



Why Pay Equity Should Be on Your Compliance Checklist

Presented by Kara G., JD, SPHR

January 10, 2023

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- Please participate in our poll + post-webinar survey.
- Use the Q&A box (not chat) to ask questions.

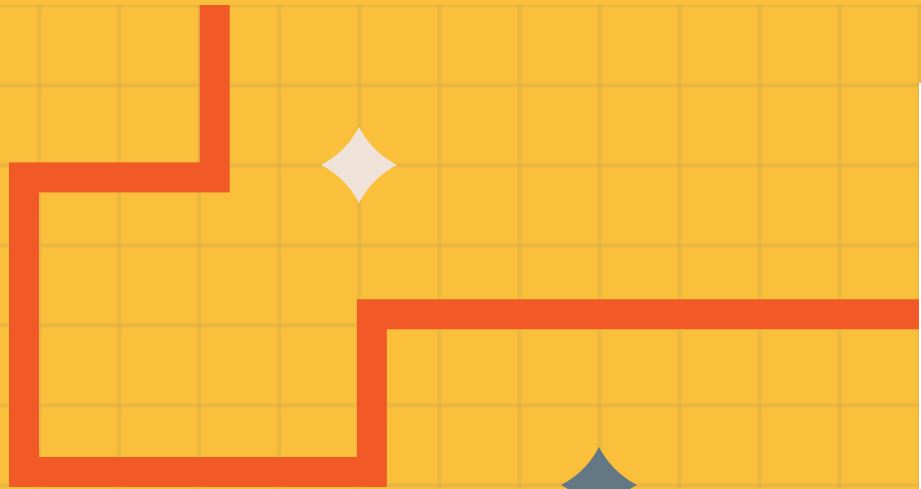
Our Speaker

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Senior Legal Analyst, Mineral

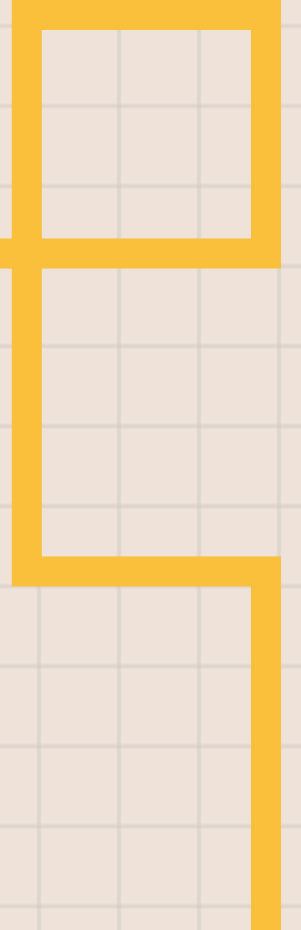


Agenda



- Federal Pay Equity Law
- State Pay Equity Laws
- Auditing: The 30,000' View
- Best Practices and Creating a Culture of Pay Equity

The Equal Pay Act of 1963





No Unequal Pay Based on Sex

Prohibits different pay for employees of the opposite sex for **substantially equal work** on jobs that require equal skill, effort, and responsibility, and which are performed under similar working conditions in the same establishment.

Applies to employers of any size. Intent is not required.





