

California Pay Equity Task Force

Agenda

November 13, 2017

10:00 a.m. – 4:00 p.m.

Orrick, Herrington & Sutcliffe, LLP, 400 Capitol Mall #3000

Sacramento California, 95814

One or more of the Task Force members will participate in this meeting at the teleconference sites listed below. Each teleconference location is accessible to the public, and the public will be given an opportunity to address the Task Force at each teleconference location.

The public teleconference site(s) for this meeting are as follows:

Orrick, Herrington & Sutcliffe, LLP – 777 South Figueroa Street, Suite 3200 Los Angeles, CA 90017

Orrick, Herrington & Sutcliffe, LLP – 405 Howard Street San Francisco, CA 94105

Orrick, Herrington & Sutcliffe, LLP – 51 West 52nd Street New York, NY 10019

Further teleconference sites may be added. Public comments will be taken on agenda items at the time the specific item is raised, unless it is a closed session item. Agenda items may be taken out of order to accommodate speakers and to maintain a quorum. Please check the California Commission on the Status of Women and Girls (CCSWG) website for updates, as the meeting may be rescheduled. For verification of the meeting, access the Commission's website at www.women.ca.gov. Time limitations for discussion and comment will be determined by the Co-Chairs.

- I. Welcome and Call to Order – Co-Chairs
- II. Roll Call
- III. Establish Quorum – Adopt Agenda
- IV. Approve Minutes of September 28, 2017 Meeting
- V. Website Overview
- VI. Employee Materials
- VII. Lunch
- VIII. Employer Materials
- IX. Outreach Discussion
- X. Other Items
 - a. Jury Instructions
 - b. Glossary
 - c. Other items if necessary
- XI. Questions/Comments/Feedback
- XII. Public comment
- XIII. Adjourn

*In addition to public comment regarding each agenda item, the Commission affords an opportunity to members of the public to address the Task Force on items of interest that are within the Commission's jurisdiction but are not on the noticed agenda. The Commission is not permitted to take action on items that are not on the noticed agenda, but may refer items for future consideration.

Disability Access

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Contact Information

Please contact stephanie.tseu@women.ca.gov or 916-651-5405 to submit written material regarding an agenda item or to request special accommodations for persons with disabilities, or non-English language translations and for requests for information prior to the meeting. To view this agenda online please visit our website at www.women.ca.gov.

MINUTES

CA PAY EQUITY TASK FORCE

SEPTEMBER 28, 2017

ORRICK OFFICES IN SACRAMENTO, SAN FRANCISCO AND LOS ANGELES

Meeting called to order: 10:14am

Meeting adjourned: No motion is needed to adjourn the meeting. Meeting ended about 3:30pm

Task Force Attendees: Co-chair Lauri Damrell, Co-Chair Julie Su, Kevin Kish, Jennifer Barrera, Daniel Kuang, Peter Pawlick, Jennifer Reisch, Jeanna Steele, Rhoma Young, Tamekia Robinson.

Other attendees: Kelly Jenkins-Pultz, Doris Ng, Holly Thomas, Representatives from SEIU, Megan Lane, Michelle Teran, Nancy Kirshner-Rodriguez, Stephanie Tseu, Marian Johnston, Tamara McDonald.

I. Call to Order

Co-Chair Damrell opened the meeting at 10:14am and asked Stephanie Tseu to start by taking Roll to assure a quorum.

II. Roll Call

Stephanie Tseu called roll and recorded the attendees. A quorum was reached.

III. Welcome

Co-Chair Lauri Damrell welcomed the group and gave a brief update of work. She updated the group on staff efforts to contact Task Force member Kimberlee Shauman. In the interim, Daniel Kuang asked for assistance finalizing his documents for "Measuring the Pay Gap" Subcommittee. Daniel felt confident in his ability to finalize the documents himself, with assistance from other task force members as needed. He will follow up with Stephanie Tseu and she will share the documents with the group as needed.

Co-Chair Damrell discussed the plan for the meeting; work together as one group for the entire meeting, with an emphasis on finalizing the subcommittee documents.

IV. Adopt Agenda

A roll call vote of the agenda was taken and the agenda was adopted. Motion to approve: Jeanna Steele, Second: Rhoma Young.

Those voting aye: Lauri Damrell, Julie Su, Kevin Kish, Jennifer Barrera, Daniel Kuang, Peter Pawlick, Jennifer Reisch, Jeanna Steele, Rhoma Young, Tamekia Robinson.

There were no “no” votes.

V. Approve Minutes of August 1, 2017 meeting

Prior meeting minutes were reviewed and approved without amendment. Motion to approve: Rhoma Young, Second: Tamekia Robinson.

Those voting aye: Lauri Damrell, Julie Su, Kevin Kish, Jennifer Barrera, Daniel Kuang, Peter Pawlick, Jennifer Reisch, Jeanna Steele, Rhoma Young, Tamekia Robinson.

There were no “no” votes.

VI. Employee Materials

Chair Damrell led Task Force members through the Employee Materials portion of the meeting binder. Task Force members discussed how much information is currently contained in the materials and that there are more questions that need to be included in the document. There was discussion about how integrated/comprehensive the Pay Equity website should be and members cautioned that this website needs to stay focused and cannot be “everything to everyone”.

There was significant discussion regarding the materials and how to make the website useable and a resource for employees, those seeking employment, and employers. Members made several suggestions including: a column/bucket for “If I am looking for a job, how to assure I’m not underpaid?” We need to figure out how these questions will actually be written out. Chair Damrell suggested going back to the power point Tonya put together. Instead of “What are my rights” we use different language for pre-employment. - “Step 1: Expectations for the application process, Step 2: I am an employee.”

Jennifer Reisch points to the www.workplacesrespond.org website as a model look of the Pay Equity website. Task Force members agree that it is a clean, straightforward website.

Task Force members agree on three columns: “Looking for Work”, “Employee”, and “Employer.” Working Women’s Clearinghouse through the US Department of Labor is a site the Task Force should consider linking to as it contains useful information.

It was agreed that the Task Force has created several tools that must now be reformatted to be placed into a workplacesrespond type website. CCSWG staff discussed that the Department of Technology will be designing the CA Pay Equity Task Force website. Once Task Force materials are finalized, they will be used as the content of the website. CCSWG will be working with the Department of Technology during this process with a goal of it being finalized early 2018.

Task Force members worked through the employee “scaffolding” document and CCSWG staff were instructed to merge this document into Tonya’s previous “employee” document, include the starting salary document that Chair Damrell and Rhoma Young are working on, link to the Women’s Bureau website and include other materials as they become available.

The conversation moved on to Kevin Kish’s feedback on “Scenario’s for substantially similar work”. The Task Force agreed with his feedback and asked staff to draft this section. Included in this section should be a link to the “Culture document” in the same areas as the scenarios. Task Force members acknowledged that even if the examples are not perfect, they can still be helpful and assist people in thinking about why they might have men and women doing different things in the work place. Staff will also include links in the disclaimer, including a link to DFEH and say something similar to “...may be violating other workplace laws, such a FEHA or Title VII.”

Jennifer Barrera gave an update on the Step-by-Step/Definitions document she updated. She explained how she removed the “absolute” language and made it more permissive. Additionally, there was significant discussion around flex schedules and discrimination against people who use them and the issue of “Variable pay.”

LUNCH BREAK

VII. Employer Materials

After the lunch break, the Task Force walked through the Employer materials. A lot of the questions Task Member asked were around how change a conversation in a polite and respectful way when an interview goes into a legally questionable area. Much of this discussion was how to pivot away from discussing salary and previous pay. “Well, if what you’d like to know is what are my salary expectations? Or what I make now may not accurately reflect what I am looking to make now.” It was suggested to move this discussion to after Oct. 15th when we know if the law passed that forbids employers from asking previous salary. The goal is to focus on skills rather than assumptions on gender.

There was also discussion around temporary employees versus full time, and “competitive markets” or highly specialized positions. Task Force members were asked to send any opinions, resources or thoughts to Stephanie Tseu.

VIII. Break

IX. Conference\Partners

The Task Force, as a whole, discussed what type of event/rollout they would like to see unveiled – Task Force members made specific suggestions:

ABA/EEO in March

ABA Labor employment conference in November

NELA Conference in June

Chamber events

Bay Area Women’s summit next June

United State of Women in LA next October

Sen. Jackson Information Hearing in January 2018

It was discussed that staff will need to help develop a press packet developed by January 2017 for Task Force Members to distribute as part of publicizing the Task Force website.

A Roll out date of Equal Pay Day (April 2018) was set for the go live date of the website. Task Force members were asked to have content finalized by December 31, 2017.

X. Next Task Force Meeting

Members identified November 13, 2017 as the date of the next meeting. At that meeting, staff walk the Task Force through drafted the content of the website on as well as work through updated and edited material.

XI. Questions/Comments/Feedback

Megan Lane gave an update on the Case Study - she is starting to identify themes and areas to improve upon in the future. The Case Study will be finished by Equal Pay Day.

XII. Public Comment

There was no public comment.

XIII. Adjourn

Meeting was adjourned about 3:30pm.

LEGISLATIVE UPDATE



Memorandum

To: Members of the CA Pay Equity Task Force

From: Stephanie Tseu, Policy Director

Date: November 6, 2017

Re: Legislative Update

Governor Jerry Brown signed two bills that will impact the work of the Pay Equity Task Force. First, AB 168 (Eggman) was signed by Governor Brown on October 12. AB 168, which will go into effect on January 1, 2018, will prohibit all employers from seeking salary history information about an applicant and requires an employer to provide the pay scale for a position to an applicant “upon reasonable request.”

If you would like to review the bill, as chaptered, you can do so here:

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB168

Additionally, Governor Brown signed AB 46 (Cooper). AB 46 seeks to expand the California Equal Pay Act to public sector employees.

If you would like to review the bill, as chaptered, you can do so here:

http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB46

Finally, AB 1209 (Gonzalez-Fletcher) which would have required employers with 500 or more employees, and who had to file a statement of information with the Secretary of State, to collect specified information on gender wage differentials, was vetoed by Governor Brown. In the veto message, he referenced the Pay Equity Task Force:

“Since the Equal Pay Act was signed into law in 2015, the Pay Equity Task Force, which is comprised of members from this administration, business, academia, labor, the legislature and pay equity advocates, has been engaged in analysis of the new law, as

well as workplace and compensation policies that can lead to successful compliance with the Act. Guidance and recommendations coming out of the Task Force will assist companies around the state with assessing their current wage practices.”

The enrolled legislation can be found here:

http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1209

DRAFT RACE AND ETHNICITY DISCLAIMER

For Review by PETF Members

Disclaimer Regarding Race and Ethnicity per September 28, 2017 PETF:

As of 2017, The CA Equal Pay Act, (Chapter 546, Statutes of 2015) incorporated additional provisions that address pay equity for additional protected categories of race and ethnicity. However, parameters of the Task Force as defined and created by the California Commission on the Status of Women and Girls, the materials and toolkits developed by the CA Pay Equity Task Force provide recommendations focused on gender.

Should you need further recommendations that address race/ethnicity, you may want to review the following sites: **Insert helpful sites here**

WEBSITE OVERVIEW



Memorandum

To: Members of the CA Pay Equity Task Force

From: Emily Van Atta, Fiscal and Operations Director

Date: November 6, 2017

Re: Pay Equity Task Force Website

At the last Pay Equity Task Force Meeting it was discussed that CCSWG staff would create a rough draft Pay Equity Task Force website using the non-finalized materials the Pay Equity Task Force has created to date.

CCSWG staff will be working with the CA Department of Technology (CDT) to build and design the site. While CDT will be designing the site, it is the Commission Staff's responsibility to deliver to them the finalized content we want incorporated into the website. This draft site was created to give Task Force members an idea of the look and feel of what the CCSWG staff will be creating with CDT. During the last meeting, Task Force members voiced their support for a website similar to Work Places Respond's website: <https://www.workplacesrespond.org/>. Staff used this website as a template while building the Task Force's draft site.

Visit the draft Pay Equity Task Force website here: <https://capayequity.wordpress.com/>

To ensure a robust, fully active website, all materials must be completed by December 31, 2017, so the Task Force has time to vote on the final materials and manipulate them into a web-friendly format.

We anticipate beginning the CDT contract in late January, for a website that will be fully functioning and ready to launch on Equal Pay Day 2018.

Prior to the first meeting of the CA Pay Equity Task Force, the CCSWG executed an agreement to provide the CA Labor Commissioner and the Department of Industrial Relations to provide \$50,000.00 to use toward the creation of the Pay Equity Task Force products. We very much appreciate the ability to execute this work around since

we are such small state agency and, we do not have purchasing authority. We anticipate the initial cost for building, activating, and maintaining the website for the first year to be about \$15,000.00. The remainder of the \$50,000.00 will go towards printing educational materials to assist with the Pay Equity Task Force outreach as well as conference support.

cc: Nancy Kirshner-Rodriguez, Executive Director

Stephanie Tseu, Policy Director

EMPLOYEE RESOURCES

Employees and Looking for Work

Website Text

&

Pay Equity “Tools” “Resources”
for Review



Employees

DRAFT



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Disclaimer: These are suggested practices only. Pay equity analyses are not required under the *Fair Pay Act*. The suggestions provided here are to help employers begin to think about pay equity at their organizations. Before beginning any pay equity analysis, we encourage employers to consult with legal counsel who are knowledgeable in employment law and pay equity because what is legally appropriate for any given employer depends upon that employer's unique circumstances.

I want to know my rights

Under the new law, an employee must show that he or she is being paid less than an employee(s) of the opposite sex who is performing substantially similar work. The employer must then show that it has a legitimate reason for the pay difference. Under the Equal Pay Act, an employee must file a claim within 2 years from the date of the violation. If the violation is willful, then an employee must file within 3 years. Each paycheck that reflects unequal pay is considered a violation for the purpose of calculating the deadline for filing. An employee who has experienced an Equal Pay Act violation can file an administrative claim before the Labor Commissioner's office or file an action in court. For information about filing a claim with the Labor Commissioner's Office, go to <http://www.dir.ca.gov/dlse/dlseRetaliation.html>. Depending on the nature of the claim, the employee may also file a claim with the California Department of Fair Employment and Housing. An employee does not have to file an administrative claim before filing an action in court. (https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm)

[Insert outside Equal Rights Advocates Materials.] We do not have all of these yet.
[Insert Tool #8 *Fair Pay Act* tool]

Tool #8 about the *Fair Pay Act*

Concept: This document or tool could explain the Equal Pay Act in terms that are applicable to all audiences. **Maybe divide the document into section for audience so it can be one tool. This is law as an overview for everyone and anyone. May want a leg counsel interpretation. This should also be everything except detail about the definitions and scenarios (which could be a different document).**

Tool:

Format:

Subcommittee on Employees: Rhoma Young and Tamekia N. Robinson

Am I being paid fairly under the Equal Pay Act of 2015?

So what if you've been at a job long enough, suspect that you might be doing similar work to men at your company or agency, and think they might be getting paid more than you are? You'd like to do some research, but where do you start? Below are pay gap calculators you might find useful to help estimate if there is a gender pay gap where you work.

- Pathways to Equity: Women and Good Jobs <http://womenandgoodjobs.org/>
- Closing the Gap: 50 years Seeking Equal Pay <http://www.womenwagegap.org/tools>
- Economic Policy Institute: What Could You Be Making? <http://www.epi.org/multimedia/gender-pay-gap-calculator/>

Challenges and Barriers Subcommittee: Jennifer Barrera and Jeanna Steele

Federal and State Laws concerning Equal Pay

- (1) What state and federal agencies enforce equal pay laws?

In California, the Labor Commissioner's Office (also known as the Division of Labor Standards Enforcement or DLSE) has the authority to enforce Labor Code Section 1197.5, which prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of the opposite sex, or of a different race or ethnicity for substantially similar work. See



https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm. The Department of Fair Employment and Housing (DFEH) enforces the Fair Employment and Housing Act (FEHA), which among other things, precludes the discrimination in employment on the basis of gender, ethnicity, and race. Paying different wages due to an employee's gender, race, or ethnicity is considered discrimination.

At the federal level, the Equal Employment Opportunity Commission (EEOC) enforces the federal Equal Pay Act, which requires employers to pay employees of the opposite sex, or of a different race or ethnicity equally for equal work performed in the same establishment. The EEOC also enforces Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967, and Title I of the American Disabilities Act of 1990, which preclude discrimination in employment, such as unequal compensation, based upon protected classifications.

- (2) What are the main differences between California's Equal Pay Act and the Federal Equal Pay Act (EPA)?
Before SB 358 (Jackson), which became effective January 1, 2016, California's Equal Pay Act was very similar to the EPA. The significant changes made to the California law were: (1) changing the term "equal work," to "substantially similar work when viewed as a composite of skill, effort, and responsibility" to reflect existing case law (see definitions and examples); (2) eliminating the "same establishment" requirement for purposes of comparing wages of employees who perform substantially similar work; and (3) defining "bona fide factor" to mean that the employer's reason for the pay difference must be job related and satisfy a business necessity; (4) specifying that an employer cannot prohibit employees from discussing their wages; (5) prohibiting retaliation against employees who exercise their rights under the law or assists another employee with exercising their rights under the law.

Under the federal EPA, comparison of wages is still limited to employees at the same physical establishment and is limited to equal pay for equal work.
- (3) Does California law require employers to pay all employees who perform the same or substantially similar job the same wage rate?
California law requires equal wages for employees of the opposite sex, or of a different race or ethnicity, who perform the same or substantially similar work. An employer can still adjust wages based upon factors such as seniority, merit or performance, or another bona factor such that is job related and necessary for the business such as education, training, experience, or the geographical location of the employee and cost of living in that area. Employers should consider conducting a privileged pay equity analysis to determine whether wages should be adjusted within their organization to comply with the Equal Pay Act.
- (4) Does an employer have to conduct a pay equity analysis of all employees' wages?
There is no mandate to conduct an audit. However, it may be a good practice for employers wishing to proactively comply with the law. Employers may want to consider conducting any audit with the advice of an attorney or HR professional.
- (5) What is the liability an employer can face if there is a wage differential that cannot be explained or justified by one of the recognized or bona fide factors?
An employer could face an enforcement action by one of the above listed state or federal agencies or a civil lawsuit, and may potentially have to pay back wages, liquidated damages, lost work benefits, attorney's fees, etc. If there is discrimination or retaliation involved, emotional distress and punitive damages may also be assessed.
- (6) What can an employer do to comply with the California Equal Pay Act and the federal EPA?
Although not required, an employer can take several proactive steps to comply with California's Equal Pay Act and the federal EPA:



Employees

- (a) An employer can conduct an annual or regular audit of its pay practices and employee wages to identify any significant disparities in wages amongst employees who perform the same or substantially similar work and make any compensation adjustments as necessary.
- (b) Employers should regularly review job descriptions to make sure that the description accurately reflects the overall job content, including the required skill, effort, and responsibility for that position. Although job titles, classifications, or descriptions are not determinative of whether two employees are performing substantially similar work, it is relevant and does provide some basis for comparison.
- (c) An employer should also educate its managers and supervisors who make compensation recommendations regarding the law and what factors they can and cannot utilize in their decision making.
- (d) An employer should document all compensation decisions and identify the basis for any adjustments. An employer should retain such documents for no less than 4 years (See Chart of Employer Record Retention Requirements).
- (e) An employer should systematize documentation of the factors relied upon to support difference in wage rates between employees (e.g., education, experience, etc.). This practice encourages pay equity and can be referenced if the employer's compensation decisions are challenged.
- (f) Employers should not retaliate and clearly prohibit retaliation against employees for asserting rights under California or federal fair pay laws, as well as ensure that they have a reporting mechanism in place for complaints. This can be part of an employer's existing equal employment opportunity policy.

(7) Can an employee discuss his or her wages with other employees?

Employees can discuss wages with one another, including asking an employee about his or her wages, without fear of retaliation by the employer. There is no obligation on any employee to disclose his or her wage or engage in these discussions. Employers can take reasonable measures to protect the privacy of information regarding employees' compensation, including prohibiting employees who have access or control over confidential wage information given their job duties and responsibilities, from disclosing such information without the consent of those employees. However, employers should be cautious about employees' rights under the Labor Code to report violations as well as assist employees with their rights to pursue equal pay.

(8) Who can an employee contact if the employee believes the employer has violated the California Equal Pay Act?

An employee can contact the Division of Labor Standards Enforcement:
<http://www.dir.ca.gov/dlse/DistrictOffices.htm>.

An employee can contact the Department of Fair Employment and Housing:
<http://www.dfeh.ca.gov/contact-us>.

(9) How does the California Equal Pay Act define "wage rate"? [Wage Rate Definition to be provided by the Definitions Subcommittee]

For further information regarding frequently asked questions about California's Equal Pay Act, please visit the Division of Labor Standards Enforcement website: http://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm.

Marian M. Johnston's piece about the history of Equal pay in California and the U.S. from the Interim Report

Statutory History of Equal Pay laws in California and the United States

California first passed an Equal Pay Act in 1949. Before SB 358 was enacted in 2015, Labor Code section 1197.5 prohibited an employer from paying an employee less than employees of the opposite sex who perform the same job, requiring the same skill, effort, and responsibility, in the same establishment, under similar working conditions. Exempt from this prohibition are payments made pursuant to systems based on seniority, merit, or that measure earnings by quantity or quality of production; or differentials based on any bona fide factor other than sex. Enforcement was by the California Division of Labor Standards Enforcement. Until recently, Labor Code Section 1197.5 (a) provided:

No employer shall pay any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions

SB 358 (Cal.Stats. 2015, Ch. 546), effective January 1, 2016, substantially broadens California's gender pay differential law. Effective January 1, 2016, California's Equal Pay Act, also known as the "Fair Pay Act," expanded pay equity rights by removing the requirement that the pay differential be within the same "establishment," and replaced the "equal" and "same" job, skill, effort, and responsibility standard, with a new standard that only requires a showing of "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." These changes make it easier for an employee to bring an equal pay suit, permitting a plaintiff to compare him or herself with employees of the opposite gender working at any location for the same employer, and in any similar job.

As amended in 2015, California's Equal Pay Act further requires employers to affirmatively demonstrate that any wage differential is based entirely and reasonably upon one or more factors. Added to the three existing factors (seniority, merit, or production-based) is a "bona fide factor": that is, a factor not based on or derived from a sex-based differential in compensation, which is related to the position in question and is consistent with a "business necessity" (defined as "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve"). The "bona fide factor" defense is inapplicable if the plaintiff demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential. With the enactment of SB 358, the California Labor Code 1197.5 (a) provides:

(a) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates:

- (1) The wage differential is based upon one or more of the following factors:**
 - (A) A seniority system.**
 - (B) A merit system.**
 - (C) A system that measures earnings by quantity or quality of production.**
 - (D) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph, “business necessity” means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.**
- (2) Each factor relied upon is applied reasonably.**
- (3) The one or more factors relied upon account for the entire wage differential.**

California’s Equal Pay Act was amended again in 2016 by SB 1063 (Cal.Stats. 2016, Ch. 866). Effective January 1, 2017, Labor Code Section 1197.5, in addition to prohibiting sex discrimination in wages, now prohibits wage discrimination based on race or ethnicity. Labor Code Section 1197.5 (b) provides, in pertinent part:

(b) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions . . .

California’s Equal Pay Act was again amended in 2017, as was another relevant law. AB 46 (Cal.Stats 2017, Ch. 776) specifies that this act applies to public and private employers, and AB 168 (Cal.Stats. 2017, Ch. 688) adds Section 432.3 to the Labor Code, prohibiting employers from relying on an applicant’s salary history and requiring employers, upon request, to provide a pay scale to the applicant. Both bills are effective January 1, 2018.

Labor Code Section 1197.5 (l) provides, in pertinent part:



As used in this section, “employer” includes public and private employers.

Labor Code Section 432.3 now provides, in pertinent part:

- (a) An employer shall not rely on the salary history information of an applicant for employment as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant.
- (b) An employer shall not, orally or in writing, personally or through an agent, seek salary history information, including compensation and benefits, about an applicant for employment.
- (c) An employer, upon reasonable request, shall provide the pay scale for a position to an applicant applying for employment.

The federal Equal Pay Act was passed in 1963 (Pub.L. 88-38; 77 Stat. 56). This act amended the Fair Labor Standards Act of 1938, as amended (29 U.S.C. et seq.), by adding a new subsection (d).

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

The Department of Labor had responsibility for enforcement of the federal Equal Pay Act until the federal Reorganization Plan No. 1 of 1978, which, as of July 1, 1979, shifted responsibility for enforcing both the Equal Pay Act and the Age Discrimination in Employment Act from the Labor Department to the Equal Employment Opportunity Commission.

<https://www.eeoc.gov/eeoc/history/35th/thelaw/epa.html>

Statutory History of Employment Discrimination Laws in California and the United States

California's and the federal equal pay laws have always been distinct from laws generally prohibiting employment discrimination. California's Fair Employment Practice Act enacted in 1949 prohibited employment discrimination because of race, religious creed, color, national origin, or ancestry, and did not prohibit sex discrimination. Sex was added as a prohibited basis of discrimination in 1970 (Cal.Stats. 1970, ch. 1508). Enforcement was through the Fair Employment Practice Commission, later named the Fair Employment and Housing Commission.

