

California Pay Equity Task Force

Agenda

August 1, 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

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](http://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 April 4, 2017 Meeting
- V. Unification of Materials
  - a. Update
  - b. Next Steps
  - c. Website

LUNCH BREAK

- VI. Subcommittee Break-Out Sessions (The following subcommittees could meet: Definitions, Enforcement and Process, Implementation and Law, Measuring the Pay Gap, Human Resources, Evaluating Systems and Functional Infrastructure, Evaluating Job Classifications, Evaluating Policy and Practice, Challenges and Barriers, Deliverables, Planning)
  - a. Update
  - b. Next Steps

- VII. Break
- VIII. Conference/Partners
- IX. Communication plan
- X. Next Task Force Meeting
  - a. New date
- 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.

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#### Contact Information

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## California Pay Equity Task Force

April 4, 2017

### DRAFT MINUTES

**CALL TO ORDER:** Commissioner Lauri Damrell calls the meeting to order at 10:13 am. Nancy Kirshner-Rodriguez calls the roll. Those in attendance are: Commissioner Lauri Damrell, Doris Su, Senator and Commissioner Hannah-Beth Jackson, Peter Pawlick, Victoria Pynchon, Jennifer Reisch, Tamekia N. Robinson, Leslie Simon, Jeanna Steele, Rhoma Young, Kelly Jenkins Pultz and Dan Kuang, Ph.D. Joining by teleconference is Director Kevin Kish and Holly Thomas, new legal liaison, and Dr. Kimberlee Shauman joined via teleconference, not voting.

CCSWG staff in attendance: Nancy Kirshner-Rodriguez, Marian Johnston, Stephanie Tseu, Stephanie Flores, and Dr. Tonya D. Lindsey

**MOTION TO ADOPT THE AGENDA:** Members review and adopt the agenda. Victoria Pynchon motions to approve the agenda. Tamekia N. Robinson seconds. Nancy Kirshner-Rodriguez takes roll. All present aye.

**MINUTES FROM FEBRUARY 16, 2017 MEETING:** Members review minutes from the February 16, 2017 meeting. Leslie Simon makes the motion to approve the meeting minutes. Peter Pawlick seconds. Nancy Kirshner-Rodriguez takes roll. All present aye.

**MINUTES FROM SUBCOMMITTEE MARCH 16, 2017:** Member review the subcommittee minutes from March 16, 2017. Jennifer Reisch motions to approve the subcommittee minutes. Jeanna Steele seconds that motion. All present aye.

**WEBSITE:** Members discussed the website, its intended audience, the importance of making the website assessable and user friendly. Discussed using the word union and the difference or importance of small vs large employer definitions. Members were leery of defining employers for fear of seeming like a legal definition since there are different definitions depending on the situation.

Action Item: Members were asked to send any feedback to Tonya or Nancy via email.

**REPORT RELEASE IN 2018:** Members discussed how to release the final report, unveiling of the finalized website, in 2018. Should there be a conference? If yes, should it be a large convening or more limited to invited stakeholders? Jeanna Steele suggested not just inviting CEO level but also Chief Diversity Officers? Commissioner Damrell suggested holding the event in March to honor Women's History Month and get ahead of Equal Pay Day.

Action Item: CCSWG staff will work on a plan (including deliverables, audience, location, etc.) and deliver to the task force for review.

### **DISCUSSION AND REVIEW OF DATA AND INFORMATION TO COLLECT**

**DOCUMENT:** Peter Pawlick and DK update members on their document. Members remarked how well thought out and thorough the document is. Members discussed beginning with a purpose statement, such as what systems are in place to conduct a pay equity audit? The goal is for the framework and the materials as a whole, to be helpful, not burdensome. Members discussed removing the counts of small, medium and large employers, combining the counts or possibly including a footnote stating – “Not designed to be a legal threshold. We distinguish between small and large employers because we recognize that smaller employers may not have the same resources or systems. This is not intended to apply a legal definition.”

Action Item: Peter Pawlick and DK will update the document with feedback gathered during the meeting and provide the updated document to Dr. Tonya D. Lindsey by April 28, 2017.

**DISCUSSION AND REVIEW OF JOB SEARCHES AND INTERVIEWING:** Tamekia N. Robinson and Rhoma Young discuss this document. Members agreed that there are overlapping parts of this document. Task Force members asked that staff review the document to ensure continuity, avoid duplication, ensure necessary words are contained in the glossary, etc. Rhoma suggested changing the tone by showing employers the benefit or what the problem is, then leading them to the right answer.

Action Item: Tamekia N. Robinson and Rhoma Young will update the document with feedback gathered during the meeting and provide the updated document to Tonya D. Lindsey by April 28, 2017. Additionally, Task Force members were asked to share any useful websites with CCSWG staff to be used as templates or guides for the Pay Equity Task Force.

**CHANGING EMPLOYER CULTURE:** Jennifer Barrera and Jeanna Steele prepared this document and presented it to the Task Force. One suggestion was to change the sentences in each action item to change the tone of the document. The use of the word “should” will be removed from the document.

Action Item: Jennifer Barrera and Jeanna Steele will update the document with feedback gathered during the meeting and provide the updated document to Dr. Tonya D. Lindsey by April 28, 2017.

### **LUNCH BREAK**

**FAQ STATE AND FEDERAL LAWS:** Commissioner Lauri Damrell, Doris Ng, Jeanna Steele and Jennifer Barrera prepared this document and discussed it with the Task Force. Members acknowledged that several documents have similar information in it.

Action Item: This work group will update the document with feedback gathered during the meeting and provide the updated document to Dr. Tonya D. Lindsey by April 28, 2017.

**REPRESENTATIVES FROM AAUW PROVIDE THE TASK FORCE WITH BOOKLET – The Simple Truth About the Gender Pay Gap**

**STEP-BY-STEP EVALUATION FOR EMPLOYERS:** Jennifer Barrera and Jeanna Steele prepared this document as a guide for employers through the audit process.

Action Item: Jeanna Steele and Jennifer Barrera will update the document with feedback gathered during the meeting and provide the updated document to Dr. Tonya Lindsey by April 28, 2017.

**MODEL CONTRACT LANGUAGE:** Jennifer Reisch and Leslie Simon prepared this document and discussed it with the Task Force.

Action Item: Jennifer Reisch and Leslie Simon will update the document with feedback gathered during the meeting and provide the updated document to Dr. Tonya D. Lindsey by April 28, 2017.

**MODEL INFORMATION REQUEST:** Jennifer Reisch and Leslie Simon prepared this document and discussed it with the Task Force. The Task Force discussed pay equity in contracts and unions.

Action Item: Jennifer Reisch and Leslie Simon will update the document with feedback gathered during the meeting and provide the updated document to Dr. Tonya D. Lindsey by April 28, 2017.

**JURY INSTRUCTIONS:** Jury Instructions were not discussed.

**GLOSSARY:** The Task Force decided not to review the Glossary but reminded members to add terms as they update their documents.

Action Items: As Task Force members update their documents, make sure necessary terms are being added to the Glossary as well.

**NEXT STEPS:** Dr. Tonya D. Lindsey will send an Outlook invite to all Task Force members as a reminder to send her their updated documents no later than April 28, 2017. Tonya will review the documents for duplicative terms and sections and begin streamlining the document. This document will be available for review at the next Pay

Equity Task Force Meeting in June. Commission staff will send Task Force members a Doodle to find the date that works best for the group.

**MEETING ADJOUNED:** Victoria motioned, \*\*\*seconded. Meeting was adjourned at 3:47pm.



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To: Commissioner Lauri Damrell  
Commissioner Julie A. Su  
Co-Chairs, California Pay Equity Task Force

From: Tonya D. Lindsey, Ph.D., Senior Research Consultant, CCSWG

Cc: Nancy Kirshner-Rodriguez, Executive Director, CCSWG  
Stephanie Tseu, Policy Director, CCSWG  
California Pay Equity Task Force

Date: June 22, 2017

Re: **Blended Task Force Materials**

The attached power point slides are structured as web pages complete with draft text and suggested links to tools. The draft text is taken almost completely and verbatim from materials developed by the Task Force. I have edited here and there as needed, but very rarely. My editing is more pronounced in the looking for work slides. The suggested links to tools in each slide are important. Any slide having one or more references to tools also includes all the Task Force materials fitting for that tool in the "Notes" section of the slide. The Notes sections of the slides present the tool name, the concept, space to fill what the tool will be, and the format for it as well as all of the information from the materials. There is also an index of materials, entitled "Materials," for each tool so the reader knows to scroll down through the materials if there is more than just one set of materials.

Overall, the suggested tools function as buckets for applicable materials that can be further blended as we create or contract for any tools we want made.

### **Materials**

The attached slide shows include the blending and/or sorting of the following Task Force materials. In addition, I went through my files and emails to find any other information Task Force members or their staff asked to have included (not necessarily listed here). I expect there to be some stray information that someone wants included but was said in passing or was an idea that has yet to be developed into materials:

- Step-by-step employer evaluation template (Jeanna and Jennifer B.)
- Documentation/Data collection items (Peter and D.K.)
- Definitions document (Commissioner Damrell, Doris, Jennifer R. Jennifer B., and Jeanna)
- Jury instructions (Doris)
- Best practice guide for employers about how to resolve pay disparities (Jeanna and Jennifer B.)
- Analytic approaches for pay audit (Kim and DK)
- Model Job Classification Schemes (Kim and DK)
- Wage data (Jeanna and Jennifer B.)
- Guidance for changing employer culture (Jeanna and Jennifer B.)
- Employee and employer questions about federal and state law (Jeanna and Jennifer B.)
- Statutory history of equal pay laws in the United States and California (Marian)
- Diagram of employee questions. (Jennifer R. and Leslie)
- Department of Industrial Relations FAQ's (Doris)
- How *Fair Pay Act* applies to unions and their members (Jennifer R. and Leslie)



- Information requests for collective bargaining (Jennifer R. and Leslie)
- Collective bargaining (Jennifer R. and Leslie)
- Looking for work document (Tamekia and Rhoma)
- List of employee tools from other organizations (Jennifer R.)
- List of organizations doing pay equity work (Jennifer R.)
- List of outreach tools from organizations doing pay equity work. (Victoria, Kelly, and Nancy)
- Glossary (Commissioner Damrell and Rhoma)
- Retention policy (Rhoma)

### Tools

This is the first iteration of the tools. These combinations are suggestions based on how the employer, employee, union/employee organizations, and looking for work buttons developed logically according to either how Task Members envisioned the website structure or, if I did not have that information, how the core documents structured an overarching theme, such as the step-by-step analysis document does. I expect the tool concepts will change and be refined. In the Notes section, I make suggestions about which tools could be further condensed where applicable and also below. There are a couple of tools that could be created or would require materials to be created beyond what we already have:

- *Wage Data tool* includes information from the wage data document. It can refer to market information, and, for all audiences, it can refer to what the gender wage gap is in California.
- *Information/Data collection tool* includes the documentation/data collection items. It could be incorporated into an excel sheet with all the infrastructure data, measuring, record keeping, and job classification information in one tool.
- *Scenarios describing skill, effort, and responsibility tool* includes materials from the step-by-step document and the definitions document. This could be incorporated into the excel sheet with all the infrastructure data, measuring, record keeping, and job classification information.
- *Job analysis tool* includes model job classification schemes. The materials are in process and the most recent draft material included. Pending the subcommittee meeting again to finalize the draft. This could be incorporated into the excel sheet with all the infrastructure data, measuring, record keeping, and job classification information.
- *Pay equity analysis tool* includes analytic approaches for pay audit. The materials are in process and the most recent draft material included. Pending the subcommittee meeting again to finalize the draft. This could be incorporated into the excel sheet with all the infrastructure data, measuring, record keeping, and job classification information.
- *Valid factors tool* includes materials from the step-by-step document. This could be incorporated into the excel sheet with all the infrastructure data, measuring, record keeping, and job classification information.
- *Changing culture tool* includes materials from the guidance for changing employer culture document. This could be a checklist or a more detailed document that incorporates existing resources for each numbered item. Could also link in with the outreach toolkit if one is created.





- *About the Fair Pay Act tool* includes materials from the looking for work, employee and employer frequently asked questions about federal and state law, statutory history of pay equity laws from the Interim Report, diagram of employee questions, and the Department of Industrial Relations FAQs documents. It could explain the Fair Pay Act in terms that are applicable to all audiences. Maybe divide the document into sections for each 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).
- *How Act impacts unions* includes how the *Fair Pay Act* impacts unions and their members. This information has been used to develop the website text, to some degree, based on the outline that the employee organization/union subcommittee developed. Some of it could also go into its own tool?
- *Information requests tool* includes information requests for collective bargaining. Important information people representing employees might want to request from employers.
- *Collective bargaining tool* includes collective bargaining materials. Presents ways to approach gender pay equity through collective bargaining.
- *Job tracking tool* includes information from looking for work document. This could be in 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.
- *Informational interviewing tool* includes information from the looking for work document. Important questions and topics for women to ask people who are in careers they want. This could be in 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.
- *California associations tool* does not include any materials created yet by Task Force. Associations comes up in the looking for work materials, and this might be a good thing to have on hand and in the website. Name and contact information of all occupation and industry associations in California. Regional. Conference information? This could be in 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. New materials.
- *For lawyers tool* includes the definitions and jury instructions documents. This tool is not referenced yet in any slideshow but could be included in the website somewhere. While this would have similar information to the tool overviews the *Fair Pay Act*, it would include full citations etc. for lawyers.
- *Glossary tool* includes the glossary. A glossary of terms used on the site and in the documents or that are important for the Task Force and Pay Equity. Could use the glossary definitions anytime there is a mouse over on one of the terms on the website.
- *Resource tool* for website consists of list of tools from employee organizations, all of the resources on the Commission's website for the Pay Equity Task Force, those listed in the Interim Report, and any other resources suggested in the various materials that were not accounted for.



- *Outreach toolkit* includes lists of organization doing pay equity work and lists of outreach materials from organizations doing pay equity work. Develop outreach lists. Potentially related to an outreach toolkit like EITC has or any of the examples given. Could include sample press releases. New materials.

DRAFT

# Employees

Website Text

&

Pay Equity “Tools” “Resources”  
for Review

First Iteration

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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](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 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 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/>

### *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](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:

- (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](http://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm).

*Marian M. Johnston's piece about the history of Fair 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 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.

#### 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](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 fairly

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 fairly?
- What do I do if I am being paid unfairly?

## How can I find out if I am being paid unfairly?

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 [link to market data information EDD]
- 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:**

- a) **Skill.** Skill is measured by factors such as the experience, ability, education, and training required to perform a job.
  - i) **Example 1 (Skill):** 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 2 (Skill):** 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 3 (Skill):** 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 is substantially similar.
- b) **Effort.** Effort is the amount of physical or mental exertion needed to perform a job.



- i) **Example 1 (Effort):** 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, making the amount of effort required to perform the jobs substantially the same.
- ii) **Example 2 (Effort):** Same as Example 1, except two of the male grocery store workers also regularly haul heavy crates from trucks into the store. In this case, the employer can lawfully pay a higher rate to the persons who perform the extra task. On the other hand, a violation would be found if all males receive higher compensation based on the extra effort required for only some of the males' jobs.
- c) **Responsibility.** Responsibility is the degree of accountability required in performing a job.
  - i) **Example 1 (Responsibility):** 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 are not substantially similar due to the difference in responsibility.
  - ii) **Example 2 (Responsibility):** Same as Example 1, except that 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 are substantially similar.
  - iii) **Example 3 (Responsibility):** Same as Example 1, except 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 are substantially similar because the difference in responsibility is minor.
  - iv) **Example 4 (Responsibility):** 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 are not substantially similar.

*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 are relevant, but not determinative**  
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.
- **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.

**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.
  
- **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 (6<sup>th</sup> 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 (6<sup>th</sup> Cir. 1981).

- *Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1030 (8<sup>th</sup> 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 (8<sup>th</sup> Cir. 2000).
- *Buntin v. Breathitt County Board of Education*, 134 F.3d 796 (6<sup>th</sup> 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,’ and ‘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 be 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.”

## What do I do if I am being paid unfairly?

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

- Talk to your boss. The *Fair 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 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/>

## *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](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).
- (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](http://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm).

*Marian M. Johnston’s piece about the history of Fair 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 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:

- (b) 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.

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

2. 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](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 am an employee**

DRAFT



**I want to know my rights**

**I want to know if I am being paid fairly**

## Message

Image

### **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](https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm))

[Link to outside Equal Rights Advocates Materials.] We do not have all of these yet.

[\[Link to Tool #8 Fair Pay Act tool\]](#)



## Message

Image

### **I want to know if I am being paid fairly**

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 fairly?
- What do I do if I am being paid unfairly?

# Message

[Next](#)A large, empty rectangular box with a thick yellow border, intended for an image.

# Image

## How can I find out if I am being paid fairly?

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 [link to market data information EDD]
- You might know someone you work with who earns more than you do.

