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Paid Time Headaches: Pay Equity, Pay Transparency, and Capturing Time Worked.

Human Resources Professional Conference for the
Disability Provider Community

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- Pay Equity and Transparency Law
- Root Causes of Pay Inequity, Consequences of Pay Inequity, and Best Practices to Maintain Pay Equity
- Captured Work Time: What is considered “work” time?
- Employer Considerations for Remote Work
- Recording Hours Worked

Pay Equity and Transparency Law

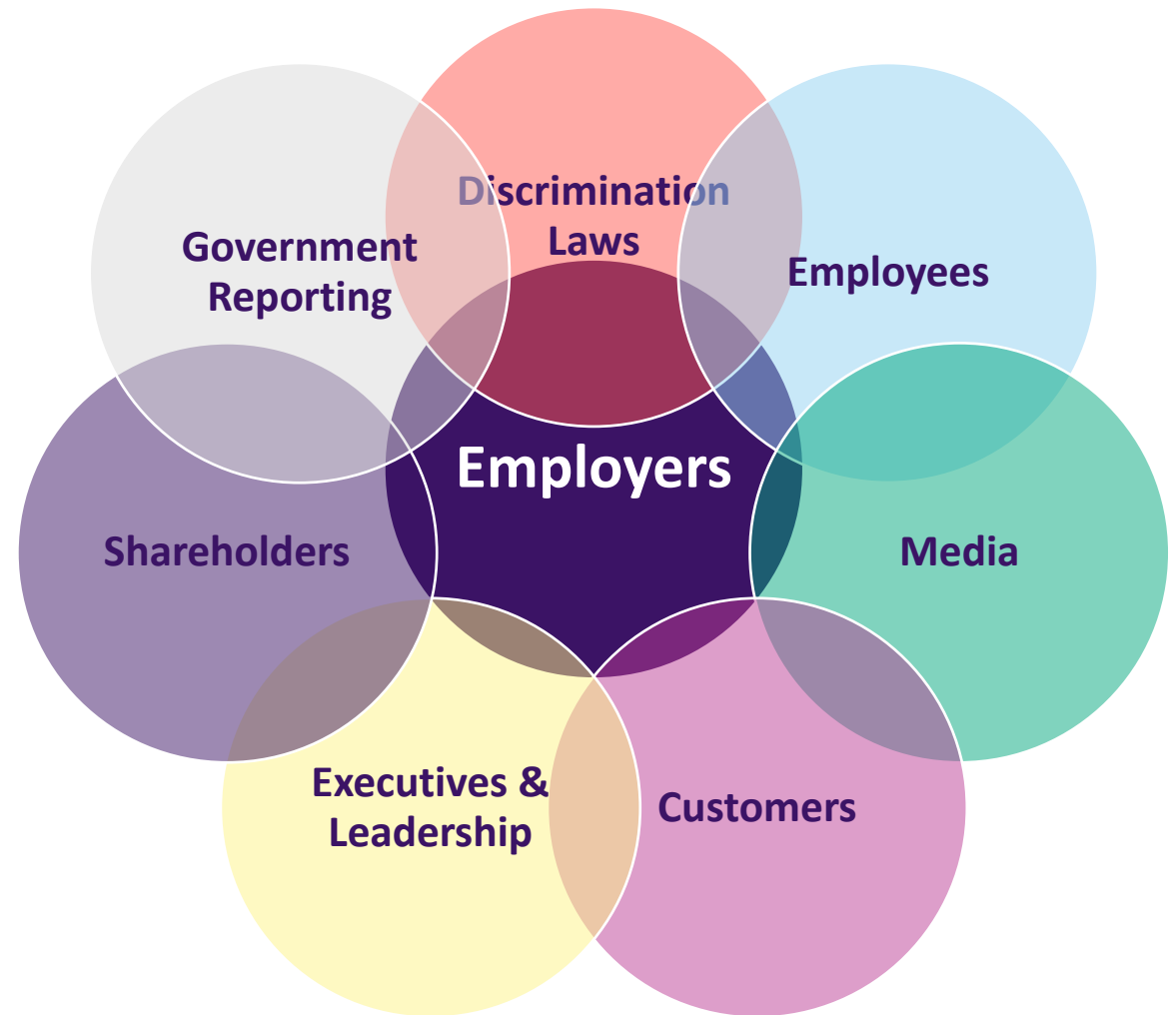
What is Pay Equity

Legal term of art referring to “Pay Fairness”

- Pay equity is an employer’s obligation under federal, state and/or local law to base pay rates on legitimate factors determined by law to be “fair” . . .
- Pay differentials are permitted when based on a factor other than a protected characteristic, such as:
 - Seniority
 - Merit
 - Production (Quantity or Quality)
- Need not pay everyone the same amount – but must be able to defend differences

Pressures for Pay Equity

- *Legal*
- *Internal*
- *Public*
- *Leadership*
- *Investor*
- *Government Reporting*



Federal Laws Governing Pay Equity

Equal Pay Act (1963)

- “Same work”
- Prohibits discrimination on the basis of sex
- Equal pay for equal work under similar working conditions
- Defense: any factor other than sex

Title VII (1964)