Title VII of the federal Civil Rights Act of 1964 (Pub. L. 88-352) prohibited race, color, religion, sex, or national origin discrimination in employment (42 USC Sec. 2000e). The administrative agency responsible for enforcement of Title VII is the Equal Employment Opportunity Commission.

Subcommittee on employee organizations and unions: Leslie Simon and Jennifer Reisch

1. File a written complaint with HR/boss, DLSE or court. Deadlines, no tolling, no admin exhaustion, HR/Boos not required, what kind of remedies.

Department of Industrial Relation FAQ's: Doris Ng

California Equal Pay Act: Frequently Asked Questions

For decades now, the California Equal Pay Act has prohibited an employer from paying its employees less than employees of the opposite sex for equal work. On October 6, 2015, Governor Brown signed the California Fair Pay Act (SB 358), which strengthens the Equal Pay Act in a number of ways, including by:

- Requiring equal pay for employees who perform "substantially similar work, when viewed as a composite of skill, effort, and responsibility.
- Eliminating the requirement that the employees being compared work at the "same establishment."
- Making it more difficult for employers to satisfy the "bona fide factor other than sex" defense.
- Ensuring that any legitimate factors relied upon by the employer are applied reasonably and account for the entire pay difference.
- Explicitly stating that retaliation against employees who seek to enforce the law is illegal, and making it illegal for employers to prohibit employees from discussing or inquiring about their co-workers' wages.
- Extending the number of years that employers must maintain wage and other employment-related records from two years to three years.

This document contains answers to frequently asked questions about California's Equal Pay Act (CA Labor Code section 1197.5), which was amended by SB 358 (Statutes of 2015).

Q: When do the amendments to California's Equal Pay Act take effect?



A: Governor Brown signed SB 358 into law on October 6, 2015. SB 358 makes several changes to California's Equal Pay Act. These amendments took effect on January 1, 2016.

Q: What does the new law provide?

A: The amended Equal Pay Act prohibits an employer from paying any of its employees wage rates that are less than what it pays employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.

Q: What does “substantially similar work” mean?

A: “Substantially similar work” refers to work that is mostly similar in skill, effort, responsibility, and performed under similar working conditions. Skill refers to the experience, ability, education, and training required to perform the job. Effort refers to the amount of physical or mental exertion needed to perform the job. Responsibility refers to the degree of accountability or duties required in performing the job. Working conditions has been interpreted to mean the physical surroundings (temperature, fumes, ventilation) and hazards.

Q: What are the key differences between the old Equal Pay Act and the amended Equal Pay Act?

A: The main differences are that the new law:

- eliminates the requirement that the jobs that are compared must be located at the same establishment;
- replaces a comparison of “equal” work with a comparison of “substantially similar” work;
- makes it more difficult for employers to justify unequal pay between men and women;
- adds new express anti-retaliation protections for workers that assist employees with bringing claims under the Act;
- provides that an employer cannot prohibit workers from disclosing their wages, discussing the wages of others, or inquiring about others' wages.

Q: Under the new law, what do I have to prove to prevail on my Equal Pay Act claim?

A: Under the new law, an employee must show that he or she is being paid less than an employee or employees of the opposite sex who is performing substantially similar work. The employer must then show that it has a legitimate reason for the pay difference.

Q: Can I file a claim if the person who earns more than I do has a different job title?

A: Yes, you may file a claim. Because the Equal Pay Act compares jobs that are “substantially similar,” the job titles that are being compared do not have to be the same.

Q: How is “wage rates” defined?

A: Although the law does not specifically define “wage rates,” it refers to the wages or salary paid, and also other forms of compensation and benefits.

Q: Under the new law, how may an employer defeat an Equal Pay Act claim?

A: Under the new law, an employer can defeat an Equal Pay Act claim by proving that the difference in pay for substantially similar work is due to:

- seniority;
- merit;
- a system that measures production; and/or
- a “bona fide factor other than sex.”

In addition, an employer must show that it applies the above factor(s) reasonably and that the factor(s) accounts for the entire difference in wages.

Q: Under the new law, how is the “bona fide factor other than sex” applied?

A: Under the new law, an employer may defeat an Equal Pay Act claim by proving that the wage differential is due to a “bona fide factor other than sex,” but to succeed on this defense, the employer must also prove that the factor is

- not based on or derived from a sex-based factor;
- job related; and
- consistent with a business necessity.

Examples of a “bona fide factor other than sex” include education, training or experience.

Q: When do I need to file my Equal Pay Act claim?

A: Under the Equal Pay Act, an employee must file a claim within 2 years from the date of the violation. If the violation is willful, then an employee must file within 3 years. Each paycheck that reflects unequal pay is considered a violation for the purpose of calculating the deadline for filing.

For example, if an employer decides in January 2016 to pay a female worker less than a male worker for substantially similar work, and the employer cannot justify the unequal pay with any available defenses, for a non-willful violation, the female worker has until January 2018 to file a claim to seek recovery going back to January 2016. If she waits until January 2019 to file a claim, she can seek recovery going back only two years, or January 2017.

Q: Where can I bring a claim to enforce the Equal Pay Act? Must I file an administrative claim before filing a case in court?

A: An employee who has experienced an Equal Pay Act violation can file an administrative claim before the Labor Commissioner’s office or file an action in court. For information about



filing a claim with the Labor Commissioner's Office, go to <http://www.dir.ca.gov/dlse/dlseRetaliation.html>. Depending on the nature of the claim, the employee may also file a claim with the California Department of Fair Employment and Housing. An employee does not have to file an administrative claim before filing an action in court.

Q: What happens after I file my claim with the Labor Commissioner's Office?

A: Under California Labor Code section 98.7, the Labor Commissioner's Office investigates your claim and makes a determination as to whether or not the employer violated the Equal Pay Act. If the Labor Commissioner's Office determines that no violation occurred, it will dismiss the claim. If the Labor Commissioner determines that a violation occurred, it will make a demand for remedies. If the employer fails to comply with the Labor Commissioner's demand for remedies, then the Labor Commissioner files a civil action in court.

Q: Do I need to file a claim with the California Department of Fair Employment and Housing (DFEH)?

A: The DFEH enforces the California Fair Employment and Housing Act, which prohibits discrimination based on sex, in addition to other protected categories. You may, but are not required to, file a claim with the DFEH if you are only claiming unequal pay based on sex. Because the Labor Commissioner's Office only investigates the Equal Pay Act, if you have additional claims (for example, if you also claim discrimination in promotion based on sex or if you also claim discrimination based on another protected status), you can also file with the DFEH. For information about deadlines for filing complaints with the DFEH, go to http://www.dfeh.ca.gov/Complaints_ComplaintProcess.htm or call 800-884-1684.

Q: May I file a claim under the Equal Pay Act anonymously or in a group with others?

A: The law states that the Labor Commissioner's Office shall keep the name of the employee who files an Equal Pay Act claim confidential until it establishes the validity of the claim. However, the Labor Commissioner may reveal the name of the claimant if needed to investigate the claim. Employees who are similarly affected may all file claims against the same employer. These claims may be assigned to the same investigator.

Q: What do I get if I prevail in my Equal Pay Act claim?

A: Under the Equal Pay Act, an employee can recover the difference in wages, interest, and an equal amount as liquidated damages. If an employee files a case in court, he or she can also recover attorney's fees and costs.

Q: How long must an employer keep records of employee wages and wage rates?

A: Under the amended Equal Pay Act, an employer must keep records of wages, wage rates, job classifications, and other terms and conditions of employment for a period of three years.

Q: Can I ask my employer how much other employees are paid?

A: Yes, an employee can ask his or her employer about how much other employees are paid, however, the law does not require an employer to provide that information.

Q: Can my employer retaliate against me for asking about other employees' wages?

A: An employer may not prohibit an employee from disclosing his or her own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise rights under the Equal Pay Act. Accordingly, an employer may not retaliate against an employee for engaging in such conduct.

Q: Am I protected from retaliation if I complain about an Equal Pay Act violation?

A: Yes, the amended Equal Pay Act specifically prohibits an employer from retaliating against an employee for "any action taken by the employee to invoke or assist in any manner" with the enforcement of the Equal Pay Act.

Q: What is my deadline to file a retaliation claim with the Labor Commissioner?

A: An employee must file a retaliation claim within six months of the retaliation.

Q: What do I get if I prevail in my retaliation claim?

A: Under the California Labor Code, an employee who prevails in a retaliation claim may be awarded reinstatement, back pay, interest on back pay, and possibly other remedies.

I want to know if I am being paid equitably

Under the new law, an employee must show that he or she is being paid less than an employee(s) of the opposite sex who is performing substantially similar work. The employer must then show that it has a legitimate reason for the pay difference. Below are some questions to help determine if you are being paid fairly or not:

- How can I find out if I am being paid equitably?
- What do I do if I am being paid inequitably?

How can I find out if I am being paid inequitably?

There are many resources that employees may wish to consult to determine appropriate compensation for a particular role. Please also note that job titles are not determinative but just an initial step in determining appropriate compensation for a particular role. The Task Force recommends consulting resources that provide a pay range, rather than the median compensation for a particular role. It is also recommended that more than one resource be consulted. Possible resources include, but are not limited to:

- Pay Scale has a free pay equity report: <http://www.payscale.com/>
- Employment Development Department [<http://www.labormarketinfo.edd.ca.gov/>]
- You might know someone you work with who earns more than you do.

[Insert Tool #1 wage rate tool here]

[Insert Tool #3 scenarios of skill, effort, and responsibility tool]

Tool #1 Wage data information

[Do we want to create an online tool about wage rate information?]

Concept: For employers this can refer to market information. For all this can refer to what the gender wage gap is in California.

Tool:

Format:

Notes: EDD/LMID information is good for employers if they do not want gender information. Also, the BLS numbers are for the U.S. Perhaps update this each year (save the code and rerun the numbers each new ACS release).

- I suggest running the numbers for occupations in California.
- All of the other links can be transferred to the resources list that is under “general.”

Example: Finally, here’s the link to the straight table of occupations with the 2016 median annual wages of full-time workers by gender: <http://www.bls.gov/cps/cpsaat39.pdf>

Example: Applicants who are seeking jobs or employees who are negotiating for a higher wage or salary should research the median wages for the same or similar position in their geographical area to determine what amount is reasonable. Additionally, employers who are hiring new employees or evaluating existing employees’ compensation, should review market data on median wages as well.

Challenges and Barriers Subcommittee: Jeanna Steele and Jennifer Barrera

Online information - Market data information EDD

There are many resources that employers and employees may wish to consult to determine appropriate compensation for a particular role. Please also note that job titles are not determinative but just an initial step in determining appropriate compensation for a particular role. The Task Force recommends consulting resources that provide a pay range, rather than the median compensation for a particular role. It is also recommended that more than one resource be consulted. Possible resources include, but are not limited to:

- California’s Employment Development Department. The California EDD provides quarterly information regarding median wages paid for various positions in different regions of the state. See <https://data.edd.ca.gov/Wages/Occupational-Employment-Statistics-OES-/pwxn-y2q5>.
- **The Department of Labor Bureau of Labor Statistics: Occupational Outlook Handbook.** The Department of Labor Bureau of Labor Statistics publishes the Occupational Outlook Handbook, which provides information about the characteristics of various jobs, the skills, education and training required for them, typical salaries and future outlook for the occupation. It is organized by job family. See <http://www.bls.gov/ooh/>.
- **The Department of Labor Bureau of Labor Statistics: O*Net Online.** The DOL also publishes O*Net Online, which is a deep database that provides job related info by a number of different search techniques, such as industry, occupation growth rates, level of training and preparation needed (job zones) and other characteristics. See <https://www.onetonline.org/>.
 - See also the median weekly earnings of full-time and salary workers by detailed occupation and sex at <http://www.bls.gov/cps/cpsaat39.pdf>.

- **Glass Door.** Glass Door is a database of information about employers that includes salary reports submitted by both employer and employee users of the site. See <https://www.glassdoor.com/index.htm>.
- **Salary.com.** Salary.com is a database that allows employers to analyze their internal pay practices against market rates. See <http://www.salary.com/>.
- **Payscale.** Payscale is a database that compiles individual salary profiles through crowdsourcing and big data technologies for use by employers and employees. See <http://www.payscale.com/>.

[Insert Additional Resources]The resources provided above are not an exhaustive list and the Task Force does not endorse reliance on any particular resource. Please also note that the data provided in the resources above may change following implementation of California's Pay Equity Law.

Tool #3 Scenarios for substantially similar work etc.

[Do we want to create an online tool that presents the scenarios for skill, effort, and responsibility?]

Concept: This could be a tool that offers easy-to-access definitions complete with scenarios. Could double with for lawyers definition in some way.

Tool:

Format:

Challenges and Barriers Subcommittee: Jeanna Steele and Jennifer Barrera

Online Tool Information - scenarios of skill, effort, and responsibility: *The materials provided on this website have been provided by individual Task Force members or staff to provide access to resources that are available on the issues considered by the Task Force. The materials provided on this web site are for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem. The materials do not represent the opinions or conclusions of the Task Force. The posting of these materials does not create requirements or mandates.*

Skill. Skill is measured by factors such as the experience, ability, education, and training required to perform a job.

- i) **Example:** CP, a hotel clerk, alleges that she is paid less than a male who performs substantially similar work. CP only has a high school degree, while the male comparator has a college degree. However, performance of the two jobs requires the same education, ability, experience, and training. A college degree is not needed to perform either job. Therefore, the skill required to perform the two jobs is substantially similar.
 - ii) **Example:** CP, a male, works for a telephone company diagnosing problems with customer lines. He alleges that he is paid less than his female predecessor in violation of the EPA. The evidence shows that the job of CP's predecessor required expert training in diagnostic techniques and a high degree of specialized computer skill. The respondent switched to a newer, more advanced computer testing system after CP's predecessor resigned. The job now requires much less overall skill, including computer skill, than was required when CP's predecessor held it. Therefore, the skill is not equal.
 - iii) **Example :** CP, a sales person in the women's clothing department of the respondent's store, alleges that she is paid less than a male sales person in the men's clothing department. The respondent asserts that differences in skills required for the two jobs make them unequal. The investigation reveals, however, that the sale of clothing in the two departments requires the same skills: customer contact, fitting, knowledge of products, and inventory control. Therefore, the skill required for the two jobs may be substantially similar.
- b) **Effort.** Effort is the amount of physical or mental exertion needed to perform a job. Effort may be exerted by two employees in a different way, but may still be similar.

- 2) **Example:** A male employee and a female employee both work as “Assistant Managers,” but the male employee oversees three different stores. Although the female manager only oversees one store, that store is the employer’s largest and brings in the most revenue. The effort used by both employees may be similar.
 - 3)
 - 4) **Example:** A male employee and a female employee are sales account managers. However, the male employee is responsible for the accounting and maintenance of significantly higher revenue accounts than the female employee. Generally, the greater the responsibility imposed, the greater the exertion that is necessary to discharge it. The effort exerted by these two employees may not be similar.
 - 5)
 - 6) **Example:** CP alleges that she and other female grocery store workers are paid less than males who perform substantially similar work. Most of the tasks performed by the males and females are the same. In addition to those same tasks, the male employees place heavy items on the store shelves, while the female employees arrange displays of small items. The extra task performed by the men requires greater physical effort, but the extra task performed by the women is more repetitive, so the amount of effort required to perform the jobs may be or likely substantially the same.
 - 7)
 - 8) **Example:** CP alleges that she and other female grocery store workers are paid less than males who perform substantially similar work. Most of the tasks performed by the males and females are the same, except two of the male grocery store workers also regularly haul heavy crates from trucks into the store. In this case, the effort required to perform the jobs may not be substantially similar. Or...In this case, the employer may be able to lawfully pay a higher rate to the persons who perform the extra task.
- a) **Responsibility.** Responsibility is the degree of accountability required in performing a job.
- 9) **Example:** Two employees work as “Project Managers” and have the same general job descriptions. One manages 20 employees in four different locations and actually performs duties not listed on the job description. The other Project Manager only manages one employee.
 - 10) **Example:** CP, a female sales clerk, claims that a male sales clerk performs substantially similar work for higher compensation. The evidence shows that the male comparator, in addition to performing the tasks that CP performs, is solely responsible for determining whether to accept personal checks from customers. That extra duty is significant because of potential losses if bad checks are accepted. The two jobs may not be substantially similar due to the difference in responsibility.
 - 11) **Example:** CP, a female sales clerk, claims that a male sales clerk performs substantially similar work for higher compensation. CP, her male comparator, and the other sales clerks rotate handling the additional responsibility of determining whether to accept personal checks. In this case, the jobs may be substantially similar.
 - 12) **Example:** CP, a female sales clerk, claims that a male sales clerk performs substantially similar work for higher compensation. The only difference in responsibility between the jobs of CP and her comparator is that the comparator occasionally is given the responsibility for performing a “walk around” inside the building at the end of the day to make sure nothing is out of the ordinary. In this case, the jobs may be substantially similar because the difference in responsibility is minor. However, if the “walk around” of the building requires a substantial amount of time because it is a large facility and includes checking for security of the premises, including entryways, security cameras, and other duties, it may justify a difference in compensation.
 - 13) **Example:** A manager responsible for a 6-person department has a different scope of responsibility than a manager responsible for a 600-person team and therefore the two roles may not be substantially similar.

i)

Comment [DLA1]: More detail needed here.

Comment [DLA2]: From Kevin Kish: “I’d like to see more facts and explanation about why the additional duty (a walk-around of the premises) creates a minor difference in responsibility. It would not necessarily be minor if the employee, upon discovering that something was out of the ordinary, needed to take certain actions or had special authority in that situation. We could simply include more assumptions, such as: ‘Because the comparator is not given any additional authority or responsibilities when he performs the walk-around, the difference in responsibility is minor and the jobs in this case are substantially similar.’”

At the 9/28/17 meeting, Jennifer Barrera said she would add another example for when “walk around” does require more.

Comment [TS3]: Jennifer Barrera’s “walk around” example.

Definitions Subcommittee et al: Jennifer Reisch, Jennifer Barrera, Commissioner Damrell, Doris Ng, Jeanna Steele

1. Substantially similar work when viewed as a composite of skill, effort, responsibility and under similar working conditions

This term requires a comparison of the job held by the person claiming unequal pay with the job of the person who earns more. When comparing the two jobs, keep the following principles in mind:

- **Look at overall job content/Consider the totality of the circumstances**
Example: A female hotel housekeeper alleges she is paid less than a male janitor. When comparing the hotel housekeeper job with the janitor job to determine whether they are substantially similar, one would consider all the duties and responsibilities of each job, and all the facts and circumstances of the work.

Actual job content matters/Jobs titles, classifications, and descriptions employee has the additional significant responsibility of creating daily detailed reports. Although the responsibilities of these jobs may not be substantially similar, one must also consider the other factors (skills, effort, working conditions) to determine if overall the jobs are substantially similar.

Comment [TS4]: Added from Employer materials

- **Precise identity of functions and duties not required/Must evaluate all duties to determine if it requires substantially similar skills, effort, responsibility, as performed under similar working conditions/If only one factor is not substantially similar, that will not necessarily mean the jobs are not substantially similar; must consider remaining factors**

Example: Two employees work as bookkeepers performing the same duties, but the male employee has the additional significant responsibility of creating daily detailed reports. Although the responsibilities of these jobs may not be substantially similar, one must also consider the other factors (skills, effort, working conditions) to determine if overall the jobs are substantially similar.

Comment [TS5]: This bullet does not exist in the Employer materials. Should it?

Jobs that share a common core of tasks are substantially similar/Where the skills, effort, responsibility, as performed under similar working conditions are substantially similar, so are the jobs

Example: A male records clerk who primarily performs duties including typing, filing, and answering phones, performs substantially similar work as compared to a female stenographer, who also primarily performs duties including typing, filing, and answering phones, and the working conditions are the same in that both work in an office setting on the same floor without exposure to any physical hazards.

- **Minor differences in the jobs do not mean jobs are not substantially similar/Occasional performance of certain tasks does not necessarily render the jobs sufficiently dissimilar/Incidental tasks or tasks that consume only a small amount of time will not render jobs sufficiently dissimilar**

Example: Male hospital orderlies spend a small percentage of their time performing cauterizations. Female hospital aides do not perform cauterizations. That difference alone would not necessarily render these two jobs substantially dissimilar where the jobs share a majority of common core duties.

- **Look at the day-to-day content of the jobs over a full work cycle, not just a snapshot**
Example: Two employees perform the same paralegal job, but one works year-round, and the other does not.
- **This element looks at the jobs themselves, not the people who have those jobs**

Example: Two employees perform the same accountant job. To determine whether the jobs are substantially similar, the actual requirements of the jobs are considered. At this point in the analysis, the relative education level, skills, training, experience, etc. of the individuals who are performing the jobs is not relevant. [These factors may be asserted as a defense to any wage disparity.]

- **Effort may be exerted in different way, but may still be substantially similar**

Example: A male employee and a female employee both work as “Assistant Managers,” but the male employee oversees three different stores. Although the female manager only oversees one store, that store is the employer’s largest and brings in the most revenue.

Example: A male employee and a female employee are sales account managers. However, the male employee is responsible for the accounting and maintenance of significantly higher revenue accounts than the female employee. Generally, the greater the responsibility imposed, the greater the exertion that is necessary to discharge it.

- **Similar working conditions means the physical surroundings and hazards/Does not include job shifts**

Example: A female assembly worker is paid less than a male assembly worker in the same department. That he works the night shift does not render their jobs substantially dissimilar. [The employer may point to the shift differential as a potential defense.]

- **Burden of Proof of Prima Facie Case/Affirmative Defenses**

- The employee has the burden to establish a prima facie case that an employee of the opposite sex performs substantially similar work when viewed as a composite of skill, effort, and responsibility and performed under similar working conditions and is paid a higher wage rate.

Comment [TS6]: Should this information remain?

- **Affirmative Defense**

- Once a prima facie case is established, the burden shifts to the employer to prove the wage disparity is based upon one of the four factors: a seniority system, a merit system, a system that measures earning by quantity or quality of production, or a bona fide factor other than sex, such as education, training, or experience, that is consistent with a business necessity and is job related.
- An employer may also prove that the higher paid employee performs additional duties to justify the wage disparity. However, any pay for the additional duties must be commensurate with the higher pay provided.
- Example: An employer may assert defense of a wage disparity based on a factor other than sex between a male art college professor who has significantly more years of experience in teaching and has a master’s degree in art, than a female music college professor, with fewer years of prior teaching but similar education.
- Example: An employer may assert a wage disparity is justified on a factor other than sex where its compensation structure is a merit or reward system that bases salaries for branch managers at a specific, uniform percentage of the branch’s projected earnings.
- Example: A salary retention policy for an employer that rewards an employee based upon length of service may justify a wage disparity if it is applied equally amongst female and male employees and explains the entire wage difference.
- Example: Male employees who perform additional duties only part of the time as compared to female employees, and where such additional work has only limited value

to employer, would not justify a 10% wage difference between male and female employees performing substantially similar work.

Comment [TS7]: Does this belong in the Employee materials?

Case References

The Task Force reviewed the following federal cases and authority to develop the above principles, but only to the extent that the protections and analysis would be similar to the California EPA. The Task Force does not endorse the outcome of these cases.

Comment [DLA8]: As per discussion at 9/28/17 meeting, we are incorporating Jennifer B/Doris's "definitions" document into this document. The "case references" language is from the "definitions" document.

- **Look at overall job content/Consider the totality of the circumstances**
 - *Brennan v. South Davis Community Hospital*, 538 F. 2d 859 (10th Cir. 1976) ("[W]e need not find precise identity of functions before an equal work determination is possible..." "The occasional or sporadic performance of an activity which may require extra physical or mental exertion is not alone sufficient to justify a finding of unequal effort.")
 - *Ewald v. Royal Norwegian Embassy*, 82 F. Supp. 3d 871 (D. Minn. 2014)
 - Plaintiff and male co-worker were hired as two high-level staff of the "New Model Consulate" of Norway located in Minnesota. She held the Higher Education and Research position and he held the Innovation and Business position. She was paid about \$30K less and evidence demonstrated that the positions were equally important and had almost identical responsibilities.
 - Court reasoned that "[w]hether two jobs are substantially equal requires a practical judgment on the basis of all the facts and circumstances . . . [n]either job classifications nor titles are dispositive for determining whether jobs are equal."
 - EEOC Guidance, available at: <https://www.eeoc.gov/policy/docs/compensation.html>
 - "Job content, not job titles or classifications, determines the equality of jobs." See *Katz v. School Dist. of Clayton, Mo.*, 557 F.2d 153, 156-57 (8th Cir. 1977) (teacher's aide performed duties of teacher and job was substantially equal to that of teacher).
 - EEOC Q&A Compliance Manual, available at: <https://www.eeoc.gov/policy/docs/qanda-compensation.html>
 - "How do you determine whether employees are similarly situated? The jobs the employees hold should be similar enough that one would expect the jobs to pay the same. This need not be an overly rigid process. The key is what people actually do on the job, not job titles or departmental designations. Skill, effort, responsibility, and the general complexity of the work are guideposts in determining job similarity."
 - *E.E.O.C. v. Port Authority of New York and New Jersey*, 768 F.3d 247, 256-258 (2nd Cir. 2014)
 - Focus on overall "job content" as a "constant in the context of the EPA;" plaintiff must establish that jobs compared entail common duties, requirements and performance, and do not simply overlap in titles or classifications. Court relies on EEOC regulations to define the underlying criteria of skill, effort, and responsibility, measured in terms of the "performance requirements of the job."