Skill

What's needed to do the job, not the skills possessed





Effort

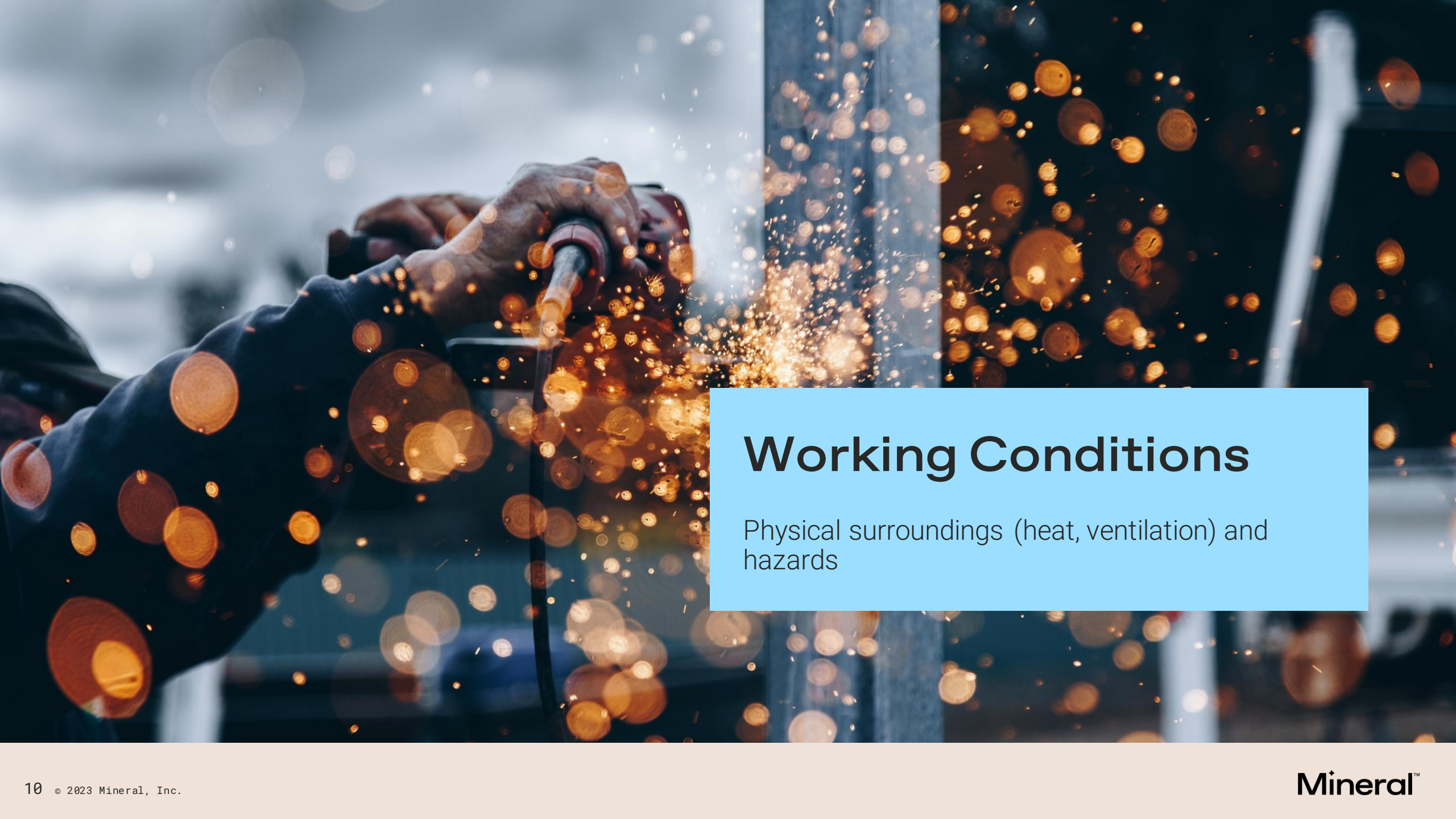
Physical or mental exertion required





Responsibility

Individual contributions and management responsibilities



Working Conditions

Physical surroundings (heat, ventilation) and hazards



Establishment

Physical place of business and operations



Acceptable Reasons for Pay Differences

1. A seniority system
2. A merit system
3. A system which measures earnings by quantity or quality of production
4. A differential based on any other factor other than sex.



The 9th Circuit Court of Appeals

Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, Washington

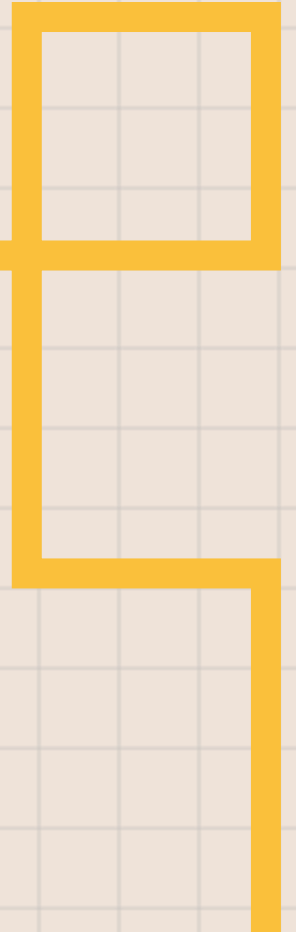
The 9th Circuit Court of Appeals ruled (in *Rizo v. Yovino*) that a bona fide factor other than sex must be job-related, such as experience, skills and abilities, and education.

State courts often take cues from federal courts, so consider this potential foreshadowing for state law claims.

In the 9th Circuit, don't expect these to work as bona fide factors:

- Past salary history
- Market factors (e.g., paying new hires more because of a tight labor market)
- Negotiation

A Sampling of State Laws





Oregon Pay Equity and Transparency



Oregon's Law

Prohibits employers from providing differing wages or other compensation to employees who are part of a particular protected class when they do **work of comparable character**.

Protected classes include race, color, religion, sex, sexual orientation, gender identity, national origin, marital status, veteran status, disability or age.



