

NOTE: This document is drafted solely for discussion during the ~~September 28~~, November 13, 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~~ Under California law, employers cannot:

- Seek salary history, including “compensation and benefits,” of an applicant
- Rely on salary history information in determining whether to offer employment or what salary to offer unless the applicant voluntarily and without prompting discloses their salary history
- ~~provides that an employer cannot not r~~ Rely on prior salary, ~~by itself, alone~~ to justify any pay disparity in compensations between male and female employees.

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The law also requires employers to provide the pay scale for a position to an applicant who makes a reasonable request for that information.

In this tool, we provide ~~guidance for employees to help them handle questions regarding prior salary if and when they come up during an interview. We also provide~~ suggested practices for employers for setting starting salaries based on factors other than prior salary. Each organization is different, and there is no one-size-fits-all strategy. However, we aim to provide high level tips, examples, and factors for ~~employees and~~ employers to consider.

Suggested Practices for Employers in Setting Starting Salaries

Compensation Philosophy. Before determining what any given employee should be paid, you should consider developing and documenting the organization’s compensation philosophy. In other words, how does the your organization think about compensation? What key principles are important ~~to the organization~~? What does the organization do you value in its your employees? Documenting this information is important so that you can (1) be consistent in setting pay; and (2) later demonstrate legitimate reasons for any pay differences if necessary.

All organizations use and state their compensation philosophy differently. Generally, any compensation philosophy should be based on the premise that employees will be paid in a fair and non-discriminatory manner. Key considerations might include, but not be limited to, some combination of those listed below: ~~provided they are based on bona fide factors other than sex, and are reasonable, job related, and consistent with business necessity;~~

- Rewarding employees for job performance that is evaluated based on gender-neutral factors.
- Rewarding employees for their impact or contribution to the organization, e.g., have they contributed to a particularly meaningful project that advanced the organization's competitive goals or increased revenue?
- Employee retention: Is any component of the compensation package designed to encourage employees to stay? For example, some employers offer deferred compensation that is paid out over a period of years so long as the employee stays with the organization for a certain period of time.
- Market competitiveness: Is it important to the your organization to offer a compensation package that is competitive with the market in which the employer is you are competing for talent as reflected, for example, in market surveys or other external market data? Is the organization competing for employees who possess "hot" or cutting-edge skills who are demanding more money in the market place?
- Employee motivation: Are certain forms of compensation designed to motivate employees to achieve certain goals or performance metrics? For instance, some employers pay commissions to sales employees based on sales revenue achieved.
- Budget: How much money is available for employee compensation considering other organization expenses?
- Profitability: Are certain components of compensation based on the your organization's financial performance?
- What is the scope, breadth, and/or depth of the role and its impact on your organization?

In addition, consider what factors are important to the organization you 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

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

If you rely on any of the considerations above, either upon hire or during employment, you must still show that each is a bona fide factor other than sex, is reasonably applied, is job related, and is consistent with business necessity. [LINK TO STEP BY STEP DOCUMENT]

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Imagine, for example, that your company sells widgets and you are looking to compete in the marketplace by making a new state-of-the-art widget. You conduct market research and find that there are few in the industry who have the experience necessary to make that type of widget. Due to high demand, those employees tend to be paid more than other widget makers. Your company makes a strategic decision to pay above market to recruit and retain those who have the specialized experience. This market consideration may justify pay disparities between widget makers. However, it would not justify a disparity if your company does not consistently consider this specialized experience when setting pay.

What if one of the widget makers with the specialized experience says they have a competing offer for higher pay? This may reflect growing competition in the market and may justify making a higher counteroffer. However, you should consider asking the applicant what it would take for them to accept the job with your company. Would they expect to make the same amount? Have they considered the total compensation package you are offering? Is the competing offer for a role that is substantially similar to the position for which the applicant applied? Do the applicant's qualifications support their increased compensation expectations? Would the counteroffer otherwise be consistent with your compensation philosophy? The answers to these questions may later help you justify this employee's higher rate of pay.

