



# Equal Pay Trends

March 2023

**Seyfarth Shaw LLP**

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# Speakers

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# Agenda

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- 01** Equal Pay Landscape
- 02** Pay Transparency: Wage Range Disclosures & Pay Reporting
- 03** Equal Pay Litigation
- 04** Best Practices

# Factors Driving the Equal Pay Landscape

**Advocacy  
Action**

**Shareholder  
Action**

**Agency  
Action**

**State Law  
Changes**

**Litigation**

# The Trend Towards Pay Transparency

*Jurisdictions That Have Introduced Pay Transparency Bills:*

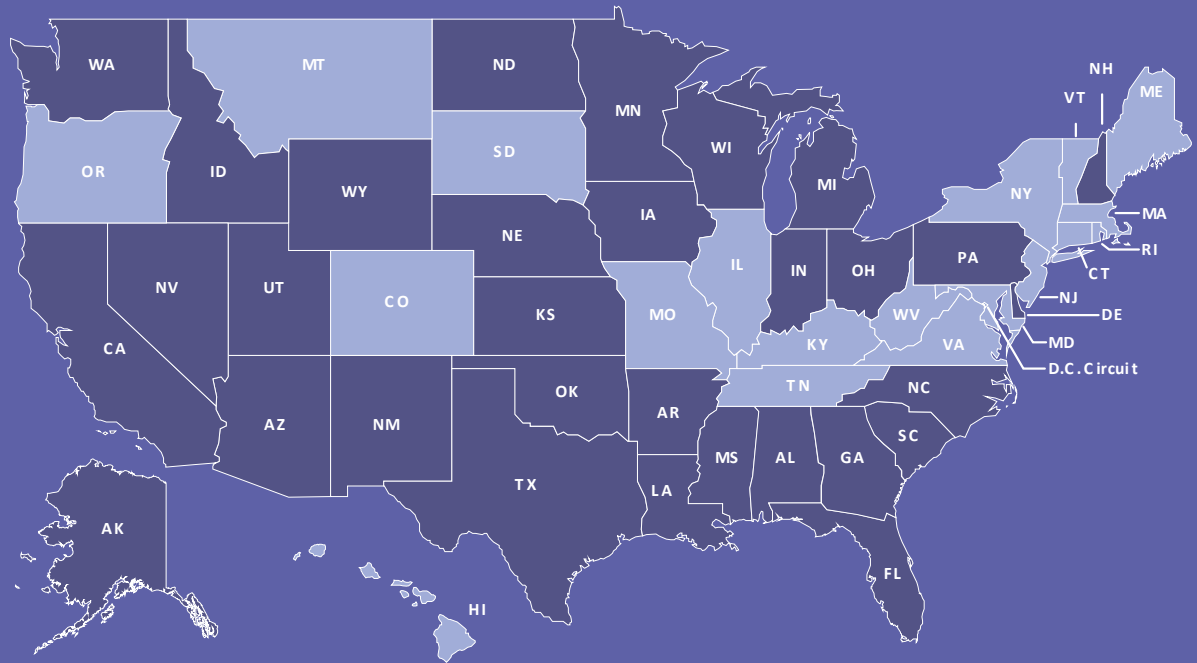
- Colorado
- Connecticut
- Georgia
- Hawaii
- Illinois
- Kentucky
- Maine
- Maryland
- Massachusetts
- Missouri
- Montana
- New Jersey
- New York City
- New York State
- Oregon
- Rhode Island
- South Dakota
- Tennessee
- Vermont
- Virginia
- Washington DC
- West Virginia

1) Wage range disclosure requirements in 15 jurisdictions

– Pending legislation in ~17 jurisdictions

2) Pay Reporting: California and Illinois

– Pending legislation in ~4 jurisdictions



# CA Pay Data Reporting Requirements



## New Timing

- Second Wednesday in May
- In 2023, the deadline is May 10<sup>th</sup>

## New Scope

- Requires reporting even if employer does not have an EEO-1 filing requirement
- Covers employees & “labor contractor” workers

## New Pay Data

- Median hourly rate
- Mean hourly rate

## New Report

- In addition to changes to the Payroll Employee Report, there is a new “Labor Contractor Employee” report

## California Now Requires Two Pay Data Reports

- *Payroll Employee Report*
  - *covers the W-2 workers employed during the selected Snapshot Period*
- *Labor Contractor Report*
  - *covers the W-2 “labor contractor” workers that performed work for a “client employer” within the client employer’s “usual course of business” during the selected Snapshot Period*
    - “Usual course of business” means the regular and customary work of the client employer.
    - “Regular and customary work” means work that is performed on a regular or routine basis that is either part of the client employer’s customary business or necessary for its preservation or maintenance. “Regular and customary work” does not include isolated or one-time tasks.





