

# Here and Abroad: Global Pay Equity, #METOO and Employee Relations for Government Contractors

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# Federal Pay Protection for Over a Half a Century!

- Title VII (1964): EEOC provides that "[a]ll forms of pay are covered [...], including salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits"
- Equal Pay Act of 1963 prohibits
  - Sex-based differentials in wages
  - Within the same "establishment"
  - For "equal work" (i.e., jobs that require substantially equal skill, effort and responsibility under similar working conditions)
  - No proof of intent is required
- Affirmative Defenses: seniority, merit, quantity or quality of production, or any factor other than sex



# Federal Pay Protection



- Federal contractors
  - June 2006: OFCCP issued guidelines regarding self-evaluation with respect to systemic compensation discrimination (EO 11246)
  - Feb. 2013: OFCCP Directive 307 provides additional details such as
    - Will continue to investigate compensation discrimination by federal contractors
    - Will use Title VII's case-by-case approach to investigate and prosecute federal contractors
    - Lists various investigation techniques (e.g., comparisons of individual pay differences, statistical analyses of class compensation disparities, and interviews of employees, to "tailor the compensation investigation" to the facts of the particular case)
- Private employers
  - Proposed amendment to the Employer Information Report (EEO-1)
    - Summary pay data from private employers (and including federal contractors and subcontractors) with 100 or more employees
    - Contains data on job category as well as by sex, ethnicity, and race
  - Created under Obama Administration but cancelled by Trump Administration in August 2017

A sample of the EEO-1 Employer Information Report form. The form is titled "EQUAL EMPLOYMENT OPPORTUNITY EMPLOYER INFORMATION REPORT EEO-1". It includes sections for "General Information", "Section A - TYPE OF REPORT", and "Section B - COMPANY IDENTIFICATION". The form is designed to be filled out by employers to provide information about their workforce.

# FAR Contract Clauses



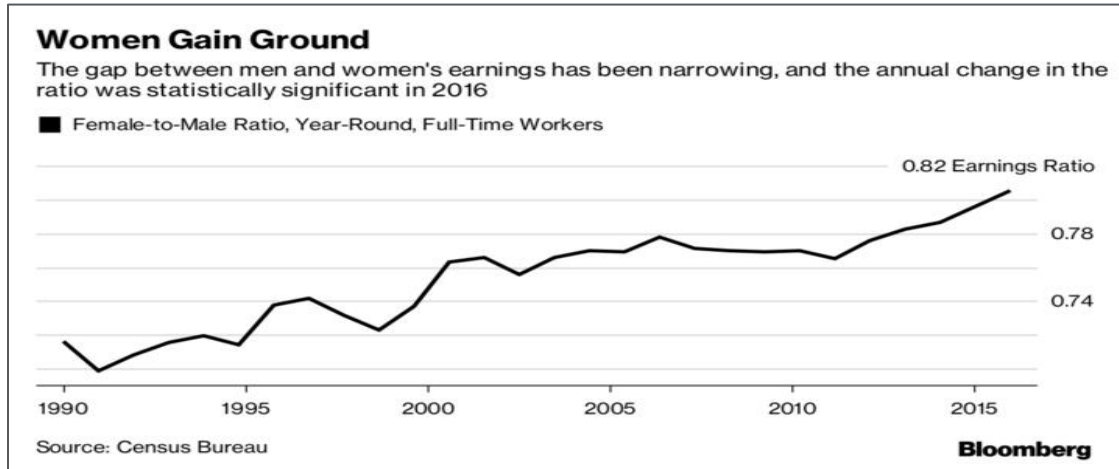
- FAR 52.222-26: requires affirmative action to ensure pay equality and prohibits termination based on inquiries regarding compensation
- DFARS 252.222-7002: requires compliance overseas with local labor laws, collective bargaining agreements, etc.
- Proposed "Blacklisting Rule" (FAR 52.222-59, -60) was repealed, which would have required
  - Disclosure of new labor law decisions and/or updates to previously disclosed labor law decisions in SAM, including those related to Title VII
  - Employer reports to employees on hours, rate of pay, gross pay, paycheck deduction, etc.