[\[Link to Tool #1 wage rate tool\]](#)

[\[Link to skill, effort, and responsibility tool\]](#)

## Message

[Next](#)

Image

### What if I am being paid unfairly?

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

- Talk to your boss. The *Fair 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.
- [\[Link to Fair Pay Act tool\]](#)



# Employers

Website Text

&

Pay Equity “Tools” “Resources”  
for Review

First Iteration



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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 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]

## 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 #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:**

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

Documentation/Data Collection Items					
Subcommittee 6: Infrastructure and Systems					
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 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.					
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 <sup>a</sup>			
		Small (50)		Med/Large (500+)	
		Minimum	Desirable	Minimum	Desirable
Human Resources Management System (HRMS)	o Time in Company <sup>a</sup>	✓		✓	
	o Time in Position	✓		✓	
	o Pay Rate History (including Starting Salary <sup>b</sup> )	✓		✓	
	o Gender	✓		✓	
	o Race <sup>c</sup>	✓		✓	
	o Employee Job History, Management Level History, Location History, Compensation History <sup>d</sup>		✓	✓	
	o Geographic Salary Ranges reflecting external market data		✓	✓	
Payroll	o Team Size (total team size and direct reports)		✓		✓
	o Payroll data	✓		✓	
	o Time and Attendance	✓		✓	
Talent Management	o Earnings	✓		✓	
	o Hours Worked	✓		✓	
	o Talent assessment data <sup>e</sup>		✓		✓
	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 <sup>f</sup>		✓		✓
	o Employee Profiles (internal/external employment history, experience, institutional knowledge, education, accomplishments, competencies) <sup>g</sup>		✓		✓
Recruiting / Talent Attraction	o Competency assessments		✓		✓
	o Succession planning		✓		✓
	o Scope of Role - Budget P&L Responsibility, Complexity of channels, geographies		✓		✓
External Market Data	o Job Profiles/Descriptions	✓		✓	
	o Candidate Resumes <sup>h</sup>		✓		✓
Company Practices**	o Salary Survey analysis		✓		✓
	o Salary Surveys with benchmark jobs		✓		✓
	o Definition / Statement of Compensation Strategy (Pay for Performance; Pay for Tenure/Service; Pay for Role) <sup>i</sup>		✓		✓
Internal Job Structure Data	o Definition of Recruiting Practices (Prior Salary; Blind Resume; Documentation of pay/hiring decisions) <sup>j</sup>		✓		✓
	o Job Functions / Job Families		✓		✓
	o Career leveling matrix indicated breadth and depth of role scope		✓		✓
Notes:					
<sup>a</sup> 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.					
<sup>b</sup> In service date to account for missing periods in tenure.					
<sup>c</sup> A very useful field to capture because currently the majority of the pay gap is due to starting salary.					
<sup>d</sup> 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.					
<sup>e</sup> Cross-over with Definitions: Need definition of compensation (pay rate vs. earnings and additionally bonus/stock)					
<sup>f</sup> Cross-over with Human Resources: Important that talent/performance assessment systems do not perpetuate bias or disparate impact.					
<sup>g</sup> Cross-over with Human Resources					
<sup>h</sup> Should External or Internal Resumes be maintained					
<sup>i</sup> 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)					
<sup>j</sup> 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					

**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](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



## Employers

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?

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

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.

[Insert Tool #4 job classification analysis tool]

### 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:

- a) **Skill.** Skill is measured by factors such as the experience, ability, education, and training required to perform a job.
  - i) **Example 1 (Skill):** 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 2 (Skill):** 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 3 (Skill):** 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 is substantially similar.
- b) **Effort.** Effort is the amount of physical or mental exertion needed to perform a job.
  - i) **Example 1 (Effort):** 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, making the amount of effort required to perform the jobs substantially the same.
- ii) **Example 2 (Effort):** Same as Example 1, except two of the male grocery store workers also regularly haul heavy crates from trucks into the store. In this case, the employer can lawfully pay a higher rate to the persons who perform the extra task. On the other hand, a violation would be found if all males receive higher compensation based on the extra effort required for only some of the males' jobs.
  - c) **Responsibility.** Responsibility is the degree of accountability required in performing a job.
    - i) **Example 1 (Responsibility):** 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 are not substantially similar due to the difference in responsibility.
    - ii) **Example 2 (Responsibility):** Same as Example 1, except that 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 are substantially similar.
    - iii) **Example 3 (Responsibility):** Same as Example 1, except 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 are substantially similar because the difference in responsibility is minor.
    - iv) **Example 4 (Responsibility):** 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 are not substantially similar.

*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 are relevant, but not determinative**  
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.
- **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.

**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.

- **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 (6<sup>th</sup> 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 (6<sup>th</sup> Cir. 1981).
- *Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1030 (8<sup>th</sup> 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 (8<sup>th</sup> Cir. 2000).

- *Buntin v. Breathitt County Board of Education*, 134 F.3d 796 (6<sup>th</sup> 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."

#### 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:

##### *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

**Comment [A1]:** I propose that we take this analysis out and maybe even Step-1 for two reasons:

- 1) Cluster Analysis method is fairly complex and few to no companies will ever have the proper functional job analysis data to support this. In the late 70s, it was important to create data driven job families and related job clusters so these methods were developed.
- 2) Step-1 may be covered under definitions or another group operationalizing the definition.

**Comment [A2]:** @KS, please keep this if you remember why/how regression may be used to identify Substantially Similar Job Clusters. Otherwise, this should be deleted.

**Comment [A3]:** Median split and Non-parametric methods are really for analyzing for pay gap, i.e. step-2. Median split is already in Step-2 so I'll move the non-parametric piece.

#### 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]

#### 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:

*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"><li>• 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)</li><li>• Estimate the pay gap between groups.</li></ul>
Median Split <sup>1</sup>	<ul style="list-style-type: none"><li>• 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.</li></ul>
Non-Parametric <sup>2</sup>	<ul style="list-style-type: none"><li>• This method determines is very effective in identifying economic segregation (e.g. women holding lower paying jobs than men).</li></ul>
MRP Standardized test	<ul style="list-style-type: none"><li>• Often times, people attribute the pay gap to market value differences.</li><li>• This method accounts for market value differences and controls for them by computing “comp-ratios” (salary/MRP).</li><li>• Applying correlation techniques, it is possible to test if there is a relationship between group membership (women/men) and comp-ratios.</li></ul>

Note: <sup>1</sup>EEOC Compensation Compliance Manual Section 10.III.A.3.b.ii

<sup>2</sup>Kruskal-Wallis, Mann-Whitney U

### 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]

### 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:**

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

Documentation/Data Collection Items					
Subcommittee(s): Infrastructure and Systems					
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 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.					
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 <sup>a</sup>			
		Small (50)	Med/Large (500+)	Minimum	Desirable
Human Resources Management System (HRMS)	o Time in Company <sup>b</sup>	✓	✓		
	o Time in Position	✓	✓		
	o Pay Rate History (including Starting Salary <sup>b</sup> )	✓	✓		
	o Gender	✓	✓		
	o Race <sup>c</sup>	✓	✓		
	o Employee Job History, Management Level History, Location History, Compensation History <sup>d</sup>	✓	✓		
	o Geographic Salary Ranges reflecting external market data	✓	✓		
Payroll	o Team Size (total team size and direct reports)	✓	✓		
	o Payroll Data	✓	✓		
	o Earnings	✓	✓		
Time and Attendance	o Hours Worked	✓	✓		
	o Talent assessment data <sup>e</sup>	✓	✓		
	o Accomplishments; Performance against goals; Productivity	✓	✓		
Talent Management	o Goals/Objectives	✓	✓		
	o Long-Term Career Potential (High Potential or Key Role); Training & Development Positions; Fast-track / leadership development <sup>f</sup>	✓	✓		
	o Employee Profiles (Internal/external employment history, experience, institutional knowledge, education, accomplishments, competencies) <sup>g</sup>	✓	✓		
	o Competency assessments	✓	✓		
	o Succession planning	✓	✓		
	o Scope of Role - Budget P&L Responsibility, Complexity of channels, geographies	✓	✓		
	o Recruiting / Talent Attraction	✓	✓		
External Market Data	o Job Profiles/Descriptions	✓	✓		
	o Candidate Resumes <sup>h</sup>	✓	✓		
Company Practices**	o Salary Survey analysis	✓	✓		
	o Salary Surveys with Benchmark jobs	✓	✓		
Internal Job Structure Data	o Definition / Statement of Compensation Strategy (Pay for Performance, Pay for Tenure/Service; Pay for Role) <sup>i</sup>	✓	✓		
	o Definition of Recruiting Practices (Prior Salary; Blind Resume; Documentation of pay/hiring decisions) <sup>j</sup>	✓	✓		
Internal Job Structure Data	o Job Functions / Job Families	✓	✓		
	o Career leveling matrix indicated breadth and depth of role scope	✓	✓		
Notes:					
<sup>a</sup> 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.					
<sup>b</sup> In service date to account for missing periods in tenure.					
<sup>c</sup> A very useful field to capture because currently the majority of the pay gap is due to starting salary.					
<sup>d</sup> 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).					
<sup>e</sup> Cross-over with Definitions: Need definition of compensation (pay rate vs. earnings and additionally bonus/stock)					
<sup>f</sup> Cross-over with Human Resources: Important that talent/performance assessment systems do not perpetuate bias or disparate impact.					
<sup>g</sup> Cross-over with Human Resources					
<sup>h</sup> Should External or Internal Resumes be maintained.					
<sup>i</sup> 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).					
<sup>j</sup> 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.					

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



## Employers

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.



## Employers

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.

### 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:**

**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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

- (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 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.<sup>4</sup> If the training

<sup>1</sup> 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).

<sup>2</sup> 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).

<sup>3</sup> 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.").

<sup>4</sup> 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;



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.

## 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.

## I want to change my business' culture

Pay disparities in the workplace between women and men or based on different race or ethnic categories 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. Employers who want to actively put a stop to implicit and explicit bias and promote a culture of equity in the workplace may consider any one or more changes to their business practices:

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*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).*



## Employers

- Increase diversity of applicant pool
- Remove bias from hiring process
- Train supervisors or managers
- Encourage employee communication
- Job classifications and descriptions
- New hire evaluations
- Consider the role of negotiation in your compensation decisions
- Review/adjust incumbent pay
- Compensation reviews
- Increase diversity at senior levels and in the compensation department
- Limit discretion in pay decisions
- Promote wage transparency/standardize compensation
- Design fair performance evaluations
- Offer training and other accommodations
- Encourage diversity of representation in all roles
- Improve workplace flexibility/change subtle drivers of discrimination
- Offer paid parental/family leave for both women and men
- Parental leave policies
- Create a culture of equality

[Insert Tool #7 changing employer culture]

### Tool #7 How to change employer culture

[Do we want to create a tool that offers more information about how to change each of these business practices?]

**Concept:** To help employers change their practices and emphasize not only fair pay but programs supporting equity and fair pay. This could be a checklist or a more detailed document that incorporates existing resources for each numbered item. Could also link in with the communications toolkit if one is created.

**Tool:**

**Format:**

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

Online tool information – Changing employer culture

1. **Increase Diversity of Applicant Pool:** 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. The Task Force recommends employers consider utilizing recruiting resources that increase the diversity of the employer's candidate pool, particularly in jobs that are majority male.
2. **Remove Bias from Hiring Process:** Increase diversity amongst those who make hiring decisions and participate in applicant interviews, including women. Providing training on implicit bias to employees involved in hiring decisions can also help to eliminate bias in the hiring process. Another option the Task Force recommends employers consider is 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).
3. **Train Supervisors or Managers:** Train managers or supervisors who participate in compensation decisions 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, the Task Force recommends employers 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:** 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. 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.
7. **Consider the Role of Negotiation in Your Compensation Decisions:** Women candidates may be less likely to negotiate their salaries than their male counterparts. One study of graduating MBA students found that half of the men had negotiated their job offers as compared to only one eighth of the women. See <https://hbr.org/2014/06/why-women-dont-negotiate-their-job-offers>. Employers may consider the role that negotiation plays in setting pay within its organization. If the workplace permits negotiation of an employee's compensation, consider either informing all employees that salaries are negotiable, or removing negotiation from the hiring process and using lockstep salary bands. If using salary bands, employers may consider limiting how high within a range new hires can be paid and provide an objective justification for any difference between an incumbent and the new hire (e.g. years of experience, relevant industry experience, etc.). Encourage transparency, accountability and consistency in your hiring process – require that hiring managers provide objective justification for any disparities in pay between candidates that are hired into the same role.

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:** Review compensation to make sure the wages provided adequately compensate the employee for the job being performed. The Task Force also recommends that employers regularly review employee compensation to evaluate any noticeable disparities amongst employees performing the same or substantially similar jobs and adjust compensation as appropriate.
10. **Increase diversity at senior levels and in the compensation department:** 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>. Consider providing 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. Increase the representation of women/minorities who make compensation decisions for their workforce.
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:** Employers may consider publishing salary ranges by level. Another option is to standardize discretionary compensation such as bonuses and equity and remove discretion in compensation decisions from individual managers.
13. **Design Fair Performance Evaluations:** Review performance evaluations to ensure fairness in the performance criteria. Publish and gain commitment for employee performance criteria and the association with pay. Establishing clear criteria for workplace evaluations has been shown to reduce or eliminate biases in decision making. Established, accepted criteria reduce the likelihood that managers construct and rationalize their own criteria based on preexisting biases and stereotypes. Offer feedback to employees rejected for promotion to help them understand how to improve. In addition, performance criteria should have a clear relationship to pay. Employees need to understand how their pay is determined, how to maximize it, and how it relates to their performance— if they are to feel fairly paid.
14. **Offer Training and Other Accommodations:** Pre-apprenticeships programs help strip away some of the barriers that preclude women/minorities from participating in apprentice training. 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/minorities in the trades.
15. **Encourage Diversity of Representation in All Roles:** While some occupations have become increasingly integrated over time, others remain highly dominated by either men or women. Occupational segregation is a concern for two reasons: 1) it is inefficient for the employer - preventing able people from moving into occupations where they could perform well and that would satisfy them more than the ones open to them; and 2) occupational segregation is a major cause for the persistent wage gap. Average earnings tend to be lower the higher the percentage of female workers in an occupation. See <https://iwpr.org/publications/separate-and-not-equal-gender-segregation-in-the-labor-market-and-the-gender-wage-gap/>. Consider evaluating job classifications that are disproportionately comprised of one gender or one race/ethnicity and identify ways to encourage both gender and racial/ethnic diversity in the role.



16. **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.
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. Employers should also provide notice of California's Paid Family Leave Program. The Task Force recommends that smaller employers, who may not have the capacity to provide paid parental/family leave, 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/pregnancy-disability-leave-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)

**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 know more about California's Fair Pay Act

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. ([https://www.dir.ca.gov/dlse/California\\_Equal\\_Pay\\_Act.htm](https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm))

[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 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/>

### *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](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



## Employers

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:

- (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



## Employers

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](http://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm).

### *Marian M. Johnston's piece about the history of Fair 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 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.

#### 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 am an employer**

DRAFT



**I want to perform a gender pay equity analysis**

**I want to change my business' culture**

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





## Message

Image

### **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.

## Message



Image

### 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.

[\[Insert Tool #1 wage rate tool here\]](#)

[\[Insert Tool #2 infrastructure and systems tool here\]](#)

# Message

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# Image

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.

[\[Link to Tool #4 job classification analysis tool\]](#)

## 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?

[\[Link to Tool #3 scenarios of skill, effort, and responsibility tool\]](#)

## Message

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### 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.

[\[Link to Tool #5 How to do a pay equity analysis\]](#)

# The Path to Pay Equity

Next

Image

## 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.

[\[Link to Tool #6 valid factors explaining the gender wage gap\]](#)

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. **[link to infrastructure data collection document.]**

# The Path to Pay Equity

[Next](#)

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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.

## 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.

# The Path to Pay Equity

[Next](#)

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## I want to change my business' culture.

Pay disparities in the workplace between women and men or based on different race or ethnic categories 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. Employers who want to actively put a stop to implicit and explicit bias and promote a culture of equity in the workplace may consider any one or more changes to their business practices:

- Increase diversity of applicant pool
- Remove bias from hiring process
- Train supervisors or managers
- Encourage employee communication
- Job classifications and descriptions
- New hire evaluations
- Consider the role of negotiation in your compensation decisions
- Review/adjust incumbent pay
- Compensation reviews
- Increase diversity at senior levels and in the compensation department
- Limit discretion in pay decisions
- Promote wage transparency/standardize compensation
- Design fair performance evaluations
- Offer training and other accommodations
- Encourage diversity of representation in all roles
- Improve workplace flexibility/change subtle drivers of discrimination
- Offer paid parental/family leave for both women and men
- Parental leave policies
- Create a culture of equality

[\[Link to Tool #7 changing employer culture\]](#)

# The Path to Pay Equity

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## I want to know more about California's *Fair Pay Act*.

