



# HR Impact on Diversity & Inclusion

HARRT at UCLA

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# My topics

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Harassment Prevention: Not working well enough

**02**

Diversity & Inclusion: Does it exclude conservatives

**03**

Social Media Recruitment: Excluding older workers

**04**

Pay Equity: Fixes and Guardrails

**05**

Recruiting & Screening Using Big Data

# Harassment Prevention: Not working well enough?

# Introduction: The Silence Breakers



- Significant shift in focus on and awareness of sexual harassment in the workplace.
  - 100+ public, high-profile sexual harassment accusations made against celebrities, public figures, politicians and corporations.
  - #MeToo social media campaign
- In 2017: 70% of Americans describe sexual harassment as a “very serious problem.”
  - In 1998: 36% of Americans described sexual harassment as a “very serious problem.” (Source: CNN/Time)

# Time's Up Initiative

**Launch Date:**  
1/1/2018

**Financial backing:**  
\$18,800,000

**Goal:**  
Combat Sexual  
Harassment Across  
Industries

“We want all  
survivors of  
sexual harassment,  
everywhere, to be  
heard, to be believed,

and to know  
that accountability  
is possible.”

#TIMESUP

# Widespread, But Underreported

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- Almost **half** of America's working women say they have experienced sexual harassment at work.
- **90%** of workers who say they've experienced harassment **never formally report it.**



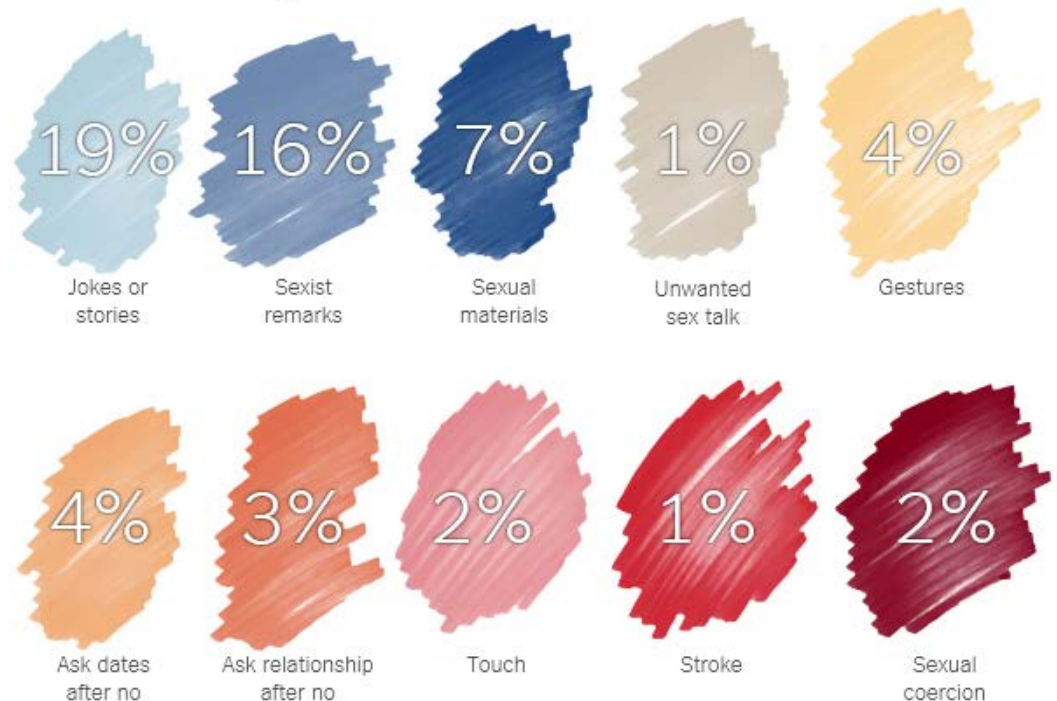
**SELECT TASK FORCE  
ON THE STUDY OF  
HARASSMENT IN THE  
WORKPLACE**

# 12/28/17

## New York Times Survey

- 1/3 reported their own work activity within the past year included “objectionable behavior or sexual harassment”
- 1 in 25 men in the “average American workplace identifies himself as a harasser.”
- **Most Common Action:** Gender Harassment – 25%
- Unwanted Sexual Attention – 10%
- **Least Common Action** – Sexual Coercion – 2%

The percentage of men who say they performed each behavior in the last year



# Why haven't we made more progress preventing sexual harassment?

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# Why haven't we made more progress preventing sexual harassment?

