

# Pay Equity:

What Employers Need to Know

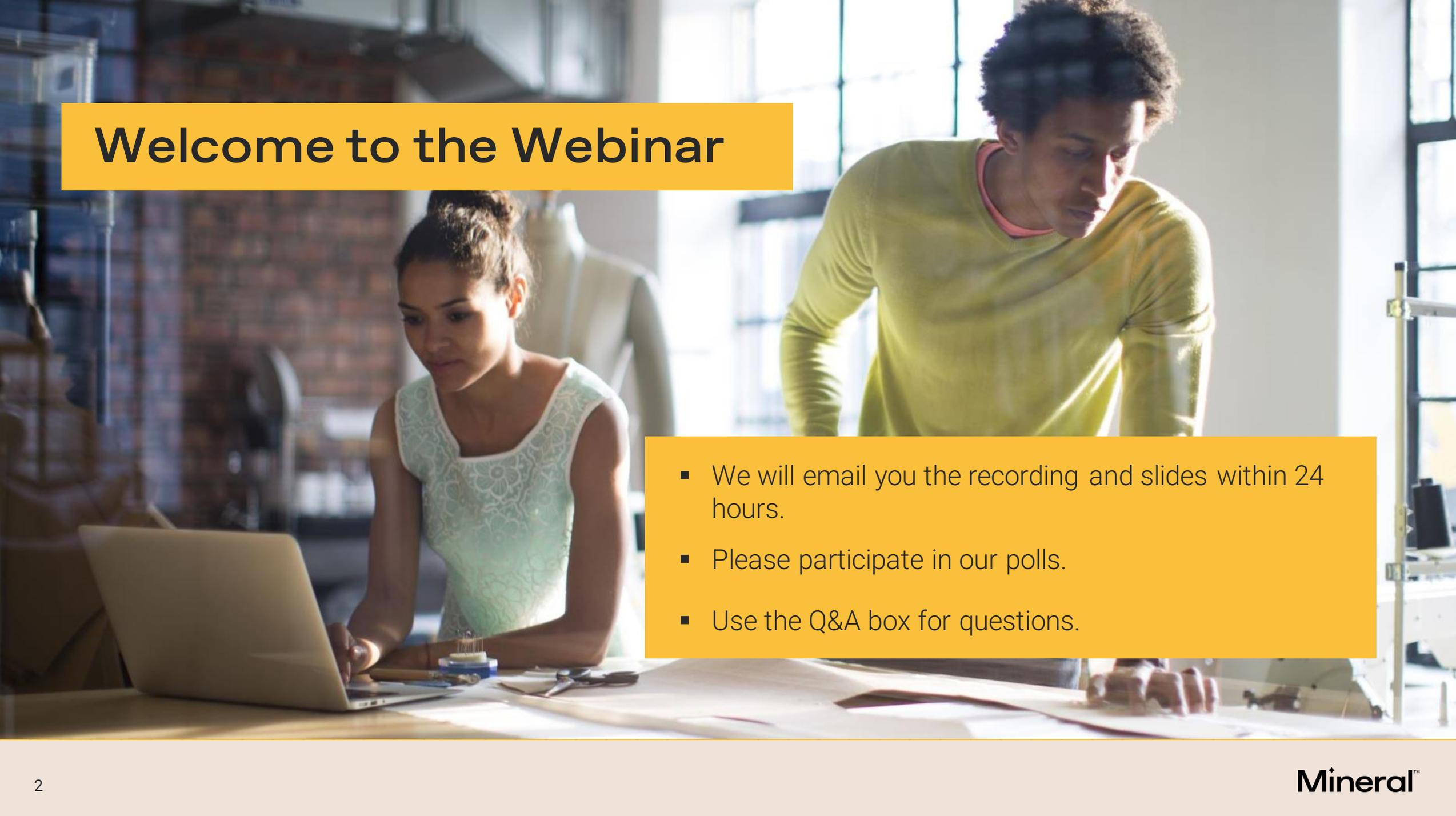
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November 17, 2022

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# Welcome to the Webinar



- We will email you the recording and slides within 24 hours.
- Please participate in our polls.
- Use the Q&A box for questions.



