

# Buchalter

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Equal Pay for Equal Work:  
How to Ensure Your Company is in Compliance  
Presented by:

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I help companies  
improve gender equity &  
advance women leaders.

# Pay equity news is everywhere.

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## PRESS RELEASES

### Pay Equity Headed To Governor's Desk

by Christine Stuart | May 4, 2018 10:17pm

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Posted to: Business, Equality



## Progressive Appoints First Female Board Chair, Announces Gender And Race Pay Equity

May 14, 2018

By: Payment Week

### 'THE CROWN' STAR CLAIRE FOY GETS \$275,000 IN BACK PAY AFTER GENDER WAGE GAP DISPUTE

BY CHRISTINA ZHAO ON 4/30/18 AT 12:25 PM



### Starbucks says it's achieved pay equity in the US

- Starbucks said it has achieved pay equity for its U.S. workers.
- The company is hoping to achieve the same goal with its global workforce.

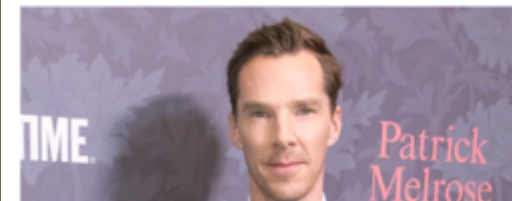
Sarah Whitten | @sarahwhit10

Published 1:25 PM ET Wed, 21 March 2018 | Updated 7:45 PM ET Wed, 21 March 2018

CNBC



*Benedict Cumberbatch will now reject roles if his female co-stars don't get equal pay, and we hope more men follow suit*



Government & Regulations

### Once again, Colorado pay-equity measures fail to advance

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### Dell EMC hit for \$2.9 million as feds say it paid women less than men

By Ethan Baron The Mercury News (TNS) 2 hrs ago (0)



# Pay equity & pregnancy/parenthood.

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"All the News That's Fit to Print"

# The New York Times

Late Edition  
Today, sunshine, partly cloudy, very warm, high 83. Tonight, clear, warm, more humid, low 71. Tomorrow, partly sunny, record-tying heat, high 85. Weather map, Page 24.

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NEW YORK, SUNDAY, JUNE 17, 2018

\$6.00



Stephanie Hicks with her son Wil, 5, in North Port, Ala. She sued the Tuscaloosa police department for pregnancy discrimination.

## A Leader Dies; A Twin's Grief Shapes Poland

By MARC NATHAN

WARSZAWA — For six weeks, the twin of a Polish president kept up the charade.

By day, he appeared at political rallies, gave speeches in meetings, confided in his friends. But at night, he was a twin who had been missing for a long time. Each time he had been missing, he had been missing for a long time. Each time he had been missing, he had been missing for a long time.

## Penalizing Pregnancy, From Walmart to Wall St.

By NATALIE KUTROFF and JESSICA SILVER-GRIENBERG

When she got pregnant, Ottilie Woodbridge asked to stop lifting heavy trays at Walmart. Her boss said she had seen Demi Moore do a flip on TV when she was nearly full-term — so being pregnant was “no excuse.” Ms. Woodbridge kept lifting until she got hurt.

When she got pregnant, Rachel Mossatis was winning awards for being a top saleswoman at Merck. She was laid off three weeks before giving birth.

When she got pregnant, Erin Murphy, a senior employee at the financial giant Glencore, was belittled on the trading floor. After returning from maternity leave, she was told to pump milk in a supply closet cluttered with recycling bins.

American companies have spent years trying to become more welcoming to women. They have rolled out generous parental leave policies, designed cushy lactation rooms and poured millions of dollars into programs aimed at retaining mothers.

But these advances haven't changed a simple fact: Whether women work at Walmart or on Wall Street, getting pregnant is difficult, and it often lasts through her early years as a mother.

The New York Times reviewed thousands of pages of court and public records and interviewed dozens of women, their lawyers and government officials. A clear pattern emerged. Many of the country's largest and most prestigious companies still systematically sideline pregnant women. They pass them over for promotions and raises. They fire them when they complain.

In physically demanding jobs — where an increasing number of women unload ships, patrol streets and hoist boxes — the discrimination can be blatant. Pregnant women risk losing their jobs when they ask to carry water bottles or take rest breaks.

In corporate office towers, the discrimination tends to be more subtle. Pregnant women and mothers are often perceived as less committed, steered away from prestigious assignments, excluded from client meetings and slighted at bonus season.