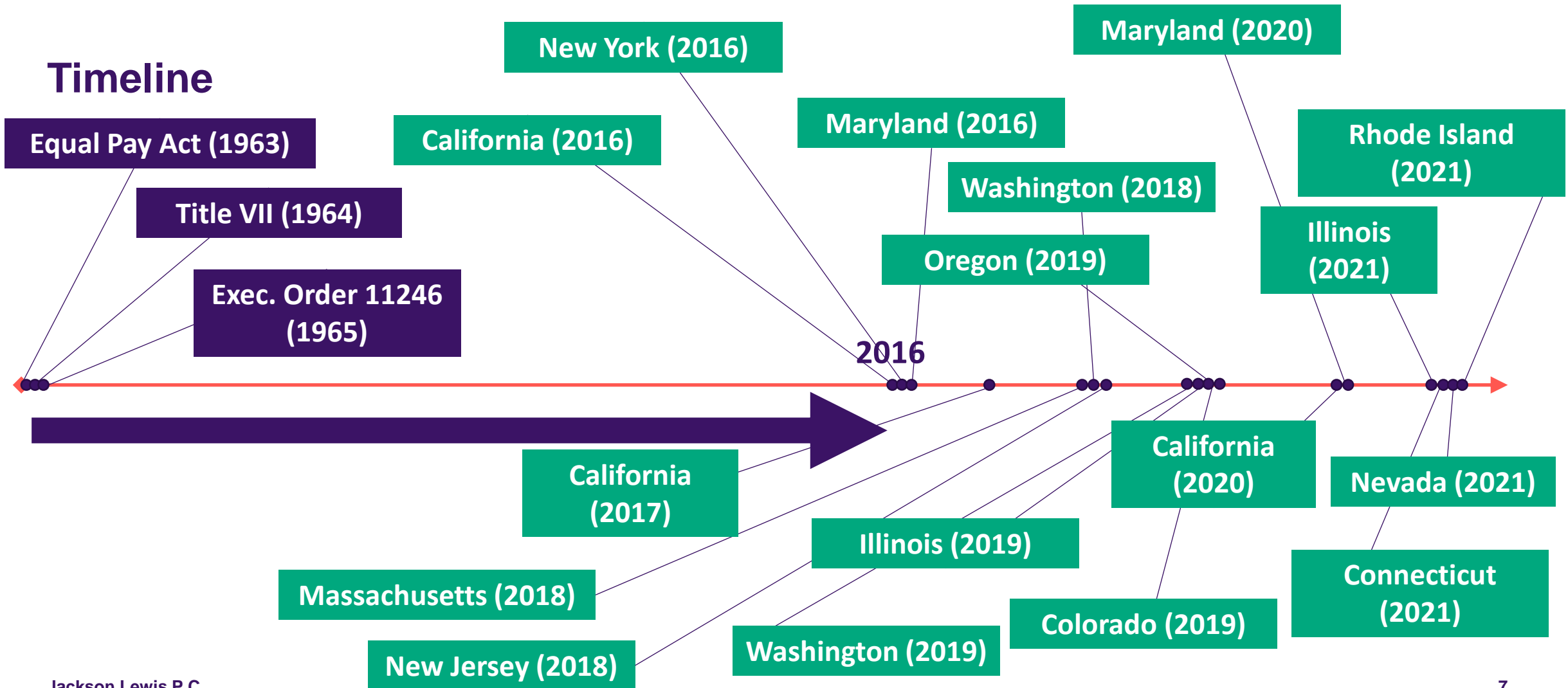
- “Substantially the same work”
- Prohibits pay discrimination on the basis of race, color, religion, national origin, and sex
- No employment discrimination
- Defense: job-related and consistent with business necessity

Executive Order 11246 (1965)

- “Similarly situated”
- Prohibits pay discrimination on the basis of race, ethnicity, and sex
- No employment discrimination for inquiring about, disclosing, or discussing pay
- Defense: job-related and consistent with business necessity, not tainted

Pay Equity Laws

Timeline

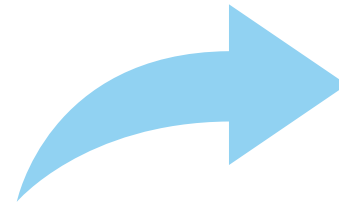


State Pay Equity Laws



Common State Laws

- Expand Comparator Groups
- Limit Permissible Pay Explainers
- Prohibit Pay Secrecy Policies
- Prohibit Inquiries into Salary History
- Encourage Litigation - Enhanced Damages
- Encourage Pay Analysis - Safe Harbors



Laws Gaining Steam

- Require Pay Transparency



Emerging Trends

- Require Opportunity Transparency
- Require Reporting to Government

Equal Pay Action

- More and more states are taking steps to enact and/or strengthen legislation designed to eliminate pay inequity.
- Many states have enhanced the penalties for violations of the Equal Pay Act.
- Employers cannot prohibit employees from discussing compensation among themselves.
- Many jurisdictions (including New York State) have passed laws prohibiting employers from asking for an applicant's salary history during the hiring process.
- To comply with the law, and as a best practice, Employers should not allow inquiries of an applicant's salary history
 - May ask about "salary expectations"
 - May inform the applicant what the company will pay
 - New York State pay transparency bill will likely eliminate the need to inform applicants going forward.