# The Equal Pay Act of 1963





## No Unequal Pay Based on Sex

Employees must be paid equally for equal work on jobs that require substantially 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

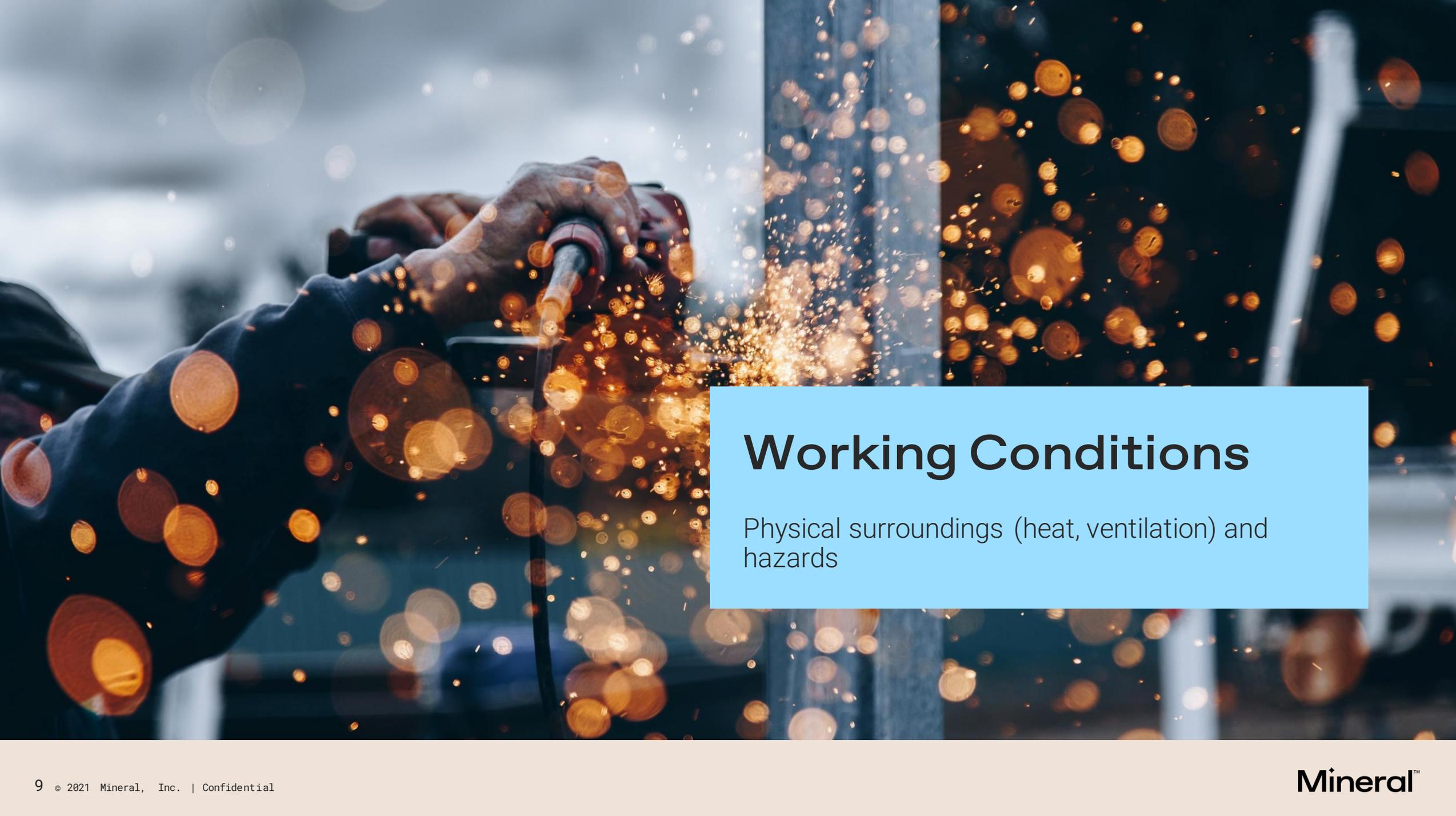
Physical or mental exertion required





# Responsibility

Individual contributions and management responsibilities



# Working Conditions

Physical surroundings (heat, ventilation) and hazards



# Establishment

Physical place of business and operations



# Acceptable Reasons for a Pay Differential

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



# Legal Bric-a-Brac

- A number of Circuits, including the 9th (in *Rizo v. Yovino*), have ruled that a bona fide factor other than sex must be job-related, such as experience, skills and abilities, and education.
- The statute of limitations is two years from the last unequal paycheck
- Wages cannot be reduced to come into compliance with the law
- Two-year statute of limitations (or three if willful)
- Successful plaintiffs get double back pay, attorneys' fees, and a raise to bring their pay up to the amount made by employees of another sex



# Poll Question

**Did you know that  
the NLRA gives  
employees a right  
to discuss their  
wages?**

# 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 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.



# Oregon - Salary Discussions and Inquiries Allowed

- 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.



