

**Fisher Phillips**



## What's In Your Wallet?

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### Overview

- SC's Wage Payment Requirements
- Pay Equity
- Tip Credits/Tip Pooling
- FLSA Issues



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## SC Wage Payment Requirements



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### HYPOTHETICAL

- Employee is terminated for attendance issues.
- Employee has 24 days of vacation banked and insists on payment.
- Because the employee was terminated for cause, he does not get the vacation payout.
- True or False?



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### HYPOTHETICAL

- The Company hires Joe as a minimum wage employee.
- The Company has a uniform policy. The Company issues uniforms to Joe and deducts \$3.00 per week from his check to pay for the uniforms.
- Any problems?

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### HYPOTHETICAL

- Anne made a mistake and, as a result, damaged some company equipment.
- The Company policy says that employees are responsible for damage they cause.
- The Company docks Anne's pay for the cost of the repairs.
- Any issues?

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**Fisher Phillips** **SC Wage Payment Laws...**

- Wage Notice at Hire
- Payment of Wages
- Reduction of Wages
- Payment of Wages on Termination



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**Fisher Phillips** **HYPOTHETICAL**

- Supervisor has poor performance.
- The company decides to demote the supervisor to an operations employee and reduce the employee's pay.
- Because employees are at-will, the company can do this effective immediately.
- True or False?

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**Fisher Phillips** **Wage Notice Must Include**

- In writing, at time of hire
- Normal hours
- Wages agreed upon
- Time and place of payment
- Deductions
- OR can post conspicuously at or near place of work



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### HYPOTHETICAL

- Employee voluntarily quits.
- Employee fails to turn in his uniform on her last day.
- The Company can hold her final paycheck until she brings in her uniform.
- True or False?

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### Wages

- Payment
  - Timing
  - Method?
- Reduction
  - 7 days' written notice
- Payment at Termination
  - 48 Hours or no later than 30 days



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### Pay Equity Updates



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### Hypothetical

- ABC Company is looking to hire another supervisor. Current supervisors make about \$50,000 depending on experience.
- Sue applies for the job. Her application indicates that she is currently making \$30,000.
- ABC decides to offer her the job at \$40,000 – an increase for her and a savings for ABC.
- Any problems?

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### Federal Law

**Equal Pay Act (EPA) 29 U.S.C. § 206(d)**

**Equal Pay Act requires that men and women in the same workplace be given equal pay for equal work.**

*Prima facie case:*

- Lower wages paid to employees of the opposite sex in the same establishment
- Employees perform substantially equal work
- Jobs performed under similar working conditions

Key: no intent to discriminate required

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### Federal Law

**Jobs must be “substantially equal”: compare job duties, not job titles.**

- Skill
- Effort
- Responsibility
- Working Conditions
- Establishment



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## Federal Law Litigation

### EPA Claim

- May proceed directly to court
- Statute of Limitations: 2 years/3 years if willful violation
- Damages
  - Salary differential
  - Liquidated damages
  - Attorney's fees and costs

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## Pay Disparities Remain a National Focus

Lowest Inequality   
  Middle Inequality   
  Highest Inequality  
 More than 50 states   
 2013-2014   
 2014-2015   
 2015-2016

Female Earnings per Dollar of Male Earnings (2013)

Choose a state to see earnings disparity details.

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## Changing Legal Landscape

- The Equal Pay Act has been in place for decades but the "pay gap" persists.
- States and cities are enacting laws and ordinances to try to close the "pay gap."
- Result: patchwork of inconsistent laws.

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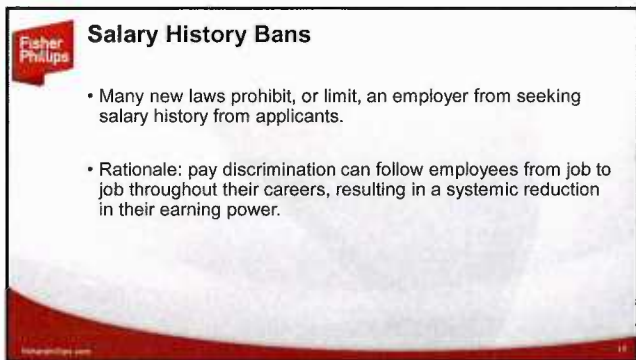
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### Salary History Bans

- Many new laws prohibit, or limit, an employer from seeking salary history from applicants.
- Rationale: pay discrimination can follow employees from job to job throughout their careers, resulting in a systemic reduction in their earning power.