Governor Hochul Signs Pay Transparency Bill Related To Job Advertisements

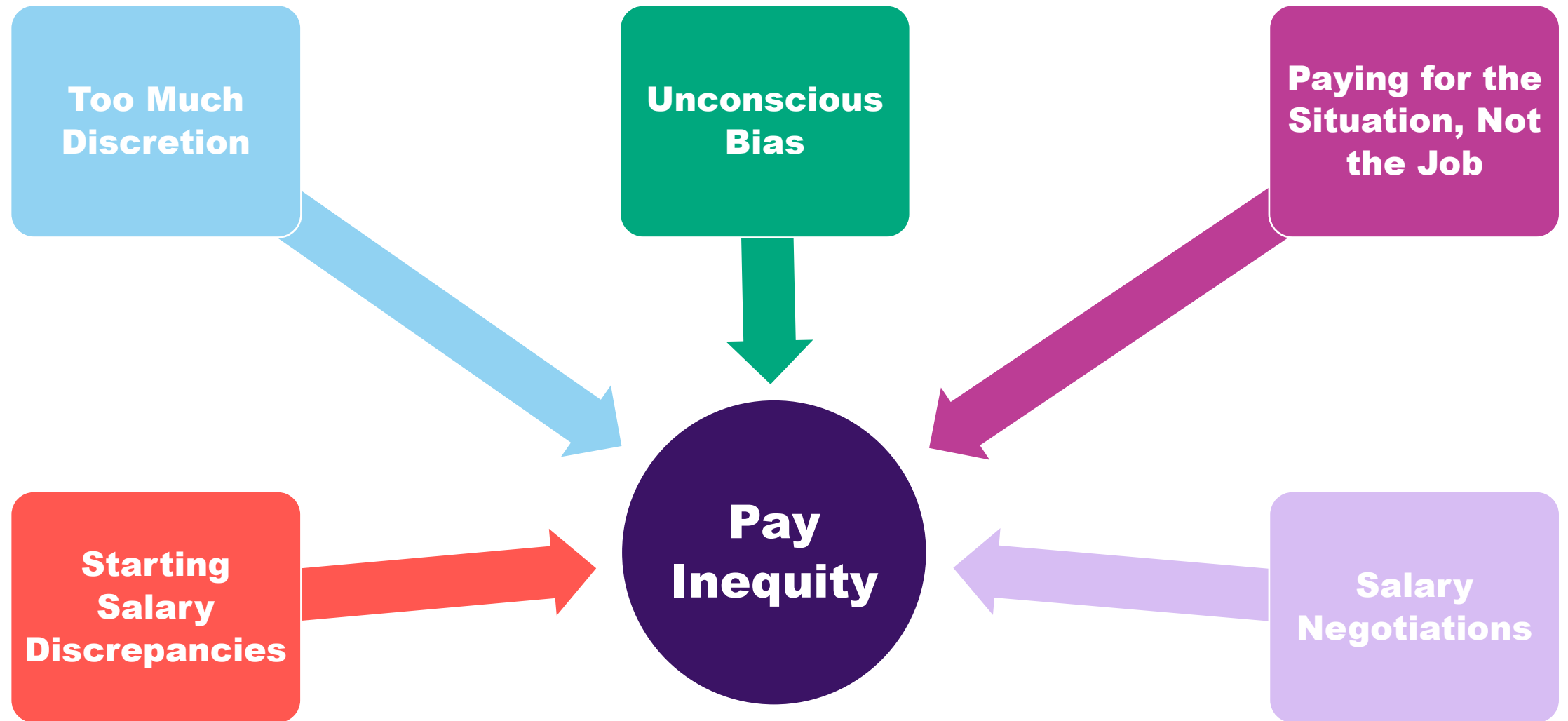
- Effective September 17, 2023, covered employers in New York State will have pay transparency obligations related to job advertisements under legislative bill S.9427-A/A.10477.
- Governor Kathy Hochul signed the bill on December 21, 2022.
- Covered employers include employers with at least four employees
- Covered employers include employment agencies (excluding temporary help firms as defined under Section 619 of the Labor Code).

