

**August 24, 2021**  
**4:00-5:00 pm ET**



# **Pay Equity Laws: The Patchwork Continues to Unfold**

**Erin Connell · Laura Mitchell**

**ORRICK · JACKSON LEWIS P.C.**

# SCOPE AND USAGE OF THE INFORMATION

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# 2021 SCHEDULE

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## Webinars

- Intersectionality: A Legal and Analytical Framework *\*members only*
- October 19 – Annual Enforcement Update
- November 16 – Q4 – Corporate Counsel Forum *\*members only*
- December 14 – EEO Year-in-Review and What to Expect in 2022
- OFCCP AAP Verification Preparation Series – *Coming soon*

## Conferences

- November 9-10 – Fall Virtual Two-Day Conference

Visit: <https://theinstitute4workplaceequality.org/conferences-and-webinars/>

# AGENDA

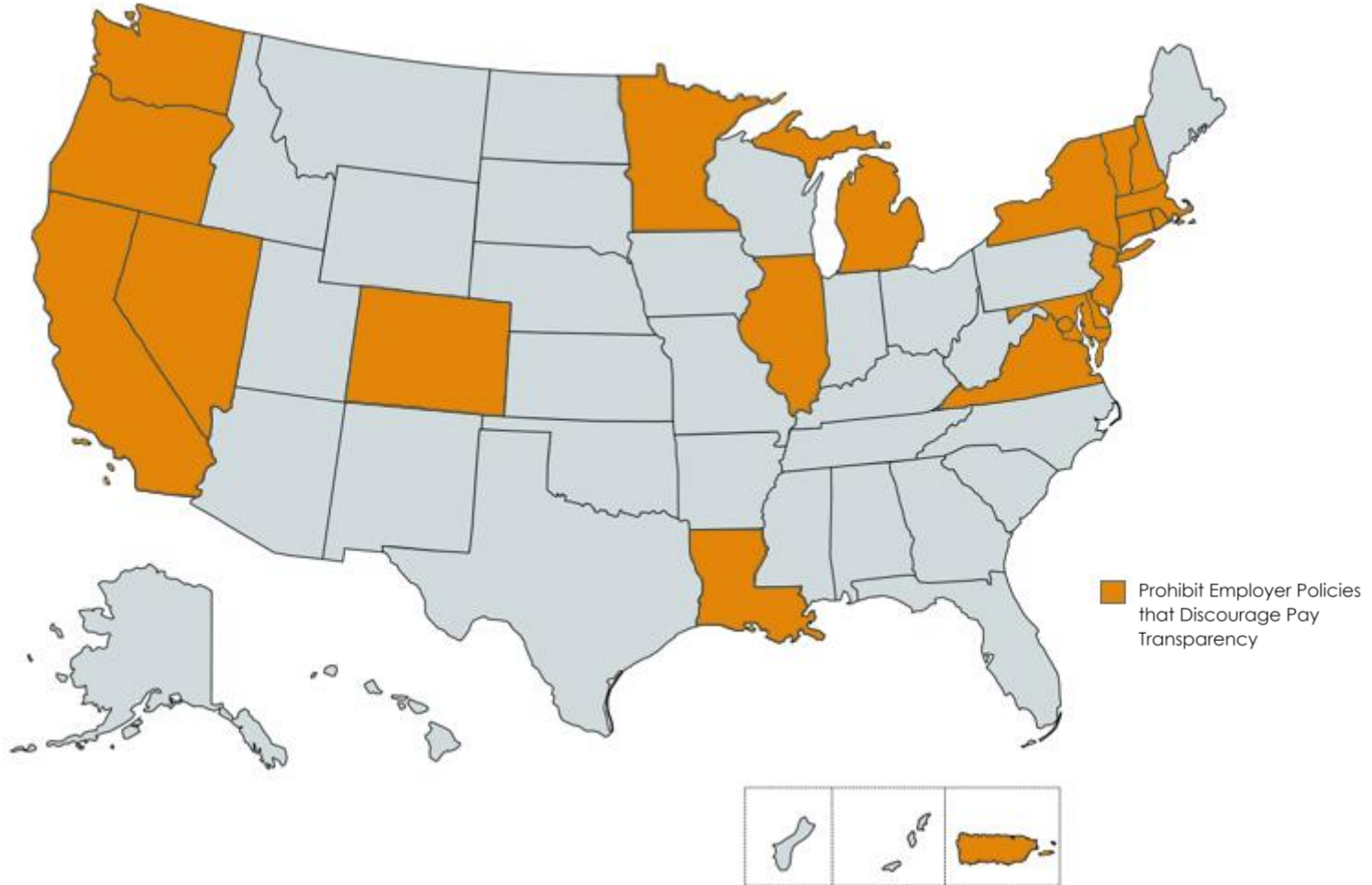
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- Prohibitions That Encourage Pay Transparency
- State Affirmative Obligations
- State Pay Data Reporting
- On the Pay Equity Horizon
- Best Practices for Staying Ahead of the Curve