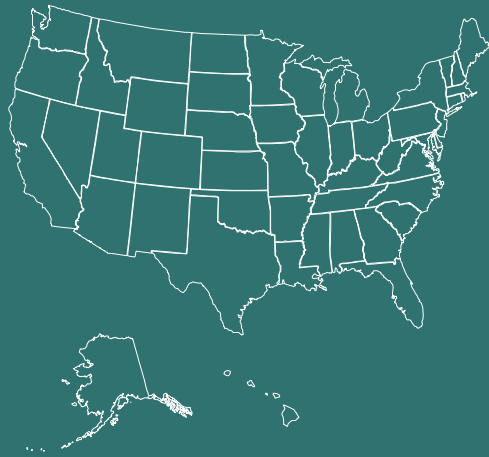
## Illinois: Pay Data Reporting

- Illinois joins California to become only the second state to require the collection and production of workforce pay data from private employers.
    - Employee level pay data
  - The Illinois law requires that employers **proactively verify compliance** with certain state and federal laws
  - Under the law, a covered “business” must:
    - Obtain an equal pay registration certificate (EPRC) from the Illinois Department of Labor
    - Rolling deadlines
    - Recertify compliance every two years thereafter
  - Allows current employees access to anonymized pay data
  - Final Regulations published in January 2023
-

# Illinois: Recordkeeping



- Record-keeping requirements:
  - name, address, and occupation of each employee;
  - the wages paid to each employee and any other forms of compensation provided by the employer;
  - **dates of hire, dates of promotion, dates of pay increases, and dates any other compensation was provided by the employer, if applicable, for each employee;**
  - and payroll records.
- All other records made in the regular course of the business operation related to the employment relationship, including
  - description of practices or other matters that describe or explain the basis for a wage differential based on sex or status as African-American
- Maintain records for five years



## Wage Range Disclosure Requirements

States and localities have adopted laws that require providing applicants and/or employees the salary/wage range (or other compensation/benefits) for a role:

1. on job postings

- California, Colorado, New York (9/23), Washington
- Jersey City, NJ; Albany County, Ithaca, Westchester County NY

