

# **LEGAL FEUD: A TOP EMPLOYMENT LAW ISSUES GAME SHOW**

## **CLE MATERIALS**

### **GENERAL OVERVIEW**

**Conference Name:** 2022 Women of Color Conference

**Session Name:** Session 1A: Legal Feud: A Top Employment Law Issues Game Show

**Date & Time:** Thursday, May 26, 2022 - 9:30 am - 10:30 am

**CA MCLE Credit:** General Credit, 1.0 hr

**Overview:** This session focuses on top employment law issues in 2022. The four categories discussed are as follows: (1) pay equity trends, (2) DE&I considerations for employers; (3) the growing use of AI in employment and the risks associated with the same; and (4) Covid-19 litigation trends.

### **PRESENTERS:**

Moderator: **Marjorie Soto Garcia**, McDermott, Will & Emery

Pay Equity: **Thelma Akpan**, Littler Mendelson

DE&I Considerations for Employers: **Tiffany Renee Thomas**, Genentech

AI in the Employment Context: **Angelina Evans**, Seyfarth Shaw

COVID-19 Litigation Trends: **Kate Djavakhyan**, Google, Inc.

### **Section 1 - Pay Equity Trends**

- **The Federal Law**

## The Federal Landscape on Pay Equity



### The two federal equal pay laws . . .

- First, the Equal Pay Act was enacted by Congress in 1963.
- The EPA prohibits employers 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**..."
- This statute overlaps with Title VII of the Civil Rights of 1964 ("Title VII") in terms of prohibiting sex discrimination, but also differs in important ways
  - Both the EEOC and OFCCP enforce Title VII

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## The Federal Laws: Equal Pay Act & Title VII

Equal Pay Act	vs.	Title VII
<ul style="list-style-type: none"> <li>• Sex</li> <li>• Compares employees whose jobs require equal skill, effort, and responsibility, and are performed under similar working conditions</li> <li>• Comparators must be in same establishment</li> <li>• Seniority, merit, quantity or quality of production, or any other factor other than sex</li> </ul>		<ul style="list-style-type: none"> <li>• Sex, race, color, national origin, religion + age and disability (ADEA and ADA)</li> <li>• Compares employees who are similarly situated</li> <li>• Comparators need not be in same establishment (but must be similarly situated)</li> <li>• Non-discriminatory factors</li> </ul>

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## The Federal Laws: Equal Pay Act & Title VII

Equal Pay Act	vs.	Title VII
<ul style="list-style-type: none"><li>• Akin to strict liability</li><li>• No exhaustion: Can go directly to Court or file with the EEOC</li><li>• Collective action proceedings limited to those who affirmatively choose to join the suit</li></ul>		<ul style="list-style-type: none"><li>• Disparate treatment cases require proof of intentional discrimination (can use statistics)</li><li>• Exhaustion: Must file with EEOC</li><li>• Follows Rule 23 class action procedures</li></ul>

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- **Amendments to the state-equivalent of the EPA**
  - There has been a wave of changes amending the state law equivalents of the Equal Pay Act.
  - In 2015 – 2016, the first wave of laws were passed in California, New York, and Massachusetts
  - Since then, other states have followed suit . . .
    - Some of these laws include
      - **Colorado** Equal Pay Act
      - **Illinois** Equal Pay Act
      - **Maryland** Equal Pay for Equal Work Act
      - **Massachusetts** Equal Pay Act
      - **New Jersey's** Diana B. Allen Equal Pay Act
      - **New York** Labor Law §§ 194
      - **Oregon** Equal Pay Act
      - **Washington** Equal Pay Opportunity Act

- And many more ...

## Who Is Protected Under Equal Pay Laws (Examples)

Sex and Gender Only	vs.	Broader Protected Statuses
<ul style="list-style-type: none"> <li>• Federal Equal Pay Act</li> <li>• Colorado</li> <li>• Massachusetts</li> <li>• Washington</li> </ul>		<ul style="list-style-type: none"> <li>• California Gender, race, and ethnicity</li> <li>• Maryland Sex and gender identity</li> <li>• New Jersey Race, creed, color, national origin, nationality, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, pregnancy or breastfeeding, sex, gender identity or expression, and disability.</li> <li>• Oregon Race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability or age.</li> </ul>

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## Who Is Compared Under Equal Pay Laws (Examples)

