

Bridging the Gap: Pay Equity Aspirations and Audits

May 14, 2022 | OCAA 2022 Spring CLE

Anne Milligan, Deputy City Attorney, City of Portland



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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



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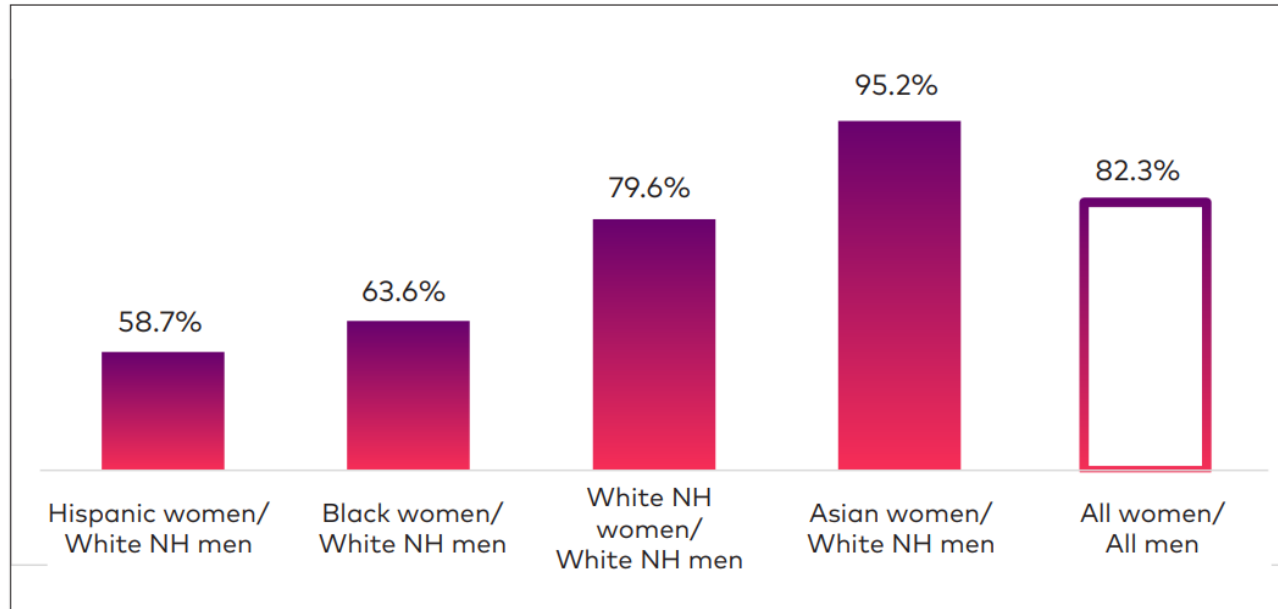
Pay Equity 101



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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.