# California Pay Equity and Transparency





## California's Law

Requires equal 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.



# CA: 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; or
4. A bona fide factor other than sex, race, or ethnicity

Salary history is specifically excluded.





## CA: 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



## CA: Salary Discussions and Inquiries Allowed

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.

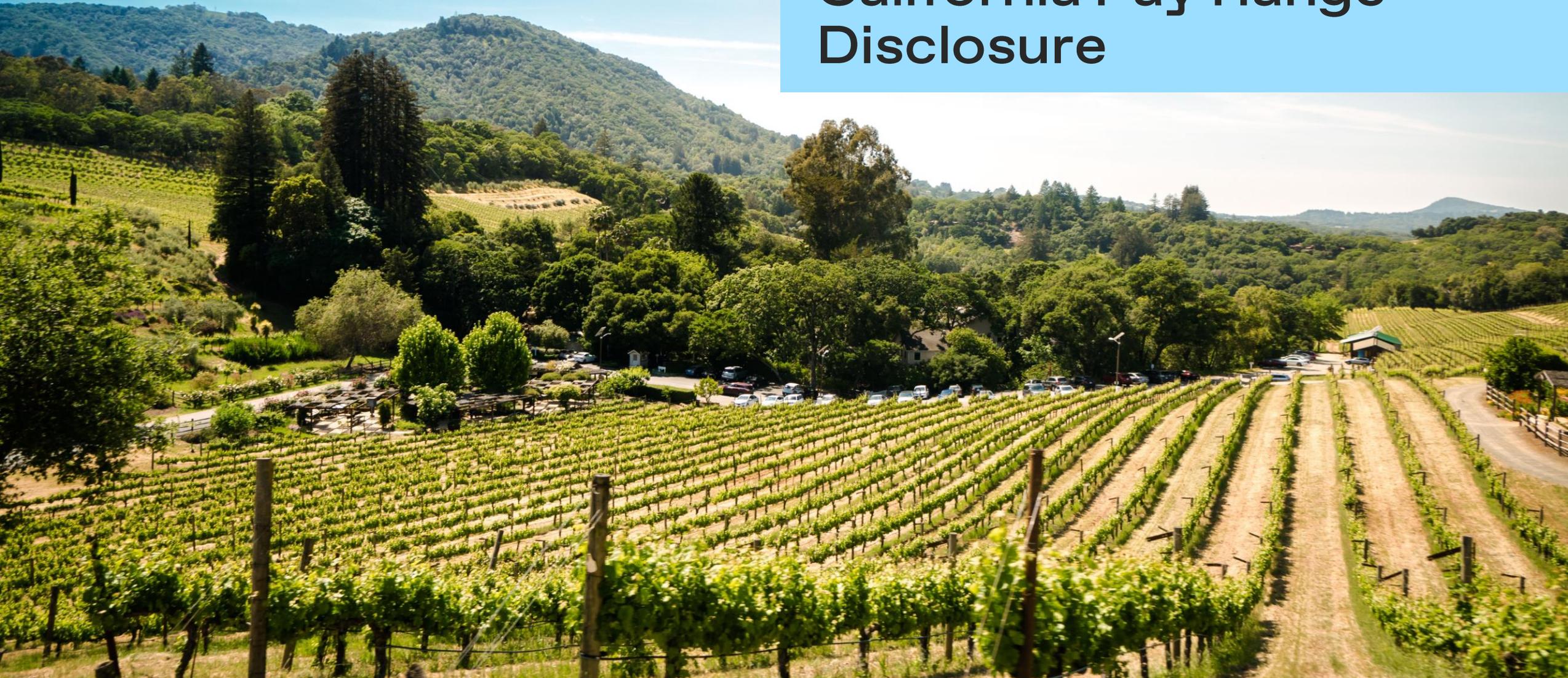
This, of course, includes anti-retaliation provisions.