Oregon: Work of Comparable Character

Work that requires substantially similar:

- Knowledge (education, certifications, licenses, experience, training)
- Skill (ability, agility, coordination, efficiency)
- Effort (exertion, sustained activity, complexity)
- Responsibility (accountability, significance of job tasks, autonomy, risks presented by employee's work)
- Working conditions (environment, hours, scheduling, physical surroundings, exposures)

Oregon: Acceptable Reasons for Differences



- A *seniority system*
- A *merit system*
- A *system* measuring earnings by quantity or quality of production (including piece rate)
- Education, training, experience
- Workplace location
- Travel (if necessary and regular)
- A combination of these factors, if they account for the entire pay discrepancy

THERE IS NO "BONA FIDE FACTOR" CATCH-ALL!

Oregon: Salary Discussions and Inquiries Protected

- Employees may discuss their wages and the wages of other employees.
- They may also inquire about others' wages, whether asking the person directly or asking management. But there is no obligation for employers or employees to provide this information.
- Employers can require employees who have access to other employees' wage information as part of their job duties, to keep that information confidential.



Oregon: Salary History Ban

- You can't ask about an applicant (or others with the information) about their current or past salary.
- You can't screen applicants based on salary history.
- You can't use salary history in deciding how much to offer or as an explanation for differences in pay, even if the applicant volunteers the info.
- Salary history *can* be used for current employees, if based on bona fide factors.



California Pay Equity and Transparency





California's Law

Prohibits unequal pay for those who do **substantially similar work** when viewed as a composite of skill, effort, and responsibility, under similar working conditions.

Applies to sex, race, and ethnicity.



California: Acceptable Reasons for Differences

Reasons for unequal pay must be reasonable and explain the entire difference.

Allowable explanations:

1. Seniority
2. Merit
3. A system that measures production
4. A bona fide factor other than sex, race, or ethnicity

THIS CATCH-ALL HAS LIMITATIONS!





California: Bona Fide Factors Other Than Sex, Race, or Ethnicity

Potentially education, training, or experience

But if challenged, the employer must prove the factor is:

- Not derived from a factor based on sex, race, or ethnicity,
- *Job related, and*
- Consistent with a business necessity



California: Salary Discussions and Inquiries Protected

Employees can discuss their wages and the wages of other employees.

They can also inquire about others' wages, whether asking the person directly or asking management, but there is no obligation to provide this information.

California: Salary History Ban



- Can't ask about past salary history.
- Can't decide whether to offer someone a job based on past salary.
- Can't use it as an explanation for differences in pay, even if asked back when it was legal or if the applicant volunteered the information.
- Salary history can be used for current employees, if based on bona fide factors.

California Pay Range Disclosure



The Basics

- Effective January 1, 2023.
- Employers with 15+ employees (located anywhere), who are posting for a job that *could* be filled in California, must post the pay scale for the position in the job posting.

Pay scale is defined as the salary or hourly wage range that the employer reasonably expects to pay for the position.

- Upon request, employers of all sizes will be required to provide an employee with the pay scale for their current position.
- Employers of all sizes will need to keep records of job title and wage rate history for each employee throughout their employment and for three years after termination.





How This Relates to Pay Equity

Employees are going to start talking.

- If the ranges are too large, they'll think you're acting in bad faith or wonder who among them makes that *little* or that *much*.
- If the ranges are reasonable, but you have current employees outside of those ranges, there may be gossip, organizing, confrontations, or all of the above.
- When employees start sharing their own wage information with one another, pay equity issues may become apparent and inspire complaints or lawsuits.



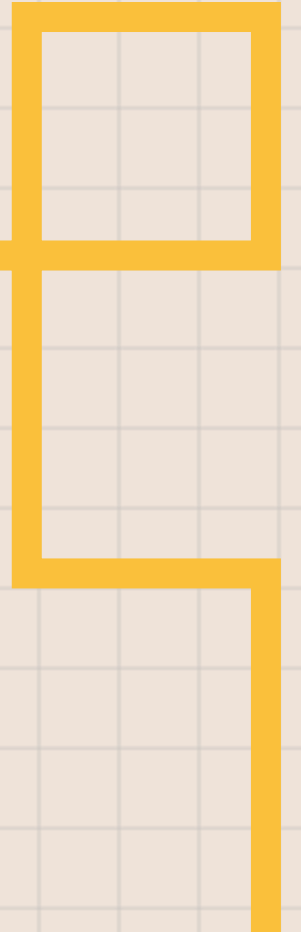
Pay Transparency in Job Postings is Spreading

Colorado, Washington State, NYC, and New York (come September) all have similar laws.

