

New OFCCP Director – New OFCCP Direction & Everything You Want to Know about Pay Equity But Are Afraid to Ask (Be a Little Afraid, But Ask Anyway)

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FORTNEY SCOTT

ATTORNEYS AT LAW

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About FortneyScott

FortneyScott represents clients on workplace matters, including representation before federal enforcement agencies including the U.S. Department of Labor (“DOL”), the Equal Employment Opportunity Commission (“EEOC”) and state enforcement agencies.

Our attorneys have significant experience advising and counseling clients on domestic and international workplace-related matters, including compliance programs, pay equity, equal employment and nondiscrimination obligations, wage and hour and prevailing wages, investigations of workplace claims and complaints, government contracting, and the development of strategies for avoiding or responding to workplace-related crises.

About Our AAP-OFCCP Practice Group

- We work closely with employers across the country to prepare affirmative action plans and defend OFCCP compliance reviews
- Our affirmative action and OFCCP defense practice group is comprised of expert attorneys who partner with statisticians and data analysts
- Our expertise includes:
 - Preparing AAPs for employers in all industries and across the country;
 - Defending OFCCP compliance reviews;
 - Stepping in on “audits gone awry” in which OFCCP alleges systemic discrimination in hiring or compensation
 - Defending litigation brought by OFCCP against employers in Texas, the Southwest region and across the country

About Our Pay Equity Group

- We work closely with employers across the country to address the full spectrum of pay equity issues
- Our Pay Equity Group is comprised of expert attorneys who partner with statisticians and labor economists
- Our comprehensive pay equity expertise includes:
 - Defending employers in agency enforcement proceedings and in litigation brought under Title VII, the Federal Equal Pay Act and state equal pay laws;
 - Conducting privileged, proactive pay analyses;
 - Helping clients identify and address unexplained pay disparities; and
 - Providing advice regarding the design and administration of pay systems to achieve pay equity and minimize liability

About Mickey Silberman, Esq.

Mickey is Chair of the firm's Affirmative Action & Pay Equity Group. He is recognized as a national expert on affirmative action, OFCCP, pay equity and systemic pay discrimination.

Mickey has worked closely with clients and a team of attorneys, statisticians and data analysts to prepare thousands of affirmative action plans and defend hundreds of OFCCP audits during the past several years.

He also oversees pay equity analyses both on a proactive basis and in response to EEOC and OFCCP pay investigations and private pay litigation. And he advises clients on pay system design and administration to identify and address subtle, often hidden, barriers to pay equity.

Lawyer's Disclaimer

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OK, So What Shall We Talk About

- Meet the New OFCCP Director
- The Merger? Dead. OFCCP is not Going Away
- OFCCP Audits – not many but deep and broad
- Pay Equity is Here and its not Going Away
- But Requests for Salary History . . . History
- Putting the Pieces of the Pay Equity Puzzle Together

