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# **Aspirins for Pay Audits Building & Leveraging Your HRIS**

**Valerie Hoffman  
Christine Hendrickson  
Seyfarth Shaw LLP**

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# Our Agenda

- 01** Why Does it Matter?
- 02** Data Gathering & the Current State of the Law
- 03** Where Do we Go from Here?



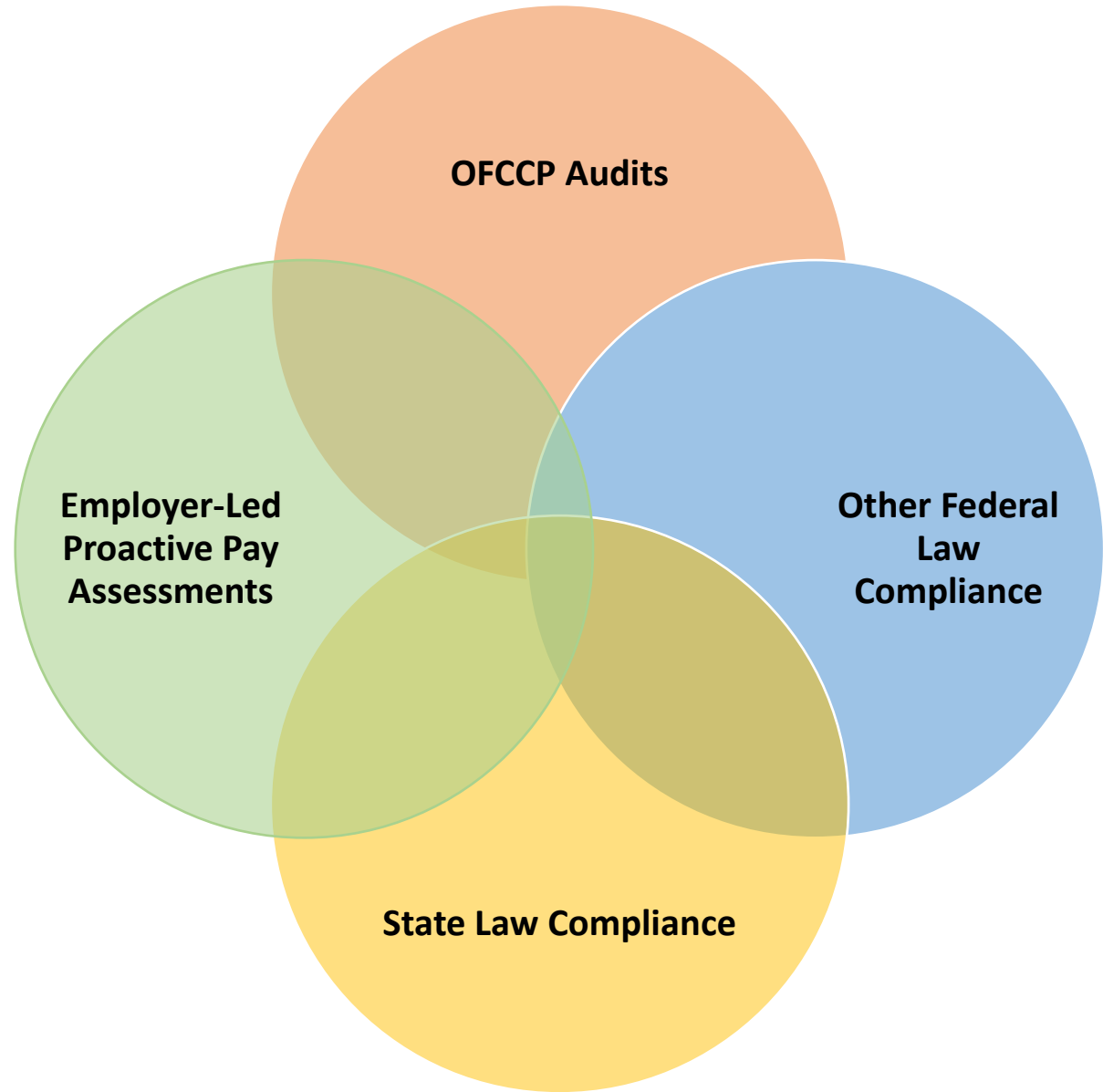
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**ways and counting . . .**

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# Why does data gathering matter?



# OFCCP Audit

- **19. Employee level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, and temporary employees) as of the date of the organizational display or workforce analysis. Provide gender and race/ethnicity information and hire date for each employee as well as job title, EEO-1 Category and job group in a single file. Provide all requested data electronically, if maintained in an electronic format. See Note 1, below.**
  - **For all employees, compensation includes base salary and or wage rate, and hours worked in a typical workweek. Other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime should be identified separately for each employee.**
  - **You may provide any additional data on factors used to determine employee compensation, such as education, past experience, duty location, performance ratings, department or function, and salary level/band/range/grade.**
  - **Documentation and policies related to compensation practices of the contractor should also be included in the submission, particularly those that explain the factors and reasoning used to determine compensation.**

**41 CFR § 60-2.17(b)(3) and (d).**







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41 CFR § 60-2.17(b)(3) and (d).

