

California Pay Equity Task Force

Agenda

September 28, 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 August 1, 2017 Meeting
- V. Employee Materials
- VI. Lunch
- VII. Employer Materials
- VIII. Conference/Partners
- IX. Next Task Force Meeting
- X. Questions/Comments/Feedback
- XI. Public comment
- XII. 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

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

**MINUTES**

## CA PAY EQUITY TASK FORCE

AUGUST 1, 2017

ORRICK OFFICES IN SACRAMENTO, SAN FRANCISCO AND LOS ANGELES

Meeting called to order: 10:27am

Meeting adjourned: 3:54pm

Task Force Attendees: Co-chair Lauri Damrell, Co-Chair Julie Su, Kevin Kish, Jennifer Barrera, Daniel Kuang, Peter Pawlick, Victoria Pynchon, Jennifer Reisch, Leslie Simon, Jeanna Steele, Rhoma Young

Other attendees: Representatives from AAUW and SEIU, Megan Lane, Michelle Teran, Eliana Berman, Nancy Kirshner-Rodriguez, Stephanie Flores, Stephanie Tseu, Marian Johnston, Tamara McDonald, Bethany Renfree, Tonya Lindsey, Ph.D.

### I. Welcome and Call to Order

Co-chair Lauri Damrell welcomed the group and gave a brief update of work. The group congratulated her on being elected the new Chair of the California Commission on the Status of Women and Girls. Stephanie Tseu shared that Bryn Sullivan has resigned her position with the Task Force due to current work commitments.

### II. Roll Call

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

### III. Establish Quorum – Adopt Agenda

A roll call vote of the agenda was taken and the agenda was adopted. Those voting aye: Lauri Damrell, Kevin Kish, Daniel Kuang, Peter Pawlick, Victoria Pynchon, Jennifer Reisch, Leslie Simon, Jeanna Steele, Rhoma Young. There were no “no” votes.

### IV. Approve Minutes of April 4, 2017 meeting

Prior meeting minutes were reviewed and approved with one amendment. On the April 4, 2017 notes, the “second” motion was not captured for adjournment of the meeting. Upon discussion with CCSWG Legal Counsel Marian Johnston, no

motion is needed to adjourn the meeting. Stephanie Tseu will amend the previous meeting notes to strike the motion to adjourn. Those voting aye: Lauri Damrell, Kevin Kish, Daniel Kuang, Peter Pawlick, Victoria Pynchon, Jennifer Reisch, Leslie Simon, Jeanna Steele, Rhoma Young.

- V. Unification of Materials
  - a. Update
  - b. Next steps
  - c. Website

Dr. Tonya Lindsey walked the group through tabs Employer, Employee, Union, Looking for Work and General. She shared with the group what information she had received since the last meeting, her process for blending, how she came up with the “buckets”, the ideas behind the Table of Contents materials and how these materials will take us to the next step of the creation of tools and a website. There was significant discussion regarding the subcommittee documents, what should be included in the tabs, why specific sections were worded the way they were, etc. The group decided that this was a great start and break down of so much material. Task Force members agreed to split into two groups for the afternoon portion of the meeting to delve into the details of the “employee” and “employer” tabs. Marian said that links to websites could be included as long as they are not paid content sites.

The group also spoke about the importance of including apprenticeship programs into our tools.

Since there is so much information for lawyers, maybe there should be a lawyer “bucket” as well on the website. The Task Force members will work in a subgroup to address this issue.

It was during this time that Megan Lane from the Senate Office of Research gave an overview of the case study that she will be working on with Tonya. Megan talked about the interviews Task Force members will, hopefully, be engaging in soon. Those interviews should be happening in the next month or so.

## 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 Policy and Practice, Challenges and Barriers, Deliverables, Planning)
  - a. Update
  - b. Next Steps

The Task Force broke into two groups for the early afternoon portion of the meeting: Employee (Union too) and Employer.

The Employee subgroup addressed the Employee and Union tabs of the meeting materials. Additionally, the subgroup discussed that “Looking for Work” should be included in the Employee portion since there is so much overlap. The Employee subgroup decided to move forward looking at the material as the “scaffolding” but not wordsmith at this time. The group agreed that the materials need to be simplified and edited. This group will work to change the focus of the questions that will shape the way the material is reworked and the website going forward.

The Employer subgroup reviewed the materials and discussed need to reword and reorganize the material. Task Force members will be updating documents per discussion during the meeting and sending them in for review at our next Task Force meeting. Task Force members will create and include language about why employers should change their culture and why it’s in their interest to ensure there is pay equity with their employees.