Each child chops 4 percent off a woman's hourly wages, according to a 2014 analysis by a sociologist at the University of Massachusetts, Amherst. Men's earnings increase by 6 percent when they become fathers, after controlling for experience, education, marital status and hours worked.

## How America Wrongs Working Mothers



Candia Higgins said Walmart made her clean with chemicals while she was pregnant.

Throughout the American workplace, pregnancy discrimination remains widespread. It can start as soon as a woman is showing, and it often lasts through her early years as a mother.

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## Border Policy Had Been Seen As Inhumane

2. Presidents Spurned Separating Families

By JULIE HIRSCHFELD DAVIS and MICHAEL D. SHEAR

WASHINGTON — Almost immediately after President Trump took office, his administration began weighing what for years had been regarded as the darkest option in the effort to discourage immigrants from unlawfully entering the United States.

Children would be separated from their parents if the families had been apprehended entering the country illegally, John F. Kelly, then the homeland security secretary, said in March 2017. “It would be a last resort,” he said, “but it was a last resort.”

For more than a decade, even as illegal immigration levels fell, parents, separated children in cages, showed border crossings had been divided. American presidents in both political parties, presiding over the last administration, had been seen as inhumane.

Mr. Trump's comments touched off a swift backlash.

But advocates inside the administration — most prominently, Stephen Miller, Mr. Trump's senior policy adviser, never gave up the idea. Last month, facing a sharp uptick in illegal border crossings, Mr. Trump ordered a new effort to substantially prosecute anyone who crossed the border unlawfully — with few exceptions for parents traveling with their minor children.

And now Mr. Trump faces the consequences. With thousands of children detained in makeshift shelters, his government this past week had to begin processing what

## TRADE WAR FEARS START TO STRAIN GLOBAL ECONOMY

BUSINESSES DISRUPTED

Trump Sees Tough Stance as Way to Rebalance U.S. Trade Deficits

This article is by Peter S. Goodman, Jack Austin and Elizabeth Mahan.

LONDON — Only a few months ago, the global economy appeared to be humming, with all major nations growing in tandem. Now, the world's fortunes are imperiled by an unfolding trade war.

In the Trump administration, import tariffs on autos and made steel, provoking broad retaliation, global commerce is suffering disruptions, leading signs of recession that could trigger economic growth. The latest escalation came on Friday, when President Trump announced fresh tariffs on 10 billion in Chinese goods, prompting swift retaliation from Beijing.

As the conflict broadens, investors are slowing at ports and airports, and around the world. Prices for crucial raw materials are rising. At factories from Germany to Mexico, orders are being cut and inventories depleted. American farmers are losing sales as trading partners hit back with duties of their own.

Workers in a Canadian steel mill scrambled to meet, and were told to stay home. In the United States, after Mr. Trump this month stepped tariffs on imported steel, a Seattle customer soon canceled an order.

“The impact was felt immediately,” said Jon Hobbie, president of Alcoa's in Idaho. “The penny is really dropping now as to what this means to people's businesses.”

The Trump administration portrays its confrontational stance as a means of forcing multinational companies to bring factory production back to American shores. Mr. Trump has described trade wars as “easy to win” while warning to rebalance the United States' trade deficits with major economies like China and Germany.