Governor Hochul Signs Pay Transparency Bill Related To Job Advertisements

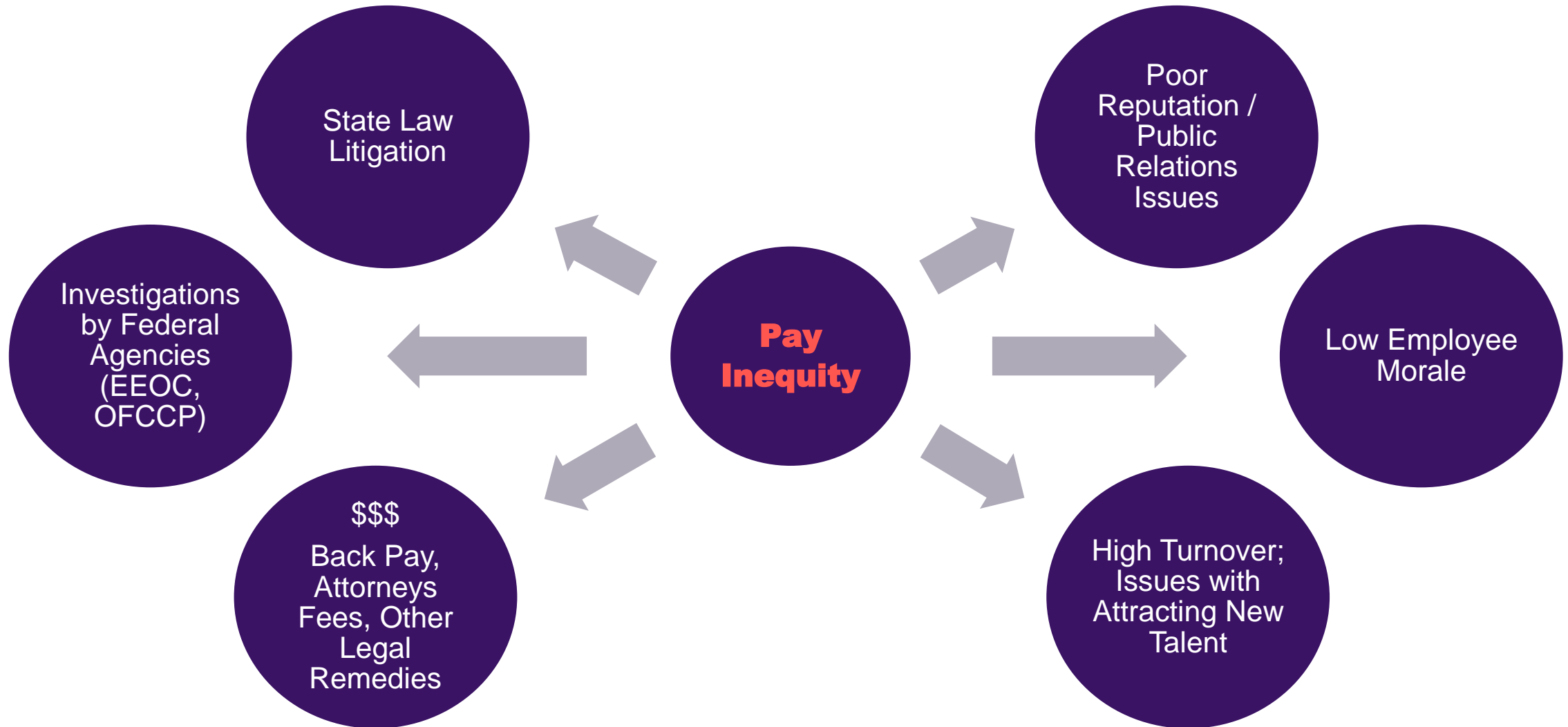
- At the time of posting any advertisement for a job, promotion, or transfer opportunity . . . In good faith, covered employers are required to also post:
 - The minimum and maximum annual salary or hourly range of compensation believed to be accurate at the time of the posting
 - Any applicable job descriptions existent at the time of the posting
- Maintain records existent at the time of the posting that evidence compliance with the statute, including, but not limited to:
 - The history of compensation ranges for each job, promotion, or transfer opportunity
 - Job Descriptions for each job, promotion, or transfer opportunity
- For commission-only positions, a general statement that compensation will be based on commission may satisfy the disclosure requirement (Don't forget NY law requiring written commission plans).

Root Causes of Pay Inequity, Consequences of Pay Inequity, and Best Practices to Maintain Pay Equity

Root Causes of Pay Inequity



Consequences of Pay Inequity



Best Practices

Starting Salary

- Set starting ranges
- Set starting rates
(if possible)
- Don't rely on salary history
- Pay based on business related factors
- Oversight

Discretion

- More formulaic pay; review pay policies
- Train managers:
 - What to pay for
 - Look for peer equity
 - Impact of unconscious biases
- Calibration & oversight

Pay for the Job

- Set pay ranges
- Set pay within ranges using job-related criteria
- Apply those criteria consistently

Pay Transparency

- Updates in legal obligations
- Consider pressures, priorities
- Weigh Impact:
 - Employee Relations
 - Competition
 - Talent Acquisition Strategies

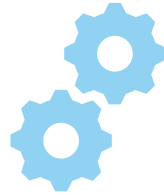
Negotiations

- Consider internal equity
- Document job-related reason for negotiated salary differences
- Oversight
- Understand implications/risk

Take Aways



**Know Your
Legal Footprint**



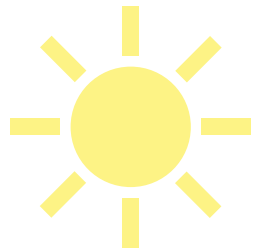
**Evaluate Your
Systems**



Pay for the Job



Train Managers



Consider Transparency



**Ensure Oversight of Pay
Decisions**



**Conduct Periodic Pay
Analyses**

(Under Privilege)



**Document, Document,
Document**

**Capturing Work Time: What
is considered “work” time?**

What is “Work”?

- One principle, many variations . . .
 - Employers must pay non-exempt employees for all hours they are “required, suffered or permitted to work.”
 - It does not matter if the time was authorized. If the employer knew or should have known the employee was working, time must be paid.
 - Employers may discipline employees for unauthorized work, but the time still must be paid.
 - Unauthorized work during meal break → PAY.
 - Unauthorized overtime → PAY.
 - Checking emails during non-work hours → PAY.
 - There are numerous ways to get in trouble here.

What is “Work”?

- Continuous Workday

- The entire period between the beginning and end of “an employee’s principal activity or activities” including “all time within that period whether or not the employee engages in work throughout all of that period.”
- This is where we get the “continuous workday” concept. Once you start the clock, there’s generally no stopping except for bona fide, duty-free meal periods.

Employer Considerations for Remote Work

Employer Considerations for Remote Work

- There are no sure-fire methods of recording time, especially when the employee is not physically supervised by management
- However, there are some ways employers can limit the risks of exposure to off-the-clock work claims for work-from-home employees

Employer Considerations for Remote Work

- Implement strict policies regarding hours to be worked.
 - While the employee must be paid for all hours, an employer may discipline an employee for disobeying such a directive.
 - Note: ensure that discipline is applied consistently, lest the employee claim retaliation for requesting to be paid for all hours worked.
- Implement an online timeclock or other digital app that requires a remote employee to hit “start” and “stop” when performing any work.
- Have all non-exempt employees verify, in writing, each day or each week, that all time spent working, both inside and outside the office, and both during and after the employee’s regular work schedule, has been recorded.