Back together – both subgroups discussed adding in ethnicity and race into the Task Force tools. It was decided that the Task Force materials would include it where it made sense but that specifically addressing ethnicity and race was outside the purview of why the Task Force was created. The Task Force was created in response to SB 358 (Jackson). The law has since been amended to include race and ethnicity but when it was passed, it was primarily addressing gender. Since that is why the Task Force was created, its focus should continue to be on gender pay equity.

VII. Break

VIII. Conference\Partners

The Task Force, as a whole, discussed what type of event/rollout they would like to see unveiled around April 10, Equal Pay Day 2018. The Task Force discussed many things including:

- The audience – who is the intended audience?
- What is the primary goal of the conference? Launch a website, unveil tools?
- Should it be a onetime event or a kick off? A series of speaking engagements? A Speakers Bureau?
- Is the goal to get other states to do something similar?
- Explain/show what makes this group special?

IX. Communication Plan

The Task Force did not talk about a specific communication plan but was discussed as part of the outreach/conference plan.

X. Next Task Force Meeting

a. New Date

CCSWG staff will be sending out a Doodle poll to quarry what date would work best for members during the week of September 25. The September 14, 2017 meeting is cancelled.

XI. Questions/Comments/Feedback

Bethany Renfree, from Senator Hannah-Beth Jackson's office, let the Task Force know about Sen. Jackson's select committee where Sen. Jackson would like to highlight the efforts of the Task Force. This hearing will be in January 2018 in the state Capitol. While the tools will not be finished for a rollout, it will be an opportunity for the Task Force to talk about everything that they have done as well as share what makes this Task Force special.

XII. Public Comment

There was no public comment.

XIII. Adjourn

Meeting was adjourned at 3:54pm.

# **EMPLOYEE DOCUMENTS**



Question/Answer	Source or Needs to be written
<ul style="list-style-type: none"> <li>• <b>What is the FPA?</b></li> </ul>	
<ul style="list-style-type: none"> <li>○ <i>Answer with base level information about the Fair Pay Act.</i></li> </ul>	ERA's FAQs re CA FPA, at <a href="https://www.equalrights.org/legal-help/know-your-rights/california-fair-pay-act/">https://www.equalrights.org/legal-help/know-your-rights/california-fair-pay-act/</a> ("ERA FAQ"); August 1 <sup>st</sup> Taskforce Binder p. 13
<ul style="list-style-type: none"> <li>• <b>Can my boss pay me less than my coworker?</b></li> </ul>	
<ul style="list-style-type: none"> <li>○ <i>Answer with info about the FPA and substantially similar work</i></li> </ul>	ERA FAQ
<ul style="list-style-type: none"> <li>○ <b>My coworker is making more than me, even though I have been at my job longer and I have a more senior title. Is this legal?</b></li> </ul>	
<ul style="list-style-type: none"> <li>▪ <i>Answer highlighting substantially similar work</i></li> </ul>	<b>Draw from</b> information in August 1 <sup>st</sup> Taskforce Binder pp. 120-122
<ul style="list-style-type: none"> <li>○ <b>I make less than a coworker, but I have more responsibility and more education and experience. Does the Fair Pay Act apply to me?</b></li> </ul>	
<ul style="list-style-type: none"> <li>▪ <i>Answer highlighting composite approach</i></li> </ul>	<b>Draw from</b> August 1 <sup>st</sup> Taskforce Binder pp. 24 – 26.
<ul style="list-style-type: none"> <li>○ <b>I make less than someone who has my same job at a different location. Does the FPA protect me?</b></li> </ul>	
<ul style="list-style-type: none"> <li>▪ <i>Answer explaining that you don't have to work in the same location but do need to have similar working conditions.</i></li> </ul>	ERA FAQ
<ul style="list-style-type: none"> <li>○ <b>Can my boss pay me less because I work a different shift?</b></li> </ul>	
<ul style="list-style-type: none"> <li>▪ <i>Answer highlighting similar working conditions requirement</i></li> </ul>	August 1 <sup>st</sup> Taskforce Binder pp. 32, 121
<ul style="list-style-type: none"> <li>○ <b>I moved into a different position and the person who replaced me has less experience than me and is making more than I was at that position. Is this allowed?</b></li> </ul>	
<ul style="list-style-type: none"> <li>▪ <i>Answer explaining that the FPA may apply to your predecessors and successors.</i></li> </ul>	<b>Draw from</b> August 1 <sup>st</sup> Taskforce Binder pp. 119
<ul style="list-style-type: none"> <li>○ <b>My coworker was hired at a wage higher than mine. Is this allowed?</b></li> </ul>	
<ul style="list-style-type: none"> <li>▪ <i>Answer highlighting substantially similar work</i></li> </ul>	<b>Draw from</b> August 1 <sup>st</sup> Taskforce Binder pp. 120-123
<ul style="list-style-type: none"> <li>○ <b>My boss hasn't given me a raise in a long time. That seems unfair to me.</b></li> </ul>	
<ul style="list-style-type: none"> <li>▪ <i>Answer explaining what the FPA means by "fair."</i></li> </ul>	<b>Needs to be written</b>