- *Beck-Wilson v. Principi*, 441 F.3d 353, 359–63 (6th Cir. 2006)
 - “Whether a job is substantially equal for purposes of the EPA, is determined on a case-by-case basis and ‘resolved by an overall comparison of the work, not its individual segments.’” (at 359-60)
 - Court compared pay of physicians’ assistants at Veterans’ Administration facilities—most of whom were men—to that of registered nurses in same facilities—most of whom were women, and concluded jobs were substantially equal.
 - Proper focus is on work performed and job requirements rather than on job titles and classifications; focus in determining whether jobs are substantially equal should be on actual job requirements rather than job titles and classifications.
- *Marshall v. Dallas Indep. Sch. Dist.*, 605 F.2d 191, 195 (5th Cir. 1979)
 - Work performed by “custodial helpers” and “maids” was not substantially equal where “custodial helpers” worked all months of year and performed work requiring heavier physical labor than seasonal “maids.”
 - Court emphasizes need to consider all circumstances related to job content. “In applying the various tests of equality to the requirements for the performance of such jobs, it will generally be necessary to scrutinize the job as a whole and to look at the characteristics of the jobs being compared over a full work cycle. This will be true because the kinds of activities required to perform a given job and the amount of time devoted to such activities may vary from time to time.” *Id.* at 195.
- *Conti v. Universal Enters., Inc.*, 50 F. App’x 690, 696 (6th Cir. 2002) (noting that to determine substantial equality “an overall comparison of the work, not its individual segments” is necessary), quoting *Odomes v. Nucare, Inc.*, 653 F.2d 246, 250 (6th Cir. 1981).
- *Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1030 (8th Cir. 2002) (“Whether two jobs are substantially equal ‘requires a practical judgment on the basis of all the facts and circumstances of a particular case’ including factors such as level of experience, training, education, ability, effort, and responsibility.”) (quoting *Buettner v. Eastern Arch Coal Sales, Co.*, 216 F.3d 707, 719 (8th Cir. 2000)).
- *Buntin v. Breathitt County Board of Education*, 134 F.3d 796 (6th Cir. 1998) (“[w]hether the work of two employees is substantially equal ‘must be resolved by the overall comparison of the work, not its individual segments.’”)
- *EEOC v. Port Authority of New York and New Jersey*, 786 F.3d 247, 256-258 (2nd Cir. 2014).
 - “A successful EPA claim depends on the comparison of actual job content; broad generalizations drawn from job titles, classifications, or divisions, and conclusory assertions of sex discrimination, cannot suffice.”
 - “Job codes, again, say nothing of actual job duties and are thus peripheral to an EPA claim. The use of identical evaluative criteria such as ‘project management,’ ‘communication,’ ‘flexibility and adaptability,’ ad ‘attendance,’ moreover speaks only to the breadth of the standards used, not to whether the attorneys subject to evaluation face varying workplace demands.”

- *Chapman v. Pacific Tel. & Tel. Co.*, 456 F.Supp. 65, 69 (N.D. Cal. 1978) ("The regulations and cases make it clear that it is actual job content, not job titles or descriptions which is controlling.")
- **One for one match between skills, effort, and responsibility not required/if one factor is not substantially similar, that will not necessarily mean the jobs are not substantially similar; must consider other factors**
 - EEOC Guidance
 - "If two jobs generally share a common core of tasks, the fact that one of the jobs includes certain duties that entail a lower level of skill would not defeat a finding that the jobs are equal. For example, if two people work as bookkeepers, and one of the individuals performs clerical duties in addition to bookkeeping tasks, the skill required to perform the two jobs would be substantially equal. . . . On the other hand, if the jobs require different experience, ability, education, or training, then the jobs are not equal. For example, a vice president of a trade association could not show that her work was equal to the work performed by other vice presidents, where they performed key policymaking for the association, a skill that her position did not require." See *Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685 (7th Cir. 1998).
 - *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 285-286 (4th Cir. 1974) ("One of the most common grounds for justifying different wages is the assertion that male employees perform extra tasks. These may support a wage differential if the create a significant variation in skill, effort, and responsibility between otherwise equal jobs.")
 - *Brennan v. South Davis Community Hospital*, 538 F.2d 859, 863 (10th Cir. 1976) ("[W]e need not find precise identity of functions before an equal work determination is possible; only substantial equality of skill, responsibility, and effort and similar working conditions must be shown to preclude a wage differential.")
- **Jobs Titles and Job Descriptions are Relevant, but Not Determinative.**
 - EEOC Guidance:
 - "The fact that jobs are in different departments is not determinative, although in some cases it may be indicative of a difference in job content." See *Strag v. Board of Trustees*, 55 F.3d 943, 950 (4th Cir. 1995) (professorship in Mathematics department of university was not substantially equal to professorship in Biology department because of difference in skills and responsibilities required by the departments).
 - *E.E.O.C. v. Port Authority of New York and New Jersey*, 768 F.3d 247, 256-258 (2nd Cir. 2014)
 - Court rejects argument that "an attorney is an attorney is an attorney" and holds that a "successful EPA claim depends on a comparison of actual job content; broad generalizations drawn from job titles, classification, or divisions, and conclusory assertions of sex discrimination, cannot suffice"; in order for jobs compared to be "substantially equal," a plaintiff must establish that the jobs compared entail common duties or consent, and do not simply overlap in titles or classifications.
- *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 822–23 (7th Cir. 2011)

- Job title of "Director of Operations" held by both female and male employees who allegedly were paid more for same work, was irrelevant to EPA claim because title covered multitude of positions differing in authority and responsibility; female employees in air and marine engine manufacturing plant failed to identify any male worker who was paid more for substantially same work; jobs not substantially equal.
- Assessing skill, effort, and responsibility when mixed within same job title. Court rejects application of "comparable worth"; emphasizes that job title is not determinative for comparator groups in context assessing skill, effort and responsibility when mixed within job title, as a "title covers a multitude of positions differing in authority (such as number of employees supervised) and responsibility."
- *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 288 (4th Cir. 1974) ("Job descriptions and titles, however, are not decisive. Actual job requirements and performance are controlling.")
- *Ingram v. Brink's, Inc.*, 414 F.2d 222, 231 (1st Cir. 2005) ("The EPA is more concerned with substance than title.")
- **Jobs that share a common core of tasks are substantially similar/where majority of the skills, effort and responsibility are substantially similar, so are the jobs**
 - EEOC Guidance:
 - In evaluating whether two jobs are substantially equal, an inquiry should first be made as to whether the jobs have the same "common core" of tasks, i.e., whether a significant portion of the tasks performed is the same. See *Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685 (7th Cir. 1998) (critical issue in determining whether two jobs are equal under the EPA is whether the two jobs involve a "common core of tasks" or whether "a significant portion of the two jobs is identical").
 - If a significant portion of the tasks performed in the two jobs is the same, an inquiry should be made as to whether the comparators perform extra duties which make the work substantially different. Jobs with the same common core of tasks are equal, even though the comparators perform extra duties, if the extra duties are insubstantial. See:
 - *EEOC v. Central Kansas Med. Ctr.*, 705 F.2d 1270, 1272-73 (10th Cir. 1983) (janitors and housekeepers performed equal work; any extra work performed by the janitors was insubstantial or was balanced by additional responsibilities performed by housekeepers).
 - *Corning Glass Works v. Brennan*, 417 U.S. 188, 203 n.24 (1974) (noting that Court of Appeals concluded that extra packing, lifting, and cleaning performed by night inspectors was of so little consequence that the job remained substantially equal to those of day inspectors).
 - *Goodrich v. International Bhd. of Elec. Workers*, 815 F.2d 1519, 1525 (D.C. Cir. 1987) (job of female union employee was not substantially equal to that of males who did the same work because males had additional duties which, though consuming little time, were essential to the operation and mission of the union).

- *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 695–97 (7th Cir. 2006)
 - Two jobs are not substantially equal where one employee has broader strategic planning responsibilities, supervisory duties, and authority over personnel than another employee.
 - “In order to determine whether or not two jobs are equal for purposes of EPA, courts look to whether the jobs have a ‘common core of tasks, i.e., whether a significant portion of the two jobs is identical; once a plaintiff establishes a ‘common core’ of tasks, court asks whether any additional tasks make the jobs substantially different” (quoting *Cullen v. Indiana Univ. Bd. Of Trs.*, 338 F.3d 693, 704 (7th Cir.2003)).
- **Minor differences in the jobs do not mean jobs are not substantially similar/occasional performance of certain tasks does not necessarily render the jobs sufficiently dissimilar/incidental tasks or tasks that consume only a small amount of time will not render jobs sufficiently dissimilar**
 - EEOC Guidance
 - “[M]inor differences in the job duties, or the skill, effort, or responsibility required for the jobs will not render the work unequal. In comparing two jobs for purposes of the EPA, consideration should be given to the actual duties that the employees are required to perform.”
 - EEOC Q&A Compliance Manual:
 - “How similar do jobs have to be under the Equal Pay Act? Under the Equal Pay Act, jobs must be substantially equal, but not identical. Therefore, minor differences in job duties, or the skill, effort, or responsibility required for the jobs will not render them unequal. Also, differences between the people in the jobs are not relevant to whether the jobs are substantially equal, though differences in qualifications could ultimately be a defense to a claim of pay discrimination.”
- OFCCP Sex Discrimination Guidelines Revised 2016 - 41 CFR 60.4(a)
 - “Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others.”
- *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir. 1970) (10% wage differential not justified despite fact that male selector-packers spent up to 18% of their time on 16 tasks not performed by females, the work in general was “substantially identical” under EPA).
- *Brennan v. South Davis Cmty. Hosp.*, 538 F.2d 859, 862 (10th Cir. 1979) (minimal amount of time spent by orderlies performing catheterization of patients each day, even though it was task requiring some skill, did not justify differential in pay between male orderlies and female aides; court reasoned that disparity is “not justified by performance of extra duties of equal skill effort and responsibility, when supposed extra duties do not in fact exist, or when extra task consumes minimal amount of time and is of peripheral importance.”).

- **Look at the day-to-day content of the jobs**
 - *Marshall v. Dallas Indep. Sch. Dist.*, 605 F.2d 191, 195 (5th Cir. 1979).
 - Work of “custodial helpers” and “maids” was not substantially equal where “custodial helpers” worked all months of year and performed work requiring heavier physical labor than “maids.”
 - Court emphasizes need to consider all circumstances related to job content. “In applying the various tests of equality to the requirements for the performance of such jobs, it will generally be necessary to scrutinize the job as a whole and to look at the characteristics of the jobs being compared over a full work cycle. This will be true because the kinds of activities required to perform a given job and the amount of time devoted to such activities may vary from time to time.” *Id.* at 195.
 - *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 770 (7th Cir. 2007) (job of female manager who supervised six-acre park with limited facilities was not equal in terms of skill, effort, and responsibility required to that of male manager who was to oversee much larger park with extensive facilities including pool).
 - *Katz v. School Dist.*, 557 F.2d 153, 156 (8th Cir. 1977) (“two employees are performing equal work when it is necessary to expend the same degree of skill, effort, and responsibility in order to perform the substantially equal duties which they do, in fact, routinely perform with the knowledge and acquiescence of the employer”).
- **This element looks at the jobs themselves, not the people who have those jobs**
 - EEOC Guidance
 - “The important comparison in determining whether the “equal work” requirement is met is the comparison of the jobs, not the people performing the jobs. Thus, a difference between the comparators has no bearing on whether the jobs are equal. The critical question at this point in the analysis is whether the jobs involve equal work. However, a difference between the comparators could qualify as a defense to a compensation disparity.”
 - *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533 (11th Cir. 1992) (“A plaintiff establishes a prima facie case by comparing the jobs held by the female and male employees, and by showing that those jobs are substantially equal, not by comparing the skills and qualifications of the individual employees holding those jobs.”)
- **Effort may be exerted in different way, but may still be substantially similar**
 - 29 C.F.R. § 1620.17 (Differences in the degree of responsibility required in the performance of otherwise equal jobs cover a wide variety of situations.)
 - OFCCP Final Rule (41 C.F.R. § 60-20.4 Discriminatory Compensation)
 - “Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others.”

- *Chapman v. Pacific Tel. & Tel. Co.*, 456 F.Supp. 65, 69-70 (N.D. Cal. 1978) ("Effort is measured by the amount of physical and mental exertion needed for the performance of the job. Responsibility reflects the degree of accountability required in the performance of the job. In this case, involving a comparison of managerial jobs, these two factors are closely related; the greater the responsibility imposed, the greater the exertion necessary to discharge it.")
- **Similar working conditions means the physical surroundings and hazards/does not include job shifts**
 - EEOC Guidance:
 - "While a difference between night and day work is not a difference in 'working conditions,' it could constitute a 'factor other than sex' that justifies a compensation differential. A shift differential operates as a defense only if both sexes have an equal opportunity to work either shift, if sex was not the reason the employer established the compensation differential, and if there is a business purpose that the shift differential is being used reasonably to serve."
 - *Shultz v. American Can Co.-Dixie Prods.*, 424 F.2d 356, 361 (8th Cir. 1970).
 - No justification for paying male night-shift workers more than female day-shift workers; males had to load heavy rolls of paper, but this consumed only small amount of time, and employer's own pay practices suggested that this was not real reason for disparity.

Burden of Proof;/Affirmative Defenses:

- *Bearden v. International Paper Co.*, 529 F.3d 828, 833 (8th Cir. 2008) ("Once an employee has established a prima facie case, the burden shifts to the employer to prove any of four statutory affirmative defenses.")
- *Beck-Wilson v. Principi*, 441 F.3d 353, 363 (6th Cir. 2006) ("Because the comparison at the prima facie state is of the jobs and not the employees, 'only the skills and qualifications actually needed to perform the jobs are considered.' Factors like education and experience are considered as a defense to an employer's liability rather than as part of a plaintiff's prima facie case.")

We therefore held that the Equal Pay Act's exception that a factor other than sex can be an affirmative defense, 'does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason.' "

- *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 695 (7th Cir. 2006)
 - "Under the EPA, differences in education and experience may be considered factors other than sex."
 - "An employer may take into account market forces when determining the salary of an employee."

Comment [TS9]: Do these cases belong in Employee materials?

What do I do if I am being paid inequitably?

If you learn you are being paid inequitably there are several options for you to seek equal pay for substantially similar work:

- Talk to your boss. The *Equal Pay Act* protects you from retaliation for asking and from employers basing differences in pay from prior salary...[need text]



- Talk to your union or union representative. [need text]
- File a complaint.

[Insert Tool #8 Fair Pay Act tool]

Tool #8 about the Fair Pay Act

Concept: This document or tool could explain the Fair Pay Act in terms that are applicable to all audiences. Maybe divide the document into section for audience so it can be one tool. This is law as an overview for everyone and anyone. May want a leg counsel interpretation. This should also be everything except detail about the definitions and scenarios (which could be a different document).

Tool:

Format:

Subcommittee on Employees: Rhoma Young and Tamekia N. Robinson

Am I being paid equitably under the Fair Pay Act of 2015?

So what if you've been at a job long enough, suspect that you might be doing similar work to men at your company or agency, and think they might be getting paid more than you are? You'd like to do some research, but where do you start? Below are pay gap calculators you might find useful to help estimate if there is a gender pay gap where you work.

- Pathways to Equity: Women and Good Jobs <http://womenandgoodjobs.org/>
- Closing the Gap: 50 years Seeking Equal Pay <http://www.womenwagegap.org/tools>
- Economic Policy Institute: What Could You Be Making? <http://www.epi.org/multimedia/gender-pay-gap-calculator/>

Challenges and Barriers Subcommittee: Jennifer Barrera and Jeanna Steele

Federal and State Laws concerning Equal Pay

- (10) What state and federal agencies enforce equal pay laws?

In California, the Labor Commissioner's Office (also known as the Division of Labor Standards Enforcement or DLSE) has the authority to enforce Labor Code Section 1197.5, which prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of the opposite sex, or of a different race or ethnicity for substantially similar work. See https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm. The Department of Fair Employment and Housing (DFEH) enforces the Fair Employment and Housing Act (FEHA), which among other things, precludes the discrimination in employment on the basis of gender, ethnicity, and race. Paying different wages due to an employee's gender, race, or ethnicity is considered discrimination.

At the federal level, the Equal Employment Opportunity Commission (EEOC) enforces the federal Equal Pay Act, which requires employers to pay employees of the opposite sex, or of a different race or ethnicity equally for equal work performed in the same establishment. The EEOC also enforces Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967, and Title I of the American Disabilities Act of 1990, which preclude discrimination in employment, such as unequal compensation, based upon protected classifications.

- (11) What are the main differences between California's Equal Pay Act and the Federal Equal Pay Act (EPA)?

Before SB 358 (Jackson), which became effective January 1, 2016, California's Equal Pay Act was very similar to the EPA. The significant changes made to the California law were: (1) changing the term "equal work," to "substantially similar work when viewed as a composite of skill, effort, and

responsibility” to reflect existing case law (*see* definitions and examples); (2) eliminating the “same establishment” requirement for purposes of comparing wages of employees who perform substantially similar work; and (3) defining “bona fide factor” to mean that the employer’s reason for the pay difference must be job related and satisfy a business necessity; (4) specifying that an employer cannot prohibit employees from discussing their wages; (5) prohibiting retaliation against employees who exercise their rights under the law or assists another employee with exercising their rights under the law.

Under the federal EPA, comparison of wages is still limited to employees at the same physical establishment and is limited to equal pay for equal work.

- (12) Does California law require employers to pay all employees who perform the same or substantially similar job the same wage rate?

California law requires equal wages for employees of the opposite sex, or of a different race or ethnicity, who perform the same or substantially similar work. An employer can still adjust wages based upon factors such as seniority, merit or performance, or another bona factor such that is job related and necessary for the business such as education, training, experience, or the geographical location of the employee and cost of living in that area. Employers should consider conducting a privileged pay equity analysis to determine whether wages should be adjusted within their organization to comply with the Equal Pay Act.

- (13) Does an employer have to conduct a pay equity analysis of all employees’ wages?

There is no mandate to conduct an audit. However, it may be a good practice for employers wishing to proactively comply with the law. Employers may want to consider conducting any audit with the advice of an attorney or HR professional.

- (14) What is the liability an employer can face if there is a wage differential that cannot be explained or justified by one of the recognized or bona fide factors?

An employer could face an enforcement action by one of the above listed state or federal agencies or a civil lawsuit, and may potentially have to pay back wages, liquidated damages, lost work benefits, attorney’s fees, etc. If there is discrimination or retaliation involved, emotional distress and punitive damages may also be assessed.

- (15) What can an employer do to comply with the California Equal Pay Act and the federal EPA?

Although not required, an employer can take several proactive steps to comply with California’s Equal Pay Act and the federal EPA:

- (g) An employer can conduct an annual or regular audit of its pay practices and employee wages to identify any significant disparities in wages amongst employees who perform the same or substantially similar work and make any compensation adjustments as necessary.
- (h) Employers should regularly review job descriptions to make sure that the description accurately reflects the overall job content, including the required skill, effort, and responsibility for that position. Although job titles, classifications, or descriptions are not determinative of whether two employees are performing substantially similar work, it is relevant and does provide some basis for comparison.
- (i) An employer should also educate its managers and supervisors who make compensation recommendations regarding the law and what factors they can and cannot utilize in their decision making.
- (j) An employer should document all compensation decisions and identify the basis for any adjustments. An employer should retain such documents for no less than 4 years (*See Chart of Employer Record Retention Requirements*).



Employees

- (k) An employer should systematize documentation of the factors relied upon to support difference in wage rates between employees (e.g., education, experience, etc.). This practice encourages pay equity and can be referenced if the employer's compensation decisions are challenged.
- (l) Employers should not retaliate and clearly prohibit retaliation against employees for asserting rights under California or federal fair pay laws, as well as ensure that they have a reporting mechanism in place for complaints. This can be part of an employer's existing equal employment opportunity policy.

(16) Can an employee discuss his or her wages with other employees?

Employees can discuss wages with one another, including asking an employee about his or her wages, without fear of retaliation by the employer. There is no obligation on any employee to disclose his or her wage or engage in these discussions. Employers can take reasonable measures to protect the privacy of information regarding employees' compensation, including prohibiting employees who have access or control over confidential wage information given their job duties and responsibilities, from disclosing such information without the consent of those employees. However, employers should be cautious about employees' rights under the Labor Code to report violations as well as assist employees with their rights to pursue equal pay.

(17) Who can an employee contact if the employee believes the employer has violated the California Equal Pay Act?

An employee can contact the Division of Labor Standards Enforcement:
<http://www.dir.ca.gov/dlse/DistrictOffices.htm>.

An employee can contact the Department of Fair Employment and Housing:
<http://www.dfeh.ca.gov/contact-us>.

(18) How does the California Equal Pay Act define "wage rate"?

[Wage Rate Definition to be provided by the Definitions Subcommittee]

For further information regarding frequently asked questions about California's Equal Pay Act, please visit the Division of Labor Standards Enforcement website: http://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm.

Looking for Work



Website Text & Pay Equity “Tools” “Resources” for Review

DRAFT



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Disclaimer: These are suggested practices only. Pay equity analyses are not required under the *Fair Pay Act*. The suggestions provided here are to help employers begin to think about pay equity at their organizations. Before beginning any pay equity analysis, we encourage employers to consult with legal counsel who are knowledgeable in employment law and pay equity because what is legally appropriate for any given employer depends upon that employer's unique circumstances.

Where can I go to find out information about jobs/careers in which I may be interested?

The first step in a job search is deciding which job/career you wish to consider. California's Employment Development Department (EDD) My Next Move website (<https://www.mynextmove.org/>) will help you choose from many possible jobs based on your interests, skills, education, personality, desired salary, experience, and knowledge. If you are not sure what you want to do, EDD's Labor Market Information for Job Seekers and Students (http://www.labormarketinfo.edd.ca.gov/LMID/SelfAssessment_for_Career_Exploration.html) even provides self-assessments so you can match *you* to a job or career.

California Occupational Guides (<http://www.labormarketinfo.edd.ca.gov/occguides/>) and Occupations in Demand (<http://www.labormarketinfo.edd.ca.gov/data/occupations-in-demand.html>) will also help you find out more about which jobs are in growing fields and offer more opportunities, education/training for those jobs, and what might be the basic pay rate for new and more experienced staff. This site even tells you where those jobs are in California and specific companies that hire people in the job you want.

Another great resource is American Job Centers (<https://www.careeronestop.org/site/american-job-center.aspx>) where they can help you look for and apply for a job.

But I need to make sure I make enough money, what do I do?

Before you even begin applying for jobs or interviewing, you're right, you need to be aware of what possible pay ranges or options exist. Doing so will help guide your research into what training you might need to increase your earnings and other requirements for possible jobs. And, you can use pay range information when you interview and are hired to make sure you are asking for and being offered pay that is similar to people with similar jobs.

Labor Market Information on EDD's website occupation profiles (<http://www.labormarketinfo.edd.ca.gov/occguides/>) also offers basic information about potential salaries and pay rates for specific jobs. This tool is a handy way to learn about the possible income/pay rate for a job in which you are interested.

What is the gender pay gap, and why should I care?

Starting out in the same pay range as men is a good idea to avoid a gender pay gap over your lifetime. Gender pay gaps happen when men are paid more than women are for substantially similar work. The pay gaps at companies are often produced and made larger during the hiring process. If a company offers women applying for jobs pay rates below what men are getting paid for doing substantially similar work, the pay gap can begin, continue, and get wider if she accepts the job. Once women earn less, even when they are awarded raises, those raises build on what they currently earn. So, if a woman starts out being paid lower than a man, then her pay will likely stay lower even if they are given the same raises. And, in some cases, when women promote or switch jobs, their prior salaries can be factored into their new salaries.

[Insert Tool #1 wage rate tool here]



Negotiating for a fair wage can be a difficult task requiring more than just confidence. Effective wage negotiation also requires good information. There are free sites on the web (<https://www.pon.harvard.edu/daily/negotiation-skills-daily/negotiation-skills-whats-the-best-process/>) that can tell you more about how to negotiate so you feel more comfortable. There are also free courses about negotiation among many topics (<https://www.coursera.org/courses?query=negotiation>). These sites do have courses that cost money, but we emphasize using the free alternatives..

Tool #1 Wage data information

[Do we want to create an online tool about wage rate information?]

Concept: For employers this can refer to market information. For all this can refer to what the gender wage gap is in California.

Tool:

Format:

Notes: EDD/LMID information is good for employers if they do not want gender information. Also, the BLS numbers are for the U.S. Perhaps update this each year (save the code and rerun the numbers each new ACS release).

- I suggest running the numbers for occupations in California.
- All of the other links can be transferred to the resources list that is under “general.”

Example: Finally, here’s the link to the straight table of occupations with the 2016 median annual wages of full-time workers by gender: <http://www.bls.gov/cps/cpsaat39.pdf>

Example: Applicants who are seeking jobs or employees who are negotiating for a higher wage or salary should research the median wages for the same or similar position in their geographical area to determine what amount is reasonable. Additionally, employers who are hiring new employees or evaluating existing employees’ compensation, should review market data on median wages as well.