Employer Considerations for Remote Work

- Since the recent COVID-19 outbreak in March 2020, many workers have been permitted or required to work from home.
- When a non-exempt employee is “suffered or permitted to work,” they must be paid, regardless of whether the work took place on the employer’s premises.
- While it is not feasible to install a timeclock in each employee’s home, employers must still ensure that employees are paid for all hours worked, and thus must accurately record the number of hours worked by each non-exempt employee.
- It is critical that employers continue to require accurate record-keeping, including time records.
- Employers should consider implementing and enforcing strict time recording policies, providing online and digital tools and apps for recording time, and daily/weekly written employee verifications to accurately maintain records of employees working remote.

Recording Hours Worked

Recording Hours Worked

- Practices vulnerable to challenge:
 - Rounding
 - Paper timesheets (i.e., 8, 8, 8, 8, 8).
 - Record retention
 - Ignoring unrecorded hours
 - Supervisors creating or editing time records
 - What checks and balances are in place?
 - Does your system require a reason for the change?
 - Does the employee have an opportunity to review changes?
 - Automatic deductions
 - Improper burden on staff to submit time records

Do's and Don'ts of Rounding

- Time clocks are not mandatory – accuracy is
- If clock used, employer may “round” by counting start and stop times to nearest:
 - Five minutes;
 - One-tenth of an hour;
 - Quarter of an hour.
- Employers must round up and down uniformly
- Trend is away from rounding
- Time and attendance work rules/practices make rounding perilous, and ripe for potential litigation

Timesheet Don'ts

- DO NOT:
 - Modify timesheets submitted with unapproved hours
 - Carry “flex” hours into the next work week
 - Let staff work “extra” hours without capturing them on the timesheet
 - Make special exceptions or arrangements

Timesheet Don'ts

- DO NOT:
 - Complete the timesheet on the employee's behalf with fixed hours (e.g., 8:30 – 5:00)
 - Approve inaccurate timesheets (e.g., missed punches, incorrect hours worked, etc.)
 - Approving timesheets without conducting due diligence (e.g., did you check for missed punches?, did you verify the employee took a meal break?, etc.)

Automatic Deductions for Unpaid Meal Breaks

- Common practice:
 - Employee supposed to work 8am-5pm, with 1-hour unpaid lunch.
 - Employer has employee clock in at 8am, and out at 5pm.
 - Time system auto-deducts 1 hour for lunch.
- This is OK . . . so long as it's 100% accurate, always
- Employers must ensure:
 - Employees never work through lunch
 - Employees never shorten lunch
 - Employee lunch is never interrupted by work

Automatic Deductions for Unpaid Meal Breaks

- Best practice: contemporaneous punches whenever work starts or stops
- But, what if that's impractical?
 - Time clock is a 5-minute walk from workstation.
 - 200 employees, 1 clock.
- Next best practice: implementing a process for employees to report deviations and get them corrected
- Employers must make sure employees are aware of the next best practice and empowered to utilize this practice

Defensible Policy for Automatic Deductions

- Policy
- Sign-offs on policy
- Training
- Readily available correction forms
- Evidence that the policy is actually used and actually works

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Successfully Defending Against EEOC, NYSDHR, and Unemployment Insurance Claims.

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Agenda

- Defending EEOC and NYSDHR Discrimination Claims
 - Role of the EEOC and NYSDHR
 - EEOC and NYSDHR Administrative Process
- Winning At Unemployment
 - Introduction
 - Establishing or proving unemployment eligibility
 - The Hearing

Defending EEOC and NYSDHR Discrimination Claims

Does the EEOC or NYSDHR decide New York discrimination claims?

- In New York, employees may file discrimination complaints with the New York State Division of Human Rights (“NYSDHR”) or its federal counterpart, the Equal Employment Opportunity Commission (“EEOC”).
- If an employee files a complaint with the NYSDHR that alleges federal claims, the complaint is likely to be automatically dual-filed with the EEOC, but the NYSDHR will likely handle the investigation of the complaint

Role of the EEOC and NYS DHR

Role of the EEOC

Investigates and enforces claims under Title VII, the ADEA, the ADA, and GINA

- Discrimination, harassment, and retaliation based on race, color, religion, sex (including pregnancy, sexual orientation, or gender identity), national origin, age (40 or older), disability, and genetic information (including family medical history).

Pushes for broader interpretations of existing laws

Role of the NYSDHR

Investigates and enforces claims under NYSHRL, and federal statutes (Title VII, the ADEA, the ADA, and GINA)

- New York State Division of Human Rights (“NYSDHR”) will investigate discrimination, harassment, or retaliation based upon race, creed, color, national origin, sexual orientation, military status, sex, age, marital status, domestic violence victim status, disability, pregnancy-related condition, predisposing genetic characteristics, prior arrest or conviction record, gender identity or expression, familial status, and lawful source of income (housing only).

Pushes for even broader interpretations of existing laws

Why Don't Employees Just File a Lawsuit?

An employee's claim is barred if he/she does not exhaust administrative remedies by filing an EEOC charge.

- Applies to Title VII, the ADA, and the ADEA.
- Does not apply to Section 1981, the Equal Pay Act, or the FMLA.
- Does not apply to NYSHRL. However, jurisdiction will be at New York State Supreme Court (trial court).

The EEOC process is designed to reduce the number of employment lawsuits in federal court.