And it's not a bad thing

- Increases applicants by 40%
- Tactical advantage over competitors
- Saves you and the applicants' time
- Helps you stick to your equal pay systems

Auditing for Compliance



A photograph of two women sitting at a small table in a modern office or cafe. One woman is using a laptop while the other looks on. The scene is lit from behind, creating a silhouette effect against a large window. The ceiling has exposed beams and ductwork.

Two Common Types of Pay Equity Audit

- Regression analysis: best for large employers and considered the gold standard in litigation.
- Cohort study: generally looking at small groups and requires more qualitative analysis.

Step 1

Gather the Data

* Step 1 and 2 can be done at the same time, but since Step 1 may take the longest, I'd suggest getting started here

Info you'll need for each employee:

- Job classifications (title, level, grade, etc.)
- Full-time or part-time status
- Seniority and hire date (for all positions at the company)
- Flexible work arrangement history
- Performance reviews and ratings
- Educational qualifications and any relevant training, licenses, or credentials
- Notable responsibilities (e.g., extra hours in the field)
- Prior job experience
- Exemption status
- Location(s)
- Sex, age, race, and other potentially relevant protected characteristics
- Total yearly compensation

Step 2

Form Your "Substantially Similar" or "Comparable Character" Groups

- This is going to be hard.
- Try to group employees together who perform work of comparable character, or work that is substantially similar, as defined either by the applicable state law (if all your employees are in one state or you feel comfortable only assessing by state), or the broadest state law.
- If you're large enough, or have the funds, this would be the time to bring in a professional.

Step 3 Do the Analysis

You may have a team of statisticians and lawyers, or you may be using an internet tutorial and figuring it out on your own.



Step 4 See if You Can Explain the Results

When you find differences, see if you can explain why they exist, using only the reasons available to you.



Step 5 Make, or Start to Make, Corrections

- Smaller adjustments may be easy to fold into annual or bi-annual reviews.
- Significant disparities may warrant more immediate and obvious correction and you may want to consult with an attorney to gauge risk.