# CA: 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.
- Applies to employers with 15 or more employees (at least one in CA)
- Employers must post the pay scale for an open position in their job postings. 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.
- If the ranges are reasonable and your current employees are paid in line with what you've posted (phew), you still may get inquiries about how someone's position in the range is determined – try to be ready to answer that.





## Pay Transparency in Job Postings is Spreading

Done deals, to be required by law: California, Colorado, New York\*, Washington

In the pipeline: Massachusetts, New Jersey

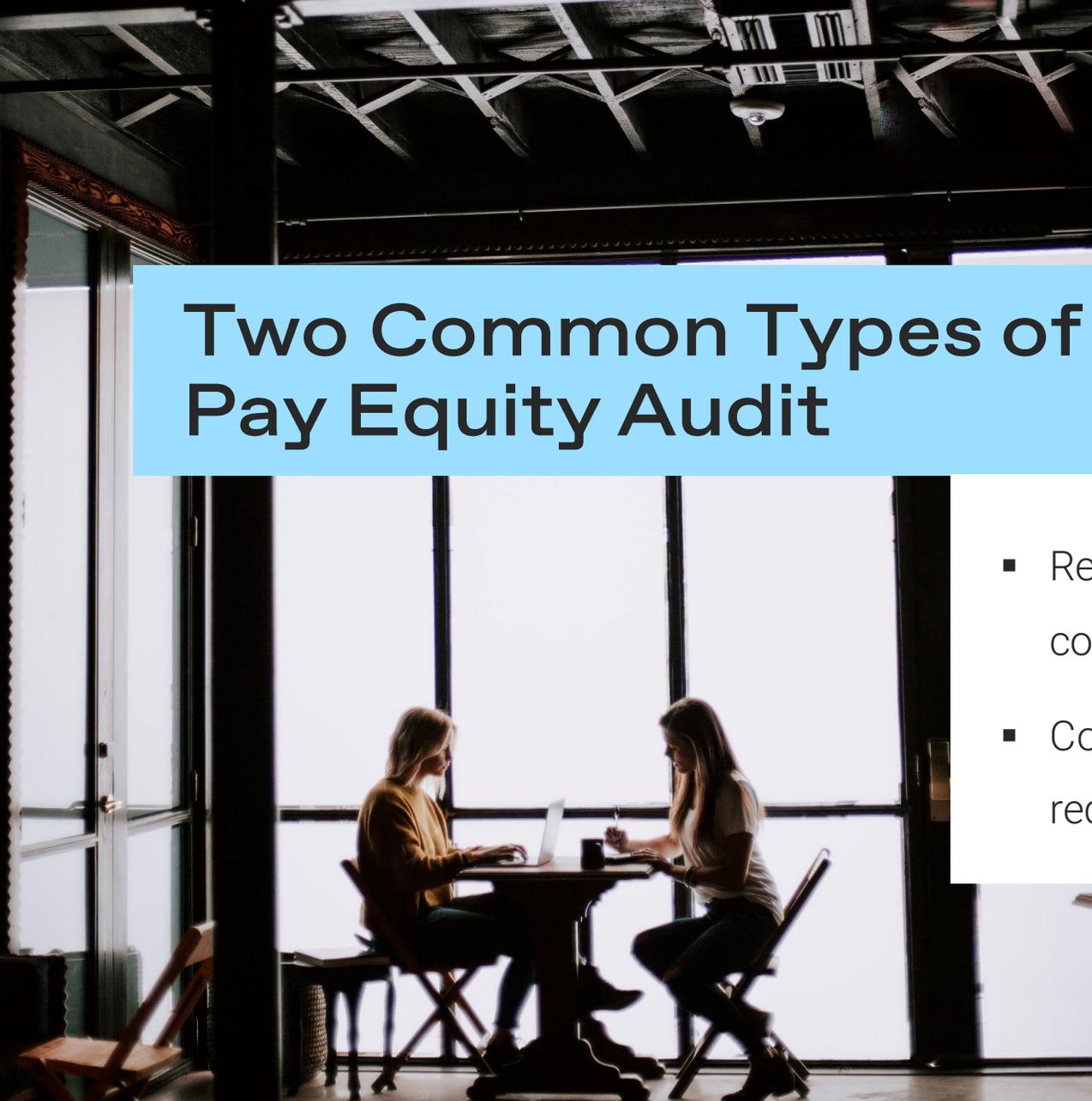
And it's not a bad thing

- 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 a large window behind them, creating a silhouette effect. The background features a grid pattern and decorative diamond shapes.