- Legal standards
- Failure to report
- HR
- Management
- Training
- Inconsistent social & workplace norms
- Workplace dating
- Blind eye to high performers
- Confusion
- Little/no bystander intervention

# What's changed?

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# What's changed?

- Social media platforms
  - Social platforms, not “official”
- Millennial sharing
  - Less concern about privacy
- Strength in numbers
  - #Metoo
- Trump effect
  - Women’s march
- Traditional media attention
  - New Yorker/Weinstein
  
- CULTURE!!
- Reputational Risk, not legal risk
  
- Where do we go from here?

# The Basics:

## Comprehensive & Effective Anti- Harassment Policies



- Clear opening statement: SH is illegal, unacceptable & won't be tolerated.
- Explain prohibited conduct, with examples.
  - **Lower Threshold Than Legal Definition Of SH**
  - **Zero Tolerance Policy- caveats/define**
- Describe
  - complaint & investigative processes.
  - responsibilities of management & staff.
- Assure that
  - complainants & witnesses will not be retaliated against.
  - confidentiality of complaints will be maintained to the extent possible.
  - employer will take prompt & proportionate corrective action when it determines that harassment has occurred.

# The Basics:

## Leadership & Accountability

- Demonstrate a visible commitment from leadership.
- Adequately fund complaint procedures.
- Allocate sufficient time and resources to procure and conduct trainings.
- Conduct climate/culture surveys.
- Ensure that discipline is prompt and proportionate to the severity of the infraction, and consistent with similar past violations.
- Hold mid-level managers and front-line supervisors accountable.



# What's Newer:

## Leadership Trends



- “Opening Statements” at internal trainings to confirm C-Suite commitment and awareness.
- One-on-One “Best Practice Consults” to avoid actions/omissions that may turn them into perceived enablers.
- Emphasizing respect in meetings
- Holding senior leadership meetings to clarify expectations.
- Key male leaders identify themselves as “allies” to women’s ERG

# Newer:

## Refocus on Effective Reporting Channels and Responses



- Support “Speak Up” culture
- Ensure multiple, wide-open reporting channels and robust response protocols.
  - Rapid Response Team and Plan
  - Corporate Hotlines
    - Potential challenges with anonymity
  - HR Structures
  - Open door options
  - EEO coordinators
- Consider
  - your model responses to social media posts that come to your attention
  - plan for internal/external communications/damage control in the media/workplace

# Newer:

## Providing Enhanced Training



- Focus on “Gateway Conduct,” small incidents that can lead to more egregious conduct if unaddressed.
- Bystander intervention techniques and trainings (including tailored “scripts”) for all employees.
  - Spot a colleague’s discomfort.
  - Support colleagues, using a step-up/speak-up model.
  - Employ distraction/extraction strategies.
  - Know when/how to call-in reinforcements.
- Evaluate effectiveness of methods; monitor if training works



**Newer:**

**Refocus on  
Consensual  
Romantic  
Relationships &  
Dating Policies**

- Additional guidance on how to handle, especially between supervisor/manager and an employee
  - Parties must disclose relationship to HR.
  - HR independently interviews each party to confirm relationship is consensual.
  - Management will endeavor to separate the parties' business interactions.

**Newer:**

## **“Love Contracts”**



- Confirming the relationship is consensual.
  - Promising that there will be no favoritism.
  - Promising to conduct themselves professionally at all times and to avoid even the appearance of improper or inappropriate conduct.
  - Confirming that relationship will not affect or interfere with normal responsibilities and duties.
  - Agreeing to notify HR if relationship ends.
- 
- Realistic?