# PROHIBITIONS THAT ENCOURAGE PAY TRANSPARENCY.

# PROHIBITIONS THAT ENCOURAGE PAY TRANSPARENCY



# WE DON'T KNOW WHAT WE DON'T KNOW...

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So, states have taken steps to promote transparency

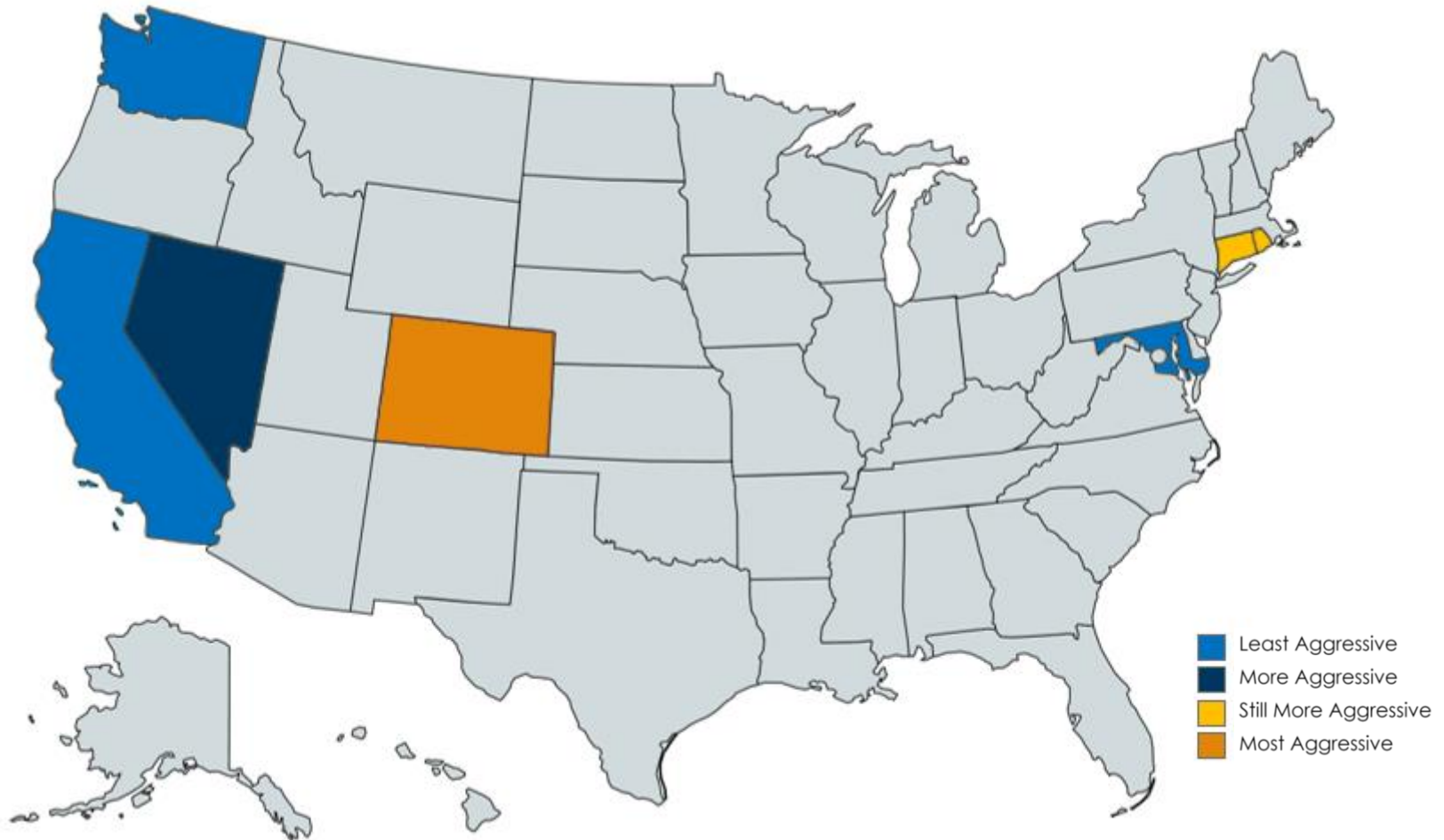
- Many state pay equity laws include **prohibitions on employer policies and practices that require secrecy around pay**
- Generally cannot restrict employees' ability to disclose, discuss, inquire into pay
- Be wary of **retaliation!**