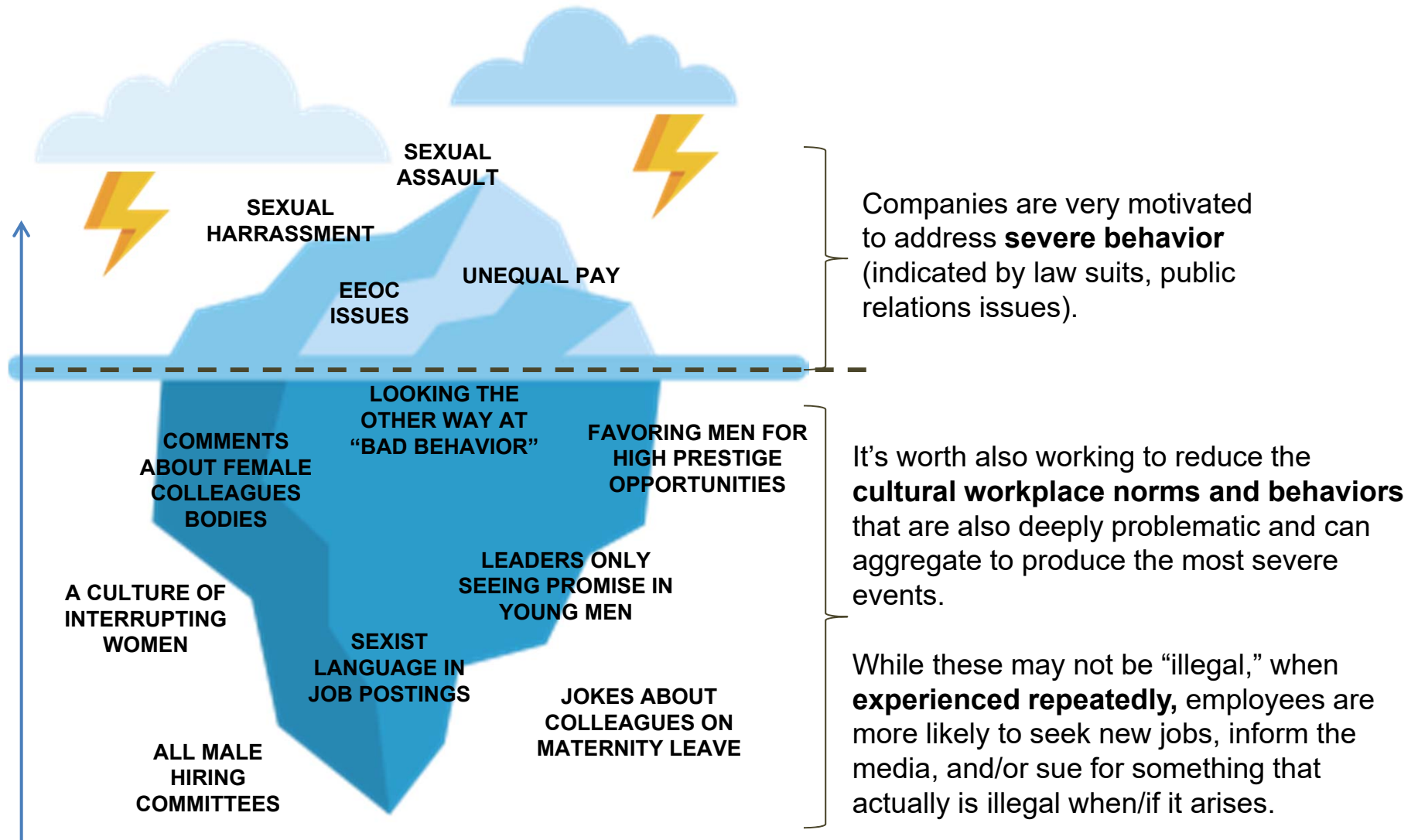
Mr. Trump's offensive may yet prove to be a negotiating tactic that threatens economic pain to force deals, rather than a move to

Pregnant women and mothers are often perceived as less committed, steered away from prestigious assignments, excluded from client meetings and slighted at bonus season.

Each child chops 4% off a woman's hourly wages, according to a 2014 analysis by a sociologist at the University of Massachusetts, Amherst.

Men's earnings increase by 6 percent when they become fathers, after controlling for experience, education, marital status and hours worked.


# Pay equity & the gender issues landscape **Buchalter**





# Agenda

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- The Facts
  - Defining “Equal pay”
  - Pay Equity Laws & trends (state, federal, international)
  - Are requests for pay history...history?
  - Action steps for improving how your company treats, advances, and sets women up for success

# The case for gender equality at work

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- **Gender inclusion makes financial sense.**  
A 26% difference in ROI was found between top-quartile companies (those with 19-44% female board members) and bottom quartile companies (those with no female board members). ([Catalyst](#))
- **Women are different, successful -- leaders.**  
The top four leadership attributes executives value most for success today—intellectual stimulation, inspiration, participatory decision-making, and setting expectations/rewards—are more commonly found among women leaders. ([McKinsey & Co.](#))
- **Women bring more organizational effectiveness.** Companies with three or more women on executive committees or boards scored higher on nine metrics of organizational effectiveness than their peers. ([McKinsey & Co.](#))

