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Loya, Ruud & Romo  
A Professional Law Corporation

**2018 EMPLOYMENT LAW CONFERENCE**  
**MISSION=POSSIBLE**

**THE EQUITABLE WORKPLACE**  
SESSION 6

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# AGENDA

- Introduction
- Promoting Equal Opportunity & Equal Rights
- Fair Pay Act
- Salary History Ban
- Discrimination
  - Gender
  - Race, Color & National Original
  - Age
  - Disability
  - Religious
- Conclusion



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## DISCRIMINATION CLAIMS

- Employment Discrimination Claims Rising
- Most diverse workforce in history
- Focus on equal opportunity, equal rights & equal pay


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**BALANCE**

PROMOTING EQUAL OPPORTUNITY  
& EQUAL RIGHTS

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Fair Pay Act

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## The California Fair Pay Act – The Next Wave Of Wage And Hour Class Actions?

- Recent amendments to the California Equal Pay Act have renamed the Act the California Fair Pay Act, broadened its reach, made it easier for current and former employees to prevail on claims of alleged violations, and added criminal penalties for willful violations.

## Forbidden Wage Differentials

- As amended, the Fair Pay Act now generally **prohibits employers from paying to any employee a wage rate less than the wage rates paid to employees of the opposite sex or to employees of another race or ethnicity for “substantially similar work,”** which applies to exempt employees and to non-exempt employees.

## The Employers Burden To Show Differential Not Based On Gender, Race, Or Ethnicity

- When such a wage differential is shown, **it becomes the employer's burden to demonstrate the wage differential is based on factors other than sex, race, or ethnicity** and not the current or former employee's burden to demonstrate the wage differential is based in whole or in part on sex, race, or ethnicity.

## Acceptable Factors

- When such a wage differential is shown, it is the employer's burden to demonstrate the wage differential is based on one or more of the following factors:
  - A seniority system,
  - A merit system,
  - A system that measures earnings by quantity or quality of production, or "[a] bona fide factor other than [sex, race, or ethnicity], such as education, training, or experience."
- In other words, when such a wage differential is shown, it is the employer's burden to show it has not violated the law.

## No Perpetuation Of Prohibited Differentials

- The last factor “shall apply only if the employer demonstrates that the factor is not based on or derived from a [sex-based, race-based, or ethnicity-based] differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity.”

## If The Employer Fails To Meet Its Burden, It Will Be Liable For The Wage Differential Plus An Equal Amount As Liquidated Damages

- When an employer is liable for a prohibited wage differential, the employer must pay the affected employee “the amount of the wages and interest thereon, of which the employee is deprived by reason of the violation and an additional equal amount as liquidated damages.”

## Adverse Employment Actions Are Prohibited

- In addition, employers are prohibited from discharging, discriminating against, or retaliating against any employee “by reason of any action taken by the employee to invoke or assist in any manner the enforcement of this section.

## Pertinent Records Must Be Kept At Least Three Years

- In any event, employers are required to “maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment of the persons employed by the employer” and to keep such records for at least three years.

## Available Civil Penalties

- In addition to the damages and other remedies provided for by the California Fair Pay Act, the civil penalty provisions of the California Private Attorneys General Act of 2004 (“PAGA”) also apply.

## Criminal Penalties for “Willful” Violations

- As if the civil consequences of violating the Fair Pay Act are not bad enough, the Fair Pay Act has been amended, also, to impose criminal penalties against any person who willfully violates the California Fair Pay Act.

