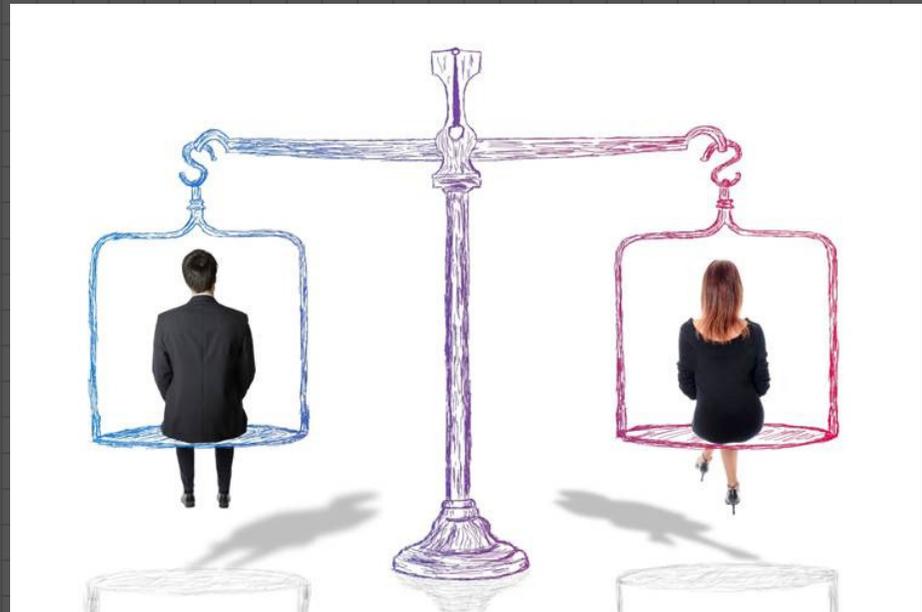
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# FAIR PAY LAWS: FEDERAL

- Equal Pay Act of 1963
- Title VII of the Civil Rights Act of 1964
- Lilly Ledbetter Act of 2009
- Paycheck Fairness Act (S. 819 - proposed)

# FAIR PAY LAWS: STATE

- California
- New York
- Maryland
- Illinois
- Puerto Rico
- Massachusetts
- New Jersey
- Oregon
- Washington



# SALARY HISTORY BANS: ??

- New Jersey
- Illinois
- New York
- Rhode Island
- Vermont



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# FAIR PAY LAWS:???

- Alabama
- Arizona
- Hawaii
- Idaho
- Indiana
- Missouri
- Mississippi
- Nebraska
- Rhode Island
- South Carolina
- Tennessee
- Texas
- Virginia



# TOO MUCH TO DO!

Jamilla, Chief Employment Law Counsel for a national U.S. company, has a million tasks to complete. Her "priority list" has priority lists.

She has been hearing about all of these pay equity statutes going into effect around the country. Sounds interesting - she wants to find time to read about them. (In the back of her mind, she knows she is underpaid, too. But, let's not digress.)

Camilla receives a call from an internal business partner. The BP gives her a "heads up" that a female senior manager has been "whining about" unequal pay for about 4 months. They listened to her, but there is nothing they can do. Now, the female senior manager has complained to HR and says there are a lot of women feeling the same way. It seems like an EEOC charge will be filed soon.

After thinking, "OH, SHIGGITY!!!", what should the company do next?

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# RECOMMENDATIONS FOR COMPLIANCE

Internal complaint procedure

Review internal documents

Update policies

Train managers and decision-makers

Consider an audit



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# WHAT AN AUDIT WILL TELL YOU

- And what you can do about it



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# **DISTINCTIONS BETWEEN THE EQUAL PAY ACT AND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964**



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# EQUAL PAY ACT VS. TITLE VII OF THE CIVIL RIGHTS ACT

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A claim for sex-based wage discrimination can potentially be brought under either the Equal Pay Act ("EPA") or Title VII of the Civil Rights Act of 1964 ("Title VII"). There are some similarities and some important differences, between a claim under the EPA and a Title VII action for sex-based wage discrimination.