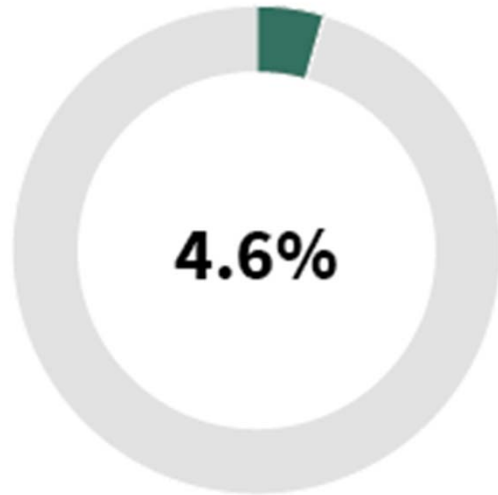
**And, CEOs agree it's the right thing to do.**  
More than 75% of American CEOs include gender equality in their top ten business priorities.

Data from national, Women in the Workplace studies conducted by LeanIn.Org and McKinsey & Co. in 2015, 2016, and 2017 as well as similar [research conducted by McKinsey in 2012](#), unless otherwise noted.



# Unequal representation

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The actual percentage of companies in the S&P 500 and the Fortune 500 that are run by women.

(And only 14% of all C-suite positions in Fortune 500 companies). -Catalyst

Nearly 50% of law school graduates are female, and almost 34% of attorneys nationally were women in 2013, **less than 19% are equity partners**. -NAWL 2015

**4% of the 200 top U.S. law firms** have female managing partners.

-American Bar Association

➤ **Women are not being advanced** at the same rates as their male peers. Even in their very early entry-level career ranks, women are promoted at **30% lower rates** than their male colleagues.

-McKinsey 2017

# Unequal pay: what research shows

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Professional women only make **92%** of what their similarly-qualified male peers do for comparable work.

-Georgetown University Center on Education and the Workforce

**Female law partners** make between 44% - 77% of what their male peers do.

-Various legal research organizations

At every education level women have to earn **one additional degree** in order reach average salaries in line with men's averages.

-Georgetown Center on Education and the Workforce

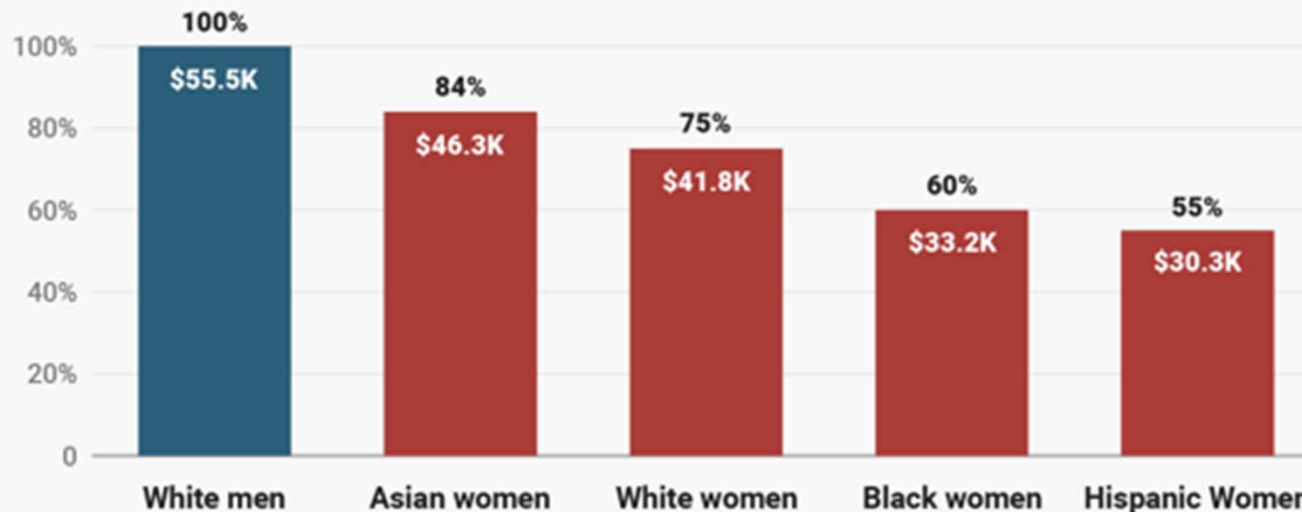


# Especially women of color

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## WOMEN'S ANNUAL EARNINGS COMPARED TO WHITE MEN'S



SOURCE: JEC.senate.gov; U.S Census Bureau

BUSINESS INSIDER

**Hispanic** women can expect on average to earn at least **\$1 Million less** than a white man for the same work in a 40 year career. -AAUW