# EPA and Prior Salary

- *Rizo v. Yovino*, 887 F.3d 453 (9th Cir. Apr. 9, 2018) (en banc)
  - Background
    - Plaintiff paid less than male coworkers
    - Starting pay based on a pay scale that expressly took into account prior salary
  - Parties' positions
    - Plaintiff sued for violation of Equal Pay Act (Federal)
    - Respondent argued that EPA catch-all phrase (based on any factor other than sex) included prior wages
  - 9th Cir. decision
    - Court of Appeal: held that prior salary to calculate current wages can be permissible under EPA
    - En banc: reversed, and held that EPA catch-all is limited to "job-related factors;" prior salary not such a factor
    - Left door open to use past salary for individualized "salary negotiations"

# Average Women's Income vs. Average Men's

- According to the Census Bureau, women now make 80.5¢ for every \$1 earned by their male counterparts
- Up from 79.6¢ in 2016
- Part of the gain has come as men lose grounds (men saw a 1.1% decline over the same period)



# Pay Gap by Gender and Race

- All Professions

	White	Black	Asian	Hispanics
Male	100%	71.4%	112.9%	64.4%
Female	79.0%	62.5%	86.8%	54.4%

Source: The Institute for Women's Policy Research (Sept, 2017)

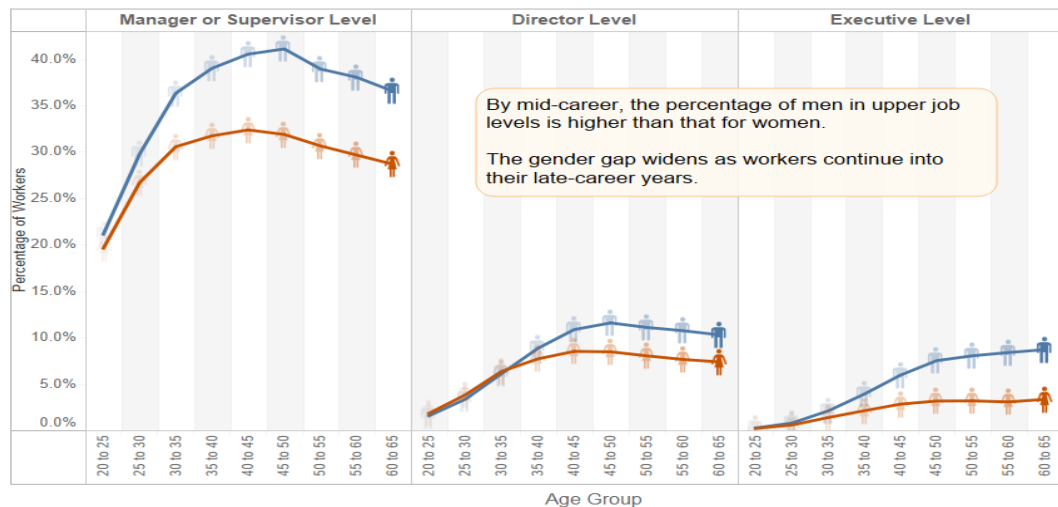
- At current pace of gap closures:
  - Black women will reach parity in 2124 (only 106 years from now)
  - Hispanic women will reach parity in 2248 (only 230 years from now)

Source: IWPR's status of Women in the States (2018)



# The Opportunity Gap

- At the start of their careers, men and women tend to work at similar job level
- Over the course of their career, both genders move into manager or supervisor-level roles
- Men are 85% more likely than women to be VPs or C-Suite Execs by mid-career
- Men are 171% more likely to hold those positions late in their career





# Pay Inequity = Power Imbalance = Harassment

- Pay equity legislation at state, city and national levels
- Bills afoot to preclude arbitration and confidentiality in settlement of sexual harassment (and discrimination) claims



# Pay Equity Developments

- At least 9 U.S. states (California, Delaware, Massachusetts, Oregon, New York, Maryland, New Jersey, Michigan, Wisconsin), plus Puerto Rico
- 5 U.S. localities, 4 cities (New York City, San Francisco, Philadelphia and New Orleans) and the county of Albany, NY
- 14 Countries: 12 European countries (Austria, Belgium, France, Germany, Italy, Portugal, the UK, Denmark, Finland, Iceland, Norway, Portugal) plus Canada and Australia
- All have enacted Pay Equity (Beyond Pay Equality) laws
- The backlash: "ban the ban"
- Note that two U.S. states, Michigan and Wisconsin, recently adopted laws preventing localities from adopting laws banning salary history inquiries



## Common Elements

- Prohibits gender pay differentials
- Comprehensive definition of compensation
- Allows for differentials due to factors such as seniority, merit, quality, quality, education, skill, experience, shift, training, location (to some degree)
- Prohibits employers from preventing employees from discussing or disclosing wages or other working conditions