# STATE AFFIRMATIVE OBLIGATIONS.



# PAY TRANSPARENCY OBLIGATIONS



# LEAST AGGRESSIVE

	Must disclose pay to <u>applicants</u>	Must disclose pay to <u>employees</u>
<b>California</b>	Must provide the pay scale for a position after an initial interview with the employer, <i>if requested.</i>	-
<b>Maryland</b>	Must provide wage range for job applied for, <i>if requested.</i>	-
<b>Washington</b>	Must provide the minimum starting salary or wage for the position after offer is made, <i>if requested.</i>	Must provide the salary range for the new position <i>after the employee is offered</i> a transfer or promotion, <i>if requested.</i>

# MORE AGGRESSIVE

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	Must disclose pay to <u>applicants</u>	Must disclose pay to <u>employees</u>
<b>Nevada</b>	Must <i>proactively</i> provide the wage or salary range or rate to applicants who have <i>completed an interview</i> .	Must provide the wage or salary range or rate to employees who:  (1) <i>applied</i> for promotion or transfer, (2) <i>completed an interview</i> or has been offered the promotion or transfer, <u>and</u> (3) <i>request</i> the wage rate or range.

# STILL MORE AGGRESSIVE

	Must disclose pay to <u>applicants</u>	Must disclose pay to <u>employees</u>
<b>Connecticut</b>	<p>Must provide the wage range for a position for which the applicant is applying <b>upon the earliest of:</b></p> <ul style="list-style-type: none"> <li>(1) the applicant's <b>request</b>, or</li> <li>(2) prior to or at the time the applicant is made an <b>offer of compensation</b>.</li> </ul>	<p>Must provide the wage range for the employee's position upon:</p> <ul style="list-style-type: none"> <li>(1) the <b>hiring</b> of the employee,</li> <li>(2) a <b>change in the employee's position</b>, <u>or</u></li> <li>(3) the employee's <b>first request</b> for a wage range.</li> </ul>
<b>Rhode Island</b>	<p>Must provide the wage range for the position for which the applicant is applying, <b>if requested</b>.</p> <p>Should provide a wage range for the position the applicant is applying for prior to discussing compensation.</p>	<p>Must provide an employee the <b>wage range for the employee's position</b> both:</p> <ul style="list-style-type: none"> <li>(1) at the time of hire <u>and</u></li> <li>(2) when the employee moves into a new position.</li> </ul> <p>Must provide wage range for employee's position during the course of employment, <b>if requested</b>.</p>