# Recent Legislative Developments & Litigation

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- New Federal Tax Act
- State Legislative Proposals
- Use of Federal Sex Trafficking Statutes



# Federal Tax Cuts and Jobs Act (the “Tax Act”)

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- I.R.C. § 162(q): No deduction shall be allowed ... for (1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or (2) attorney's fees related to such a settlement or payment.
- Applies to any payments made after December 22, 2017.
- Unintended Consequences:
  - Employers may lower settlement offers.
  - Plaintiffs' tax burden could increase.
- Undefined: “sexual harassment,” “sexual abuse,” and “related to.”

# California Senate Bill 820/ STAND Act (Stand Together Against Non-Disclosures) January 2018

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- Proposes to prohibit use of confidentiality provisions in settlement agreements involving sexual assault, harassment or discrimination in the workplace
- Sponsor: Sen. Connie M. Leyva (D-Chino)
- Would apply to
  - both public and private employers
  - agreements entered into on or after Jan. 1, 2019
- currently under consideration by Senate Judiciary Committee
- [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180SB820](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB820)

# Other State Law Proposals

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- New York: Gov. Cuomo unveiled proposal to combat workplace sexual harassment:
  - Void forced arbitration policies or clauses in employee contracts that prevent sexual harassment cases from consideration in law enforcement investigation and trials.
  - Mandate private companies that do business with the state report sexual assault and harassment statistics.
- Similar proposals in New Jersey, Pennsylvania, and Washington (no NDAs) and South Carolina (no mandatory arbitration).

# Use of Sex Trafficking Statutes

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- Trafficking Victims Protection Reauthorization Act (“TVPRA”), 18 U.S.C. § 1591
  - Whoever knowingly—in or affecting interstate or foreign commerce:
    - recruits, entices, . . . or solicits by any means a person . . .
    - knowing . . . that means of force, threats of force, fraud, coercion . . . or any combination of such means will be used to cause the person to engage in a commercial sex act . . . shall be punished.
- § 1595 provides a civil remedy and private right of action.
- 10-year statute of limitations.



# Diversity & Inclusion: Does it exclude conservatives?

# James Damore's "Ideological Echo Chamber" Memo

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- *People generally have good intentions, but we all have biases which are invisible to us.*
- *Thankfully, open and honest discussion with those who disagree can highlight our blind spots and help us grow, which is why I wrote this document.*
- *Google has several biases and honest discussion about these biases is being silenced by the dominant ideology.*
- *What follows is by no means the complete story, but it's a perspective that desperately needs to be told at Google.*

# James Damore's "Ideological Echo Chamber" Memo

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- *Differences in distributions of traits between men and women may in part explain why we don't have 50% representation of women in tech and leadership.*
- *Discrimination to reach equal representation is unfair, divisive, and bad for business.*

# Damore's Observations re Personality differences

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*Women, on average, have more:*

- *Openness directed towards feelings and aesthetics rather than ideas. Women generally also have a stronger interest in people rather than things, relative to men (also interpreted as empathizing vs. systemizing).*
- *These two differences in part explain why women relatively prefer jobs in social or artistic areas. More men may like coding because it requires systemizing and even within SWEs, comparatively more women work on front end, which deals with both people and aesthetics.*
- *Extraversion expressed as gregariousness rather than assertiveness. Also, higher agreeableness.*
- *This leads to women generally having a harder time negotiating salary, asking for raises, speaking up, and leading. Note that these are just average differences and there's overlap between men and women, but this is seen solely as a women's issue. This leads to exclusory programs like Stretch and swaths of men without support.*

