



Complying with Rapidly Expanding Pay Transparency & Pay Equity Requirements

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Seyfarth Shaw LLP

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Agenda

- 1** Overview of Pay Transparency Concepts
- 2** Decision Point: When and To Whom to Make Disclosures
- 3** Decision Point: What to Disclose
- 4** State Aggregate Compensation Disclosure Requirements
- 5** Update on Pay Equity Landscape
- 6** Overview of Pay Equity Audit Process



1 | An Overview of Pay Transparency Laws

- Legislation regarding affirmative disclosure of compensation information is new.
 - Premise for pay transparency requirements is to enable employees to negotiate compensation from an informed position and potentially overcome tendencies of some protected categories of employees to avoid negotiating pay.
 - No federal law requires such disclosures.
 - Federal law does expressly permit employees to discuss compensation among themselves, but does not require the employer to provide any information.
 - State-level pay transparency laws are evolving very rapidly, with statutes becoming more stringent and onerous as additional states experiment.
 - Most pay transparency laws are so new that they have not been subject to any litigation or governmental enforcement activity, leaving many ambiguities and unanswered questions.



2 | State Pay Transparency Compliance – When & To Whom to Disclose Comp. Information

State Pay Scale Disclosure Laws

Upon Request (Applicant and/or Employee)

	Timing	What Must be Provided
California	Upon reasonable request, made after an applicant has completed an initial interview with the employer	“Pay scale,” which means a salary or hourly wage range
Maryland	Upon request	Wage range (undefined)
Ohio (Cincinnati & Toledo)	Upon reasonable request, after a conditional offer of employment	Pay scale (undefined)
Washington State	<p><u>Applicants</u>: Upon request after initial offer*</p> <p><u>Employees</u>: Upon request after offer of internal transfer to a new position or promotion</p>	<p><u>Applicants</u>: Minimum wage or salary for the position for which the applicant is applying</p> <p><u>Employees</u>: Wage scale or salary range for employee’s new position</p> <p>If no wage scale or salary range exists, provide the minimum wage or salary expectation set prior to posting the position, making a position transfer or making a promotion</p>

*Effective January 1, 2023, Washington state will require disclosure of wage scale or salary range in each job posting

State Pay Scale Disclosure Laws

Automatic Disclosure Requirements (No Request Necessary)

	Timing	What Must be Provided
Connecticut	<p><u>Applicants:</u> Upon earliest of (1) applicant’s request; or (2) prior to or at the time of an offer of compensation</p> <p><u>Employees:</u> Upon (1) hire; (2) change in employee’s position; or (3) employee’s first request</p>	<p>Wage range, which means the range of wages the employer anticipates relying on when setting wages for a position and may include reference to: (1) any applicable pay scale; (2) previously determined range of wages for the position; (3) actual range of wages for those employees currently holding comparable positions; or (4) the employer’s budgeted amount for the position</p>
Nevada	<p><u>Applicants:</u> Upon completion of an interview for a position</p> <p><u>Employees:</u> For promotion or transfer to a new position if the employee has (1) applied for the promotion or transfer; (2) completed an interview for the promotion or transfer or been offered the promotion or transfer; and (3) requested the wage or salary range or rate for the promotion or transfer</p>	<p>Wage or salary range or rate</p>
Rhode Island	<p><u>Applicants:</u> Upon request. Employer should provide the wage range prior to discussing compensation.</p> <p><u>Employees:</u> Upon (1) hire; (2) when employee moves into a new position; or (3) employee's request</p>	<p>Wage range, which means:</p> <p><u>Applicants:</u> The wage range the employer anticipates relying on in setting wages for the position and may include reference to any applicable pay scale, previously determined range of wages for the position, the actual range of wages for those currently holding equivalent positions, or the budgeted amount for the position, as applicable.</p> <p><u>Employees:</u> May include reference to any applicable pay scale, previously determined range of wages for the position, or the range of wages for incumbents in equivalent positions, as applicable</p>