Pay gaps also exist for **older** workers, workers with **disabilities**, and working **parents**. -AAUW

# The Law: What is “Equal Pay”?

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“Equal pay for equal work” –  
employees doing the same job  
should be given equal pay

# What is the Framework for Pay Equity Requirements?

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- Equal Pay Act of 1963
- Title VII of the Civil Rights Act of 1964
- Lilly Ledbetter Fair Pay Act of 2009
- State pay equity laws
  - Review of California's Equal Pay Act
  - Other state laws to consider



## The Equal Pay Act (EPA)

- Employers must not pay unequal wages to men and women who perform jobs that require: (1) substantially equal skill, effort and responsibility, and that are (2) performed under similar working conditions (3) within the same establishment.
- Four exceptions:
  1. seniority system
  2. merit system
  3. system that measures earnings by quantity or quality
  4. differential based on any other factor other than sex

# Governing Standards Under Federal Law Buchalter

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## cont'd

- Seniority, merit or incentive system must be bona fide to operate as an EPA defense
  - an established system containing predetermined criteria
  - has been communicated to employees
  - has been consistently and even-handedly applied
  - is in fact the basis for the differential
- “Factors other than sex” defense
  - must be related to job requirements or otherwise business related
  - Employer and employee were aware that factor was being applied in setting compensation
  - must be applied consistently
  - must correspond to compensation disparity
  - e.g.: education, experience, training and ability



# Governing Standards Under Federal Law

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## cont'd

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- The Equal Pay Act
  - Two year statute of limitations
  - A charge may be filed with the EEOC or go straight to court
  - Employer burden to prove a good reason for the wage disparity





# Governing Standards Under Federal Law

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## cont'd

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- EPA – Important Things to Know:
  - Equal wages must be paid in the same form
    - An employer cannot pay a higher hourly wage to a male employee and then attempt to equalize the difference by paying a bonus to a female employee.
  - Possession of a skill not needed to meet the requirements of the job should not be considered
    - A female employee with a masters degree cannot be paid more than a male employee with a bachelors degree if a masters degree is not necessary to perform the job.
  - Job content, not job titles, determines whether jobs are substantially equal
  - If there is inequality in wages between men and women, employers may not reduce the wages of either sex to equalize their pay

### The Ninth Circuit Comes in Line with California:

- Rizo v. Yovino, 2018 WL 1702982 (9<sup>th</sup> Cir. April 9, 2018) - an employer's consideration of prior salary information cannot serve as a justification for sex-based wage differentials under the federal Equal Pay Act
- Focus was on the catchall exception to wage differentials under the Equal Pay Act—"a differential based on any other factor other than sex"
- Prior salary does not fall under the catchall exception by emphasizing that the exception only applies to legitimate job-related factors (e.g., experience, educational background, ability, prior job performance) and does not apply to factors "that are simply good for business"

# Governing Standards Under Federal Law

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## cont'd

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- Title VII
  - Employee must show that he or she is paid less because of sex, race, age, nationality, disability, etc.
  - Employee has the burden to prove that the employer's reason for the disparity is a pretext
  - No liquidated damages
  - Emotional distress and punitive damages, although subject to caps
  - No requirement that the claimant's job be substantially equal to that of a higher paid person outside of the employee's protected class
  - No requirement that work be within the same establishment
  - Intent required for disparate treatment but not disparate impact
  - Disparate impact cases something to watch
  - 180 or 300 day statute of limitations



# Recent Developments at the Federal Level **Buchalter**

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- Lily Ledbetter Act, 2009
  - Each paycheck that contains discriminatory compensation is a separate violation regardless of when the discrimination began
- Pay transparency for federal contractors adopted by Office of Federal Contract Compliance Programs in January 2016
- EEOC-1 (2016) regulation by EEOC/DOL requires employers to report on the W-2 earnings and hours worked for all employees by race/ethnicity and gender
  - First compensation date was due March 2018; covers 60,000 employers and 63 million employees
  - Applies to employers with 100 or more employees
  - Must report the hours worked by employees in ten job categories divided by twelve pay bands

# California Fair Pay Act

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- Prohibits disparity in pay based gender, race or ethnicity
- Compares “substantially similar” employees when viewed as a “composite of skills, experience and responsibilities”
  - Broader than federal standard of “similarly situated”
- Compares employees across locations