Challenges and Barriers Subcommittee: Jeanna Steele and Jennifer Barrera

Online information - Market data information EDD

There are many resources that employers and employees may wish to consult to determine appropriate compensation for a particular role. Please also note that job titles are not determinative but just an initial step in determining appropriate compensation for a particular role. The Task Force recommends consulting resources that provide a pay range, rather than the median compensation for a particular role. It is also recommended that more than one resource be consulted. Possible resources include, but are not limited to:

- California’s Employment Development Department. The California EDD provides quarterly information regarding median wages paid for various positions in different regions of the state. See <https://data.edd.ca.gov/Wages/Occupational-Employment-Statistics-OES-/pwxn-y2q5>.
- **The Department of Labor Bureau of Labor Statistics: Occupational Outlook Handbook.** The Department of Labor Bureau of Labor Statistics publishes the Occupational Outlook Handbook, which provides information about the characteristics of various jobs, the skills, education and training required for them, typical salaries and future outlook for the occupation. It is organized by job family. See <http://www.bls.gov/ooh/>.



- **The Department of Labor Bureau of Labor Statistics: O*Net Online.** The DOL also publishes O*Net Online, which is a deep database that provides job related info by a number of different search techniques, such as industry, occupation growth rates, level of training and preparation needed (job zones) and other characteristics. See <https://www.onetonline.org/>.
 - See also the median weekly earnings of full-time and salary workers by detailed occupation and sex at <http://www.bls.gov/cps/cpsaat39.pdf>.
- **Glass Door.** Glass Door is a database of information about employers that includes salary reports submitted by both employer and employee users of the site. See <https://www.glassdoor.com/index.htm>.
- **Salary.com.** Salary.com is a database that allows employers to analyze their internal pay practices against market rates. See <http://www.salary.com/>.
- **Payscale.** Payscale is a database that compiles individual salary profiles through crowdsourcing and big data technologies for use by employers and employees. See <http://www.payscale.com/>.

[Insert Additional Resources]The resources provided above are not an exhaustive list and the Task Force does not endorse reliance on any particular resource. Please also note that the data provided in the resources above may change following implementation of California's Pay Equity Law.

Once I have an idea of what job/career I want, where do I find open jobs?

To find open jobs, it is helpful to go to a basic career website or portals that advertise and announce current job openings. Begin exploring jobs that are open by going to sites like Cal Career, <https://www.ccregistry.org/jobs/searchForm.aspx>, Craigslist, <https://csucareers.calstate.edu/>, Glassdoor, higheredjobs.com, Idealist, Indeed, Monster, San Francisco Business Times Books of Lists, <https://jobs.universityofcalifornia.edu/>, or unionjob.com.

Ask family and friends about what they do. What do they dis/like about their jobs? Their responses will not make your job decision for you, but information from people who are already doing the job you might want to do are good starting points to spark your interest. Finding out from other people what they like and do not like about their jobs can help you build a list of possible job titles and occupations to explore.

How do I create a résumé and cover letter once I am ready to apply?

Do you have an up-to-date-résumé? If not, free résumé templates can guide you as you develop your personalized resume (<https://templates.office.com/en-us/Resumes-and-Cover-Letters>).

Whether you are building your résumé from scratch or have one already, try signing up for LinkedIn. LinkedIn is a social media site you can freely join, similar to Facebook, but for job seekers and those already employed. The site prompts you to enter information about your work experience, education, skills, accomplishments, and interests. Saving your information on a site like LinkedIn is useful:

- It stores your résumé information in one place easily updated.
- You can look at other people's profiles to think about how to create yours.
- LinkedIn allows you to convert your information into a résumé format (<https://www.resumonk.com/resume-builder/help/import-from-linkedin>).
- You can connect with people who are already in the jobs you want.

Remember as you apply for job:

- Keep track of the jobs you apply and any follow-up you want to do.



[Insert Tool #10 Job Tracking]

- Connect your skills to a job announcement by emphasizing those skills you have that match what the employer is asking for.
- Write a compelling cover letter. There are many websites with examples of cover letters. (<https://www.careeronestop.org/ResumesInterviews/Letters/CoverLetterTemplate.aspx> and <https://www.thebalance.com/best-cover-letters-a-z-list-of-examples-2060172>)

Tool #10 Job tracking

[Do we want an excel template for the site that helps job seekers track their applications etc?]

Concept: This could be an excel sheet to help people looking for work track the jobs they want to apply for, the ones they apply for, following up, names, contacts etc.

Tool:

Format?

Employee subcommittee: Tamekia N. Robinson and Rhoma Young

Checklist for beginning a job search.

This checklist will help you to ask the right questions to get you started on your job search. Answering these questions and using the free tools suggested above will bring you closer to choosing the right occupation for you and to be paid fairly for the work.

About me:

- What are my qualifications, skills, and experience (have check boxes derived from EDD's website)?
- What is my education level?
- What is a reasonable salary/pay range for me to start? To earn after two years?

About jobs:

- What kinds of jobs sound interesting to me?
- How much do people usually earn in this job?
- Is there a gender pay gap in this occupation?
- Is there a demand/anticipated need for this occupation in my area and in the state?
- Who should I talk to find out more about this occupation? (Informational Interviews? Research? Linked in? Associations?)
- Do my current qualifications, skills, and experience already *match* the job requirements?
- What kind of training do I need?
- How and where do I get needed training? Community Colleges? Free online courses? How long will it take?
- How much will the training cost?
- Is there available public transportation to these jobs?

How do I connect with a prospective employer?

Networking. Networking is the key process by which people find jobs. It means asking questions and getting into conversations with everyone you can think of and anyone your personal connections can think of about their jobs.

LinkedIn. A good networking tool that also helps you organize your qualifications, skills, experience, and education is LinkedIn. LinkedIn has free services that allow you to create an employee profile about you that employers can



see. It also helps you to connect with other people who are in the jobs you want so you can ask them questions and learn more about the job you want.

Informational interviews. happen when you meet with a prospective employer, ask them more about the job you want, and provide them more information about you. It can be done in-person, on the phone, and even via chat online.

[Insert tool #11 for informational interviewing]

Industry, occupation, professional, and trade organizations and associations form a very important role in networking. These organizations and associations are often national, but they do have local and regional connections. Go online and search for associations and organizations that include the occupations in which you want to work. For example, if you are interested in information technology or computers then you could look into the Women in Technology Association (<http://www.womenintech.org/>) or National Center for Women and Information Technology (<https://www.ncwit.org/>). Or, if you are interested in helping professions you might look into the California Chapter of the National Association of Social Workers (<http://www.naswca.org/>). If you are using LinkedIn, search for the association there and join online. Attend meetings and conferences of the associations and organizations representing the industry and occupations in which you are interested and call or message them to ask questions about the occupation and jobs.

[insert tool #12 that lists all associations in California]

Tool #11 informational interviewing

[Do we want an excel template for the site that helps job seekers prepare for informational interviewing?]

Concept: Important questions and topics for women to ask people who are in careers they want. This could be a part of a looking for work excel spreadsheet tool.

Tool:

Format:

Employee Subcommittee: Rhoma Young and Tamekia N. Robinson

Informational interviewing

Informational interviewing with other women in a company or occupation in which you're interested is a great strategy to get to know a potential employer or an industry, how compensation is structured, and how different jobs are evaluated.

Acknowledging what they've accomplished is a great conversation starter. Start with, "You have a great reputation for being knowledgeable and experienced in your field," or some similar observation. If you have a personal referral, that's even better. Let your prospective employer know who you know. Ask if they have time to talk informally, "Do you have time to talk for about 15 minutes?" As they are talking about themselves the conversation often continues longer, and you have more opportunities to let them get to know you, too. Possible or sample questions to ask and information to share during an informational interview include:

- How did you get to where you are today?
- How did you start off?
- Did you have a firm idea of what you wanted to do and how to get there?
- If not, what is the progression to get to where you are?

- I don't know exactly what I want to do, but the important things to me are the ability to contribute, to grow, and to learn. I am curious about everything. I enjoy working hard and taking pride in what I have accomplished.
- What do you suggest as the most practical and effective way to find out about different careers in (general field)?
- Is it your perspective that there is a growing demand for (occupation)?
- Is the field already crowded?
- Do you feel you are in the right job? The right field? How? When did you know that you were in the right job?
- Do feel you are fairly paid? Is there a difference in how men and women are paid in (company name or industry)?
- If you were starting over today, would you make different choices? What would you choose differently?
- If you knew what you know now about being a (occupation) would you do it again? What do you wish you had done differently, if anything?
- Does a person in your field need to be flexible? How? A lot? Is that an issue?
- Is there anyone else you would suggest I speak with? What particular reason do you have in making that suggestion? Or, what should I say when I contact this person?

Tool #12 California associations

[Do we want a list of all California associations and contact information?]

Concept: Name and contact information of all occupation and industry associations in California. Regional. Maybe? Conference information? This could be a part of the looking for work excel tool. Associations comes up in the looking for work information and this might be a good thing to have on hand and in the website.

Tool:

Format:

Question/Answer	Source or Needs to be written
<ul style="list-style-type: none"> What is the FPA? <ul style="list-style-type: none"> <u>Answer with base level information about the Fair Pay Act.</u> <u>On January 1, 2016, the Fair Pay Act of 2016 took effect and strengthened the requirement that men and women doing “substantially similar” work be paid equally and provided greater protection against retaliation for workers who talk or ask about pay.</u> 	<p>ERA’s FAQs re CA FPA, at https://www.equalrights.org/legal-help/know-your-rights/california-fair-pay-act/ (“ERA FAQ”); August 1st Taskforce Binder p. 13 <u>Taken directly from ERA’s FAQ page</u></p>
<ul style="list-style-type: none"> Can my boss pay me less than my coworker? <ul style="list-style-type: none"> <u>Answer with info about the FPA and substantially similar work</u> <u>An employer can pay you less than a coworker of a different sex, race or ethnicity who performs substantially similar work under similar working conditions if it can demonstrate that the pay difference is based on one or more of the following factors:</u> <ol style="list-style-type: none"> <u>1. A seniority system (a system that bases pay on the time you’ve worked for the company or in a certain position);</u> <u>2. A merit system (an objective system of evaluating and paying employees based on their performance);</u> <u>3. A system that measures earnings by quantity or quality of production (a pay system based on how much you produce at work, such as under a piece rate or commission system); or</u> <u>4. A bona fide (i.e. real or authentic) factor other than sex, such as education, training or experience as long as this factor is:</u> <ul style="list-style-type: none"> <u>* NOT based on or derived from a sex, race or ethnicity-based differential in compensation (for example, an employee’s height or weight, which are often used as a proxy for sex) and</u> <u>*Related to the job in question; and</u> <u>*Consistent with business necessity (which means that it effectively fulfills an overriding legitimate business purpose.)</u> <u>My coworker is making more than me, even though I have been at my job longer and I have a more senior title. Is this legal?</u> <ul style="list-style-type: none"> <u>Answer highlighting substantially similar work</u> <u>I make less than a coworker, but I have more responsibility and more education and experience. Does the Fair Pay Act apply to me?</u> 	<p>https://www.equalrights.org/legal-help/know-your-rights/california-fair-pay-act/ERA-FAQ</p>
<ul style="list-style-type: none"> My coworker is making more than me, even though I have been at my job longer and I have a more senior title. Is this legal? <ul style="list-style-type: none"> Answer highlighting substantially similar work 	<p>Draw from information in August 1st Taskforce Binder pp. 120-122</p>
<ul style="list-style-type: none"> I make less than a coworker, but I have more responsibility and more education and experience. Does the Fair Pay Act apply to me? 	

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<ul style="list-style-type: none"> ▪ Answer highlighting composite approach 	<p>Draw from August 1st Taskforce Binder pp. 24 – 26.</p>
<ul style="list-style-type: none"> ○ I make less than someone who has my same job at a different location. Does the FPA protect me? 	
<ul style="list-style-type: none"> ▪ <u>Answer explaining that you don't have to work in the same location but do need to have similar working conditions.</u> ▪ <u>Working in different locations would not (by itself) justify a difference in pay. "Similar working conditions" means that their working environment and situation must be similar and does not mean that they must necessarily work at the same job site or physical location.</u> ▪ <u>Example: if two employees of a coffee shop chain perform work that is substantially similar in terms of the skill, effort, and responsibility involved at two different locations, which share the same basic features, sell similar products, and serve a similar volume of customers, they are still working under "similar working conditions."</u> 	<p>ERA FAQ https://www.equalrights.org/legal-help/know-your-rights/california-fair-pay-act/</p>
<ul style="list-style-type: none"> ○ Can my boss pay me less because I work a different shift? 	
<ul style="list-style-type: none"> ▪ Answer highlighting similar working conditions requirement 	<p>August 1st Taskforce Binder pp. 32, 121</p>
<ul style="list-style-type: none"> ○ I moved into a different position and the person who replaced me has less experience than me and is making more than I was at that position. Is this allowed? 	
<ul style="list-style-type: none"> ▪ Answer explaining that the FPA may apply to your predecessors and successors. 	<p>Draw from August 1st Taskforce Binder pp. 119</p>
<ul style="list-style-type: none"> ○ My coworker was hired at a wage higher than mine. Is this allowed? 	
<ul style="list-style-type: none"> ▪ Answer highlighting substantially similar work 	<p>Draw from August 1st Taskforce Binder pp. 120-123</p>
<ul style="list-style-type: none"> ○ My boss hasn't given me a raise in a long time. That seems unfair to me. 	
<ul style="list-style-type: none"> ▪ Answer explaining what the FPA means by "fair." 	<p>Needs to be written</p>
<ul style="list-style-type: none"> ○ I have a second degree and more experience than someone who does a different job with much less responsibility than mine, but that person is getting paid more. Is this allowed? 	
<ul style="list-style-type: none"> ▪ Answer explaining what the FPA means by "fair." 	<p>Needs to be written</p>
<ul style="list-style-type: none"> • I think I'm being paid unequally, but I'm not certain. How can I find out? 	

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<ul style="list-style-type: none"> ○ <i>Link to chart of resources on how to find out about pay in your area</i> 	August 1 st Taskforce Binder pp. 199-200.
<ul style="list-style-type: none"> ○ <i>Text answer with tips on how to talk to your boss, coworkers, etc. about your pay.</i> 	ERA FAQ; tips on talking to boss need to be written
<ul style="list-style-type: none"> ▪ Am I allowed to talk to my coworkers about their pay? 	
<ul style="list-style-type: none"> • <u><i>Answer with info about pay secrecy and retaliation.</i></u> • <u><i>Under the CA Equal Pay Act, it is illegal for an employer to forbid an employee from disclosing his or her wages, talking about his or her coworkers' wages, asking about another employee's wages, or helping or encouraging coworkers in exercising their right to equal pay.</i></u> • <u><i>It is also illegal for an employer to retaliate against or discriminate against you or engaging in any of this conduct or for complaining to your employer or to a government agency or court about being paid less than a co-worker of a difference sex, race or ethnicity.</i></u> 	ERA FAQ; August 1 st Task Force Binder pp. 15, 21 https://www.equalrights.org/legal-help/know-your-rights/california-fair-pay-act/
<ul style="list-style-type: none"> ▪ I tried talking to my coworkers and then my boss reduced my hours. Is that allowed? 	
<ul style="list-style-type: none"> • <u><i>Answer about retaliation with examples of retaliation.</i></u> • <u><i>It is illegal for an employer to fire you, demote you, reduce your work hours, or reduce your pay because you complained about being paid less than a co-worker of a different sex, race, or ethnicity, or you spoke out against a practice of paying employees unequally.</i></u> 	ERA FAQ & August 1 st Taskforce Binder pp. 21, 191 https://www.equalrights.org/legal-help/know-your-rights/california-fair-pay-act/
<ul style="list-style-type: none"> • I know that I am being paid less than a coworker who does the same job as me. What can I do? 	
<ul style="list-style-type: none"> ○ <i>1. Talk to your boss/HR and keep a paper trail</i> 	

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<ul style="list-style-type: none"> ▪ <u>Link to tips on how to talk to your boss and keep good records.</u> ▪ <u>The law forbids your employer from punishing you for asking your employer or coworkers about how much they make. Do so if you feel comfortable and reach out to those you trust.</u> ▪ <u>Record any information you discover about your coworkers' pay in a notebook or another safe place not accessible to your employer.</u> ▪ <u>Keep copies of your pay stubs and any other documents about your pay (including benefits packages, etc.)</u> ▪ <u>Investigate whether your employer has any written policy regarding how pay decisions are made.</u> ▪ <u>Keep doing a good job and keep a record of your work. Keep copies at home of your job evaluations and any letters or other documents that show that you do a good job at work.</u> 	<p>ERA FAQ; information on talking to boss needs to be written</p> <p>https://www.equalrights.org/legal-help/know-your-rights/california-fair-pay-act/</p>
<ul style="list-style-type: none"> ○ 2. Talk to your union rep if you have one <ul style="list-style-type: none"> ▪ <u>Link to information about union rights/how to form a union</u> 	<p>Needs to be written – draw from August 1st Taskforce Binder pp. 107-09</p>
<ul style="list-style-type: none"> ○ 3. File a written complaint with your company <ul style="list-style-type: none"> ▪ <u>Link to information on filing internal complaints, how they differ from</u> ▪ <u>Check your employee handbook for information about complaint procedures. Your company may have an Equal Employment Opportunity Officer, a Human Resources Department, or another way for you to file a formal internal complaint.</u> ▪ <u>If there are not written procedures, ask your employer how you should go about filing a complaint with the complaint.</u> ▪ <u>Submit any complaint you make to your employer in writing and include a date.</u> 	<p>ERA FAQ; August 1st Taskforce Binder pp. 13, 19</p> <p>https://www.equalrights.org/legal-help/know-your-rights/california-fair-pay-act/</p>
<ul style="list-style-type: none"> ○ 4. File a complaint with an administrative agency and/or court 	

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<ul style="list-style-type: none"> ▪ <u>Link to information on how to file</u> ▪ <u>If you wish to file a legal claim, you can do so by filing a lawsuit in a court or by a filing a claim with the California Division of Labor Standards Enforcement, or DLSE or "Labor Commissioner."</u> ▪ <u>Whether you file your claim for unpaid wages with the DLSE or go directly to court, the law requires you to do so within a certain time period, generally within two years of the last time you were paid unequally.</u> 	ERA FAQ & August 1 st Taskforce Binder pp. 20, 106 https://www.equalrights.org/legal-help/know-your-rights/california-fair-pay-act/
<ul style="list-style-type: none"> ○ What are some things (information, documents, etc.) that I will need before I file? 	
<ul style="list-style-type: none"> ▪ Answer with checklist of things to have (pay records, info about comparator, info about any differences from comparator's job, as much info as possible about comparator's education and experience, timeline of any meetings with HR, information or evidence of any wage differentials and/or retaliation, etc.) 	Checklist needs to be written- draw from ERA FAQ
<ul style="list-style-type: none"> ○ Where can I get help if I need more assistance? 	
<ul style="list-style-type: none"> ▪ Link to ERA, LAAW, and others that can provide assistance 	ERA FAQ & August 1 st Taskforce Binder pp. 201-02
<ul style="list-style-type: none"> • If I no longer work at the job where I think I was paid less than someone who did the same work as me, can I still try to recover the money I am owed? 	
<ul style="list-style-type: none"> ○ Answer explaining statute of limitations 	ERA FAQ & August 1 st Taskforce Binder p. 19.
<ul style="list-style-type: none"> ○ I have passed the deadline to file. Is there anything else I can do? 	
<ul style="list-style-type: none"> ▪ Answer explaining options are limited once the statute is up. 	August 1 st Taskforce Binder pp. 13, 19. Information about what to do once the statute is up needs to be written.
<ul style="list-style-type: none"> ▪ Link to tips on how to talk to your employer to make sure you're not currently experiencing a violation. 	ERA FAQ, no explicit tips.
<ul style="list-style-type: none"> • I'm scared that if I do anything, my boss will fire me. Can I file anonymously? 	
<ul style="list-style-type: none"> ○ Answer explaining process for filing with DLSE 	August 1 st Taskforce Binder pg. 40
<ul style="list-style-type: none"> • I filed several months ago and haven't heard anything back. Is this typical? 	
<ul style="list-style-type: none"> ○ Answer explaining the DLSE process – complaint, investigation, hearing, etc. 	Draw from August 1 st Taskforce Binder pg. 40
<ul style="list-style-type: none"> • Can I go right to court instead of filing with the DLSE? 	
<ul style="list-style-type: none"> ○ Answer explaining that there is no administrative exhaustion. 	August 1 st Taskforce Binder pg. 40

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<ul style="list-style-type: none"> • What are some possible outcomes if I file a Fair Pay Act claim? 	
<ul style="list-style-type: none"> <ul style="list-style-type: none"> ○ <i>Answer explaining remedies include back pay, front pay, reinstatement, and injunctive relief.</i> 	August 1 st Taskforce Binder pg. 41
<ul style="list-style-type: none"> <ul style="list-style-type: none"> <ul style="list-style-type: none"> ▪ <i>Link to pages that explain what these are if no definition for them is provided in the answer.</i> 	August 1 st Taskforce Binder pgs. 172 (Back Pay), 180 (Front Pay) Need Need to be written: definitions for injunctive relief, reinstatement. [Glossary pgs. 170 – 196]

EMPLOYER RESOURCES

California Pay Equity Task Force

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Laurie, these are my October 2017 edits.

NOTE: This document is drafted solely for discussion during the September 28, 2017 Task Force meeting and should not be construed as legal advice or a final recommendation of this subcommittee or the Task Force.

California law provides that an employer cannot not rely on prior salary alone to justify pay disparities between male and female employees. In this tool, we provide guidance for employees to help them handle questions regarding prior salary if and when those questions may come up during an interview.

Guidance for Job Applicants on Discussing Starting Salary

To help you find the “right” employer and job and be paid equitably, be sure to do your research ahead of time to be ready for the interview. Check the organization’s website. Know what kind of jobs they may be recruiting for. Check glassdoor website to see comments on the company (and salaries paid) by current and former employees. Check recent business information about the company, their planned growth and their organizational values.

Most employers have a compensation philosophy, and you can ask what that philosophy is for the organization. A general part of that is that they try to pay experienced, competent employees at the midpoint of the salary range.

An interview is really a two way process. During the interview, you may want to explain that you would like information on the position beyond the ad or posting. Ask if they have salary ranges, and what is the range for this position? You can share your total compensation target and explain that you hope the interviewer is willing to share the salary range, total compensation, and working environment for the position you are discussing. Both you and the employer want to make sure there is a reasonable alignment between what you can offer and what they are looking for.

If you are asked about the salary your current employer pays you, there are many ways it can be presented in both the information you offer and the questions you ask. Employers have historically asked about a prospective employee's salary history to use as a benchmark in determining if their open position is "even in the ballpark" and whether to continue considering you for the available job. If your salary expectation is more/less than a 10-15 % spread above or below the range of the position for which you are interviewing, then the employer often makes some assumptions that may be inaccurate.

- ✓ This person makes enough/more in their current job that we can't match or offer a meaningful increase.
- ✓ If the candidate communicates a lower salary, the employer may assume that the candidate was performing at a lower level of responsibility and had an inflated title and/or may not have the requisite skills needed in the prospective position. The employer may then conclude that the open job is too much of a leap for the candidate.

Both of these assumptions can be mitigated if the candidate puts the information in context with a reasonable rationale. Better yet, when asked about prior salary, you could respond with:

- “I hope that is not the critical criteria that you are looking at to figure out I am a viable candidate, as my knowledge, skill and abilities were not fully reflected in my prior salary, alone. For example...”
- “My prior salary is only part of the story. Here is what I bring to the table....”
- “In addition to my salary, I also enjoyed additional advantages with my prior employer.” Offer examples of learning growth opportunities, flexibility, continuing education, relevant benefits, etc.

If you are making less.....

- “My contributions were recognized when I was promoted x number of times or given increased responsibilities, even though they were not accompanied by a new title or salary increase.”
- “I worked for a nonprofit that had a limited budget but great learning opportunities.”

If you are making more.....

- “The company/organization is in a state of flux/consolidation and may not offer sufficient growth and development in the long term. To me, compensation is not just about base salary. Total compensation includes salary, benefits, and a possible incentive arrangement that reflects and can be tied

to my contributions. It can be in dollars, opportunities, and working environment. Important things to me are....”

- “Money is not the only thing I am hoping to find in a new career/job. Flexibility and growth are also important. For example....”

Be relaxed, and try to be comfortable, be thoughtful and let the interviewer complete all their information before you respond. Take your time. Ask for clarity if you do not fully understand what they have said. You may want to take some notes.

In addition, consider what factors are important to the organization in recruiting new hires. Some examples are provided below, though various other factors could be considered as well. Here, too, these must be bona fide factors other than sex, and they must be reasonable, job related, and consistent with business necessity.