State Pay Scale Disclosure Laws

On Job Posting

	Timing	What Must be Provided
Colorado	<p>On job posting.</p> <p>Notice of a promotional opportunity must be made to all employees for whom it may be a promotion, on the same calendar day; and sufficiently in advance of the hiring or promotion decision that employees receiving notice may apply. There is an exception where an employer continuously -- at least once per month -- either (1) hires for a specific position that would qualify as a promotional opportunity for any current employees, or (2) automatically promotes employees in an in-line job progression upon completing set requirements (e.g., a certification or number of service hours). Such an employer may provide a single notice of such promotional opportunities, rather than a notice for each individual promotion.</p>	<p><u>Compensation Information Posting Requirement:</u> For roles that will be CO based, and for remote roles that could be performed in CO, employers must include: (1) the hourly rate or salary compensation (or a range thereof) that the employer is offering for the position; (2) a general description of any bonuses, commissions, or other forms of compensation that are being offered for the job; and (3) a general description of all employment benefits the employer is offering for the position.</p> <p><u>Promotional Opportunity Notice Requirement:</u> Employers must post or otherwise notify CO employees of all job vacancies, whether such vacancies exist in CO or elsewhere, and whether or not any CO employee is qualified for the job. The notice must be in writing and can be made by any method(s) reaching all employees. The definition of promotion is broad, and applies to any opportunity that could be a promotion for any employee within the organization (including potentially world-wide roles), and includes in-line, career progression promotions. There are some exceptions to this requirement for confidential searches, certain automatic promotions, and temporary, acting, or interim roles.</p>
Jersey City (NJ)	<p>On any print or digital media circulating within the City that provides notice of employment opportunities</p>	<p>Minimum and maximum salary and/or hourly wage, and benefits to said posting or advertisement in the City. In stating the minimum and maximum salary and/or hourly wage for a position, the range may extend from the lowest to the highest salary the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion, or transfer opportunity.</p>
NYC	<p>On advertisement for a job, promotion, or transfer opportunity</p>	<p>Minimum and maximum salary. In stating the minimum and maximum salary for a position, the range may extend from the lowest to the highest salary the employer in good faith believes at the time of the posting it would pay for the advertised job, promotion, or transfer opportunity.</p>

New York City: Proposed Amendment

	Current Law	Proposed Amendment
Effective Date	May 15, 2022	November 1, 2022
Size of Employer	4 or more employees	15 or more employees
Applies to Remote Work?	"Covered employers should follow the new law when advertising for positions that can or will be performed, in whole or in part, in New York City, whether from an office, in the field, or remotely from the employee's home."	Only if position is required to be performed, at least in part, in the city of New York

Pending Legislation

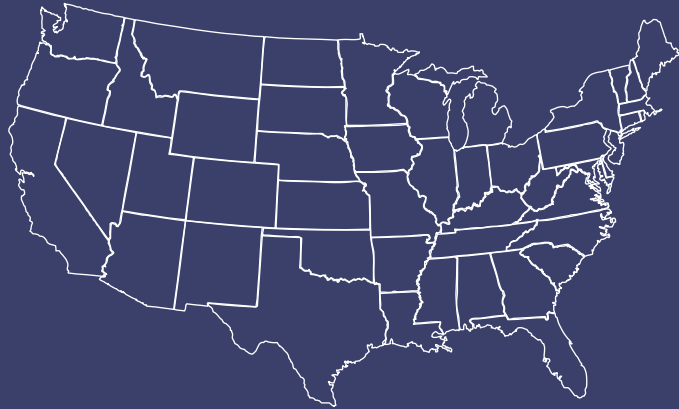
	TO WHOM?	TIMING	WHAT MUST BE PROVIDED
Indiana	Applicants + Employees	<p>Applicant: Upon the earliest of: (1) at the applicant's request; (2) prior to or at the time the employer inquires about the applicant's wage expectations; (3) prior to or at the time the employer provides the applicant with an offer of compensation.</p> <p>Employee: Must provide: (1) at the time of hiring; (2) annually after the date of hire; and (3) upon the employee's request.</p>	<p>"Wage range," which means the wage range on which the employer anticipates relying in setting wages for a position, and may include reference to: (1) any applicable pay scale; (2) a previously determined range of wages for the position; (3) the actual range of wages for those currently holding comparable positions; or (4) the budgeted amount of the position, as applicable.</p> <p>For purposes of providing wage range information to applicants, the wage range may include reference to: (1) any applicable pay scale; (2) a previously determined range of wages for the position; or (3) the range of wages for incumbents in equivalent positions, as applicable.</p>
Massachusetts	Applicants + Employees	<p>Applicant: Upon reasonable request, made upon an invitation to be interviewed or anytime thereafter during the hiring process.</p> <p>Employee: Upon reasonable request, regarding employee's current position.</p>	"Pay scale," which means a salary or hourly wage range for such position.
Missouri	Applicants + Employees	<p>Applicant: Upon the earliest of the prospective employee's request or prior to or at the time an offer of compensation is made.</p> <p>Employee: To an employee who has applied for a promotion or transfer to a new position if an employee has: (1) Completed an interview for the promotion or transfer or been offered the promotion or transfer; and (2) Requested the wage or salary range or rate for the promotion or transfer.</p>	Wage range (undefined)