Sex and Gender Only	vs.	Broader Protected Statuses
<ul style="list-style-type: none"> <li>• Federal Equal Pay Act Equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions</li> <li>• New York Jobs that require equal skill, effort and responsibility, and are performed under similar working conditions</li> </ul>		<ul style="list-style-type: none"> <li>• California Substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions</li> <li>• Maryland Work of comparable character or work in the same operation, in the same business, or of the same type</li> <li>• Massachusetts Work that requires substantially similar skill, effort and responsibility and is performed under similar working conditions</li> <li>• New Jersey Substantially similar work, when viewed as a composite of skill, effort and responsibility</li> <li>• Oregon "Work of comparable character" means work that requires substantially similar knowledge, skill, effort, responsibility and working conditions in the performance of work, regardless of job description or job title.</li> <li>• Washington The performance of the job requires comparable skill, effort, and responsibility, and the jobs are performed under similar working conditions.</li> </ul>

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## Which Explanatory Reasons Can Be Used to Explain Pay Differences Under Equal Pay Laws (Example)

Broad List of Factors	vs.	Narrow List of Factors
<ul style="list-style-type: none"> <li>• Federal Equal Pay Act               <ul style="list-style-type: none"> <li>– Permissible to justify wage differences based on:                   <ul style="list-style-type: none"> <li>• a seniority system;</li> <li>• a merit system;</li> <li>• a system which measures earnings by quantity or quality of production; or</li> <li>• a differential based on any other factor other than sex</li> </ul> </li> </ul> </li> </ul>		<ul style="list-style-type: none"> <li>• E.g., New Jersey               <ul style="list-style-type: none"> <li>– Permissible to justify wage differences based on:                   <ul style="list-style-type: none"> <li>• a seniority system;</li> <li>• a merit system;</li> <li>• legitimate, bona fide factors (e.g., training, education or experience, or the quantity or quality of production) <b>if factors do not perpetuate differentials, are reasonably applied, and are job-related with respect to the position in question and based on a legitimate business necessity unless plaintiff demonstrates there are alternative business practices that would serve the same business purpose without producing the wage differential</b></li> </ul> </li> </ul> </li> </ul>

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### • Salary History bans

- Recently, a number of states and local municipalities have passed laws that prohibit employers from requesting information regarding an applicant's previous salary either directly from an applicant and/or the applicant's past employer.
- Some of these laws also prohibit a hiring entity from screening applicants based on their prior wages or utilizing this information to set pay for a new hire.
- The stated goal of these laws is to ensure employees are paid appropriately for the work they perform, and that their pay is not negatively impacted by sex discrimination.

## Jurisdictions with Limitations

On Salary History Impacting Private Employers

State Laws	Territories	Cities and Counties
<ul style="list-style-type: none"> <li>Alabama</li> <li>California</li> <li>Colorado</li> <li>Connecticut</li> <li>Delaware</li> <li>Hawaii</li> <li>Illinois</li> <li>Maine</li> <li>Maryland</li> <li>Massachusetts</li> <li>New Jersey</li> <li>New York</li> <li>Oregon</li> <li>Vermont</li> <li>Washington State</li> </ul>	<ul style="list-style-type: none"> <li>Puerto Rico</li> </ul>	<ul style="list-style-type: none"> <li>San Francisco, CA</li> <li>Kansas City, MO</li> <li>New York City, NY</li> <li>Albany County, NY</li> <li>Suffolk County, NY</li> <li>Westchester County, NY</li> <li>Cincinnati, OH</li> <li>Toledo, OH</li> <li>Philadelphia, PA</li> </ul>

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- Pay-Scale disclosure requirements and gender transparency
  - Other states have adopted laws that require offering applicants or employees (e.g., Washington State) the pay scale for the role either upon reasonable request (e.g., California, Maryland, Ohio, Washington) or with job postings (e.g., Colorado)
    - Impacted Jurisdictions
    - California
    - Colorado (far-reaching implications)
    - Maryland
    - Ohio (Toledo and Cincinnati)
    - Washington State
- Systemic Equal Pay Risks
  - Employers need to be alert to the risk of federal and state lawsuits alleging that employees are denied equal pay on the basis of sex or other protected category on a company-wide basis.
  - These lawsuits often rely on statistical analyses of pay data to allege a pattern of systemic pay discrimination.
  - Systemic equal pay lawsuits can be costly to defend because they often involve many employees. They can also impose significant reputational risk given the nature of the allegations.