# Damore's Observations re Personality differences

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- *Neuroticism (higher anxiety, lower stress tolerance).*
  - *This may contribute to the higher levels of anxiety women report on Googlegeist and to the lower number of women in high stress jobs.*
- *Men's higher drive for status*
  - *We always ask why we don't see women in top leadership positions, but we never ask why we see so many men in these jobs. These positions often require long, stressful hours that may not be worth it if you want a balanced and fulfilling life.*
  - *Status is the primary metric that men are judged on, pushing many men into these higher paying, less satisfying jobs for the status that they entail. Note, the same forces that lead men into high pay/high stress jobs in tech and leadership cause men to take undesirable and dangerous jobs like coal mining, garbage collection, and firefighting, and suffer 93% of work-related deaths.*

# Damore Fired and Sues Google for Class-wide Discrimination

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- January 8- James Damore, and David Gudeman file complaint on behalf of all employees of Google discriminated against due to
  - “their perceived conservative political views,”
  - “their male gender,” and/or
  - “their Caucasian race.”
- *Damore v. Google, LLC*, Case No. 18CV321529 (Cal. Sup. Ct., Santa Clara Cty.)

# The Complaint's Allegations

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- Employees who deviated from the “majority view” at Google re ‘diversity’ hiring policies, ‘bias sensitivity,’ or ‘social justice,’
  - were singled out, mistreated, and systematically punished and terminated from Google
- This “open hostility” to conservative thought leads to discrimination in hiring, promotion, and termination decisions on the basis of race and gender
  - because of the “extreme” lengths Google goes to in taking race and/or gender into consideration as determinative hiring factors,
  - to the detriment of white males.

# The Complaint's Allegations

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- Several of Google's diversity initiatives are evidence of bias against conservative white men
  - including, among other things, a Diversity and Inclusion Summit and a diversity training class
- Google's current method of increasing diversity resulted in reverse discrimination
  - because Caucasian and Asian males were not being selected for jobs and promotions due solely to their status as non-females or non-favored minorities



## Discussion/ Case Study

Federal and state law prohibits discrimination on the basis of race or sex.

California law prohibits discrimination due to political views, affiliations or activities.

Are D&I Summit and Diversity Training Class programs legally risky?

Did Damore engage in sexual harassment creating a “hostile environment” ?

Do private sector employees have a right to “free speech?”

Should affinity groups for political conservatives be allowed?



# Social Media Recruitment: Excluding older workers

# Class Action: CWA

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- class action complaint filed on December 20, 2017 on behalf of the Communications Workers of America (“CWA”) and three individual plaintiffs, alleging age discrimination based on employment ads placed on Facebook.

# Background of Current Litigation

## *Onuoha v. Facebook, Inc., No. 16-cv-6440 (N.D. Cal.)*

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- November 2016
- Alleges Facebook’s advertising tools, which allow businesses to target particular individuals and groups
  - enable and encourage businesses to engage in discrimination by excluding African Americans, Latinos, and Asian Americans from receiving advertisements for employment, housing, and credit opportunities.
- Facebook moved to dismiss the complaint arguing that it did not injure the plaintiffs and that any liability for misuse of its platform falls on the companies that use it.
  - There has been no further court activity, as the parties have pursued voluntary mediation.

# **CWA v. Amazon.com, Inc., et al., No. 17-07232 (N.D. Cal.) December 20, 2017**

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- Alleges
  - employers have used Facebook in a way that violates federal and state laws prohibiting age discrimination.
  - when a company places sponsored content on the Facebook platform, including employment ads, it is prompted to make choices about the audience targeted to receive the message
  - Among the targeting options are demographic options, including age ranges, gender, race, etc.
  - According to the plaintiffs, applying an age range restriction on an employment ad is age discrimination.
- CWA also has issued demand letters to a number of companies making the same allegations and requesting to enter private settlement discussions.

# Definition of the Classes Sought in the Class Action

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- Plaintiffs seek to represent a sweeping class
  - all Facebook users age 40 and older who were interested in but did not receive employment-related ads that included upper age limits
- Uncommon: and a *defendant* class comprised of
  - all employers with at least 2,500 employees who have purchased the types of Facebook ads being challenged.
  - If the defendant class is approved, any company meeting the criteria would be liable.