The EPA is a statute that prohibits an employer from paying women less than men for jobs that require substantially equal work. The act was created to prohibit wage discrimination against women.

# EQUAL PAY ACT VS. TITLE VII OF THE CIVIL RIGHTS ACT - SIMILARITIES

**The affirmative defenses set for the EPA**

- 1. A seniority system**
- 2. A merit system**
- 3. A system which measures earnings by quantity or quality of production; or**
- 4. A differential based on any other factor other than sex—are applicable to Title VII actions for sex-based wage discrimination. See the Bennett Amendment to Title VII and *County of Washington v. Gunther*, 426 U.S. 161 (1981).**

**Title VII makes it illegal to discriminate based on sex in pay and benefits.**

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# EPA VS. TITLE VII - SIMILARITIES

Per the EPA and Title VII a plaintiff can potentially recover the following kinds of pay:

1. Salary
2. Bonuses
3. Overtime pay
4. Benefits (vacation and holiday pay, travel expenses, etc. )
5. Stock Options
6. Signing bonus (possibly)

# EPA VS. TITLE VII - DIFFERENCES

1

The EPA does not require proof of intent to discriminate. See *EEOC v. Delaware Dept. of Health and Social Services*, 865 F.2d 1408 (3d Cir. 1989).

2

Title VII disparate treatment claims require proof of an intent to discriminate.

3

Title VII does not require the plaintiff to prove the EPA statutory requirement of “equal work and “similar working conditions”. See *Gunther, supra*.

# EPA VS TITLE VII - DIFFERENCES

4

1. Title VII's burden shifting schemes differ from the burdens of proof applicable to an action under the EPA. (the *McDonnell Douglas* three-step burden shifting does not apply; rather, a two-step burden-shifting paradigm applies). The plaintiff must first establish a prima facie case by demonstrating that employees of the opposite sex were paid differently for performing "equal work"—work of substantially equal skill, effort and responsibility, under similar working conditions. *E.E.O.C. v. Delaware Dept. of Health and Social Services*, 865 F. 2d 1408, 1412-14 (3<sup>rd</sup> Cir. 1989). The burden of persuasion shifts to the employer to demonstrate the applicability of one of the four affirmative defenses set forth in the EPA. The employer bears the burden of proof at trial on this issue.

# EPA VS. TITLE VII - DIFFERENCES

5

1. In an EPA claim, the employer will have the burden of proof (not just production like a Title VII claim) to establish its EPA defense (seniority system, merit system, production quota system or any other factor other than sex). 29. U.S.C. § 206(d)(1). The employer is required to submit evidence from which a reasonable factfinder could conclude not merely that the employer's proffered reasons could explain wage disparity, but that the proffered reasons do in fact explain the wage disparity. See also *Delaware Dept. of Health*, 865 F. 2d at 1415 (stating that "the correct inquiry was whether, viewing the evidence most favorably to the [plaintiff], a jury could only conclude that the pay discrepancy resulted from one of the affirmative defenses. (emphasis added)).

# EPA VS. TITLE VII - DIFFERENCES

6

1. The EPA exempts certain specific industries from its coverage, including some fishing and agricultural businesses. See 29 U.S.C. §213. These industries are not exempt from Title VII.

7

The EPA has no employee coverage threshold like Title VII.  
(15 employees)

# EPA VS. TITLE VII - DIFFERENCES

9

1. The EPA unlike Title VII has no requirement of filing administrative complaints and awaiting administrative conciliation efforts.