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.

([https://www.dir.ca.gov/dlse/California\\_Equal\\_Pay\\_Act.htm](https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm))

[\[Link to Tool #8 Fair Pay Act tool\]](#)



# Union & Employee Organizations

Website Text

&

Pay Equity “Tools” “Resources”

for Review

First Iteration

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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.

## What is the California *Fair Pay Act*?

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.
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- Extending the number of years that employers must maintain wage and other employment-related records from two years to three years. ([https://www.dir.ca.gov/dlse/California\\_Equal\\_Pay\\_Act.htm](https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm))

[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 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/>

### *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](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:

- (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](http://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm).

## *Marian M. Johnston's piece about the history of Fair 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 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.

#### 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](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.

## How does this law apply to my union and our members?

While the *Fair Pay Act* covers all employees in California, there are few things unions might especially want to consider:

- The Fair Pay Act/Equal Pay Act covers employees in all industries in California
- There is no carve out under the Fair Pay Act/Equal Pay Act for employees covered by Collective Bargaining Agreements, as there is for overtime, and there is no minimum number of employees needed for this law to apply

- Unions and employers can, however, negotiate bona fide merit or seniority based systems that can be the basis for wage differentials under the law
- In light of the recent Amendments to California law, unions may wish to review provisions in the collective bargaining agreement that relate to employee compensation – such as hiring and selection criteria, job classifications and definitions, pay scales, promotion and pay raise provisions, etc. – to ensure that these provisions comply with the law
- Unions and their members may wish to evaluate historical inequities in pay (e.g. between female- and male-dominated positions) to determine potential issues that conflict with the law, especially when negotiating an initial contract
- Finally, as employers, unions may utilize the tools and guidance for employers with respect to conducting pay audits and correcting any inequities.

[Insert Tool #13 How Does Fair Pay Act Affect My Union and Our Members?]

[Link to all the Employer Tools]

### Tool #13 How *Act* impacts unions

#### [Do we want to create an online tool about how *Act* impacts unions?]

**Concept:** This information has been used to develop the website text to some degree based on the outline that the employee organization/union subcommittee developed. Some of it could also go into its own tool?

**Tool:**

**Format:**

#### *Employee organization/Union Subcommittee: Jennifer Reisch and Leslie Simon*

#### **How Does the Fair Pay Act Apply to Unions and Their Members?**

- The Fair Pay Act/Equal Pay Act covers employees in all industries in California;
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- Finally, as employers, unions may utilize the tools and guidance for employers with respect to conducting pay audits and correcting any inequities, available here [\[Link to those tools\]](#)

### What Can a Union Representative Tell an Employee or Union Member Who Believes She is Not Being Paid Fairly?

- A Union representative can educate members about the existence of the Equal Pay Act, and her rights under the law and that the Union has the ability to get information from the employer that could help to evaluate and address the issue;
- Depending on the terms of the Collective Bargaining Agreement, union represented employees may have a remedy through the negotiated grievance and arbitration procedure, or the individual employee may need to seek representation from an outside attorney or file a claim with the California Labor Commissioner. [\(Link to the employee tool/Tip Sheet\).](#)
- A Union representative may tell employees who are not already represented by the union that they have the same rights under state law but also that issues of pay equity can be, and often are, addressed in the collective bargaining process. The employee may also want to know that the gender wage gap is much smaller among unionized workers than non-union workers.

### What do I tell a member or non-represented employee who believes she is being unfairly paid?

- A Union representative can educate members about the existence of the *Fair Pay Act*, and her rights under the law and that the Union has the ability to get information from the employer that could help to evaluate and address the issue
- Depending on the terms of the Collective Bargaining Agreement, union represented employees may have a remedy through the negotiated grievance and arbitration procedure, or the individual employee may need to seek representation from an outside attorney or file a claim with the California Labor Commissioner
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[Insert Tool #8 Fair Pay Act tool]

[Insert Tool #1 wage rate tool here]

[Insert Tool #3 scenarios of skill, effort, and responsibility 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 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/>

### *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](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.
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- (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](http://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm).

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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 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:

- (b) 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.

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

2. 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](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.

### 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:**

- a) **Skill.** Skill is measured by factors such as the experience, ability, education, and training required to perform a job.
  - i) **Example 1 (Skill):** 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 2 (Skill):** 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 3 (Skill):** 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 is substantially similar.
- b) **Effort.** Effort is the amount of physical or mental exertion needed to perform a job.
  - i) **Example 1 (Effort):** 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, making the amount of effort required to perform the jobs substantially the same.
- ii) **Example 2 (Effort):** Same as Example 1, except two of the male grocery store workers also regularly haul heavy crates from trucks into the store. In this case, the employer can lawfully pay a higher rate to the persons who perform the extra task. On the other hand, a violation would be found if all males receive higher compensation based on the extra effort required for only some of the males' jobs.
  - c) **Responsibility.** Responsibility is the degree of accountability required in performing a job.
    - i) **Example 1 (Responsibility):** 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 are not substantially similar due to the difference in responsibility.
    - ii) **Example 2 (Responsibility):** Same as Example 1, except that 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 are substantially similar.
    - iii) **Example 3 (Responsibility):** Same as Example 1, except 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 are substantially similar because the difference in responsibility is minor.
    - iv) **Example 4 (Responsibility):** 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 are not substantially similar.

*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 are relevant, but not determinative**  
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.
- **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.

**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.

- **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 (6<sup>th</sup> 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 (6<sup>th</sup> Cir. 1981).
- *Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1030 (8<sup>th</sup> 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 (8<sup>th</sup> Cir. 2000).

- *Buntin v. Breathitt County Board of Education*, 134 F.3d 796 (6<sup>th</sup> 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,’ and ‘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 be 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.”

## How can unions address issues of pay equity in the bargaining process?

In unionized workplaces, the issue of pay equity, whether for individual union members or for historically lower-paid classifications with predominantly female and/or non-white workforces, could be addressed as part of the bargaining process. Establishing protocols for sharing information about employee compensation can help unions and management to work cooperatively and proactively to address these issues before and during contract negotiations, rather than only address them at the bargaining table or in an adversarial manner.

[Insert Tool #14 Model Information Request]

Where a pay equity audit has already been conducted and the parties have identified disparities in compensation between individuals or groups of employees who are of different sexes or races/ethnicities and doing substantially similar work, the parties can specifically negotiate about the wage rates for individuals or classifications affected. Unions can also seek to negotiate over the terms and timeline for conducting and/or overseeing a pay equity audit in circumstances where this has not been done. In addition, they can negotiate for changes in hiring, compensation, promotion, and leave policies that would help to alleviate the root causes of pay inequity.

[Link to Tool #15 Model CBA Language]

### Tool #14 information requests

#### [Do we want to create an online tool about how Act impacts unions?]

**Concept:** Important information people representing employees might want to request from employers.

**Tool:**

**Format:**

*Employee Organization/union Subcommittee: Leslie Simon and Jennifer Reisch*

**DRAFT 3-20-2017**

#### **Pay Equity and Collective Bargaining**

In unionized workplaces, the issue of pay equity, whether for individual union members or for historically lower-paid classifications with predominantly female and/or non-white workforces, could be addressed as part of the bargaining process. Establishing protocols for sharing information about employee compensation can help unions and management to work cooperatively and proactively to address these issues before and during contract negotiations, rather than only address them at the bargaining table or in an adversarial manner. To facilitate informed, arm’s-length negotiations about pay equity issues and enable the union to adequately represent its members during the bargaining process, both sides need to have equal access to the same information about the

compensation and job duties of represented employees as well as employees working in classifications that arguably are performing substantially similar work under similar working conditions. The union's right to information that is relevant and necessary to performing its duties to represent its members stems from Section 8(a)(5) of the National Labor Relations Act which requires the parties to negotiate in good faith. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956). Unions should be prepared to show why information requested is relevant and necessary to properly representing its members.

The following is an illustrative, not necessarily exhaustive, list of the types of information and data that unions and employers may need to compile and exchange or share with one another in order to evaluate and address pay equity issues within the collective bargaining process. This list also may serve as a point of reference to guide the information gathering process that a Joint Labor Management Committee authorized to address pay equity issues could undertake.

TYPE OF INFORMATION	TYPE OF EMPLOYEE(S)	LAWS RELATED TO RECORDKEEPING OF THIS INFORMATION	POTENTIAL RELEVANCE TO COLLECTIVE BARGAINING
Name, sex, race and/or ethnicity, and job classification of all bargaining unit members and all employees in substantially similar job classifications outside of the bargaining unit.	All bargaining unit members and all employees in substantially similar job classifications (to be specified by union in request for information)	Section 709(c) of Title VII of the Civil Rights Act of 1967, as amended by the Equal Employment Opportunity Act of 1972 and 29 C.F.R. §§ 1602.7-1602.14 require such records to be kept and reported to the U.S. Equal Employment Opportunity Commission on an annual basis by employers with 100+ employees and federal contractors with 50+ employees (EEO-1 Report), and on a biennial basis by local unions (EEO-3 Report), state and local government agencies (EEO-4 Report), and elementary-secondary school districts with 100+ employees (EEO-5 Report).	To detect/identify pay disparities along gender, race or ethnicity lines between or among employees doing substantially similar work; this information is needed to determine if any pay equity issues exist.  Because the union is requesting information about employees who are not part of the bargaining unit, the employer may have concerns about confidentiality of information provided, and the union should be prepared to discuss ways to protect the confidentiality of information provided.
Date of hire and job history with employer (including start dates in any new classification)	All bargaining unit members and all employees in substantially similar job classifications (to be specified by union in request for	California Labor Code §§ 226 (employee payroll records), 432 (any documents signed by employee or applicant relating to employment) 1174 (payroll records of hours worked),	To understand differences in compensation that may be related to longevity with company and/or other aspects of employees' employment history.

TYPE OF INFORMATION	TYPE OF EMPLOYEE(S)	LAWS RELATED TO RECORDKEEPING OF THIS INFORMATION	POTENTIAL RELEVANCE TO COLLECTIVE BARGAINING
	information)	1197.6(d) (wages, wage rates, job classifications, other terms and conditions) and 1198.5 (employee personnel files and records).	
Pay rate/salary history, including starting salary	All bargaining unit members and all employees in substantially similar job classifications (to be specified by union in request for information)	See above; see also Industrial Welfare Commission Wage Orders 1-17, codified at 8 Cal. Code Regs. §§ 11001-11017, subd. 7 ("Records"); U.S. Department of Labor Wage and Hour Division, recordkeeping regulations under the Fair Labor Standards Act, 29 C.F.R. §§ 516 <i>et seq.</i>	To identify starting salary differences and track pay increases between employees doing substantially similar work.
Hours worked annually/per contract year (if applicable)	All bargaining unit members and all employees in substantially similar job classifications (to be specified by union in request for information) who are employed on an hourly basis	California Labor Code §§ 226, 1174 and 1197.5; Industrial Welfare Commission Wage Orders 1-17, 8 Cal. Code Regs. §§ 11001-11017, subd. 7 ("Records"); Revised Employer Information Report (EEO-1) form, pursuant to 81 FR 45479, Dkt. No. EEOC-2016-0002.	To compare total compensation among employees in same and substantially similar classifications, which may be based on their hours worked.
Documents describing policies relating to benefits that are not provided to bargaining unit members.	Non-bargaining unit employees in substantially similar job classifications	[ERISA - ??]	In order to compare total compensation, it is necessary to have complete information about benefits provided to non-represented employees that are not provided to represented ones.
Accounting of any compensation received in addition to salary (e.g., bonuses or stipends)	Salaried employees in the bargaining unit and in substantially similar job classifications	California Labor Code §§ 226 and 1197.5(d)	In order to do a pay equity analysis, complete information about total compensation is required.

TYPE OF INFORMATION	TYPE OF EMPLOYEE(S)	LAWS RELATED TO RECORDKEEPING OF THIS INFORMATION	POTENTIAL RELEVANCE TO COLLECTIVE BARGAINING
For each job classification and/or job position, descriptions containing or summarizing: primary duties/responsibilities; required knowledge, skills, abilities, and experience; educational qualifications or requirements; physical requirements (if applicable); and any licensure or certification requirements (if applicable).	All bargaining unit job classifications and all job classifications or positions outside bargaining unit that are substantially similar to bargaining unit classifications	California Labor Code §§ 1197.5(d)	In order to compare whether positions are substantially similar, detailed information about the work performed, skills utilized, training or education required is essential.
Performance evaluation form(s) utilized in setting pay or making pay decisions	All bargaining unit members and all non-bargaining unit employees in job classifications that are substantially similar to bargaining unit classifications	California Labor Code §§ 1197.5(d) (terms and conditions of employment) and 1198.5 (personnel files and records)	The form used in evaluating employees provides insight into what aspects of work performance are valued for employees in a classification. When negotiating a first contract, or when the collective bargaining agreement allows for merit pay increases, it would also be important to obtain a copy of the performance evaluations for the past 3-years for each employee in the bargaining unit and in substantially similar classifications.
Any audit of pay equity conducted by the employer in the past 3 years.	All bargaining unit job classifications and all job classifications or positions outside bargaining unit that are substantially similar to bargaining unit classifications.	??	The audits will show whether any issues of pay equity have been raised and will assist in evaluating whether concerns have been addressed.

TYPE OF INFORMATION	TYPE OF EMPLOYEE(S)	LAWS RELATED TO RECORDKEEPING OF THIS INFORMATION	POTENTIAL RELEVANCE TO COLLECTIVE BARGAINING
Any employer policy with respect to job families and/or promotional paths for employees.	All bargaining unit job classifications and all job classifications or positions outside bargaining unit that are substantially similar to bargaining unit classifications.	??	This will help to analyze how the employer views the classifications being compared in relation to their value to the employer.
Dates and numbers of days absent and all leaves of absence taken	All bargaining unit job classifications and all job classifications or positions outside bargaining unit that are substantially similar to bargaining unit classifications.	??	This will help to analyze whether leaves of absence based on child care responsibilities which often fall on women, has affected pay rate paid to employees in the bargaining unit as compared to the employees in the substantially similar job classification.

### Tool #15 contract bargaining language

#### [Do we want to create an online tool about how Act impacts unions?]

**Concept:** Ways to approach gender pay equity through collective bargaining.

**Tool:**

**Format:**

*Employee Organization/union Subcommittee: Leslie Simon and Jennifer Reisch*

DRAFT 3-20-2017

#### Collective Bargaining – Contract Language

Unions can play an important role in narrowing the persistent gender wage gap within the industries and organizations where they have bargaining power by raising pay equity as an issue to be addressed in the collective bargaining process. Where a pay equity audit has already been conducted and the parties have identified disparities in compensation between individuals or groups of employees who are of different sexes or races/ethnicities and doing substantially similar work, the parties can specifically negotiate about the wage rates for individuals or classifications affected. Unions can also seek to negotiate over the terms and timeline for conducting and/or overseeing a pay equity audit in circumstances where this has not been done. In addition, they can negotiate for changes in hiring, compensation, promotion, and leave policies that would help to alleviate the root causes of pay inequity.

Below are some examples of potential approaches to addressing pay equity issues through collective bargaining. This is an illustrative rather than an exhaustive list, and not all of the strategies listed below will apply or be useful in every unionized workplace. For example, certain suggested approaches to bargaining over compensation practices and structures may only be relevant in situations in which the collective bargaining agreement allows for discretionary pay increases by management.

- ***Establish a Joint Labor Management Committee to Conduct and/or Oversee a Pay Equity Audit.*** Where a pay equity study has not been conducted, the parties could utilize the collective bargaining process to establish a Joint Labor Management Committee (JLMC) on Pay Equity and provide funds for the JLMC to either conduct a pay equity audit itself or hire an outside expert/consultant to design and carry out such evaluation under its oversight. In either case, parties will need to agree on:
  - the number of union and management representatives on the Committee;
  - the role of the JLMC in the audit process (i.e., as the entity that will carry out the audit or facilitate and oversee it) and its budget;
  - how often and in what manner the JLMC will keep the parties apprised of the progress of the audit and report on its findings;
  - the nature and extent of the JLMC's authority to make recommendations to the parties about changes to policies, wage rates, job classifications, compensation structures, and/or hiring practices that would help to alleviate any gender and/or race-related wage gaps revealed by the audit;
  - the term of the JLMC and timeline for the completion of the initial pay equity audit and issuance of the JLMC's final recommendations, and
  - a schedule of meetings for the JLMC.

In addition to the terms above, contract language should specify whether the pay equity analysis will be conducted during the term of the Agreement with a re-opener to address any pay inequities and/or to negotiate about the JLMC's recommendations. The parties should also ensure there is a clear process for resolving any disputes about whether or how to implement the JLMC's proposed changes. Alternatively, the parties could agree to convene the JLMC and complete an initial pay equity audit *prior to* the start of the next round of negotiations, with any inequities to be addressed at that time. Contract language could also establish the pay equity audit as a periodic event that will occur prior to the expiration of each contract, rather than a one-time snapshot, which would enable the union and management to evaluate the impact and effectiveness of any changes they agree to make.