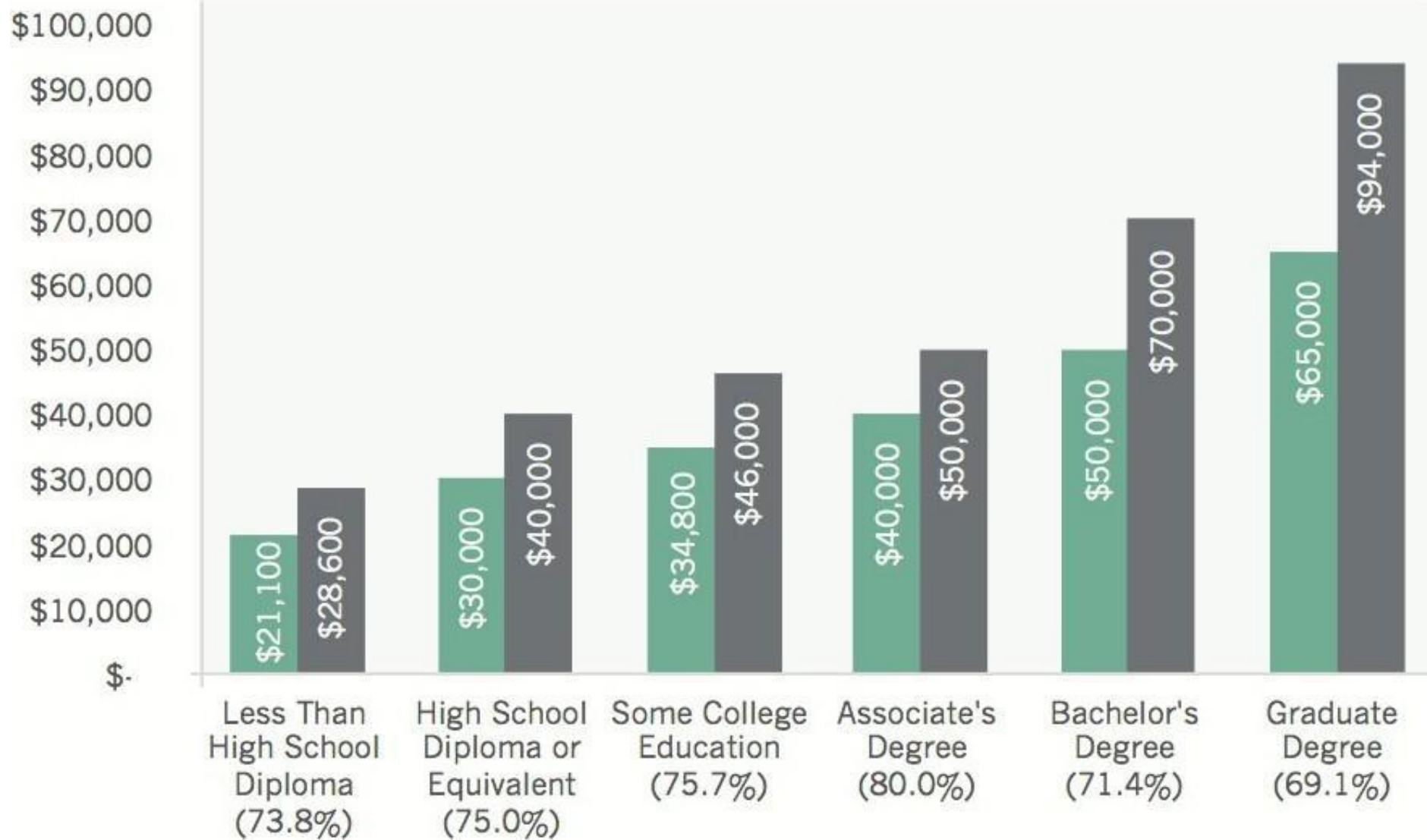
Source: See Table 2

**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%).

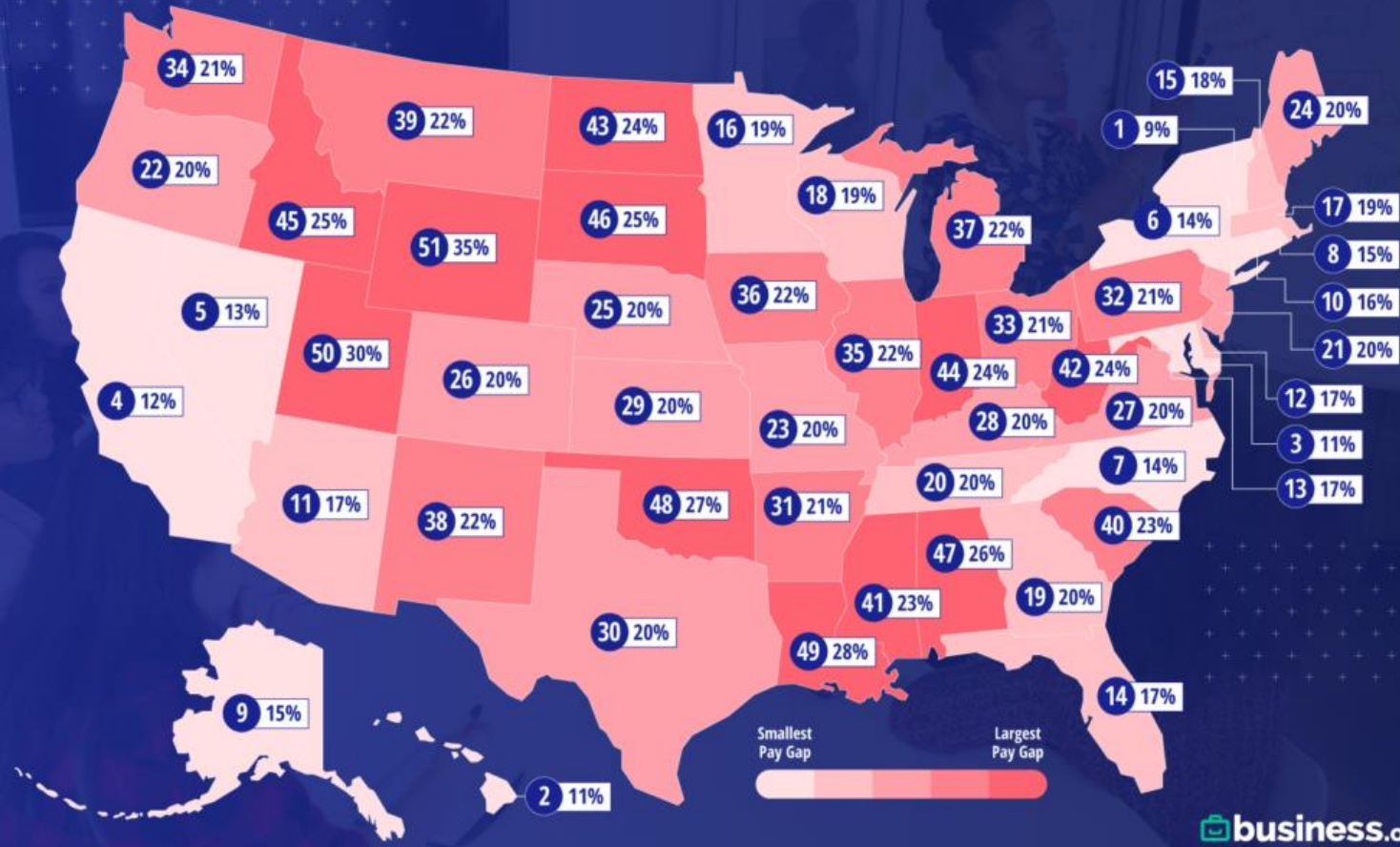


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The Gender Pay Gap Across the US in 2021

States are ranked based on the percentage difference between women's and men's earnings for full time, year round workers.