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### Salary History Bans – Effective Dates

- Puerto Rico (Mar. 8, 2017)
- New York City (Oct. 31, 2017)
- Delaware (Dec. 14, 2017)
- California (Jan. 1, 2018)
- San Francisco (Jan. 1, 2018)
- Massachusetts (July 1, 2018)
- Oregon (Jan. 1, 2019)
- Philadelphia (on hold)



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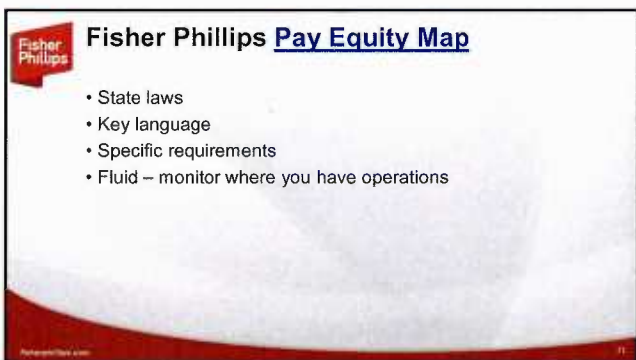
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### Fisher Phillips Pay Equity Map

- State laws
- Key language
- Specific requirements
- Fluid – monitor where you have operations



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**SOUTH CAROLINA**

- Statute**  
Statewide Employment Practices, S.C. Code Title 13, § 13-13-80
- Classes protected**  
Sex, race, religion, color, age, national origin, disability
- Key language on pay discrimination**  
Disparate employment practices "do not include against an individual with respect to the individual's compensation terms, conditions or benefits of employment on the basis of the individual's race, religion, color, sex, age, national origin, or disability."
- Exceptions for pay disparities (including affirmative defenses)**
  - A bona fide seniority or merit system
  - A bona fide system which measures pay on the basis of a factor other than sex, race, religion, color, age, national origin, or disability

Main Map

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**Tips**

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**TIP CREDITS & POOLS**

- Tip Credit
  - Advance written notice
  - Amount of tip credit claimed
  - Tipped wage + tips must = applicable M.W.
  - \$30/month in tips
  - 20% rule (prep work/maintenance)
  - Tips are sole property of employee

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- Tip Pools
  - Advance written notice
  - Only employees who customarily & regularly receive tips
  - Yes: Servers, counter personnel who serve customers, bussers, service bartenders
  - No: Owners, managers, supervisors, janitors, dishwashers, chefs or cooks, food preparers

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**Fisher Phillips** **TIP CREDITS & POOLS**

- Tip Pools
  - Closer cases: Hosts, bar backs, expeditors (server helpers?), employees who act like supervisors
  - If you get it wrong . . .
  - USDOL Fact Sheet #15
    - <https://www.dol.gov/whd/regs/compliance/whdfs15.pdf>

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- USDOL's current position under the FOH: Tipped employees not required to share tips with employees who do not customarily and regularly receive tips:
  - Janitors
  - Chefs or cooks (other than performance chefs)
  - Dishwashers
  - Laundry room attendants
  - Salad preparers
  - Prep cooks

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## FLSA Issues

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## Collective Action Litigation

- FLSA Collective action litigation is on the rise in all industries
- Reason for increase:
  - Increased understanding of the law
  - Easy to replicate
  - Mandatory attorney fees
  - Liquidated damages

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## Litigation Trends

- Overtime
- Off the Clock
- Misclassification
- Deductions
- "Wage Theft"
- Independent contractors



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### HYPOTHETICAL

- Employee takes 30 minutes unpaid meal break.
- Employee takes lunch at her desk so she can answer the phone and address problems. As a result, her lunch is regularly interrupted.
- Because her supervisor has told her she must take a lunch, she should be docked for the 30 minute lunch.
- True or False?



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### HYPOTHETICAL

- Employee is given a 15 minute paid break by his supervisor. The employee is 2 minutes late returning (and this is a pattern the employee has been warned about). The supervisor decides to make future breaks unpaid.
- Is this okay?