# Key Differences



- Beyond gender
  - CA: sex, race and ethnicity
  - OR: race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, or age
- Salary inquiry forbidden
  - California
  - Philadelphia
  - New Orleans
- Salary inquiry permitted after offer
  - Delaware
  - Massachusetts
  - Oregon
  - Puerto Rico

## Key Differences (cont.)

- Affirmative defense or mitigation based on self-assessment
  - MA: if within 3 years prior to the commencement of the action the employer has conducted "self-evaluation" and "can demonstrate that reasonable progress has been made towards eliminating compensation differentials based on gender "
  - OR: if the employer "demonstrates . . . that [it] [c]ompleted, within three years . . . , an equal-pay analysis of the employer's pay practices in good faith . . . , [e]liminated the wage differentials for the plaintiff and has made reasonable and substantial progress toward eliminating wage differentials for the protected class asserted by the plaintiff"
  - PR: back pay penalty may be waived if good faith mitigation has occurred since self-evaluation
- Express prohibition to lower salary of others to comply: DE, MA, OR
  - Applicant's right to obtain pay scale: CA upon request

# Key Questions

- How do you treat years of seniority?
  - In same field
  - Other years of service
  - Prior employment
- Total compensation
  - Base pay
  - Performance bonuses
  - Overtime opportunities
  - Equity
  - Sign on bonus
  - Relocation bonus
- Performance evaluations (tainted by unconscious bias?)



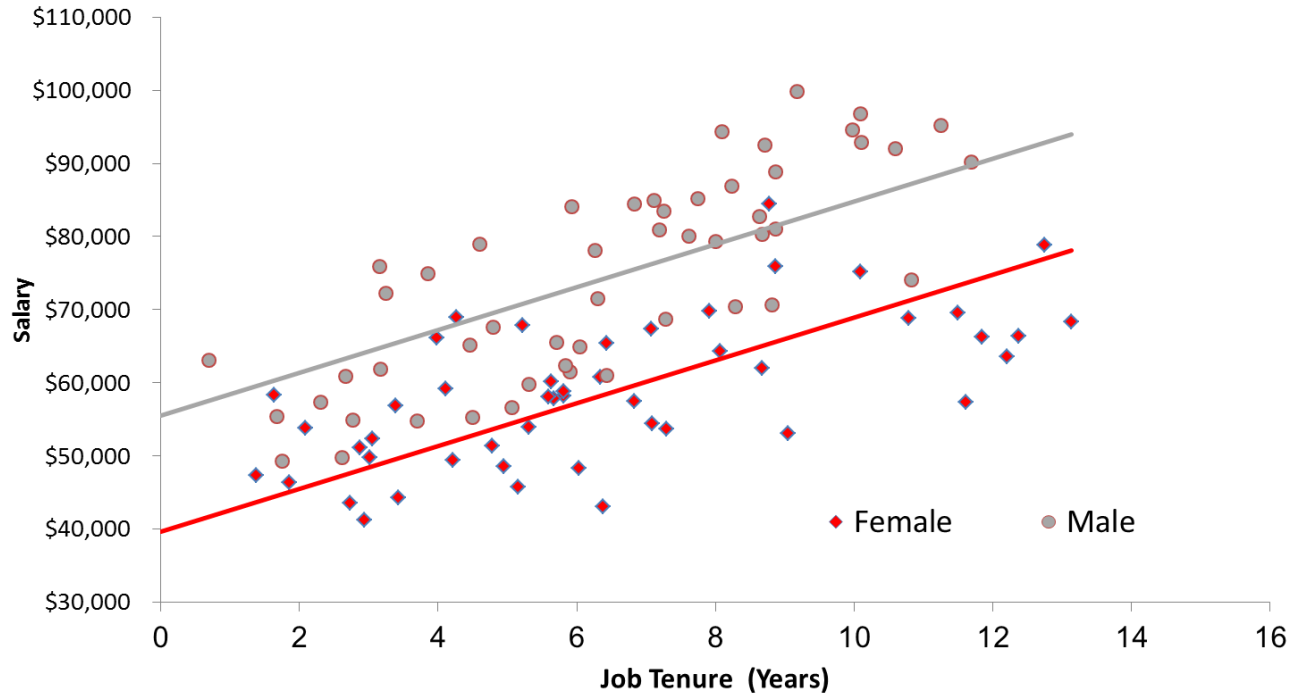
# Fixing the Problem

- Internal attorney-client privileged audits may need to be waived for affirmative defense or mitigation
- Base pay increases: prohibited decreased adjustments under some laws
- Other "wage" adjustments
- Identifying mislabeled individuals to align with actual functions
- Review of initial and subsequent comp (e.g., base, bonus & equity grants) and performance evaluation
- Unconscious bias training
- Does asking for "salary expectations" perpetuate discrimination?
- Separating compensation from hiring decisions?