- The employee must only show that he/she is being paid less than an employee of the opposite sex/race/ethnicity who is performing substantially similar work.
- The employer then must show that it has a legitimate reason for the pay difference.
- Employer can escape liability only if it carries its burden of proof to establish that the pay difference is related to one or the combination of:
  1. A seniority system;
  2. A merit system;
  3. A system that measure earnings by quantity or quality of production;
  4. Bona fide factor other than the protected category, such as education, training, or experience
    - Prior salary does not fall under the “bona fide factor” exception for a wage differential
    - An employer may only rely upon this last defense, however, where it can demonstrate that the factor (a) is not based on or derived from a sex/race/ethnicity-based differential in compensation; (b) is job-related with respect to the position in question; and (c) is consistent with business necessity



- What does “business necessity” mean?
- It means “an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve”
- This business necessity defense will not apply if the employee demonstrates that an alternative business practice exists that would serve the same purpose without producing the wage differential
- To escape liability, an employer must also affirmatively demonstrate that the factor relied upon was reasonably applied and that the factor actually accounts for the entire wage differential

# California Fair Pay Act cont'd

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- Allows the recovery of “unpaid” wages, interest, attorneys’ fees, \$10,000 penalty, and liquidated damages—double the wages and interest
- Prohibits retaliation against employees who seek to enforce—or assist in any manner in the enforcement—of the EPA: question their pay
- Employer must keep records of wages, wage rates, job classifications, and other terms and conditions of employment for three years. (Previously, the record requirement was only two years)

As California Goes...



...so goes the nation.

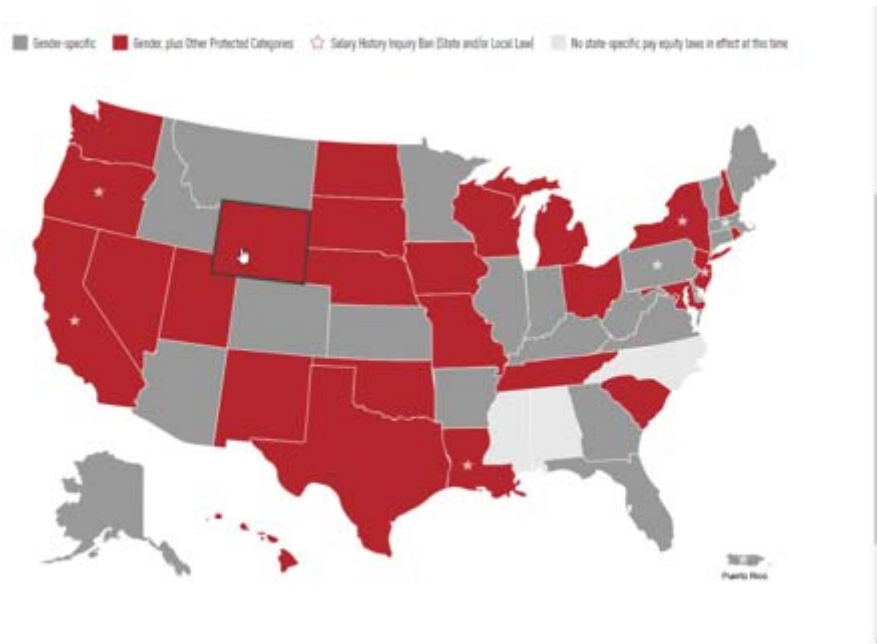
## Other states to consider as well

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- Massachusetts – equal pay for “comparable work”
- Maryland – prohibits an employer from “providing less favorable employment opportunities”
- New York – similar work under similar conditions; rationale for differential in pay must be a “bona fide factor other than sex, such as education training or experience”
- New Jersey – makes it unlawful “[f]or an employer to pay any of its employees who is a member of a protected class at a rate of compensation, including benefits, which is less than the rate paid by the employer to employees who are not members of the protected class for substantially similar work, when viewed as a composite of skill, effort and responsibility”
  - Race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait of any individual, or liability for service in the armed forces

## Other states, cont'd



- Oregon – equal pay for “work of comparable character”
- Puerto Rico – follows Massachusetts lead, few differences
- Washington – “Any employer in this state who discriminates in any way in providing compensation based on gender between similarly employed employees of the employer is guilty of a misdemeanor.”
  - “An employer may not, on the basis of gender, limit or deprive an employee of career advancement opportunities that would otherwise be available.”
  - Unfair practice for any employer “[t]o discriminate against any person in compensation . . . because of . . . sex[.]”
- 30 more states and jurisdictions have action in the works

