

Challenges and Barriers Subcommittee Members:

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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 ensure their pay structure is compliant with California law:

- 1) **Determine categories of employees who perform substantially similar work:** Please refer to the proposed definition of “substantially similar work” 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.
- 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 proposed definition of “wage rate” 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. 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) 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).
 - ii) Is the difference due to a merit system?
 - (1) 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).
 - iii) Is the difference due to a system that measures earnings by quantity or quality of production?
 - (1) 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).
 - 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, training, or experience? A bona fide factor is defined in California law as something that is job-related and serves an overriding legitimate business purpose. An example of a bona fide factor is providing an employee higher compensation for an employee’s length of experience. That prior experience would need to be related to the

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job and serve a legitimate business purpose. Another bona fide factor may be higher compensation given the geographical location of the employees and the cost of living in those different areas.

**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) **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.

- 6) **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. Although the new hire's prior salary or compensation may be considered by the employer, it cannot be the sole basis for the new hire's compensation. A 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 salary requirements.

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