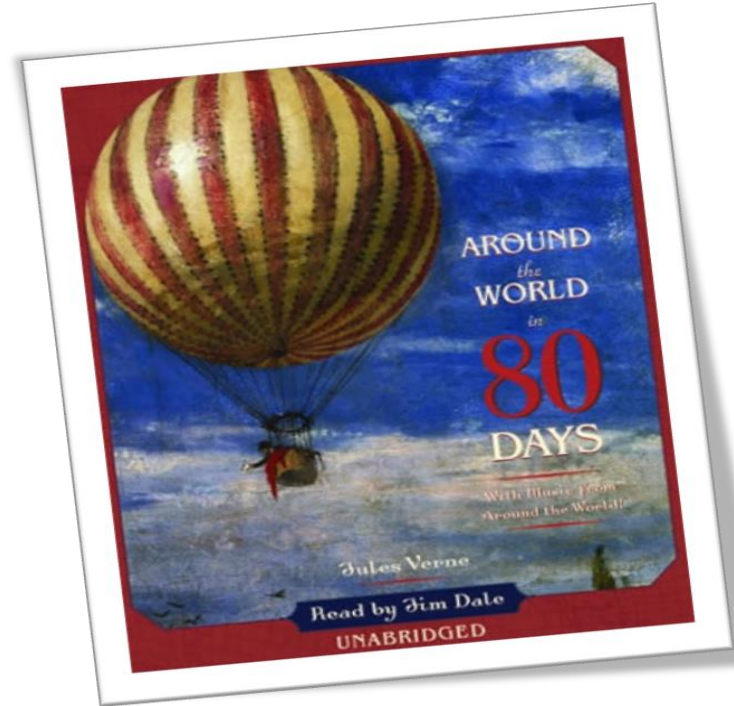


# Regression: Gender Salary Gap



## Other Countries with Pay Equity Laws

- Austria
- Belgium
- Denmark
- Finland
- France
- Germany
- Iceland
- Italy
- Norway
- Portugal
- Sweden
- U.K.
- Australia
- Canada



# Approaches

## U.S. Approach

- Forbidding rules which restrict employees rights to discuss wages and terms and conditions of employment
- Prohibiting or restricting prior salary inquiries
- Litigation and fines

## Non- U.S. Approach

- "Name and Shame"
- Website disclosures of mean and median gender gaps (hourly, bonus, comprehensive pay quartiles)
- Periodic pay surveys with pay action plans
- Government reporting

# U.K. Equality Act of 2010 (amended 2017)

- Employers with 250+ U.K. employees must publish by Apr. 4, 2018, and each year thereafter, on the employer's and a government website
  - Mean/median gender pay gap in hourly pay
  - Mean/median bonus gender pay gap
  - Percentage of males and females receiving a bonus payment
  - Percentage of males and females in pay quartile
  - Pay means (non-exhaustive definition) basic pay, paid leave, area allowances, shift premium pay, bonus pay and other pay (including other types of allowances)
  - Bonus means payments received and earned in relation to profit sharing, productivity, performance and other bonus or incentive pay, piecework and commission, long term incentive plans or schemes
  - Pay and bonus must be measured on Apr. 5 of the previous year



## Other European Countries

- Differences in average gross hourly wage between men and women across the economy; the average in the EU is 16.7%



Country	Gender Pay Gap 2016
Italy	6.1%
Sweden	13.8%
Portugal	14.9%
France	15.5%
Denmark	16%
Finland	18.4%
UK	20.9%
Austria	22.2%

## Other Countries



- Austria: compulsory requirement for companies to publish detailed equal pay reports for companies with more than 150 employees
- Scandinavia: in Sweden, employers must carry out a pay survey every three years in order to detect, remedy, and prevent unjustified differences between women's and men's pay, terms and conditions of employment, and draw up an equal pay action plan (if employing 25 or more workers)
- France: compulsory collective bargaining on gender equality and requires companies to report on salaries and plans to close the gender pay gap
- Australia: must submit a report to government between Apr. 1 and May 31 each year for the preceding 12 months (if employing 100 or more workers)

# #METOO

- Used by 4.7M+ people in 12M posts during the first 24 hours
- 45% of FB users in the United States has a friend who posted using #metoo
- Trended in at least 85 countries, including India, Pakistan, Iran, and the U.K.
- Variants of the phrase trended in France, the Philippines, Italy, Spain, Israel, etc.