Pending Legislation

	TO WHOM?	TIMING	WHAT MUST BE PROVIDED
New York State	Applicants + Employees	<p>Applicant/Employee: Upon issuing an employment opportunity for internal or public viewing.</p> <p>Employee: Provide compensation range at current employee's request. Provide job description, if such description exists, at the time of hire and upon the employee's request, but no more frequently than once per year.</p>	<p><u>Employment Opportunity</u>: Must disclose: (1) the compensation or a range of compensation for such employment opportunity; (2) the job description for the position, if such description exists; and (3) a general description of all benefits and other forms of compensation to be offered.</p> <p><u>Current Employees</u>: Must provide: (1) the range of compensation in place at the time of such employee's request; (2) the job description, if such description exists, for the employee's current position.</p>
Pennsylvania	Applicants + Employees	<p>Applicant/Employee (candidate for internal transfer or promotion): Must provide, but does not specify when.</p> <p>Employee: Upon hire and annually thereafter</p>	<p><u>Applicant/Employee (candidate for internal transfer or promotion)</u>: Pay range and the factors the employer considers in setting pay ranges. If no pay range exists, provide the minimum wage or salary set by the employer before the employer posted the position or offered an internal transfer or promotion.</p> <p><u>Current Employees</u>: Upon hire, and annually thereafter, provide, in writing, the pay range for the employee's job title and for jobs within the employer's business that are substantially similar with respect to the skill, effort and responsibility required to perform the jobs and the conditions under which the jobs are performed.</p>
Vermont	Applicants + Employees	Not specified.	Pay scale for a specific position or job title.
Virginia	Applicant	Prior to discussing compensation and at any time upon the prospective employee's request.	Wage or salary range for the position for which the prospective employee is applying.

Recap:

When to Make Pay Transparency Disclosures



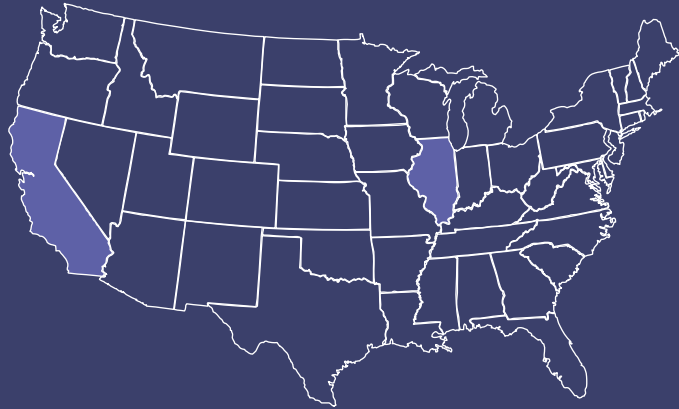
- Colorado / New York City: Must be Made in Job Posting
- States Triggered by Hiring-Related Event (CT, RI (employees), NV (applicants))
 - Issue upon state-specific trigger
 - OR
 - Least common denominator approach (invite for interview)
- States Triggered by Application/Employee Request (CA, MD, OH, WA)



3 | State Pay Transparency Compliance – What Information to Disclose?

- Most existing statutes include only very limited descriptions of the material to be disclosed in a pay transparency disclosure (but that may change as legislation continues to develop).
- Natural options for disclosures of a compensation range include:
 - A salary band or grade applicable to a position (with bonus/incentive comp info for CO employees).
 - A range of lowest to highest compensation for incumbents in a given position.
 - A budgeted amount of compensation for a given position.
- Currently, none of the applicable statutes seem to require great precision in the wage range information to be disclosed, so we need not treat disclosed ranges as a hard minimum or maximum for a given job.