- ***Review and update job descriptions.*** As part of the collective bargaining process, the parties may review job descriptions for all covered classifications and positions to ensure that they are accurate and provide sufficiently specific information to be useful in conducting a pay equity analysis.
- ***Correct inequities in pay rates and pay scales.*** In the event that a pay equity study has already been conducted, and issues of inequity have been determined to exist, the parties should negotiate to correct the inequities, whether for individual employees or whole classifications (where an entire classification is paid on a lower scale than another despite doing substantially similar work under similar working conditions, for example.)
- ***Increase diversity in recruitment and eliminate bias in hiring.*** While not typically considered a mandatory subject of bargaining, the parties could discuss and agree upon steps that could be taken during the hiring process to increase the gender and racial diversity of the applicant pool for some or all

positions and departments. The parties may also negotiate about ways to reduce or eliminate the impact and influence of bias in the hiring process.

- ☐ ***Train hiring managers on appropriate salary criteria.*** If the collective bargaining agreement gives managers any discretion with respect to setting starting salaries for members of the bargaining unit, the parties could agree to a training program for managers who make hiring decisions and initial pay offers to ensure that they understand what the permissible and impermissible criteria for making such decisions are and how to apply them. Where the employer has discretion in setting starting salaries, the parties could negotiate language requiring decisions about initial compensation to be based on objective factors. Such language could also specify that a newly-hired employee's prior salary or salary history should not be used to set pay, and that any reliance on such factor must be documented (explained in writing) by the hiring manager.
- ☐ ***Protect discussion of wages and discourage retaliation.*** The parties could negotiate contract language that makes it clear that employees may discuss their salaries with other employees, and that management will not retaliate or discriminate against any employee for exercising their right to do so.
- ☐ ***Evaluate new hire v. incumbent salaries.*** The parties could agree to language requiring the employer to evaluate the salaries of incumbent employees at any time that a new hire is provided an initial salary that is higher than theirs.
- ☐ ***Establish objective performance evaluation process.*** The parties could negotiate a fair process for performance evaluations in which employees are evaluated on clear criteria based on the skills and specific tasks performed in the position, and not on subjective criteria subject to potential bias based on gender or race.
- ☐ ***Recognize and value employees with caregiving responsibilities.*** The parties could negotiate for flexible work hours that recognize the demands of childrearing and other types of caregiving while not diminishing the value that employees who are parents and caregivers bring to the workplace. The parties could also negotiate job-protected, paid parental leave and ensure that it is equally available to employees of all genders, with additional job-protected, paid leave for the parent who actually gives birth. The parties could also negotiate for child care centers at or near the worksite.
- ☐ ***Ensure training for potential promotional opportunities is available to all employees.*** In the event that the audit finds that one reason for a pay gap between genders or between races/ethnicities is caused by more frequent promotions to one group of employees than to another, the parties could negotiate to provide training opportunities for all employees in management skills, or other skills needed for jobs that provide a promotional opportunity.
- ☐ ***Take Proactive Steps to Avoid Occupational Separation.*** In the event that the audit shows that jobs are segregated by gender, or by race/ethnicity, with one gender or race working primarily in lower paying jobs, the parties could negotiate for training to be provided so that employees can transfer to higher paying classifications as openings occur.







**I am an employee  
organization/union**

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**What is the California *Fair Pay Act*?**

**How does this law apply to my union and our members?**

**What do I tell a member or non-represented employee who believes she's being unfairly paid?**

**How can unions address issues of pay equity in the bargaining process?**

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## Message

Image

### What is the California *Fair Pay Act*?

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.

[https://www.dir.ca.gov/dlse/California\\_Equal\\_Pay\\_Act.htm](https://www.dir.ca.gov/dlse/California_Equal_Pay_Act.htm)

[\[Link to Fair Pay Act tool\]](#)

## Message

Image

### How does this law apply to my union and our members?

While the *Fair Pay Act* covers all employees in California, there are few things unions might especially want to consider: The Fair Pay Act/Equal Pay Act covers employees in all industries in California

- There is no carve out under the Fair Pay Act/Equal Pay Act for employees covered by Collective Bargaining Agreements, as there is for overtime, and there is no minimum number of employees needed for this law to apply
- Unions and employers can, however, negotiate bona fide merit or seniority based systems that can be the basis for wage differentials under the law
- In light of the recent Amendments to California law, unions may wish to review provisions in the collective bargaining agreement that relate to employee compensation – such as hiring and selection criteria, job classifications and definitions, pay scales, promotion and pay raise provisions, etc. – to ensure that these provisions comply with the law
- Unions and their members may wish to evaluate historical inequities in pay (e.g. between female- and male-dominated positions) to determine potential issues that conflict with the law, especially when negotiating an initial contract
- Finally, as employers, unions may utilize the tools and guidance for employers with respect to conducting pay audits and correcting any inequities.

[\[Link to Tool #13 How Does Fair Pay Act Affect My Union and Our Members?\]](#)

[\[Link to all the Employer Tools\]](#)

# Message

[Next](#)

Image

## **What do I tell a member or non-represented employee who believes she is being unfairly paid?**

- A Union representative can educate members about the existence of the *Fair Pay Act*, and her rights under the law and that the Union has the ability to get information from the employer that could help to evaluate and address the issue
- Depending on the terms of the Collective Bargaining Agreement, union represented employees may have a remedy through the negotiated grievance and arbitration procedure, or the individual employee may need to seek representation from an outside attorney or file a claim with the California Labor Commissioner
- A Union representative may tell employees who are not already represented by the union that they have the same rights under state law but also that issues of pay equity can be, and often are, addressed in the collective bargaining process. The employee may also want to know that the gender wage gap is much smaller among unionized workers than non-union workers.

[\[Link to the Tool #8 Fair Pay Act\]](#)

[\[Link to the Tool #1 wage rate tool\]](#)

[\[Link to the Tool #3 scenario tool\]](#)

## Message

[Next](#)

Image

### **How can unions address issues of pay equity in the bargaining process?**

In unionized workplaces, the issue of pay equity, whether for individual union members or for historically lower-paid classifications with predominantly female and/or non-white workforces, could be addressed as part of the bargaining process. Establishing protocols for sharing information about employee compensation can help unions and management to work cooperatively and proactively to address these issues before and during contract negotiations, rather than only address them at the bargaining table or in an adversarial manner.

[\[Link to Tool #14 Model Information Request\]](#)

Where a pay equity audit has already been conducted and the parties have identified disparities in compensation between individuals or groups of employees who are of different sexes or races/ethnicities and doing substantially similar work, the parties can specifically negotiate about the wage rates for individuals or classifications affected. Unions can also seek to negotiate over the terms and timeline for conducting and/or overseeing a pay equity audit in circumstances where this has not been done. In addition, they can negotiate for changes in hiring, compensation, promotion, and leave policies that would help to alleviate the root causes of pay inequity.

[\[Link to Tool #15 Model CBA Language\]](#)

# Looking for Work

Website Text

&

Pay Equity “Tools” “Resources”

for Review

First Iteration

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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](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.labormarket>

[info.edd.ca.gov/occguides/](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 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.womenin technology.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 ofr work information and this might be a good thing to have on hand and in the website.

**Tool:**

**Format:**



**I am looking for  
work**

DRAFT

# The Path to Pay Equity

Image

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# The Path to Pay Equity

[Next](#)

Image

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[\[Link to gender Pay Gap in California occupations or Tool #1 Wage Rate\]](#)

Negotiating for a fair wage can be 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..

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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.

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Remember as you apply for job:

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<https://www.careeronestop.org/ResumesInterviews/Letters/CoverLetterTemplate.aspxand>
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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.
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**Informational interviews.** [\[insert tool #11 for informational interviewing\]](#) 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.

**Industry, occupation, professional, and trade organizations and associations** [\[insert tool #12 that lists all associations in California\]](#) 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.womenin technology.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.



# General

Website Text

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Pay Equity “Tools” “Resources”

for Review

First Iteration

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## For Lawyers

### Tool #16 For lawyers

#### [Do we want to create an online tool specifically for lawyers?]

**Concept:** While this would have similar information to the tool overviews the Fair Pay Act, but it would include full citations etc for lawyers as well as jury instructions.

**Tool:**

**Format:**

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

FOR DISCUSSION – UPDATED 5/30/2017

*This document is drafted solely for discussion at the Definitions Subcommittee and should not be construed as legal advice or a final recommendation of this subcommittee or the Task Force.*

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 are relevant, but not determinative**  
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.
- **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.

**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.

2. Wage rates; compensation; wages

- EPA applies to compensation in all its forms, including, but not limited to, wages and salaries, bonuses, commissions, stock options, vacation, and pension.
- EPA typically would 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 EPA do cover adverse actions taken by an employer in retaliation for an employee exercising rights under the EPA.]

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The Task Force reviewed the following federal EPA 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 (6<sup>th</sup> 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 (6<sup>th</sup> Cir. 1981).
- *Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1030 (8<sup>th</sup> 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 (8<sup>th</sup> Cir. 2000).
- *Buntin v. Breathitt County Board of Education*, 134 F.3d 796 (6<sup>th</sup> 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,’ and ‘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 be 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."

## **Glossary**

**Concept:** A glossary of terms used on the site and in the documents or that are important for the Task Force and Pay Equity. Could use the definitions here anytime there is a mouse over on one of the terms on the website.

**Tool:**

**Format:**

*Human Resources Subcommittee: Commissioner Lauri Damrell and Rhoma Young*  
California Pay Equity Task Force

#### **Draft Glossary of Terms**

*This document is drafted solely for discussion should not be construed as legal advice or a final recommendation of this subcommittee or the Task Force.*

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#### **360-degree Feedback**

A performance appraisal process, where an employee is rated on his/her performance by people who are usually directly connected with his/her work. Peers, supervisors, managers, customers or clients, familiar with the employee's work can be included in the feedback process. Typically used for assessing competence development needs and succession planning in the organization rather than for determining pay or promotions. Such feedback is usually anonymous. *Also called multi-rater assessment, multi-source assessment or multi-source feedback.*

**401(K)**

A 401(k) is a feature of a qualified profit-sharing plan that allows employees to contribute a portion of their wages to individual accounts. Employers sometimes match a certain % of the employee contribution.

#### **Accommodation (see also Reasonable Accommodation)**

Reasonable accommodation is any change to a job, the work environment, or the way things are usually done. It is often allows an individual with a disability to apply for a job, perform job functions, or enjoy equal access to benefits available to other individuals in the workplace. Agencies are required by law to provide reasonable accommodation to qualified individuals with disabilities, unless doing so would impose an undue hardship to the agencies. In addition, Executive Order 13164 requires Federal agencies to develop written procedures for providing reasonable accommodation for a qualified disability.

**Adverse Impact** –Usually refers to a negative impact to an employee involving a material difference in the work, pay or circumstances. Also a “term of art” used in Affirmative Action Plan Analyses.

#### **Affirmative Action**

Any formal program, policy or procedure that an employer implements in order to correct past defined discrimination and prevent current and future discrimination within the workplace. It is also an active effort to improve the employment or educational opportunities of members of protected classes.

#### **Affirmative Action Plan (AAP)**

An AAP includes the policies, practices and procedures that a U.S. federal contractor (contracts of \$50,000 or more and employing 50 or more people) implements with a focus towards providing qualified applicants and employees equal opportunity for recruitment, selection, advancement, and other terms and privileges associated with employment. This written set of results-oriented procedures is intended to remedy disparities between or underutilization of women and minorities. The effectiveness of the plan is measured by the results it actually achieves rather than by the results intended and by the good faith efforts undertaken by the contractor to increase the pool of qualified women and minorities in all parts of the organization.

#### **Americans with Disabilities Act (ADA) of 1990**

The ADA is a federal anti-discrimination law which prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training and other terms, conditions and privileges of employment.

#### **Appraisal (also Performance Planning)**

Performance appraisal is the process of reviewing employee performance, setting new performance objectives, documenting the review, and also possibly delivering the review verbally in a face-to-face meeting between the employee and the supervisor. Annual performance reviews are typically intended to give mutual feedback on performance to the employee and often also to the supervisor, set new performance objectives and justify and form the basis for personnel decisions, e.g. compensations and benefits and sometimes, promotions.

#### **Attorney / Client Privilege**

A client's privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications between the client and his or her attorney. Such privilege protects communications between

attorney and client that are made for the purpose of furnishing or obtaining professional legal advice or assistance. For additional guidance regarding the application of the attorney client privilege, please consult legal counsel.

### **Back Pay**

A type of damages awarded in an employment lawsuit that represents the amount of money the employee would have earned in the past if the alleged discrimination had not occurred.

### **Base Salary**

Pay received for a given work period, as an hour or week, but not including additional pay, as for overtime work. It is used as the basis for calculating other allowances and benefits.

### **Benchmarking – (also Best Practice Benchmarking or Process Benchmarking)**

A process used in management and particularly strategic management, in which organizations evaluate various aspects of their processes in relation to best practice, usually within their own sector or industry. This allows organizations to develop plans for adopting and adapting such best practice for increasing their performance. Benchmarking is considered a continuous process in which organizations should continually seek to challenge and improve their practices.

### **Benefits**

Some see benefits as a form of supplement paid by employers to employees over and above the amount of pay specified as cash compensation. For others, benefits are a portion of a total compensation package or total rewards for employees. A comprehensive, common set of benefits could include many components e.g., career development, support for work-life balance, personal security, pension schemes, health insurance, life insurance, PTO or paid time off. (for discussion with Definitions and Systems and Functional Infrastructure subcommittees)

### **Best practices**

The practices of an organization that enables them to achieve superior organizational performance results. It usually reflect an “ideal” or hoped for standard.

### **Bias**

Prejudice in favor of or against one thing, person, or group compared with another, usually in a way considered to be unfair to one or more “protected” groups.

### **Bona fide occupational qualification (BFOQ)**

A very narrowly interpreted exception to EEO laws that allows employers to base employment decisions for a particular job on such factors as sex, religion or national origin, if they are able to demonstrate that such factors are an essential qualification for performing a particular job.

### **Bonus**

An after-the-fact reward or payment (may be either discretionary or nondiscretionary) based on the performance of an individual, a group of workers operating as a unit, a division or business unit, or an entire workforce. Payments may be made in cash, shares, share options or other items of value, such as a special event, travel or gift

card. In the context of sales compensation, a defined, pre-established amount of money to be earned for achieving a specified performance goal. Planned bonus amounts commonly are expressed as a percent of the incumbent's base salary, salary range midpoint, percentage of target cash compensation or incentive compensation, or a defined dollar amount.

### **Calibration**

A process designed to ensure different managers are applying similar and consistent standards in measuring and evaluating the performance of their subordinates. The process typically involves managers (and, often, HR) meeting to review and discuss the proposed performance ratings for the employees, and then adjusting ratings for accuracy and consistency.

### **California Labor Commissioner**

Sets and enforces regulations for employee wages, paycheck deductions, breaks, vacation, jury/witness duty, or temporary military leave, the workweek, minors, employee access to personnel files, "lawful conduct" discrimination, exempt status, and independent contractor status. The commissioner also assess fines and files charges with the District Attorney on behalf of underpaid employees, and investigates, holds hearings, takes action to recover wages, assesses penalties, and makes demands for compensation.

**Call in pay** – Additional compensation awarded to employees who are required to remain on call during off-duty hours.

### **Casual Employment**

The practice of hiring employees on an as-needed basis, either as a replacement for permanent full-time employees who are out on short- and long-term absences or to meet employer's additional staffing needs during peak business periods.

### **Civil Rights Act of 1964**

A federal statute enacted to further guarantee the constitutional rights of individuals and prevent employment discrimination based on race, color, sex, religion, national origin or age.

### **Civil Rights Act of 1991**

A federal statute that amended the Civil Rights Act of 1964 enacted to strengthen and improve federal civil rights laws by providing for damages in cases of intentional employment discrimination, clarifying provisions regarding disparate impact actions and for other purposes.

### **COBRA (*Consolidated Omnibus Reconciliation Act (COBRA) of 1985*)**

Under the Consolidated Omnibus Budget Reconciliation Act of 1985, if an employee (of a certain size) terminates employment with the company, the employee is entitled to continue participating in the company's group health plan for a prescribed period of time, usually 18 months. (In certain circumstances, such as an employee's divorce or death, the length of coverage period may be longer for qualified dependents). The employee typically pays the premium. COBRA coverage is not extended to employees terminated for gross misconduct.

### **COLA (*Cost of Living Adjustment*)**

An annual adjustment in wages to offset a change in purchasing power, as measured by the Consumer Price Index (CPI). The Consumer Price Index is used rather than the Producer Price Index because the purpose is to offset inflation as experienced by the consumer, not the producer.

### **Collective Bargaining Agreement (CBA)**

A collective agreement is a labor contract between an employer and one or more unions about the terms and conditions of employment of employees. Typical issues are salaries and wages, hours of work, working conditions and grievance procedures and the rights and responsibilities of trade unions.

