

# Pay Equity Update: Do Your Pay Practices Make “Cents” in Today’s Environment?

**Tim Muma**

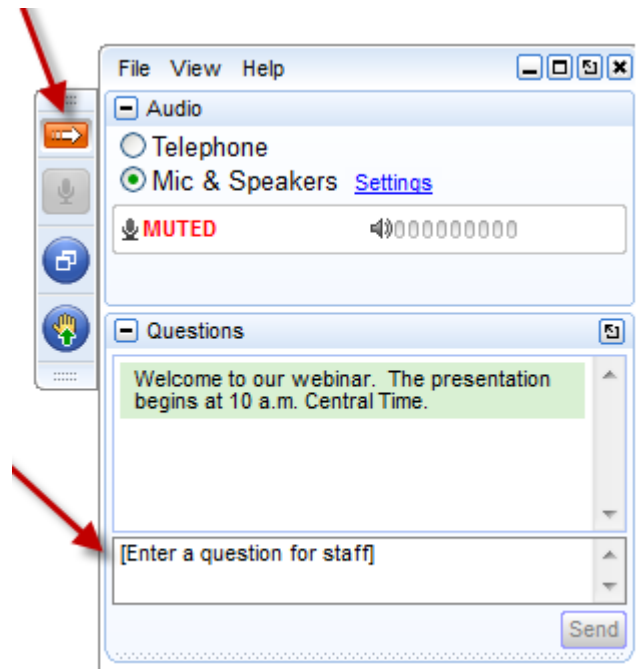
LocalJobNetwork.com

**Lynn Clements, Esq.**

Berkshire Associates Inc.

# Webinar 101

- GoToWebinar panel
- Chat questions are answered at the end of the webinar
- Phones/microphones are muted to minimize distractions



## About Us



**Tim Muma** is a senior marketing coordinator at the Local JobNetwork™ with experience in interviewing hundreds of employers to learn about their hiring processes, strategies, and more. Tim focuses on giving employers expert insight through a variety of webinars, mostly focused on OFCCP regulations and practical perspectives on outreach, candidate management, and employee engagement.



**Lynn Clements** is the Director of Regulatory Affairs for Berkshire Associates Inc., a leading affirmative action consulting and software company. Lynn provides clients strategic advice on EEO/AA issues and oversees Berkshire's OFCCP audit defense practice, helping clients defend hundreds of OFCCP compliance reviews each year.

Lynn served in several senior level policy positions at the U.S. Department of Labor and the EEOC during the George W. Bush administration. Prior to joining Berkshire, Lynn was a shareholder at a management-side employment law firm where she advised employers on a wide range of OFCCP and EEO compliance.

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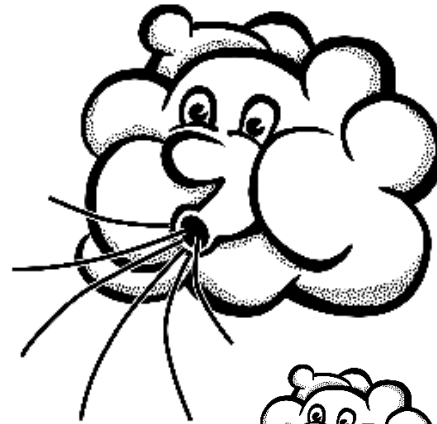
# Agenda

- The Trend – Pay, Pay, and More Pay
- The latest updates on state pay equity laws
- State and local salary history bans
- What should employers do now?
- Live Q&A

# The Trend: What Has Happened?



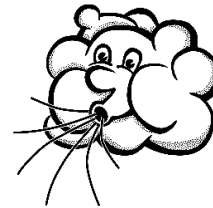
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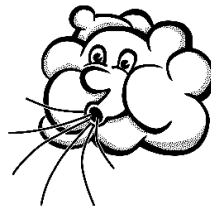
**State and  
Local Laws**



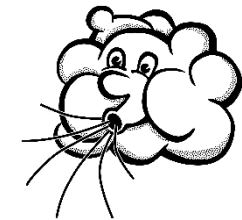
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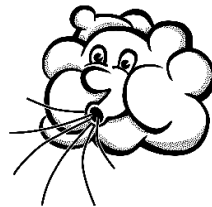
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States want to attack the historical “pay gap”

Group	Nationwide
All Women vs Men	80¢
African-American Women vs Men	63¢
Hispanic Women vs Men	54¢

Over the course of a 40-year career, a Hispanic woman can expect on average to earn at least *\$1 Million* less than a man

