Bridging the Gap:
Pay Equity Aspirations and Audits

April 8, 2022 | IMLA 2022 Mid-Year Seminar

Anne Milligan, Deputy City Attorney, City of Portland

CITY OF
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Agenda



- Introduction
- Pay Equity 101
- Costs of Indecision and Inaction
- Attorney Client Privileged Audits
  - Scope & Partnerships
  - Staffing Pay Equity
  - Timing and Budget Cycles
  - Data Gathering
  - Employee Messaging
  - Comparing the 2018 and 2021 Audits
  - Allowing Appeals
- Maintaining Pay Equity Between Audits
- Public Records Requests
- Looking Forward
- Questions & Answers

Pay Equity 101

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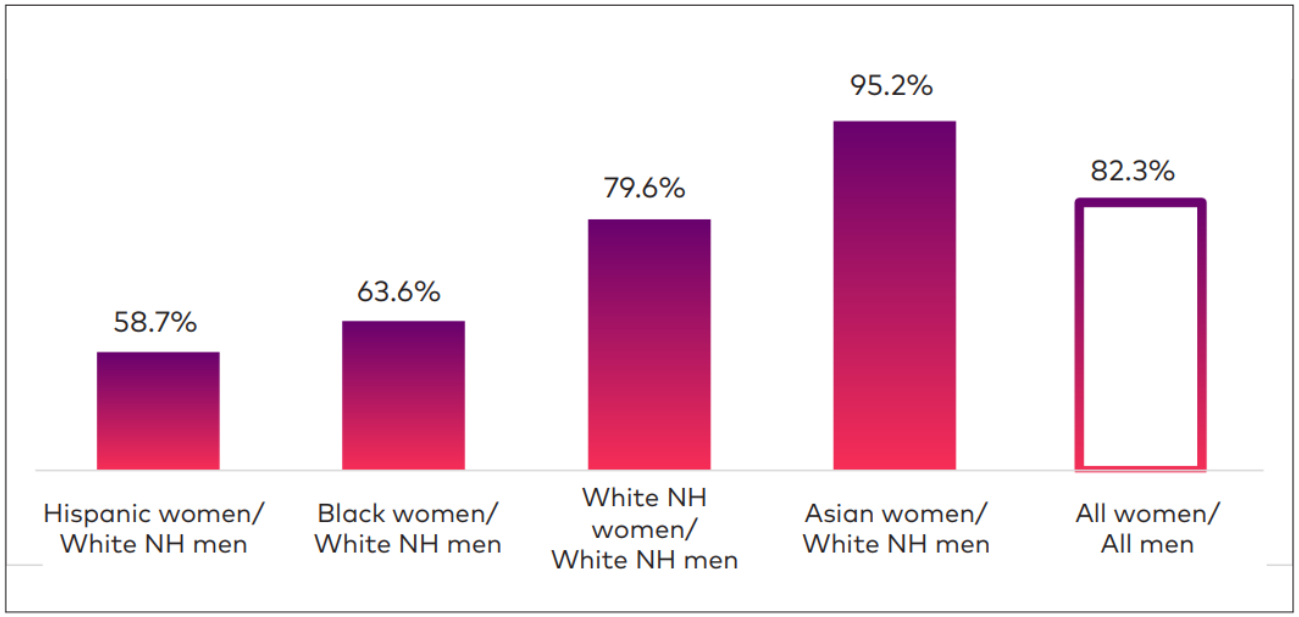
Women of the largest Racial and Ethnic Groups Earned Substantially less per Week than White non-Hispanic Men in 2020

Female Earnings as a Percent of White Male Earnings Weekly Full-time Workers, by Race and Ethnicity, 2020