# Scrutiny on Age Discrimination in Hiring

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- EEOC recently reiterated that elimination of systemic barriers in recruitment and hiring continues to be one of its strategic enforcement priorities
  - including those related to age
  - The tech industry is a particular area of focus for the EEOC.

# Recommended for Any Employer using Social Media for Recruiting/Job Ads

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- inform hiring managers who place ads on Facebook or other social media that
  - they should not target particular age groups
  - Ads with no upper age limit may continue.
- If you discover that social media has been used in this fashion, consider doing a privileged and confidential analysis
  - of the demographics of those who actually saw or interacted with the ads.
  - of hiring resulting from social media posts that could establish that any such ads did not materially impact the demographics of those hired.
- be prepared to respond to inquiries if it is added to the case.



## Case Study

- What about ads for “recent college grads?”
- How is this different from campus recruiting for certain positions?



# Pay Equity: Fixes and Guardrails

# California Fair Pay Act

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“An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the **opposite sex [or of another race or ethnicity]** for **substantially similar work**, when viewed as a composite of skill, effort, and responsibility, and performed under **similar working conditions**[.]”

Fair Pay Act, **Cal. Labor Code § 1197.5(a-b)**.

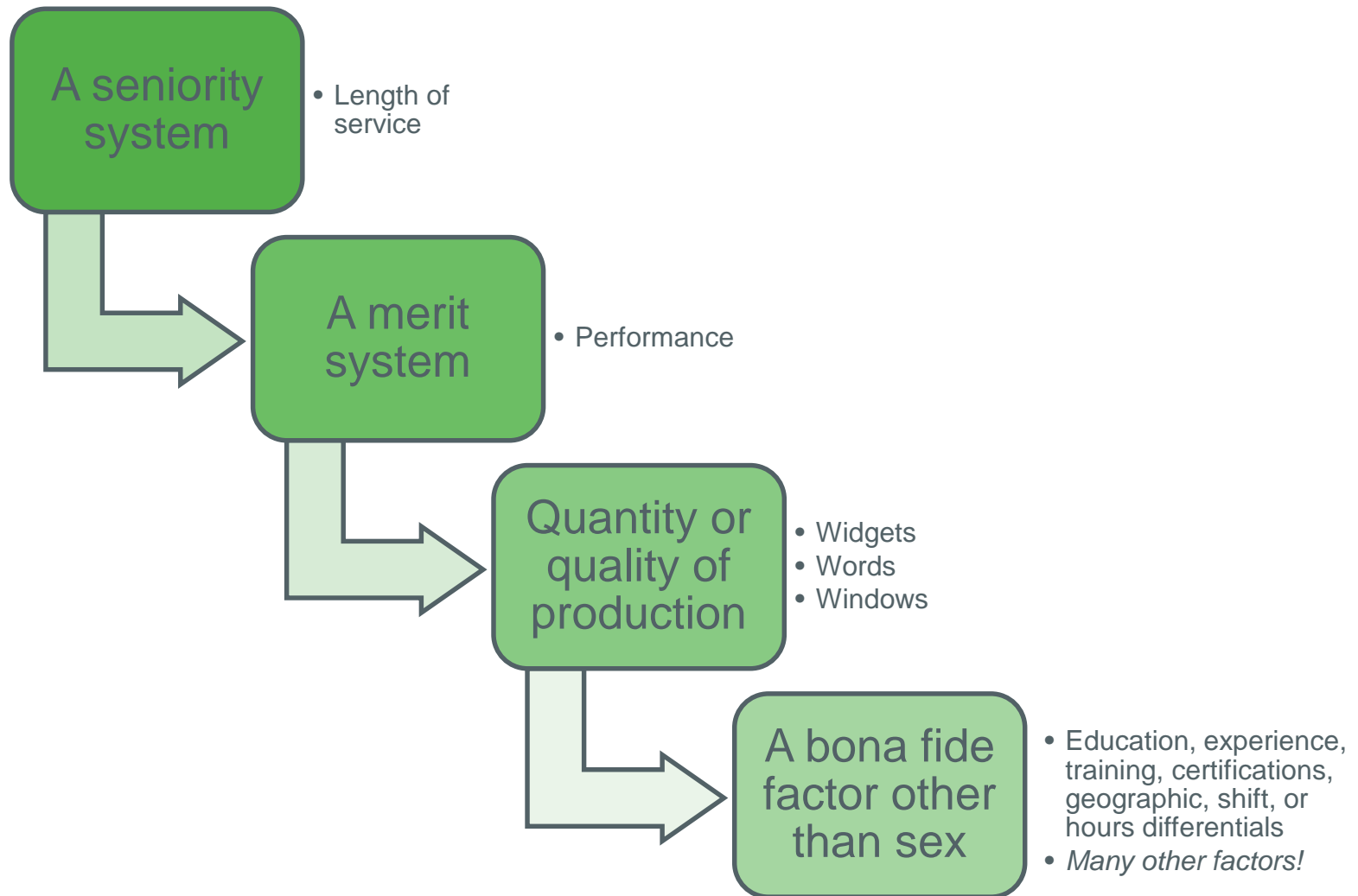
- Signed by Governor Brown on October 6, 2015 and amended in 2016 to expand protected classes
- Amends Labor Code Section 1197.5

