California Pay Equity Task Force
Subcommittee: Definitions
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*Discussion Draft

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Terms/Definitions

Jennifer Barrera, CalCHAMBER

(1) "substantially similar work," "composite of skill, effort, and responsibility," "similar working conditions," "entire wage differential," "discussing the wages of others . . . or aiding or encouraging any other employee to exercise his or her rights under this section."

(2) "Substantially similar work" – A job that requires the employee to perform almost all of the same tasks and requires almost all of the same skill, effort, and responsibility. It requires the two employees to perform more than just a majority of the same tasks. The actual content of the jobs must be similar enough so that the jobs performed appear the same. Insignificant differences in tasks do not render the work as dissimilar. Job title, job description, division, and department are all relevant factors, but not controlling. (EEOC Guidance on Compensation Discrimination – states different departments and organizational units are relevant, but not controlling); *Good Rich v. International Brotherhood of Electrical Workers*, 815 F.2d 1519 (11th Cir. 1987); *Puchakjian v. Township of Winslow,* 804 F.Supp.2d 288 (N.J. Dist. Ct. 2011); *Wildi v. Alle-Kiski Medical Center*, 659 F. Supp.2d 640 (W.D.Penn. 2009)

(3) "Composite of skill, effort, and responsibility" –

1. Composite = a combination of the three factors to determine if the job is substantially similar
2. Skill = the experience, ability, education, certification, licensure, and training required to perform the job. This is not evaluated based upon the skill the individual has, but rather what skill is required to perform the job and the performance, utilization, or application of the skills by the employee.
3. Effort = The amount of physical or mental exertion needed to perform the job
4. Responsibility = the degree of accountability required in performing the job and the workload or number of assignments and tasks performed by the employee.

(4) "Similar working conditions" – the time commitment required to perform the job within a similar physical setting that has similar resources available.

(5) "Entire Wage Differential" – there is a statistical significant difference in the wages provided or more than a *de minimis* amount in the wage differential.

(6) "Discussing the wages of others . . . ." - an employer can preclude an employee who because of his or her job duties, has access to information regarding other employees' wages, from disclosing or discussing other employees' wages, unless specifically authorized to do so by the individual employee(s).

Records:

Job descriptions, job postings, payroll records, job performance reviews

Terms/Definitions

Jennifer Reisch, Equal Rights Advocates

While I agree with Jennifer that many of the terms/provisions within the Act call for further clarification, explanation, or definition, I have some differences with respect to the content of those proposed definitions and also would identify some additional phrases or concepts on which employees and employers would probably benefit from further guidance. I have not had a chance to do the legal research that I'd like to do on these issues, but flag the following additions/alternative proposals for now:

- I agree that the terms/concepts of "substantially similar work," "similar working conditions," "entire wage differential," may need further definition. I am not sure that the phrase or provision "discussing the wages of others . . . or aiding or encouraging any other employee to exercise his or her rights under this section" needs further definition. However, I think some clarification of what is meant by, "Nothing in this section creates an obligation to disclose wages" would be helpful (to make it clear we are talking about not requiring employers or their HR managers to reveal or disclose the wage rates of others without the knowledge/permission of those other employees, unless such information is already publicly disclosed or required to be disclosed to an employee pursuant to another law or legal process).
- I think that the phrase "composite of skill, effort, and responsibility," is pretty self-explanatory, but to the extent that it calls for further definition, it should be defined in a way that is analogous to a "totality of circumstances" standard or test that looks at the combination of skill, effort, and responsibility-related characteristics of the job(s) in question, and takes into account the operational and environmental conditions in which those jobs are performed. I think Jennifer and I are roughly on the same page in this respect.

- "Substantially similar work" = work that is substantially similar in that it requires substantially similar skill, effort and responsibility and is performed under similar working conditions; provided, however, that a job title or job description alone shall not determine substantial similarity.

  "Working conditions" = the circumstances customarily taken into consideration in setting salary or wages, including, but not limited to, reasonable shift differentials, physical surroundings and hazards encountered by employees performing a job.

- "Entire Wage Differential" – this should be defined as the total difference in compensation as the result of the payment of unequal wage rates. I do NOT agree or believe there is any support in the statute or legislative history for the notion that the "entire wage differential" must be "statistically significant" to violate the act, nor do I think that such a definition would be feasible to apply or make any sense in the context of comparing two individual employees. I think that, as with minimum wage claims, if an employer can demonstrate that an otherwise unlawful wage differential produces only a *de minimis* loss of wages to the employee who brings a claim, then it can raise that defense and will have the burden of proving it. It is also important to note that by including a "statistically significant" requirement in the definition of "entire wage differential" would harm low-wage workers, who may only be losing cents on the dollar (e.g., being paid $0.50 less per hour on a $13.00/hour wage) due to unequal pay, which may seem "de minimis" or not "statistically significant" as measured by the total hourly wage rate, but which leads or could lead over time [if uncorrected] to substantial wage losses.

- I think we should provide further definition of "[records of] other terms and conditions of employment of the persons employed by the employer" (1197.5(d)). I will need to conduct further research on this to make a proposal, but believe that such records should be defined broadly and include any/all documents that the employer relies on or purports to rely on to set pay rates or make pay decisions.

Lastly – and I'm not sure if this falls under our bailiwick as a Sub-Committee or not -- but I think some clarification about the statute of limitations for retaliation/discrimination claims under 1197.5(j) is in order: while the DLSE FAQs states that the SOL is 6 months, the statute itself says that employees have one year to commence a civil action for violation of this section (see 1197.5(j)(3).) I am not sure why a different, shorter SOL would or should apply to claims filed with the DLSE than to claims filed directly in court.

I would suggest that one concrete task this Subcommittee should consider undertaking is to develop model or proposed jury instructions for the two different types of claims that could be brought under

LC §1197.5, which the Task Force could eventually vote on (?) and/or recommend that the Judicial Council consider taking up:

1) "Nonpayment of equal wage under Labor Code §1197.5(a)," which could be modeled after the existing CACI on the elements of a "Nonpayment of minimum wage" claim (CACI 2701);

2) "Discrimination or retaliation under Labor Code §1197.5(j)," which could be developed by borrowing from existing CACIs on retaliation (e.g., CACI 2505 and 2730) and any model jury instructions that exist for retaliation claims brought under the federal Fair Labor Standards Act, whose language is similar to 1197.5(j), though not as broad. See 29 U.S.C. § 215(a) (3) (making it unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.")