## Key Data Points:

- (1) Base/wage rate, bonuses, incentives, commissions, merit, locality pay, OT for “all employees”
- (2) Hours worked in a typical workweek
- (3) EEO Data
- (4) Hire Date
- (5) Job Title
- (6) EEO-1 Category
- (7) AAP Job Group

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- A. Education*
- B. Experience*
- C. Duty location*
- D. Performance ratings*
- E. Department*
- F. Function*
- G. Salary level/band/range/grade*
- H. “Catch-all” any additional data on factors used to determine employee compensation*
- I. Compensation policies*



# Federal Equal Pay Act

- SEC. 206(d) - Prohibition of sex discrimination

(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

\* indicates that factor is duplicative or partially duplicative of data required by other laws

## Key Data Points:

- (1) Establishment
- (2) Seniority system\*
- (3) Merit system
- (4) A system which measures earnings by quantity or quality of production
- (5) "Catch-all" any other factor other than sex\*, e.g.,
  - i. Education, Experience, Training, and Ability
  - ii. Participation in Training Program
  - iii. Shift Differential
  - iv. Job Classification Systems
  - v. "Red Circle" Rates
  - vi. Temporary Reassignments
  - vii. Revenue Production
  - viii. Market Factors
  - ix. Part-time/Temporary Job Status
  - x. Employer Error (liquidated damages only)
  - xi. Collective Bargaining Agreement

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# Title VII, ADA, ADEA

- Title VII, the ADEA, and the ADA prohibit discrimination in "compensation" based on race, color, religion, sex, national origin, age, disability, or protected activity.
- Different pathways:
  - An employer pays employees inside a protected class less than similarly situated employees outside the protected class, and the employer's explanation does not satisfactorily account for the differential;
  - An employer maintains a neutral compensation policy or practice that has an adverse impact on employees in a protected class and cannot be justified as job-related and consistent with business necessity;
  - An employer sets the pay for jobs predominantly held by protected class members below that suggested by the employer's job evaluation study, while the pay for jobs predominantly held by employees outside the protected class is consistent with the level suggested by the job evaluation study;
  - A discriminatory compensation system has been discontinued, but salary disparities caused by the system are maintained
  - The compensation of one or more employees in a protected class is artificially depressed because steering.

\* indicates that factor is duplicative or partially duplicative of data required by other laws

## Key Data Points:

- (1) Job descriptions
- (2) Management chain and/or organizational charts
- (3) Compensation, merit, and bonus policies\*
- (4) Collective bargaining agreements\*
- (5) Entry level wage rates or salaries
- (6) Job evaluation studies, reports, or other analyses made by or for the employer with respect to its method of compensation and pay rates
- (7) "Catch all" for other objective factors\*
  - i. Minimum objective qualifications, such as a specialized license or certification
  - ii. Qualifications, experience, and education
  - iii. Differences in job titles, departments, or other organizational units (as relates to comparators)







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# Unique State Law Requirements

CA and NY

- Has “catch-all” but must also prove that the factor is not based on or derived from a sex-based factor; job related; and is consistent with a business necessity + no neutral alternative

MD

- (1) Seniority but leave for a pregnancy-related condition and protected parental, family and medical leave does not reduce seniority; (2) Geographic location; (3) Travel if travel is a regular and necessary condition of the particular job

MA

- (1) Workplace locations; (2) Travel, if travel is necessary and regular for the employee; (3) Education; (4) Training.

OR

- (1) Workplace locations; (2) Travel, if travel is necessary and regular for the employee; (3) Education; (4) Training.

## Key Additional Data Points:

- (1) Location
- (2) Seniority not off-set by protected leave
- (3) Travel as “regular and necessary condition” of job
- (4) Education
- (5) Training



***When does location  
mater?***



# Remember: Location Matters in Two Ways

1

**Federal  
Equal Pay  
Act:**

- Same “establishment””