### **Collective Bargaining**

The process by which an employer negotiates employment contracts and working conditions with one or more unions collectively for all employees.

### **Commission**

Compensation paid to an employee based on a proportional amount of sales of the employer's property or services. Is most frequently called incentive pay and used primarily for sales positions. Mutually agreed upon, or fixed by custom or law, fee accruing to an agent, broker, or salesperson for facilitating, initiating, and/or executing a commercial transaction.

### **Common law employment test**

Refers to the IRS's 20-question common law test which examines the level of control exercised over a worker by an employer in order to determine whether the individual is an employee or an independent contractor.

### **Comparable Worth**

The concept that women and men should be paid equally when they perform different work that nonetheless requires comparable skills and responsibility or is of equal value to the employer.

### **Compensation**

All forms of pay going to employees and arising from their employment. Typically compensation includes base elements such as wages and salaries and variables such as bonus and incentives

### **Compensation philosophy**

A compensation philosophy is simply a formal statement documenting the company's position about employee compensation. It essentially explains the why behind employee pay and creates a framework for consistency. Compensation philosophies are typically developed by the human resources department in collaboration with the executive team. The philosophy is based on many factors, including the company's financial position, the size of the organization, the industry, business objectives, salary survey information, and the level of difficulty in finding qualified talent based on the economy, as well as the unique circumstances of the business.

### **Competencies / Competency**

Competencies are the knowledge-skills and the attitude needed by any individual employee to carry out their job effectively. Another way to define competency is 'an underlying characteristic of a person' 'motive, trait, skill, aspect of one's self-image or social role, experience or a body of knowledge'.

### **Condition of employment**

An organization's policies and work rules that employees are expected to abide by in order to remain continuously employed.

### **Confidentiality agreement**

A contract restricting an employee from disclosing confidential or proprietary information.

### **Contingent Workers**

Contingent workers are employed when the employer needs them, without defined job security or long-term commitments. Part-time workers, temporary and contract workers, self-employed workers and independent contractors are examples.

### **Contractor**

Under Executive Order 11246, a contractor is a firm that does business with the federal government. A prime contractor receives \$50,000 or more in contracts each year and employs more than 50 people in total employment. A subcontractor performs part of the contract at the direction of the prime contractor and receives \$10,000 or more in subcontracts each year.

### **CPI (Consumer Price Index)**

An index of prices used to measure the change in the cost of basic goods and services in comparison with a fixed base period. Also called *cost-of-living index*.

### **Craft worker**

An individual employed in a profession or activity that uses experienced hands to make something. Apprenticeships are often required and post-secondary vocational schools also offer such craft oriented training. Training time can be over a course of years and require certification examinations. Examples: electrician, plumber, tool and die maker, machinist, HVAC specialist, journeyman carpenter, cabinet maker.

### **DBA**

Stands for "doing business as" and is an official and public registration of a business name. DBAs are also known as Fictitious Names, Fictitious Business Names, Assumed Names, and Trade Names.

### ***De minimis rule***

Described by IRS guidelines as any benefit, property or service provided to an employee that has so little value (taking into account how frequently similar benefits are provided to employees) that accounting for it would be unreasonable or administratively impracticable. Cash, no matter how little, is never excludable as a de minimis benefit, except for occasional meal money or transportation fare.

### **Deductible**

Usually, in the employee insurance context this is a fixed amount or percentage of an insurance claim that is the responsibility of the insured, and which the insurance company will deduct from the claim payment. Sometimes deductibles are voluntary (to qualify for a lower premium rate) but usually they are imposed by the insurer to avoid paying a large number of small claims.

#### **Defined benefit plan**

A retirement plan that is not an individual account plan and pays participants a fixed periodic benefit or a lump sum amount, calculated using specific formulas that include such items as age, earnings and length of service.

#### **Defined contribution plan**

An individual account plan in which the employer contributes a specific amount of money into each year that is to be distributed among the accounts of each plan participant.

#### **Department of Fair Employment and Housing (DFEH)**

State agency that enforces California's non-discrimination laws. DFEH has jurisdiction over private and public employment, housing, public accommodations, and public services. DFEH receives and investigates discrimination complaints, and provides technical assistance to employers regarding their responsibilities under the law.

#### **Department of Industrial Relations (DIR)**

Seeks to improve working conditions for California's wage earners and to advance opportunities for profitable employment in California. DIR has these major areas of responsibility: labor law, workplace safety and health, apprenticeship training, Workers' Compensation, statistics and research, mediation, and conciliation.

#### **Department of Labor (DOL)**

U.S. Department of Labor, federal agency, administers a variety of federal labor laws including those that guarantee workers' rights to safe and healthful working conditions, a minimum hourly wage and overtime pay, freedom from employment discrimination, Unemployment Insurance, and other income support.

#### **DFEH**

See Department of Fair Employment and Housing

#### **Disciplinary Procedure**

An employment management procedure carried out in the workplace in the event of an employee behaving in a manner contrary to the terms of the employment agreement. It is often part of a defined process called Progressive Discipline.

#### **Discretionary Bonus**

A plan in which management determines the size of the bonus pool and the amounts to be allocated to specific individuals after a performance period. These have no predetermined formula or promises, and are not guaranteed.

#### **Discrimination**



The making of a distinction in favor of or against, a person based on the group, class, gender, ethnicity, sexual preferences, religion or category to which that person belongs rather than on individual performance or merit.

**Dismissal**

Involuntary termination of employment by employer.

**Disparate (Adverse or Unequal) Impact**

Refers to an employment practice that appears neutral but discriminates against a protected class in practice.

**Disparate (Unequal) Treatment**

Refers to an applicant or employee who belongs to a protected class receiving different treatment because of his or her membership in a protected class.

**Diversity**

A broad definition of diversity ranges from personality and work style to all of the visible dimensions of diversity such as race, age, ethnicity or gender, to secondary influences such as religion, socioeconomics and education, to work diversities such as management and union, functional level and classification or proximity/distance to headquarters.

**Diversity Training**

A fundamental component of a diversity initiative that represents the opportunity for an organization to inform and educate senior management and staff about diversity. The purpose of training is not only to increase awareness and understanding of workplace diversity, but also to develop concrete skills among staff that will facilitate enhanced productivity and communications among all employees.

**Division of Labor Standards Enforcement (DLSE)**

Investigates wage claims and discrimination complaints and enforces California's labor laws (including the California Fair Pay Act) and Industrial Welfare Commission (IWC) Wage Orders.

**DOL**

See Department of Labor.

**Domestic partnership**

A domestic partnership is not identical to marriage, but it provides some of the same benefits. Some states refer to the institution as a "civil union," but the definitions vary from one city or state to the next.

**Downsizing**

The process of reducing the number of people working for an organization by terminations, retirements and spinoffs. Often referred to in a shorthand way as a RIF (or a reduction in the workforce)

**EAP (Employee Assistance Plan)**

A work-based intervention program designed to identify and assist employees in resolving personal problems (i.e., marital, financial or emotional problems, family issues, substance/alcohol abuse) that may be adversely affecting the employee's performance. It is usually confidential and usage may not be known to the employer.

#### **Educational assistance / tuition reimbursement plan**

An employer sponsored program for providing eligible employees with financial assistance up to \$5,250 per year in the pursuit of undergraduate and graduate education. The coursework does not have to be job related and payments can be applied to expenses directly related to education including tuition, fees, books, supplies and equipment. Each employer generally defines the criteria and amount per annum.

#### **EEO (Equal Employment Opportunity)**

A policy statement that equal consideration for a job is applicable to all individuals and that the employer does not discriminate based on race, color, religion, age, marital status, national origin, disability or sex.

#### **EEOC**

See Equal Employment Opportunity Commission

#### **Employee Profile**

(for discussion with Systems and Functional Infrastructure subcommittee) This is usually a summary of highlights about an employee's career progression in an organization and includes salary, raises, job title and respective dates occurred that are maintained on the employer data base.

#### **Employee Relations**

A broad term, which is used to refer to the general management and planning of activities related to developing, maintaining, and improving employee-management relationships typically by communicating with employees, processing grievances/disputes, etc. It also is a usual part of HR that focuses on addressing workplace problems and facilitating resolution.

#### **Employee Retention**

Systematic effort by employers to create and foster an environment that encourages current employees to remain employed by having organizational policies and practices in place to address their diverse needs effectively.

#### **Employment "at will"**

A legal doctrine that states that an employment relationship may be terminated by the employer or employee at any time and for any or no reason.

#### **Equal Employment Opportunity Commission**

A federal agency that interprets discrimination law, collects employment data and handles employee complaints. They also offer mediation and research plus legal advocacy.

#### **Equal Pay Act of 1963**

A federal law prohibiting employers from discriminating between male employees and female

employees in terms of pay when they are performing jobs that are essentially the same or of comparable worth.

### **Equity adjustment**

Equity adjustments are salary changes outside of the normal salary programs (promotions, reclassifications, merits, etc.) to remedy salary issues such as external pressure in high demand areas, internal salary compression, and/or retention considerations. Equity adjustments are not granted to reward performance.

### **Ethics**

A philosophy principle concerned with opinions about appropriate and inappropriate moral conduct or behavior by an individual or social group. Many companies have a separate ethics policy

### **Executive Order 11246 of 1965**

The Executive Order prohibits federal contractors and federally-assisted construction contractors and subcontractors, who do over \$10,000 in Government business in one year from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin. The Executive Order also requires Government contractors to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment. Additionally, Executive Order 11246 prohibits federal contractors and subcontractors from, under certain circumstances, taking adverse employment actions against applicants and employees for asking about, discussing, or sharing information about their pay or the pay of their co-workers.

### **Exempt employees**

Employees who meet one of the FLSA exemption tests and who are paid on a fixed salary basis and not eligible for overtime.

### **Exit Interview**

An exit interview is a meeting between an employee who is leaving the organization and a representative of the organization, usually from the Human Resources department. The purpose is to get feedback about the reasons for leaving, the job the employee held, the work environment, and the organization; especially what the employee would like to change. Usually not be carried out by employee's immediate superior.

### **External Market Data**

(for discussion with Systems and Functional Infrastructure subcommittee)

### **Fair Employment and Housing Act (FEHA)**

California law prohibiting discrimination/harassment on the basis of race/color, religious creed, national origin/ancestry, physical disability, mental disability, medical condition (including no genetic testing), marital status, sex, age, and sexual orientation.

### **Family Medical Leave Act (FMLA) of 1993**

The Family and Medical Leave Act (FMLA) allows employees who have met minimum service requirements (12 months employed by the company with 1,250 hours of service in the preceding 12 months) to take up to 12 weeks

of unpaid leave per year for: (1) a serious health condition; (2) to care for a family member with a serious health condition; (3) the birth of a child; or (4) the placement of a child for adoption or foster care.

### **Flex Time**

Variable work hours requiring employees to work a standard number of core hours within a specified period of time, allowing employees greater flexibility in their starting and ending times.

### **Flexible benefit plan**

A benefit program regulated under IRC 125 that offers employees a choice between permissible taxable benefits (including cash) and nontaxable benefits such as life and health insurance, vacations, retirement plans and child/dependent care. Although a common core of benefits may be required, the employee may determine how his or her remaining benefits dollars are allocated for each type of benefit from the total amount offered by the employer.

### **Front Pay**

A type of damages awarded in an employment lawsuit that represents the amount of money the employee could have earned into the future if he or she had not experienced the alleged discrimination.

### **FTE (Full-time Equivalent)**

A value assigned to signify the number of full-time employees that could have been employed if the reported number of hours worked by part-time employees had been worked by full-time employees instead.

### **Functional Job Analysis**

A method of job analysis that produces standardized occupational information specific to the performance of a particular job.

### **Geographical differential**

The variance in pay established for same or comparable jobs based on variations in labor and costs of living among other geographic regions.

### **Goal Setting**

The systematic process of setting and assigning a set of specific and attainable goals to be met by an individual, group or organization.

### **Good Faith Bargaining**

A duty to conduct negotiations where two parties meet and confer at reasonable times on matters within the scope of their representation, with open minds and with the intention of reaching an agreement.

### **Grievance**

In a HR context, a grievance is a formal complaint or allegation brought by the employee or the organization to an employment contract against another party, about unfair, inconsistent treatment or violation of a union contract.

**Harassment**

Conduct or actions, based on protected characteristics such as race, religion, sex, national origin, age, disability, military membership or veteran status, severe or pervasive enough to create a hostile, abusive or intimidating work environment for a reasonable person.

**High potential employee**

Often the top 3-5 % of company employees ranked in performance review ratings. High potentials consistently and significantly outperform their peer groups in a variety of settings and circumstances. While achieving these superior levels of performance, they exhibit behaviors that reflect their companies' culture and values in an exemplary manner. Moreover, they show a strong capacity to grow and succeed throughout their careers within an organization—more quickly and effectively than their peer groups do.

**Hire date**

Hire date is normally the date an employee completes new hire paperwork, including the W-4 and I-9. Start date is the first day the employee actually works.

**Hostile Environment Harassment**

Sexual or other discriminatory conduct that is so severe and pervasive that it interferes with an individual's ability to perform the job, creates an intimidating, offensive, threatening or humiliating work environment or causes a situation where a person's psychological well-being is adversely affected.

**Hourly employee**

An employee who is paid by the hour and who must be paid overtime under the FLSA or a state wage hour statute.

**HR Audit**

A method for assessing the effectiveness of human resource functions. Can be carried out internally or by engaging external HR audit systems.

**HRIS (Human Resource Information System)**

A computer database used to gather, store, maintain and retrieve relevant employee and HR-related information.

**Human Capital**

From an organization point of view - the collective knowledge, competencies, health, skills and abilities of all the organization's employees. Human capital, unlike structural capital, is not reflected in financial statements and can walk out when employees leave unless it is systematically recorded in the organization's procedures and systems. From an individual point of view – the set of skills an employee acquires on the job, through experience and training, which increases the employee's value in the job market.

**Human Resources Management System**

(for discussion with Systems and Functional Infrastructure subcommittee) Also called HRIS, which is a computer based system used in the administration, record keeping and documentation of HR data.

### **Implicit Bias (or Unconscious Bias)**

Unlike explicit bias (which reflects the attitudes or beliefs that one endorses at a conscious level), implicit bias is the bias in judgment and/or behavior that results from subtle cognitive processes (e.g., implicit attitudes and implicit stereotypes) that often operate at a level below conscious awareness and without intentional control.

### **Incentive Compensation**

Compensation that is linked to performance by rewarding employees for actual results achieved instead of seniority or hours worked.

### **Incentive Pay**

Additional financial compensation used to motivate and to reward employees for reaching and/or exceeding standard performance or productivity goals.

### **Independent Contractor**

A self-employed individual who performs a service for an employer under an express or implied agreement and who is not subject to the employer's control, or right to control, regarding the method and means in which the service is performed. Can also be a person who works as an entrepreneur but has a contract for services with another person / organization, and is not considered an employee. [See Common Law Employment Test]

### **Individual Employment Agreement**

An individual employment agreement is a formal, legally binding agreement between an employer and employee outlining terms of employment such as duration, compensation,

benefits, etc.

### **Individual Retirement Account (IRA)**

Tax-deferred retirement schemes that can be started by anyone who earns employment income. Individuals who earn less than a certain amount (or who do not participate in their employer's retirement plan) can generally deduct a part or all of their contribution to such schemes from their taxable income. Money in an IRA is taxed only when it is withdrawn.

### **Insubordination**

The willful or repeated disobedience to a directive from a higher level manager. Often part of a laundry list of more serious employment infractions.

### **Interactive process**

A process in which the employee, health care provider and employer each share information about the nature of a disability and the physician outlined limitations that may affect the employee's ability to perform the essential job duties. This process is referred to as an interactive process. It entails a good-faith effort by the employer and the employee to discuss the limitations or performance issues the employee's disability may pose. The purpose of this discussion is to determine what (if any) accommodations may be needed or possible. The interactive process involves a review of the [accommodation request](#) from the employee or his or her health care provider.

### **Intermittent Leave**

Under FMLA, intermittent and reduced schedule leave is used to describe leave that is not taken on a consecutive basis but rather taken in increments of days or hours.

### **Internal Recruitment**

The practice of assessing the employer's current workforce to determine whether or not current employees possess the required skills or qualifications to fill specific vacancies either through promotion or transfer.

### **Interpretive Guidelines on Sexual Harassment**

EEOC issued guidelines defining sexual harassment and the employer's responsibility for maintaining a workplace environment which is free from sexual harassment or intimidation.

### **Job Accommodation Network (JAN)**

A service of the Office of Disability Employment Policy (ODEP) of the U.S. Department of Labor. JAN's mission is to facilitate the employment and retention of workers with disabilities by providing employers, employment providers, people with disabilities, their family members and other interested parties with information on job accommodations, self-employment and small business opportunities and related subjects. This is considered a key and valuable resources for employees and employers.

