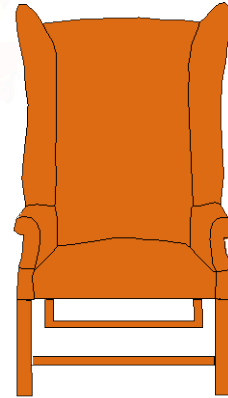


# FIRST CHAIR

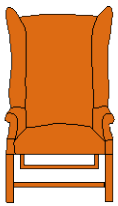


UNITING LEGAL COMMUNITIES TO RECOGNIZE EXCELLENCE

## Pay Equity Laws

Lori A. Bowman, Shareholder of  
Ogletree, Deakins

- Federal Law
  - Equal Pay Act, 29 USC § 206(d)(1)
    - Prohibits an employer from paying different compensation to employees of the opposite sex who work in the same establishment and perform equal work in jobs that require equal skill, effort and responsibility and which are performed under similar working conditions
    - Differences in pay may be justified by: (1) seniority system; (2) merit system; (3) system which measures earnings by quantity or quality of production; or (4) based on any other factor other than sex

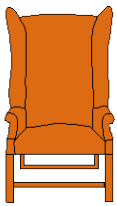


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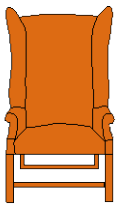
- Other federal statutes: Title VII of 1964 Civil Rights Act, Age Discrimination In Employment Act, Americans With Disability Act, and Genetic Information Nondiscrimination Act
- Regulations
  - Beginning with the 2017 report due on March 31, 2018, employers with 100 or more employees are required to report aggregate W-2 wages and hours in 12 pay bands for each of the 10 EEO-1 job categories and 14 gender, race and ethnicity categories on the current form



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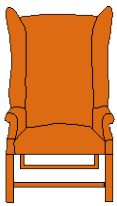
- Effective January 11, 2016, OFCCP Final Rule under Executive Order 13665 applicable to federal contractors prohibits discrimination against those “who inquire about, discuss, or disclose their own compensation or compensation of other employees or applicants”
- Effective August 15, 2016, additional OFCCP regulations prohibit contractors from paying different compensation to similarly situated employees on basis of sex; factors include tasks performed, skills, effort, level of responsibility, working conditions, job difficulty, minimum qualifications and other objective factors



Recent State Laws make it easier to prevail on equal pay claims

•States with recent EPA statutes and amendments:

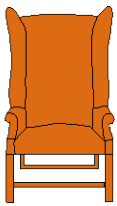
- California (1/1/16, 1/1/17)
- Oregon (1/1/19)
- New York (1/19/16)
- Maryland (10/1/16)
- Massachusetts (7/1/18)



## Key features of state statutes

### •Protected Classes:

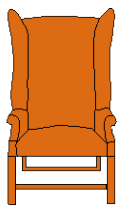
- **California:** sex, race, ethnicity
- **Oregon:** sex, race, religion, sexual orientation, national origin, marital status, veteran status, disability, age
- **New York:** sex
- **Maryland:** sex and gender identity
- **Massachusetts:** gender



## Key features of state statutes

- Location comparison:

- **California:** Amendment eliminated same establishment provision
- **Oregon and Massachusetts:** Location may explain wage difference
- **New York:** Comparators must work in same “geographic region”  
no larger than the same county
- **Maryland:** Comparators must work in same county

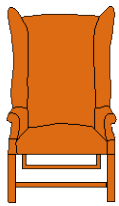


## Key features of state statutes

### •Comparison Groups:

- **California and Massachusetts:** Substantially similar work when viewed as a composite of skills, effort and responsibility and performed under similar working conditions
- **Oregon:** “work of comparable character” defined as “work that requires substantially similar knowledge, skill, effort, responsibility and working conditions in the performance of work, regardless of job description or title”
- **New York:** “equal work” defined as “equal skill, effort and responsibility” and “performed under similar working conditions”
- **Maryland:** “work of comparable character” or work on the same operation, in the same business, or of the same type; or providing less favorable employment opportunities based on sex or gender identity

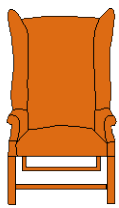




## Key features of state statutes

### •Defenses:

- **California:** seniority, merit, system that measures quantity or quality of production, bona fide factor other than sex
  - Bona fide factor other than sex (e.g. education, training or experience) requires employer to show factors non-discriminatory, job related and consistent with business necessity; employee can prevail by showing a less restrictive alternative
  - Prior salary may not by itself justify pay disparity



## Key features of state statutes

- Defenses:

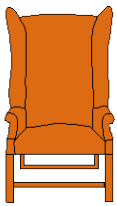
- **Oregon:** education, training, experience, seniority, merit and production related systems, workplace location, travel needs
  - Affirmative defense to compensatory and punitive damages: Within three months before action filed, employer completed an equal pay analysis in good faith that was reasonable in detail and scope; employer eliminated wage differential for plaintiff and made reasonable and substantial progress towards eliminating wage differential for the protected class



## Key features of state statutes

### •Defenses:

- **New York:** bona fide factor other than sex; such as education, training or experience
  - Employer must show that the factor: 1) is not based or derived from a sex-based differential; 2) is job-related; and 3) is consistent with business necessity
  - Employee will be able to overcome the defense by showing: 1) the employer uses an employment practice that causes a disparate impact on the basis of sex; 2) an alternative employment practice exists that would serve the same purpose without causing a disparate impact; and 3) the employer has refused to adopt the alternative practice



## Key features of state statutes

- Defenses:

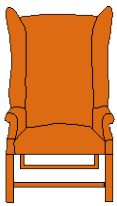
- **Maryland:** employer systems that measure performance based on quality or quantity of production and bona fide factor other than sex or gender identity, including education, training or experience but only if factor is not based on gender-based differential, is job related and consistent with business necessity, and accounts for the entire pay differential



## Key features of state statutes

### •Defenses:

- **Massachusetts:** bona fide seniority system, bona fide merit system, bona fide system that measures quality and quantity of production or sales, geographic location, travel, education, training or experience but only if job related and consistent with business necessity
  - Eliminates employee's previous compensation defense
  - Affirmative defense: 1) employer conducted reasonable self-evaluation of pay practices, 2) evaluation is conducted within three years of commencement of action, and 3) employer made reasonable progress on eliminating gender-based pay differential based on self-audit

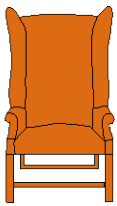


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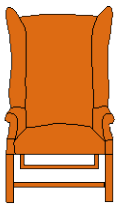
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- Pay Transparency – All statutes prohibit employers from prohibiting employees from disclosing, discussing or inquiring about own or co-workers' wages
- Prohibition on asking about salary history
  - **California and New York:** Bills to prohibit asking about salary history
  - **Massachusetts:** Statute prohibits screening applicants based on salary history



- Summary
  - Movement towards comparable worth
  - Comparisons across locations
  - Prohibition on prohibiting employees from disclosing, discussing or inquiring about own or co-workers' wages
  - Prohibition on use of previous salary history
  - Audit defense
  - Movement towards favorable opportunity requirement



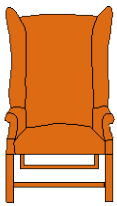
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- Proactive Steps:
  - Take action now – before agencies, private litigants and political pressure
  - Group “substantially similar” positions
  - Clean up data to identify factors driving pay decisions – HRIS systems





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- Audit wage data to identify pay disparities and weaknesses
  - Have data analyzed by expert (e.g., multiple regression analysis)
  - Outliers
- Don't forget the attorney-client privilege!