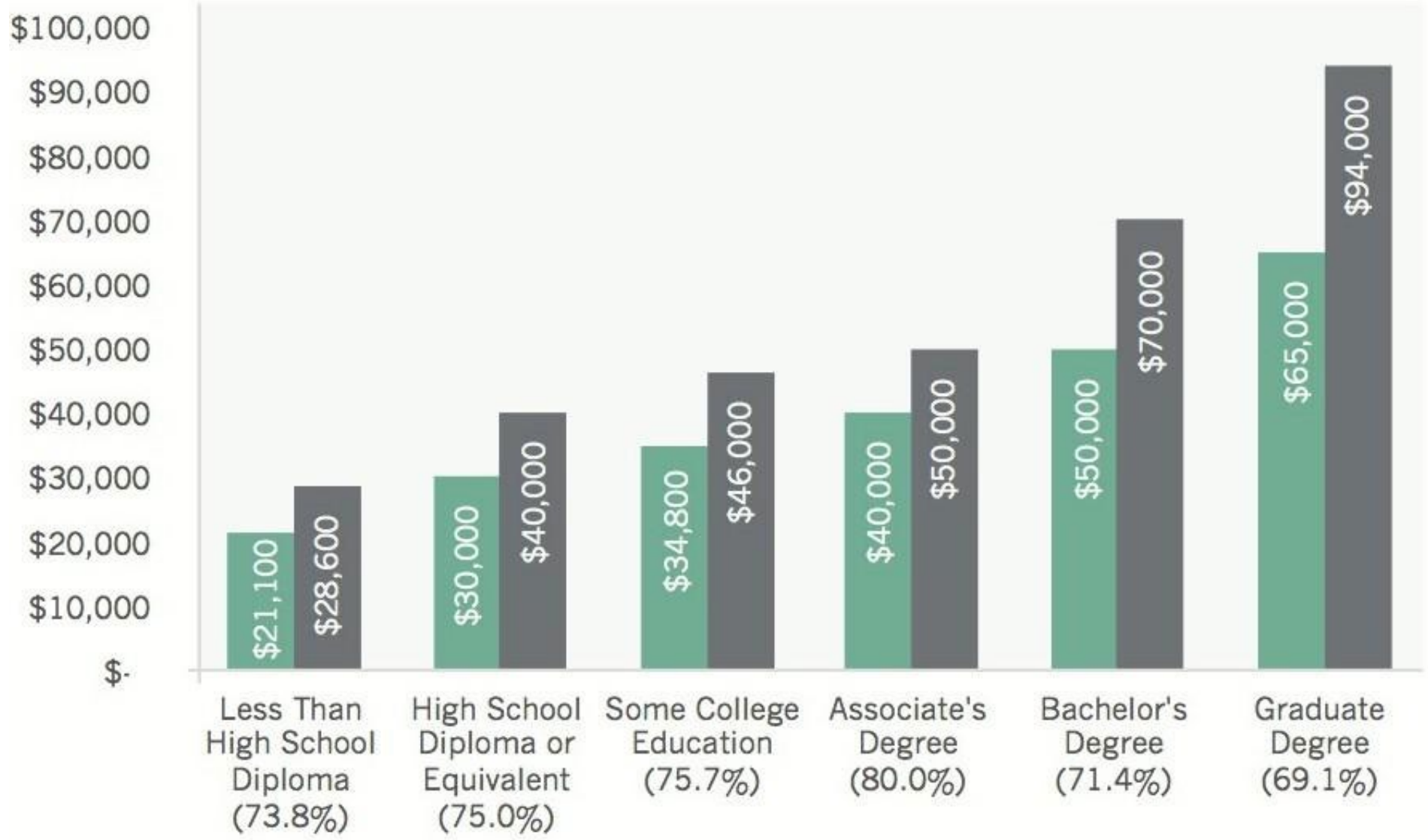


Notes: Data for White workers are White alone, non-Hispanic (NH); data for Black and Asian workers may include Hispanic workers. Hispanic workers may be of any race. Annual averages of median weekly earnings.

Source: See Table 2

INSTITUTE FOR WOMEN'S POLICY RESEARCH, "Policy Brief: The Weekly Gender Wage Gap by Race and Ethnicity in 2020" (Mar. 2021).

The gender wage gap in weekly earnings for full-time workers in the United States narrowed between 2019 and 2020, from 19.5% in 2019 (a gender earnings ratio of 81.5%) to 18.7% in 2020 (a gender earnings ratio of 82.3%).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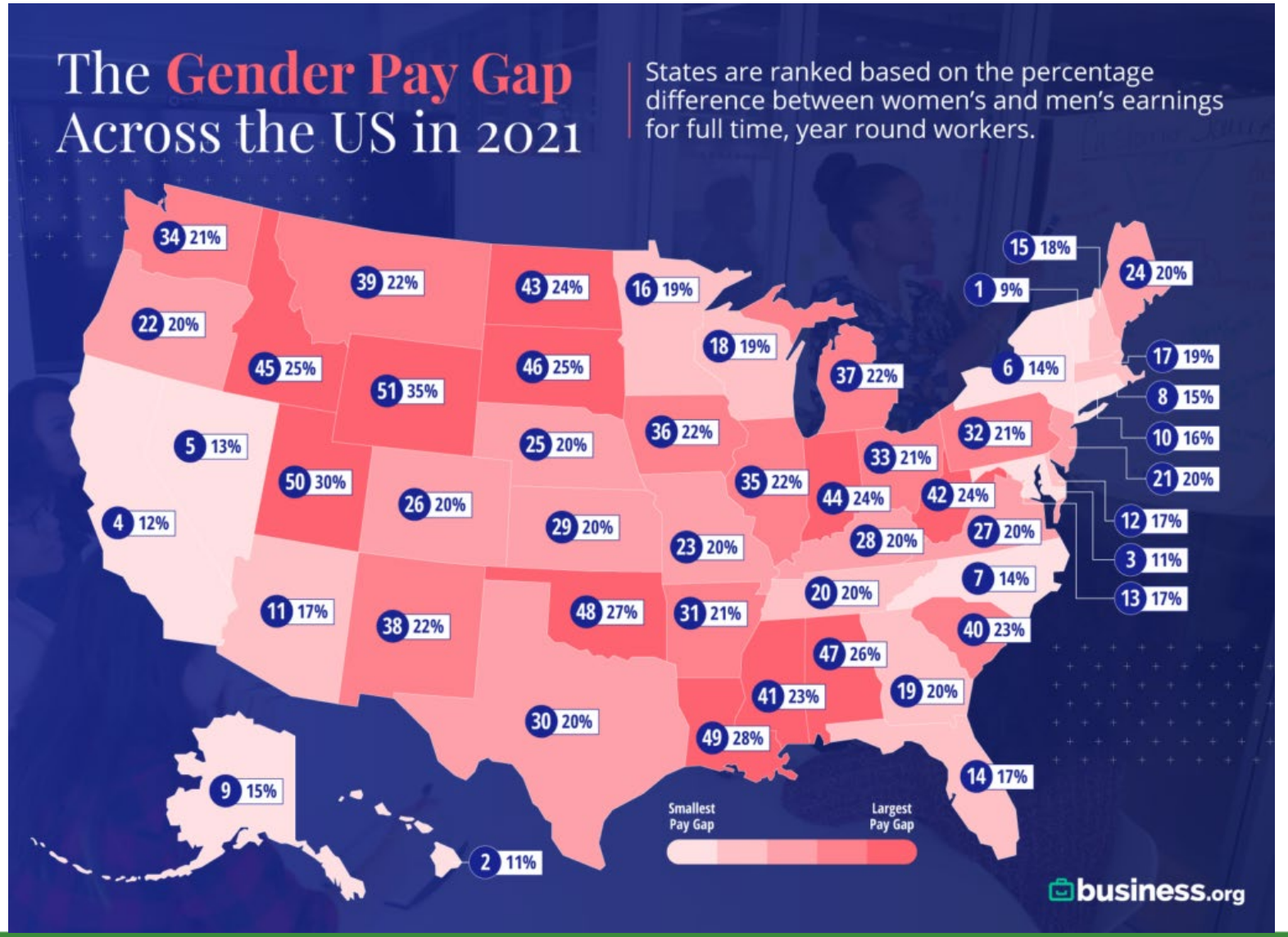
$21,100
$28,600
$30,000
$40,000
$34,800
$46,000
$40,000
$50,000
$50,000
$70,000
$65,000
$94,000
Less Than High School Diploma (73.8%)
High School Diploma or Equivalent (75.0%)
Some College Education (75.7%)
Associate's Degree (80.0%)
Bachelor's Degree (71.4%)
Graduate Degree (69.1%)