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
- Childcare assistance/provision

Setting Salary Ranges. ~~The organization~~You should also consider setting salary ranges for each job position prior to interviewing ~~candidate~~applicants. To do this, ~~the organization~~you can look at external market data and the salaries of ~~its~~your existing employees in jobs that are substantially similar when viewed as a composite of skill, effort, and responsibility. This will help ~~the employer~~you evaluate the reasonable value to ~~the~~your organization of each job position. Employers generally aim to place new hires ~~at the midpoint of~~in the salary range based on the applicant's readiness for the position. A fully qualified applicant is likely to be placed in the mid-point of the range, absent appropriate differentiating factors that may support placement at the higher or lower end of the range.

Communicating with the Prospective Employee about Starting Salary. ~~Employers~~You can adopt strategies for evaluating what to pay new employees without asking their prior salary or other prior forms of compensation or benefits. Ultimately, you want to know if there is a possible "match" between the ~~candidate~~applicant's expectations and the realities of the total compensation for the position you are discussing. ~~You also want to know if the applicant is honest.~~

To accomplish this, you can:

- ~~Consider asking~~Ask the ~~candidate~~applicant, "What are your salary expectations?" instead of asking their prior salary and ask why they believe their qualifications are in line with their expectations.
- If the applicant mentions that he or she would be forfeiting deferred equity by leaving their current job, focus back on the applicant's expectations: "What does that mean in terms of your compensation expectations? What will it take for you to take a job at this organization?"
- Be ready to discuss the salary range pay scale (i.e. salary range) for the specific position for which you are considering the applicant and for which the applicant is qualified and explain your compensation philosophy. Remember that the law requires employers to provide the pay scale for a position to an applicant applying for employment who makes a reasonable request for that

information. If the position is new and you do not already have a pay scale for the job, be prepared to provide the range you have in mind for the position.

- Be prepared to discuss your compensation philosophy, which may help guide the applicant in setting their salary expectations and explain their basis for them.
- Be able to clearly define the “total” compensation being offered, especially if there are performance-based bonuses or rewards. This should also include a discussion of what other non-financial incentives the organization offers.

Document What You Considered in Setting the Employee’s Compensation. Take the time to appropriately document the factors you consider in setting each employee’s pay upon hire to ensure that you are making decisions that are consistent with your compensation philosophy and to enable the organization to better defend these decisions if later challenged.

For honesty, it is important to do if you conduct individualized reference checks, t (even if only for final candidates). Get the candidate to sign an appropriate waiver of information release. Tell whomever you call that the candidate signed that release of information and gave permission to ask job-related questions. Be ready to send them a copy of the signed release. Take notes about responses, including what the references said and on what date they said it. This information can be key in making a more accurate assessment about the applicant. Below are examples of questions that you can ask an applicant’s references to further solidify the responses gathered from the applicant: Get a list from candidate of at least 5 persons who can really address:

- What the applicant did in the previous position
- Confirm the employee’s applicant’s title and the scope of their responsibilities
- What were their major strengths? (ask for example)
- Was there any area that needed more development? If so, what?
- What did you value and appreciate most about this candidate applicant?
- What were the candidate applicant’s major accomplishments? Impact on the workplace?
- Were they a team player? How do you define that?
- Were they reliable and dependable? Define?
- Did you respect and trust/not respect and trust them? Why?
- Would you hire/rehire this person? Into what types of job?
- Any other question you feel is key to the job.

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- If they show reluctance, explain a little bit about the position and ask if they feel the prospective applicant could do that work: Do you see any difficulty in the match between the job and the employee? What?

~~Wait for any hesitation in their answers and be sure to ask what that means. While it can be a bit time consuming, try to communicate with at least 3 of the 5 persons identified. This information can be key in making a more accurate assessment about the applicant.~~

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