<ul style="list-style-type: none"> <li>○ <b>I have a second degree and more experience than someone who does a different job with much less responsibility than mine, but that person is getting paid more. Is this allowed?</b></li> </ul>	
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>▪ <i>Answer explaining what the FPA means by “fair.”</i></li> </ul> </li> </ul>	Needs to be written
<ul style="list-style-type: none"> <li>● <b>I think I’m being paid unequally, but I’m not certain. How can I find out?</b></li> </ul>	
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>○ <i>Link to chart of resources on how to find out about pay in your area</i></li> </ul> </li> </ul>	August 1 <sup>st</sup> Taskforce Binder pp. 199-200.
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>○ <i>Text answer with tips on how to talk to your boss, coworkers, etc. about your pay.</i></li> </ul> </li> </ul>	ERA FAQ; tips on talking to boss needs to be written
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>▪ <b>Am I allowed to talk to my coworkers about their pay?</b></li> </ul> </li> </ul> </li> </ul>	
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>• <i>Answer with info about pay secrecy and retaliation</i></li> </ul> </li> </ul> </li> </ul> </li> </ul>	ERA FAQ; August 1 <sup>st</sup> Task Force Binder pp. 15, 21
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>▪ <b>I tried talking to my coworkers and then my boss reduced my hours. Is that allowed?</b></li> </ul> </li> </ul> </li> </ul>	
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>• <i>Answer about retaliation with examples of retaliation</i></li> </ul> </li> </ul> </li> </ul> </li> </ul>	ERA FAQ & August 1 <sup>st</sup> Taskforce Binder pp. 21, 191
<ul style="list-style-type: none"> <li>● <b>I know that I am being paid less than a coworker who does the same job as me. What can I do?</b></li> </ul>	
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>○ <i>1. Talk to your boss/HR and keep a paper trail</i></li> </ul> </li> </ul>	
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>▪ <i>Link to tips on how to talk to your boss and keep good records</i></li> </ul> </li> </ul> </li> </ul> </li> </ul>	ERA FAQ; information on talking to boss needs to be written
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>○ <i>2. Talk to your union rep if you have one</i></li> </ul> </li> </ul>	
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>▪ <i>Link to information about union rights/how to form a union</i></li> </ul> </li> </ul> </li> </ul> </li> </ul>	Needs to be written – draw from August 1 <sup>st</sup> Taskforce Binder pp. 107-09
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>○ <i>3. File a written complaint with your company</i></li> </ul> </li> </ul>	
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>▪ <i>Link to information on filing internal complaints, how they differ from</i></li> </ul> </li> </ul> </li> </ul> </li> </ul>	ERA FAQ; August 1 <sup>st</sup> Taskforce Binder pp. 13, 19
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>○ <i>4. File a complaint with an administrative agency and/or court</i></li> </ul> </li> </ul>	
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>▪ <i>Link to information on how to file</i></li> </ul> </li> </ul> </li> </ul> </li> </ul>	ERA FAQ & August 1 <sup>st</sup> Taskforce Binder pp. 20, 106
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>○ <b>What are some things (information, documents, etc.) that I will need before I file?</b></li> </ul> </li> </ul>	
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>▪ <i>Answer with checklist of things to have (pay records, info about comparator, info about any differences from comparator’s job, as much info as possible about comparator’s education and experience, timeline of any meetings with HR, information or evidence of any wage differentials and/or retaliation, etc.)</i></li> </ul> </li> </ul> </li> </ul> </li> </ul>	Checklist needs to be written- draw from ERA FAQ
<ul style="list-style-type: none"> <li> <ul style="list-style-type: none"> <li>○ <b>Where can I get help if I need more assistance?</b></li> </ul> </li> </ul>	