The Gender Pay Gap By Country

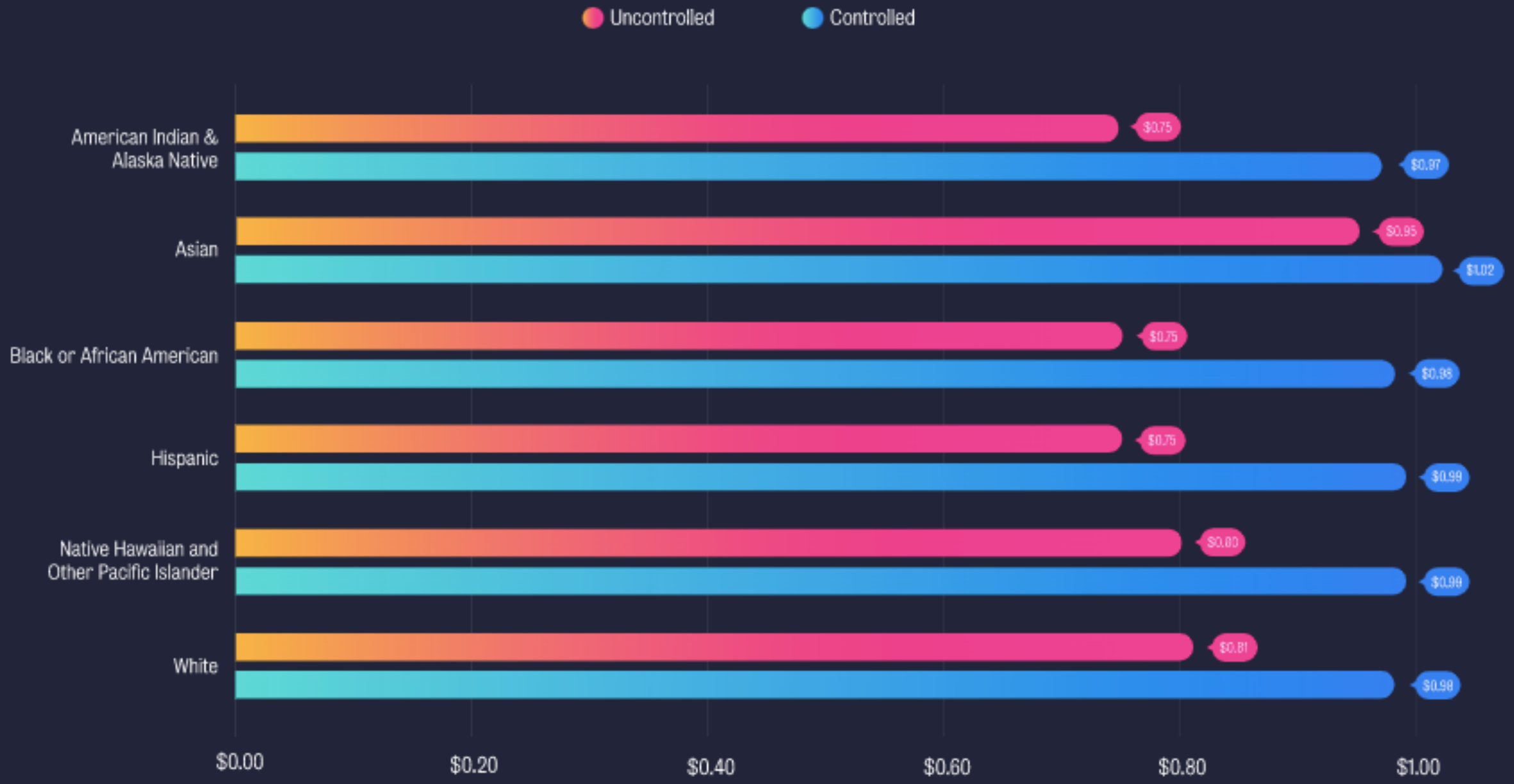
	"UNADJUSTED" BASE GENDER PAY GAP		"ADJUSTED" BASE GENDER PAY GAP	
	Average Cents/Pence Earned by Women Per Dollar/Pound/Euro of Male Earnings	Percentage Male Pay Advantage	Average Cents/Pence Earned by Women Per Dollar/Pound/Euro of Male Earnings	Percentage Male Pay Advantage
Australia	0.85	15.1%	0.97	3.1%
France	0.88	11.6%	0.96	3.7%
Canada	0.84	16.1%	0.96	4.0%
United States	0.79	21.4%	0.95	4.9%
United Kingdom	0.82	17.9%	0.95	5.0%
Singapore	0.87	12.8%	0.95	5.2%
Germany	0.78	22.3%	0.94	6.4%
Netherlands	0.81	18.9%	0.93	6.6%

Source: Glassdoor Economic Research (Glassdoor.com/research).