Meet the New OFCCP Director

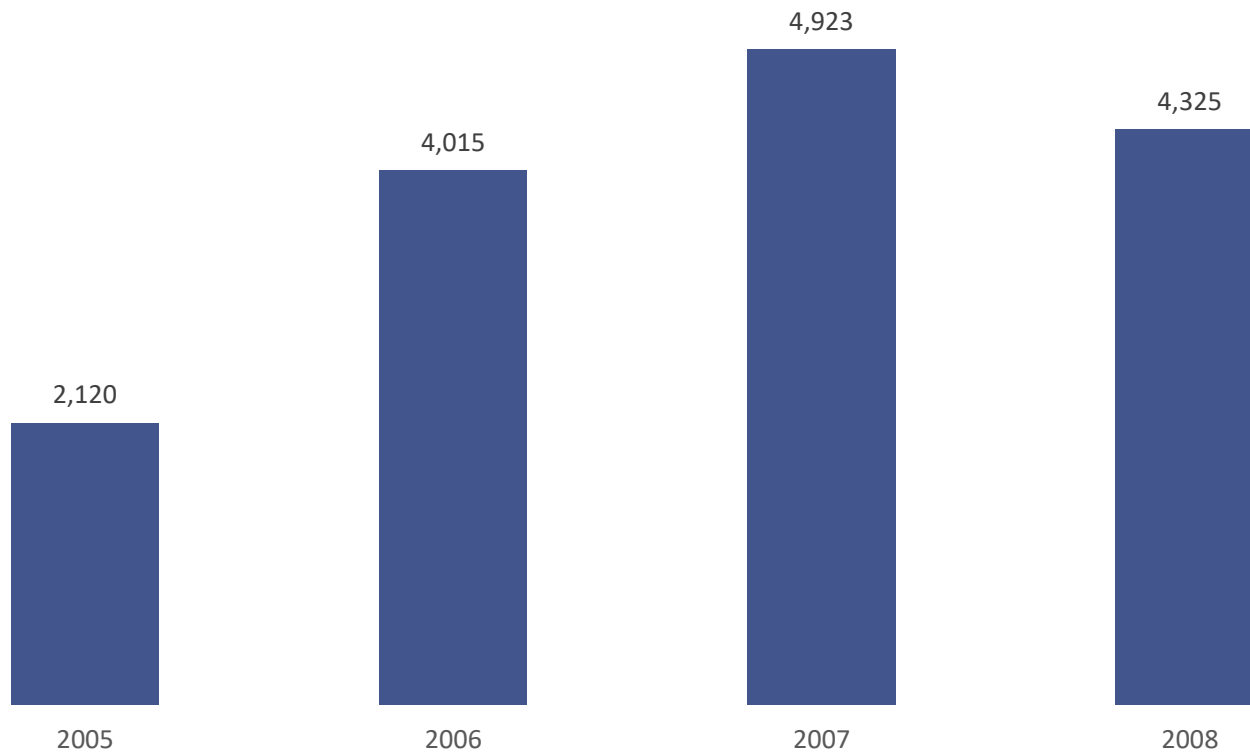
- Ondray T. Harris the new OFCCP Director effective December, 2017
- JD from Washington and Lee Law School
- For six months before a Senior Advisor at the DOL
- During George W. Bush administration held roles as Deputy Chief of Employment Litigation and Director, Community Relations Service
- Former law firm partner focusing on management-side employment law
- Former Virginia Assistant Attorney General with substantial employment litigation and counseling portfolio