10

**A plaintiff in an EPA action can recover liquidated damages if proof of a willful violation is established.**

# EPA VS. TITLE VII - FOOTNOTES

1. [http://www.ca3.uscourts.gov/sites/ca3/files/11\\_Chap\\_11\\_2014\\_spring.pdf](http://www.ca3.uscourts.gov/sites/ca3/files/11_Chap_11_2014_spring.pdf)
2. Under Title VII, the statute of limitations for a pay claim begins to run upon the occurrence of an "unlawful employment practice", which pursuant to the 2009 amendments to 42 U.S.C. section 2000e-5(e), can include "when a discriminatory compensation decision or other practices, or when an individual is affected by application of a discriminatory compensation decision or other practice, including wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice. *Id.* section 2000e-5(e)(3)(A).
3. The Lilly Ledbetter Fair Pay Act of 2009 extends the statute of limitations for discriminatory compensation claims by clarifying "that discriminatory compensation decision...occurs each time compensation is paid pursuant to the [discriminatory decision]." Pub. L. No. 111-2, S. 181 (2009).

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# GENDER IDENTITY DISCRIMINATION IN THE WORKPLACE



**CHRISTIAN ELLOIE WEST**

DELOITTE

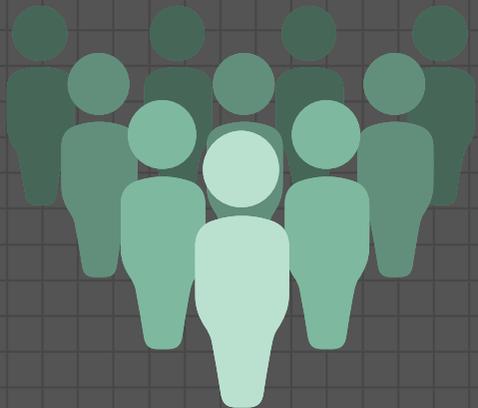
ASSISTANT GENERAL COUNSEL

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# TERMS DEFINED

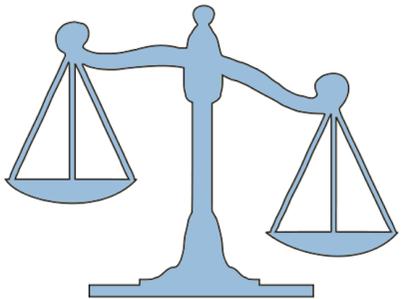
- **Gender identity** is a person's innate, internal sense of his or her gender.
- **Gender expression** is the way in which a person presents his or her gender to the outside world.
- **Transgender** is an umbrella term used to refer to a person whose gender identity presentation falls outside of stereotypical gender norms and may seek to change his or her physical characteristics through hormones, gender reassignment surgery or other actions. But not all transgender people can or will take those steps, and a transgender identity is not dependent upon physical appearances or medial procedures.





# PROTECTION UNDER THE LAW

- Currently there are federal laws that specifically prohibit discrimination based on race, color, sex, religion, national origin, age, and disability, but there is *no* federal law that universally and *explicitly* prohibits private sector discrimination based on *gender identity*
- 2014 President Obama Executive Orders; OFCCP can investigate complaints of discrimination based on sexual orientation or gender identity
- Oct. 2017 Attorney General Sessions Memo
- *However*, the *EEOC* has issued regulations stating that discrimination against a person based on sexual orientation, gender identity or transgender status *is* discrimination because of *sex* and therefore covered under Title VII of the Civil Rights Act.

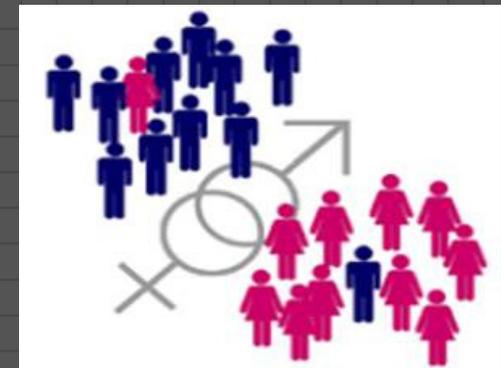


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# STATE ANTI-DISCRIMINATION LAWS

Twenty states, Guam, Puerto Rico and the District of Columbia include gender identity and/or gender expression in their employment non-discrimination statutes.