2. at some point in time during the application or employment process

- Connecticut, Nevada, Rhode Island

3. upon reasonable request

- Maryland, Cincinnati & Toledo, OH
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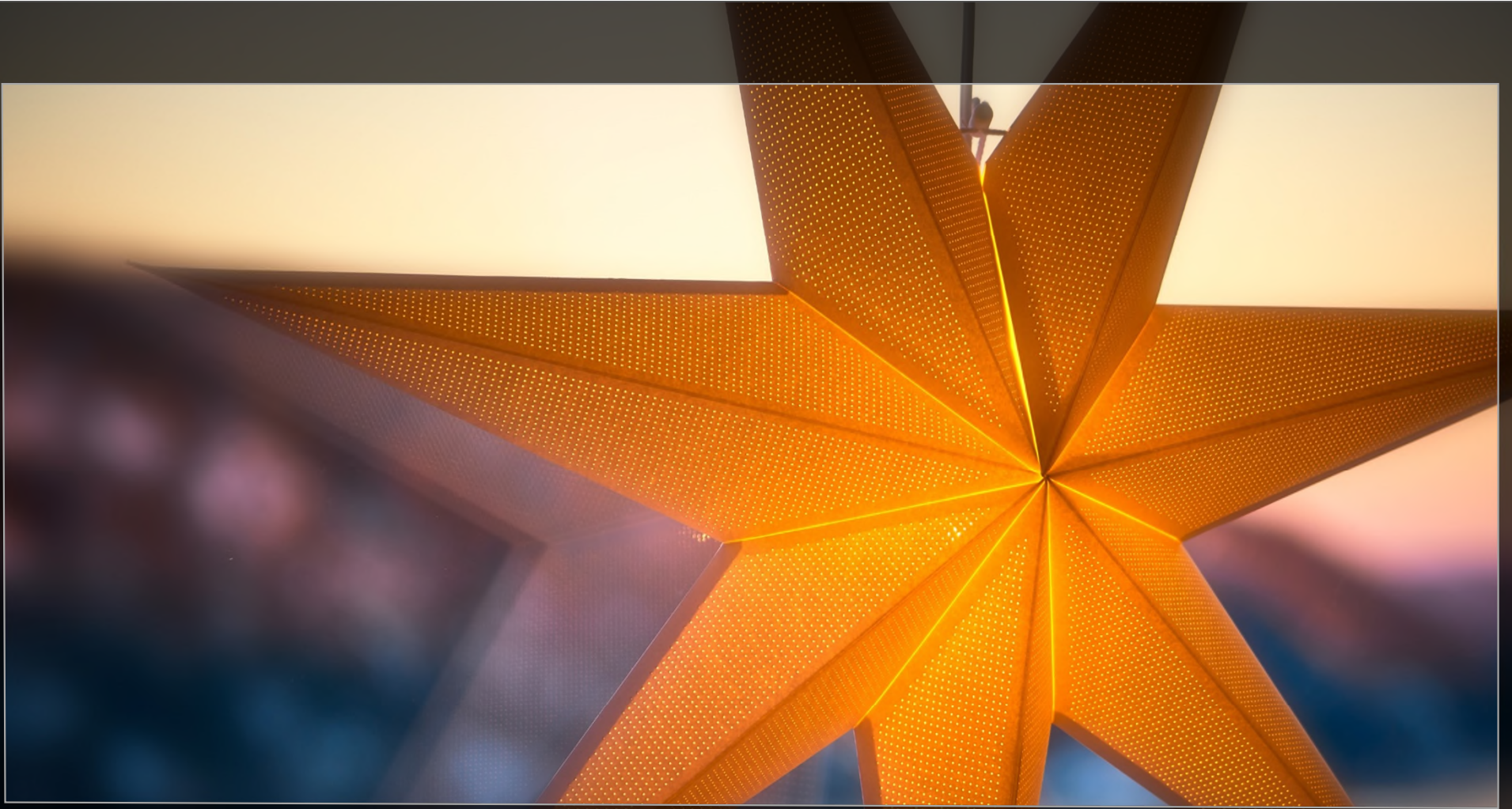
## Pay Transparency Practices

- Partner with key stakeholders to develop a **comprehensive strategy**
    - National vs state-by-state approach?
    - Guiding principles/governance: who will provide pay ranges
    - Consider providing greater transparency regarding how comp is set at organization
  - Determine **ranges for each jurisdiction**
    - Employees above/below range?
    - Consider how to post geographic differentials
    - Full range vs. posted range?
      - Balance the legal requirements and the “optics”
  - Develop **language** to be used on postings, offer letters, etc...
    - Consider whether to be more expansive than required based on talent acquisition needs; consider disclaimers (e.g., posted range applies to the current posting)
-



## Pay Transparency Practices

- Consider how to address **questions** from employees in jurisdictions that do not have pay transparency requirements
    - **Beyond legal:** these are *practical/business considerations*
  - Develop strategy responding to **questions** from current employees about position on range
  - **Train** key personnel and operationalize process
    - Talking or FAQs points for leaders and employees
    - Templates/scripts for responding to applicant/employee requests
  - Continue to **monitor** pay transparency laws and **trends nationwide**
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## **Developments in Equal Pay Litigation**



## “Equal” vs. “Substantially Similar” Work

- “Equal work”: A key element of a plaintiff’s prima facie case
- State-level legislation in California, New York, Illinois, and other states use a “substantially similar” standard rather than an “equal work” standard
  - Federal Equal Pay Act prohibits an employer from discriminating “between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which [it] 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”
  - California Fair Pay Act: “An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for **substantially similar work**, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions”



## Early Decisions Interpreting This Difference

- Class certification decision in *Ellis v. Google, LLC*, No. CGC-17-561299, 2021 WL 4169813 (Cal. Super. Ct. May 27, 2021)
  - The Court held that the “substantially similar” standard does not require that jobs be identical or require exactly the same duties.
- Summary judgment decision in unpublished opinion: *Pak v. Github, Inc.*, No. A159585, 2021 WL 3660375 (Cal. App. Aug. 18, 2021)
  - held that the 2016 revision to California’s equal pay law “did not materially alter the definition of ‘equal work’ or the analysis of that issue reflected in prior state and federal cases,” but instead, “the amended standard was very close to that which has long been applied by courts under the federal Equal Pay Act.”
- What about salary history? *Edelman v. NYY Langone Health Sys.*, No. 21-cv-502(LGS), 2022 WL 4537972 (S.D.N.Y. Sept. 28, 2022)