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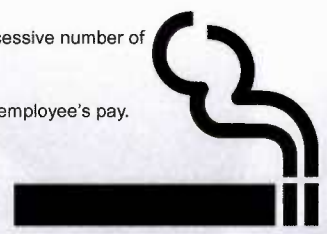
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### HYPOTHETICAL

- An employee takes an excessive number of smoke breaks.
- The supervisor docks the employee's pay.
- Is this okay?



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### MEALS AND BREAKS

- Federal law does not require lunch or coffee breaks.
- Short breaks (usually lasting about 5 to 20 minutes) are compensable work hours that would be included hours worked.
- Meals/Breaks of 30 minutes or longer are not included in hours worked.



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### HYPOTHETICAL

- A manager decides to provide a special bonus of \$50 each week to nonexempt employees that receive a patient compliment.
- HR is not aware of the bonus.
- The employee works 50 hours and claims her overtime is not correctly calculated.
- Does she have a reason to complain?



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### OVERTIME PAY

- Count hours worked over 40 in a workweek.
- Pay 1.5 times the "regular rate" of pay (all pay ÷ all hours the pay covers).
- Include in the regular rate things like bonuses, commissions, incentive pay and other kinds of extra pay.

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### HYPOTHETICAL

- An employee is supposed to have supervisor approval before working overtime. The employee works overtime without permission. The supervisor tells the employee that he will not be paid because he did not have permission.
- Is this permissible under the law?



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### OVERTIME PAY

- Some payments can be excluded from the "regular rate." For example:
  - Pay for un-worked holidays.
  - Pay for un-worked vacation time.
  - "Discretionary" bonuses (be careful with this)



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### HYPOTHETICAL

- An hourly employee asks to take 3 hours off Friday.
- The employee has no paid leave available. He asks you to pay him for 40 hours, even though he only worked 37 hours, and promises to make up the 3 hours next week.
- Is this okay?



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### OVERTIME PAY

- THE RULE ON "COMP" TIME?
- It's illegal (in the private sector workplace)



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### MISCLASSIFYING EMPLOYEES AS EXEMPT

- Failure to pay required overtime is the most common claim in litigation
- Title and salary alone are insufficient
- "White Collar" Exemptions – administrative, executive, professional, computer, outside sales
  - Duties test
  - Salary basis test

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### HYPOTHETICAL

- Your company is a sponsor for the upcoming charity race on main street.
- As a sponsor, the company gets to set up a table with information about the company for attendees.
- The company asks Frank and Jane to man the table.
- Because this is a charity event, the employees do not have to be paid.
- True or False?

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 **HYPOTHETICAL**

- Managers are paid a bonus based on a number of factors, including keeping labor costs within budget.
- Without company knowledge, several managers begin adjusting overtime down because it was not approved and is affecting their bonuses.
- Any problems?

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 **HYPOTHETICAL**

- Harvey was a long time valued employee.
- Harvey retired.
- The Company has had difficulty filling Harvey's role and asks Harvey to return as an independent contractor for a while.
- Any problems?

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 **What Happened?**

**May 2016:** Exemption regulations released (known as "**the overtime rule**") slated to be effective December 1, 2016

- Minimum threshold was to be **raised** from \$455/week to \$913/week (annualizes from \$23,660/year to \$47,476/year)
- Amount would be "**updated**" every three years

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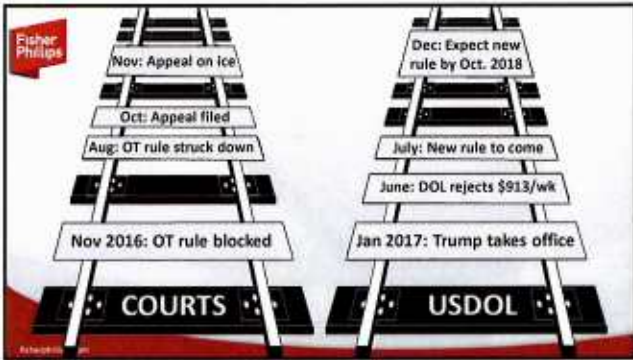
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**What's Next?**

- Expect new regulatory proposals to include an increased salary threshold somewhere in the mid-\$600 per week range (annualizing to around \$32,000 to \$35,000 per year)
- A welcome return to wage-and-hour opinion letters from the Department of Labor
- A possible increase in the federal minimum wage? (\$15 doubtful; moderate increase possible)

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**Questions**

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## Thank You



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