# MOST AGGRESSIVE

	Must disclose pay to <u>applicants</u>	Must disclose pay to <u>employees</u>
<b>Colorado</b>	<p><i>The job posting</i> must include:</p> <ul style="list-style-type: none"><li>(1) wage rate or range,</li><li>(2) general description of other compensation, <u>and</u></li><li>(3) general description of benefits offered for the role.</li></ul> <p>Applies to roles in Colorado and roles that can be performed in Colorado.</p>	<p>-In connection with opportunity transparency, must include the following for jobs that can be performed in Colorado:</p> <ul style="list-style-type: none"><li>(1) wage rate or range,</li><li>(2) general description of other compensation, <u>and</u></li><li>(3) general description of benefits offered for the role.</li></ul>

# WHAT MUST BE INCLUDED IN COLORADO JOB POSTINGS?

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## General Descriptions of Pay and Benefits Details

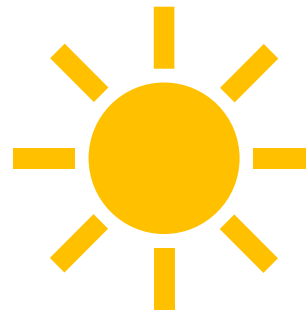
- **Level of Detail.** At a minimum, employers must describe the nature of these benefits and what they provide, *not specific details or dollar values* — such as listing that the job comes with “health insurance,” without needing to detail premium costs or coverage specifics
- **Benefits must include.**



**Healthcare  
Benefits**



**Retirement  
Benefits**



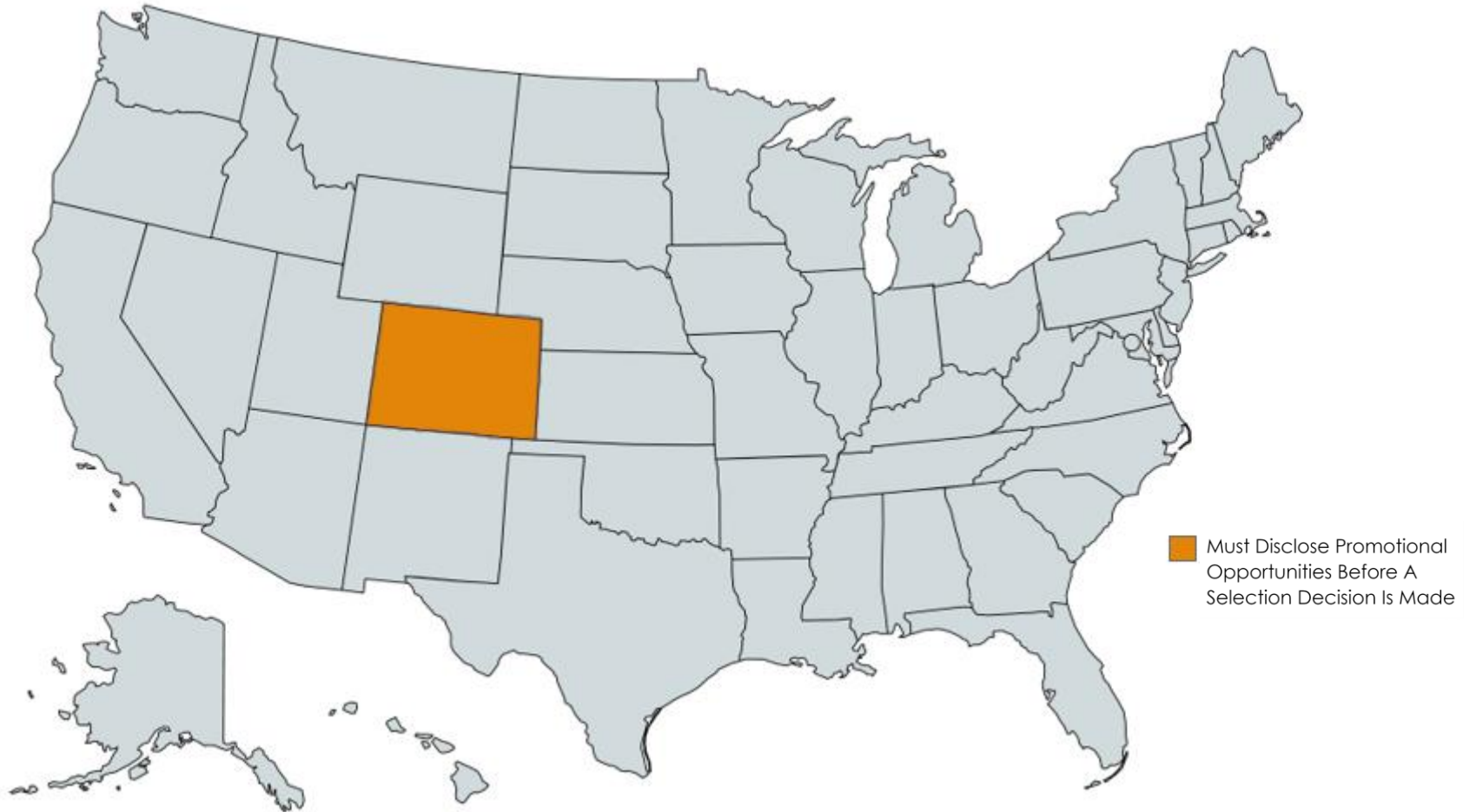
**Paid Days Off**  
Sick, Parental,  
PTO, Vacation