**New York:**

- Same “geographic region” not larger than county

**Maryland:**

- Same county

**California:**

- Employees need not work in same establishment or region

2

**In some states, it may also be a bona fide factor other than sex**

**But location matters only if there are legitimate differences in market pay**



# Geography v. Geo Differentials

## Geography

- **California**
- **San Fran**

## Geo Differentials

- **120%**





*What about prior salary?*



# Prior Salary Ban Timeline

## Philadelphia

- Was to be May 23, 2017 but stayed

## NYC, NY

- October 31, 2017

## Massachusetts

- July 1, 2018

## Oregon

- Fall 2017 but no private right of action until 2024

## Puerto Rico

- March 8, 2018



# SALARY HISTORY BANS

JURISDICTION	DIRECT INQUIRY?	PUBLIC RECORD OR PRIOR EMPLOYER?	DISCLOSURE BY APPLICANT?	PENALTY
<b>Oregon</b>	No, cannot inquire directly but can confirm with written post-offer and post-salary negotiation	No, cannot ask current or former employer of the applicant or employee	Prohibits employers from screening or setting comp based on prior salary.	Penalties but no private right of action until 2024
<b>New York City</b>	No, cannot ask the applicant directly about his or her salary history	No, discriminatory employment practice to conduct a search of publicly available records or reports	Yes, can rely on the salary history if applicant “unprompted” and “willingly” discloses his or her prior salary information	\$125,000 for an unintentional violation and up to \$250,000 for an “intentional malicious violation”
<b>Massachusetts / Puerto Rico</b>	No, cannot ask prospective employee or a current or former employer about wage or salary history until after negotiation & cannot require that a prospective employee’s prior wage or salary history meet certain criteria	Not specified in the Act but forbidden to ask former employers	If “voluntarily disclosed” or post-offer may confirm but violates Act if rely on prior salary	Not specified in the Act
<b>Philadelphia</b>	No, cannot inquire in writing or otherwise or condition employment or consideration for an interview on disclosure of wage history	Not specified in the Act	Yes, if applicant “knowingly and willingly” disclosed his or her wage history	Potential remedies would include equitable relief, compensatory and punitive damages, attorney’s fees and costs



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- **California's Fair Pay Act prohibits employers from using an employee's prior salary as the sole basis to justify a pay disparity**
- **NOTE: California does NOT ban employer inquiries into an applicant's prior salary but California legislature is also currently considering a salary history ban**

# Federal Landscape

## 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> Circuits

- **Prior salary alone is insufficient to justify prior salary differences**

- **Riser v. QEP Energy, 776 F.3d 1191, 1199 (10th Cir. 2015)**
- **Irby v. Bittick, 44 F.3d 949 (11th Cir. 1995)**

## 10<sup>th</sup> and 11<sup>th</sup> Circuits

- **Can rely on prior salary to justify wage differences**

- **Rizo v. Yoviny, No. 16-15372, 2017 WL 1505068 at \*1 (9th Cir. April 27, 2017)**
- **Wernsing v. Department of Human Servs, 427 F.3d 466, 471 (7th Cir. 2005)**
- **Taylor v. White , 321 F.3d 710, 720 (8th Cir. 2003)**





***But what about salary expectations?***



# Salary Expectations

- **None of the current laws forbid employers from inquiring about salary expectations**
  - **But consider full impact**
  - **Start low/stay low**



# Proactive Pay Analysis

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**Most Critical to Success?**

# STRUCTURE

**(Job Functions / Job Families / Levels)**





# Proactive Audit

- Driven by compliance, legal risk mitigation, and best practice mentality

\* indicates that factor is duplicative or partially duplicative of data required by other laws

## Key Data Points:

(1) Anything that matters matters

- Actual measure of experience
- Time in Grade/Level
- Acquisition
- Founders
- Product Line
- Hot Jobs
- Certifications
- Bill Rate
- Billable/Chargeable Hours
- Revenue Generation
- Career Hires v. College Hires
- Rotations
- Global Experience
- Scope / Span of Job
- Point of Calibration
- And more!

# Backdrop: Major Milestones in a Pay Analysis

1

## Identify Goals, Protect the Privilege and Gather Resources

- Identify key goals and objectives.
- Define the scope of the analysis, including identifying the workforce and the components of pay under review.
- Build the team.
- Implement attorney-client privilege protocols to safeguard the analysis to the maximum extent possible.

2

## Understand How Employees are Paid

- Partner with the key stakeholders to understand the compensation structure and pay philosophy
- Determine the most appropriate way to group employees for the statistical analysis and identify the job-related factors that are relevant to employee pay.

3

## Gather the Data

- Gather relevant data regarding employee pay from the electronic data systems.

4

## Statistical Analysis and Identification of “Hot Spots” and Opportunities

- Partner with statistical experts to conduct the statistical analysis.
- Interpret the results and identify any “hot spots” within the organization that require further review.
  - Often the initial analysis brings to light errors in the data, individual employees who were slotted in the wrong job or level, or additional factors that drive employee compensation that were not identified initially.
- We can then work with you to explore additional factors that we may wish to include in the statistical model and data errors that need to be addressed.

5

## Consider Adjustments, Reclassifications, and Changes to Policies and Practices

- Provide advice related to mitigation strategies if needed. These recommendations can include pay adjustments, reclassification of employee levels or job titles, or modifications to policies or practices.



*Where do we go from here?*





# Next Steps and Key Takeaways

- Key Points
- Checklist and aspirin on your chairs