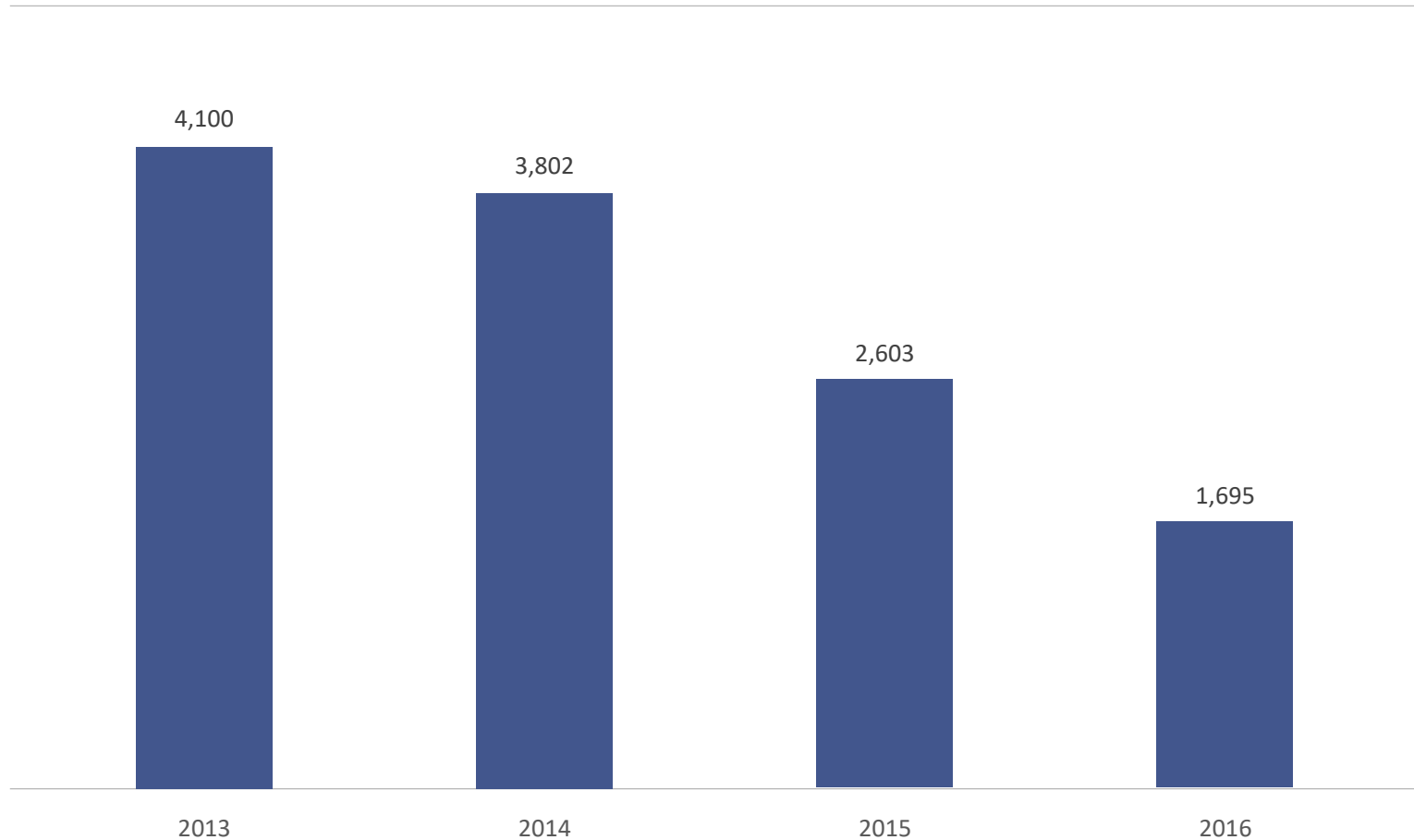
I've Got Some Good News and ...

- Democratic OFCCPs are more passionate about, but less efficient and effective at, enforcement
 - More ambitious/aggressive about novel theories of discrimination
 - Pay (Directive 307), demanding and analyzing all expressions of interest, deep dives in almost every audit
- Republican OFCCPs tend to be more businesslike which typically means more effective enforcement
 - A “law enforcement” agency that enforces existing law; doesn’t try to make new law
 - Active Case Management vs. Active Case Enforcement