business.org



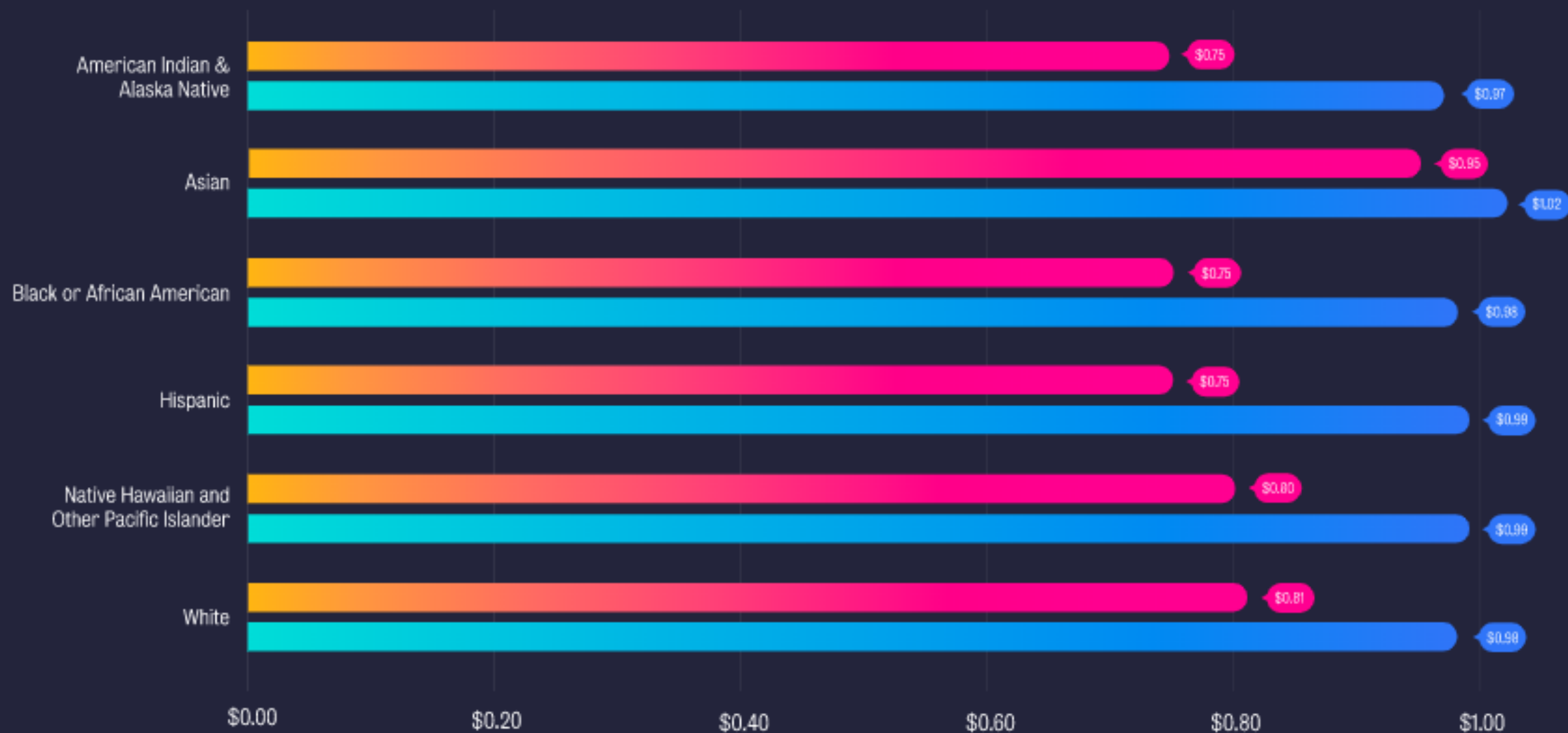
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GENDER PAY GAP BY RACE, RELATIVE TO WHITE MEN

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

Uncontrolled

Controlled



The Controlled Wage Gap

vs.

The Uncontrolled Wage Gap



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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)



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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



- *Passed in 1955, updated in 2017 and 2019*
- *Expanded who is covered...* Made intentional and unintentional “wage” discrimination illegal between any protected class (race, gender, color, national origin, age, sexuality, veteran status, disability, marital status, etc.).
- *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, rather than the old any “good faith” factors.
- *Salary History...* We can’t ask applicants about their salary history anymore before making an offer. We also can’t base a new employee’s pay on their past pay at a former employer.



What changed at City?



- City conducts an attorney-client privileged pay equity audit through CAO every 3 years on all non-represented employees
 - First City pay equity audit ended 12/31/2018
 - Last audit occurred in 2021, with final information reviewed by City Council and leadership for decision making
- City introduced SuccessFactors to improve the performance review process
- All incoming and internal employees' pay is set in line with pay equity compliant pay bands identified by BHR



What changed at City?