# 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 who is part of the analysis:

- Job classifications (title, level, grade, etc.)
- Full-time or part-time status
- Seniority and hire date (for all positions with a company)
- Flexible work arrangement history
- Performance reviews and ratings
- Educational qualifications and any relevant training, licenses, or credentials
- Notable responsibilities (e.g., working 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 Comparable Character Groups

- 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.
- This is going to take some thought!
- 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.

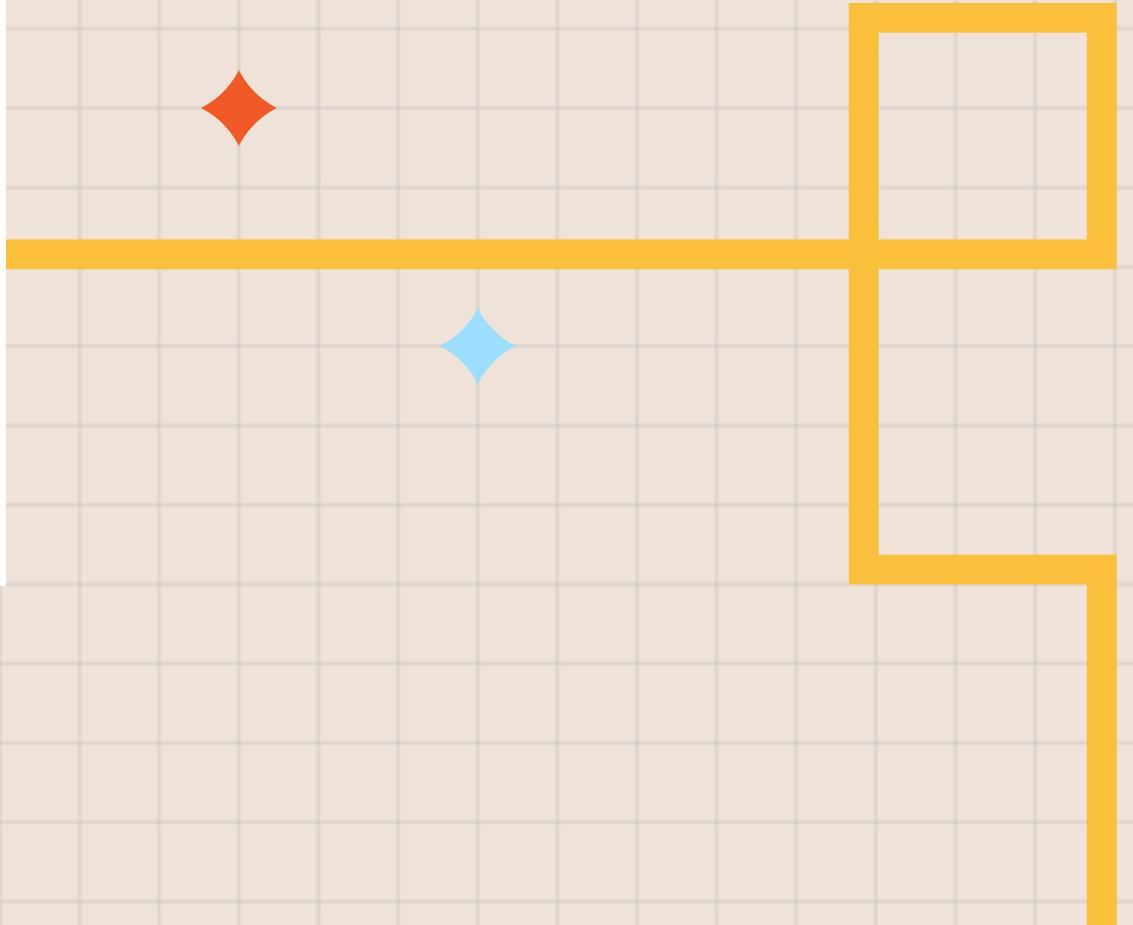