- Relevant experience
- Relevant education
- Relevant training
- Relevant skills or knowledge
- Market conditions
- Geography/location
- Competing offer

- Salaries of current employees in jobs that are substantially similar when viewed as a composite of skill, effort, and responsibility

An employer's compensation philosophy should also account for what forms of compensation are offered. Examples include:

- Base pay
- Bonus
- Stock or stock option awards
- Commission or other incentive compensation
- Benefits like medical insurance and retirement
- Other non-financial benefits such as:
 - Time away from work,
 - Flexible starting times,
 - Commute allowances,
 - The ability to work from home X number of days a week or month,
 - Special training opportunities,
 - Tuition reimbursement
 - 1025 benefit coverage, FLSA advantages

The prospective employer may do individualized reference checks (even if only for final candidates). As part of that process, you may be asked to sign an appropriate waiver of information

release. This is often printed right on the employment application. This is routine, but you can ask what kind of verifications they do. It should all be job related to the position for which you are applying. You will be asked for contact information on prior employers. In reference checks, prospective employers often ask question like:

- What you did in your previous position
- Confirm your title and the scope of your responsibilities
- What were your major strengths? (ask for example)
- Was there any area that you needed more development? If so, what?
- What did they value and appreciate most about you?
- What were your major accomplishments? Impact on the workplace?
- Were you a team player? How do you define that?
- Were you reliable and dependable? Define?
- Were they able to respect and trust/not respect and trust you? Why?
- Would they hire/rehire you? Into what types of job?

DEAR CALIFORNIA BUSINESS LEADER:

Why should you care that your employees are paid equitably?

Of Course there is the need for legal compliance however and more importantly, it is the right thing to do for your business and your employees.

There are also some practical reasons to commit to pay equity.

You can brag about it. A company's good reputation makes it easier to recruit and retain employees in today's competitive and informed workforce. And, if you are open and transparent about pay practices, you are ready and primed to quickly and accurately respond **if an employee complains or publicly accuses the company of paying them unfairly.**

If you can clearly articulate your compensation philosophy and your commitment to pay equity, you are much more likely to avoid a PR nightmare. It is not just a "feel good" management approach, it is a logical, business like stance to recruit and retain your workplace heroes. Some employers say that their workers are their most important asset.

So, it is important to demonstrate that you do care; why you care and how you plan to continue your commitment to workplace fairness and equity. This Toolkit developed by the California Pay Equity Task Force can lead you on the path to pay equity in your Company or Organization.

I. I want to know more about California's Equal Pay Act

- a) Overview of State Law**
- b) Links to text of CA Pay Equity/Wage Equality Laws (SB 358, SB 1063, AB 1676, etc.)**
- c) Statutory History of Equal Pay Laws in CA and U.S.**
- d) DLSE FAQ**
- e) Federal & State Laws re Equal Pay**
 - i) What state and federal agencies enforce equal pay laws**
 - ii) What are the main differences between CA Equal Pay Act and Federal EPA**
 - iii) Does CA require ERs to pay all EEs who perform the same or substantially similar job the same wage rate**
 - iv) Does an ER have to conduct a pay equity analysis of all EEs wages**
 - v) What is the liability an ER can face**
 - vi) Can an EE discuss his or her wages with other EEs**
 - vii) How does the CA Equal Pay Act define "wage rate"**

- II. **What Can I do to comply with the California Equal Pay Act and the federal EPA?/Best Practices**
 - a. **Conduct an audit**
 - b. **Review job descriptions**
 - c. **Educate managers**
 - d. **Document comp decisions**
 - e. **Systematize documentation**
 - f. **How do I handle information about a candidate's prior salary? Etc.**
[Lauri D] *Per Rhoma Possible Employee Cross Link. See Employee Prior Salary section.*
 - g. **Don't retaliate**
- III. **What Strategies Can I Adopt to Promote a Culture of Pay Equity?**
 - a. **Employer Culture Document**
- IV. **I want to perform a pay equity analysis**
DK & Peter materials
 - a. **Collect the right data**
 - b. **Identify employees doing similar work and include cases to reference**
 - c. **Compare wage rates by gender**
 - d. **Determine reasons for any differences in pay**
 - e. **Remedy disparity that can be attributed to gender.**

f. Etc.

Discussion Draft 2017

Why should I care that my employees are paid equitably?

Beyond legal compliance, it's the right thing to do.

There are also some practical reasons to commit to pay equity.

You can brag about it. A company's good reputation makes it easier to recruit and retain employees in today's competitive and informed workforce. And, if you are open and transparent about pay practices, you are ready and primed to quickly and accurately respond if an employee complains or publicly accuses the company of paying them unfairly.

If you can clearly articulate your compensation philosophy and your commitment to pay equity, you are much more likely avoid a PR nightmare. It is not just a "feel good" management approach, it is a logical, business like stance to recruit and retain your workplace heroes. Some employers say that their workers are their most important asset.

So, it is important to demonstrate that you care, why you care and how you plan to continue your commitment to workplace fairness and equity.

This toolkit can lead you on the path to pay equity in your Company or Organization.

I want to know more about California's *Equal Pay Act*

Overview of the Current State Law

For decades, the California Equal Pay Act (CA Labor Code section 1197.5) has prohibited an employer from paying its employees less than employees of the opposite sex for equal work.

In October 2015 Governor Brown signed SB358 (Jackson) a substantial amendment to the law which strengthened the Equal Pay Act in a number of ways, including:

- Requiring equal pay for employees who perform “substantially similar work, when viewed as a composite of skill, effort, and responsibility.
- Eliminating the requirement that the employees being compared work at the “same establishment.”
- Making it more difficult for employers to satisfy the “bona fide factor other than sex” defense.
- Ensuring that any legitimate factors relied upon by the employer are applied reasonably and account for the entire pay difference.
- Explicitly stating that retaliation against employees who seek to enforce the law is illegal, and making it illegal for employers to prohibit employees from discussing or inquiring about their co-workers’ wages.
- Extending the number of years that employers must maintain wage and other employment-related records from two years to three years.

In September 2016, Governor Brown signed further amendments to the Equal Pay Act including:

- adding race and ethnicity as protected categories. Therefore, an employer is prohibited from paying its employees less than employees of the opposite sex, or of another race, or of another ethnicity for substantially similar work. The provisions, protections, procedures, and remedies relating to race- or ethnicity-based claims are identical to the ones relating to sex.

- Prohibiting employers from justifying a sex-, race-, or ethnicity-based pay difference *solely* on the grounds of prior salary

In October 2017 Governor Brown signed two further amendments which will go into effect in January 2018.

AB 168 by Assemblymember Susan Eggman (D-Stockton) prohibits all employers, including the Legislature, the state and local governments, from seeking salary history information about an applicant for employment and requires an employer to provide the pay scale for a position to an applicant upon reasonable request.

AB 46 by Assemblymember Jim Cooper (D-Elk Grove) Applies the Equal Pay Act within the Labor Code to public sector employers, which are generally governed by the Government Code, and thus, defines “employer” to include both public and private employers.

Link to the CA Equal Pay Act as currently amended:

https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=LAB§ionNum=1197.5

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Statutory History of Equal Pay laws in California and the United States

California first passed an Equal Pay Act in 1949. Before SB 358 was enacted in 2015, Labor Code section 1197.5 prohibited an employer from paying an employee less than employees of the opposite sex who perform the same job, requiring the same skill, effort, and responsibility, in the same establishment, under similar working conditions. Exempt from this prohibition are payments made pursuant to systems based on seniority, merit, or that measure earnings by quantity or quality of production; or differentials based on any bona fide factor other than sex. Enforcement was by the California Division of Labor Standards Enforcement. Until recently, Labor Code Section 1197.5 (a) provided:

No employer shall pay any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions

SB 358 (Cal.Stats. 2015, Ch. 546), effective January 1, 2016, substantially broadens California's gender pay differential law. Effective January 1, 2016, California's Equal Pay Act, also known as the "Fair Pay Act," expanded pay equity rights by removing the requirement that the pay differential be within the same "establishment," and replaced the "equal" and "same" job, skill, effort, and responsibility standard, with a new standard that only requires a showing of "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." These changes make it easier for an employee to bring an equal pay suit, permitting a plaintiff to compare him or herself with employees of the opposite gender working at any location for the same employer, and in any similar job.

As amended in 2015, California's Equal Pay Act further requires employers to affirmatively demonstrate that any wage differential is based entirely and

reasonably upon one or more factors. Added to the three existing factors (seniority, merit, or production-based) is a “bona fide factor”: that is, a factor not based on or derived from a sex-based differential in compensation, which is related to the position in question and is consistent with a “business necessity” (defined as “an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve”). The “bona fide factor” defense is inapplicable if the plaintiff demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential. With the enactment of SB 358, the California Labor Code 1197.5 (a) provides:

(a) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates:

(1) The wage differential is based upon one or more of the following factors:

(A) A seniority system.

(B) A merit system.

(C) A system that measures earnings by quantity or quality of production.

(D) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph, “business necessity” means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that

would serve the same business purpose without producing the wage differential.

(2) Each factor relied upon is applied reasonably.

(3) The one or more factors relied upon account for the entire wage differential.

California's Equal Pay Act was amended again in 2016 by SB 1063 (Cal.Stats. 2016, Ch. 866). Effective January 1, 2017, Labor Code Section 1197.5, in addition to prohibiting sex discrimination in wages, now prohibits wage discrimination based on race or ethnicity. Labor Code Section 1197.5 (b) provides, in pertinent part:

(b) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions . . .

California's Equal Pay Act was again amended in 2017, as was another relevant law. AB 46 (Cal.Stats 2017, Ch. 776) specifies that this act applies to public and private employers, and AB 168 (Cal.Stats. 2017, Ch. 688) adds Section 432.3 to the Labor Code, prohibiting employers from relying on an applicant's salary history and requiring employers, upon request, to provide a pay scale to the applicant. Both bills are effective January 1, 2018.

Labor Code Section 1197.5 (l) provides, in pertinent part:

As used in this section, "employer" includes public and private employers.

Labor Code Section 432.3 now provides, in pertinent part:

(a) An employer shall not rely on the salary history information of an applicant for employment as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant.

(b) An employer shall not, orally or in writing, personally or through an agent, seek salary history information, including compensation and benefits, about an applicant for employment.

(c) An employer, upon reasonable request, shall provide the pay scale for a position to an applicant applying for employment.

The federal Equal Pay Act was passed in 1963 (Pub.L. 88-38; 77 Stat. 56). This act amended the Fair Labor Standards Act of 1938, as amended (29 U.S.C. et seq.), by adding a new subsection (d).

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

The Department of Labor had responsibility for enforcement of the federal Equal Pay Act until the federal Reorganization Plan No. 1 of 1978, which, as of July 1, 1979, shifted responsibility for enforcing both the Equal Pay Act and the Age Discrimination in Employment Act from the Labor Department to the Equal Employment Opportunity Commission.

<https://www.eeoc.gov/eeoc/history/35th/thelaw/epa.html>

Statutory History of Employment Discrimination Laws in California and the United States

California's and the federal equal pay laws have always been distinct from laws generally prohibiting employment discrimination. California's Fair Employment Practice Act enacted in 1949 prohibited employment discrimination because of race, religious creed, color, national origin, or ancestry, and did not prohibit sex discrimination. Sex was added as a prohibited basis of discrimination in 1970 (Cal.Stats. 1970, ch. 1508). Enforcement was through the Fair Employment Practice Commission, later named the Fair Employment and Housing Commission.

Title VII of the federal Civil Rights Act of 1964 (Pub. L. 88-352) prohibited race, color, religion, sex, or national origin discrimination in employment (42 USC Sec. 2000e). The administrative agency responsible for enforcement of Title VII is the Equal Employment Opportunity Commission.

Statutory History of Equal Pay Laws in California and the United States

California first passed an Equal Pay Act in 1949. Before SB 358 was enacted in 2015, Labor Code Section 1197.5 prohibited an employer from paying an employee less than employees of the opposite sex who perform the same job, requiring the same skill, effort, and responsibility, in the same establishment, under similar working conditions. Exempt from this prohibition are payments made pursuant to systems based on seniority, merit, or that measure earnings by quantity or quality of production; or differentials based on any bona fide factor other than sex. Enforcement was by the CA Labor Commissioner (also known as the Division of Labor Standards Enforcement):

(a) No employer shall pay any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires

equal skill, effort, and responsibility, and which are performed under similar working conditions

The federal Equal Pay Act was passed in 1963. Pub.L. 88-38; 77 Stat. 56 This act amended the Fair Labor Standards Act of 1938, as amended (29 U.S.C. et seq.), by adding a new subsection (d).

(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

The U.S. Department of Labor had responsibility for enforcement of the federal Equal Pay Act until the Federal Reorganization Plan No. 1 of 1978, which, as of July 1, 1979, shifted responsibility for enforcing both the Equal Pay Act and the Age Discrimination in Employment Act from the Labor Department to the Equal Employment Opportunity Commission.

<https://www.eeoc.gov/eeoc/history/35th/thelaw/epa.html>

Senate Bill 358 substantially broadened California's gender pay differential law. SB 358, also called the "Fair Pay Act," became effective January 1, 2016. The "Fair Pay Act" expanded pay equity claims by removing the requirement that the pay differential be within the same "establishment," and replaced the "equal" and

“same” job, skill, effort, and responsibility standard. The new standard would require only a showing of “substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.” These changes make it easier for an employee to bring an equal pay suit, permitting a plaintiff to compare him or herself with employees of the opposite gender working at any location for the same employer, and in any similar job.

The “Fair Pay Act” also requires employers to affirmatively demonstrate that the wage differential is based entirely and reasonably upon one or more factors. The “Fair Pay Act” adds to the three existing factors (seniority, merit, or production-based) a “bona fide factor”: that is, a factor not based on or derived from a sex-based differential in compensation, that is related to the position in question, and that is consistent with a “business necessity” (defined as “an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve”). The “bona fide factor” defense is inapplicable if the plaintiff demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential. With the enactment of SB 358, the California Labor Code 1197.5 now provides:

- (a) No employer shall pay any individual in the employer's employ at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where the payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex.

Statutory History of Employment Discrimination Laws in California and the United States

The state and federal equal pay laws have always been distinct from laws generally prohibiting employment discrimination. California’s Fair Employment

Practice Act enacted in 1949 prohibited employment discrimination because of race, religious creed, color, national origin, or ancestry, and did not prohibit sex discrimination. Sex was added as a prohibited basis of discrimination in 1970 (Cal.Stats. 1070, ch. 1508). Enforcement was through the Fair Employment Practice Commission, later named the Fair Employment and Housing Commission. Title VII of the federal Civil Rights Act of 1964, as originally enacted, prohibited race, color, religion, sex, or national origin discrimination in employment. The administrative agency responsible for enforcement of Title VII is the Equal Employment Opportunity Commission.

LINK to CA Labor Commissioner- Division of Labor Standards
Enforcement Frequently asked Questions

[https://www.dir.ca.gov/dlse/California Equal Pay Act.htm](https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm).

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Federal and State Laws concerning Equal Pay

(1) What state and federal agencies enforce equal pay laws?

In California, the Labor Commissioner's Office (also known as the Division of Labor Standards Enforcement or DLSE) has the authority to enforce Labor Code Section 1197.5, which prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of the opposite sex, or of a different race or ethnicity for substantially similar work.

See https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm.

The Department of Fair Employment and Housing (DFEH) enforces the Fair Employment and Housing Act (FEHA), which among other things, precludes the discrimination in employment on the basis of gender, ethnicity, and race. Paying different wages due to an employee's gender, race, or ethnicity is considered discrimination.

At the federal level, the Equal Employment Opportunity Commission (EEOC) enforces the federal Equal Pay Act, which requires employers to pay employees of the opposite sex, or of a different race or ethnicity equally for equal work performed in the same establishment. The EEOC also enforces Title VII of the Civil Rights Act of 1964, Age Discrimination in Employment Act of 1967, and Title I of the American Disabilities Act of 1990, which preclude discrimination in employment, such as unequal compensation, based upon protected classifications.

(2) What are the main differences between California's Equal Pay Act and the Federal Equal Pay Act (EPA)?

Before SB 358 (Jackson), which became effective January 1, 2016, California's Equal Pay Act was very similar to the EPA. The significant changes made to the California law were: (1) changing the term "equal work," to "substantially similar work when viewed as a composite of skill, effort, and responsibility" to reflect existing case law (see definitions and examples); (2) eliminating the "same

establishment” requirement for purposes of comparing wages of employees who perform substantially similar work; and (3) defining “bona fide factor” to mean that the employer’s reason for the pay difference must be job related and satisfy a business necessity; (4) specifying that an employer cannot prohibit employees from discussing their wages; (5) prohibiting retaliation against employees who exercise their rights under the law or assists another employee with exercising their rights under the law.

Under the federal EPA, comparison of wages is still limited to employees at the same physical establishment and is limited to equal pay for equal work.

- (3) Does California law require employers to pay all employees who perform the same or substantially similar job the same wage rate?

California law requires equal wages for employees of the opposite sex, or of a different race or ethnicity, who perform the same or substantially similar work. An employer can still adjust wages based upon factors such as seniority, merit or performance, or another bona factor such that is job related and necessary for the business such as education, training, experience, or the geographical location of the employee and cost of living in that area. Employers should consider conducting a privileged pay equity analysis to determine whether wages should be adjusted within their organization to comply with the Equal Pay Act.

- (4) Does an employer have to conduct a pay equity analysis of all employees’ wages?

There is no mandate to conduct an audit. However, it may be a good practice for employers wishing to proactively comply with the law. Employers may want to consider conducting any audit with the advice of an attorney or HR professional.

- (5) What is the liability an employer can face if there is a wage differential that cannot be explained or justified by one of the recognized or bona fide factors?

An employer could face an enforcement action by one of the above listed state or federal agencies or a civil lawsuit, and may potentially have to pay back wages, liquidated damages, lost work benefits, attorney's fees, etc. If there is discrimination or retaliation involved, emotional distress and punitive damages may also be assessed.

(6) Can an employee discuss his or her wages with other employees?

Employees can discuss wages with one another, including asking an employee about his or her wages, without fear of retaliation by the employer. There is no obligation on any employee to disclose his or her wage or engage in these discussions. Employers can take reasonable measures to protect the privacy of information regarding employees' compensation, including prohibiting employees who have access or control over confidential wage information given their job duties and responsibilities, from disclosing such information without the consent of those employees. However, employers should be cautious about employees' rights under the Labor Code to report violations as well as assist employees with their rights to pursue equal pay.

(7) How does the California Equal Pay Act define "wage rate"?

[Wage Rate Definition to be provided by the Definitions Subcommittee]

For further information regarding frequently asked questions about California's Equal Pay Act, please visit the Division of Labor Standards Enforcement website: [http://www.dir.ca.gov/dlse/California Equal Pay Act.htm](http://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm).

WHAT CAN I DO TO COMPLY WITH THE CA EQUAL PAY ACT AND THE FEDERAL EQUAL PAY ACT?

Although not required, an employer can take several proactive steps to comply with California's Equal Pay Act and the federal EPA:

1. **Conduct an Audit** An employer can conduct an annual or regular audit of its pay practices and employee wages to identify any significant disparities in wages amongst employees who perform the same or substantially similar work and make any compensation adjustments as necessary.
2. **Review Job Descriptions** Employers should regularly review job descriptions to make sure that the description accurately reflects the overall job content, including the required skill, effort, and responsibility for that position. Although job titles, classifications, or descriptions are not determinative of whether two employees are performing substantially similar work, it is relevant and does provide some basis for comparison.
3. **Educate Managers** An employer should also educate its managers and supervisors who make compensation recommendations regarding the law and what factors they can and cannot utilize in their decision making.
4. **Document Compensation Decisions** An employer should document all compensation decisions and identify the basis for any adjustments. An employer should retain such documents for no less than 4 years (**See Chart of Employer Record Retention Requirements**).
5. **Systematize Documentation** An employer should systematize documentation of the factors relied upon to support difference in wage rates between employees (e.g., education, experience, etc.). This practice encourages pay equity and can be referenced if the employer's compensation decisions are challenged.

6. How do I handle information about a candidate's prior salary

- a. **ROMA/LD document with updates due to new law.**

7. **Do not retaliate** Employers should not retaliate and clearly prohibit retaliation against employees for asserting rights under California or federal fair pay laws, as well as ensure that they have a reporting mechanism in place for complaints. This can be part of an employer's existing equal employment opportunity policy

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WHAT CAN I DO TO PROMOTE A CULTURE OF PAY EQUITY

Pay disparities in the workplace amongst men and women, or different races or ethnicities, can be the result of direct and indirect bias. Examples of indirect bias include assuming women perform certain jobs or duties instead of men; presuming women are not interested in advancement or promotions; making subjective pay determinations that are not based upon job-related factors; or basing an individual's compensation solely on prior wage or salary history. The Task Force recommends that employers consider adopting some or all of the below Action Items to promote a culture of pay equity within the employer's organization. These Action Items are not required by law and may not be feasible for all employers. However, adopting some, or all, of these action items may assist in promoting a culture of pay equity in the workplace.

Action Items:

1. **Increase Diversity of Applicant Pool:** Develop tools to increase the diversity of the employer's candidate pool, particularly in jobs that are majority male. Achieving at least 25% women candidates in an applicant pool has been shown to reduce the likelihood of unconscious gender bias and stereotyping, thus increasing the likelihood that more female candidates are hired.
2. **Remove Bias from Hiring Process:** Increase the representation of women who make hiring decisions and participate in applicant interviews. Although not required by law, employers should also consider whether to make the initial pre-employment screening blind to the candidate's gender, race or ethnicity (e.g., no name initially provided, just initials). The Task Force also recommends that employers provide training on implicit bias to employees involved in hiring decisions.
3. **Train Supervisors or Managers:** Train managers on how to create a culture of pay equity. The Task Force recommends that employers train any supervisor or manager who has input regarding employee's compensation about unconscious bias and the law's pay equity requirements, under both

federal and state law. Train supervisors and managers on how to make valid compensation decisions or recommendations that are based on objective, job-related factors and not on an employee's gender, race or ethnicity. Training managers promotes job satisfaction and morale among employees generally, and reduces employee turnover.

4. **Encourage Employee Communication:** Encourage employees to communicate with one another regarding compensation without the fear of retaliation. Encourage employees to ask the employer questions about their compensation without any concern of retaliation or an adverse employment action. Similarly, employers should consider encouraging managers and supervisors who are communicating compensation decisions to employees to explain the basis for any compensation changes.
5. **Job Classifications and Descriptions:** Review job classifications and job descriptions on a regular basis to make sure the classifications and descriptions accurately reflect the work being performed.
6. **New Hire Evaluations:** Base any offer of compensation to a new hire according to the objective, job-related factors and not on the applicant's gender, race, or ethnicity. Additionally, although employers may consider an applicant's prior compensation information, employers should not base any offer of compensation solely on the applicant's prior salary or compensation. Employers may consider excluding prior salary from the hiring process to eliminate any risk of perpetuating any pay disparity to women and minorities who may have been underpaid in a prior role. Focus on paying applicants what a job is worth and not basing a pay decision on the candidate's current salary. Review market data to determine the median wage for similar positions in the same geographical area as well as the compensation of other existing employees who are performing the same or substantially similar responsibilities.
7. **Consider Removing Negotiation from the Hiring Process/Lockstep Salary Bands:** Consider either empowering women to negotiate, or removing negotiation from the hiring process. If using salary bands, employers should limit how high within a range new hires can be paid and require an

objective justification for any difference between an incumbent and the new hire (e.g. years of experience, relevant industry experience, etc.)

8. **Review/Adjust Incumbent Pay:** Require a review of incumbent compensation if new hires are brought in at higher salaries than their current workforce. Adjust current workforce upwards to match higher compensation offered to a new candidate unless there are objective factors that justify any pay disparity.
9. **Compensation Reviews:** Regularly review employee compensation to evaluate any noticeable disparities amongst employees performing the same or substantially similar jobs. Review compensation to make sure the wages provided adequately compensate the employee for the job being performed.
10. **Increase diversity at senior levels and in the compensation department:** Provide structural supports to move women and minorities up the talent pipeline, e.g. leadership training for top female and minority managers. Require that all important meetings include 30-50% women/minorities (e.g. Salesforce: Women Surge). Increase the representation of women/minorities who make compensation decisions for their workforce. A study of senior executive compensation at public companies revealed that women executives were better compensated when the compensation committee included women. There was a substantial gap in compensation when the committees included either no women or just one woman. See, e.g., <http://www.businessinsider.com/salesforce-ceo-explains-women-surge-2015-3>.
11. **Limit Discretion in Pay Decisions:** For larger employers with a separate compensation department, consider requiring that manager compensation requests/recommendations be reviewed and approved by the Company's compensation department.
12. **Promote Wage Transparency/Standardize Compensation:** Although not required by law, employers may consider publishing salary ranges by level. Standardize discretionary compensation such as bonuses and equity and

remove discretion in compensation decisions from individual managers. A recent study by the City of Boston found that in industries where there was high compensation “ambiguity” — meaning limited knowledge of the negotiating range and appropriate standards of compensation — recent women MBAs received salaries that were 10% lower than male classmates with the same skills and experience. In industries where salary ranges and standards were clear, male and female MBAs earned the same. *See Boston, Closing the Wage Gap (2013), at https://www.cityofboston.gov/images_documents/Boston_Closing%20the%20Wage%20Gap_Interventions%20Report_tcm3-41353.pdf.*

13. **Design Fair Performance Evaluations:** Review performance evaluations to ensure fairness in the performance criteria. Publish and gain commitment for employee performance criteria.
14. **Offer Training and Other Accommodations:** Offer management training, skills training, or other learning opportunities to all employees so that both women and men have the same opportunities for promotions. Support training programs for women in the trades. Pre-apprenticeships programs help strip away some of the barriers that preclude women from participating in apprentice training.
15. **Improve Workplace Flexibility/Change Subtle Drivers of Discrimination:** Offer flexible work arrangements. Train managers to manage a flexible workforce and reorient workplace culture to emphasize results. Offer subsidized child care or back up child care. Review part time or flexible schedule policies to ensure that they reflect equal pay for substantially similar work on a pro-rata basis.
16. **Design Fair Incentive Compensation Plans.** Review incentive plans to ensure fairness in criteria applied to determine incentive pay eligibility, including whether part time employees are being evaluated and paid on a pro-rata basis for substantially similar work.
17. **Offer Paid Parental/Family Leave for both Women and Men:** Offer and publicize paid parental/family leave for both women and men and actively

encourage both men and women to use it. Smaller employers, who may not have the capacity to provide paid parental/family leave, should consider accommodating employee requests for family leave when feasible.