- Built job family groupings to further refine what is work of comparable character beyond merely grouping all individuals in the same class spec together
- What is a job family?
 - Job families are groupings of jobs related by common vocations/professions. Jobs in a job family are similar in that they:
 - Require similar knowledge, skills and abilities (competencies).
 - Have a continuum of knowledge, skills and abilities that represent a career path from the lowest to the highest-level job.



**Job
Family
#2**

Classification Specification (broad job title)

**Job
Family
#3**

True Comparators

Same job title
AND
Similar skill, effort,
responsibility,
working
conditions,
required
knowledge, etc.

Job Family #1



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Costs of Indecision and Inaction



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Pay equity in the press

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

BY [DAVID CRUZ](#)

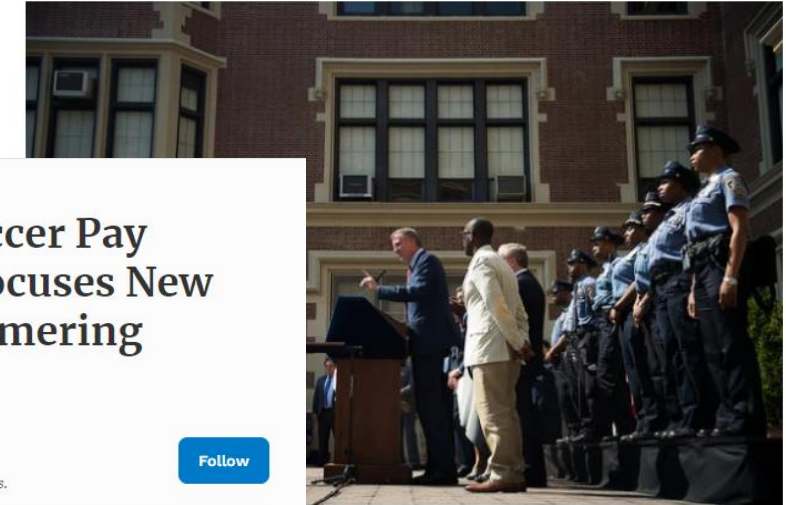
PUBLISHED AUGUST 2, 2021 | 45 COMMENTS



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



Agreement with school safety agents. (Photo: NYC Mayor's Office)

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

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



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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.



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Attorney Client Privileged Audits



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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?