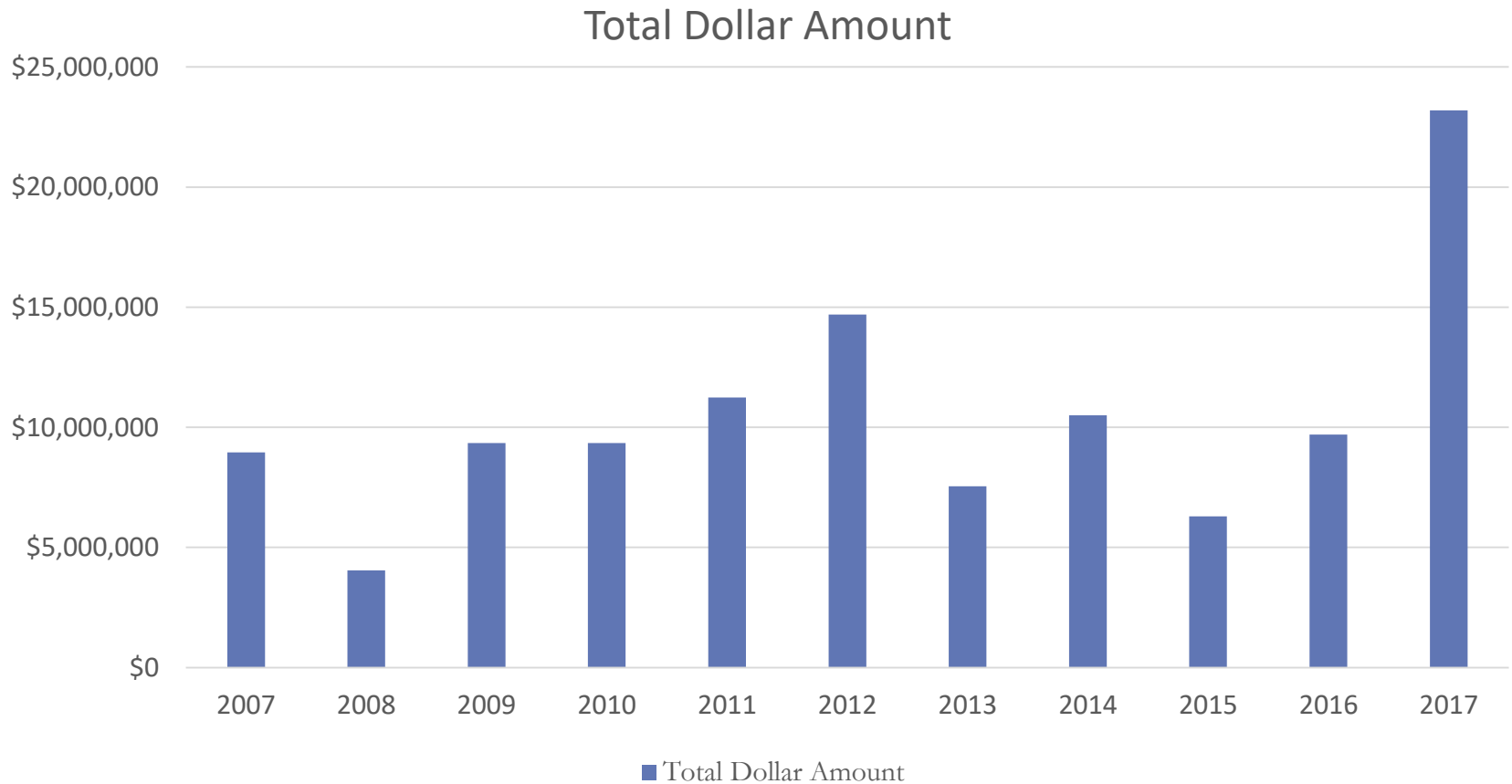
Total OFCCP Compliance Evaluations During Bush Administration



Total OFCCP Compliance Evaluations During Obama Administration



Financial Settlements



Big \$\$ Settlements

- **State Street Corporation – \$5 million**
 - Pay discrimination against female and black employees for executive level positions
- **B& H Foto and Electronics Corp - \$3.2 million**
 - Hiring, Compensation, and Promotion discrimination and harassment against females, blacks and Asians
- **Splunk, Inc. - \$2.7 million**
 - Hiring discrimination against black and Asian applicants for professional level positions
- **Palantir - \$1.65 million**
 - Hiring discrimination against Asian applicants for engineering positions

With New Director, Predictions for OFCCP in 2018 and Beyond

- The Merger is Dead – the OFCCP Lives
- Decreased Budget, but not by much
 - OFCCP will do more with less
- OFCCP Will Close Some District Offices
- Continued Focus on Pay Enforcement
- ACM May Replace ACE
- “Back to the Future” on Pay
 - Standards (or something similar) Replace Directive 307
 - Safe Harbor Provision?

With New Director, Predictions for OFCCP in 2018 and Beyond

- Contract Compliance Certification Program
 - Already in regs at 60-2.31 – annual submission of “Program Summary”
- Regional “Centers of Excellence”
 - Tech and Financial Industries will continue to get close scrutiny
- Likely Review of OFCCP's Sole Reliance on Statistical Significance to "Prove" Discrimination

Program Summary

- 41 CFR 60-2.31

The affirmative action program must be summarized and updated annually. The program summary must be prepared in a format which will be prescribed by the Deputy Assistant Secretary and published in the Federal Register as a notice before becoming effective. ***Contractors and subcontractors must submit the program summary to OFCCP each year on the anniversary date of the affirmative action program***

Pay Equity Enforcement Will Stay But . . .