The Gender Pay Gap Across the US in 2021
States are ranked based on the percentage difference between women's and men's earnings for full time, year round workers.
34 21%
39 22%
43 24%
16 19%
15 18%
24 20%
1 9%
22 20%
18 19%
45 25%
46 25%
37 22%
6 14%
17 19%
51 35%
8 15%
5 13%
25 20%
36 22%
32 21%
10 16%
33 21%
50 30%
35 22%
21 20%
26 20%
44 24%
42 24%
4 12%
29 20%
12 17%
28 20%
27 20%
23 20%
3 11%
7 14%
11 17%
48 27%
31 21%
20 20%
13 17%
38 22%
40 23%
47 26%
41 23%
19 20%
30 20%
49 28%
9 15%
14 17%
Smallest Pay Gap
Largest Pay Gap
2 11%
business.org

GENDER PAY GAP BY RACE, RELATIVE TO WHITE MEN

(INCLUDES ONLY THOSE WITH AT LEAST A BACHELOR'S DEGREE)



The Controlled Wage Gap

vs.

The Uncontrolled Wage Gap

Equal Pay Act (federal) (1963)



The EPA requires employers to pay men and women equal pay for equal work.

- Only prohibits sex-based pay discrimination
- The jobs need not be identical, but they must be substantially equal
- All forms of pay are covered by this law
- Employers can defend a difference in pay by establishing that the difference results from (1) a seniority system, (2) a merit system, (3) a quantity/quality payment system, or (4) "any other factor other than sex."

  29 U.S.C. § 206(d)(1) (affirmative defenses)

Equal Pay Act (part 2)



Work is equal between jobs that require substantially similar…

- **Skill:** Measured by factors such as the experience, ability, education, and training required to perform the job.
- **Effort:** The amount of physical or mental exertion needed to perform the job.
- **Responsibility:** The degree of accountability required in performing the job.
- **Working Conditions:** Incl. two factors: (1) physical surroundings like temperature, fumes, and ventilation; and (2) hazards.

Title VII (1964), ADEA (1967), and the ADA (1990)





- Title VII, the ADEA, and the ADA prohibit compensation discrimination on the basis of race, color, religion, sex, national origin, age, or disability
- Unlike the EPA, there is no req. that the claimant's job be substantially equal to that of a higher paid person outside the claimant's protected class
- Looking for discrimination generally

Oregon Equal Pay Act (2017)



What does your state say about Pay Equity?

- *Oregon expanded who is covered*…Intentional and unintentional wage discrimination between any protected class (race, gender, color, national origin, age, sexuality, veteran status, disability, marital status, etc.) is illegal.
- *Expanded what we compare*… Now we compare all forms of compensation, not just salary/hourly wage.
- *Reduced justifications for pay gaps*… Employers only have eight specific reasons to justify a pay gap.
- *Salary History*… We can't ask applicants about their salary history before making an offer.
  - 21 states + 21 localities have salary history rules
- See handouts for state specific laws; digital copies include active hyperlinks to your locality's law

Costs of Indecision and Inaction

Pay equity in the press

New Council Report Shows Significant Gender And Racial Pay Disparity Among City Workers

BY DAVID CRUZ

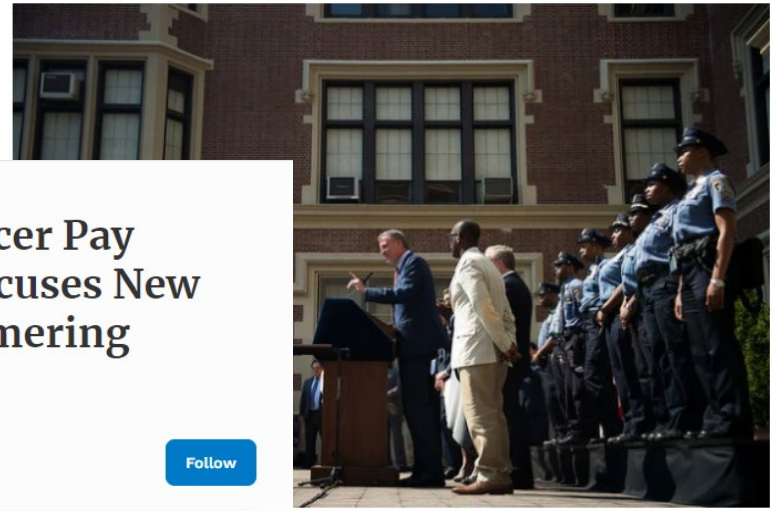
PUBLISHED AUGUST 2, 2021 | 45 COMMENTS



Deputy Majority Leader Laurie Cumbo (at podium) speaks at a rally for equal pay 2018.
WILLIAM ALATRISTE/NYC COUNCIL

City Settles Pay Equity Litigation With School Safety Agents

By Ross Barkan · 08/26/14 4:30pm



greement with school safety agents. (Photo: NYC Mayor's

Feb 27, 2022, 10:27am EST | 274 views

Settlement Of Soccer Pay Equity Lawsuit Focuses New Attention On Simmering Workplace Issue

Edward Segal Senior Contributor
Leadership Strategy
I cover crisis-related news, issues and topics.