# Growing International Obligations

Global Top 10	
The Global Gender Gap Index	Global rank*
Iceland	1
Finland	2
Norway	3
Sweden	4
Rwanda	5
Ireland	6
Philippines	7
Slovenia	8
New Zealand	9
Nicaragua	10

Source: The Global Gender Gap Report 2016  
Note: \*2016 rank out of 144 countries

**Australia** – employers with 100+ ees must submit an annual report with details on salary and number of men versus women

**Austria** – employers with 150+ ees must prepare a report showing gender pay differences

**Belgium & France** - employers with 50+ ees must conduct a comparative pay equity analysis and, if the analysis finds that women earn less than men, the employer must establish an action plan to remedy the pay difference

**Canada** – depends on jurisdiction; reporting obligations exist in Quebec and Ontario

**Germany** – pay equity reporting obligation and ees may request salary info

**Iceland** – requires companies to confirm every 3 years they pay men and women equally

**New Zealand** – would require gender pay data for publication in aggregate

**Norway** - employers who are subject to certain accounting obligations and public employers have a legal duty to report on gender pay differences

**Portugal** - employers must annually collect information regarding working conditions and compensation and submit the information to labor inspection authorities for review

**Sweden** – survey of gender pay differences every 3 years

**Singapore** – calculate gender pay gap at board level

**UK** – Employers with 250 or more ees must publish and report specific figures about their gender pay gap

# Are requests for salary history... history? Buchalter

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- While we can differ as to why it exists –  
The Pay Gap is Real
  - This persistent pay gap has existed for several decades with little change despite laws since the 1960s prohibiting pay discrimination
- States, big cities, and other pay equity champions are looking for new, aggressive tools to “attack the gap”
- One tool that has quickly and broadly emerged is bans on requesting applicants’ salary history
- Why?





# Salary History Restrictions are Spreading

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Passed Salary History Ban	Proposed Salary History Ban
<ul style="list-style-type: none"><li>• California</li><li>• Delaware</li><li>• Massachusetts (July 1, 2018)</li><li>• Oregon</li><li>• Puerto Rico</li><li>• New Orleans</li><li>• New York (City of New York, Albany County, and Westchester County)</li><li>• Pittsburgh</li><li>• Philadelphia</li><li>• San Francisco (July 1, 2018)</li></ul>	<ul style="list-style-type: none"><li>• DC</li><li>• Georgia</li><li>• Iowa</li><li>• Maine</li><li>• Maryland</li><li>• New York</li><li>• North Carolina</li><li>• Pennsylvania</li><li>• Rhode Island</li><li>• Texas</li><li>• Vermont</li><li>• Washington</li><li>• Wisconsin</li><li>• Los Angeles – feasibility study</li></ul>

## So what can I ask for in terms of salary requirements?

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- Best Practice – stop asking for salary history and instead ask for salary expectations
  - Provide to applicants a salary range for the position
  - Set a fixed starting salary or set of salaries by position
    - “Matrix approach” that takes into account job-related attributes
  - Data-driven “predicted starting salary” approach – use stat tool to determine job offer amount based on salaries of incumbent employees in the position



# Fixing root causes of pay gaps

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## 1. Understand where your company has **negative workplace norms and behaviors**.

(Survey staff, confidentially interview staff, analyze HR/legal/media data, review policies, conduct behavior scans, observe.)

Recruitment	Hiring	Opportunities	Promotion	Parental policies	Culture	Retention
Do your cultivation events have subtle “turn-offs”?	Which applicants negotiate?	Who is given the best and most coveted projects and clients?	What are the rates of promotion for various groups?	Do you have a ramp-on/off program?	Who are the top evangelists? (Which groups are not?)	Are certain groups leaving more than others?
Who makes up the pool?	Are people hired based on “cultural fit”?	Do pregnant women get the same access?	Is there a disparity in raises earned? Bonuses?	Do women progress at the same rate after having a baby? Do men?	Who gets the airtime?	Why?
How do you encourage diverse groups and women to apply?	What groups of people are declined more than others?	When people retire, which people get their client load?	Do managers see data on promotion rates?	Are deliverables emphasized over “face-time”?	Is there an overtly hostile environment or quid-pro-quo culture?	If gender inequality is raised in exit interviews, how do you act on it?
Who serves on interview committees?		Do women and men take on separate kinds of projects and internal initiatives?	Are there prominent women leaders?		Are subtle practitioners of “on the edge” behavior ignored rather than coached?	
How do you ensure interviewers avoid unconscious bias?			Are there differences in what people consider superior performance?			