EEOC and NYSDHR Administrative Process

EEOC and NYSDHR Administrative Process

Intake / Employee's charge

EEOC gives employer notice of charge

Mediation

Employer's position statement

EEOC's requests for information / subpoenas

EEOC's determination and notice of right to sue letter

Litigation/Conciliation

What To Do When You Receive a Charge/Complaint?

- Conduct an initial review
- Notify your insurance carrier
- Decide whether to retain legal counsel
- Investigate
 - Identify key issues
 - Identify key witnesses
 - Gather and preserve relevant documentation
 - Identify who should conduct the investigation (consider advantages and disadvantages of having HR, internal counsel, or outside counsel/third-party investigate)
- Send out a litigation hold notice to preserve potential evidence and relevant privileged documents
- Consider placing an employee on administrative leave or separating the alleged wrongdoer from the charging party
- Consider filing an extension request
- Take steps to reduce the risk of retaliation claims

The Charge/Complaint

Look closely for:

- Investigative Agency involved (NYSDHR or EEOC)
- Parties Involved
- Allegations
- Deadlines

Class/systemic allegations

- Policies, compensation, facility-wide hostile work environment, discrimination against other employees

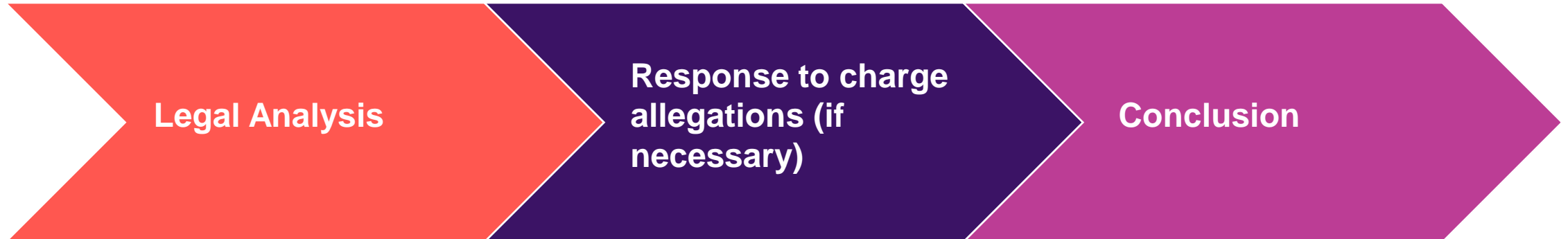
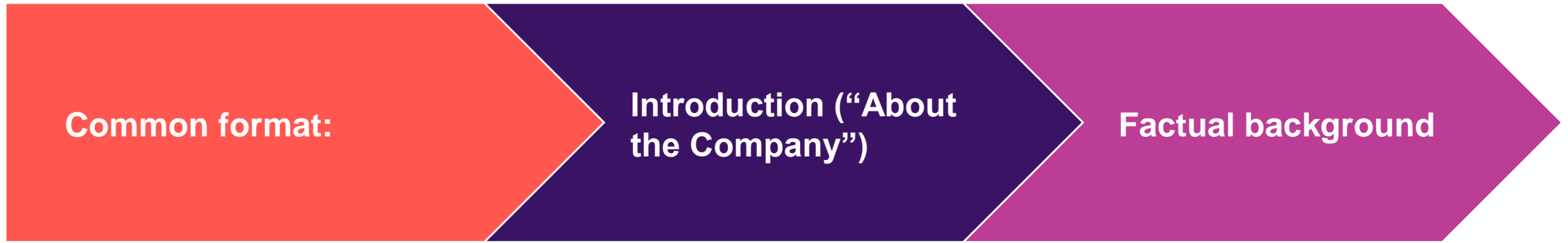
Consider best next steps

- Obtaining Counsel
- Having Counsel Issue Litigation hold notice to Relevant Parties
- Document collection
- Instructing counsel to request extension for response based on practical or strategic factors

Is an opportunity to mediate offered?

- Voluntary and confidential
- Opportunity to learn key facts
- FY 2020: 69.4% of EEOC mediations resulted in resolution
- Strict deadlines to elect to mediate

Position Statements



Position Statements

Cardinal rule:

Provide no more facts than what is absolutely necessary

Think about potential systemic investigation

- Skeletons in the closet
- Inadvertent disclosure
- “Grand” claims of defense – “We never ...”

Position Statements

Common mistakes:

- Providing more information and documents than is necessary to respond to charge
 - Spreadsheets, company-wide data
- Not ensuring accuracy
- Relying on vague justifications (“employee had a bad attitude”) instead of specific details
- Providing affidavits
- Providing too much law
- Misidentifying the correct employer
- Not reviewing EEOC investigation manuals or NYSDHR local rules

Requests for Information

Don't be afraid to stand your ground against overly broad requests for information ("RFIs")

Typical focus of RFIs is "comparator" evidence

You do have options:

- Object on appropriate grounds
- Contact the EEOC or NYSDHR investigator to narrow the scope of the RFI if any of the requests are inappropriate or too broad.
- Contact information for the EEOC and NYSDHR is usually within the Charge or Complaint.
- Send in what you believe is reasonable.
- Communicate with the EEOC and NYSDHR investigations regarding what you are and are not willing to send.