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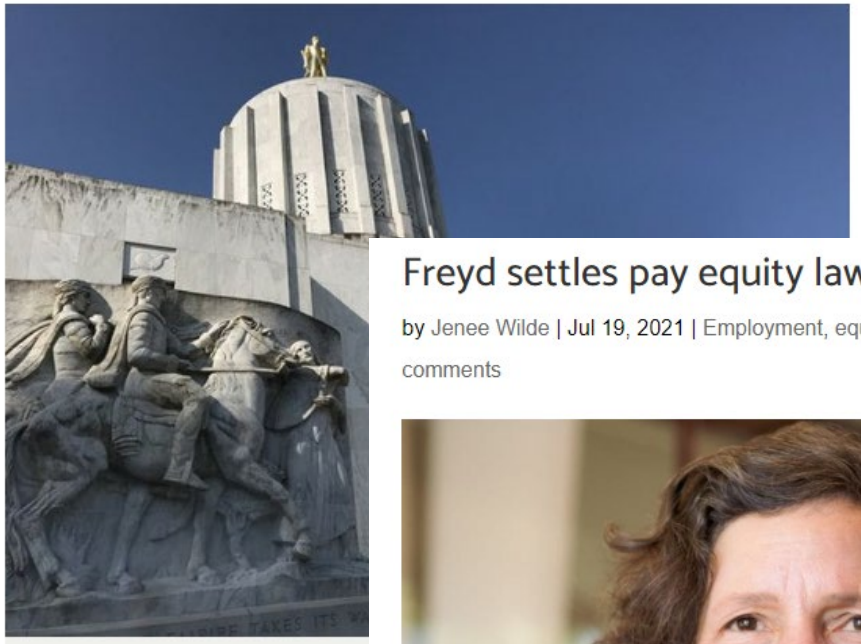
YOKOHAMA, JAPAN - JULY 30: Crystal Dunn #2, Rose Lavelle #16, Christen Press #11, Megan Rapinoe #15 ... [+] GETTY IMAGES

Pay equity in the press

Oregon legislative employee files federal lawsuit seeking equal pay

Updated Jan 29, 2019; Posted Sep 26, 2018



Class-action lawsuit on Nike: 'where women are devalued and demeaned'

Updated Jan 29, 2019; Posted Aug 10, 2018



Freyd settles pay equity lawsuit with UO

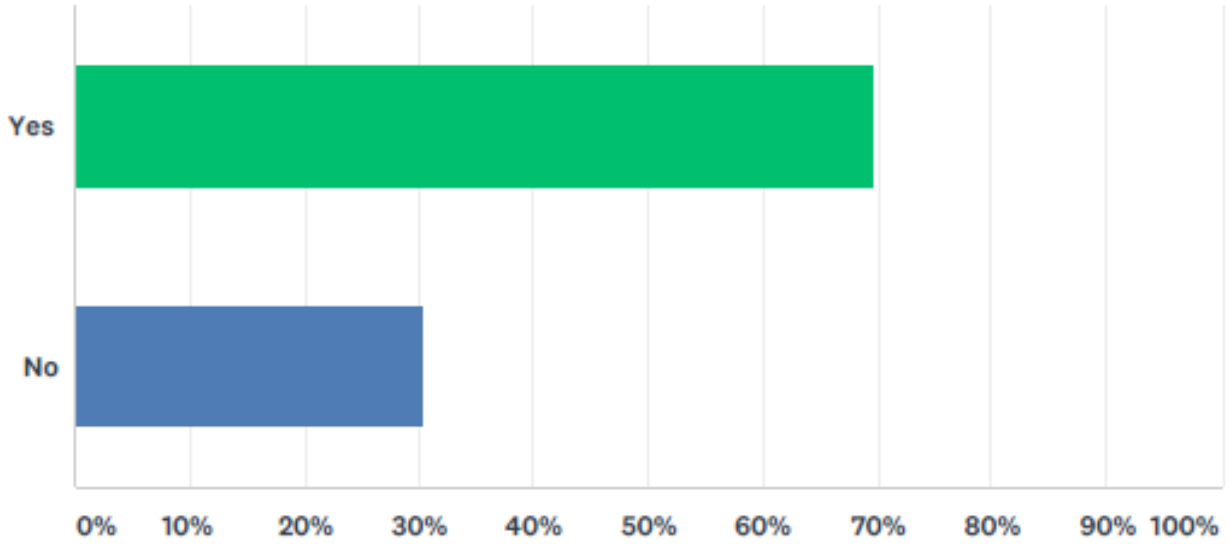
by Jenee Wilde | Jul 19, 2021 | Employment, equity, Faculty affiliates, Gender, News | 0 comments



After more than four years of litigation, Jennifer Freyd and the University of Oregon announced on Friday that they have settled the psychology professor's pay equity lawsuit.

Q3 Have you ever disclosed your salary to a co-worker?