18. **Parental Leave Policies:** Adopt and publicize policies that specify that employees will continue to accrue seniority during parental leave, including but not limited to Pregnancy Disability Leave, Bonding Leave (CFRA), and FMLA. See <http://www.dfeh.ca.gov/resources/frequently-asked-questions/employment-faqs/pdl-cfra-fmla-guide/>. Note that CFRA specifically requires accrual of benefits and seniority during CFRA leave. Cal. Code Regs. tit. 2, § 11092(e)
19. **Create a Culture of Equality:** Embrace and publicize the pay equity issue as an issue that impacts men as much as it impacts women and acknowledge their role in closing the wage gap.

I want to perform a gender pay equity analysis

California law requires that employers pay women and men doing substantially similar work the same wage rate. To comply, businesses will want to evaluate the jobs their employees do and compare wages by gender:

- Collect the right data
- Identify employees doing similar work
- Compare wage rates by gender
- Determine reasons for any differences in pay
- Remedy disparity that can be attributed to gender.

Collect the right data

Beginning a pay equity analysis means having the right information to analyze. Generally, this means collecting information about employees, jobs, business/company practices, market data, and salaries, though the size of your business may impact what you collect and what makes sense to collect.

For employers of all sizes, retaining information to perform a pay audit will help you to:

- Establish and/or change existing management practices
- Ensure that sufficient data for a pay equity analysis are captured and stored in an accurate manner with appropriate retention schedules
- Analyze and take action on pay equity data.

[Insert Tool #1 wage rate tool here]

[Insert Tool #2 infrastructure and systems tool here]

There are many resources that employers and employees may wish to consult to determine appropriate compensation for a particular role. Please also note that job titles are not determinative but just an initial step in determining appropriate compensation for a particular role. The Task Force recommends consulting resources that provide a pay range, rather than the median compensation for a

particular role. It is also recommended that more than one resource be consulted. Possible resources include, but are not limited to:

- California’s Employment Development Department. The California EDD provides quarterly information regarding median wages paid for various positions in different regions of the state. See <https://data.edd.ca.gov/Wages/Occupational-Employment-Statistics-OES-/pwxn-y2q5>.
- **The Department of Labor Bureau of Labor Statistics: Occupational Outlook Handbook.** The Department of Labor Bureau of Labor Statistics publishes the Occupational Outlook Handbook, which provides information about the characteristics of various jobs, the skills, education and training required for them, typical salaries and future outlook for the occupation. It is organized by job family. See <http://www.bls.gov/ooh/>.
- **The Department of Labor Bureau of Labor Statistics: O*Net Online.** The DOL also publishes O*Net Online, which is a deep database that provides job related info by a number of different search techniques, such as industry, occupation growth rates, level of training and preparation needed (job zones) and other characteristics. See <https://www.onetonline.org/>.
 - See also the median weekly earnings of full-time and salary workers by detailed occupation and sex at <http://www.bls.gov/cps/cpsaat39.pdf>.
- **Glass Door.** Glass Door is a database of information about employers that includes salary reports submitted by both employer and employee users of the site. See <https://www.glassdoor.com/index.htm>.
- **Salary.com.** Salary.com is a database that allows employers to analyze their internal pay practices against market rates. See <http://www.salary.com/>.
- **Payscale.** Payscale is a database that compiles individual salary profiles through crowdsourcing and big data technologies for use by employers and employees. See <http://www.payscale.com/>.

[Insert Additional Resources]The resources provided above are not an exhaustive list and the Task Force does not endorse reliance on any particular resource. Please also note that the data provided in the resources above may change following implementation of California’s Pay Equity Law.

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Documentation/Data Collection Items					
Subcommittees\6. Infrastructure and Systems					
<p><i>Draft - For Discussion Purposes Only: The materials provided on this website have been provided by individual Task Force members or staff to provide access to resources that are available on the issues considered by the Task Force. The materials provided on this website are for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem. The materials do not represent the opinions or conclusions of the Task Force. The posting of these materials does not create requirements or mandates.</i></p>					
Infrastructure / Systems					
<p>For employers of all sizes, a commitment to providing resources to:</p> <ul style="list-style-type: none"> - Establish and/or change existing management practices - Ensure that sufficient data for a pay equity analysis are captured and stored in an accurate manner with appropriate retention schedules - Analyze and take action on pay equity data. <p>This document summarizes suggested infrastructure and data that would be useful in conducting a pay equity analysis. These may not always apply based on industry or employee population. There may be other data points that may be relevant that may not be listed here. While not explicitly required by law, this data may facilitate compliance with the law.</p>					
Function	Description	Pay Equity Data ¹			
		Small (50)		Med/Large (500+)	
		Minimum	Desirable	Minimum	Desirable
Human Resources Management System (HRMS)	o Time in Company ^A	✓		✓	
	o Time in Position	✓		✓	
	o Pay Rate History (including Starting Salary ^B)	✓		✓	
	o Gender	✓		✓	
	o Race ^C	✓		✓	
	o Employee Job History, Management Level History, Location History, Compensation History ^D		✓	✓	
	o Geographic Salary Ranges reflecting external market data		✓	✓	
	o Team Size (total team size and direct reports)		✓		✓
Payroll Time and Attendance	o Payroll Data	✓		✓	
	o Earnings	✓		✓	
	o Hours Worked	✓		✓	
Talent Management	o Talent assessment data ^E		✓	✓	
	o Accomplishments; Performance against goals; Productivity		✓	✓	
	o Goals/Objectives		✓		✓
	o Long-Term Career Potential (High Potential or Key Role); Training & Development Positions; Fast-track / leadership development ^F		✓		✓
	o Employee Profiles (internal/external employment history, experience, institutional knowledge, education, accomplishments, competencies) ^G		✓		✓
	o Competency assessments		✓		✓
	o Succession planning		✓		✓
	o Scope of Role - Budget P&L Responsibility, Complexity of channels, geographies		✓		✓
Recruiting / Talent Attraction	o Job Profiles/Descriptions	✓		✓	
	o Candidate Resumes ^G		✓	✓	
External Market Data	o Salary Survey analysis		✓		✓
	o Salary Surveys with benchmark jobs		✓		✓
Company Practices**	o Definition / Statement of Compensation Strategy (Pay for Performance; Pay for Tenure/Service; Pay for Role) ^H		✓		✓
	o Definition of Recruiting Practices (Prior Salary; Blind Resume; Documentation of pay/hiring decisions) ^I		✓		✓
Internal Job Structure Data	o Job Functions / Job Families		✓		✓
	o Career leveling matrix indicated breadth and depth of role scope		✓		✓
<p>Note s:</p> <p>¹ Elements of this checklist that are required to conduct a pay equity analysis should not be construed as legal requirements. They are suggested management practices that will help facilitate a pay equity analysis.</p> <p>^A In service date to account for missing periods in tenure.</p> <p>^B A very useful field to capture because currently the majority of the pay gap is due to starting salary.</p> <p>^C SB 1067 expanded SB 358 to cover race. Include Non-Reported vs. Opt-Out as options; Cross-over with Definitions and HR: Need to define best practice for survey form for Race/Ethnicity including available options and differentiate opt-out vs. not capture d.</p> <p>^D Cross-over with Definitions: Need definition of compensation (pay rate vs. earnings and additionally bonus/stock)</p> <p>^E Cross-over with Human Resources: Important that talent/performance assessment systems do not perpetuate bias or disparate impact.</p> <p>^F Cross-over with Human Resources</p> <p>^G Should External or Internal Resumes be maintained</p> <p>^H Cross-over with Human Resources: Define practices surrounding pay decisions; regularly review internal and external equity; leverage calibration discussions (more than one person making decision)</p> <p>^I Cross-over with Human Resources: Define practices surrounding recruiting; asking for pay history; placing employee into correct role and job level; re-level jobs based on changes in scope and business priority</p>					

Recordkeeping Policy: Record Maintenance, Retention and Destruction

https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms_017186.aspx Jul 14, 2014 **THIS LINK IS NOT WORKING**

Numerous federal laws require employers to create and retain various forms of employment records. Many of these requirements are dependent on the number of employees a company has. See Federal Labor Laws by Number of Employees. The laws typically impose civil monetary penalties for failure to maintain statutory records. In some instances, there is individual liability and criminal liability. Proper maintenance of employment records is also critical to defending against employment-related litigation. In fact, an employer can be sued for wrongful destruction of employment records under the theory of spoliation of evidence. See Federal Recordkeeping Requirements and Federal Reporting Requirements. Moreover, many states, including Massachusetts, New York and South Carolina, require businesses to destroy records containing certain employee and applicant personal information by shredding, erasing or other means to render the information unreadable or undecipherable. See New Year's Time to Review Screening Documents to Keep, Toss.

The sample policy below sets forth general maintenance, retention and destruction procedures for employee records. For a policy specifically related to record confidentiality, see Recordkeeping: Employee Records Confidentiality Philosophy Policy. For a policy that covers electronic personnel records, see Recordkeeping: Electronic Document Retention Policy.

Purpose

The human resources (HR) department retains and destroys personnel records in accordance with the [Company Name's] corporate policies on business records retention as well as federal and state laws governing records retention. Below is

an outline of the HR department's operating procedures for personnel records retention and destruction of documents when such retention periods have passed. If the [Company Name]'s retention procedure is not of sufficient duration for any state in which the company does business, this procedure will be superseded by state requirements.

The HR department maintains both employee record information and government compliance reports. Both are subject to the following retention requirements and destruction procedures.

Maintenance of Employee Records

The following employee information records are maintained in segregated personnel files:

- 1) Pre-employment information.
- 2) I-9 forms.
- 3) Benefits plan and employee medical records.
- 4) Health and safety records.
- 5) General employee personnel records.

Government compliance reports are maintained in reverse chronological sequence and filed separately from the above employee information records.

Destruction of Employee and Applicant Records

All paper personnel records and confidential employee data maintained by the HR department will be destroyed by shredding after retention dates have passed; this procedure pertains to all personnel records, not just those governed by the Fair and Accurate Credit Transactions Act (FACTA).

Application materials submitted by applicants for employment who were never employed are also to be shredded.

Personnel records include electronic as well as paper records. The HR department will work with the IT department periodically but no less than twice annually to

review and ensure that the HR department's electronic records relating to employee information and compliance reports are properly purged.

Retention of Terminated Employees' Records

The retention periods for terminated employees' and applicants' records and compliance reports are as follows:

Pre-employment records:

- Résumés, applications and related employment materials, including interview records and notes, for applicants not hired: 3 years.
- Résumés, applications and related employment materials, including interview records and notes, for employees: 4 years after date of termination.
- Background checks, drug test results, driving records, company employment verifications, letters of reference and related documents: 5 years.

Employee records:

- Terminated employee I-9 Forms: The later of 3 years from date of hire or 1 year following termination of employment.
- Compensation, job history and timekeeping records: 4 years after termination.
- FMLA and USERRA and related leave records: 3 years after termination.
- Performance appraisal and disciplinary action records: 4 years after termination.
- Benefit records: 6 years after the filing date of the documents, based on the information they contain, or 6 years after the date on which such documents would have been filed but for an exemption or simplified reporting requirement.
- Disputed issues (records relating to issues 2 years after resolution of dispute involving external agencies or parties, wage-hour investigation by

DOL, EEOC charge, arbitrations, court actions, etc.), OSHA and employee safety records: 5 years after termination.

- Workers' compensation claims: 30 years after date of injury/illness.

Compliance reports and records:

- State New Hire reports: 1 year after report was filed.
- EEO-1: 2 years after report was filed.
- Annual Affirmative Action plans: 2 years after close of AAP year.
- OSHA 300/300A: 5 years after posting.
- Form 5500: 6 years after report was filed.
- Federal/state tax reports: 4 years after report was filed.

Identify employees doing substantially similar work.

The law defines substantially similar work as a composite measure of skill, effort, and responsibility.

As you begin evaluating jobs people do in your business, you will start by grouping together positions with similar functions and roles. Some common job functions might be human resources, marketing, legal, and administrative. And, some common roles employees have in a job might be entry-level, management, and Vice-President. Functions and roles will depend on the type of business you have. [link to O*Net <https://www.onetonline.org/find/family>]

When grouping the positions consider the following:

- Is this position interchangeable with any other positions?
- Can you easily move one person in one position into another position?
- Does this position involve the same depth of knowledge and scope of tasks as other positions?
- Does this role require the same skill, effort, and responsibility as other roles do?

Your next step will be to analyze job classifications and ensure that "substantially similar" jobs are paid equally and that between-job pay differences are justified by "bona fide factors other than sex," are job-related, and consistent with business requirements. Such reviews require the collection and analysis of reliable data on job characteristics.

Online Tool Information - scenarios of skill, effort, and responsibility:

The materials provided on this website have been provided by individual Task Force members or staff to provide access to resources that are available on the issues considered by the Task Force. The materials provided on this web site are for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem. The materials do not represent the opinions or conclusions of the Task Force. The posting of these materials does not create requirements or mandates.

Step-By-Step Job Evaluation Template for Employers to Determine Wage Rate:

Generally, California law requires employers to pay the same wage rate to employees who perform substantially similar work. Below is a list of steps an employer can complete to analyze compliance with the California Equal Pay Act. The examples provided are meant to help readers understand the California Equal Pay Act. Keep in mind that if employers assign different tasks to male and female employees, they must have reasons for doing so that are not related to the employees' gender, or they may be violating other workplace laws, such as the California Fair Employment and Housing Act or Title VII of the Civil Rights Act of 1964.

Determine categories of employees who perform substantially similar work:

The term "substantially similar work when viewed as a composite of skill, effort, and responsibility and performed under similar working conditions" means that the employer should look at the overall job content and actual duties performed to determine if the jobs are substantially similar. Jobs that share a common core of tasks are substantially similar. Precise identity of functions and duties are not required. It is a totality of the circumstances

analysis. Occasional, trivial, or minor differences in duties that only consume a minimal amount of the employee's time will not render the work dissimilar.

Example: Male hospital orderlies spend a small percentage of their time performing catheterizations. Female hospital aides do not perform catheterizations. That difference alone would not necessarily render these two jobs substantially dissimilar where the jobs share a majority of common core duties.

- a) Job titles and job descriptions are relevant to the consideration, but not determinative of whether employees are performing substantially similar work.

Example: A male records clerk who primarily performs duties including typing, filing, and answering phones, likely perform substantially similar work as compared to a female stenographer, who also primarily performs duties including typing, filing, and answering phones, and the working conditions are the same in that both work in an office setting on the same floor without exposure to any physical hazards.

- b) Composite of skill, effort, and responsibility and when performed under similar working conditions is applicable to the actual job duties performed, not the person. Additionally, the analysis is a full work cycle, not just a snap shot of a particular time period or day.

Example: Two employees work as bookkeepers performing the same duties, but the male employee has the additional responsibility of performing clerical duties. Although the responsibilities of these jobs may not be substantially similar, one must consider the other factors (skills, effort, working conditions) to determine if overall the jobs are substantially similar.

Example: Two employees both perform custodial duties at a school. However, Employee A works all months of the year performs additional duties that require heavier physical labor and Employee B only works 9 months out of the year. For purposes of determining

whether the two jobs are substantially similar, it is necessary to scrutinize the job as a whole and to look at the characteristics of the jobs being compared over a full work cycle. The kinds of activities required for a given job and the amount of time devoted to such activities may vary throughout the year.

- c) **Skill.** Skill is measured by factors such as the experience, ability, education, and training required to perform a job.

Example: CP, a hotel clerk, alleges that she is paid less than a male who performs substantially similar work. CP only has a high school degree, while the male comparator has a college degree. However, performance of the two jobs requires the same education, ability, experience, and training. A college degree is not needed to perform either job. Therefore, the skill required to perform the two jobs may be substantially similar.

Example: CP, a male, works for a telephone company diagnosing problems with customer lines. He alleges that he is paid less than his female predecessor in violation of the EPA. The evidence shows that the job of CP's predecessor required expert training in diagnostic techniques and a high degree of specialized computer skill. The respondent switched to a newer, more advanced computer testing system after CP's predecessor resigned. The job now requires much less overall skill, including computer skill, than was required when CP's predecessor held it. Therefore, the skill may not be equal.

Example: CP, a sales person in the women's clothing department of the respondent's store, alleges that she is paid less than a male sales person in the men's clothing department. The respondent asserts that differences in skills required for the two jobs make them unequal. The investigation reveals, however, that the sale of clothing in the two departments requires the same skills: customer contact, fitting, knowledge of products, and inventory control. Therefore, the skill required for the two jobs may be substantially similar.

- i) **Effort.** Effort is the amount of physical or mental exertion needed to perform a job. Effort may be exerted by two employees in a different way, but may still be similar.

Example: A male employee and a female employee both work as “Assistant Managers,” but the male employee oversees three different stores. Although the female manager only oversees one store, that store is the employer’s largest and brings in the most revenue. The effort used by both employees may be similar.

Example: A male employee and a female employee are sales account managers. However, the male employee is responsible for the accounting and maintenance of significantly higher revenue accounts than the female employee. Generally, the greater the responsibility imposed, the greater the exertion that is necessary to discharge it. The effort exerted by these two employees may not be similar.

Example: CP alleges that she and other female grocery store workers are paid less than males who perform substantially similar work. Most of the tasks performed by the males and females are the same. In addition to those same tasks, the male employees place heavy items on the store shelves, while the female employees arrange displays of small items. The extra task performed by the men requires greater physical effort, but the extra task performed by the women is more repetitive, so the amount of effort required to perform the jobs may be **or likely** substantially the same.

Example: CP alleges that she and other female grocery store workers are paid less than males who perform substantially similar work. Most of the tasks performed by the males and females are the same, except two of the male grocery store workers also regularly haul heavy crates from trucks into the store. In this case, the effort required to perform the jobs may not be substantially similar. **Or...In this case, the employer may be able to lawfully pay a higher rate to the persons who perform the extra task.**

- ii) **Responsibility.** Responsibility is the degree of accountability required in performing a job.

Example: Two employees work as “Project Managers” and have the same general job descriptions. One manages 20 employees in four different locations and actually performs duties not listed on the job description. The other Project Manager only manages one employee.

Example: CP, a female sales clerk, claims that a male sales clerk performs substantially similar work for higher compensation. The evidence shows that the male comparator, in addition to performing the tasks that CP performs, is solely responsible for determining whether to accept personal checks from customers. That extra duty is significant because of potential losses if bad checks are accepted. The two jobs may not be substantially similar due to the difference in responsibility.

Example: CP, a female sales clerk, claims that a male sales clerk performs substantially similar work for higher compensation. CP, her male comparator, and the other sales clerks rotate handling the additional responsibility of determining whether to accept personal checks. In this case, the jobs may be substantially similar.

Example: CP, a female sales clerk, claims that a male sales clerk performs substantially similar work for higher compensation. The only difference in responsibility between the jobs of CP and her comparator is that the comparator occasionally is given the responsibility for performing a “walk around” inside the building at the end of the day to make sure nothing is out of the ordinary. In this case, the jobs may be substantially similar because the difference in responsibility is minor. However, if the “walk around” of the building requires a substantial amount of time because it is a large facility and includes checking for security of the premises, including entryways, security cameras, and other duties, it may justify a difference in compensation.

Example: A manager responsible for a 6-person department has a different scope of responsibility than a manager responsible for a 600-

person team and therefore the two roles may not be substantially similar.

- d) **Similar Working Conditions:** This means the physical surroundings and hazards. It does not include job shifts.

Example: A female assembly worker is paid less than a male assembly worker in the same department. That he works the night shift does not render their jobs substantially dissimilar. [However, the employer may have a defense if the employer pays all employees who work the night shift higher wages, regardless of gender.]

- e) Group positions that require the same skill, effort and responsibility (when viewed as a composite) based on function (e.g., HR, Legal, Marketing, etc.) and role from entry level to VP (e.g., assistant, director, vice president). Ask yourself when grouping positions, “Is the position fungible? Can you move someone from one position to another?” Ask, “Does this position involve the same depth, or breadth of scope? Does the role require the same skill, effort and responsibility?” Consider whether relying on “job family” is consistent with whether the job requires the same skill, effort, and responsibility when viewed as a composite and performed under similar working conditions.

- 2) **Compare the wage rate for each employee in the same category:** The term “wage rate” is not limited to just an employee’s annual salary or hourly wage, but includes other forms of compensation for an employee’s performance, including, but not limited to, wages and salaries, bonuses, commissions, stock options, vacation, and pension. The California EPA generally does not cover disparate treatment in other terms and conditions of work, such as promotions, assignment, work hours, overtime worked, harassment, training, reasonable accommodations, lay off, termination, suspension or other employment actions that may be challenged under the Fair Employment and Housing Act. [The anti-retaliation provisions of the EPA do cover adverse actions taken by an employer in retaliation for an employee exercising rights under the EPA.]

- 3) **No Difference in Wage Rate:** If there is no difference in the wage rate of employees who perform substantially similar work, then there is no need to do anything further.

- 4) **Valid/Bona Fide Factor for a Difference in Wage Rate:** If there is a difference in the wage rate of employees who perform substantially similar work, then the employer needs to identify the factor(s) for the difference to determine if an adjustment in the wage rate needs to be made. The employer must determine if the difference is due to a valid or invalid factor that is job related and consistent with business necessity. “Business necessity” means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential. There are several valid factors identified in California law for a wage rate difference. One or more of the following factors can be a valid basis for a wage difference. Please note, the factor(s) must be applied reasonably and account for the entire pay difference:
 - i) Is the difference due to a seniority system?
 - (1) A seniority system rewards employees according to the length of their employment.
 - (2) In order for a seniority system to be considered valid, it must be well-established, consistently utilized, and based upon the length of time of employment. Courts are more likely to consider a seniority system valid if it includes the following: (1) a rule on when the seniority clock begins ticking; (2) the circumstances under which seniority may be forfeited; (3) the lengths of service that will count toward accrual of seniority; and (4) the types of employment decisions that will govern seniority. *See California Brewers Association v. Bryant*, 444 U.S. 598 (1980).
 - (3) To be a bona fide system, it must not have been adopted with discriminatory intent; it must be based on predetermined criteria; it must have been communicated to employees; and it must have been applied consistently and even-handedly to employees of both sexes.

Example: A salary retention policy for an employer that rewards an employee based upon length of service may justify a wage disparity if it is applied equally amongst female and male employees and explains the entire wage difference.

ii) Is the difference due to a merit system?

- (1) A merit system rewards employees for exceptional job performance.
- (2) A valid merit system requires employers to show that there is well-established, organized and structured procedure to evaluate an employee's performance according to predetermined criteria. See American Bar Association Model Jury Instructions Employment Litigation, P 106 § 2.04(2)(c).
- (3) To be a bona fide system, it must not have been adopted with discriminatory intent; it must be based on predetermined criteria; it must have been communicated to employees; and it must have been applied consistently and even-handedly to employees of both sexes.

iii) Is the difference due to a system that measures earnings by an "incentive system"?

- (1) An incentive system provides compensation on the basis of the quality or quantity of production.
- (2) Employers may provide compensation incentives for greater output or better quality of production. Compensation tied to quantity refers to an equal dollar per unit rate so that the rate of pay is actually the same among employees, but the total compensation may differ. A compensation system based on the quality of production rewards employees who make superior products. See American Bar Association Model Jury Instructions Employment Litigation, P 106 § 2.04(2)(d).
- (3) To be a bona fide system, it must not have been adopted with discriminatory intent; it must be based on predetermined criteria; it must have been communicated to employees; and it must have been applied consistently and even-handedly to employees of both sexes.
Example: An employer may assert a wage disparity is justified on a factor other than sex where its compensation structure is a merit or

reward system that bases salaries for branch managers at a specific, uniform percentage of the branch's projected earnings. \

iv) Is the difference due to any other bona fide factor other than sex, race, or ethnicity such as an applicant or employee's education, experience, ability, or training?