# A Growing Momentum

- Since 2017, big uptick in number of states that have created/amended existing laws
- The “big ones”
  - California: amended (expanded and explained) more than once already
  - Massachusetts
  - New York
  - Puerto Rico
  - Washington
  - Maryland
  - Oregon
  - New Jersey



## Other States Follow...

- Passed or pending state pay laws
  - Alaska
  - Arizona
  - Arkansas
  - Connecticut
  - Delaware
  - Washington, D.C.
  - Georgia
  - Illinois
  - Indiana
  - Iowa
  - Kentucky
  - Louisiana
  - Michigan
  - Mississippi
  - Missouri
  - Montana
  - Nebraska
  - Ohio
  - Oklahoma
  - Pennsylvania
  - Rhode Island
  - South Carolina
  - Tennessee
  - Texas
  - Utah
  - West Virginia

## And Don't Forget About the Cities...

- New York City
- Philadelphia
- San Francisco
- Albany
- With more coming . . .

# The Challenge

- New state laws have differing, often contrasting, standards and requirements
- Pose unique challenges for multi-state employers and for employers who recruit across states or nationwide



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# The Basics of the New State Laws

- Most states followed federal Equal Pay Act
  - Equal work as basis for comparison
  - Within the same establishment
  - Affirmative defenses: Seniority system, Merit system, System which measures earnings by quantity or quality of production, Differential based on **any factor other than sex**
- Recent changes to state equal pay laws
  - Broaden groupings from equal to **"similar or comparable" work**
  - Compare across **broader geography**, typically state-wide
  - Any pay factor other than sex changed to **prescribed, validated pay factors**

# Oregon: A Case Study of the State Laboratory

- **Expands protected classes:** sex, race, color, religion, sexual orientation, national origin, marital status, disability, veterans, and age
- **Expands definition of “compensation”** – wages, bonuses, equity, benefits, *etc.*
- **Expands who can be compared to “work of a comparable character”**
- **Limits explanations for pay differences** to eight 8 “bona-fide” factors
- Must account for the **“entire compensation differential”**
- Limited **“safe harbor”** if employer conducted voluntary, proactive pay analysis

# Who is Compared to Whom?

- **Equal work** – EPA standard; employees, same job in same establishment
- **Similarly situated** – Title VII standard
- **Substantially similar** – California's expanded standard – similar work when viewed as *a composite of* skill, effort, and responsibility
- **Comparable work** – Massachusetts standard – who remembers "Comparable Worth"?
- **Work of comparable character** – Oregon's version
- **Similarly Employed** – Washington state's version
- **Pay Analysis Groups** – OFCCP standard in Directive 307; most expansive of all?

# What is Your Defense?

- States limiting employers' reasons for raw wage discrepancies
- New defenses to unequal pay vary state by state
- A **bona fide** factor other than sex
  - Often limited to certain clearly defined factors, such as education, training, or experience
  - Can't be "any factor other than sex"
  - Must show factor was actually relied upon in setting or changing pay

# Explaining the Entire Wage Differential

Some states now require that an employer explain the “**entire wage differential**”

- What does this mean?
- How does an employer do this?





# California Leads the Way

- Under the CFPA
  - Employers must explain the “**entire wage differential**”
  - Provides attorneys’ fees for prevailing plaintiffs
- What does this combination of requirements mean for employers?
  - California Plaintiff’s bar is jumping in
  - Most claims are being brought under state law rather than federal law
  - Attorneys’ fees may be exponentially more than unexplained wage difference

# Safe Harbors: A Way To Defend Pay Equity Claims?

- **What is a Safe Harbor?**
- **Two types of safe harbors are developing**
  - (1) Complete affirmative defense
    - First passed in Massachusetts
  - (2) Limited defense
    - Typically bars some but not all possible damages
    - Oregon and Puerto Rico

# Safe Harbors: A Way To Defend Pay Equity Claims?

- **But safe harbors are not all the same**
  - Different time period for conducting a proactive analysis
  - Different standards for who should be compared
  - Possibly different standards about what kind of analysis is “reasonable”
  - Possibly different standards about what constitutes a “reasonable correction”
  - Different impacts on underlying pay discrimination claim

# Salary History Bans

- **What?**
  - Prohibition on requesting applicants' salary history during all or certain parts of hiring process
- **Why?**
  - Employers traditionally ask for and have taken salary history into account when making offers and setting starting salaries
  - May be a "neutral" practice but women making less before will often wind up making less in their new jobs
  - The growing belief is that this practice *perpetuates* the "pay gap" from employer to employer