<ul style="list-style-type: none"> <li>▪ <i>Link to ERA, LAAW, and others that can provide assistance</i></li> </ul>	ERA FAQ & August 1 <sup>st</sup> Taskforce Binder pp. 201-02
<ul style="list-style-type: none"> <li>• <b>If I no longer work at the job where I think I was paid less than someone who did the same work as me, can I still try to recover the money I am owed?</b></li> </ul>	
<ul style="list-style-type: none"> <li>○ <i>Answer explaining statute of limitations</i></li> </ul>	ERA FAQ & August 1 <sup>st</sup> Taskforce Binder p. 19.
<ul style="list-style-type: none"> <li>○ <b>I have passed the deadline to file. Is there anything else I can do?</b></li> </ul>	
<ul style="list-style-type: none"> <li>▪ <i>Answer explaining options are limited once the statute is up.</i></li> </ul>	August 1 <sup>st</sup> Taskforce Binder pp. 13, 19. <b>Information about what to do once the statute is up needs to be written.</b>
<ul style="list-style-type: none"> <li>▪ <i>Link to tips on how to talk to your employer to make sure you're not currently experiencing a violation.</i></li> </ul>	ERA FAQ, <b>no explicit tips.</b>
<ul style="list-style-type: none"> <li>• <b>I'm scared that if I do anything, my boss will fire me. Can I file anonymously?</b></li> </ul>	
<ul style="list-style-type: none"> <li>○ <i>Answer explaining process for filing with DLSE</i></li> </ul>	August 1 <sup>st</sup> Taskforce Binder pg. 40
<ul style="list-style-type: none"> <li>• <b>I filed several months ago and haven't heard anything back. Is this typical?</b></li> </ul>	
<ul style="list-style-type: none"> <li>○ <i>Answer explaining the DLSE process – complaint, investigation, hearing, etc.</i></li> </ul>	<b>Draw from</b> August 1 <sup>st</sup> Taskforce Binder pg. 40
<ul style="list-style-type: none"> <li>• <b>Can I go right to court instead of filing with the DLSE?</b></li> </ul>	
<ul style="list-style-type: none"> <li>○ <i>Answer explaining that there is no administrative exhaustion.</i></li> </ul>	August 1 <sup>st</sup> Taskforce Binder pg. 40
<ul style="list-style-type: none"> <li>• <b>What are some possible outcomes if I file a Fair Pay Act claim?</b></li> </ul>	
<ul style="list-style-type: none"> <li>○ <i>Answer explaining remedies include back pay, front pay, reinstatement, and injunctive relief.</i></li> </ul>	August 1 <sup>st</sup> Taskforce Binder pg. 41
<ul style="list-style-type: none"> <li>▪ <i>Link to pages that explain what these are if no definition for them is provided in the answer.</i></li> </ul>	August 1 <sup>st</sup> Taskforce Binder pgs. 172 (Back Pay), 180 (Front Pay) <b>Need to be written: definitions for injunctive relief, reinstatement.</b> [Glossary pgs. 170 – 196]

From the Challenges and Barriers subcommittee: Jeanna Steele and Jennifer Barrera (from August 1, 2017 meeting)

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- **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

**Comment [TS1]:** Many of the examples assume that men and women are performing different tasks in the same workplace, and then describe why the differences between those tasks do or do not support a conclusion that the jobs require similar amounts of skill, effort, or responsibility. An underlying question for me is: “why are men and women performing different tasks in the first place?” To the extent people are performing different tasks for discriminatory reasons (an employer’s stereotype about or preference for employees based on sex/gender), then the examples help people identify and avoid one type of legal violation (based in the equal pay act), but provide no guidance about another (based in the anti-discrimination protections of FEHA/Title VII).

**Comment [TS2]:** If other task force members share this concern, one way of dealing with it would be to include language at the beginning of the examples section (for example, directly under “Online Tool Information – scenarios of skill, effort, and responsibility”) saying something like: “The following examples are meant to help readers understand the Equal Pay Act. Keep in mind that if employers assign different tasks to male and female employees, they must have reasons for doing so that aren’t related to the employees’ gender, or they may be violating other workplace laws.” I’d be curious to hear what Lauri and others think of that – the language may be too broad.

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.

**Comment [TS3]:** Or, we could include language in the relevant examples. At the end of example 1 (Responsibility) we could include a parenthetical sentence along the lines of "(While the two jobs may not be substantially similar, the employer should have a non-discriminatory reason for assigning only the male employee the additional task that increases his pay.)"

**Comment [TS4]:** Returning to page 14, in example 3 (Responsibility), I'd like to see more facts and explanation about why the additional duty (a walk-around of the premises) creates a minor difference in responsibility. It would not necessarily be minor if the employee, upon discovering that something was out of the ordinary, needed to take certain actions or had special authority in that situation. We could simply include more assumptions, such as: "Because the comparator is not given any additional authority or responsibilities when he performs the walk-around, the difference in responsibility is minor and the jobs in this case are substantially similar."

*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.

**Comment [TS5]:** I have the same concern about the example given at the very top of page 15: “Two employees work as bookkeepers performing the same duties, but the male employee has the additional significant responsibility....”

**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.

**Comment [TS6]:** And again in the second example under the 4th bullet on page 15: “A male employee and a female employee are sales account managers....”

- **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.]

**Comment [TS7]:** On page 15, second to last bullet, I think we need more info about the night shift issue. Most people have no idea what a “shift differential” is. At least in some circumstances, it’s a legal term of art. We could say something like “That he works the night shift does not render their jobs substantially dissimilar. [However, the employer may have a defense if the employer pays all employees who work the night shift higher wages, regardless of gender.]” I’d want Lauri and others to confirm that’s true, though.