# Example starting solutions

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2. Work to fix your specific issues. What works in one company varies dramatically from organization by organization, but here are some examples of ways companies are ending the behaviors, systems, and practices that accumulate to bring about pay disparities, retention troubles, #metoo issues...

Recruitment	Hiring	Opportunities	Promotion	Parental policies	Culture	Retention
Involve women in planning and staffing recruiting events.	Consider not allowing salary negotiations. Or, spell out "negotiations welcome."	Track which gender is given the best and most coveted projects and clients.	Track and share with managers their gendered rates of promotion.	Install a ramp-off/ramp-on program for re-introducing employees to projects and clients. Base it on projects, not hours.	In employee engagement surveys, ask if employees promote the company to see if certain groups are more confident about the workplace.	Perform exit interviews to understand trends in where employees are going and why they are leaving.
Involve men in campaigns to bring more women into the firm.	Don't hire for "cultural fit" but rather for talent & track record.	When people retire, equitably re-distribute their client load based on skill, capacity, etc..	Include as a part of managers' review that they must promote equitably or fully document reasons for disparities.	Track the speed of parents progressing after leave compared to non-parents of both genders.	Ensure women get airtime and preferred seating at meetings, firm social events.	Create a protocol to track and correct gender issues that come up in exit interviews.
Don't stop search until you have qualified women in pool.	Track the rate you decline women applicants vs. men.	Circulate between the genders the less coveted activities such as calendaring, taking notes and party-planning.	For all promotions, require written rationale of who was second and third to be considered and what it will take for them to be promoted next time.	Emphasize deliverables, not "facetime" in the office or at office socials.	ID & coach subtle practitioners of "on the edge" behavior.	
Promote to women's trade organizations, groups, conferences.	When you offer women positions and they decline, ask why.					
Ensure women serve on interview committees.						

# Sustaining real change

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To ensure your changes “stick” and that any new programs are accepted and changed policies are followed consistently, do the following:

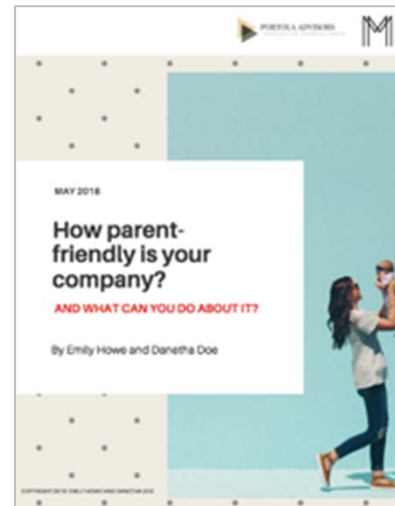
- ❑ **Build buy-in for a better culture - at all levels** - from executive team alignment to middle management willingness. All roles will need to usher in and uphold the new ways.
- ❑ **Assess and understand what needs fixing at your specific business.** Target those areas.
- ❑ **Map out the specific expected behaviors, changes, and metrics for all groups.** Communicate expected future behaviors to each group, including why the effort is critical to the company. (Don't just send an email telling people to do X differently now.)
- ❑ **Embed true consequences** and build in reinforcements for the expected new behaviors.
- ❑ **Offer tools, training, and positive reinforcement on a regular basis** (ex. tools that help managers/HR track the gender of promotions, training on more equitable recruiting practices).



# Resources & References

- Pew Research Center. [“Women and Leadership.”](#) (2015)
- AAUW. [The Simple Truth about the Gender Pay Gap.](#) (2017)
- Spencer Stuart. [“Women in Technology: Closing the Gap.”](#) (2016)
- Egon Zehnder. [“Global Board Diversity Analysis.”](#)(2016)
- Fortune. [“What Makes a Great Workplace for Women? \(Not What Most Companies Think\)”](#) (2017)
- LeanIn.Org and McKinsey & Co. “Women in the Workplace.” (2017, 2016, 2015)

Or, email me for these resources: [Emily@PortolaAdvisors.com](mailto:Emily@PortolaAdvisors.com)



# Questions?

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