- California
- Colorado
- Connecticut
- Delaware
- Hawaii
- Illinois
- Iowa
- Maine
- Maryland
- Massachusetts
- Minnesota,
- Nevada
- New Jersey
- New Mexico
- New York
- Oregon
- Rhode Island
- Utah
- Vermont
- Washington



# WHAT CONDUCT IS CONSIDERED DISCRIMINATORY?

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- Sexual stereotyping
- Disparate treatment of an employee because that employee does not conform to the gender stereotypes associated with his or her biological sex
- Refusal to hire into a position requiring client interaction
- Restricting restroom usage
- Repeated failure to address an individual by his/her preferred name and pronoun
- Invasive inquiries about medical history or genitalia
- Refusing to investigate claims of harassment by coworkers and managers

# BEST POLICIES AND PRACTICES

1. Update anti-discrimination policies to include gender identity and expression and other defined terms
2. Update facilities signage to gender neutral
3. Revise employment applications and personnel records to include more than binary gender selections
4. Training on what constitutes discrimination and harassment, not just civility inclusion
5. Monitor accommodation requests and process or dialogue
6. Determine if insurance providers equally cover transition -related medical needs and leaves
7. Develop gender transition guidelines or plan: protocols for gender transitions that delineate responsibilities and expirations of transitioning employees, their supervisors, colleagues and other staff; flexible enough to tailor to specific needs of a transitioning employee, while specific enough to provide a consistent frameworks.

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# PAID FAMILY LEAVE



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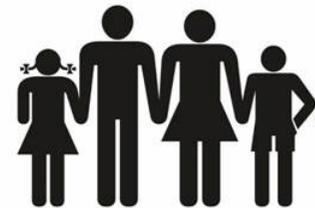
**K&L GATES**

**PARTNER**

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# PAID FAMILY LEAVE IS EXPANDING

- California, New York, New Jersey and Rhode Island already have laws in effect
- Washington and Washington D.C. have passed laws that will go into effect in 2020



# NEW IN 2018

## New York

- Entitles eligible employees to up to 12 weeks of paid family leave annually
- Phased-in program starting in 2018 with increasing benefits through 2021
- 2018: up to 8 weeks of leave with pay set at 50% of the employee's average weekly wage, or up to 50% of the state's average weekly wage



# NEW IN 2018

## California

- New law expands the benefits for paid family leave
- Workers will receive 60-70% of their average wages depending on income
- Benefits are paid for a maximum of six weeks within a 12-month period
- Removes the 7-day waiting period for paid leave



# COMING SOON

## Washington

- Beginning 1/1/20, entitles eligible employees to 12 weeks of paid time off for the birth or adoption of a child, or for the serious condition of the employee or a family member
- Employers and employees pay into the system with limited exception
- Weekly benefits are based on a percentage of the employee's wages and the state's weekly average wage



# COMING SOON

## Washington, D.C.

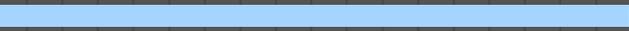
- Starting 7/1/20, applies to all private-sector employers with limited exception
- Expands coverage to new employees and part-time employees who were employed at some point in the prior year
- Paid Leave
  - 8 weeks within a 52-week period to new parents
  - 6 weeks for the care of a family member with a serious health condition
  - 2 weeks for an employee's own medical leave
- Allows intermittent days of paid leave



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# TIPS FOR EMPLOYERS

- Monitor developments in paid family leave laws
- Review and update employee handbooks
- Notify employees of policies, payroll deductions and resources
- Know the differences between the FMLA and state paid family leave laws
- Develop a plan for staffing while an employee is on leave



QUESTIONS?

# THANK YOU



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