4 | Aggregate Compensation Disclosure Requirements



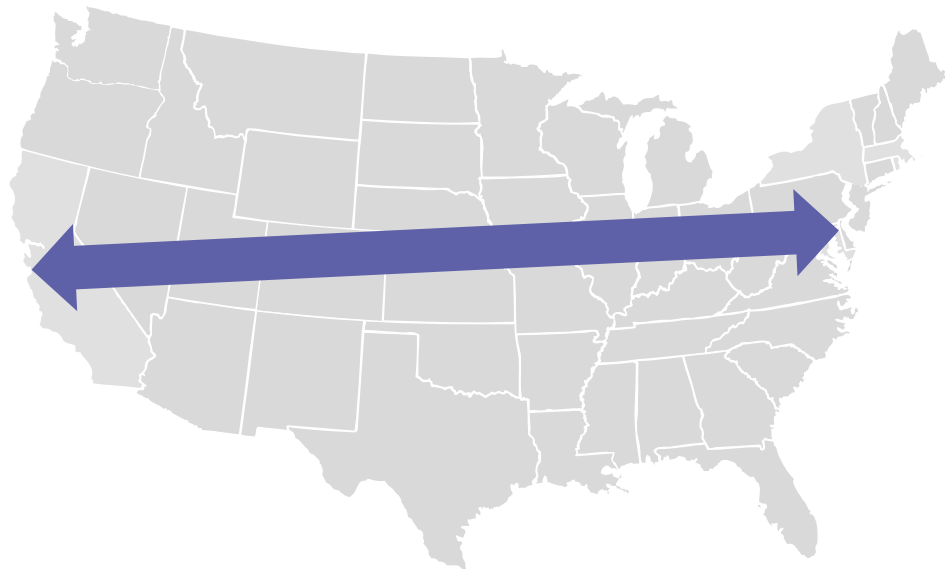
- **California:** Employers with 100 or more employees nationwide, and at least one employee in CA, must report pay and hours-worked data by establishment, job category, sex, race, and ethnicity to the Department of Fair Employment and Housing by March 31 each year.
- **Illinois:** Employers with more than 100 Illinois employees will be required to apply for an Equal Pay Registration Certificate by submitting a compliance statement and pay data report to the Illinois Department of Labor. The report must include data concerning the pay, gender and race/ethnicity categories as reported in the employer's most recently filed EEO-1 report. In addition, employers will be required to submit employee-level compensation data. Employers will be required to recertify their every two years.



5 | Update on Pay Equity Landscape

The Rising Tide of State Equal Pay Laws

- There has been a wave of changes amending the state law equivalents of the Equal Pay Act.
- In 2015 – 2016, the first wave of laws were passed in California, New York, and Massachusetts
- Since then, other states have followed suit . . .



Some of these laws include

- **Colorado** Equal Pay Act
- **Illinois** Equal Pay Act
- **Maryland** Equal Pay for Equal Work Act
- **Massachusetts** Equal Pay Act
- **New Jersey's** Diana B. Allen Equal Pay Act
- **New York** Labor Law §§ 194
- **Oregon** Equal Pay Act
- **Washington** Equal Pay Opportunity Act

Comparing Federal and State Equal Pay Laws

Equal Pay Act

vs.

State Law Equivalents

- Protected Category: Sex
- Compares pay of workers whose jobs require **equal** skill, effort, and responsibility, and are performed under similar working conditions
- Comparators must be in same establishment
- Pay differences can be explained by “any other factor other than sex”
- Affirmative defenses: No business necessity requirement

- Expanded protected categories (e.g., race, age, caregiver status, and other categories)
- Compares employees whose jobs require **similar** skill/effort/responsibility or **comparable** work
- Comparators need not be in same establishment in many jurisdictions
- Pay differences can be explained only by certain limited factors
- Affirmative defenses: may have a business necessity requirement

Who Is Protected Under Equal Pay Laws (Examples)

Sex and Gender Only

vs.