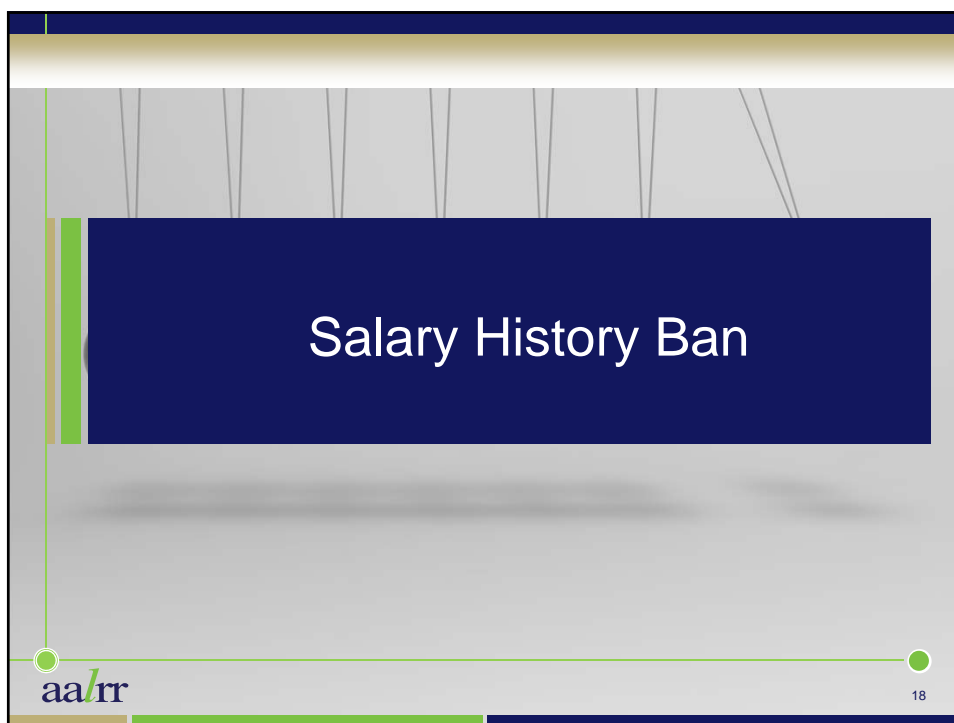


## Reducing Risks of Fair Pay Act Claims

- What should employers do to reduce their risk of exposure to claims based on the Fair Pay Act?

## Recommended Steps

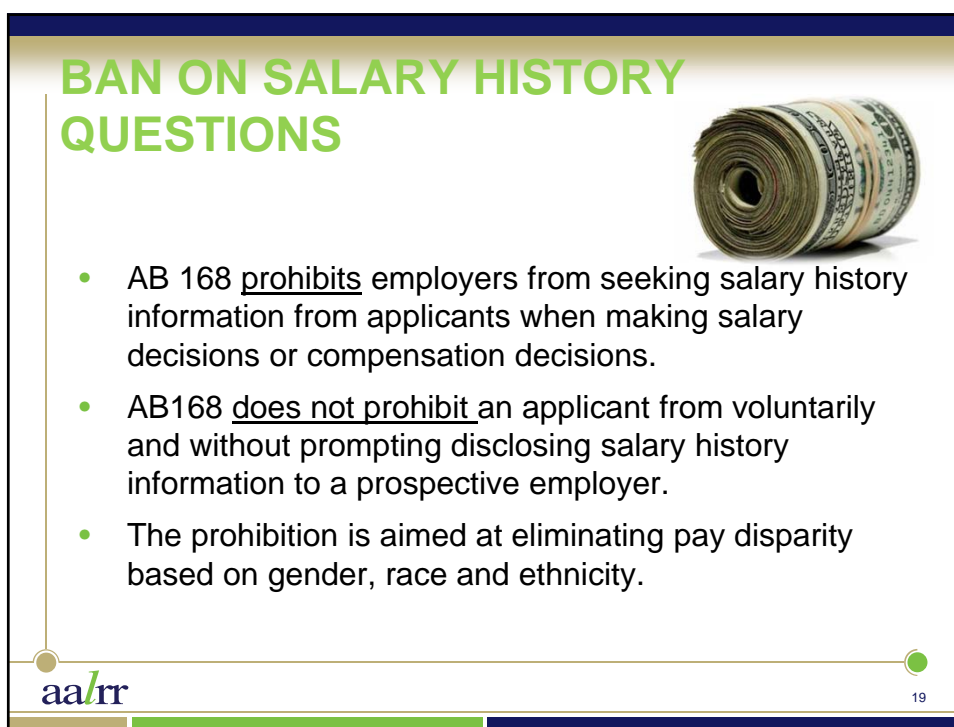
- Employers should review the wage rates of all employees to determine whether any employees are paid wage rates less than the wage rates paid to employees of the opposite sex or to employees of another race or ethnicity for “substantially similar work.”
- Employers should review the criteria being used to determine the wages of new hires and the wages of existing employees. Objective, gender neutral and race and ethnicity neutral criteria are preferable to subjective criteria.
- Employers should not discourage employees from disclosing or discussing the amount of their wages or other working conditions and avoid to the extent possible even the appearance of discrimination or retaliation against employees who do.



A presentation slide with a dark blue background and a white title box. The title 'Salary History Ban' is centered in the white box. The slide features a green vertical bar on the left and a green horizontal bar at the bottom. The 'aalrr' logo is in the bottom left, and the number '18' is in the bottom right.