## Wage Rates or Total Compensation

- Courts should take into account all forms of compensation, including bonuses, commissions, benefits, and other forms of remuneration. But ultimately, the comparison should be about rates, not total compensation.
- This issue can be surprisingly complex:
  - *Wiler v. Kent State Univ.*, No. 5:20-cv-00490, 2022 WL 15633387 (N.D. Ohio Oct. 28, 2022)
  - *Sempowich v. Tactile Sys. Tech., Inc.*, No. 5:18-cv-488-D, 2020 WL 6265076 (E.D.N.C. Oct. 23, 2020)
  - *Morgan v. U.S. Soccer Fed'n, Inc.*, 445 F. Supp. 3d 635 (C.D. Cal. 2020)



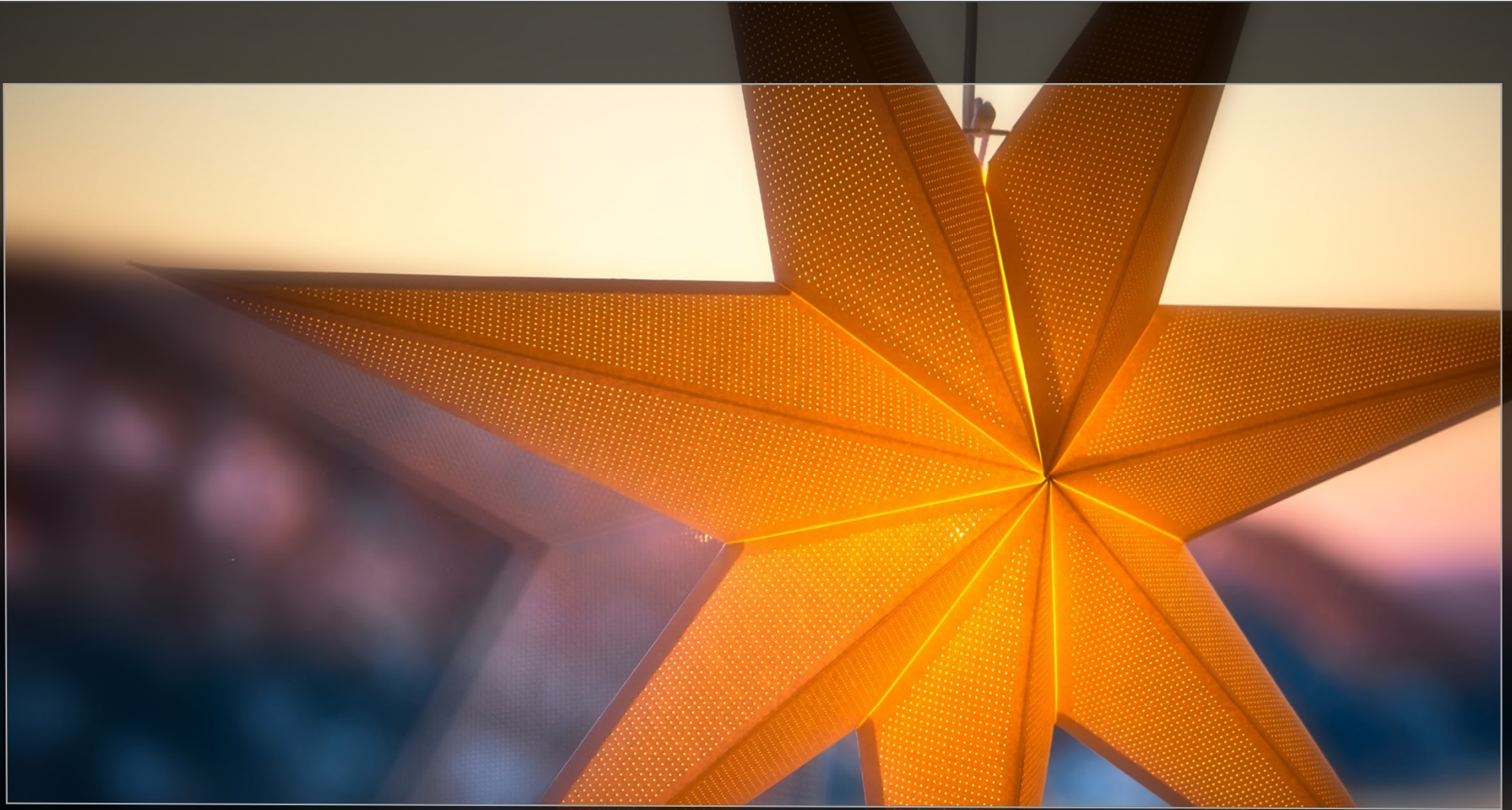
## Proving the “Factor Other Than Sex” Defense