**Any Other  
Taxable  
Benefit**

# OPPORTUNITY TRANSPARENCY OBLIGATIONS

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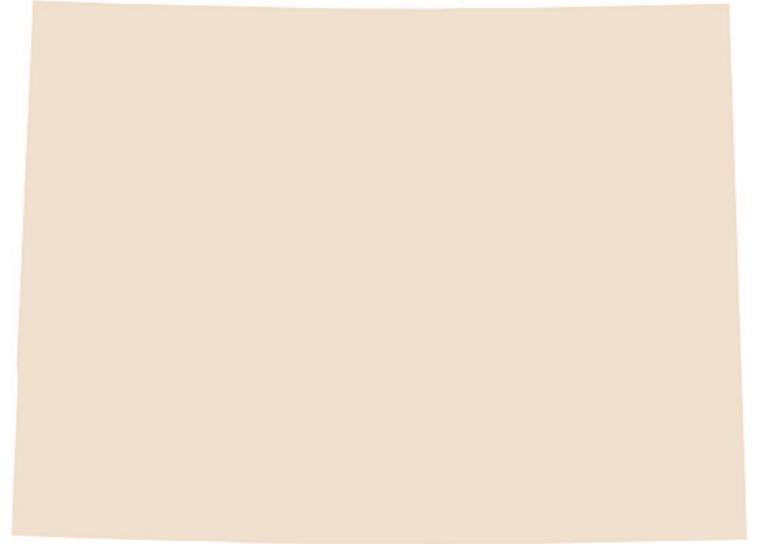


# COLORADO OPPORTUNITY TRANSPARENCY

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An employer shall *make reasonable efforts to announce, post, or otherwise make known all opportunities for promotion* to all current employees on the same calendar day and prior to making a promotion decision.

C.R.S. § 8-5-201(1)





# COLORADO OPPORTUNITY TRANSPARENCY

1

- An employer with **at least one** Colorado employee

2

- Must provide **written notice to all Colorado employees**

3

- **Before it decides:**
  - Who will be **hired**, or
  - Who will receive a (a) **job title change** or (b) **material change** in job duties, authorities, or opportunities

4

- If that new roles is **“better” than** the Colorado employee’s **current role**

5

- Notice must include (a) **the job title**, (b) **how to express interest/apply**, and (c), if the role may include more than “modest” work in Colorado or is remote, **pay and benefit information** (see Pay Transparency)



# STATE PAY DATA REPORTING

# PAY DATA REPORTING



# CALIFORNIA

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Effective at the end of 2020

Applicable to all employers with:

- 1) At least 100 total employees and
- 2) At least 1 employee in CA

First reporting cycle completed at the end of March 2021

Closely resembles now-defunct Component 2 of EEO-1 Report

- Report all CA employees (and those working remotely reporting to a manager in CA) by race, ethnicity, and sex within 12 pay bands
- Separately report hours worked by employees within each pay band
- Consolidated report and individual location reports for employers with multiple CA establishments
- Answer numerous questions related to the organization