## Salary History Ban

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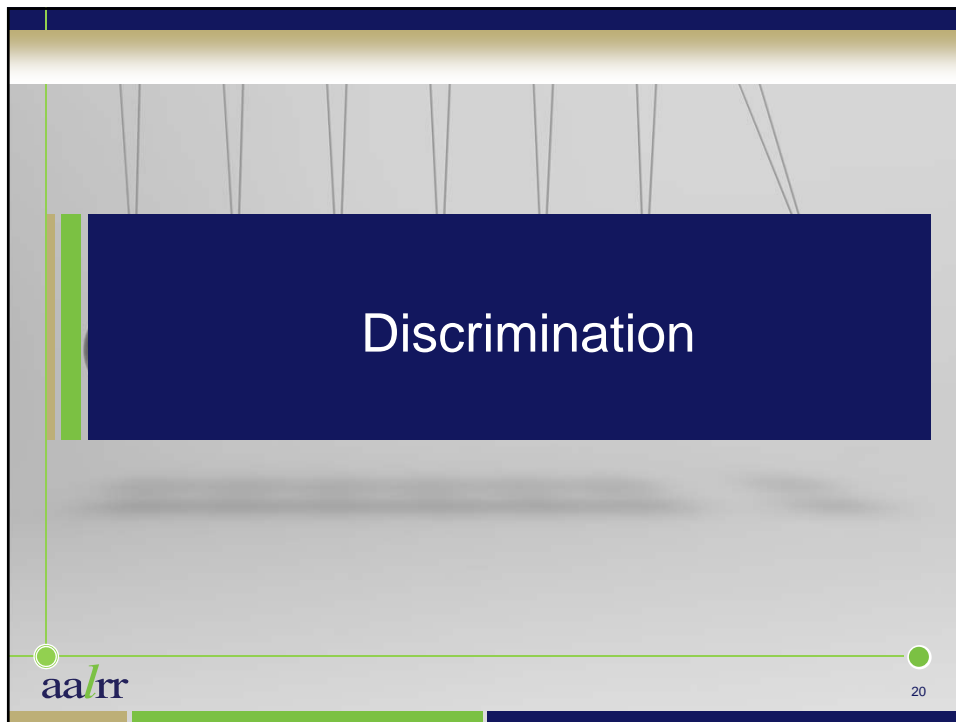
A presentation slide with a white background and a green title. The title 'BAN ON SALARY HISTORY QUESTIONS' is in green. To the right is an image of a roll of US dollar bills. Below the title is a bulleted list of three points. The slide features a green vertical bar on the left and a green horizontal bar at the bottom. The 'aalrr' logo is in the bottom left, and the number '19' is in the bottom right.

## BAN ON SALARY HISTORY QUESTIONS



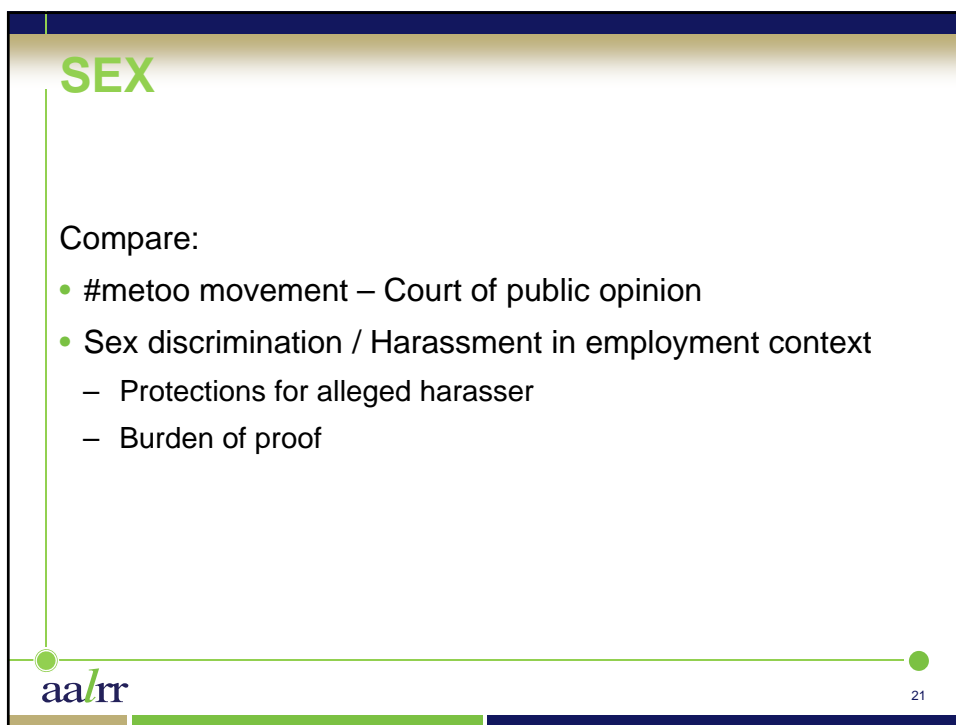
- AB 168 prohibits employers from seeking salary history information from applicants when making salary decisions or compensation decisions.
- AB168 does not prohibit an applicant from voluntarily and without prompting disclosing salary history information to a prospective employer.
- The prohibition is aimed at eliminating pay disparity based on gender, race and ethnicity.