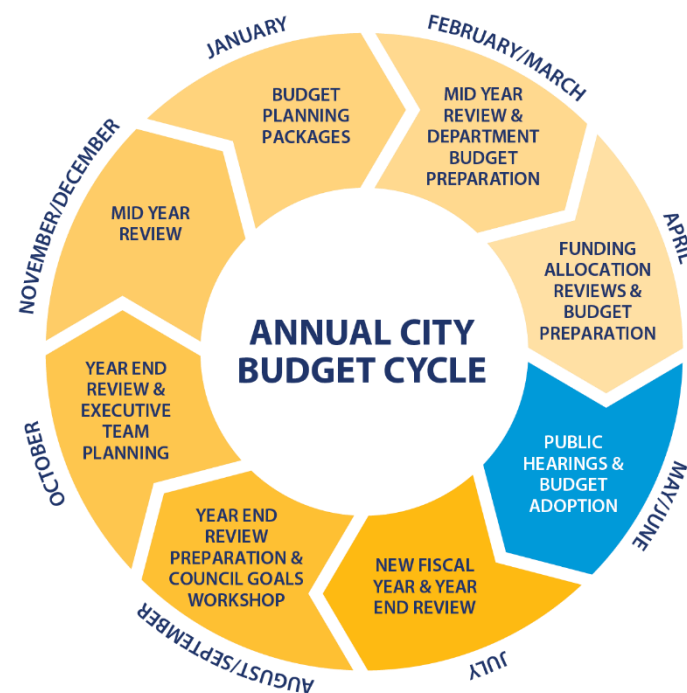
Staffing Pay Equity



- 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



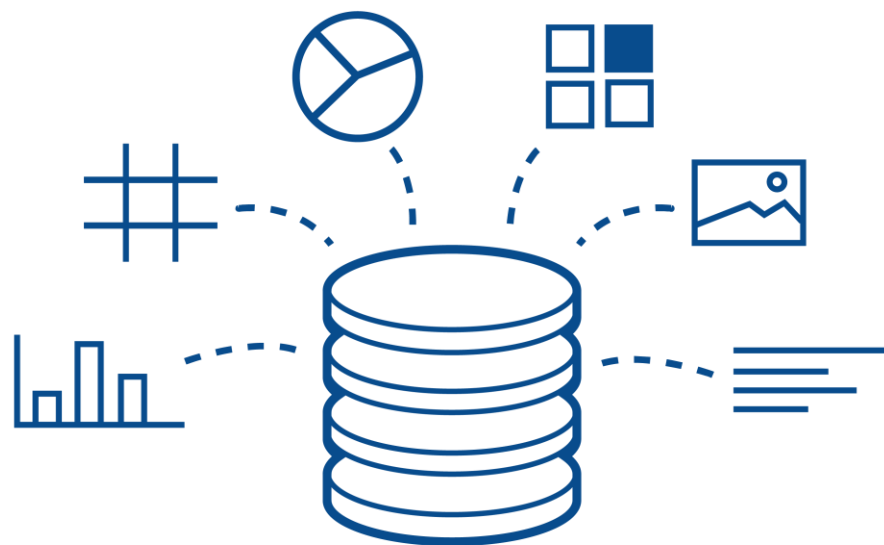
Timing and Budget Cycles



- **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
- **"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



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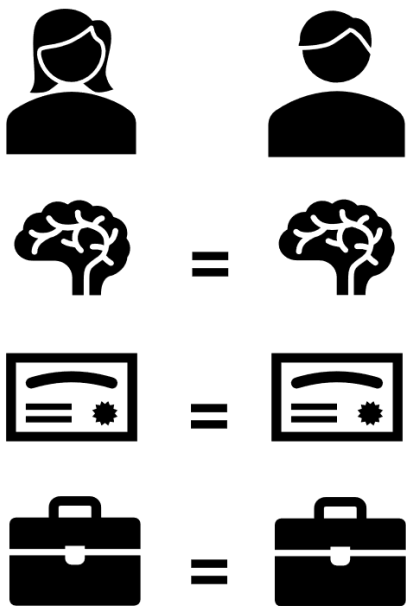
The Equal Pay Analysis



- **Step 1 – IDENTIFY COMPARATORS:** Are two City employees performing equal/comparable work?
 - *Job titles do not control this analysis.*
 - *That said, without a systematic, preexisting marker, you will need to likely go through thousands of data points to determine work of comparable character.*
 - *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...
 - Under the EPA 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."
 - Under Oregon's pay equity law, the eight (8) statutory bona fide factors.



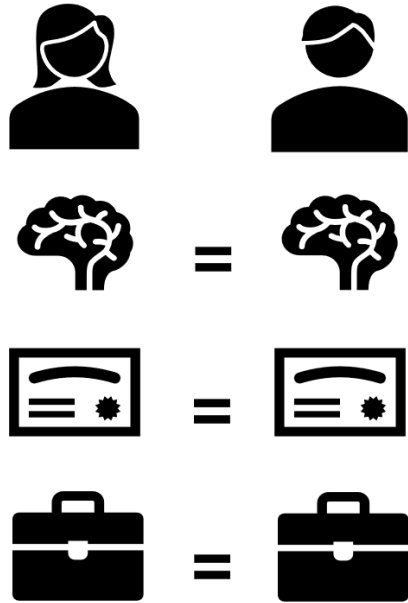
What are Bona Fide Factors? (Step 2)



- Seniority system
- Merit system
- System measuring earnings by quantity/quality of work
- Workplace locations
- Travel (*if necessary and regular*)
- Education (*if relevant to position*)
- Training (*if relevant to position*)
- Experience (*if relevant to position*)
- Or any combination of these factors, provided the combination “***accounts for the entire compensation differential***”