Broader Protected Statuses

- Federal Equal Pay Act
- Colorado
- Massachusetts
- Washington

- California
Gender, race, and ethnicity
- Maryland
Sex and gender identity
- 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 or breastfeeding, sex, gender identity or expression, and disability.
- Oregon
Race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age.

Comparison of Work Under Equal Pay Laws (Examples)

Equal Work

vs.

Broader Comparison Groups

- **Federal Equal Pay Act**
Equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions
- **New York**
Jobs that require equal skill, effort and responsibility, and are performed under similar working conditions

- **California**
Substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions
- **Maryland**
Work of comparable character or work in the same operation, in the same business, or of the same type
- **Massachusetts**
Work that requires substantially similar skill, effort and responsibility and is performed under similar working conditions
- **New Jersey**
Substantially similar work, when viewed as a composite of skill, effort and responsibility.
- **Oregon**
“Work of comparable character” means work that requires substantially similar knowledge, skill, effort, responsibility and working conditions in the performance of work, regardless of job description or job title.
- **Washington**
The performance of the job requires comparable skill, effort, and responsibility, and the jobs are performed under similar working conditions.

Factors that May be Used to Explain Pay Differences (Example)

Broad List of Factors

vs.

Narrow List of Factors

- Federal Equal Pay Act
 - Permissible to justify wage differences based on:
 - a seniority system;
 - a merit system;
 - a system which measures earnings by quantity or quality of production; or
 - a differential based on ***any other factor other than sex***

- Massachusetts
 - Permissible to justify wage differences based on:
 - a system that rewards seniority with the employer provided, that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority;
 - a merit system;
 - a system which measures earnings by quantity or quality of production, sales, or revenue;
 - the geographic location in which a job is performed;
 - education, training or experience to the extent such factors are reasonably related to the particular job in question; **or**
 - travel, if the travel is a regular and necessary condition of the particular job.

The entire difference in pay must be based on one or more of these factors. MEPA does not recognize any other valid reasons for variations in pay between men and women performing comparable work.



Salary History Bans

- States and local municipalities have passed laws that prohibit employers from requesting information regarding an applicant's previous salary either directly from an applicant and/or the applicant's past employer.
- Some of these laws also prohibit a hiring entity from screening applicants based on their prior wages or utilizing this information to set pay for a new hire.
- The stated goal of these laws is to ensure employees are paid appropriately for the work they perform, and that their pay is not negatively impacted by sex discrimination.

Jurisdictions with Salary History Prohibitions

State Laws

- Alabama
- California
- Colorado
- Connecticut
- Delaware
- Hawaii
- Illinois
- Maine
- Massachusetts
- Nevada
- New Jersey
- New York
- Oregon
- Rhode Island (effective 1/1/23)
- Vermont
- Washington State

