

Frequently Asked Questions:

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

In California, the Division of Labor Standards Enforcement (DLSE) has the authority to enforce Labor Code Section 1197.5, that requires an employer to pay an equal wage rate for substantially similar work. 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 equal wages 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," in order to codify 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 it has to 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 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?

No. California law just prohibits an employer from paying employees who perform the same or substantially similar work a different wage rate based upon sex, race, or ethnicity. 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 an audit of all employees' wages?

No. There is no mandate to conduct an audit. However, in order to avoid any potential legal liability, it is a good practice in which to engage. Employers may want to consider conducting any audit with the advice of an attorney.

- (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, lost work

benefits, and attorney's fees. If there is discrimination or retaliation involved, there may be punitive damages as well.

(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.
- (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) Prohibit retaliation against employees for asserting rights under California or federal fair pay laws and ensure that you have a reporting mechanism in place for complaints. This can be part of your existing equal employment opportunity policy.

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

Yes. 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 wage information of other employees 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) What constitutes the "wage rate" for purposes of determining whether an employer is in compliance with the California Equal Pay Act?

[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.

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