

Note to Draft: I pulled most of the examples below from the EEOC Manual – as well as definitions of Skill, Effort and Responsibility, but I did not link to the page because of the difference between the CA pay equity law and the federal EPA on market factors. See section g. Market Factors at: <https://www.eeoc.gov/policy/docs/compensation.html>.

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~~analyze compliance 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” 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.

a) Group positions 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?” Avoid relying on internal levels of convenient existing groupings such as job family.

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

i) **Example 1 (Skill):** A bona fide factor would include a college degree if that college degree is necessary to perform the job. CP, a hotel clerk, alleges that she is paid less than a male who performs substantially similar work. CP only has a high school degree, while the male comparator has a college degree. However, performance of the two jobs requires the same education, ability, experience, and training. A college degree is not needed to perform either job. Therefore, the skill required to perform the two jobs is substantially similar.

ii) **Example 2 (Skill):** CP, a male, works for a telephone company diagnosing problems with customer lines. He alleges that he is paid less than his female predecessor in violation of the EPA. The evidence shows that the job of CP’s predecessor required expert training in diagnostic techniques and a high degree of specialized computer skill. The respondent switched to a newer, more advanced computer testing system after CP’s predecessor resigned. The job now requires much less overall skill, including computer skill, than was required when CP’s predecessor held it. Therefore, the skill is not equal, and no violation is found.

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.

c) **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.

- Formatted: Font: Not Bold
- Formatted: Font: Not Bold, Highlight
- Formatted: Font: Not Bold

- Comment [JS1]: Link to Definitions Page
- Formatted: Highlight
- Formatted: Highlight
- Formatted

- Formatted: Font: Bold
- Comment [JS2]: Will the Definitions subcomm define? If so we should reflect that definition here, if different.
- Formatted: Font: (Default) Helvetica, 10 pt
- Formatted

- Formatted: Font: Bold

- Formatted: Font: Not Bold

- Comment [JS3]: Will the Definitions subcomm define? If so we should reflect that definition here, if different.
- Formatted: Font: Bold
- Formatted
- Formatted: Font: Not Bold
- Formatted

- d) **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 [JS4]: Will the Definitions subcomm define? If so we should reflect that definition here, if different.

Comment [BJ5]: The Definitions Subcommittee is working on examples from existing cases of what is substantially similar when viewed as a composite of skill, effort and responsibility. I think this is good – and maybe we should give to the Task Force for review and consideration.

Formatted: Font: Bold

Formatted: Font: Not Bold

Formatted:

Formatted:

Comment [BJ6]:

Formatted: Indent: Left: 0.5", No bullets or numbering

4)

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 Task Force's definition of "wage rate" here for guidance on what types of compensation should be included in the comparison.

Comment [JS7]: Link to Definitions Page

Formatted: Highlight

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) 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).

Comment [JS8]: From EEOC Guidance Manual

(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.

Comment [JS9]: From EEOC Guidance Manual

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.

Comment [JS10]: From EEOC Guidance Manual

iii) Is the difference due to a system that measures earnings by an "incentive system" quantity of quality of production?

(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.

Comment [JS11]: From EEOC Guidance Manual

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, 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.² 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.³ 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.⁴

(2) A bona fide factor is defined in California law as something that is job-related and serves an overriding legitimate business purpose. **Education.** An example of a bona fide factor

Formatted

Formatted: Font: Bold

² 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).

³ 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).

⁴ 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.").

Formatted: Font: 8 pt

is providing an employee higher compensation for an employee's education. That prior experience ~~would need must to be related to the~~ job-related and serve a legitimate business purpose.

(3) ~~Experience and Ability. An example~~Examples of a 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. ~~That prior~~

Formatted: Font: Bold

(a) **Example 1 (Experience).** CP had been employed as an office manager. Her starting salary was \$42,000. She resigned one year later. Her male successor was hired at a starting salary of \$50,000. CP filed a charge claiming that the difference in starting salaries violated the EPA. The employer proves that the salary difference was based on the successor's extensive experience as an office manager, as compared to CP's lack of any job-related experience. The difference in experience qualifies as a factor other than sex justifying the compensation disparity.

(b) **Example 2 (Experience).** Same as Example 1, except that the evidence shows that the employer relies inconsistently on work experience in setting salaries for office manager jobs, and that males who lacked experience were offered higher starting salaries than CP. A violation of the EPA is found.

(c) **Example 3 (Experience).** Same as Example 1, except that CP did have job-related experience, though her successor had a slightly greater amount of experience. The difference in their experience was not commensurate with the \$8,000 difference in starting salaries, and therefore a violation of the EPA is found.

~~experience would need to be related to the job and serve a legitimate business purpose.~~

Formatted: Indent: Left: 1", No bullets or numbering

(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.⁵ 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.

Formatted: Font: Bold

Formatted

(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.

Formatted: Font: Bold

Formatted

Formatted: Font: Bold

(5) ~~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 job and serve a legitimate business purpose.~~ **Geography.** Another bona fide factor may be higher compensation given the geographical location of the employees and the cost of living 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.

Formatted

Formatted: Font: Bold

Formatted: Not Highlight

(a) Differences in compensation based on geography should be analyzed after analyzing skill, effort and responsibility.

Comment [JS12]: This is a tough one – the Task Force may wish to consider whether this section adequately captures the concern on both sides of the issue.

Formatted

Formatted

Formatted: Font: 8 pt

iv) in those different areas.

⁵ 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).

**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. ~~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. 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 objective salary requirements.~~

Formatted: Not Highlight