# California Fair Pay Act: Pay Equity

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- Employees can be comparators even if they do not:
  - Work at the same establishment
    - *(i.e., even if they are 100s of miles apart...)*
  - Hold the “same” or “equal” jobs
- Instead it applies to employees performing “substantially similar work” based on:
  - Composite of skill, effort, and responsibility AND
  - Performed under similar working conditions

# Permitted Factors that Explain Pay Differences in California



# Getting to Zero

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“The one or more factors relied upon account for the **entire** wage differential.”

Fair Pay Act, Cal. Labor Code § 1197.5(a)(3) & (b)(3).

*Is eliminating statistical significance necessary to comply with the Fair Pay Act?*

# Pay Equity Fixes and Guardrails

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- Conduct a proactive **pay analysis**, prepared under privilege
  - Statistical models and analyses test extent to which permissible factors explain pay differentials
  - multivariate regression analysis
  - make adjustments where indicated
- Calibrate at hire and promotion
- Evaluate performance ratings before they become final
- Test proposed merit raises, bonuses, equity grants before they become final.

# California's Salary History Ban

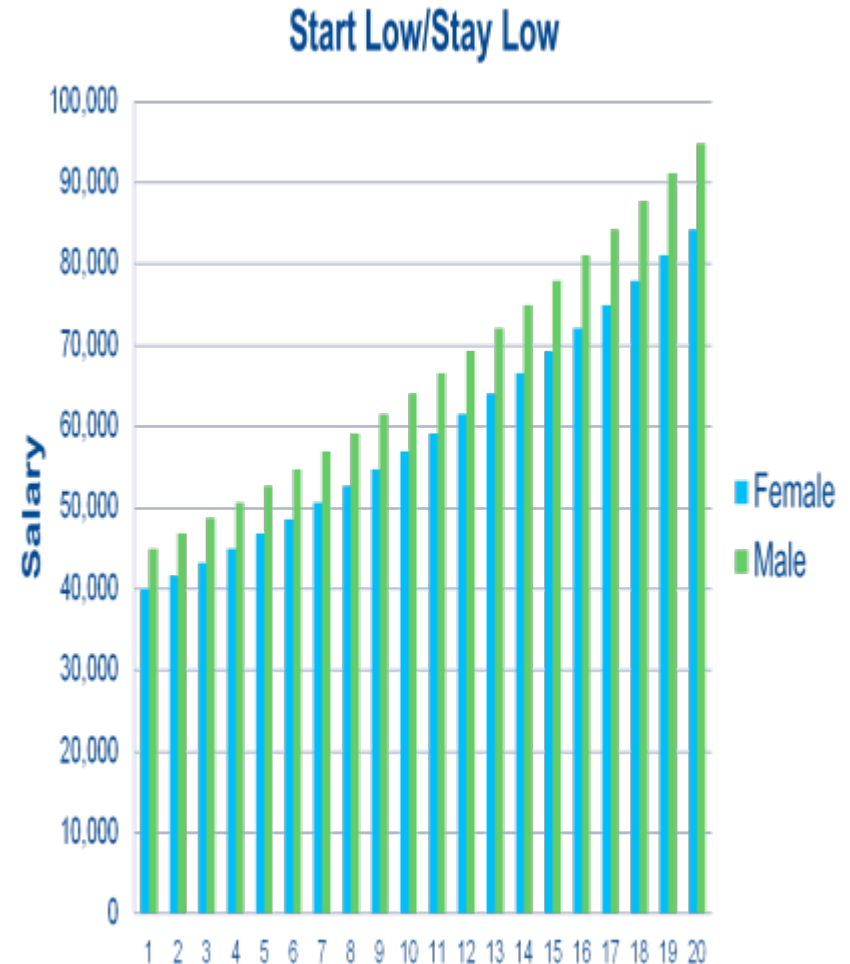
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- Salary History Ban
  - “An employer shall not, orally or in writing, personally or through an agent, seek salary history information, including compensation and benefits, about an applicant for employment.”
  - Applicable to all employers, including the government.  
**Cal. Labor Code § 432.2**
- Pay Scale Disclosure
  - “An employer, upon reasonable request, shall provide the pay scale for a position to an applicant applying for employment.”
  - Applicable to all employers, including the government.