Subpoenas

- Five business days to file a Petition to Revoke or Modify
- The EEOC must make its determination on the petition within eight calendar days “or as soon as practicable” 29 CFR § 1601.16
- The EEOC may enforce the subpoena by filing an action in federal district court
 - Courts generally side with the EEOC

“No Cause” Determinations and Notice of Right to Sue Letters

- The majority of EEOC and NYSDHR proceedings end with “no cause” findings or administrative closures
- Employee has 60 days from receipt of notice of right to sue letter to appeal suit to New York State Supreme Court.
- Employee has 90 days from receipt of notice of right to sue letter to file suit in federal court.
 - Only affects timeliness of federal claims

Conciliation and Litigation

What happens if the EEOC finds cause?

- You'll be offered the opportunity to "conciliate"
- If conciliation fails:
- Case goes to regional attorney or Washington, D.C. to determine if EEOC will prosecute
- Private counsel can take case or "tag along"

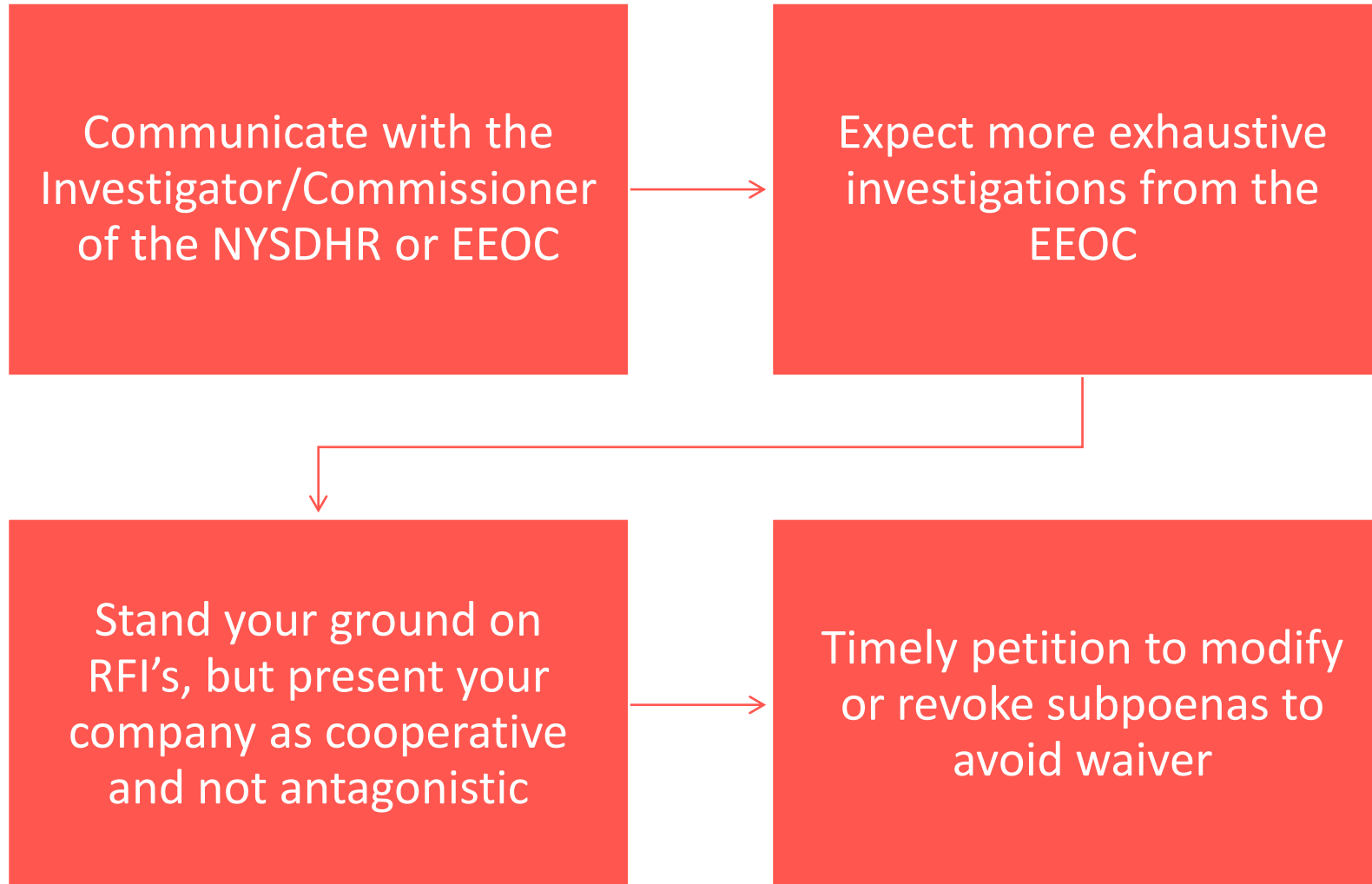
EEOC Litigation

- Generally more expensive (multiple plaintiffs, many depositions, unlimited budget)
- No private settlement

What happens if the NYSDHR finds cause?

- May ask the Commissioner of Human Rights to review the finding within 60 days. A successful request will prevent a public hearing.
- Otherwise, the case proceeds to public hearing before an Administrative Law Judge.

Key Takeaways



Winning At Unemployment

INTRODUCTION



- The New York State Department of Labor Unemployment Insurance Division adjudicates claims for unemployment compensation.
- In adjudicating these unemployment claims, the Agency considers whether the claimant left work voluntarily without good cause or was discharged for repeated willful misconduct within the meaning of the statute.

Establishing or Proving Unemployment Eligibility



BURDEN OF PROOF

- The employer has the burden of proving that an employee should be disqualified from receiving unemployment benefits.