### **Job Analysis**

Job analysis is a systematic study of a job to determine what activities and responsibilities are included, their relationships with other jobs, the personal qualifications necessary for performance of the jobs, and the conditions under which work is performed. Job analysis usually results in a job description as well as recruiting plans.

### **Job description**

A written description of a job based on a job analysis, which includes information about the nature of the work to be performed, specific responsibilities and duties, and the employee skills and characteristics required to perform the job, scope and working conditions, job title and the name of the person to whom the person holding the job reports.

### **Job Evaluation**

Job evaluation is usually a system for analyzing and comparing different jobs and placing them in a ranking order according to the overall demands of each one. The objective is to assess which jobs should get more pay than others. There are two kinds of job evaluation programs: non-analytical and analytical. Non-analytical programs compare a job with others. In an analytical program, a job is split up into a number of different aspects and each factor is measured separately. Job evaluations assess the content of a job, not an individual's performance of that job.

### **Job expectations**

What an employee must accomplish, in a position, to be considered a successful employee.

### **Job family**

Groups of similar occupations based on work performed and on required skills, education, training, and credentials (similar types of work and requiring similar training, skills, knowledge, and expertise.). (for discussion with Systems and Functional Infrastructure subcommittee)

### **Job Grading**

Jobs are assigned a job grade based on the job value determined during the job evaluation. Jobs are classified into a grade/category structure or hierarchy. Each job is assigned to a specific grade/category. Jobs are placed with other jobs of similar requirements, duties, and responsibilities. The higher the job grade, the greater the level of responsibility and the higher the salary range.

### **Job Leveling**

(for discussion with Systems and Functional Infrastructure subcommittee) A systemic method of objectively and accurately assigning value to individual positions within an organization. It is a process that defines and evaluates the knowledge and skills that are necessary to perform the job and establishes the job's duties, responsibilities, tasks and level of authority within the organization's job hierarchy.

### **Job Posting**

The method of advertising for vacancies internally by posting a notice of the opening on a bulletin board, etc.

### **Job title**

A specific name given to a particular job which is used to distinguish that job from other jobs within the organization.

### **Key Performance Indicators**

Key Performance Indicators or KPI's are quantifiable measurements, agreed to beforehand, which reflect the critical success factors and organizational goals of an organization. They differ according to the nature and the field of the organization. From a performance management point of view, KPI's measure how tasks agreed between an employee and the person to whom the employee reports, have been carried out in the agreed time and manner.

### **Knowledge worker**

Employees whose job functions are primarily of an intellectual nature.

### **KSAs**

Knowledge, skills and abilities – the personal attributes that a person requires to perform the job.

### **Labor Commissioner**

See California Labor Commissioner

### **Labor Law Posting**

Federal and state regulations requiring employers to post in conspicuous places a variety of labor law posters, including, but not limited to, information regarding employee rights under EEO, FMLA, OSHA, ADA, FLSA, as well as other labor laws.



## **Labor Market**

A geographical or economic area of economic exchange in which workers seek jobs and employers seek workers. Labor markets can be primary labor markets, which provide secure employment with good benefits and good working conditions or secondary labor markets, which are occupations with insecure jobs, little benefits and low wages.

## **Layoff / RIF (Reduction in Force)**

**Layoff** is a temporary termination of employees, or the elimination of jobs, during periods of economic downturn or organizational restructuring. **RIF** is an involuntary separation of an employee or groups of employees due to economic pressures, lack of work, organizational changes or other reasons of business necessity that require a reduction in staff.

## **LOA (Leave of Absence)**

A period of time that one must be away from one's primary [job](#), while maintaining the status of [employee](#). This contrasts with normal periods away from the workplace, such as [vacations](#), [holidays](#), hiatuses, [sabbaticals](#), and "working from home" programs, in that they are considered exceptional circumstances, rather than benefits. Generally such an arrangement has a predefined termination at a particular date or after a certain event has occurred.

## **Long-Term Bonus**

Usually a form of deferred compensation that establishes an income stream in the form of a bonus over time, typically at a predetermined age or upon retirement.

## **Lump Sum Payment**

In an HR Context, a fixed negotiated payment, which is not typically included in an employee's annual salary but given in place of regular pay increases.

## **Management Employee**

An employee who meets the salary basis test and regularly manages or supervises two or more employees.

## **Market rate**

The usual price in the market / typical rate for a specific job.

## **Matrix Organization**

A matrix shaped multifunctional team organizational structure, where employees from different functional disciplines (e.g. accounting, marketing, engineering) report to more than one manager or supervisor without being removed from their respective positions.

## **Mean Wage**

The average wage for a worker in a specified position or occupation, which is determined by adding together the total wages for all incumbents in a specific position or occupation and then dividing it by the total number of incumbents.

### **Median Wage**

The margin between the highest paid 50 percent and the lowest paid 50 percent of workers in a specific position or occupation.

### **Mediation Services**

In an HR context, a system of alternative dispute resolution or the process of intervention by an independent specialist in an employment dispute.

### **Medicare**

A health insurance program administered by the Social Security Administration which is broken into two distinct categories: 1) Medicare Part A helps with hospital costs; and 2) Medicare Part B requires a monthly fee and is used to pay medical costs for people 65 years of age and older, and some disabled people under 65 years of age and people.

### **Mentoring**

A one-to-one systematic interaction process between an employee and a senior or more experienced individual, who acts as an advisor, counsellor or guide. The mentor provides support and gives feedback to facilitate learning. May be formal or informal.

### **Merit pay / salary increase**

Higher wage rate paid to an employee on the basis of an agreed upon criteria such as efficiency and performance. Also called merit bonus.

### **Mid-Point**

The point on a continuum at which half of the distribution is above the mean and half is below.

### **Minimum qualifications**

The attributes of a job description which establishes a baseline for meeting the qualifications for a particular position.

### **Minimum wage**

The lowest hourly rate an employer can pay an employee. The government sets this rate by law.

### **Minorities**

Men and women of those minority groups for whom EEO-1 reporting is required; that is, black, Hispanic, Asian or Pacific Islander, American Indian or Alaskan Native. The term may refer to these groups in the aggregate or to an individual group.

### **Mission Statement**

A brief written description of a company's core purpose and focus, which normally remains unchanged, whereas business strategies and practices may frequently change to adapt to the changing circumstances. Also called company mission, corporate mission or corporate purpose.

### **National Labor Relations Act (NLRA) of 1947**

The National Labor Relations Act (NLRA), passed in 1935, provides that all employees have the right to form, join and assist labor organizations and to bargain collectively with their employers.

### **National Origin**

The country – including those that no longer exist – of one's birth or of one's ancestors' birth. "National origin" and "ethnicity" often are used interchangeably, although "ethnic group" can refer to religion or color, as well as country of one's ancestry.

### **Non-compete Agreement**

A contract restricting an employee from obtaining employment with a competitor within a specified industry, distance and/or time frame.

### **Non-Discretionary Bonus**

A plan in which management determines the size of the bonus pool and the amounts to be allocated to specific individuals after a performance period. These use a predetermined formula and promises.

### **Non-Disclosure Agreement**

A contract restricting an employee from disclosing confidential or proprietary information.

### **Non-exempt employee**

An employee who does not meet any one of the Fair Labor Standards Act exemption tests and is paid on an hourly basis and covered by wage and hour laws regarding hours worked, overtime pay, etc.

### **Occupational Groups**

Used to classify specific occupations into a specific category, such as professionals, technical/hi-tech, administrative/clerical, sales, service, retail, etc.

### **Occupational Segregation**

The systematic concentration of groups of workers (e.g., women, people of color) in particular jobs.

### **Office of Federal Contract Compliance Programs (OFCCP)**

This division of the Department of Labor holds those who do business with the federal government – contractors and subcontractors – responsible for complying with the legal requirement to take affirmative action and not discriminate on the basis of race, color, sex, sexual orientation, gender identity, religion, national origin, disability, or status as a protected veteran. In addition, contractors and subcontractors are prohibited from discharging or

otherwise discriminating against applicants or employees who inquire about, discuss or disclose their compensation or that of others, subject to certain limitations.

### **Onboarding**

Onboarding is the process of integrating employees into their new work environment. A relatively new term, it is slightly more comprehensive than orientation as it links new employees with team members very early in the employment process and continuing after the traditional orientation program ends.

### **Open Door Policy**

A policy encouraging employees to bring employment issues to the attention of the employer, rather than going outside the company.

### **Organization chart (org chart)**

A graphic representation outlining how authority and responsibility are distributed within an organization.

### **Organizational Culture**

The specific collection of values and norms that are shared by people and groups in an organization and that control the way they interact with each other and with stakeholders outside the organization.

### **Orientation (New employee orientation)**

The introduction of employees to their jobs, co-workers, and the organization by providing them with information regarding such items as policies, procedures, company history, goals, culture, and work rules.

### **Outplacement**

The process of facilitating a terminated employee's search for a new job by providing professional services, such as job counseling, training and assistance paid for by the former employer as a benefit.

### **Overtime pay**

In accordance with the Fair Labor Standards Act (FLSA), it is the term used to define work that is performed in excess of 40 hours per week.

### **Paid Time Off (PTO)**

A benefit program granting employees a specific number of vacation or personal days off which that are paid by the employer. The number of days is generally based on the employer's policy for accrual of paid time off.

### **Parental Leave**

A benefit designed to provide employees with approved paid or unpaid time off following the birth or adoption of a child or to care for a dependent.

### **Part-Time Employee**

An individual who continually works less than 40 hours per week (standard workweek hours are based on individual employer policy, therefore, a 40-hour workweek is only a guideline; this number could be higher or lower).

**Pay Rate**

A fixed amount of payment based on a unit of time or a piece of work performed.

**Pay Scale**

(for discussion with Systems and Functional Infrastructure subcommittee)

**Performance Appraisal**

A periodic review and evaluation of an individual's job performance. May be verbal (informal) or written (more formal)

**Performance Improvement Plan**

Performance Improvement Plan is a tool to monitor and measure the work processes and/or behaviors of a particular employee or a unit in order to improve performance or modify behavior. It provides employees with constructive feedback, facilitate discussions between an employee and his or her supervisor regarding performance-related issues, and outline specific areas of performance requiring improvement, often over a specific time period.

**Performance management**

A process of identifying, evaluating and developing the work performance of employees in an organization. This is to foster organizational objectives are more effectively achieved and understood by employees, through the use of performance assessment tools, coaching and counseling as well as providing continuous feedback.

**Personal Grievance**

Any grievance that an employee may have against the current employer or former employer. The most common types of personal grievance are dismissals, or threats of dismissal, sexual harassment, racial harassment, duress, and discrimination. Some organizations have a formal policy on grievance handling and procedures, sometimes contained in a CBA

**Piece Rate**

An amount paid for completing a particular task or making a particular piece of goods.

**Position Analysis**

A questionnaire used in an organization to collect quantifiable data about the responsibilities and requirements of jobs in that particular organization.

**Pregnancy / maternity LOA**

A period of approved absence for a female employee granted for the purpose of giving birth and taking care of infant children. Maternity leave may last anywhere from several weeks to a period of months depending on the

organization, and may be paid or unpaid depending on policies. A certain amount of maternity leave may also be legally mandated for some states or municipalities.

### **Prevailing Wage**

A rate of pay determined by the U.S. Department of Labor based upon the geographic area for a given class of labor and type of project.

### **Probation / Probationary Period**

When hiring new employees, many employers use probationary employment periods to ascertain whether the new workers will be able to handle the duties and challenges associated with their new job. Also called trial period. Probation or probationary periods, which can be from two weeks to several months helps the employer evaluate the employee before making the employment permanent.

### **Professional Development Plan**

The Professional Development Plan outlines how the professional capabilities of the employee will be developed over a defined period. This plan may include formal training, participation in work related activities (projects or committees), access to coaching, mentoring or any other opportunities for experience to enhances the skills, knowledge or personal attributes of the employee.

### **Progressive discipline**

A form of discipline with increasing penalties are awarded each time an employee is disciplined for the same or a different performance infraction or policy or work-rule violation. Generally, the sequence is an oral warning to written warnings to suspension and finally termination.

### **Promotion**

Career advancement within an organization, which includes increased authority, level of responsibility, status and (usually) pay.

### **Protected class / group**

A legal term describing certain groups, such as women, older and disabled individuals, veterans and minorities.

### **Race / Gender (Sex) / Ethnic Categories**

**Race** is a division of humans with certain distinguishing characteristics in common which indicate distinctive origins or cultural heritage. **Gender / Sex** is the classification of people as male or female. **Ethnic Categories** is a grouping of individuals who are of the following decent: American Indian or Alaska Native; Asian; Black or African American; Native Hawaiian or Other Pacific Islander; and White.

### **Reasonable Accommodation (see also Accommodation)**

Modifying or adjusting a job process or a work environment to better enable a qualified individual with a disability to be considered for or perform the essential functions of a job.

### **Records retention**

Number of years prescribed by a law for which certain records must be kept before their final disposition.

### **Recruitment**

The process of bringing into an organization personnel who will possess the appropriate education, qualifications, skills, competence and experience for the post offered.

### **Red circle rate / Red Circling**

A **Red Circle Rate** is a pay rate that is usually above the maximum range assigned to the job grade. Employees are usually not eligible for additional pay increases until the range maximums exceed the individual pay rate. **Red Circling** is when an employee's pay rate is approved to be above the established salary maximum for that position.

### **Regular Rate of Pay**

The calculated amount of an employee's actual earnings, which may include an hourly rate, commission, bonuses, piece work, and the value of meals and lodging. (may require further discussion with definitions subcommittee)

### **Representation**

Members from various demographic groups, (can be legally protected groups or classes), such as race, ethnicity, religion, sex, national origin, age and physical and mental disabilities.

### **Reprimand**

An oral or written reproach given to an employee as part of disciplinary action.

### **Rest break**

The Fair Labor Standards Act (FLSA) does not require breaks or meal periods be given to workers. Some states may have requirements for breaks or meal periods. If a state does not require breaks or meal periods, these benefits are a matter of agreement between the employer and the employee (or the employee's representative). California requires: Paid 10-minute rest period for each 4 hours worked or major fraction thereof; as practicable, in middle of each work period. Not required for employees whose total daily work time is less than 3 and ½ hours.

### **Résumé / CV**

A document setting out a summary of a person's education, training, professional history, skills, competences and job qualifications, which is used typically when applying for a job. The term CV (Curriculum Vitae) can more common in more academic or technical fields.

### **Retaliation**

*Retaliation* occurs when an employer negatively treats an employee for engaging in "legally protected activity". It can include a negative job action, such as demotion, discipline, firing, salary reduction, or job or shift reassignment.

### **Retention**

Effective employee retention is a systematic effort by employers to create and foster an environment that encourages current employees to remain employed by having policies and practices in place that address their diverse needs.

**Right-to-sue letter**

A letter issued by the U.S. Equal Employment Opportunity Commission or the California Department of Fair Employment and Housing, once a charge has been recorded and processed, informing individuals who filed the charge that they have the right to further pursue their charges in a federal or state court.

**Right-to-work**

A state law preventing labor-management agreements requiring an individual to join a union as a condition of employment.

**Salary**

A fixed amount of money for each payroll period, whether weekly, bi-weekly, semi-monthly, or monthly.

**Salary grade / level**

A compensation level expressed as a salary range, which has been established for each position within the organization.

**Salary range**

A range of pay rates, from minimum to maximum, set for a specific pay grade.

**Salary survey**

Tools used to determine the median or average compensation paid to employees in one or more jobs. Compensation data, collected from several employers, is analyzed to develop an understanding of the amount of compensation paid.

**Seniority**

Status determined by the length of time an employee has worked for a specific employer, department or position within the organization.

**Severance Pay**

Usually a one-time payment given by employers when terminating an employment. It is often a trade off for an employee waiver or release in agreeing to sue the company.

**Sexual Harassment**

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, interferes with an individual's work performance or creates an intimidating, hostile or offensive work environment. Sexual harassment can occur in a variety of circumstances, including but not limited to the following: The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex. The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.

**Sick Leave**



Paid time off granted to employees who are out of work due to an illness or injury.

### **Skill Based Pay**

A compensation system based on the repertoire of skills an employee can perform, rather than the specific skill that the employee may be using at a particular time. Pay increases generally are associated with the addition and/or improvement of the skills of an individual employee, as opposed to better performance or seniority within the system.

### **Stock options**

The right to purchase stock of the employer at a given price at some designated time in the future. Stock Options usually come in two types: Incentive stock options (ISOs) in which the employee is able to defer taxation until the shares bought with the option are sold. Nonqualified stock options (NSOs) in which the employee must pay income tax on the 'spread' between the value of the stock and the amount paid for the option.

### **Succession planning**

Succession planning is a process for identifying potential candidates to replace core individual employees either known to be leaving the firm at some point in the future and/or whose sudden departure would pose a risk to the operation of the firm. Succession planning differs from *replacement planning*, as it is much broader in scope. The aim is to ensure predictable organizational stability and consistency by identifying critical skill sets and developing methods such as job sharing, job trading, mentoring, coaching, cross training to maintain and develop these skill sets across the organization.