Territories

- Puerto Rico

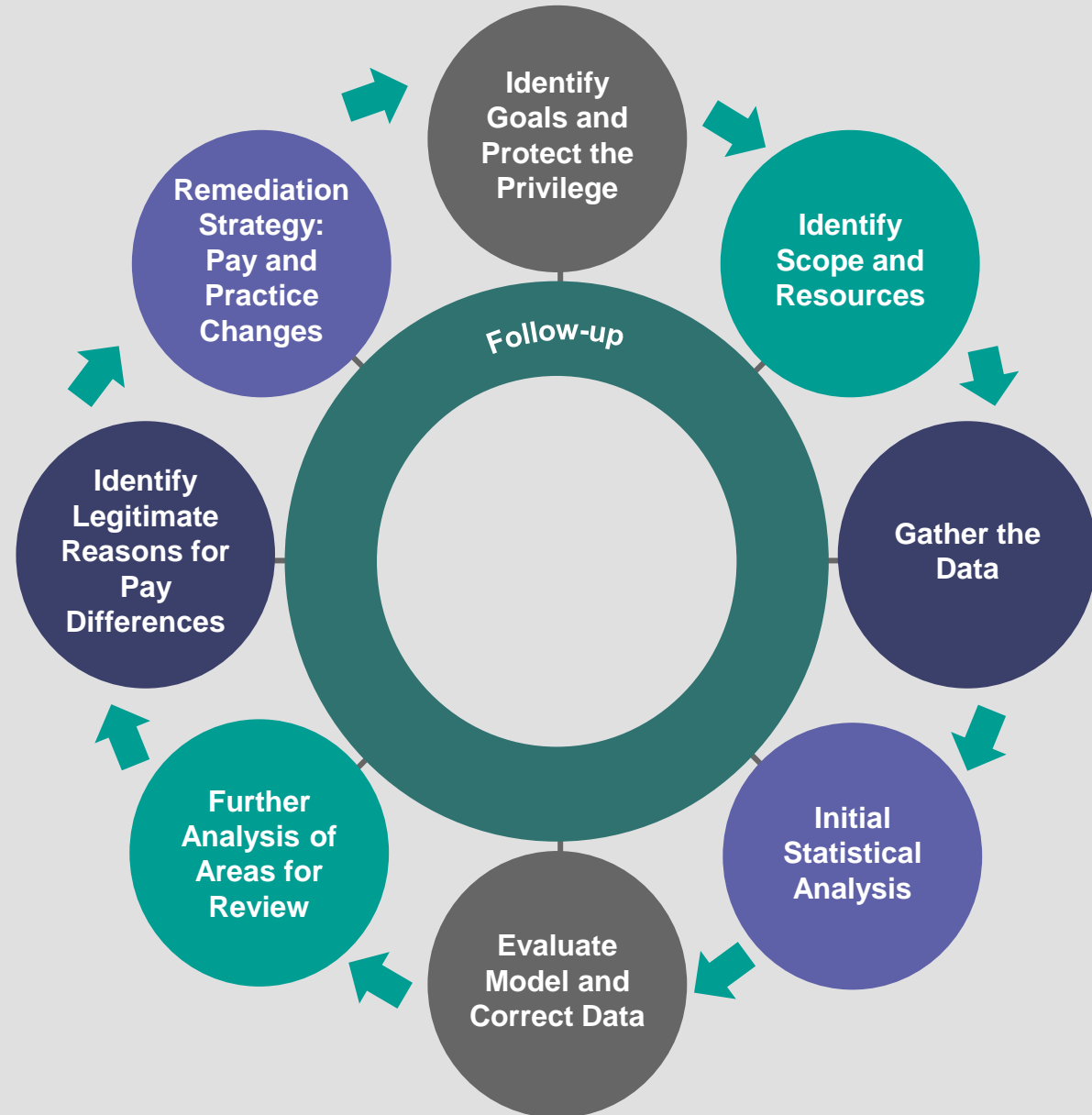
Cities and Counties

- San Francisco, CA
- Kansas City, MO
- New York City, NY
- Albany County, NY
- Suffolk County, NY
- Westchester County, NY
- Cincinnati, OH
- Toledo, OH
- Philadelphia, PA



6 - Overview of Pay Equity Audit Process

Life Cycle of a Pay Equity Audit





Multiple Regression Analyses

- A regression analysis measures the relationship between compensation and the factors believed to affect compensation
 - Simultaneously adjusts for multiple factors impacting salary
- A regression analysis provides an aggregate statistic of group-wide pay differences.
 - It does not mean that discrimination is driving the identified pay differences
 - The lack of a statistically significant group finding also does not mean that all individual pay differences are captured



Explanation of Unadjusted v. Adjusted Pay Gap Analyses

- There has been an increase in media attention on the gender “pay gap” as well as activist shareholder initiatives focused on equal pay, which has driven voluntary release of equal pay statistics by some companies
- When the term “pay gap” is used, what is typically being described is an “unadjusted” pay gap analysis.
 - I.e., “Women earn .80 for every \$1.00 earned by a man.
 - This compares the difference in average salary between men and women regardless of key drivers of pay such as the type of job performed, experience, education or certifications.
- By contrast, an adjusted pay gap “controls” for each characteristic or variable that has an impact on pay and then determines the “pay gap” between the two groups being compared