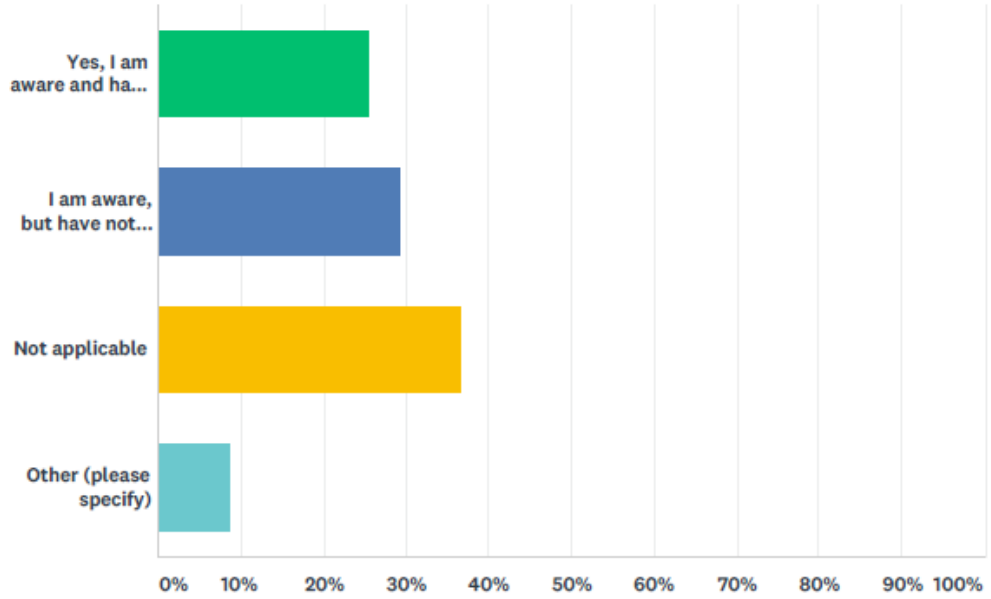
Answered: 86 Skipped: 0



ANSWER CHOICES	RESPONSES	
Yes	69.77%	60
No	30.23%	26
TOTAL		86

Q16 If you have ever become aware of a pay disparity during your legal career, have you made management aware of it?

Answered: 82 Skipped: 4



ANSWER CHOICES	RESPONSES	
Yes, I am aware and have made management aware of the salary difference.	25.61%	21
I am aware, but have not made management aware of the salary difference.	29.27%	24
Not applicable	36.59%	30
Other (please specify)	8.54%	7
TOTAL		82

Attorney Client Privileged Audits

Scope and Partnerships



- ***Cahill et al. v. Nike, Inc.* (2020 ruling)**
- Involve either in house or outside counsel at the outset so A/C and work-product privileges attach as early as possible in the audit process; privilege is not retroactive
- Determine scope of work needed and what outside partnerships make sense
  - Professional statistician (2018)
  - USC Race and Equity Center (2021)
- Retain experts as needed through legal counsel rather than human resources
- Contracting with outside agencies/staff can be time consuming; plan ahead!
- All employees in audit, or just non-represented classifications? Include or exclude the offices of electeds? What if non-reps become rep'd during study?

Staffing Pay Equity



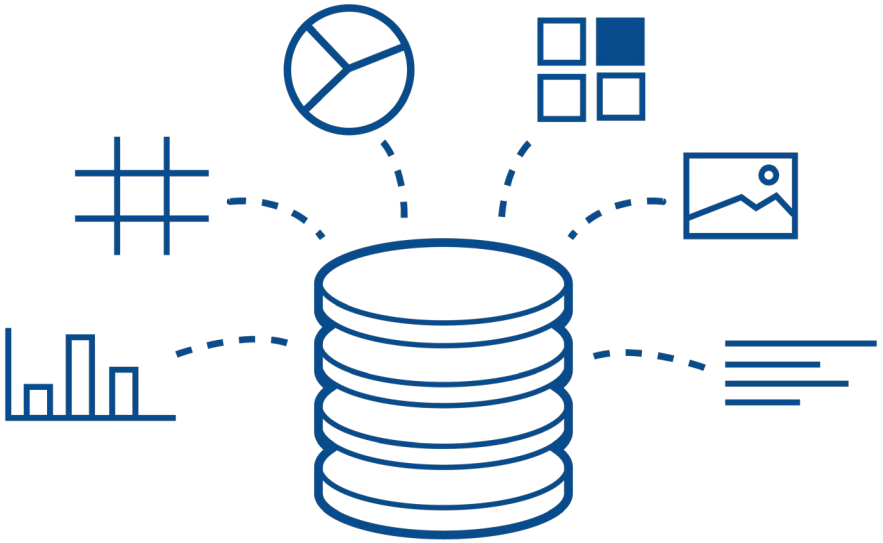
- Classification & Compensation + Pay Equity develops, establishes, and maintains the City's classification and compensation structure. The classification framework provides a consistent standardized description of work and minimum qualifications. The compensation system seeks to achieve market competitiveness and internal equity. The Pay Equity program manages compliance with the Oregon Equal Pay Act by analyzing and adjusting pay using quantifiable factors.
- **Current FTE**: One Senior Classification Analyst, Two General Classification Analysts; One Pay Equity Analyst; One Administrative Support = Six FTE (.08 staff per 100 employees)
- **Staffing Needs:** Two Classification + Compensation Analysts; Three Pay Equity Analysts = Five FTE
- **Game Changer:** Having an actuarial/statistician on staff

Timing and Budget Cycles



- **Statutory timing** constraints (e.g., new law coming into effect on a specific date)
- **Safe harbor-based deadlines** (e.g., audit must occur at least once every three years)
- **Best Practice:** Align audit with your City's existing budget cycle (e.g., pay changes to occur in alignment with natural budget cycle of City)
  - Involve your City's Budget Office early / often
  - Make sure that pay equity audit's preliminary statistical analysis will be complete in time for your bureaus/divisions to make budget requests for pay bumps as needed
  - Large budget requests may be unavoidable, but you can avoid the shock of a significant off-cycle request and gain better elected/bureau buy in

Data Gathering



Gather existing workforce data (protected classes + bona fide factors)

- Quality (completeness) and Cleanliness (accuracy) of the data is key to a correct, legally defensible, and efficient audit.
- Name, Position, Division, Grade, Structure, Salary/Pay, Applicable Salary Range, Years Education, Years Experience, and EEO data.