### **Suspension**

A form of disciplinary action resulting in an employee being sent home with or without pay and forbidden to come to work for a specified period of time.

### **Talent management**

Broadly defined as the implementation of an integrated strategies or systems designed to increase workplace productivity by developing improved processes for attracting, developing, retaining and utilizing people with the required skills and aptitude to meet current and future business needs.

### **Temporary employee / work**

An individual who works on either short- or long-term assignments with an employer without being treated as a permanent employee and lacking the benefits of permanent employees. Normally utilized by employers to meet seasonal or other demands that they do not have the internal resources to meet.

### **Termination**

Separation from employment due to a voluntary resignation, layoff, retirement or dismissal.

### **Termination-at-will**

A rule allowing an employee or employer to terminate the employment relationship at any time for any or no reason at all.

### **Third-Party Sexual Harassment**

Harassment of an employee by someone other than another employee, such as a client, customer, vendor or service provider.

### **Title VII, Civil Rights Act of 1964**

Federal law prohibiting employers of 15 or more employees from discriminating on the basis of race, color, religion, sex, or national origin.

### **Total Compensation**

The complete pay package awarded employees on an annual basis, including all forms of money, benefits, services and in-kind payments. The total cash remuneration plus the valued perquisites and benefits awarded employees on an annual basis. In valuing perquisites and benefits, the value of long-term benefits are usually included. Typical items included are medical expenses, vacation tickets, special events children's education, terminal benefits (gratuity, provident fund, social security), share purchase plans, club memberships etc. Also known as total remuneration.

### **Total Rewards**

The monetary and non-monetary compensation provided to employees in exchange for their time, talents, efforts and results. Total rewards include key elements that effectively attract, motivate and retain the talent required to achieve desired business results. Total rewards can be seen to include compensation, benefits, work-life balance, career development, recognition programs.

### **Total Rewards Statement**

An annual statement issued individually to each employee of an organization that quantifies the total value of his or her rewards received in the previous calendar year. Statement includes income from all compensation sources as well as the cash value of all benefits and work experience elements received. The objective of the statement is to communicate the value of employer expenditures on behalf of each employee.

### **Turnover**

In an HR context, turnover is the number of employees hired to replace those who left or were fired during a 12-month period.

### **UI (Unemployment Insurance) / SDI (Short-term Disability Insurance)**

**UI** is a statutory benefit. Unemployment insurance is designed to provide workers who have been laid off a weekly income during short periods of unemployment. The system is run and funded by state and federal taxes paid by employers. **SDI** is a benefit designed to provide temporary income replacement for worker absent due to illness or injury, but who is expected to return to work within a specified timeframe.

### **Union dues**

Union dues are a regular payment of money made by members of unions. Dues are the cost of membership; they are used to fund the various activities which the union engages in. Nearly all unions require their members to pay dues.

## **Unions**

Groups of workers who have joined to form incorporated associations relating to the type of work that they perform in order to protect their common interests and improve their working conditions.

## **Vacation pay**

A benefit that employers typically give full-time employees that allows the employees to take a paid vacation. Most full-time jobs start with two weeks paid vacation with the option to earn more throughout years of service.

## **Wage or Wages**

Money received by an employee for labor performed of every description, whether the amount is fixed or determined by the standard of time, task, piece, commission or other methods of calculation. (for discussion with definitions subcommittee)

## **Wellness program**

Programs, such as on-site or subsidized fitness centers, health screenings, smoking cessation, weight reduction/management, health awareness and education, that target keeping employees healthy, thereby lowering employer's costs associated with absenteeism, lost productivity and increased health insurance claims.

## **Whistleblower Protection Act of 1989 / Whistle Blower**

Whistleblower protection is the federal law that provides protection to employees against retaliation for reporting illegal acts of employers. An employer may not rightfully retaliate in any way, such as discharging, demoting, suspending or harassing the whistle blower. Employer

retaliation may result in the whistle blower filing a charge with a government agency and/or filing a law suit against the employer.

**Whistle Blower** is a person who reveals wrongdoing within an organization to the public or to those in positions of authority.

## **Work-Life Balance**

Work-life balance is a concept for prioritizing between career and ambitions and family, leisure, pleasure and spiritual development. Work-life balance is not the same for everyone as people have different priorities in life.

## **Worker's Compensation**

State laws enacted to provide workers with protection and income replacement benefits due to an illness or injury suffered *on the job*. Employers must carry appropriate workers' compensation insurance, as required by state law, or have a sufficient source of funding for claims incurred.

## **Workplace bullying**

Persistent, offensive, abusive, intimidating or insulting behavior or unfair actions directed at another individual, causing the recipient to feel threatened, abused, humiliated or vulnerable.

## **Workplace violence**

Assaults and other violent acts or threats that occur in or are related to the workplace and entail a substantial risk of physical or emotional harm to individuals or damage to company resources or capabilities.

## Resources for Website

**Concept:** Could be a long list of tools categorized by topics and/or could slot these into the tools we create as applicable or both.

**Tool:**

**Formant:**

*Subcommittees and Various Members' materials as well as suggestions*

All items here: <http://www.women.ca.gov/CaliforniaPayEquityTaskForce.aspx> under resources and information.

All items listed in the Interim report appendices

### Job Descriptions, Toolboxes and Resources (Also add articles from Task Force website)

- Rutgers School of Management and Labor Relations, Center for Women & Work (<http://smlr.rutgers.edu/content/education-and-career-development>) provides quality professional development opportunities and technical assistance for educators and administrators, as well as experiential programs for students regarding current equity issues and research, with a focus on gender, race/ethnicity, and socio-economic status.
- Annette Bernhardt, Coffee Pot Wars: Unions and Firm Restructuring in the Hotel Industry (<http://www.cows.org/the-coffee-pot-wars-unions-and-firm-restructuring-in-the-hotel-industry>) is a research [article featuring unionization and gender equity in the hotel industry](#).
- EDD ([www.edd.ca.gov](http://www.edd.ca.gov)) is the state's employment development department and features online resources and toolbox for job seekers in California looking for assistance in their job search, career exploration, and training needs.
  - America's Job Center of California<sup>SM</sup> provides no-cost services, tools, and resources for job seekers ([www.americasjobcenter.ca.gov](http://www.americasjobcenter.ca.gov)). This site includes what was formerly known as One Stop Career Centers. Most job centers offer career specialists to assist job seekers with assessments to identify and match skills to occupations; career decisions; and no-cost access to the internet, phones, printers, and copy machines.
  - CalJOBS<sup>SM</sup> (<https://www.caljobs.ca.gov/vosnet/Default.aspx>) is a virtual job center that gives you online access to thousands of job listings and tools to help you manage your career. Benefits include creating and uploading multiple versions of your résumé tailored to specific jobs or career paths; automatic job alerts through the feature titled Virtual Recruiter; notifications of new job openings via text messages and/or e-mail; information about current events such as workshops and job fairs by location; and a message center with templates to communicate with employers.
- California Occupational Guides ([www.labormarketinfo.ca.gov/occguides](http://www.labormarketinfo.ca.gov/occguides)) are long-recognized resources designed to assist individuals in making career decisions. Each guide includes local and/or statewide information about training; current wages; and job prospects, skills requirements, and day-to-day tasks.
- The California Department of Industrial Relations ([www.dir.ca.gov/das](http://www.dir.ca.gov/das)) provides job seekers a search feature to locate apprenticeship programs by individual counties and occupations.
- Labor Market Information Division, EDD (<http://labormarketinfo.edd.ca.gov/>) allows you to explore a new career by comparing occupational profiles and finding out which jobs are the most in demand by local area.

- Career Outlook (<http://www.careeractionresources.com/>) is a website formerly known as Occupational Outlook Quarterly. Career Action Resources specializes in best-practice assessments and action planners used by workforce, employment, and career services to guide job seekers and the unemployed in getting hired. With nearly 20 years of experience in workforce development and publishing, career resources staff creates Layoff-to-Employment Action Planner (LEAP) and Your Employment Search (YES).

#### Resources:

- A Handbook of Human Resource Management Practice 10th Edition by Michael Armstrong. Kogan Page 2006
- Glossary of HR Terms by Rana Sinha (<http://www.dot-connect.com>)
- hbr.org
- HRM Guide Network <http://www.hrmguide.net/>
- [legal-dictionary.thefreedictionary.com/attorney-client+privilege](http://legal-dictionary.thefreedictionary.com/attorney-client+privilege)
- OPM.gov
- Reward Management Associates <http://www.reward-management.com/Definitions.htm>
- Society for Human Resource Management <http://www.shrm.org>
- The Essential HR Handbook: A Quick and Handy Resource for Any Manager or HR Professional by Sharon Armstrong. Career Press 2008
- World At Work: The Total Rewards Association <http://www.worldatwork.org/waw/Glossary>
- [www.agilehr.com](http://www.agilehr.com)
- [www.businessdictionary.com](http://www.businessdictionary.com)
- [www.CalChamber.com](http://www.CalChamber.com)
- [www.dol.gov](http://www.dol.gov)
- [www.dol.gov/ofccp/aboutof.html](http://www.dol.gov/ofccp/aboutof.html)
- [www.dol.gov/ofccp/regs/compliance/ca\\_11246.htm](http://www.dol.gov/ofccp/regs/compliance/ca_11246.htm)
- [www.gerstco.com/affirmative-action-planning/what-is-affirmative-action-plan.php](http://www.gerstco.com/affirmative-action-planning/what-is-affirmative-action-plan.php)
- [www.henry.fi/files/180/Glossary\\_of\\_HR\\_terms.pdf](http://www.henry.fi/files/180/Glossary_of_HR_terms.pdf)
- [www.hr-survey.com](http://www.hr-survey.com)
- [www.humanresourceblog.com](http://www.humanresourceblog.com)
- [www.irs.gov/retirement-plans/401k-plans](http://www.irs.gov/retirement-plans/401k-plans)
- [www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx](http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/Implicit%20Bias%20FAQs%20rev.ashx)
- [www.nolo.com](http://www.nolo.com)
- [www.onetonline.org](http://www.onetonline.org)
- [www.shrm.org](http://www.shrm.org)
- [www.shrm.org/resourcesandtools/hr-topics/compensation/pages/job-leveling.aspx](http://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/job-leveling.aspx)
- [www.wikipedia.org](http://www.wikipedia.org)

Here's the link to the IWPR article: [http://www.rosavzw.be/digidocs/dd-001369-2016\\_PathwaystoEquity\\_Narrowing\\_Wage\\_Gap\\_IWPR.pdf](http://www.rosavzw.be/digidocs/dd-001369-2016_PathwaystoEquity_Narrowing_Wage_Gap_IWPR.pdf)

Here is the link to the Occupational Outlook Handbook published by the Department of Labor Bureau of Labor Statistics that 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, for instance if you click on the legal job family, you'll find information for everything from court reporters to lawyers, judges and paralegals: <http://www.bls.gov/ooh/>

In addition, the Department also publishes the 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. <https://www.onetonline.org/> Either one of these databases could be useful to employers doing job analysis or compensation planning.

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>

Additional resources

<https://twitter.com/EqualPay2dayOrg/status/849323958532964352?s=03>

<http://women.vermont.gov/sites/women/files/pdf/ResourcesToUnderstandWageGap.pdf>

Job leveling example

<https://radford.aon.com/insights/articles/2015/radford-global-job-leveling>

Here is the link to the Occupational Outlook Handbook published by the Department of Labor Bureau of Labor Statistics that 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, for instance if you click on the legal job family, you'll find information for everything from court reporters to lawyers, judges and paralegals: <http://www.bls.gov/ooh/>

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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>

<http://www.aauw.org/resource/pay-equity-resource-kit/>

<http://www.nelp.org/content/uploads/2015/03/2014-UI-Toolkit1.pdf> (bad link)

<http://www.bantheboxphilanthropy.org/wp-content/uploads/2016/02/Fair-Chance-Hiring-Philanthropy-Guide.pdf>

Legal

<https://legalaidthatwork.org/do-it-yourself-sample-letters-toolkits-and-guides/>

Employees

<https://legalaidthatwork.org/fact-sheets/>

<https://www.uscis.gov/archive/blog/2012/10/the-employee-rights-toolkit-you-should>

### **Tools, Databases, and Resources for Employees – Inventory (DRAFT)**

Compiled by Equal Rights Advocates for State Pay Equity Task Force

Feb. 16, 2017

**Figuring out Employee Salary** (not included in Fair Pay KYR at <http://www.equalrights.org/legal-help/know-your-rights/california-fair-pay-act/>)

Organization	Website	Description	Drawbacks/Limitations
Glassdoor	<a href="http://www.glassdoor.com">http://www.glassdoor.com</a>	Allows people to post how much they are earning at their current jobs. You can narrow your search down by geographic area.	Information is submitted by users and may not be reliable. Information may not be available for smaller employers.
America's Career Infonet	<a href="https://www.careeronestop.org/Toolkit/ACINET.aspx">https://www.careeronestop.org/Toolkit/ACINET.aspx</a>	This website, sponsored by the U.S. Department of Labor, allows users to search salary and hourly ranges by zip code and occupation category.	Information is only available as a range of salary for a broad category. Specific information about employers is not available.
Payscale	<a href="http://www.payscale.com">http://www.payscale.com</a>	Provides compensation information for employers and individuals. Free comparison report showing an expected compensation range, common benefits, and job opportunities.	Must join and create a profile to access information. Information may not be employer specific.
SimplyHired	<a href="http://www.simplyhired.com/">http://www.simplyhired.com/</a>	SimplyHired's salary calculator allows users to compare salaries with others in the same profession regionally and nationally. Data is taken from their job listings.	Because salary data comes from the job listings posted on their search engine, information may not be available for smaller employers. Information is also limited to those employers who use the site to post job listings.
Transparent California (California Pay)	<a href="http://transparentcalifornia.com/">http://transparentcalifornia.com/</a>	A searchable database of salary records for California. Can look by county, city, university system, community colleges, K-12 schools, charter schools, special districts, and State of California. Additionally, you can search CA pension plans.	Currently, certain sectors only date back to 2015.

Organization	Website	Description	Drawbacks/Limitations
Office of Personnel Management (Federal Pay)	<a href="https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/">https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/</a>	Includes links to general pay schedule, law enforcement officer, and executive and senior level employee pay.	Not very user friendly, requires you to download a PDF for each locality/pay rat that you wish to view. May not reflect “actual” pay. Only displays the pay grades.
GuideStar	<a href="http://www.guidestar.org/search">http://www.guidestar.org/search</a>	You can search multiple states and employers. Could be useful when looking up non-profit salaries. High-level employees will be listed in the tax returns (Form 990, which is public record).	Requires you to sign up. Free account only offers limited access to certain information.
Educate to Career	<a href="https://www.jobsearchintelligence.com/etc/jobseekers/salary-calculator.php#">https://www.jobsearchintelligence.com/etc/jobseekers/salary-calculator.php#</a>	A free program to help determine your salary benchmark. Particularly helpful for negotiation. You can include your work experience, school, degree, and location for employment. Then provides an average salary for that field or profession.	

### ***Negotiation Tools and Tips***

Organization	Website	Description	Drawbacks/Limitations
LifeHacker	<a href="http://lifehacker.com/how-to-negotiate-your-salary-1566202988">http://lifehacker.com/how-to-negotiate-your-salary-1566202988</a>	Provides a simple breakdown of two popular negotiation strategies.	
PayScale	<a href="http://www.payscale.com/salary-negotiation-guide">http://www.payscale.com/salary-negotiation-guide</a>	Provides tips and tools for negotiating salary at multiple different stages of career (from first offer to asking for a raise or better benefits). Also has a “pay calculator.” Multiple articles.	Lots of advertising.
Women For Hire	<a href="http://womenforhire.com/negotiating_salary_benefits/negotiating_salary_101_tactics_for_better_compensation/">http://womenforhire.com/negotiating_salary_benefits/negotiating_salary_101_tactics_for_better_compensation/</a>	Provides specific (but otherwise general) advice targeting the common mistake that	



Organization	Website	Description	Drawbacks/Limitations
		women make when negotiating. Gives concrete examples for effective negotiation.	

#### ***How to enforce your Equal Pay Rights\****

Organization	Website	Description	Drawbacks/Limitations
Department of Labor	<a href="https://www.dol.gov/sites/default/files/documents/featured/equalpay/equalpay-employee.pdf">https://www.dol.gov/sites/default/files/documents/featured/equalpay/equalpay-employee.pdf</a>	PDF handout of the EPA. Steps for enforcing pay equality.	Not interactive. Similar to ERA KYR and toolkit flyers.
Equal Rights Advocates	<a href="http://www.equalrights.org/legal-help/know-your-rights/california-fair-pay-act/">http://www.equalrights.org/legal-help/know-your-rights/california-fair-pay-act/</a>  See also <i>Fighting Pay Discrimination and Unequal Pay At Work: Toolkit for Advocates &amp; Organizers</i> , at <a href="http://www.equalrights.org/wp-content/uploads/2014/11/ERA-Gender-Justice-Toolkit-Addressing-Fair-Pay-Issues.pdf">http://www.equalrights.org/wp-content/uploads/2014/11/ERA-Gender-Justice-Toolkit-Addressing-Fair-Pay-Issues.pdf</a> .		