What Bona Fide Factors does City use? (Step 2)



- Seniority system
- Merit system
- ~~System measuring earnings by quantity/quality of work~~
- ~~Workplace locations~~
- ~~Travel (*if necessary and regular*)~~
- Education (*if relevant to position*)
- ~~Training (*if relevant to position*)~~
- Experience (*if relevant to position*)
- Or any combination of these factors, if the combination “*accounts for the entire compensation differential*”



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

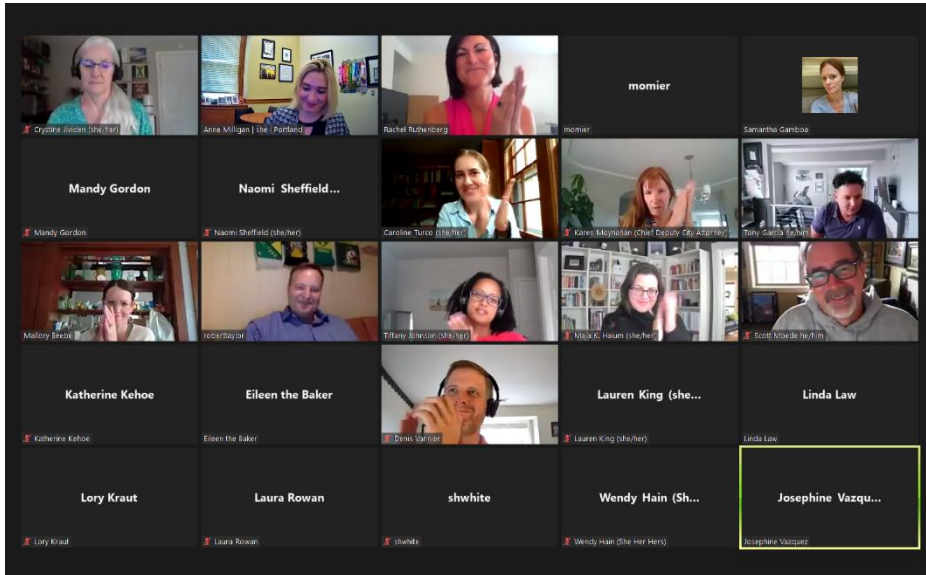
New Pay Equity Law Throws City Of Portland Into Confusion

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.



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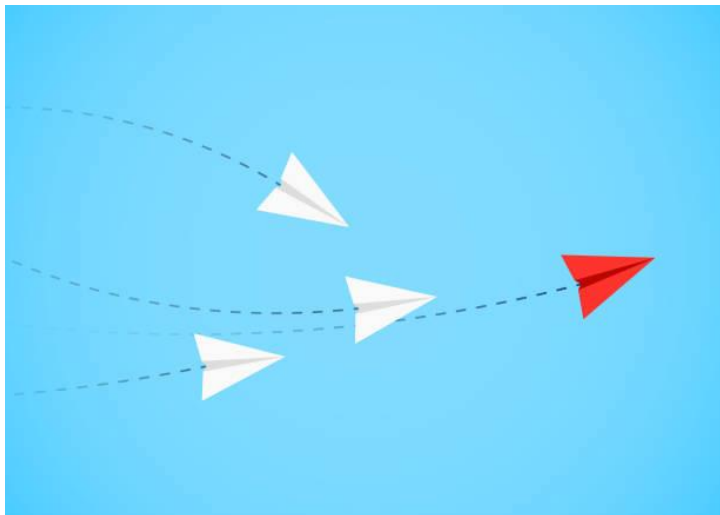
Comparing the 2018 and 2021 audits



- **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)
 - Bought + incorporated new technologies for the regression modelling work
 - Increased staffing in 2021 vs. 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



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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



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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



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Thanks for listening.



Anne Milligan, Deputy City Attorney



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