# ILLINOIS

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## Requirements to obtain Equal Pay Certification:

- Copy of most recent EEO-1 Report
- *List of all employees categorized by gender and race/ethnicity with corresponding wages*
- Signed statement from an officer that company is in compliance with equal pay laws
- Confirmation that business does not restrict certain genders to specific roles and makes employment decisions without regard to sex
- Explanation of how business reviews wages/benefits for disparities and certification that such disparities are remedied when identified
- Outline of company compensation system

Statute signed March 23, 2021

Applicable to all employers with 100 or more employees in Illinois

First Equal Pay Certification due March 23, 2024

# ON THE PAY EQUITY HORIZON:

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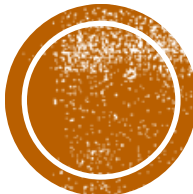

- Paycheck Fairness Act failed again
- Still waiting on developments from OFCCP
- EEOC: Still waiting on results from NAS study of EEO-1 component 2
- Trend in the states is pay transparency
- Pay equity litigation (particularly class cases) on the rise

# BEST PRACTICES FOR STAYING AHEAD OF THE CURVE:

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- Watch for new laws
- Regular, robust pay equity analyses
- Focus on compensation systems
- Focus on job leveling and promotions practices
- Evaluate starting pay practices
- Document starting pay decisions
- Develop robust training for pay decision-makers

# WRAP UP & THANK YOU





# ERIN CONNELL

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Erin is an employment partner and Co-Chair of Orrick’s EEO & OFCCP Compliance Group and Pay Equity Task Force. Erin’s practice covers all aspects of employment law. Erin has successfully defended numerous class actions, systemic discrimination investigations, and complex individual cases involving claims of discrimination, harassment, retaliation, wrongful termination, and wage-and-hour claims. Erin has particular expertise in the area of pay equity, compensation analyses, and diversity initiatives; and regularly advises clients with respect to OFCCP and other EEO audits.

Erin also is an accomplished trial lawyer. She has tried several cases in both court and arbitration and has successfully obtained numerous defense summary judgment rulings and other favorable resolutions for her clients. Erin led the trial team that obtained a complete dismissal for Oracle in *OFCCP v. Oracle*, a high-stakes systemic compensation discrimination case that garnered national media attention and earned Erin and her team recognition as “Litigators of the Week” by the *American Lawyer*.

Erin is currently the management chair of the ABA Equal Employment Opportunity Committee, and frequently speaks on California and national employment law issues. She has published numerous articles on employment law in publications around the country, including the *ABA Journal of Labor & Employment Law*. She also provides training on managing within the law and preventing sexual harassment and conducts internal investigations on employment-related matters.

# LAURA MITCHELL

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Laura A. Mitchell is a Principal in the Denver, Colorado, office of Jackson Lewis P.C. She is a member of the firm's Affirmative Action and OFCCP Defense practice group as well as the firm's Pay Equity Resource Group. She is also on the leadership team for the firm's Government Contractor Industry Group. Her practice is focused on representing government and non-government contractors in OFCCP matters, preparing for and defending OFCCP audits, and counseling employers on issues stemming from OFCCP regulations.

Ms. Mitchell personally oversees the development of hundreds of AAPs each year and is intimately involved in the defense of numerous OFCCP audits. She also spends significant time counseling companies in connection with conducting pay equity analyses as well as government contractor employment obligations. Ms. Mitchell is the editor and a principal contributor of The Affirmative Action Law Advisor blog and frequently presents on pay equity, affirmative action compliance, OFCCP enforcement trends, and government contractor obligations.

## Honors and Recognitions

- The Best Lawyers in America©, “Litigation – Labor and Employment” (2021)
- The National Law Review, Go-To Thought Leadership Award (2020)
- JD Supra Readers' Choice Awards, “Top Author” (2017-2020)