(1) While the relative education, experience, training, and/or ability of individual jobholders are not relevant to determining whether their jobs require equal skill, these factors can, in some cases, justify a compensation disparity. Employers can offer higher compensation to applicants and employees who have greater education, experience, training, or ability where the qualification is related to job performance or otherwise benefits the employer's business.¹ Such a qualification would not justify higher compensation if the employer was not aware of it when it set the compensation, or if the employer does not consistently rely on such a qualification.² Furthermore, the difference in education, experience, training, or ability must correspond to the compensation disparity. Thus, a very slight difference in experience would not justify a significant compensation disparity. Moreover, continued reliance on pre-hire qualifications is less reasonable the longer the lower paid employee has performed at a level substantially equal to, or greater than, his or her counterpart.³

(2) **Education.** An example of a bona fide factor is providing an employee higher compensation for an employee's education. That

¹ See, e.g., *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1312 (2d Cir. 1995) (employer who claims that experience justifies higher salary for male employee must prove both that it based the higher salary on this factor and that experience is a job-related qualification for the position in question); *EEOC v. First Citizens*, 758 F.2d 397, 401 (9th Cir.) (greater experience of male comparator did not justify pay disparity where the main qualities necessary for the job were speed and accuracy, not experience; greater education of another comparator also did not justify pay disparity where that qualification was only marginally related to the job), *cert. denied*, 474 U.S. 902 (1985).

² See *EEOC v. White and Son Enters.*, 881 F.2d 1006, 1010 (11th Cir. 1989) (male employees' prior experience did not justify their higher compensation where defendant did not know what prior experience its employees possessed when they began employment).

³ See *Kouba*, 691 F.2d at 878 (one consideration in determining reasonableness of relying on prior salary to justify a pay differential was "whether the employer attributes less significance to prior salary once the employee has proven himself or herself on the job"); *Jones v. Westside Urban Health Ctr., Inc.*, 760 F. Supp. 1575, 1580 (S.D. Ga. 1991) ("Presumably, defendants initially hired [the female comparator] at a higher rate of pay because, in their informed judgment, they assumed that experience and education would make her perform at a higher level than [the male plaintiff,] a less-educated novice. Defendants have offered no explanation for clinging to a salary discrepancy when their underlying assumption has been proved, as plaintiff alleges, grossly incorrect.").

prior education must be job-related and serve a legitimate business purpose.

- (3) **Experience and Ability.** Examples of bona fide factors are providing an employee higher compensation for an employee's length of experience or ability where the qualification is related to the job and serves a legitimate business purpose.

Example: An employer may assert defense of a wage disparity based on a factor other than sex between a male art college professor who has significantly more years of experience in teaching and has a master's degree in art, than a female music college professor, with fewer years of prior teaching but similar education.

Example: CP had been employed as an office manager. Her starting salary was \$42,000. She resigned one year later. Her male successor was hired at a starting salary of \$50,000. CP filed a charge claiming that the difference in starting salaries was unlawful. The employer proves that the salary difference was based on the successor's extensive experience as an office manager, as compared to CP's lack of any job-related experience. The difference in experience may qualify as a factor other than sex justifying the compensation disparity.

Example: CP had been employed as an office manager. Her starting salary was \$42,000. She resigned one year later. Her male successor was hired at a starting salary of \$50,000. The evidence shows that the employer relies inconsistently on work experience in setting salaries for office manager jobs, and that males who lacked experience were offered higher starting salaries than CP. This may be a violation.

Example: CP had been employed as an office manager. Her starting salary was \$42,000. She resigned one year later. Her male successor was hired at a starting salary of \$50,000. CP did have job-related experience, though her successor had a slightly greater amount of experience. The difference in their experience may not be commensurate with the \$8,000 difference in starting salaries.

(4) **Training.** A compensation disparity attributable to participation in a bona fide training program is permissible. While an organization might offer numerous types of training programs, a bona fide training program that can justify a compensation disparity must be a structured one with a specific course of activity. Elements of a legitimate training program include: (1) employees in the program are aware that they are trainees; (2) the training program is open to both sexes; and (3) the employer identifies the position to be held at the program's completion.⁴ If the training involves rotation through different jobs, the compensation of an employee in such a training program need not be revised each time he or she rotates through jobs of different skill levels.

(a) **Example (Training):** CP, a bank teller, alleges that she is paid less than a male bank teller who performs substantially equal work. The respondent alleges that the male comparator is a participant in a management training program that is open to both sexes. The evidence shows, however, that the program is not bona fide because it is not a formal one, no other employees are identified as participants in the program, and the comparator does not receive any formal instruction or even know that he is in a management training program. An EPA violation therefore is found.

(5) **Geography.** Another bona fide factor may be higher compensation given the geographical location of the employees and the cost of labor in a given region. However, if relying on cost of labor to justify a pay differential be careful to analyze whether every employee in an otherwise substantially similar role should be provided a competitive market increase to account for any pay disparities that might otherwise violate the Equal Pay Act. Differences in compensation based on geography should be analyzed after analyzing skill, effort and responsibility.

****The employer has the burden to prove that a wage difference is based upon one or more of the above-listed factors, the factors are applied reasonably, and**

⁴ See, e.g., *EEOC v. First Citizens*, 758 F.2d 397, 400 (9th Cir.) (greater experience of male comparator did not justify pay disparity where the main qualities necessary for the job were speed and accuracy, not experience; greater education of another comparator also did not justify pay disparity where that qualification was only marginally related to the job), cert. denied, 474 U.S. 902 (1985).

account for the entire wage difference. A good practice is to document the factor(s) for any wage rate offered to an applicant or employee and retain that documentation for future reference if a wage difference is questioned. Please review the chart that sets forth an employer's obligation regarding retention periods for various employment related documents.

- 5) An employer can raise as a defense additional job duties that render the two positions dissimilar and justify the wage disparity. However, any pay for the additional duties must be commensurate with the higher pay provided.

Example: Male employees who perform additional duties only part of the time as compared to female employees, and where such additional work has only limited value to employer, would not justify a 10% wage difference between male and female employees performing substantially similar work.

- 6) **No Bona Fide Factor Exists to Justify Wage Difference:** If there is no factor listed above in (4) that justifies the wage rate differential, then the employer should consider: (1) increasing the wage rate of the employee who is performing substantially similar work and being paid less; and (2) compensating the employee for back pay as a result of the wage difference.

An employer may consider contacting legal counsel to assist with this analysis and determining how to mitigate a wage difference that is not supported by a bona fide factor. It is always a good practice to maintain documentation of the analysis conducted above for reference if an employee's wage rate is later questioned or challenged.

- 7) **Setting the Wage Rate for a New Hire:** If the individual is a new hire, the same standards apply. An employer must base the new hire's compensation on a bona fide factor, as set forth above. **As of January 1, 2018, employers cannot ask an applicant about their prior salary. Additionally, the Fair Pay Act** provides that: "Prior salary shall not, by itself, justify any disparity in compensation." See Labor Code Section 1197.5. Best practice is to determine in advance such factors as: (1) the employer's budgetary requirements; (2) what the job is worth; (3) seniority issues amongst existing employees; and (4) the employer's potential salary range for the open position. With this advance planning, the employer will be better able to examine the potential candidate based on their qualifications for the position and negotiate within objective salary requirements.

Substantially similar work when viewed as a composite of skill, effort, responsibility and under similar working conditions

This term requires a comparison of the job held by the person claiming unequal pay with the job of the person who earns more. When comparing the two jobs, keep the following principles in mind:

- **Look at overall job content/Consider the totality of the circumstances**

Example: A female hotel housekeeper alleges she is paid less than a male janitor. When comparing the hotel housekeeper job with the janitor job to determine whether they are substantially similar, one would consider all the duties and responsibilities of each job, and all the facts and circumstances of the work.

Actual job content matters/Jobs titles, classifications, and descriptions employee has the additional significant responsibility of creating daily detailed reports. Although the responsibilities of these jobs may not be substantially similar, one must also consider the other factors (skills, effort, working conditions) to determine if overall the jobs are substantially similar.

Jobs that share a common core of tasks are substantially similar/Where the skills, effort, responsibility, as performed under similar working conditions are substantially similar, so are the jobs

Example: A male records clerk who primarily performs duties including typing, filing, and answering phones, performs substantially similar work as compared to a female stenographer, who also primarily performs duties including typing, filing, and answering phones, and the working conditions are the same in that both work in an office setting on the same floor without exposure to any physical hazards.

- **Minor differences in the jobs do not mean jobs are not substantially similar/Occasional performance of certain tasks does not necessarily render the jobs sufficiently dissimilar/Incidental tasks or**

tasks that consume only a small amount of time will not render jobs sufficiently dissimilar

Example: Male hospital orderlies spend a small percentage of their time performing cauterizations. Female hospital aides do not perform cauterizations. That difference alone would not necessarily render these two jobs substantially dissimilar where the jobs share a majority of common core duties.

- **Look at the day-to-day content of the jobs over a full work cycle, not just a snapshot**

Example: Two employees perform the same paralegal job, but one works year-round, and the other does not.

- **This element looks at the jobs themselves, not the people who have those jobs**

Example: Two employees perform the same accountant job. To determine whether the jobs are substantially similar, the actual requirements of the jobs are considered. At this point in the analysis, the relative education level, skills, training, experience, etc. of the individuals who are performing the jobs is not relevant. [These factors may be asserted as a defense to any wage disparity.]

- **Effort may be exerted in different way, but may still be substantially similar**

Example: A male employee and a female employee both work as “Assistant Managers,” but the male employee oversees three different stores. Although the female manager only oversees one store, that store is the employer’s largest and brings in the most revenue.

Example: A male employee and a female employee are sales account managers. However, the male employee is responsible for the accounting and maintenance of significantly higher revenue accounts than the female employee. Generally, the greater the responsibility imposed, the greater the exertion that is necessary to discharge it.

- **Similar working conditions means the physical surroundings and hazards/Does not include job shifts**

Example: A female assembly worker is paid less than a male assembly worker in the same department. That he works the night shift does not render their jobs substantially dissimilar. [The employer may point to the shift differential as a potential defense.]

- **Burden of Proof of Prima Facie Case/Affirmative Defenses**

- The employee has the burden to establish a prima facie case that an employee of the opposite sex performs substantially similar work when viewed as a composite of skill, effort, and responsibility and performed under similar working conditions and is paid a higher wage rate.

- **Affirmative Defense**

- Once a prima facie case is established, the burden shifts to the employer to prove the wage disparity is based upon one of the four factors: a seniority system, a merit system, a system that measures earning by quantity or quality of production, or a bona fide factor other than sex, such as education, training, or experience, that is consistent with a business necessity and is job related.
- An employer may also prove that the higher paid employee performs additional duties to justify the wage disparity. However, any pay for the additional duties must be commensurate with the higher pay provided.
- Example: An employer may assert defense of a wage disparity based on a factor other than sex between a male art college professor who has significantly more years of experience in teaching and has a master's degree in art, than a female music college professor, with fewer years of prior teaching but similar education.
- Example: An employer may assert a wage disparity is justified on a factor other than sex where its compensation structure is

a merit or reward system that bases salaries for branch managers at a specific, uniform percentage of the branch's projected earnings.

- Example: A salary retention policy for an employer that rewards an employee based upon length of service may justify a wage disparity if it is applied equally amongst female and male employees and explains the entire wage difference.
- Example: Male employees who perform additional duties only part of the time as compared to female employees, and where such additional work has only limited value to employer, would not justify a 10% wage difference between male and female employees performing substantially similar work.

Case References

The Task Force reviewed the following federal cases and authority to develop the above principles, but only to the extent that the protections and analysis would be similar to the California EPA. The Task Force does not endorse the outcome of these cases.

- **Look at overall job content/Consider the totality of the circumstances**
 - *Brennan v. South Davis Community Hospital*, 538 F. 2d 859 (10th Cir. 1976) (“[W]e need not find precise identity of functions before an equal work determination is possible...” “The occasional or sporadic performance of an activity which may require extra physical or mental exertion is not alone sufficient to justify a finding of unequal effort.”)
 - *Ewald v. Royal Norwegian Embassy*, 82 F. Supp. 3d 871 (D. Minn. 2014)
 - Plaintiff and male co-worker were hired as two high-level staff of the “New Model Consulate” of Norway located in Minnesota. She held the Higher Education and Research position and he held the Innovation and Business position. She was paid about \$30K less and evidence demonstrated that the

positions were equally important and had almost identical responsibilities.

- Court reasoned that “[w]hether two jobs are substantially equal requires a practical judgment on the basis of all the facts and circumstances . . . [n]either job classifications nor titles are dispositive for determining whether jobs are equal.”
- EEOC Guidance, available at: <https://www.eeoc.gov/policy/docs/compensation.html>
 - “Job content, not job titles or classifications, determines the equality of jobs.” See *Katz v. School Dist. of Clayton, Mo.*, 557 F.2d 153, 156-57 (8th Cir. 1977) (teacher’s aide performed duties of teacher and job was substantially equal to that of teacher).
- EEOC Q&A Compliance Manual, available at: <https://www.eeoc.gov/policy/docs/qanda-compensation.html>
 - “How do you determine whether employees are similarly situated? The jobs the employees hold should be similar enough that one would expect the jobs to pay the same. This need not be an overly rigid process. The key is what people actually do on the job, not job titles or departmental designations. Skill, effort, responsibility, and the general complexity of the work are guideposts in determining job similarity.”
 - *E.E.O.C. v. Port Authority of New York and New Jersey*, 768 F.3d 247, 256-258 (2nd Cir. 2014)
 - Focus on overall “job content” as a “constant in the context of the EPA;” plaintiff must establish that jobs compared entail common duties, requirements and performance, and do not simply overlap in titles or classifications. Court relies on EEOC regulations to define the underlying criteria of skill, effort, and responsibility, measured in terms of the “performance requirements of the job.”

- *Beck-Wilson v. Principi*, 441 F.3d 353, 359–63 (6th Cir. 2006)
 - “Whether a job is substantially equal for purposes of the EPA, is determined on a case-by-case basis and ‘resolved by an overall comparison of the work, not its individual segments.’” (at 359-60)
 - Court compared pay of physicians’ assistants at Veterans’ Administration facilities—most of whom were men—to that of registered nurses in same facilities—most of whom were women, and concluded jobs were substantially equal.
 - Proper focus is on work performed and job requirements rather than on job titles and classifications; focus in determining whether jobs are substantially equal should be on actual job requirements rather than job titles and classifications.
- *Marshall v. Dallas Indep. Sch. Dist.*, 605 F.2d 191, 195 (5th Cir. 1979)
 - Work performed by “custodial helpers” and “maids” was not substantially equal where “custodial helpers” worked all months of year and performed work requiring heavier physical labor than seasonal “maids.”
 - Court emphasizes need to consider all circumstances related to job content. “In applying the various tests of equality to the requirements for the performance of such jobs, it will generally be necessary to scrutinize the job as a whole and to look at the characteristics of the jobs being compared over a full work cycle. This will be true because the kinds of activities required to perform a given job and the amount of time devoted to such activities may vary from time to time.” *Id.* at 195.
- *Conti v. Universal Enters., Inc.*, 50 F. App’x 690, 696 (6th Cir. 2002) (noting that to determine substantial equality “an overall comparison

of the work, not its individual segments” is necessary), quoting *Odomes v. Nucare, Inc.*, 653 F.2d 246, 250 (6th Cir. 1981).

- *Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1030 (8th Cir. 2002)(“Whether two jobs are substantially equal ‘requires a practical judgment on the basis of all the facts and circumstances of a particular case’ including factors such as level of experience, training, education, ability, effort, and responsibility.”) (quoting *Buettner v. Eastern Arch Coal Sales, Co.*, 216 F.3d 707, 719 (8th Cir. 2000).
- *Buntin v. Breathitt County Board of Education*, 134 F.3d 796 (6th Cir. 1998) (“[w]hether the work of two employees is substantially equal ‘must be resolved by the overall comparison of the work, not its individual segments.’”)
- *EEOC v. Port Authority of New York and New Jersey*, 786 F.3d 247, 256-258 (2nd Cir. 2014).
 - “A successful EPA claim depends on the comparison of actual job content; broad generalizations drawn from job titles, classifications, or divisions, and conclusory assertions of sex discrimination, cannot suffice.”
 - “Job codes, again, say nothing of actual job duties and are thus peripheral to an EPA claim. The use of identical evaluative criteria such as ‘project management,’ ‘communication,’ ‘flexibility and adaptability,’ ad ‘attendance,’ moreover speaks only to the breadth of the standards used, not to whether the attorneys subject to evaluation face varying workplace demands.”
- *Chapman v. Pacific Tel. & Tel. Co.*, 456 F.Supp. 65, 69 (N.D. Cal. 1978) (“The regulations and cases make it clear that it is actual job content, not job titles or descriptions which is controlling.”)

- **One for one match between skills, effort, and responsibility not required/if one factor is not substantially similar, that will not necessarily mean the jobs are not substantially similar; must consider other factors**
 - EEOC Guidance
 - “If two jobs generally share a common core of tasks, the fact that one of the jobs includes certain duties that entail a lower level of skill would not defeat a finding that the jobs are equal. For example, if two people work as bookkeepers, and one of the individuals performs clerical duties in addition to bookkeeping tasks, the skill required to perform the two jobs would be substantially equal. . . . On the other hand, if the jobs require different experience, ability, education, or training, then the jobs are not equal. For example, a vice president of a trade association could not show that her work was equal to the work performed by other vice presidents, where they performed key policymaking for the association, a skill that her position did not require.” *See Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685 (7th Cir. 1998).
 - *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 285-286 (4th Cir. 1974) (“One of the most common grounds for justifying different wages is the assertion that male employees perform extra tasks. These may support a wage differential if they create a significant variation in skill, effort, and responsibility between otherwise equal jobs.”)
 - *Brennan v. South Davis Community Hospital*, 538 F.2d 859, 863 (10th Cir. 1976) (“[W]e need not find precise identity of functions before an equal work determination is possible; only substantial equality of skill, responsibility, and effort and similar working conditions must be shown to preclude a wage differential.”)
- **Jobs Titles and Job Descriptions are Relevant, but Not Determinative.**
 - EEOC Guidance:

- “The fact that jobs are in different departments is not determinative, although in some cases it may be indicative of a difference in job content.” See *Strag v. Board of Trustees*, 55 F.3d 943, 950 (4th Cir. 1995) (professorship in Mathematics department of university was not substantially equal to professorship in Biology department because of difference in skills and responsibilities required by the departments).
- *E.E.O.C. v. Port Authority of New York and New Jersey*, 768 F.3d 247, 256-258 (2nd Cir. 2014)
 - Court rejects argument that “an attorney is an attorney is an attorney” and holds that a “successful EPA claim depends on a comparison of actual job content; broad generalizations drawn from job titles, classification, or divisions, and conclusory assertions of sex discrimination, cannot suffice”; in order for jobs compared to be “substantially equal,” a plaintiff must establish that the jobs compared entail common duties or consent, and do not simply overlap in titles or classifications.
- *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 822–23 (7th Cir. 2011)
 - Job title of “Director of Operations” held by both female and male employees who allegedly were paid more for same work, was irrelevant to EPA claim because title covered multitude of positions differing in authority and responsibility; female employees in air and marine engine manufacturing plant failed to identify any male worker who was paid more for substantially same work; jobs not substantially equal.
 - Assessing skill, effort, and responsibility when mixed within same job title. Court rejects application of “comparable worth”; emphasizes that job title is not determinative for comparator groups in context assessing skill, effort and responsibility when mixed within job title, as a “title covers a

multitude of positions differing in authority (such as number of employees supervised) and responsibility.”

- *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 288 (4th Cir. 1974) (“Job descriptions and titles, however, are not decisive. Actual job requirements and performance are controlling.”)
- *Ingram v. Brink’s, Inc.*, 414 F.2d 222, 231 (1st Cir. 2005) (“The EPA is more concerned with substance than title.”)
- **Jobs that share a common core of tasks are substantially similar/where majority of the skills, effort and responsibility are substantially similar, so are the jobs**
 - EEOC Guidance:
 - In evaluating whether two jobs are substantially equal, an inquiry should first be made as to whether the jobs have the same “common core” of tasks, i.e., whether a significant portion of the tasks performed is the same. *See Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685 (7th Cir. 1998) (critical issue in determining whether two jobs are equal under the EPA is whether the two jobs involve a “common core of tasks” or whether “a significant portion of the two jobs is identical”).
 - If a significant portion of the tasks performed in the two jobs is the same, an inquiry should be made as to whether the comparators perform extra duties which make the work substantially different. Jobs with the same common core of tasks are equal, even though the comparators perform extra duties, if the extra duties are insubstantial. *See*:
 - *EEOC v. Central Kansas Med. Ctr.*, 705 F.2d 1270, 1272-73 (10th Cir. 1983) (janitors and housekeepers performed equal work; any extra work performed by the janitors was insubstantial or was balanced by additional responsibilities performed by housekeepers).

- *Corning Glass Works v. Brennan*, 417 U.S. 188, 203 n.24 (1974) (noting that Court of Appeals concluded that extra packing, lifting, and cleaning performed by night inspectors was of so little consequence that the job remained substantially equal to those of day inspectors).
- *Goodrich v. International Bhd. of Elec. Workers*, 815 F.2d 1519, 1525 (D.C. Cir. 1987) (job of female union employee was not substantially equal to that of males who did the same work because males had additional duties which, though consuming little time, were essential to the operation and mission of the union).
- *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 695–97 (7th Cir. 2006)
 - Two jobs are not substantially equal where one employee has broader strategic planning responsibilities, supervisory duties, and authority over personnel than another employee.
 - “In order to determine whether or not two jobs are equal for purposes of EPA, courts look to whether the jobs have a ‘common core of tasks, i.e., whether a significant portion of the two jobs is identical; once a plaintiff establishes a ‘common core’ of tasks, court asks whether any additional tasks make the jobs substantially different” (quoting *Cullen v. Indiana Univ. Bd. Of Trs.*, 338 F.3d 693, 704 (7th Cir.2003)).
- **Minor differences in the jobs do not mean jobs are not substantially similar/occasional performance of certain tasks does not necessarily render the jobs sufficiently dissimilar/incidental tasks or tasks that consume only a small amount of time will not render jobs sufficiently dissimilar**
 - EEOC Guidance
 - “[M]inor differences in the job duties, or the skill, effort, or responsibility required for the jobs will not render the work

unequal. In comparing two jobs for purposes of the EPA, consideration should be given to the actual duties that the employees are required to perform.”

- EEOC Q&A Compliance Manual:
 - “How similar do jobs have to be under the Equal Pay Act? Under the Equal Pay Act, jobs must be substantially equal, but not identical. Therefore, minor differences in job duties, or the skill, effort, or responsibility required for the jobs will not render them unequal. Also, differences between the people in the jobs are not relevant to whether the jobs are substantially equal, though differences in qualifications could ultimately be a defense to a claim of pay discrimination.”
- OFCCP Sex Discrimination Guidelines Revised 2016 - 41 CFR 60.4(a)
 - “Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others.”
- *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir. 1970) (10% wage differential not justified despite fact that male selector-packers spent up to 18% of their time on 16 tasks not performed by females, the work in general was “substantially identical” under EPA).
- *Brennan v. South Davis Cmty. Hosp.*, 538 F.2d 859, 862 (10th Cir. 1979) (minimal amount of time spent by orderlies performing catheterization of patients each day, even though it was task requiring some skill, did not justify differential in pay between male orderlies and female aides; court reasoned that disparity is “not justified by performance of extra duties of equal skill effort and responsibility, when supposed extra duties do not in fact exist, or when extra task consumes minimal amount of time and is of peripheral importance.”).

- **Look at the day-to-day content of the jobs**

- *Marshall v. Dallas Indep. Sch. Dist.*, 605 F.2d 191, 195 (5th Cir. 1979).
 - Work of “custodial helpers” and “maids” was not substantially equal where “custodial helpers” worked all months of year and performed work requiring heavier physical labor than “maids.”
 - Court emphasizes need to consider all circumstances related to job content. “In applying the various tests of equality to the requirements for the performance of such jobs, it will generally be necessary to scrutinize the job as a whole and to look at the characteristics of the jobs being compared over a full work cycle. This will be true because the kinds of activities required to perform a given job and the amount of time devoted to such activities may vary from time to time.” *Id.* at 195.
- *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 770 (7th Cir. 2007) (job of female manager who supervised six-acre park with limited facilities was not equal in terms of skill, effort, and responsibility required to that of male manager who was to oversee much larger park with extensive facilities including pool).
- *Katz v. School Dist.*, 557 F.2d 153, 156 (8th Cir. 1977) (“two employees are performing equal work when it is necessary to expend the same degree of skill, effort, and responsibility in order to perform the substantially equal duties which they do, in fact, routinely perform with the knowledge and acquiescence of the employer”).

- **This element looks at the jobs themselves, not the people who have those jobs**

- EEOC Guidance
 - “The important comparison in determining whether the “equal work” requirement is met is the comparison of the jobs, not the people performing the jobs. Thus, a difference between the comparators has no bearing on whether the jobs are equal.

The critical question at this point in the analysis is whether the jobs involve equal work. However, a difference between the comparators could qualify as a defense to a compensation disparity.”