Determine whether you intend to seek additional EEO data

- Proceed with only on-hand EEO data?
- Issue mandatory employee survey?
- How do you deal with noncompliance or delayed compliance?
- Run a blind equity audit with no EEO data?

Response to Survey	# by Response	Percentage
Completed	1,407	81%
Partially completed	107	6%
Did not complete	206	12%
No longer employed	16	1%
On FMLA leave	1	0%
Grand Total	1,737	—

The Equal Pay Analysis



- **Modern Trend:** more states' laws are now encouraging employers to conduct an equal pay analysis (see digital handout for your state law)
- **"Equal-pay analysis"** means an evaluation process to find, look at, and fix wage gaps among employees who do work of comparable character with similar bona fide factors
- Can provide critical **protection in a lawsuit**
- **Model employer in the community**
- **Make sure employees are paid fairly**
- Multiple regression analysis is the gold standard
  - Regression – statistical technique of measuring the difference between variables; Multiple – more than one factor

Job Group - 2 : Professionals

	Incumbents	Total Salary	Relative %	$ Difference
AVERAGE				
Male	50	$73,019.50		
Female	40	$61,729.29	84.5	$11,290.21
White	64	$69,185.49		
Minority	26	$65,087.51	94.1	$4,097.98
Asian	4	$85,906.59		
Pac./Hawaiian	1	$81,001.26	94.3	$4,905.33
Two or More	1	$69,707.61	81.1	$16,198.98
White	64	$69,185.49	80.5	$16,721.10
Hispanic	7	$63,090.77	73.4	$22,815.82
Black	13	$58,177.28	67.7	$27,729.31
American Indian	0	$0.00	N/A	N/A
MEDIAN				
Male	50	$72,749.00		
Female	40	$57,163.20	78.6	$15,585.80
White	64	$66,000.00		
Minority	26	$61,500.00	93.2	$4,500.00
Asian	4	$87,909.40		
Pac./Hawaiian	1	$81,001.26	92.1	$6,908.14
Two or More	1	$69,707.61	79.3	$18,201.79
White	64	$66,000.00	75.1	$21,909.40
Hispanic	7	$63,018.98	71.7	$24,890.42
Black	13	$55,825.00	63.5	$32,084.40
American Indian	0	$0.00	N/A	N/A

Job Group - 2 : Professionals (90 Employees)

	Employees	Avg Salary	Significant?	Std Dev
Male	50	$73,020		
Female	40	$61,729	Yes	-2.98
White	64	$69,185		
Minority	26	$65,088	No	-0.98
Asian	4	$85,907		
Hawaiian/Pac. Islander	1	$81,001	No	-1.16
Two or More	1	$69,708	No	-0.06
White	64	$69,185	No	-1.71
Hispanic	7	$63,091	Yes	-3.12
Black	13	$58,177	Yes	-3.90
American Indian	0	$0	No	0.00

Model Explanation

The following independent variables were included in the models for this group: [Race/Gender] and [Hire Date].

Example regression; not real data/outcomes

The Equal Pay Analysis



- **Step 1** – IDENTIFY COMPARATORS: Are two City employees performing work of similar skill, effort, responsibility, and working conditions?
  - *Keep in mind, job titles do not control this analysis.*
  - *Without a systematic, preexisting marker, you will need to likely go through thousands of data points to determine comparable character.*
  - *At City, our classification structure provides the framework for identifying work of comparable character, and we can further narrow in the classification specifications to the job families.*
  - *People who are not comparators do not get compared against each other. The EPA only guarantees equal pay for equal work.*
- **Step 2** – PAY JUSTIFICATIONS: Comparators can be paid differently due to (1) seniority, (2) a merit, (3) a quantity/quality payment system (e.g., by the hour), or (4) "any other factor other than sex."

What comes next?



- **If an analysis determines that two people are performing equal work AND there is no defensible reason that justifies a pay difference -- what happens next?**
- **Option 1:** Increase the pay of the lower paid employee to be equal to the higher paid person.
  - Only works if comparators are truly identical
- **Option 2:** Red circle or freeze (hold an employee's salary constant) as the lower paid person comes into alignment over time.
- **Option 3:** Bring the lower paid person into alignment with their statistically predicted pay–likely that they are not 100% identical to the higher paid person.