# Salary History Bans

## Passed Salary History Ban

- California
- Delaware
- Massachusetts
- Oregon
- Puerto Rico
- New York City
- Philadelphia
- San Francisco
- Albany, NY
- Westchester, NY

## Proposed Salary History Ban

- DC
- Georgia
- Iowa
- Maine
- Maryland
- New York
- North Carolina
- Pennsylvania
- Rhode Island
- Texas
- Vermont
- Wisconsin
- Los Angeles – *feasibility study*

# Is Federal Law Heading in the Same Direction?

- Fresno County's practice was to add 5% to new hires' prior pay; female employee challenged practice under EPA
- 9th Circuit panel held that use of prior pay constituted a "factor other than sex" under the EPA's defenses
- *En banc* court reversed, holding that to be a legitimate "factor other than sex" factor must be job-related; court held prior salary was not job-related in this case
- Split in federal circuits

# A Backlash to Salary History Bans

- Wisconsin passed law barring local jurisdictions from enacting laws that regulate asking job applicants about prior pay
- Michigan expanded existing law to restrict localities from banning requests for salary history in employment application or during job interviews

# How to Respond to Salary History Bans

- Review employment applications and other documents for requests related to salary history
- Train managers about requirements to avoid verbal requests for salary history information
- Update hiring policies and practices
- Best Practice is to stop asking for salary history and instead
  - Ask for salary expectations
  - Provide applicants a salary range/scale for the position
  - Set a fixed starting salary or set of salaries by position
  - Use a “Matrix approach” that takes into account job-related attributes
  - Rely on data-driven “predicted starting salary” approach



# What's Next? Pay Disclosures?

- EEOC annual pay data report still on hold
- But watch for states and localities to move in this direction
  - Proposed bill in California would have required employers with 500 or more CA employees to submit information on gender pay gap to Secretary of State who would publish information on a public website
  - Vetoed by governor in October, 2017

# California Leads the Way (again)

- California requires employers to provide the **“pay scale”** to applicants upon reasonable request
- The law originally did not define “pay scale” or when this information must be provided
- Law was already amended in July 2018 to define terms:
  - Pay scale means the salary or hourly wage range for the position; does not include bonuses or equity ranges
  - Applicants can make a request for this information after completing the initial interview
  - Disclosure requirement does not apply to current employees
  - Also clarifies that employers may ask for salary expectations!

# How to Respond to the Pay Equity Avalanche?

- Set expectations with C-Suite to expect inevitable increase in internal, shareholder and external pay claims
- Review salary setting practices
  - Discontinue asking for applicants' salary history
- Review and revise job descriptions to clarify which jobs are appropriately compared
- Conduct proactive pay analysis to find and address *unexplained* disparities
  - Conduct under privilege
  - Consider groupings for comparison in light of differing state standards
  - Prepare separate analyses for employees in “safe harbor” states
  - If also conducting pay parity/wage gap analysis, ensure clear separation for privilege and other purposes
  - Make equity adjustments for Caucasians and males, not only minorities and females

# Top 10 Takeaways

1. Have accurate, well-written job descriptions that focus on how jobs are similar or different
2. Focus your team and employment processes on salary expectations rather than salary history
3. Analyze personnel decisions that influence compensation (promotions, performance ratings)
4. Define compensable factors and develop a more data-driven approach to setting pay
5. Complete external market studies and document and save results

## Top 10 Takeaways (cont.)

6. Decide how to deal with various state standards and complete internal pay equity analyses under attorney client privilege
7. Review and update documentation regarding your pay practices and decisions
8. Begin tracking data used to set pay for statistical analysis (time-based variables, education, certifications, *etc.*)
9. Put monitoring systems in place so that equity can be maintained
10. Create a pay transparency culture so that employees come to you with concerns first

# Resources

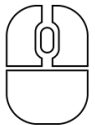


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## Berkshire Resources

- [Free Resource Center](#)
- [HR and Affirmative Action Blog](#)
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## LocalJobNetwork.com Resources

- [OFCCP Solutions](#)
- [Outreach Management](#)
- [DOL Highlights](#)
- [ESDS Map](#)



## OFCCP Resources

- OFCCP's [website](#)
- [EO 11246](#)
- [VEVRAA](#)
- [Section 503](#)

# Wrap Up

- Slides will be sent later today
- HRCI and SHRM credit information in follow-up email
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