- The “factor other than sex” defense is, by far, the most commonly relied upon affirmative defense.
- Economic concerns, such as competitive pressures to attract top talent, as well as financial difficulties and corporate cutbacks, are often relied upon as factors other than sex.
- The variety of ways that economic considerations intrude upon employers’ compensation decisions, and the ways that those decisions will be viewed by a court, are difficult to categorize or generalize about.
  - Market value and attracting top talent
  - Pay cuts or salary freezes due to economic or business challenges
  - Concern for internal equity



## Compensation Systems as a “Factor Other Than Sex”

- Employers will often defend salary disparities by claiming they are the natural result of the normal operation of their compensation system
  - Follow the rules: *Niekamp v. State of Missouri*, No. 20-cv-04075-WJE, 2022 WL 4543207 (W.D. Mo. Sept. 28, 2022)
  - Think hard about discretion within those systems. Unwritten guidelines can be trouble: *Barthelemy v. Moon Area Sch. Dist.*, No. 2:16-cv-00542, 2020 WL 1899149 (W.D. Pa. Apr. 16, 2020) vs. *Lochner v. Wisc. Dep’t of Agriculture, Trade, and Consumer Prot.*, No. 19-cv-878-wmc, 2022 WL 3355262 (W.D. Wisc. Aug. 15, 2022)
  - No mistakes! *Johnson v. Canyon Cnty., Idaho*, No. 1:19-cv-364-BLW, 2020 WL 5077731 (D. Idaho Aug. 27, 2020)



# Proactive Equal Pay Best Practices



## Documentation & Data is Key for Proving Any Affirmative Defense

- Robust, contemporaneous documentation is often the most critical factor in determining the applicability of any affirmative defense.
- The debate about prior salary history shows the potential advantage to plaintiffs in challenging allegedly “tainted” defenses: *Rizo v. Yovino*, 950 F.3d 1217, 1228 (9th Cir. 2020)
- Equal pay plaintiffs have tried to expand upon the logic of the “prior salary” line of cases to attack other factors other than sex:
  - Salary negotiations
  - Other forms of discrimination, e.g., sales territories or other perks



## Consistent Application is Critical To Support Affirmative Defense

- If employers choose to justify a pay disparity based on a seniority or merit system, or on a system that bases pay on the quantity or quality of output, they must be careful that those systems are well documented and communicated to employees.
- A system that appears ad hoc or that is inconsistently applied risks being met with skepticism by a court
  - Brunarski v. Miami Univ., No. 1:16-cv-311, 2018 WL 618458 (S.D. Ohio Jan. 26, 2018)
  - Tourangeau v. Nappi Distribs., No. 2:20-cv-00012-JAW, 2022 WL 17987103 (D. Me. Dec. 29, 2022)