# **EMPLOYER DOCUMENTS**



## Memo about “WHY? From Rhoma Young. August 2017 DRAFT

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

Why should I care that my employees are paid equitably?

Beyond legal compliance, there are some very concrete reasons to make sure you are paying your employees equitably. You can brag about it. A good reputation with today's competitive and informed workforce makes it easier to recruit new employees. Being open and transparent about pay practices makes it more likely you will be able to retain valued employees while you minimize inaccurate assumptions and anticipate and answer unasked questions. You are ready and primed to quickly and accurately respond if an irate, disappointed employee complains or makes a public accusation that your pay is biased.

If you can clearly articulate your compensation philosophy and how you make sure your employees are paid fairly, you can much more likely avoid a PR nightmare. It is not just a “feel good” management approach, it is a logical, business like stance to be able to recruit and retain your workplace heroes. Some employers say that their workers are their most important asset. This approach demonstrates that you care, why you care and how you plan to continue your commitment to workplace fairness and equity.

**California Pay Equity Task Force  
Human Resources Subcommittee Draft Tool on Starting Salary  
September 18, 2017**

***Rhoma Young***

Human Resource Policy and Practice Consultant  
Principal, Rhoma Young & Associates

***Lauri Damrell***

Employment Lawyer, Management Side  
Partner, Orrick Herrington & Sutcliffe

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

California law provides that an employer cannot not rely on prior salary alone to justify pay disparities between male and female employees. In this tool, we provide guidance for employees to help them handle questions regarding prior salary if and when they come up during an interview. We also provide suggested practices for employers for setting starting salaries based on factors other than prior salary. Each organization is different, and there is no one-size-fits-all strategy. However, we aim to provide high level tips, examples, and factors for employees and employers to consider.

**Guidance for Job Applicants on Discussing Starting Salary**

To help you find the “right” employer and job, be ready for the interview. Of course, this is premised on your asking, (and receiving) early in the conversation, a general ballpark of the salary/compensation range for the new position. Employers generally aim to place new hires at the midpoint of the salary range, absent appropriate differentiating factors that may support placement at the higher or lower end of the range. Understanding the range can help you more clearly explain why you propose a certain starting salary, for example, “I feel my background and skills are well established. Placing me in the ‘x’ percentile of the salary range will recognize what I bring to the position, yet still give me room to grow.” Research the prospective employer sufficiently to know their values and future growth plans. Also, research job listings on various websites (e.g. salary.com and indeed.com) to get a sense of what comparable positions are paying.

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

Truth is usually very effective, but there are many ways it can be presented in both the information you offer and the questions you ask. Employers have historically asked about a prospective employee’s

salary history to use as a benchmark in determining if their open position is “even in the ballpark” and whether to continue considering this person for the available job. If it is more/less than a 10-15 % spread above or below, then the employer often makes some assumptions that may be inaccurate.

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

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

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

If making less.....

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

If making more.....

- “The company/organization is in a state of flux/consolidation and may not offer sufficient growth and development in the long term. To me, compensation is not just about base salary. Total compensation includes salary, benefits, and a possible incentive arrangement that reflects and can be tied to my contributions. It can be in dollars, opportunities, and working environment. Important things to me are....”
- “Money is not the only thing I am hoping to find in a new career/job. Flexibility and growth are also important. For example....”

### **Suggested Practices for Employers in Setting Starting Salaries**

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

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

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

In addition, consider what factors are important to the organization in recruiting new hires. Some examples are provided below, though various other factors could be considered as well. Here, too,

these must be bona fide factors other than sex, and they must be reasonable, job related, and consistent with business necessity.

- Relevant experience
- Relevant education
- Relevant training
- Relevant skills or knowledge
- Market conditions
- Geography/location
- Competing offer
- Salaries of current employees in jobs that are substantially similar when viewed as a composite of skill, effort, and responsibility

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

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

- Childcare assistance/provision

**Setting Salary Ranges.** The organization should also consider setting salary ranges for each job position prior to interviewing candidates. To do this, the organization can look at external market data and the salaries of its existing employees in jobs that are substantially similar when viewed as a composite of skill, effort, and responsibility. This will help the employer evaluate the reasonable value to the organization of each job position. Employers generally aim to place new hires at the midpoint of the salary range, absent appropriate differentiating factors that may support placement at the higher or lower end of the range.

**Communicating with the Prospective Employee about Starting Salary.** Employers can adopt strategies for evaluating what to pay new employees without asking their prior salary. Ultimately, you want to know if there is a possible “match” between the candidates’ expectations and the realities of the total compensation for the position you are discussing. You also want to know if the applicant is honest.