- OFCCP took a radical approach to analyzing pay – Directive 307
- Pay will most likely remain a focus for OFCCP
- But expect Agency to return to analyzing pay in more traditional ways as interpreted under 50 years of Title VII case law
 - “similarly situated” = job titles
 - Along with statistics, anecdotal evidence required

What is Likely to Remain/Renew in the New OFCCP?

- Hiring adverse impact will stay “bread & butter”
 - But on “applicants”, not expressions of interest
- Veterans
- Individuals with disabilities
- Outreach and recruitment of minorities and females
- Possible adoption of GAO recommendations – annual submission of report on AAPs

**Everything You Want to Know
about Pay Equity But Are Afraid
to Ask
(Be a Little Afraid, But Ask
Anyway)**

Setting the Stage – The “Pay Gap”

For every \$1.00 paid to men, how much is paid to. . .

Group	Nationwide
All Women	80¢
African-American Women	63¢
Hispanic Women	54¢

Over the course of a 40-year career, a Hispanic woman can expect on average to earn at least *\$1 Million* less than a man

First, Let's Define Our Terms

- **“Equal pay for equal work”** – employees doing the same job should be given *equal* pay
- **Pay Equity** – paying employees fairly, taking into account job related factors such as education, work experience, tenure, *etc.*
- **Pay Parity** – Activist Shareholders increasingly demand companies show there is zero pay gap across the entire workforce
- **Pay Transparency** – Activist shareholders and millenials are demanding companies pull back the curtain on pay

Next, Who Goes with Whom . . .

Depends Who You Ask

- **Similarly situated** – federal law standard essentially says to compare employees doing the same job
- **Substantially similar** – California’s expanded standard – similar work when viewed as a *composite* of skill, effort, and responsibility
- **Work of comparable character** – Oregon’s expanded version
- **Comparable work** – Massachusetts’ standard goes further – who remembers “Comparable Worth”?
- **Pay Analysis Groups** – OFCCP created its own standard in Directive 307 – most expansive of all?

Next, Let's Talk about Harbors

- **Safe harbors . . . that is**
- Where there are safe harbors, whether deep or shallow, you sail there with proactive pay analyses
- **“Deep” safe harbors**
 - Are a complete “affirmative defense” against pay discrimination claims
 - Massachusetts is the only true “deep” harbor
- **“Shallow” safe harbors**
 - Are a limited defense, typically to additional damages beyond “make whole”
 - Oregon, Puerto Rico already there – others coming

The Trump Administration & The States

- Trump says he supports equal pay for women
- Despite that, many states and big cities are enacting a “patchwork” of aggressive equal pay laws that differ and often contradict each other
- In the past 18 months, California, Massachusetts, Oregon, New York, Maryland, Delaware, Puerto Rico, New York City, Philadelphia, San Francisco
- One dozen or more new laws likely in next 18 months

New, Aggressive Tools to “Attack the Gap”

- States, big cities, academics, comp experts, women’s and civil rights groups coordinating to “attack the gap”
 - Aggressive State Equal Pay Laws
 - Bans on Requests for Applicants’ Salary History
 - OFCCP Pay Investigation Deep Dives
 - Safe Harbors to Encourage Proactive Pay Analyses
 - “Naming and Shaming” aka Pay Gap Website Reporting
 - Activist Shareholders and Employee Demands for Pay Parity and Transparency
 - Growing Wave of Private Class Litigation

Growing Wave of Aggressive State Pay Laws

The States are Taking Over – How?

- Aggressive State Equal Pay Laws are Designed to –
 - Make it easier bring and win pay discrimination claims
 - Expand who may be compared with whom to demonstrate unexplained pay differences
 - Often require that employers explain the “entire wage differential”
 - Bans requesting applicants’ salary history
 - For California – others soon to follow – requires that employers provide to applicants the “pay scale” for a position, upon request

California Leads and Other States Follow

- Alaska
- Arizona
- Arkansas
- Connecticut
- Delaware
- District of Columbia
- Georgia
- Illinois
- Indiana
- Iowa
- Kentucky
- Louisiana
- Maryland
- Massachusetts
- Mississippi
- Missouri
- Montana
- Nebraska
- New Jersey
- New York
- Ohio
- Oregon
- Pennsylvania
- Rhode Island
- South Carolina
- Tennessee
- Texas
- Utah
- Washington
- West Virginia