Employee Messaging

See Messaging section of handout for examples of Portland's employee messaging in 2018, 2019, and 2021

Pay equity analyses shake up Oregon's government

Updated Jan 29, 2019; Posted Sep 28, 2018



1,200 Portland employees' salaries frozen due to high pay

Updated Jan 04, 2019; Posted Jan 04, 2019

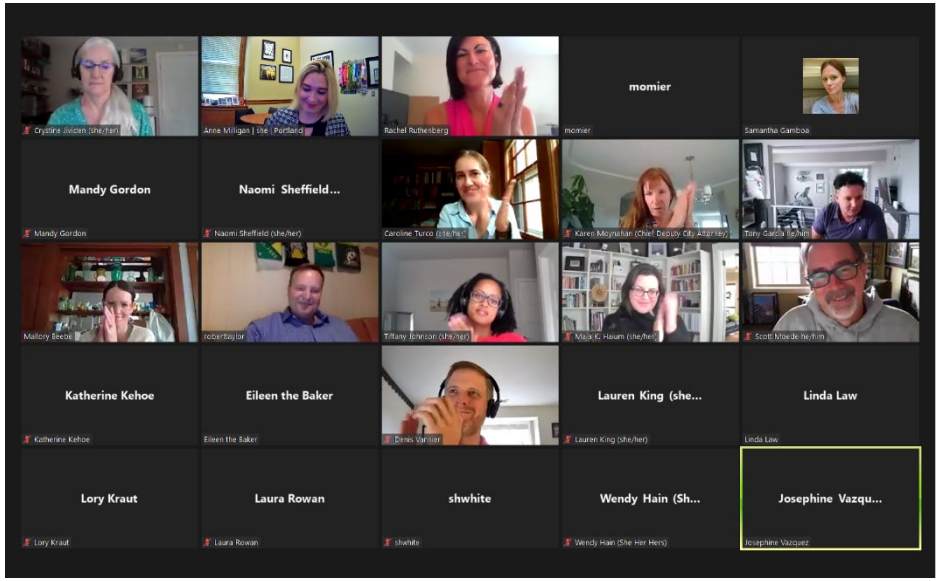


Local | Politics | News

New Pay Equity Law Throws City Of Portland Into Confusion

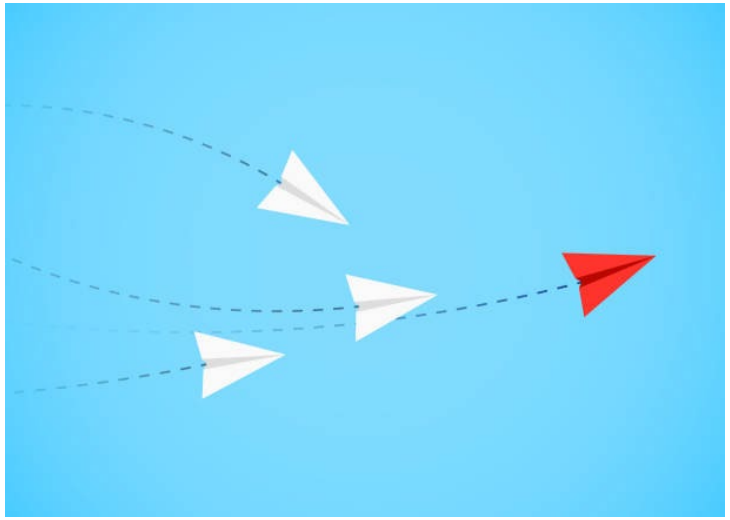
by **Ericka Cruz Guevarra** and **Amelia Templeton** Follow OPB Jan. 4, 2019 12:32 p.m. | Updated: Jan. 4, 2019 2:51 p.m. | Portland, Ore.

Comparing the 2018 and 2021 audits



- **2018: 518 pay changes (19.8% of participants)**
  - **Cost:** $3.7 million ($1.4 million from General Fund)
  - **Runway:** September-December 2018
- **2021: 37 pay changes (2.1% of participants)**
  - **Cost:** ~$300,000
  - **Runway:** January-December 2021
  - **More Communication and Training**
  - **Layered Training Approach:** Managers trained first, so they were prepared to answer employees' questions, then training provided to employees (162 managers and 93 non-managers voluntarily trained)
  - Incorporated/bought new technologies for the regression modelling work
  - Increased staffing compared to 2018

Allowing Appeals



- Our process allows employees to submit appeals (a "re-evaluation") to the current study year's findings as relate to their pay
- Can't appeal the entire study/audit
- Can't inquire into the identities of their comparators or their comparator's protected HR information (EEO, experience, etc.)
- *See appeals form in handout*
- This year, deadline to appeal findings was 2/28/2022; 20 appeals rec'd (.01%)
- Requests reviewed starting 3/1/2022
- Allows employees who failed to participate in initial survey to provide more information
- Evidence in litigation – why didn't you appeal if you believed pay was inequitable?

Maintaining Pay Equity

SPF is for more than sun protection



After the audit, define the scope of work moving forward to ensure that pay equity is considered in every transfer, promotion, and hire, so that pay equity is maintained rather than corrected every few years.

- Silo all pay decisions to specific staff trained in pay equity, rather than individual managers
- **SPF/Salary Predictive Formula:** a formula model for compensatory factors to mathematically determine salary– e.g., a 4-year degree is always worth 4 points, a masters degree is worth 6 points
- In the absence of SPF, determine the closest comparators at time of hire and bring in the candidate or transfer in line with those figures

Public Records Requests

Avoiding production of the privileged audit



- **Public Records Exemptions**
  - Attorney Client Privilege
  - Work Product/Anticipation of Litigation
  - Successfully protected the 2018 and 2021 City of Portland Pay Equity Audits from PRRs
  - *See PRR+ District Attorney Opinion in handout*
- ***Cahill, et al. v. Nike* (D.Or., 2020)**
  - Nike's failure to produce a privilege log within 30 days of RFP did not result in a waiver of privilege because of the magnitude of the production
  - Nike's retention of outside counsel was for legal purposes – to assess the risks associated with Nike's pay and promotion policies and potential discrepancies – so attorney-client privilege applied
  - Work product privilege also applied because audit prepared to evaluate the possibility of litigation

Looking Forward

Thanks for listening.



Anne Milligan, Deputy City Attorney