# Importance of Starting Salary Decisions

- Starting salary is typically the most important pay decision
  - “Start Low/Stay Low” phenomenon
- Consider developing a formal policy regarding how the company sets starting salary



# What Can Prospective Employers and Applicants Talk About?

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- An applicant's pay expectations
- Financial benefit the applicant would have to forego in order to take the new job
  - unvested equity
  - a future bonus
- If an applicant voluntarily, and without prompting by the prospective employer, discloses his/her salary history, the employer may consider that information.

# What Can Prospective Employers and Applicants NOT Talk About?

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- The Salary Ban prohibits employers from:
  - relying upon salary history information of applicant as factor in determining
    - whether to offer employment
    - what salary to offer
  - Seeking salary history information
    - orally or in writing
    - personally or through agent (e.g. recruiters)
    - including compensation and benefits

# No Secrets Allowed

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- Employers are not allowed to prohibit employees from:
  - disclosing or discussing their own wages or the wages of others;
  - inquiring about the wages of others
  - aiding or encouraging other employees to exercise their rights under the Act.
  - Expressly does not create an obligation to disclose wages.

# Don't Even Think About Asking...

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- California joins several other states in prohibiting employers from **asking** job applicants for “salary history information”
- If you have operations in multiple jurisdictions, do you conform your policies and practices to the most restrictive laws?
- Think about where in your hiring practice, you have historically asked about prior salary:
  - job applications
  - applicant tracking systems
  - background check documents
  - phone screens
  - standard interview templates
  - compensation planning documents
  - recruiter training materials
  - compensation guidelines

# Pay Scales

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- New Labor Code Section 432.2
  - requires employers to provide “pay scale: for a position to applicant applying for employment upon reasonable request.

# Review Compliance with Salary History Ban

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- Review (and revise) written policies and practices *and* job applications
  - *Delete salary questions*
- Train recruiters, HR professionals and any recruiting or decision-making managers
  - *To not ask (or snoop online) about salary history*
- Document basis for compensation decisions
  - *Especially when an application voluntarily discloses salary history and other compensation information*
  - *Expand HRIS to capture data on important factors going forward*

# Gender Pay Gap Transparency Act VETOED

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- AB 1209 would have required California employees with 500+ employees to collect and produce data concerning:
  - the difference between the mean and median wages of male and female exempt employees located in California, by job classification or title;
  - the difference between the mean and median wages of male and female board members located in California
  - the number of employees used to make these determination.





**Thank You**