## **Section 2 - DE&I Considerations For Employers**

- Increased transparency demands DE&I data
  - Companies face increased pressure and scrutiny from regulators, investor advocacy groups, and internal stakeholders to be publicly transparent with data and initiatives related to workforce diversity.
  - Growing demand by investors in environmental, social, and governance (ESG) disclosures, which include DE&I.
  - Shareholder proposals seek diversity data, including demands for public disclosure of EEO-1 reports.
  - More recent trend includes requests for “diversity audits” by independent third parties
  - Employers are responding to the increased demands for data by implementing and publicizing workforce “goals”
- Risks of Increased Transparency
  - Discrimination lawsuits
  - Reverse discrimination allegations
  - Class Action lawsuits
  - Statements Used Against the Company in litigation
  - Public Relations Risks – always responding to stakeholders
  - Insatiable appetite for data
  - Additional agency scrutiny
  - OFCCP and EEOC follow company releases and statements
  - Transparency may encourage litigation
  - Identifying areas of opportunity may spur internal complaints or lawsuits
  - May detract from goal of “belonging” and create divisiveness and employee morale issues

## **Section 3 - AI in the Employment Context**



## Growing Use of Artificial Intelligence

- Artificial Intelligence refers to processes that leverage data-rich inputs and computational techniques to make predictions that either aid or replace human decision-making.
- Employers are using AI tools as part of their regular employment decision-making process, mostly in the hiring context
- Employers are also using AI tools to enhance and support DEI initiatives
  - There are potential opportunities and risks associated with using AI tools to leverage DEI strategies
- As AI tools continue to gain significant traction in the employment context, we are seeing legislative and regulatory efforts to designed to ensure that AI tools are unbiased and transparent.

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## Increased Focus by Regulators & Legislatures

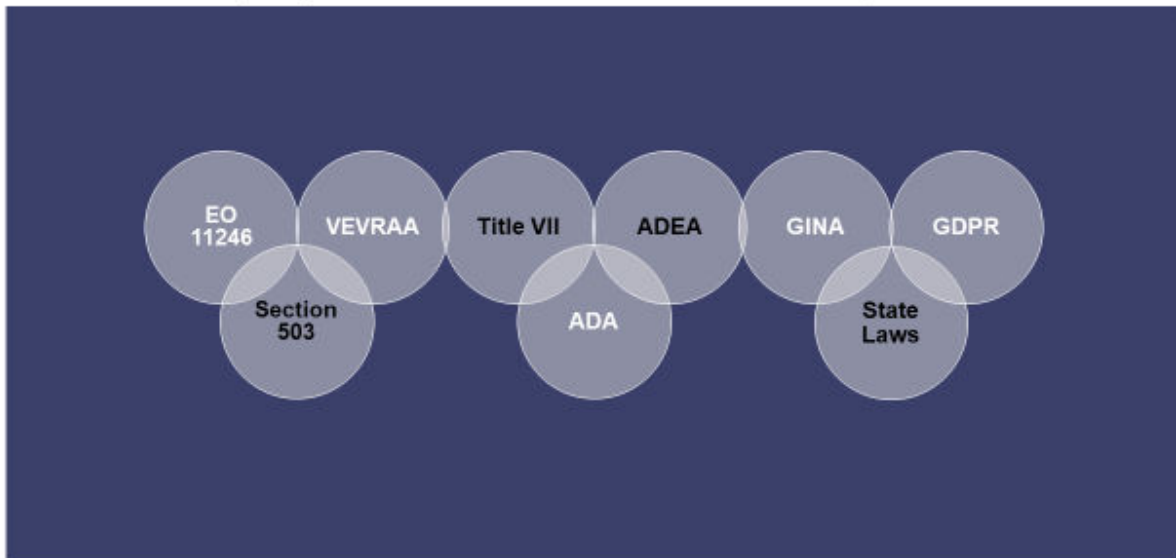
EEOC	OFCCP	New York City
<ul style="list-style-type: none"> <li>• On October 28, 2021, EEOC announced an initiative to ensure that the use of AI complies with federal non-discrimination laws.</li> <li>• EEOC also plans to issue technical assistance to provide guidance on algorithmic fairness and the use of AI in employment decisions.</li> </ul>	<ul style="list-style-type: none"> <li>• OFCCP's FAQs address AI-based technologies used to make any employment decision.               <ul style="list-style-type: none"> <li>– "Irrespective of the level of technical sophistication involved, OFCCP analyzes all selection devices for adverse impact. If OFCCP discovers that a contractor's use of an AI-based selection procedure is having an adverse impact at a contractor's establishment, the contractor will be required to validate the selection procedure using an appropriate validation strategy..."</li> </ul> </li> <li>• OFCCP Director, Jenny Yang is extremely interested in AI issues</li> </ul>	<ul style="list-style-type: none"> <li>• Beginning January 1, 2023, NYC employers will be prohibited from using tools which substantially assist or replace discretionary decision-making processes unless the tool underwent a "bias audit" within a year before its use.               <ul style="list-style-type: none"> <li>– Requires that the results of the audit be available publicly</li> </ul> </li> <li>• Legislation is pending in the District of Columbia. (Stop Discrimination by Algorithms Act of 2021)</li> </ul>