## Best Practices

- Design a Comprehensive Compensation Structure and Philosophy
    - Refine pay ranges
    - Geographic pay differentials
    - How will prior experience factor into compensation strategy
    - Performance
    - Market Considerations
  - Establish, maintain effective job structure
  - Define and share how the company sets salary at various stages
    - Starting pay philosophy
    - Promotional increases
    - Departmental transfers
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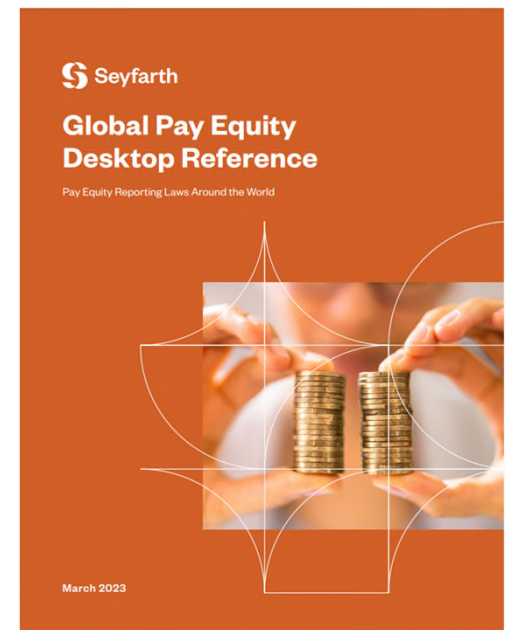
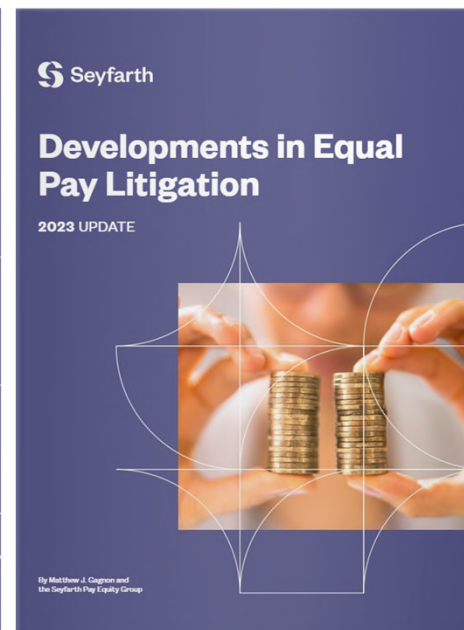
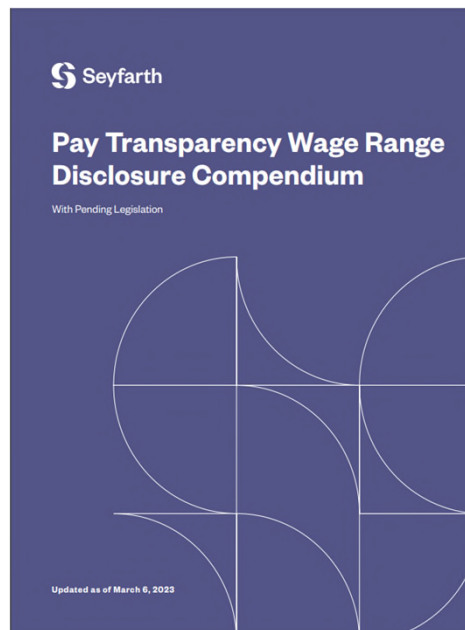
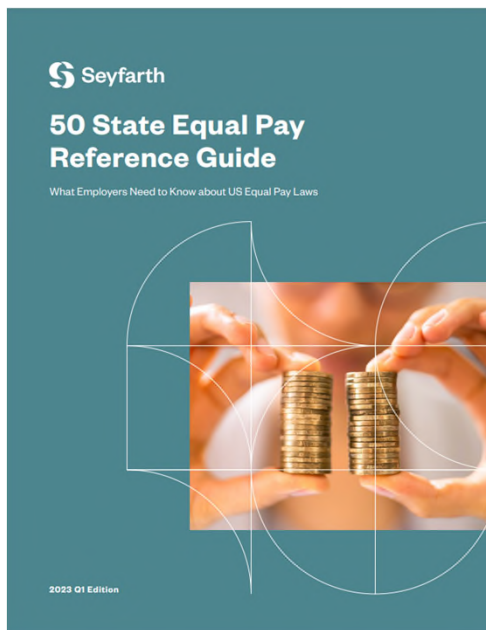


## Best Practices (Cont'd)

- Conduct regular, proactive attorney-client privileged assessments
    - Test your job architecture and compensation strategy
    - If necessary, implement adjustments to pay
    - Reassess practices that lead to unexplained pay differences
  - Implement interim methods to review compensation
    - Assess peer equity at hire and promotion
    - Compa ratios
    - Merit Increases
  - Evaluate strategy to address and correct compression
  - Focus on closing the “data” gap
    - Capture the data related to the factors that explain pay differences
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# Available Today - Four New Resources



The image features a solid teal background. On the left side, there is a white geometric design consisting of a vertical line, a horizontal line, and two quarter-circles. The vertical line is on the right, the horizontal line is in the middle, and the two quarter-circles are on the left, meeting at the horizontal line. The text "Thank You" is positioned to the right of this design.

**Thank You**