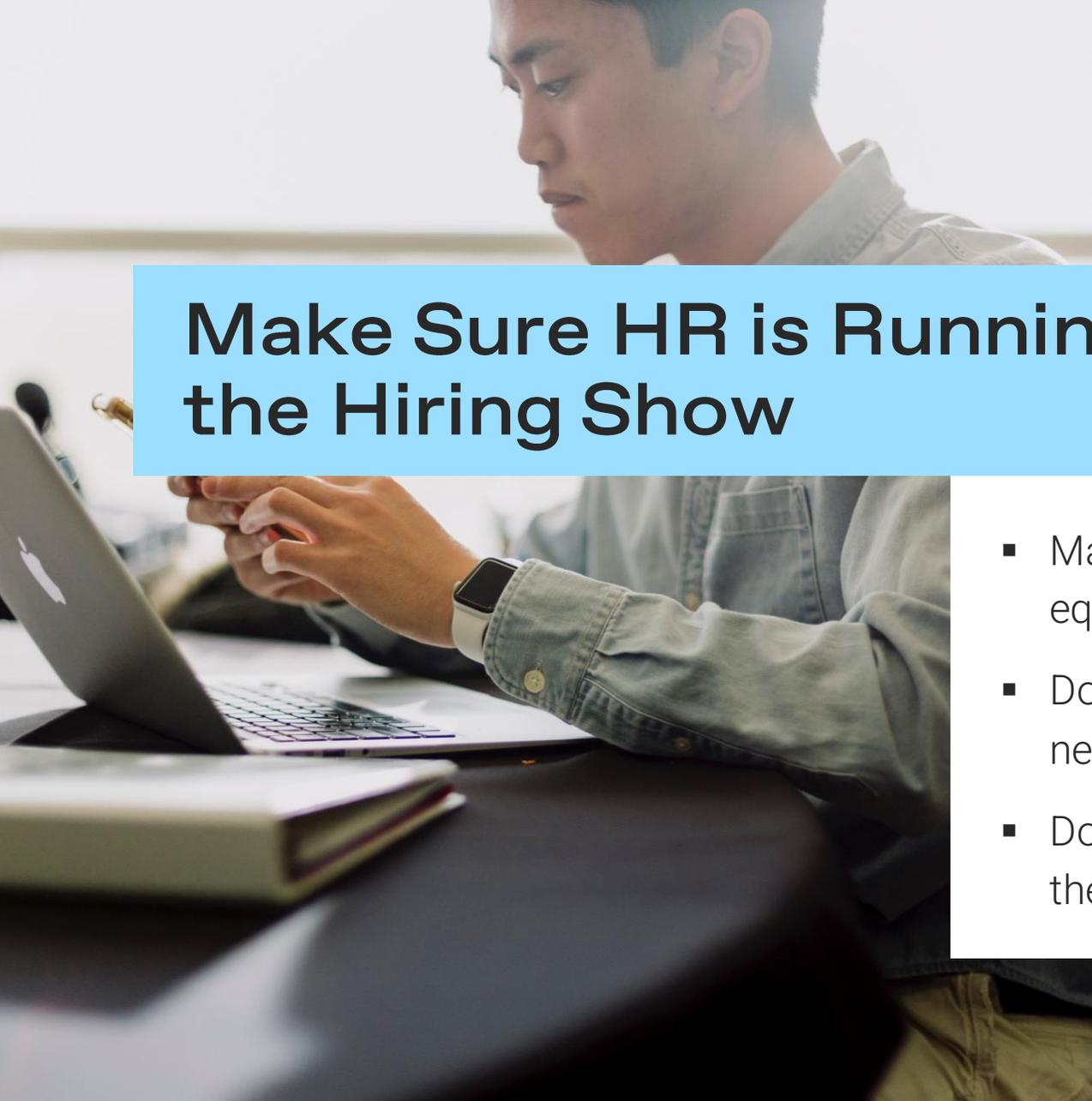


# Poll Question

**Have you done any kind of pay audit in the last five years?**

# 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 in a matter of months.
- Do educate those involved in hiring as to *why* you need to keep compensation locked down.
- Don't expect or trust 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 for a given job type, you may need more differentiation in your titling or 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
  - Market factors 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

Feel free to tell candidates why you don't negotiate – this is going to become common.

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



**Thank you!**