A photograph of three business professionals in an office setting. On the left, a man in a dark suit and light blue shirt smiles. In the center, a woman in a grey blazer and light blue top looks directly at the camera. On the right, a man in a dark suit looks slightly to the side. A white text box is overlaid on the right side of the image.

VALID TERMINATION MISCONDUCT

- A valid reason for termination of employment does not necessarily equate to a basis for denial of unemployment benefits.

VIOLATION OF COMPANY POLICY

- Policy should (must?) be published
 - Where is the handbook? What's in it?
- The policy or rule at issue in the termination must also be consistently enforced and fairly applied
- Mentioned in term letter

WORK-RELATED MISCONDUCT

The employer has the burden of proving work-related, repeated willful “misconduct” as defined by the statute:

- Deliberate violations or disregard of standards of behavior that the employer has the right to expect of an employee

LOUSY WORK BUT...NOT MISCONDUCT

- **Inefficiency**
- **Inadvertent violations**
- **Incompetence**
- **Poor performance due to incapacity**
- **Ordinary negligence in isolated instances**
- **Good faith errors in judgment or discretion**
- **“Not every mistake, exercise of poor judgment ... will rise to level of misconduct.”**
- **Absenteeism? It depends**



POSSIBLE MISCONDUCT – ATTENDANCE

Chronic absenteeism may constitute work-related misconduct if it is:

- without notice or excuse and
- the employer has repeatedly warned the employee about the absenteeism
- the employer can prove that notice, if any, is required.

Absent such proof, an absence for good cause is not willful misconduct

RELATIONSHIP OF THE EMPLOYEE'S CONDUCT TO THE DISCHARGE

- The employer must prove that the claimant committed some act which constitutes willful misconduct and was proximate cause of claimant's discharge.
- Timing matters!
- Even where claimant has a long history of job-related misconduct, the employer must establish that the final incident of misconduct for which the claimant was discharged contained some element of willfulness.

RESIGNATION

An employee who voluntarily resigns must establish “good cause connected with the claimant’s work” as the reason for the resignation in order to qualify for unemployment benefits.

Good Cause

- Lousy work atmosphere, unfair treatment, unreasonable demands.
- Safety / health issues
- Negative change in employment terms.
- Significant (10%) pay cut.
- CBA – layoff exception
- Family crisis exception

RESIGNATION

Not Good Cause

- General dissatisfaction with wages or work conditions
- Educational pursuits
- Anticipation of termination
- Assist a sick relative without first exhausting NYPFL & FMLA

ATTITUDE & POOR PERFORMANCE – NOT ENOUGH TO DENY BENEFITS

- Attitude vs. Action
- Poor Performance
 - Too slow
 - Not smart enough
 - Imprecise
 - Bad with service recipients

The Hearing

THE HEARING

- The ALJ is the BOSS!
- Sworn testimony / Taped transcript
- Interpreters
- Sequestration
- Rules of Evidence
 - Direct / Cross-examination
 - Collateral estoppel
 - Subpoenas
- Right to counsel
- Closing argument

HEARING PREPARATION

- Read the hearing notice thoroughly upon receipt
- Determine whether the hearing is in-person or by telephone
- Be certain of the location of the hearing and time it is to commence
- Arrive at least 15 minutes prior to the scheduled start of the hearing
- Request and read the file

HEARING PREPARATION

- Anticipate approximately one to two hours for the entire hearing, which includes presentation by both sides.
- The start time may be delayed if the hearing officer / judge is occupied with another hearing.
- If you or a key witness has a legitimate conflict, contact the UI Board immediately to request a continuance. Granting these requests are strictly discretionary and may be denied.

EVIDENTIARY ISSUES



While hearsay is admissible in administrative hearings, it cannot be used as the sole evidence of the employee's wrongful acts.



The employer's witnesses should have first-hand knowledge of the conduct at issue in the termination.

Important Points For An Employer's Case

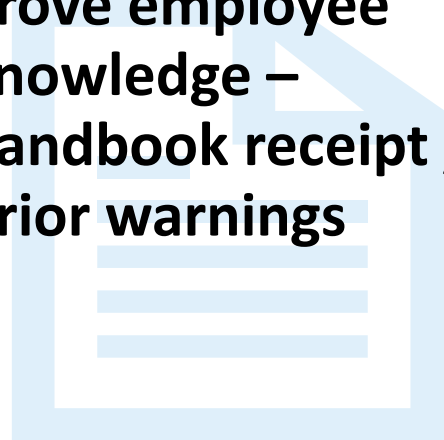
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- **Prove the rule – publication**



2

- **Prove employee knowledge – handbook receipt / prior warnings**



3

- **Prove consistent application**



Important Points For An Employer's Case

4

- Prove appropriate timing of discharge

5

- Bring all documents (4 copies)

6

- Use credible eye-witnesses

REASONS PARTIES LOSE (BOTH CLAIMANTS & EMPLOYERS)

They may fail to respond promptly to Agency notices.

They may fail to attend the hearing.

They may be unprepared for the hearing.

They may not be familiar with the standards for unemployment benefits.

They may not recognize which side has the burden of proof on the issue.

OTHER REASONS EMPLOYERS LOSE

- Fail to present relevant documentation or bring necessary witnesses
- Over focus on their own version of events and inadequately prepare to address the claimant's version – they will lie!
- Oppose legitimate claims
- Treat employees differently, without a sound basis for the differences
- Fail to recognize that the standards for unemployment are more difficult to meet than establishing that the termination was legitimate/sensible

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Questions?

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Thank you.