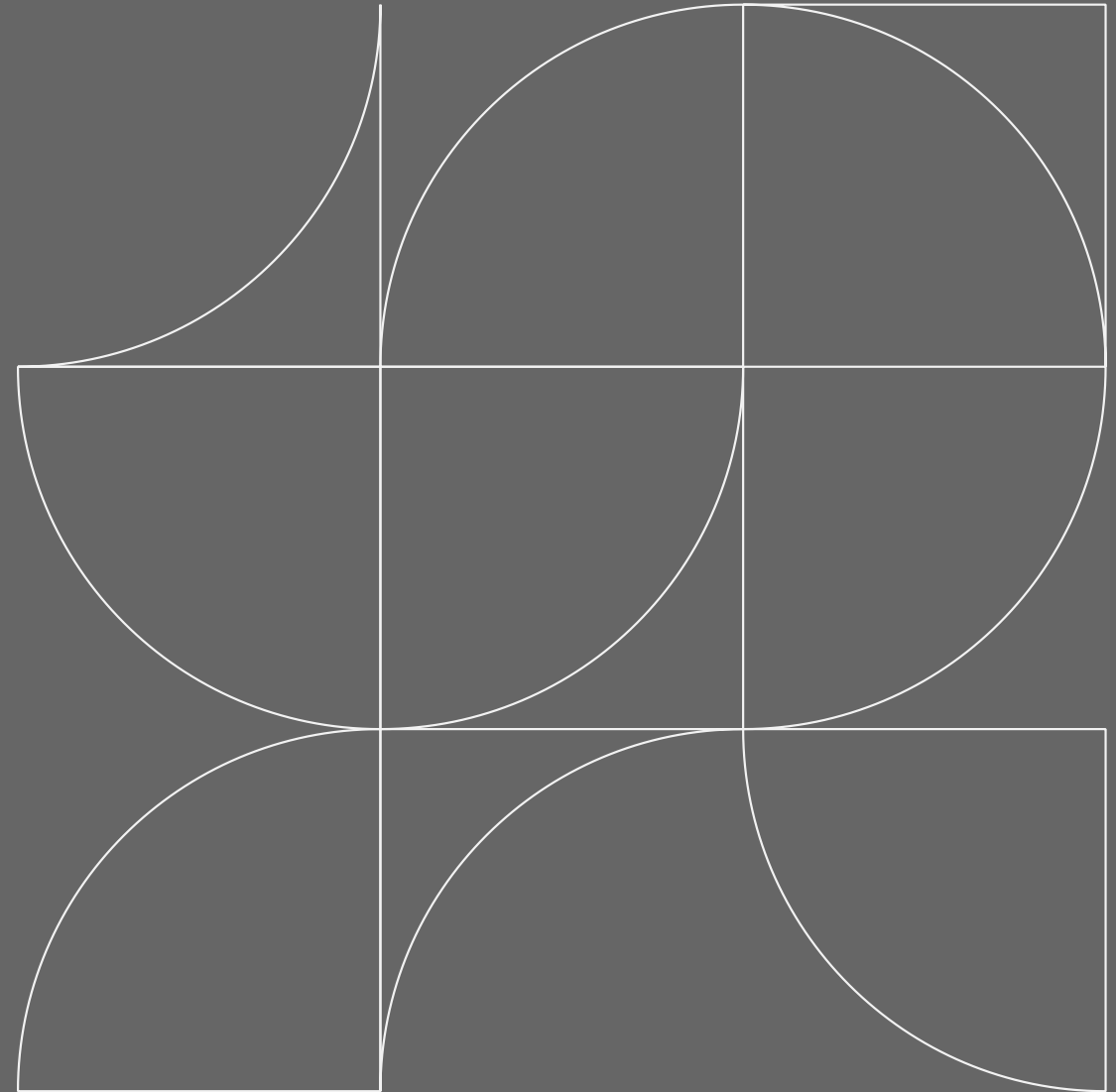


Investigation and Review Process

Focus on the outliers in statistically significant groups:

1. Confirm the data for accuracy
2. Evaluate if there are other compensation-impacting factors not captured by the current model (e.g. employee part of acquisition)
3. Work with **HRBPs** to identify the **legitimate, non-discriminatory reasons** for pay differences in outliers
 - a. Special Skills or Experience
 - b. Premium Paid for a Highly Experienced Hire
 - c. Red-Circling During Transfer or Demotion Into a Different Role
 - d. Acquisition of a Business with a Different Pay Structure
 - e. Performance
4. Follow the steps outlined in the review process documents in order to maintain **attorney-client privilege**
5. Evaluate whether any adjustments need to be considered

Questions?



**thank
you**

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