To accomplish this, you can:

- Consider asking the candidate, "What are your salary expectations?" instead of asking their prior salary.
- Be ready to discuss the salary range for the position and explain your compensation philosophy.
- Be able to clearly define the “total” compensation being offered, especially if there are performance base bonuses or rewards. This should also include a discussion of what other non-financial incentives the organization offers.

For honesty, it is important to do individualized reference checks (even if only for final candidates). Get the candidate to sign an appropriate waiver of information release. Tell whomever you call that the candidate signed that release of information and gave permission to ask job-related questions. Be ready to send them a copy of the signed release. Take notes about responses, including what they said and on what date they said it. Get a list from candidate of at least 5 persons who can really address:

- What the applicant did in the previous position
- Confirm the employee’s title and the scope of their responsibilities
- What were their major strengths? (ask for example)
- Was there any area that needed more development? If so, what?
- What did you value and appreciate most about this candidate?
- What were the candidate’s major accomplishments? Impact on the workplace?
- Were they a team player? How do you define that?

- Were they reliable and dependable? Define?
- Did you respect and trust/not respect and trust them? Why?
- Would you hire/rehire this person? Into what types of job?
- Any other question you feel is key to the job.
- If they show reluctance, explain a little bit about the position and ask if they feel the prospective applicant could do that work: Do you see any difficulty in the match between the job and the employee? What?

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

DRAFT

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

Generally, California law requires employers to pay the same wage rate to employees who perform substantially similar work. Below is a list of steps an employer can complete to analyze compliance with California law:

1) Determine categories of employees who perform substantially similar work<sup>1</sup>: ~~Please refer to the proposed definition of “substantially similar work” here as well as the included examples for guidance on how to evaluate whether employees perform substantially similar work when viewed as a composite of skill, effort, and responsibility.~~

~~The term “substantially similar work when viewed as a composite of skill, effort, and responsibility and performed under similar working conditions” means that the employer should look at the overall job content and actual duties performed to determine if the jobs are substantially similar. Jobs that share a common core of tasks are substantially similar. Precise identity of functions and duties are not required. It is a totality of the circumstances analysis. Occasional, trivial, or minor differences in duties that only consume a minimal amount of the employee’s time will not render the work dissimilar.~~

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

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

Example: ~~A male records clerk who primarily performs duties including typing, filing, and answering phones, 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.~~

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

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

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

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

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<sup>1</sup> Employers are encouraged to refer to the “Definitions” document for further detail and information on the meaning of terms used in California’s Equal Pay Act.



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

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

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

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

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

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

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

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

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Example: CP alleges that she and other female grocery store workers are paid less than males who perform substantially similar work. Most of the tasks performed by the males and females are the same, except two of the male grocery store workers also regularly haul heavy crates from trucks into the store. In this case, the 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.~~

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b)iii) **Responsibility.** Responsibility is the degree of accountability required in performing a job.

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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.

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

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

**Example:** CP, a female sales clerk, claims that a male sales clerk performs substantially similar work for higher compensation. The only difference in responsibility between the jobs of CP and her comparator is that the comparator occasionally is given the responsibility for performing a "walk around" inside the building at the end of the day to make sure nothing is out of the ordinary. In this case, the jobs may be substantially similar because the difference in responsibility is minor.

**Example:** A manager responsible for a 6-person department has a different scope of responsibility than a manager responsible for a 600-person team and therefore the two roles are not substantially similar.

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

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↳ 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 – see below.]

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

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- 2) **Compare the wage rate for each employee in the same category:** The term "wage rate" is not limited to just an employee's annual salary or hourly wage, but includes other forms of compensation for an employee's performance. Please see the Task Force's definition of "wage rate" here for guidance on what types of compensation should be included in the comparison.
- 3) **No Difference in Wage Rate:** If there is no difference in the wage rate of employees who perform substantially similar work, then there is no need to do anything further.
- 4) **Valid/Bona Fide Factor for a Difference in Wage Rate:** If there is a difference in the wage rate of employees who perform substantially similar work, then the employer needs to identify the factor(s) for the difference to determine if an adjustment in the wage rate needs to be made. The employer must determine if the difference is due to a valid or invalid factor that is job related and consistent with business necessity. "Business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would

serve the same business purpose without producing the wage differential. There are several valid factors identified in California law for a wage rate difference. One or more of the following factors can be a valid basis for a wage difference. Please note, the factor(s) must be applied reasonably and account for the entire pay difference:

- i) Is the difference due to a seniority system?
  - (1) A seniority system rewards employees according to the length of their employment.
  - (2) In order for a seniority system to be considered valid, it must be well-established, consistently utilized, and based upon the length of time of employment. Courts are more likely to consider a seniority system valid if it includes the following: (1) a rule on when the seniority clock begins ticking; (2) the circumstances under which seniority may be forfeited; (3) the lengths of service that will count toward accrual of seniority; and (4) the types of employment decisions that will govern seniority. See *California Brewers Association v. Bryant*, 444 U.S. 598 (1980).
  - (3) To be a bona fide system, it must not have been adopted with discriminatory intent; it must be based on predetermined criteria; it must have been communicated to employees; and it must have been applied consistently and even-handedly to employees of both sexes.