# Recent Headlines: Celebrities & Hollywood

***Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades***

The New York Times - Oct. 5, 2017

**Ben Affleck apologizes for groping  
Hilarie Burton on camera**

CNN - Oct. 11, 2017

**Netflix severing ties with Kevin Spacey amid  
sexual assault allegations**

Fox News - Nov. 3, 2017

**5 Women Accuse Louis C.K. Of Sexual  
Misconduct**

Huffington Post - Nov. 10, 2017

# Recent Headlines: The Media

**NPR's top editor placed on leave after accusations of sexual harassment**

The Washington Post - Oct. 31, 2017

**Eight women say Charlie Rose sexually harassed them — with nudity, groping and lewd calls**

The Washington Post - Nov. 20, 2017

**NBC News fires Matt Lauer after sexual misconduct review**

NBC News - Nov. 30, 2017

**PBS Host Tavis Smiley Suspended After Sexual Misconduct Investigation**

NPR - Dec. 13, 2017

# Recent Headlines: Politics

**Woman says Roy Moore initiated sexual encounter when she was 14, he was 32**

The Washington Post - Nov. 9, 2017

**Eight Women Have Accused George H.W. Bush of Groping Them**

The Texas Monthly - Nov. 16, 2017

***Al Franken to Resign From Senate Amid Harassment Allegations***

***Trump Sexual Misconduct Accusations Repeated by Several Women***

The New York Times - Dec. 11, 2017

# Recent Headlines: Corporate World

**3 Female Former Employees Sue Google Over Alleged Gender Pay Discrimination**

NPR - Sept. 15, 2017

***Uber Embraces Major Reforms as Travis Kalanick, the C.E.O., Steps Away***

**Fear and panic in the H.R. department as sexual harassment allegations multiply**

The Washington Post - Nov. 30, 2017

***Ford Apologizes for Sexual Harassment at Chicago Factories***

# Witch Hunts to Firing Squads



# Investigation Process Highlights

## Receive Complaint

- Ethics hotline
- Direct employee complaint
- Second-hand employee complaint
- Internal audit
- External source (customer, vendor, government agency)
- Document inside or outside counsel's direction and date to conduct privileged investigation
- Document complaint utilizing **ER Notes Template**

## Plan Investigation

- Inform appropriate stakeholders (HR LT)
- Identify investigator(s)
- Gather and review documentation and other evidence (email, Lync, screen shots, timecards, ee file(s), expense reports, badge reports)
- Determine interviewee list, questions, and sequencing
- Check whether background consent and/or notice are required

## Execute Interviews

- Provide *Upjohn* admonition
- Conduct interviews, simultaneously where appropriate
- Document interviews utilizing **ER Notes Template**
- Discuss confidentiality and non-retaliation; ensure relevant policies are provided to interviewees
- Utilize different types of questions: behavioral baseline; fact-based; open-ended; clarifying.

## Summarize Findings

- Review documentation, evidence, and interview notes for corroboration or inconsistencies
- Complete **Privileged Investigation Report**
  - Incident summary
  - Specific allegations
  - Investigation process steps
  - Summary of evidence and findings for each allegation
  - Conclusion
  - Recommendation

# Blueprint for Appropriate Investigation of a Complaint of Sexual Harassment

- Have disinterested person, knowledgeable about the law, conduct investigation
- Promptly investigate complaint
- Notify accused promptly of the charges and give him/her full opportunity to present his/her version of incidents
- Ask open-ended, non-leading questions; the only wrong answer is an untrue one
- Elicit facts versus opinions or speculation
- Attempt to increase confidentiality by conducting interviews off premises or by telephone, if appropriate
- Encourage interviewees, including alleged victim and accused, to contact investigator if they want to talk again



## Blueprint (cont.)

- Provide interviewees opportunity to clarify, correct or challenge information provided by other witnesses which cast doubt on their credibility
- Gather and preserve relevant documents and records (including electronically stored information)
- Identify which documents, information, witness statements, etc., will be relied upon for any recommended discipline
- Memorialize findings by preparing investigation report
- Prepare summary of conclusions to alleged victim and accused
- Check in with the alleged victim to ensure conduct has stopped and there has been no retaliation
- The problem does not disappear merely because the complaining employee does!

# Questions?