Along with Growing International Obligations

Passed

- **UK** – gender pay gap website reporting
- **Germany** – pay equity reporting obligation and employees may request salary info to compare
- **Quebec** – conduct pay equity audit and post results
- **Sweden** – survey of gender pay differences every 3 years
- **Singapore** – calculate gender pay gap at board level

Proposed

- **Iceland** – would require companies to prove they pay men and women equally
- **New Zealand** – would require gender pay data for publication in aggregate

Asking for Salary History is . . . History

Bans on Requesting Salary History – The Newest Tool to “Attack the Gap”

- One tool to “attack the gap” that has quickly and broadly emerged is bans on requesting applicants’ salary history
- Why?
- Employers traditionally ask for and have taken salary history into account when making offers and setting starting salaries
- This may be a “neutral” practice but women making less before will often wind up making less in their new jobs
- The growing belief is that this practice *perpetuates* the “pay gap” from employer to employer

Jurisdictions That Have Passed or Proposed Similar Bans on Asking for Salary History

Passed Salary History Ban

- California
- Delaware
- Massachusetts
- Oregon
- Puerto Rico
- New York City
- Philadelphia
- San Francisco

Proposed Salary History Ban

- DC
- Georgia
- Iowa
- Maine
- Maryland
- New York
- North Carolina
- Pennsylvania
- Rhode Island
- Texas
- Vermont
- Washington
- Wisconsin
- Los Angeles –
feasibility study

To Ask or Not to Ask? And If Not, Then What?

- Emerging Best Practices – stop asking for salary history and instead
 - Ask for salary expectations
 - Provide to applicants a salary range/scale 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

OFCCP Deep Dive Pay Investigations

OFCCP's Intense Focus on Tech and Financial Sectors

- OFCCP developed an Equal Pay Initiative early in the Obama administration
 - Much effort and press in first several years of Initiative but little to show for it
- In final years of Obama administration, OFCCP focused intensely on two industries – Financial and IT
 - First big win – State Street Corporation recently paid \$5 million to settle claims of systemic pay discrimination against 300 Female and Black executives
- Litigation against Google, Oracle, JP Morgan – Public
- More than one dozen ongoing pay investigations against many high-profile IT and financial sector companies – Private (for now)

“Naming and Shaming”

UK's Gender Pay Gap Reporting

- Effective April 2017
- Requires private employers with 250 or more UK-based employees to publish on company website gender pay gap
- Employers must
 - Publish the information on their own website
 - Send information to the government for it to be published on a public website
- Reporting deadline – April of each year, starting in 2018
- California Governor recently vetoed similar measure but other states considering it

Shareholder Pay Parity Demands

Shareholder Pressure to Achieve and Announce “Pay Parity”

- Activist investor and employee pressure to achieve both pay parity and transparency
- CEOs are telling HR and in-house counsel: “This is going to get done”
- Silicon Valley and other Fortune 500 companies feel increasing pressure to conduct pay parity analyses
- . . . and publish the results
- Pay parity analyses typically use a different methodology than legally-grounded pay equity analyses
- If plan to do, design the two analyses as separate projects under separate privilege protocols