(3) 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.

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- 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.

(3) 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.

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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>2</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>3</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>4</sup>
- (2) **Education.** An example of a bona fide factor is providing an employee higher compensation for an employee's education. That prior ~~education~~~~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.

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

**Example:** CP had been employed as an office manager. Her starting salary was \$42,000. She resigned one year later. Her male successor was hired at a starting salary of \$50,000. CP filed a charge claiming that the difference in starting salaries was ~~unlawful~~~~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 ~~may~~ qualifies as a factor other than sex justifying the compensation disparity.

**Example:** ~~Same as Example 1, 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, 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. ~~This may be a violation. A violation of the EPA is found.~~

**Example:** ~~Same as Example 1, 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, except that~~ CP did have job-related experience, though her successor had a slightly greater amount of experience. The difference in

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<sup>2</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>3</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>4</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.").

their experience ~~may~~ was not ~~be~~ 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>5</sup> If the training involves rotation through different jobs, the compensation of an employee in such a training program need not be revised each time he or she rotates through jobs of different skill levels.
- (a) **Example (Training):** CP, a bank teller, alleges that she is paid less than a male bank teller who performs substantially equal work. The respondent alleges that the male comparator is a participant in a management training program that is open to both sexes. The evidence shows, however, that the program is not bona fide because it is not a formal one, no other employees are identified as participants in the program, and the comparator does not receive any formal instruction or even know that he is in a management training program. An EPA violation therefore is found.
- (5) **Geography.** Another bona fide factor may be higher compensation given the geographical location of the employees and the cost of labor in a given region. However, if relying on cost of labor to justify a pay differential be careful to analyze whether every employee in an otherwise substantially similar role should be provided a competitive market increase to account for any pay disparities that might otherwise violate the Equal Pay Act. Differences in compensation based on geography should be analyzed after analyzing skill, effort and responsibility.

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

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

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

5)6) **No Bona Fide Factor Exists to Justify Wage Difference:** If there is no factor listed above in (4) that justifies the wage rate differential, then the employer should consider: (1) increasing the wage rate of the employee who is performing substantially similar work and being paid less; and (2) compensating the employee for back pay as a result of the wage difference.

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

<sup>5</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; 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).

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- | 67) **Setting the Wage Rate for a New Hire:** If the individual is a new hire, the same standards apply. An employer must base the new hire's compensation on a bona fide factor, as set forth above. Employers are advised that any reliance on a candidate's prior salary to set pay may increase the risk of liability because the Equal Pay Act provides that: "Prior salary shall not, by itself, justify any disparity in compensation." See Labor Code Section 1197.5. Best practice is to determine in advance such factors as: (1) the employer's budgetary requirements; (2) what the job is worth; (3) seniority issues amongst existing employees; and (4) the employer's potential salary range for the open position. With this advance planning, the employer will be better able to examine the potential candidate based on their qualifications for the position and negotiate within objective salary requirements.

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FOR VOICE

# **DELIVERABLES SUBCOMMITTEE**

Date: September 19, 2017

To: Gender Equity/Pay Parity Task Force of CCSWG

From: The Deliverables Subcommittee and Stephanie Tseu

Re: *Teleconference with Kelly Jenkins-Pultz and Stephanie Tseu re Women's Conference/s to Roll Out Pay Parity Materials to Employers and Employees*

**The purpose of this memo** is to provide a structure for a discussion at the next Task Force Meeting about the means by which we can most efficiently and effectively roll out the new Pay Equity Act for both employers and employees, with a focus on conferences that will give us the most public “bang” for the State’s and its allies’ buck.

### **The Sub-Committee Teleconference on Potential Roll-Out and Follow-On Materials and Conference:**

The deliverables sub-committee (Kelly Jenkins-Pultz and Victoria Pynchon) participated in a teleconference with Stephanie Tsue on September 19, 2017 regarding potential plans to provide materials (power point presentations, FAQs, social media materials, memes and talking points) for use in presentations at women’s and employer and/or employee conferences on and after Equal Pay Day 2018 as well as to discuss the possibility of the CCSWG together with the Task Force holding its own conference in the State Capitol, at U.C. Davis and/or at any other State College or University in the Spring of 2018.