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## AI in the Employment Context Touches On Multiple Laws



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### A Few Questions To Start Asking Your Vendors

- Does the vendor have specific experience in the HR space?
- Has the tool demonstrated adverse impact?
- Does the validation evidence comply with the requirements of the *Uniform Guidelines*?
- What validation evidence has been collected to establish the job relatedness of the algorithm?
- How often does the algorithm change? Is revalidated?
- What kind of ongoing monitoring is provided?
- How does the tool impact Individuals with Disabilities? Accessibility Issues

## Questions to Keep in Mind



- How representative is your data set?
- How does your data model account for biases?
- How accurate are your algorithm's predictions?
- Does your algorithm raise ethical or fairness concerns?
- Has the tool demonstrated adverse impact?
- If so, has the tool been validated under the requirements of the Uniform Guidelines?
- How often does the algorithm change? Is revalidated?
- What kind of ongoing monitoring is provided?

## Section 4 - Covid-19 Litigation Trends

## Types of Lawsuits



### COVID-19 Employment Litigation Trends

#### Failure to provide a safe working environment:

- Negligence claims, violations of state or federal workplace safety laws and COVID-19 safety protocols, wrongful death claims
- Common allegations:
- Failure to provide workers with adequate personal protective equipment
- Failure to implement customer or visitor policies (such as required temperature checks or masks) to protect employees

#### Discrimination claims:

- Age and disability discrimination claims dominate COVID-19-related filings to date
- Example allegations:
- 70-year-old plaintiff in New Jersey state court alleged he was denied work-from-home accommodation that he requested due to his medical condition and age, which he asserted presented additional risk of complications from COVID-19
- Plaintiff forced out of a job because of his age due to employer's concern about exposing an older worker to COVID-19
- In September 2021, EEOC filed its first lawsuit against an employer challenging its denial of a work-from-home request as an accommodation under the ADA. The EEOC asserts that the employer's pandemic work-from-home policy evidences the reasonableness of the request for ongoing accommodation

## Types of Lawsuits



### COVID-19 Employment Litigation Trends

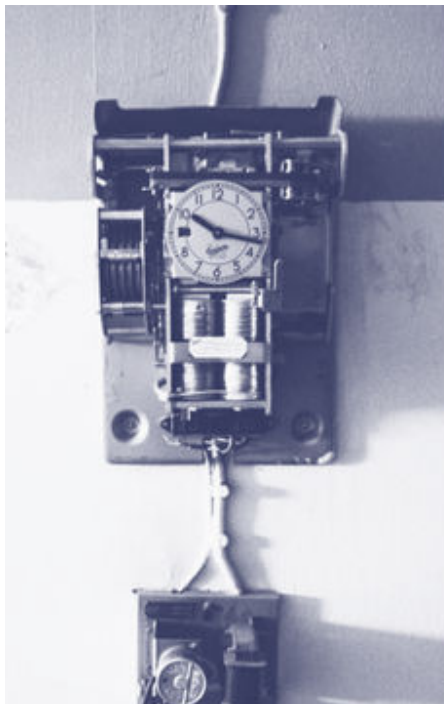
#### Leave claims:

- Numerous lawsuits filed alleging employees unlawfully denied sick leave or family and medical leave for reasons related to COVID-19 under:
- Family Medical Leave Act
- Families First Coronavirus Response Act
- State and local paid leave laws
- Employer sick-leave policies

#### Retaliation and whistleblower claims:

- Typically asserted in reference to an employee's termination
- Assert that employee was terminated for complaining about workplace safety or working conditions
- Failure to provide appropriate personal protective equipment
- Failure to comply with applicable COVID-19 safety protocols or for exercising leave rights related to COVID-19
- Assert that employee was terminated for exercising leave rights related to COVID-19
- State-law claims for wrongful termination against public policy

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### COVID-19

#### Employment Litigation Trends

#### Wage and hour claims:

- A number of new filings have involved circumstances directly caused by COVID-19 business impacts:
- Cases disputing compensation practices related to sanitation and hygiene protocols, expanded schedules, and on-call time have been filed in significant numbers
- Cases asserting employer's failure to pay contractually-agreed commissions or fees
- Claims motivated by changes in working schedules or venues (e.g., work-from-home situations) and state-law-dictated expense reimbursement claims may become more fertile area for employee-litigants in coming months

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