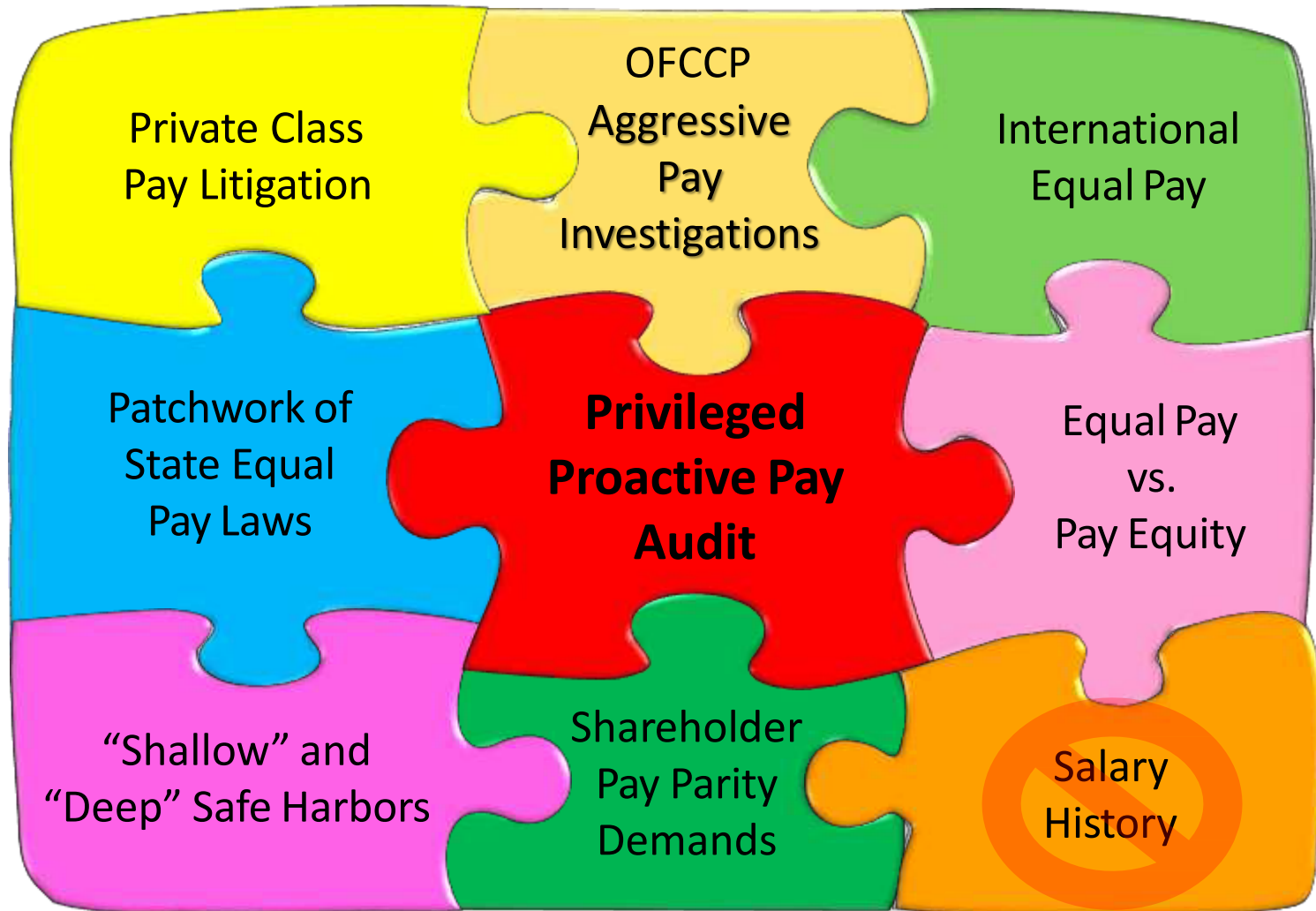
The Rising Tide of Private Class Pay Claims

Private Plaintiffs Starting to Bring Class Claims

- Class pay discrimination claims brought against IT sector companies, include –
 - Qualcomm – settled for \$19.5 million
 - Google – dismissed in past week – plaintiffs will re-file
 - Microsoft
 - Oracle
 - Twitter
 - Uber
- This likely just the start as most of the recently-enacted state equal pay laws have yet to become effective

Recommendations & Best Practices

- Conduct annual **privileged** pay equity analysis to find and address *unexplained* disparities
 - Consider groupings for comparison in light of differing state law standards
 - Prepare separate analyses for employees in “safe harbor” states
 - If also conducting annual pay parity analysis, ensure you maintain clear separation for privilege and other purposes
 - Make equity adjustments for Whites, Asians and Males, not only underrepresented minorities and females
- Discontinue asking for applicants’ salary history
- Review and revise job descriptions to clarify which jobs are appropriately compared
- Set expectations with C-Suite that increase in internal, shareholder and external pay claims are inevitable



Questions?

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