\*No resources found that function similar to a “decision tree.”

## Outreach Toolkit

**Concept:** Develop outreach lists. Potentially related to an outreach toolkit like EITC has or any of the examples given.

**Tool:**

**Format:**

*Deliverables subcommittee: Victoria Pynchon, Kelly Jenkins-Pultz, and Nancy Kirshner-Rodriguez*

LIST OF OUTREACH ORGANIZATIONS

**Nonprofit organizations to partner with for outreach:**

Unions

Association of California Commissions for Women

California Working Family Coalition

California Women’s Law Center

Legal Aid at Work

A Stronger California Network

AAUW

Santa Clara Office of Women's Policy

Santa Clara Wage Theft Coalition

Feminist Majority

Equal Rights Advocates

LAANE

Center on Policy Initiatives

Women's Foundation of California

YWCA

HOPE

National Council of Negro Women

California Regional Network of Asian American and Pacific Islanders

California Employment Lawyers Association

#### **I. White House Equal Pay Pledge Signatories**

Accenture - signed June 14, 2016

Airbnb- signed June 14, 2016

Akamai Technologies - signed August 26, 2016

Amazon- signed June 14, 2016

American Airlines- signed June 14, 2016

Anheuser-Busch -signed August 26, 2016

Apple - signed August 26, 2016

A.T. Kearney - signed August 26, 2016

BCG- signed June 14, 2016

Buffer- signed June 14, 2016

Care.com- signed June 14, 2016

CEB- signed June 14, 2016

Chobani - signed August 26, 2016

Cisco- signed June 14, 2016

The Cocoa-Cola Company - signed August 26, 2016

CVS Health - signed August 26, 2016

Delta Air Lines - signed August 26, 2016

Dropbox - signed August 26, 2016

Dunkin' Brands - signed August 26, 2016

Expedia, Inc.- signed June 14, 2016

EY - signed August 26, 2016

Facebook - signed August 26, 2016

Gap Inc. - signed June 14, 2016

Glassdoor- signed June 14, 2016

General Motors - signed August 26, 2016

GoDaddy- signed June 14, 2016

The Hartford - signed August 26, 2016

The Hershey Company - signed August 26, 2016

Hilton - signed August 26, 2016

IBM - signed August 26, 2016

IKEA US - signed August 26, 2016

Intel - signed August 26, 2016

Jet.com- signed June 14, 2016

Johnson & Johnson- signed June 14, 2016

The Libra Group - signed August 26, 2016

LinkedIn - signed August 26, 2016

L'Oréal USA - signed June 14, 2016

MailChimp - signed August 26, 2016

Microsoft - signed August 26, 2016

Mulesoft - signed August 26, 2016

Nike - signed August 26, 2016

Patagonia - signed August 26, 2016

PepsiCo- signed June 14, 2016

Pinterest- signed June 14, 2016

Popcorn Heaven- signed June 14, 2016

PwC- signed June 14, 2016

Rebecca Minkoff- signed June 14, 2016

Salesforce- signed June 14, 2016

Slack - signed June 14, 2016

Spotify- signed June 14, 2016

Staples- signed June 14, 2016

Stella McCartney- signed June 14, 2016

Target - signed August 26, 2016

Unilever - signed August 26, 2016

Visa - signed August 26, 2016

Nancy's additions:

**Hello- I realized today that I had not shared this full list from the Legislative Analysis before the final vote**

**Here it is and the full analysis is attached.**

**SUPPORT:** (Verified 8/28/15)

9to5 California, National Association of Working Women

9to5, National Association of Working Women

Alliance of Californians for Community Empowerment

American Association of University Women

American Association of University Women - California

American Civil Liberties Union of California

Bay Area Council

Bet Tzedek Legal Services

Business & Professional Women of Nevada County

CalAsian Chamber of Commerce

California Chamber of Commerce

California Child Care Resource and Referral Network

California Employer Law Center

California Federation of Teachers, AFT, AFL-CIO

California Hospital Association

California Immigrant Policy Center

California Labor Federation, AFL-CIO

California Newspaper Publishers Association

California Nurses Association

California Partnership

California Professional Firefighters

California Rural Legal Assistance Foundation, Inc.

California School Employees Association, AFL-CIO

California Women Lawyers

California Women's Law Center

California Work and Family Coalition

Career Ladders Project

Center for Popular Democracy Centro Legal de la Raza

Child Care Law Center City of West Hollywood

Civil Justice Association of California

Communications Workers of America, AFL-CIO, CLC Local 9003

Communications Workers of America, ALF-CIO, District 9

Community Action Fund of Planned Parenthood of Orange and San Bernardino Counties

Computing Technology Industry Association

Consumer Attorneys of California

Council on American-Islamic Relations,

California Chapter County of Santa Cruz, Board of Supervisors

Courage Campaign

Glendale City Employees Association La  
Raza Centro Legal

Maintenance Cooperation Trust Fund

Monterrey County Board of Supervisors

Mujeres Unidas y Activas

National Council of Jewish Women

California National Domestic Workers Alliance

National Organization for Women (National offices in DC)

National Partnership for Women & Families

National Women's Law Center

Organization of SMUD Employees

Parent Voices

Planned Parenthood Action Fund of Santa Barbara, Ventura & San Luis Obispo Counties

Planned Parenthood Action Fund of the Pacific Southwest

Planned Parenthood Affiliates of California

Planned Parenthood Northern California Action Fund

Raising California Together

Redlands Area Democratic Club

Restaurant Opportunities Centers United

San Bernardino Public Employees Association

San Diego County Court Employees Association

San Francisco Unified School District

San Luis Obispo County Employees Association

TradesWomen Inc.

Ultra Violet

Western Center on Law and Poverty

Women In Non Traditional Employment Roles

Women's Foundation of California

Women's Law Project

- II. In addition to signing the White House Equal Pay Pledge, the following employers have formed an independent business consortium, Employers for Pay Equity—to help private industry players share best practices and develop better hiring, promotion, and pay policies.**

The consortium released the following mission statement:

*The Employers for Pay Equity consortium is comprised of companies that understand the importance of diversity and inclusion, including ensuring that all individuals are compensated equitably for equal work and experience and have an equal opportunity to contribute and advance in the workplace. We are committed to collaborating to eliminate the national pay and leadership gaps for women and ethnic minorities. Toward that end, we have come together to share best practices in compensation, hiring, promotion, and career development as well as develop strategies to support other companies' efforts in this regard. By doing so, we believe we can have a positive effect on our workforces that, in turn, makes our companies stronger and delivers positive economic impact.*

Consortium members include:

Accenture

Airbnb

BCG

Care.com

CEB

Cisco

Deloitte

Dow

Expedia

EY

Glassdoor

GoDaddy

Jet.com

L'Oréal USA

Mercer

PepsiCo

Pinterest

Rebecca Minkoff

Salesforce

Spotify

Staples

Stella McCartney

Visa

### **III. Gender Equity Challenge Forum 2017**





*The Gender Equality Challenge aims to motivate organizations to advance gender equality in San Francisco and improve the working environment for all women and men. The Challenge collects gender-responsive policies and programs and showcases companies with model workplace practices that can be measured, shared, and replicated.*

Hosted By: **Gap, Inc.**

**Featured Participants:**

Bank of America

Glassdoor, Inc.

Latham & Watkins LLP

Morgan Stanley

Moss Adams LLP

Pinterest

PricewaterhouseCoopers LLP

Prologis

Target Corporation

University of California, San Francisco

**Sponsored By:**

Wells Fargo

Prologis

Lisa Adukia

Linda Calhoun

Banc of California

Lee Hect Harrison

Morgan Stanley

Leadership California

San Francisco Realtors

Wilson, Sonsini, Goodrich & Rosati Foundation

**IV. For partners out of state (Massachusetts). Businesses supporting an Act to Establish Pay Equity [in Mass] (S. 2119)**

- Arjuna Capital
- Baldwin Brothers
- Bay Coast Bank
- Cape Air
- Care.com
- Greater Boston Chamber of Commerce
- Grossman Marketing
- Hollister Staffing Inc.
- Marlborough Chamber of Commerce
- Metrowest Chamber of Commerce
- Shorelight Education
- Virtual, Inc.
- RDK Engineers

See Massachusetts Coalition for Equal Pay <http://www.maequalpaycoalition.com/current-supportive-businesses/>

## INVENTORY OF OUTREACH MATERIALS

### Massachusetts Fact Sheet



## Massachusetts: Leading the Way in Closing the Wage Gap



### Effective July 1, 2018: Close the Gap in Three Parts

**PART 1:** The law provides a definition of comparable work and encourages employers to conduct internal reviews of their payroll to ensure equitable compensation within industry standards.

**PART 2:** The law prevents employers from asking people about their previous salary history in the interview process.

**PART 3:** The law protects employees from termination for discussing their compensation with their co-workers and colleagues.



Women in Massachusetts make up almost half the workforce, but **earn approximately 82% of what men earn.**



**Women of color are most affected by the wage gap** with African American women earning **66 cents** for every dollar earned by men and Latina women earning **54 cents** for every dollar earned by men.



**The pay gap does not exclusively affect women.** Black and African American workers earn only **78 cents** for every dollar earned by white men. Hispanic and Latino workers earn only **72 cents** for every dollar earned by white men.

**40% of households include mother as breadwinner**



As of 2013, **40% of households** with children under 18 included mothers who were the primary breadwinner for the family. In addition, **57% of low wage workers in Massachusetts are women.**



Over the course of a lifetime, the wage gap can have a **serious impact** on the economic security of women. Since women live longer than men, lower wages makes it even harder to be self-sufficient throughout retirement.

For information about the Pay Equity Law or the effort of the Equal Pay Coalition, please contact Jill Ashton at [Jill.Ashton@state.ma.us](mailto:Jill.Ashton@state.ma.us).

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[https://www.dol.gov/wb/resources/equal\\_pay\\_guide\\_employer.pdf](https://www.dol.gov/wb/resources/equal_pay_guide_employer.pdf)

### What Salesforce Did with \$3 Million to Assure Equal Pay

<https://www.salesforce.com/blog/2016/03/equality-at-salesforce-equal-pay.html>

*We put employees in comparable roles into groups and analyzed salaries of those groups to determine whether there were statistically significant wage differences between women and men. We based our analysis on objective factors that determine pay, such as job function, level and location. If there were unexplained differences, salary adjustments were made for both men and women as needed.*

*Our assessment showed that we needed to adjust some salaries—for both men and women. Approximately six percent of employees required a salary adjustment, and roughly the same number of women and men were impacted. Salesforce has spent nearly \$3 million dollars to eliminate statistically significant differences in pay.*

Recently Created “Hack the Gap” Apps <https://medium.com/presidential-innovation-fellows/how-we-hacked-the-gender-pay-gap-1d7a9304950#bhrych63v>

**What’s My Pay Gap** allows you to discover how the gender pay gap affects people like you. As you answer questions about yourself, your personal wage gap grows and shrinks, allowing you to see how what forces create the wage gap in your life.

**Data used:** This personalized story is empowered by the opening of data. For this project, the team built an API to connect with the [Department of Commerce’s ACS datasets](#), allowing anyone to recalculate wage data in real-time, and bringing it out of academia and into the hands of citizens.

**Virtual Reality Salary Negotiation Simulator** provides users with learning modules to improve people’s soft skills. Teaming up with the [American Association of University Women \(AAUW\)](#), Variable Labs has created a tool to help women and men practice salary negotiation techniques with a virtual employer. By translating AAUW’s curriculum and methodology to a virtual environment, the hope is that women will have an accessible, safe space to practice and gain the confidence and language for a variety of negotiation scenarios that will lead to higher salaries.

**PowerShift** is a tool that will encourage women to negotiate for the best possible job offer. By providing users’ salary breakdown and range data on what men in a similar situation are making, in addition to legal information about fair pay, the tool aims to encourage women to negotiate for higher salaries.

**BumpAhead** On average, an American woman’s earnings [decrease by 4 percent](#) for every child that she bears. BumpAhead helps working mothers making the right childcare decisions based on their location, industry, income level and family structure. BumpAhead is an empathy building game to demonstrate the ways the high cost of childcare exacerbates the gender pay gap. The game aims to have players better understand the often tough choices women face in providing for their children, by walking in the shoes of a new mother. The game ends with a call to action that makes it easy for players to reach out to their lawmakers and hold them accountable to support family-friendly legislation.

**Raise Above the Wage** wanted to create a way for people to experience the wage gap and gain a deeper personal understanding of its impact. Through this Chrome extension, a user will be able to pick a profile of four women of different backgrounds, and experience wage inequality as them, via the price of an item.

**Freelancer Economy Equalizer (FrEE) Kit** provides a set of software services that can be used to extend any online freelancer platform with intelligent assistance and data-visualizations that empower both hiring organizations and candidates to take action to improve fairness and reduce gender pay gaps. FrEE includes a suite of off-the-shelf tools and data that has been integrated to ensure that job postings used to attract candidates have reduced (or are completely free of) bias, and that the processes of selecting, and negotiating pay for those candidates is transparent and consistent.

**Aware: The Smarter Employee Survey** is solving the problem of companies' (1) not knowing what information related to the gender gap to collect from employees and (2) not having an incentive to do something with the insights gleaned from data on the pay gap. As a third, intermediary party whose goal is to improve the employee-employer relationship, Aware is essentially a survey application, and in the long term, will evolve into a data analytics platform that will help companies better understand their employees as well as provide new ways of measuring how equal a company's capital is. On the app, Aware also plans to have resources on policies that impact companies' relationship with their employees so that they can be aware of the political environment around the issue.

**Statistics on Women in the Low Wage Work Force** <http://nwlc.org/resources/chart-book-women-low-wage-workforce-may-not-be-who-you-think/>

**A FAQ on the Fair Pay Act that would be useful in terms of language, topics** (this is the federal legislation on the Fair Pay Act, not the CA FPA) <https://www.pay-equity.org/info-Q&A-Act.html>

**A 2-sheet on the Paycheck Fairness Act** (again, exemplary language, concision) <https://www.pay-equity.org/PDFs/PFA-FactSheet-2012.pdf>

**The terrific *Equal Rights Advocates* web page on California's Fair Pay Act**

<http://www.equalrights.org/legal-help/know-your-rights/california-fair-pay-act/>

Webinar on CA FPA by California Women's Law Center, Legal Aid at Work and Equal Rights Advocates (must register to download) <http://www.cwlc.org/download/webinar-equal-pay-in-california-your-right-to-pay-equity-in-the-workplace-2016/>

Podcast by Littler Mendelsohn on California's New Fair Pay Act: Employer's Compliance Action Plan <https://www.littler.com/publication-press/publication/californias-new-fair-pay-act-employers-compliance-action-plan>

Arthur J. Gallagher: Advise on actions employers should take to avoid liability under CA FPA: *California Fair Pay Act: New Obligations for Employers or a Paper Tiger?* <https://www.ajg.com/media/1697914/california-fair-pay-act-new-obligations-for-employers-or-a-paper-tiger.pdf>

LAW 360: Recommendations to employers to avoid liability under FPA: *Proactively Addressing California Fair Pay Act Liability*

<https://www.law360.com/articles/763489/proactively-addressing-california-fair-pay-act-liability>

Emtrain Blog, Phyllis Cheng's article and link to registration for a webinar about steps employers should take to comply with the FPA: *California Fair Pay Act: 5 Steps to Employer Compliance*

<http://blog.emtrain.com/california-fair-pay-act-steps-to-employer-compliance>

**From Roger White, SEIU staff email 3/22**

Was hoping one of you could get this list to the Deliverables Subcommittee. They put together an outreach list and wanted people to get to them any other groups we thought should be on it and what type of outreach we'd like to do with the groups. We identified a few organizations that work with women in lower wage occupational sectors with significant gender pay gaps or higher paid workers in extreme high gap occupations that we'd like to add to the outreach list. We'd like to talk with women workers in these sectors about some of their challenges and experiences with pay gap issues working together with the UCLA Labor Center. We'd like to invite maybe 3-5 workers to present to the task force at the September meeting. Thanks, Roger

Farming

- Lideres Capesinas
- CAUSE (based in Ventura County)

Cleaning

- California Domestic Workers
- UFCW

Sales

- LAANE (Shopwell project w/ UFCW)
- Black Worker Center

Food Service

- ROCK

Production

- Garment Worker Center

Personal Services

- 9 to 5 Coalition

Home Health Care Aides

- SEIU United Health Care Workers West

Legal

- California Women's Law Center