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Discrimination

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**SEX**

Compare:

- #metoo movement – Court of public opinion
- Sex discrimination / Harassment in employment context
  - Protections for alleged harasser
  - Burden of proof

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## GENDER

- Title VII of Civil Rights Act of 1964
- Sexual Orientation, Gender Identity and Gender Expression
  - Federal law
    - Does not specifically prohibit workplace discrimination based on sexual orientation – Courts are split
    - *Christiansen v. Omnicom Group* (2017)
    - *Whitaker v. Kenosha Unified School District* (2018)
  - California law
    - Clearly protects transgender and gender non-conforming individuals

## GENDER

Compare  
Masterpiece Cakeshop Case  
Arlene's Flowers Case  
Gender discrimination in employment context

## GENDER STEREOTYPING

- Title VII of the Civil Rights Act of 1964
- *Price Waterhouse v. Hopkins* (1989)
  - Gender Stereotyping
  - Burden of Proof Changed
- **Caution:** Employers should be cognizant of potential discriminatory conduct
  - Employees in jobs that are traditionally held by those of different gender or gender expression

## FAIR EMPLOYMENT & HOUSING COUNCIL REGULATIONS

- Equal access to “facilities” without regard to the sex of the employee.
- Permit employees to use “facilities” that correspond to the employee’s gender identity or gender expression.
- Transitioning employees shall not be required to undergo, or provide proof of, any particular medical treatment to use “facilities” designated for use by a particular gender.
- Employers and other covered entities with single-occupancy “facilities” shall use gender-neutral signage.

## RESTROOMS



- AB1732 - effective March 1, 2017, businesses in California with single-user restrooms will be required to label such restrooms as “all gender” facilities.
- Requirement applies to facilities with no more than 1 “water closet” and 1 urinal, with a locking mechanism controlled by the user.
- *Roberts v. Clark County School District* (2016)

## RACE, COLOR, NATIONAL ORIGIN

- Diversity in workforce presents opportunities & obstacles
- Disparate treatment
- Investigate any claims
- *Daniel Beasley v. East Coast Foods, Inc. dba Roscoe’s House of Chicken n’ Waffles* (2015)
- *EEOC v. OnSite Solutions, LLC* (2016)

## AGE

- The ADEA prohibits discrimination on the basis of age against any individual employee over the age of 40.
- Applies to employers with 20 or more employees working on each work day in 20 or more calendar weeks.
- Four distinct generations in the workforce.
- EEOC age claims in 2017 (22.8% of total cases filed)
  - *Charles Saccio v. Antonio R. Romasanta dba Eladio's Restaurant* (2015)
  - *EEOC v. Montrose Memorial Hospital, Inc.* (2018)
  - *EEOC v. Professional Endodontics* (2018)

## DISABILITY

- The ADA prohibits discrimination in the workplace against employees suffering from a physical or mental impairment which substantially limits one of more major life activities.
- The ADA prohibits discrimination in the workplace against employee “regarded as” disabled.
- Applies to employers engaged in an industry affecting commerce with 15 or more employees working on each work day in 20 or more calendar weeks.
- *Caution:* Recognize the need to accommodate disabled employees and broad definition of “disability.”

## RELIGIOUS

- Title VII & FEHA require employers to make reasonable accommodations for religious beliefs
  - Undue hardship
- *EEOC v. Consol Energy, Inc.* (2017)
- *EEOC v. XPO Last Mile Inc.* (2017)
- *EEOC v. Universal Protection Services, LP dba Allied Universal Security Services* (2017)



CONCLUSION



## Disclaimer


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