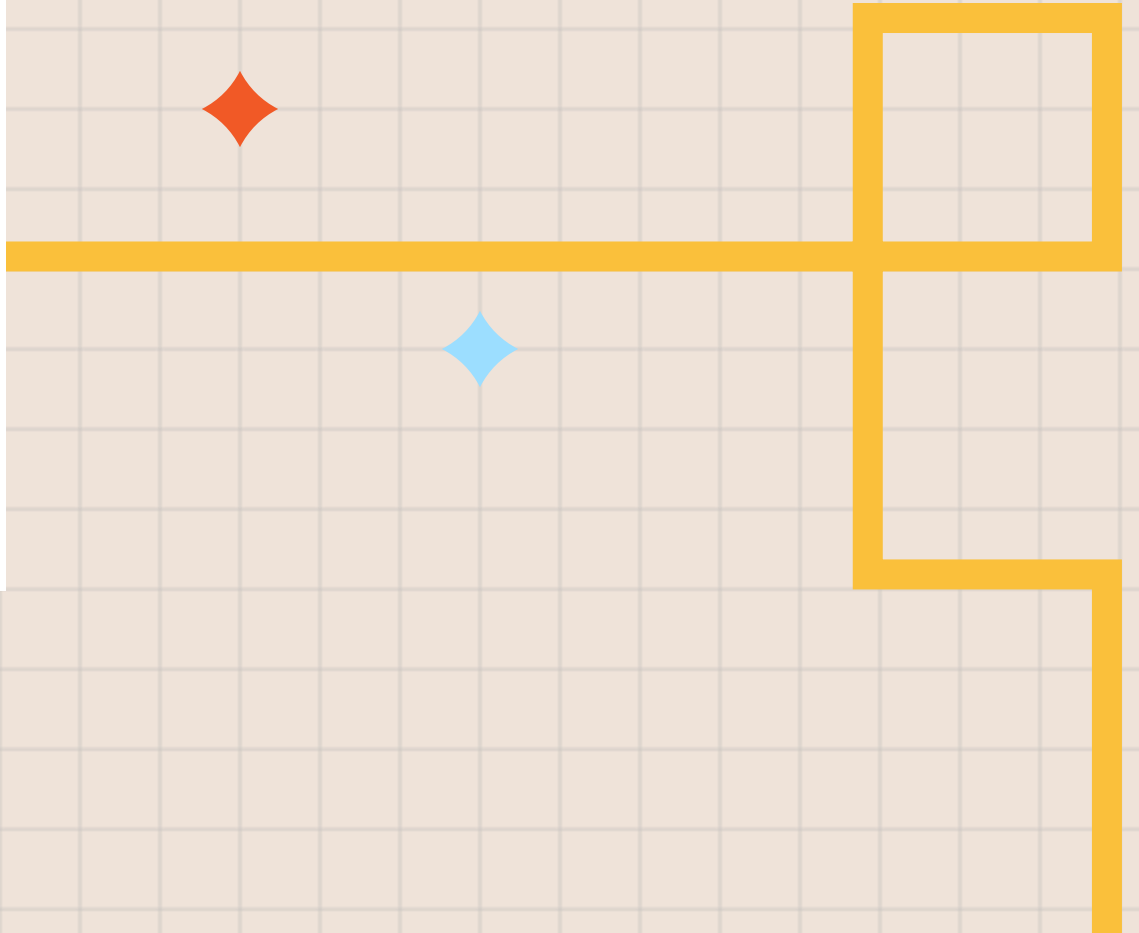




Poll Question

**Have you done any
kind of pay audit?**

Best Practices and Creating a Culture of Pay Equity





Make Sure HR is Running the Hiring Show

- Managers gone wild can bring your new equitable pay structure down overnight.
- Do educate those involved in hiring as to *why* you need to keep compensation locked down.
- Don't expect them to fully grasp the law or the extent of the company's potential liability.

Be Intentional with Your Pay Structures

- Get granular – if you only have a few levels, you may need more differentiation in your salary structure.
- Don't make pay grades so wide they're meaningless.
- Have a system for how you place and move people within a pay grade.
- Don't assume that two workers being in the same pay grade is the same as equal pay.





Post the Pay Range for Open Positions

- Attracts more applicants
- Makes your job easier
- Salary negotiation skills aren't job-related
- Remember that all benefits count



Eliminate Negotiation

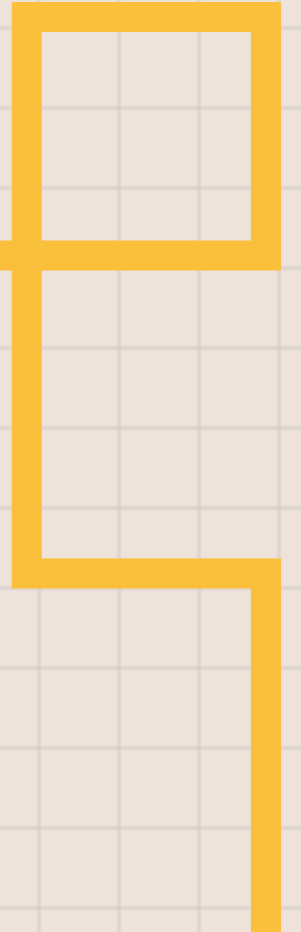
- Makes your job easier
- Salary negotiation skills aren't job-related
- Market factors aren't job-related
- Remember that all benefits count



If You Have to Pay New Employees More to Get Them in the Door, Give Current Employees the Same Increase



How Mineral Can Help





Dedicated HR Expert

Power of Mineral HR Experts, led by Dedicated Guides who understand your business

- Compliance audit and plan of action
- Guidance through HR and compliance
- Quarterly review for long-term partnership
- Support from foundational to strategic HR and compliance



Guided HR Compliance

Manage complex challenges with confidence.



Dedicated HR Expert

Work with a dedicated Mineral Expert who understands your business, needs and goals for successful HR and compliance.



Smart Employee Handbook Plus

Create and maintain federal and multi-state employee handbook including e-signatures and Spanish translation.



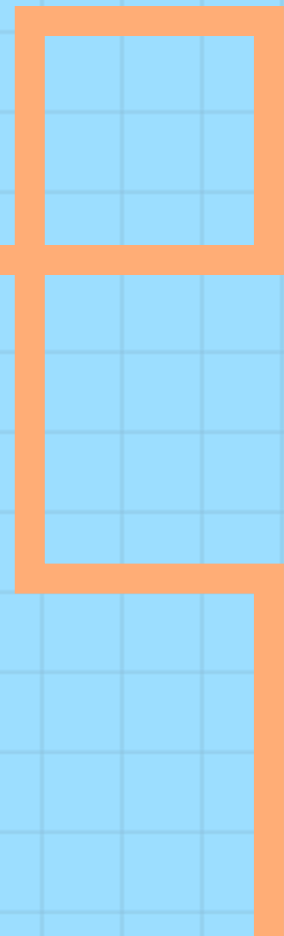
Workplace Harassment Prevention

Assign and track interactive courses aligned to state mandates and best practices - including DE&I training.

Poll Question

Interested in **Guided HR Compliance?**

Q&A





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