- *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533 (11th Cir. 1992) (“A plaintiff establishes a prima facie case by comparing the jobs held by the female and male employees, and by showing that those jobs are substantially equal, not by comparing the skills and qualifications of the individual employees holding those jobs.”)
- **Effort may be exerted in different way, but may still be substantially similar**
 - 29 C.F.R. § 1620.17 (Differences in the degree of responsibility required in the performance of otherwise equal jobs cover a wide variety of situations.)
 - OFCCP Final Rule (41 C.F.R. § 60-20.4 Discriminatory Compensation)
 - “Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others.”
 - *Chapman v. Pacific Tel. & Tel. Co.*, 456 F.Supp. 65, 69-70 (N.D. Cal. 1978) (“Effort is measured by the amount of physical and mental exertion needed for the performance of the job. Responsibility reflects the degree of accountability required in the performance of the job. In this case, involving a comparison of managerial jobs, these two factors are closely related; the greater the responsibility imposed, the greater the exertion necessary to discharge it.”)
- **Similar working conditions means the physical surroundings and hazards/does not include job shifts**

- EEOC Guidance:
 - “While a difference between night and day work is not a difference in “working conditions,” it could constitute a “factor other than sex” that justifies a compensation differential. A shift differential operates as a defense only if both sexes have an equal opportunity to work either shift, if sex was not the reason the employer established the compensation differential, and if there is a business purpose that the shift differential is being used reasonably to serve.”
- *Shultz v. American Can Co.-Dixie Prods.*, 424 F.2d 356, 361 (8th Cir. 1970).
 - No justification for paying male night-shift workers more than female day-shift workers; males had to load heavy rolls of paper, but this consumed only small amount of time, and employer’s own pay practices suggested that this was not real reason for disparity.

Burden of Proof;/Affirmative Defenses:

- *Bearden v. International Paper Co.*, 529 F.3d 828, 833 (8th Cir. 2008) (“Once an employee has established a prima facie case, the burden shifts to the employer to prove any of four statutory affirmative defenses.”)
- *Beck-Wilson v. Principi*, 441 F.3d 353, 363 (6th Cir. 2006) (“Because the comparison at the prima facie state is of the jobs and not the employees, ‘only the skills and qualifications actually needed to perform the jobs are considered.’ Factors like education and experience are considered as a defense to an employer’s liability rather than as part of a plaintiff’s prima facie case.”)

We therefore held that the Equal Pay Act’s exception that a factor other than sex can be an affirmative defense, ‘does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason.’ “

- *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 695 (7th Cir. 2006)

- “Under the EPA, differences in education and experience may be considered factors other than sex.”
- “An employer may take into account market forces when determining the salary of an employee.”

Discussion Draft 2017

i. Tool #4 How to do a job analysis

[Do we want to create an online tool that describes how to do a job analysis?]

Concept: How to do a job analysis. Corresponds with step--by-step instruction from challenges and barriers subcommittee step-by-step document. Could be added into the excel sheet for infrastructure and systems and document retention tool. Could include a sample in the excel sheet of how to do the analysis, complete with programmed cells to illustrate the calculation.

Tool:

Format:

ii. *Measuring the Pay Gap Subcommittee: Dr. Kimberlee Shauman and Dr. Daniel C.Y. Kuang*

Online tool information – Identifying substantially similar jobs (job clusters)

1. Cluster analysis
 - a. Companies who are fortunate enough to have detailed functional job analysis and quantified and coded Knowledge, Skills, and Abilities data can apply cluster analysis methods to identify and cluster jobs that share similar Knowledge, Skills, and Abilities.
2. Regression model of pay scale (base pay) by job characteristics
 - a. - to identify associations and outliers
 - b. - to quantify needed pay-scale adjustments
3. Median split by Group (see e.g., EEOC Compensation Compliance Manual Section 10.III.A.3.b.ii)
4. Non-parametric methods for testing for differences between groups
 - a. - Kruskal-Wallis
 - b. - Mann-Whitney

Compare wage rates by gender

Wage rates are not limited to an employee's annual salary or hourly wage and can include compensation for performance. Once you group together positions with similar functions, roles, skills, efforts, and responsibilities,

you will want to analyze whether or not there is a pay gap between what women and men are paid in substantially similar jobs.

[Insert Tool #5 How to do a pay equity analysis]

iii. Tool #5 How to do a pay equity analysis

[Do we want to create a tool that describes how to perform a pay equity analysis?]

Concept: How to do a pay equity analysis. Corresponds with step-by-step instruction from challenges and barriers subcommittee step-by-step document. Could be added into the excel sheet for infrastructure and systems and document retention tool. Could include a sample in the excel sheet of how to do the analysis, complete with programmed cells to illustrate the calculation.

Tool:

Format:

iv. Measuring the Pay Gap Subcommittee: Dr. Kimberlee Shauman and Dr. Daniel C.Y. Kuang

Online tool information - Measure equity in employee pay w/in job clusters

Method	Research Question
Regression	<ul style="list-style-type: none"> • Determine if there is statistically significant pay disparity between groups (e.g. men and women) after accounting for explanatory factors (e.g., time in company, time in job, performance) • Estimate the pay gap between groups.
Median Split ¹	<ul style="list-style-type: none"> • This method determines if there is a difference in the proportion of women above/below the median as compared to men. All else being equal (i.e., no pay gap), the proportion of women above and below the median is the same as that of men.
Non-Parametric ²	<ul style="list-style-type: none"> • This method determines is very effective in identifying economic segregation (e.g. women holding lower paying jobs than men).
MRP Standardized test	<ul style="list-style-type: none"> • Often times, people attribute the pay gap to market value differences. • This method accounts for market value differences and controls for them by computing “comp-ratios” (salary/MRP). • Applying correlation techniques, it is possible to test if there is a relationship between group membership (women/men) and comp-ratios.

Note: ¹EEOC Compensation Compliance Manual Section 10.III.A.3.b.ii

²Kruskal-Wallis, Mann-Whitney U

g. Determine reasons for any differences in pay.

If there is no difference in the wage rate of employees who perform substantially similar work, then there is no need to do anything further. However, if there is a difference in the wage rate of women and men who perform substantially similar work, then the employer needs to identify the factor(s) explaining the difference. The employer must determine if the difference is due to a bonafide factor that is job related and consistent with business necessity. **[link to definition of business necessity]** If the employee demonstrates an alternative business practice exists that would serve the same business purpose without producing the wage differential, then

the employer should heed the alternate business practice. There are several valid factors identified in California law for a wage rate difference, and they must be applied reasonably and account for the entire pay difference:

- Seniority system
- Merit system
- Incentive system
- *Bona fide* factor such as education, experience, ability, or training.

[Insert Tool #6 valid factors explaining the gender wage gap]

The employer has the burden to prove a wage difference is based upon one or more of the above-listed factors and that the factors are applied reasonably and account for the entire wage difference. A good practice is to document the factor(s) for any wage rate offered to an applicant or employee and retain that documentation for future reference if a wage difference is questioned. Please review the chart that sets forth an employer's obligation regarding retention periods for various employment related documents.

[Insert Tool #2 infrastructure and systems tool here]

i. Tool #2 Documentation/Data Collection Items

[Do we want to create an online resource about wage rate information?]

Concept: This could be incorporated into an excel sheet that is similar to the Australia sheet. It could include all of the infrastructure data, measuring, record keeping, and job classification information in one tool.

Tool:

Format:

ii. *Infrastructure and System Subcommittee: Dr. Daniel C.Y. Kuang and Peter Pawlick*

Documentation/Data Collection Items					
Subcommittees/6. Infrastructure and Systems					
<i>Draft - For Discussion Purposes Only: The materials provided on this website have been provided by individual Task Force members or staff to provide access to resources that are available on the issues considered by the Task Force. The materials provided on this website are for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem. The materials do not represent the opinions or conclusions of the Task Force. The posting of these materials does not create requirements or mandates.</i>					
Infrastructure / Systems					
For employers of all sizes, a commitment to providing resources to:					
- Establish and/or change existing management practices					
- Ensure that sufficient data for a pay equity analysis are captured and stored in an accurate manner with appropriate retention schedules					
- Analyze and take action on pay equity data.					
This document summarizes suggested infrastructure and data that would be useful in conducting a pay equity analysis. These may not always apply based on industry or employee population. There may be other data points that may be relevant that may not be listed here. While not explicitly required by law, this data may facilitate compliance with the law.					
Function	Description	Pay Equity Data ¹			
		Small (50)		Med/Large (500+)	
		Minimum	Desirable	Minimum	Desirable
Human Resources Management System (HRMS)	o Time in Company ^A	✓		✓	
	o Time in Position	✓		✓	
	o Pay Rate History (including Starting Salary ^B)	✓		✓	
	o Gender	✓		✓	
	o Race ^C	✓		✓	
	o Employee Job History, Management Level History, Location History, Compensation History ^D		✓	✓	
	o Geographic Salary Ranges reflecting external market data		✓	✓	
Payroll Time and Attendance	o Team Size (total team size and direct reports)		✓		✓
	o Payroll Data	✓		✓	
	o Earnings	✓		✓	
Talent Management	o Hours Worked	✓		✓	
	o Talent assessment data ^E		✓	✓	
	o Accomplishments; Performance against goals; Productivity		✓	✓	
	o Goals/Objectives		✓		✓
	o Long-Term Career Potential (High Potential or Key Role); Training & Development Positions; Fast-track / leadership development ^F		✓		✓
	o Employee Profiles (Internal/external employment history, experience, institutional knowledge, education, accomplishments, competencies) ^G		✓		✓
	o Competency assessments		✓		✓
Recruiting / Talent Attraction	o Succession planning		✓		✓
	o Scope of Role - Budget P&L Responsibility, Complexity of channels, geographies		✓		✓
	o Job Profiles/Descriptions	✓		✓	
External Market Data	o Candidate Resumes ^H		✓	✓	
	o Salary Survey analysis		✓		✓
Company Practices**	o Salary Surveys with benchmark jobs		✓		✓
	o Definition / Statement of Compensation Strategy (Pay for Performance; Pay for Tenure/Service; Pay for Role) ^I		✓		✓
	o Definition of Recruiting Practices (Prior Salary; Blind Resume; Documentation of pay/hiring decisions) ^J		✓		✓
Internal Job Structure Data	o Career leveling matrix indicated breadth and depth of role scope		✓		✓
	o Job Functions / Job Families		✓		✓
Notes:					
¹ Elements of this checklist that are required to conduct a pay equity analysis should not be construed as legal requirements. They are suggested management practices that will help facilitate a pay equity analysis.					
^A In service date to account for missing periods in tenure.					
^B A very useful field to capture because currently the majority of the pay gap is due to starting salary.					
^C SB 1067 expanded SB 358 to cover race. Include Non-Reported vs. Opt-Out as options; Cross-over with Definitions and HR: Need to define best practice for survey form for Race/Ethnicity including available options and differentiate opt-out vs. not captured.					
^D Cross-over with Definitions: Need definition of compensation (pay rate vs. earnings and additionally bonus/stock)					
^E Cross-over with Human Resources: Important that talent/performance assessment systems do not perpetuate bias or disparate impact.					
^F Cross-over with Human Resources					
^G Should External or Internal Resumes be maintained					
^H Cross-over with Human Resources: Define practices surrounding pay decisions; regularly review internal and external equity; leverage calibration discussions (more than one person making decision)					
^I Cross-over with Human Resources: Define practices surrounding recruiting; asking for pay history; placing employee into correct role and job level; re-level jobs based on changes in scope and business priority					

iii. Human Resources Subcommittee: Commissioner Lauri Damrell and Rhoma Young

Recordkeeping Policy: Record Maintenance, Retention and Destruction

https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms_017186.aspx Jul 14, 2014

Numerous federal laws require employers to create and retain various forms of employment records. Many of these requirements are dependent on the number of employees a company has. See Federal Labor Laws by Number of Employees. The laws typically impose civil monetary penalties for failure to maintain statutory records. In some instances, there is individual liability and criminal liability. Proper maintenance of employment records is

also critical to defending against employment-related litigation. In fact, an employer can be sued for wrongful destruction of employment records under the theory of spoliation of evidence. See Federal Recordkeeping Requirements and Federal Reporting Requirements. Moreover, many states, including Massachusetts, New York and South Carolina, require businesses to destroy records containing certain employee and applicant personal information by shredding, erasing or other means to render the information unreadable or undecipherable. See New Year's Time to Review Screening Documents to Keep, Toss.

The sample policy below sets forth general maintenance, retention and destruction procedures for employee records. For a policy specifically related to record confidentiality, see Recordkeeping: Employee Records Confidentiality Philosophy Policy. For a policy that covers electronic personnel records, see Recordkeeping: Electronic Document Retention Policy.

Purpose

The human resources (HR) department retains and destroys personnel records in accordance with the [Company Name's] corporate policies on business records retention as well as federal and state laws governing records retention. Below is an outline of the HR department's operating procedures for personnel records retention and destruction of documents when such retention periods have passed. If the [Company Name]'s retention procedure is not of sufficient duration for any state in which the company does business, this procedure will be superseded by state requirements.

The HR department maintains both employee record information and government compliance reports. Both are subject to the following retention requirements and destruction procedures.

Maintenance of Employee Records

The following employee information records are maintained in segregated personnel files:

- 1) Pre-employment information.
- 2) I-9 forms.
- 3) Benefits plan and employee medical records.
- 4) Health and safety records.
- 5) General employee personnel records.

Government compliance reports are maintained in reverse chronological sequence and filed separately from the above employee information records.

Destruction of Employee and Applicant Records

All paper personnel records and confidential employee data maintained by the HR department will be destroyed by shredding after retention dates have passed; this procedure pertains to all personnel records, not just those governed by the Fair and Accurate Credit Transactions Act (FACTA).

Application materials submitted by applicants for employment who were never employed are also to be shredded.

Personnel records include electronic as well as paper records. The HR department will work with the IT department periodically but no less than twice annually to review and ensure that the HR department's electronic records relating to employee information and compliance reports are properly purged.

Retention of Terminated Employees' Records

The retention periods for terminated employees' and applicants' records and compliance reports are as follows:

Pre-employment records:

- Résumés, applications and related employment materials, including interview records and notes, for applicants not hired: 3 years.
- Résumés, applications and related employment materials, including interview records and notes, for employees: 4 years after date of termination.
- Background checks, drug test results, driving records, company employment verifications, letters of reference and related documents: 5 years.

Employee records:

- Terminated employee I-9 Forms: The later of 3 years from date of hire or 1 year following termination of employment.
- Compensation, job history and timekeeping records: 4 years after termination.
- FMLA and USERRA and related leave records: 3 years after termination.
- Performance appraisal and disciplinary action records: 4 years after termination.
- Benefit records: 6 years after the filing date of the documents, based on the information they contain, or 6 years after the date on which such documents would have been filed but for an exemption or simplified reporting requirement.
- Disputed issues (records relating to issues 2 years after resolution of dispute involving external agencies or parties, wage-hour investigation by DOL, EEOC charge, arbitrations, court actions, etc.), OSHA and employee safety records: 5 years after termination.
- Workers' compensation claims: 30 years after date of injury/illness.

Compliance reports and records:

- State New Hire reports: 1 year after report was filed.
- EEO-1: 2 years after report was filed.
- Annual Affirmative Action plans: 2 years after close of AAP year.
- OSHA 300/300A: 5 years after posting.
- Form 5500: 6 years after report was filed.
- Federal/state tax reports: 4 years after report was filed.

iv. Tool #6 Valid factors

[Link to valid factors explaining the gender wage gap]

[Do we want to create a tool that describes the valid factors?]

Concept: If employers find a wage gap, acceptable explanations for it. This is a part of the step-by-step document. It could be incorporated into the infrastructure and systems excel sheet.

Tool:

Format:

***v. Challenges and Barriers Subcommittee: Jeanna Steele and
Jennifer Barrera***

Online tool information: Valid factors explaining a gender wage difference.

- i) Is the difference due to a seniority system?
 - (1) A seniority system rewards employees according to the length of their employment.
 - (2) In order for a seniority system to be considered valid, it must be well-established, consistently utilized, and based upon the length of time of employment. Courts are more likely to consider a seniority system valid if it includes the following: (1) a rule on when the seniority clock begins ticking; (2) the circumstances under which seniority may be forfeited; (3) the lengths of service that will count toward accrual of seniority; and (4) the types of employment decisions that will govern seniority. *See California Brewers Association v. Bryant*, 444 U.S. 598 (1980).
 - (3) To be a bona fide system, it must not have been adopted with discriminatory intent; it must be based on predetermined criteria; it must have been communicated to employees; and it must have been applied consistently and even-handedly to employees of both sexes.
- ii) Is the difference due to a merit system?
 - (1) A merit system rewards employees for exceptional job performance.
 - (2) A valid merit system requires employers to show that there is well-established, organized and structured procedure to evaluate an employee's performance according to predetermined criteria. *See American Bar Association Model Jury Instructions Employment Litigation*, P 106 § 2.04(2)(c).
 - (3) To be a bona fide system, it must not have been adopted with discriminatory intent; it must be based on predetermined criteria; it must have been communicated to employees; and it must have been applied consistently and even-handedly to employees of both sexes.

- iii) Is the difference due to a system that measures earnings by an “incentive system”?
 - (1) An incentive system provides compensation on the basis of the quality or quantity of production.
 - (2) Employers may provide compensation incentives for greater output or better quality of production. Compensation tied to quantity refers to an equal dollar per unit rate so that the rate of pay is actually the same among employees, but the total compensation may differ. A compensation system based on the quality of production rewards employees who make superior products. See American Bar Association Model Jury Instructions Employment Litigation, P 106 § 2.04(2)(d).
 - (3) To be a bona fide system, it must not have been adopted with discriminatory intent; it must be based on predetermined criteria; it must have been communicated to employees; and it must have been applied consistently and even-handedly to employees of both sexes.
- iv) Is the difference due to any other bona fide factor other than sex, race, or ethnicity such as an applicant or employee’s education, experience, ability, or training?
 - (1) While the relative education, experience, training, and/or ability of individual jobholders are not relevant to determining whether their jobs require equal skill, these factors can, in some cases, justify a compensation disparity. Employers can offer higher compensation to applicants and employees who have greater education, experience, training, or ability where the qualification is related to job performance or otherwise benefits the employer's business.⁵ Such a qualification would not justify higher compensation if the employer was not aware of it when it set the compensation, or if the employer does not consistently rely on such a qualification.⁶ Furthermore, the

⁵ See, e.g., *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1312 (2d Cir. 1995) (employer who claims that experience justifies higher salary for male employee must prove both that it based the higher salary on this factor and that experience is a job-related qualification for the position in question); *EEOC v. First Citizens*, 758 F.2d 397, 401 (9th Cir.) (greater experience of male comparator did not justify pay disparity where the main qualities necessary for the job were speed and accuracy, not experience; greater education of another comparator also did not justify pay disparity where that qualification was only marginally related to the job), *cert. denied*, 474 U.S. 902 (1985).

⁶ See *EEOC v. White and Son Enters.*, 881 F.2d 1006, 1010 (11th Cir. 1989) (male employees' prior experience did not justify their higher compensation where defendant did not know what prior experience its employees possessed when they began employment).

difference in education, experience, training, or ability must correspond to the compensation disparity. Thus, a very slight difference in experience would not justify a significant compensation disparity. Moreover, continued reliance on pre-hire qualifications is less reasonable the longer the lower paid employee has performed at a level substantially equal to, or greater than, his or her counterpart.⁷

- (2) **Education.** An example of a bona fide factor is providing an employee higher compensation for an employee's education. That prior experience must be job-related and serve a legitimate business purpose.
- (3) **Experience and Ability.** Examples of bona fide factors are providing an employee higher compensation for an employee's length of experience or ability where the qualification is related to the job and serves a legitimate business purpose.
 - (a) **Example 1 (Experience).** CP had been employed as an office manager. Her starting salary was \$42,000. She resigned one year later. Her male successor was hired at a starting salary of \$50,000. CP filed a charge claiming that the difference in starting salaries violated the EPA. The employer proves that the salary difference was based on the successor's extensive experience as an office manager, as compared to CP's lack of any job-related experience. The difference in experience qualifies as a factor other than sex justifying the compensation disparity.
 - (b) **Example 2 (Experience).** Same as Example 1, except that the evidence shows that the employer relies inconsistently on work experience in setting salaries for office manager jobs, and that males who lacked experience were offered higher starting salaries than CP. A violation of the EPA is found.
 - (c) **Example 3 (Experience).** Same as Example 1, except that CP did have job-related experience, though her successor had a slightly greater amount of experience. The difference in their experience

⁷ See *Kouba*, 691 F.2d at 878 (one consideration in determining reasonableness of relying on prior salary to justify a pay differential was "whether the employer attributes less significance to prior salary once the employee has proven himself or herself on the job"); *Jones v. Westside Urban Health Ctr., Inc.*, 760 F. Supp. 1575, 1580 (S.D. Ga. 1991) ("Presumably, defendants initially hired [the female comparator] at a higher rate of pay because, in their informed judgment, they assumed that experience and education would make her perform at a higher level than [the male plaintiff,] a less-educated novice. Defendants have offered no explanation for clinging to a salary discrepancy when their underlying assumption has been proved, as plaintiff alleges, grossly incorrect.").

was not commensurate with the \$8,000 difference in starting salaries, and therefore a violation of the EPA is found.

(4) **Training.** A compensation disparity attributable to participation in a bona fide training program is permissible. While an organization might offer numerous types of training programs, a bona fide training program that can justify a compensation disparity must be a structured one with a specific course of activity. Elements of a legitimate training program include: (1) employees in the program are aware that they are trainees; (2) the training program is open to both sexes; and (3) the employer identifies the position to be held at the program's completion.⁸ If the training involves rotation through different jobs, the compensation of an employee in such a training program need not be revised each time he or she rotates through jobs of different skill levels.

(a) **Example (Training):** CP, a bank teller, alleges that she is paid less than a male bank teller who performs substantially equal work. The respondent alleges that the male comparator is a participant in a management training program that is open to both sexes. The evidence shows, however, that the program is not bona fide because it is not a formal one, no other employees are identified as participants in the program, and the comparator does not receive any formal instruction or even know that he is in a management training program. An EPA violation therefore is found.

(5) **Geography.** Another *bona fide* factor may be higher compensation given the geographical location of the employees and the cost of labor in a given region. However, if relying on cost of labor to justify a pay differential be careful to analyze whether every employee in an otherwise substantially similar role should be provided a competitive market increase to account for any pay disparities that might otherwise violate the Equal Pay Act. Differences in compensation

⁸ See, e.g., *EEOC v. First Citizens*, 758 F.2d 397, 400 (9th Cir.) (greater experience of male comparator did not justify pay disparity where the main qualities necessary for the job were speed and accuracy, not experience; greater education of another comparator also did not justify pay disparity where that qualification was only marginally related to the job), cert. denied, 474 U.S. 902 (1985).

based on geography should be analyzed after analyzing skill, effort and responsibility.

Remedy disparity that can be attributed to gender.

Current employees: If there is no valid or bona fide factor justifying the wage rate differential, then the employer should consider:

- Increasing the wage rate of the employee who is performing substantially similar work and being paid less
- Compensating the employee for back pay as a result of the wage difference

An employer may also consider contacting legal counsel for assistance with analyses and determining how to mitigate a wage difference unsupported by a *bona fide* factor. It is always a good practice to maintain documentation of analyses for reference if an employee's wage rate is later questioned or challenged.

New employees: The same standards apply for newly hired employees. An employer must base a new employee's compensation on a *bona fide* factor, too. Employers should also heed the Fair Pay Act's stipulation about prior salary, "Prior salary shall not, by itself, justify any disparity in compensation." See Labor Code Section 1197.5.

With this advance planning the employer will be better able to examine potential candidate based on their qualifications for the position and negotiate within objective salary requirements. Best practices include determining in advance:

- Employer's budgetary requirements
- What a job is worth
- Seniority issues amongst existing employees
- Potential salary ranges for open positions.

vi. Subcommittee on Employees: Rhoma Young and Tamekia N. Robinson

Am I being paid fairly under the Fair Pay Act of 2015? (Stage II)

So what if you've been at a job long enough, suspect that you might be doing similar work to men at your company or agency, and think they might be getting paid more than you are? You'd like to do some research, but where do you start? Below are pay gap calculators you might find useful to help estimate if there is a gender pay gap where you work.

- Pathways to Equity: Women and Good Jobs <http://womenandgoodjobs.org/>
- Closing the Gap: 50 years Seeking Equal Pay <http://www.womenwagegap.org/tools>
- Economic Policy Institute: What Could You Be Making? <http://www.epi.org/multimedia/gender-pay-gap-calculator/>

- (8) Who can an employee contact if the employee believes the employer has violated the California Equal Pay Act?

An employee can contact the Division of Labor Standards Enforcement:
<http://www.dir.ca.gov/dlse/DistrictOffices.htm>.

An employee can contact the Department of Fair Employment and Housing:
<http://www.dfeh.ca.gov/contact-us>.

Subcommittee on employee organizations and unions: Leslie Simon and Jennifer Reisch

1. File a written complaint with HR/boss, DLSE or court. Deadlines, no tolling, no admin exhaustion, HR/Boos not required, what kind of remedies.

Disclaimer: These are suggested practices only. Pay equity analyses are not required under the *Fair Pay Act*. The suggestions provided here are to help employers begin to think about pay equity at their organizations. Before beginning any pay equity analysis, we encourage employers to consult with legal counsel who are knowledgeable in employment law and pay equity because what is legally appropriate for any given employer depends upon that employer's unique circumstances.