### **The General Topics Discussed**

We discussed pros and cons, as well as the extent and reach of impactful Pay Equity materials to present at a conference or series of conferences to bring the new Pay Equity Law to the attention of employers, employees, talent acquisition and management professionals (H.R.), with a focus on the employee side on the greatest number of women who should be benefitted by this law, low- and minimum-wage workers, particularly in the garment industry, clerical, retail clerk (cashiers, etc.), hotel/motel employees, child care workers, city, state and county employees, teachers (particularly those at low paid private primary and middle schools), child care workers and other industries where low- and minimum-wage salaries – as well as less than minimum - are paid.

### **Timing and Identity of Existing Conferences**

We discussed the following loose schedule for activities leading to the completion of conference and other materials and the scheduling of conferences.



1. Based on finalized FAQs and other materials prepared by other Task Force Sub-Committees, **the Deliverables Sub-Committee should first** translate those materials into power point presentations, talking points, pamphlets and social media memes, announcements and educational materials tailored to our two main audiences: employees and primarily low- to minimum-wage workers.
  - a. Toward that end, we could begin to prepare sample materials with the precise language still be evaluated that would cover those areas which are most problematic and/or useful to one or more of our target audiences.
  - b. Kelly mentioned that special evidence should be placed on explaining, in as clear and accessible terms as possible, the meaning of “substantial similarity” and how low- to minimum-wage workers could navigate their investigation of the new law and learn, as easily as possible, whether it applies to them.
2. Even before the completion of the materials mentioned above (about which more later) **the Sub-Committee members should begin exploring organizations that have yearly (or even monthly) conferences and/or training sessions who would be willing to partner with the State of California in rolling out the new Pay Equity Law**, developing a list of those organizations with the audiences most tailored to the needs of our target audiences.
3. **Everyone agreed that we need input from every member of the Task Force about the best means of reaching the groups they represent**, i.e., large and small corporate employers, small business owners, employees and those that help or retard the goal (HR as doing both) of forwarding the well-being of employees.
4. **We therefore are in the process of preparing a list of organizations that are well-established conference- and training-providers** to all groups impacted by the new law. A partial list discussed during our telephone conference (which needs to be drastically expanded) included:
  - a. The (former Governors’) Conferences for Women, one of which is currently held in San Jose – the [Watermark Conference](#) (aimed at corporate and professional thought leaders across most industries; they are “leadership” conferences but with a political and celebrity aspect).<sup>1</sup>
  - b. One or more of the Universities of California or State Universities, particularly one for the most prominent roll-out on Equal Pay Day (this to be sponsored by the State of California)
  - c. Other Women’s conferences, including women’s small business and organizations serving the needs of marginalized communities such as: the [U.C. Davis Women’s Conference](#); the Central California Women’s Conference, the U.C. San Diego Women’s Conference; the [California Diversity Women’s Leadership Conference](#); the [2018 Diversity Leadership Conference](#); the [National](#)

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<sup>1</sup> These conferences, currently held in Mass, Philly, Texas and the Silicon Valley grew out (and retained the audience) of the Governors’ Conferences for Women begun by Governor Anne Richards of Texas. When she was no longer Governor, the Conferences continued without the honorific of “Governors”). (Cecile Richards, National President of Planned Parenthood is Governor Richards’ daughter).

[Latina Women's Conference](#); [California HR Conference](#). Obviously, we need dozens more of these to choose from, particularly those for working women in marginalized communities.

5. **A suggestion was made that we might also wish to ally with some powerful women's organizations** toward the end that they would help us bring our own conference (sponsored by the State) to the attention of as many women as possible including the Women's March organizers.
  - a. Vickie suggested that the Women's March women would likely not want to be involved in promoting the roll out of the California law unless it was openly intersectional, something we discussed and didn't resolve (I don't think) during our last meeting.
  - b. We should also discuss whether our roll-out conference materials will address women of color and LGBTQ women as well as women in other marginalized communities.

## 6. How to Most Effectively and Efficiently Achieve Our Goal

- a. **Every time we hear Senator Jackson talk about the new law**, she says we're looking for culture change, not simply more rights for the state or individuals to enforce by force of law.
- b. If that is indeed our goal, **our means should be geared to capture the most wide-spread attention in a way that stresses the benefits of the new law to all stakeholders** rather than defining rights and remedies (although the latter, of course, must be covered)
- c. That means not simply conferences, but the **compelling promotion of conferences and of speakers** who agree to use our instructional materials, through press, social media and grass roots organizing. A bit job for sure and one that requires money.
- d. That means **social media, press releases, press conferences and public relations work. It also means celebrity and corporate endorsement as well as the endorsement of community leaders in marginalized communities.**
- e. How we accomplish that is a topic for discussion at the next task force meeting.