

## **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 the California law. The examples provided are meant to help readers understand the California Fair Pay Act. While reading the examples, keep in mind that if employers assign different tasks to male and female employees, they must have reasons for doing so that are not related to the employees' gender, or they may be violating other workplace laws, such as the California Fair Employment and Housing Act or Title VII of the Civil Rights Act of 1964.

Please also note the Task Force reviewed a number of federal cases and authority referenced in endnotes to develop the below principles, but only to the extent that such protections and analysis would be similar to California law. The Task Force does not endorse the outcome of these cases.

### **1. Determine whether employees are performing substantially similar work**

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.<sup>i</sup>

Employers should group together those 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 substantially similar working conditions.

Jobs that share a common core of tasks are substantially similar.<sup>ii</sup> The law does not require job functions and duties to be identical. Occasional, trivial, or minor differences in duties that only consume a minimal amount of the employee's time will not render the work dissimilar.<sup>iii</sup>

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

Job titles and job descriptions are relevant to the consideration, but not determinative of whether employees are performing substantially similar work.<sup>iv</sup>

**Example:** A male records clerk primarily performs duties including typing, filing, and answering phones. He works in the same office and on the same floor as a female stenographer, who also primarily performs duties including typing, filing, and answering phones. Neither employee is exposed to any physical hazards. They likely perform substantially similar work, despite the difference in job titles.

Composite of skill, effort, and responsibility and when performed under substantially similar working conditions is applicable to the actual job duties performed, not the specific person performing the work.<sup>v</sup> Additionally, the analysis should be applied to a full work cycle, not just a snap shot of a particular time period or day.<sup>vi</sup>

**Example:** Two employees both perform custodial duties at a school. However, Employee A works all months of the year and performs additional duties that require heavier physical labor than Employee B, who only works 9 months out of the year. For purposes of determining whether the two jobs are substantially similar, it is necessary to scrutinize the job as a whole and to look at the characteristics of the jobs being compared over a full work cycle. The kinds of activities required for a given job and the amount of time devoted to such activities may vary throughout the year.

a) **Skill.** Skill is measured by factors such as the experience, ability, education, and training required to perform a job.<sup>vii</sup>

**Example:** A female hotel clerk, alleges that she is paid less than a man who performs substantially similar work. She 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 substantially similar.

**Example:** A male employee 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 the male'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 the male's predecessor resigned. The job now requires much less overall skill, including computer skill, than was required when the male's predecessor held it. Therefore, the skill may not be equal.

**Example:** A female 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 substantially similar.

- b) 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.<sup>viii</sup>

**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.

**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, the greater the effort that is necessary to meet it. The effort exerted by these two employees may not be similar.

**Example:** Two female grocery store workers are paid less than men who perform substantially similar work. Most of the tasks performed by the men and women 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, so the amount of effort required to perform the jobs may be substantially the same.

**Example:** Two female grocery store workers are paid less than men who perform substantially similar work. Most of the tasks performed by the men and women 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 effort required to perform the jobs may not be substantially similar. Or...in this case, the employer may be able to lawfully pay a higher rate to the persons who perform the extra task.

- c) Responsibility.** Responsibility is the degree of accountability required in performing a job.<sup>ix</sup>

**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. The two jobs may not be substantially similar due to the difference in responsibility.

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

**Example:** 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 the female employee 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. However, if the "walk around" of the building requires a substantial amount of time because it is a large facility and includes checking for security of the premises, including entryways, security cameras, and then taking any action to correct identified problems, it may justify a difference in compensation.

**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 may not be substantially similar.

**d) Substantially Similar Working Conditions.** This means the physical surroundings and hazards, but does not include job shifts.<sup>x</sup>

**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. [However, the employer may have a defense if the employer pays all employees who work the night shift higher wages, regardless of gender.]

## **2. Compare the wage rate for employees performing substantially similar work**

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, including, but not limited to, wages and salaries, bonuses, commissions, stock options, vacation, and pension. The California EPA generally does not cover disparate treatment in other terms and conditions of work, such as promotions, assignment, work hours, overtime worked, harassment, training,

reasonable accommodations, lay off, termination, suspension or other employment actions that may be challenged under the Fair Employment and Housing Act. [The anti-retaliation provisions of the EPA do cover adverse actions taken by an employer in retaliation for an employee exercising rights under the EPA.]

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.

### **3. Affirmative Defense: Identify Factors that Account for any Differences in Wage Rate**

Once a prima facie case is established, the burden shifts to the employer to prove the wage disparity is based upon one of the four factors: a seniority system, a merit system, a system that measures earning by quantity or quality of production, or a bona fide factor other than sex, such as education, training, or experience, that is consistent with a business necessity and is job related. In other words, 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.<sup>xi</sup> In relying on a bona fide factor, 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:

#### **a) Seniority**

A seniority system rewards employees according to the length of their employment.

In order for a seniority system to be considered a valid basis for paying employees different wage rates, 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).

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.

**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.

**b) Merit**

A merit system rewards employees for exceptional job performance.

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).

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.

**c) Incentive/Production**

An incentive or production system provides compensation on the basis of the quality or quantity

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).

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.

**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.

**d) Other Bona Fide Factors**

In addition to the factors listed above, other factors unrelated to sex, race, or ethnicity can justify paying employees different wage rates for substantially similar work. These factors include but are not limited to education, experience, certifications, ability, seniority, performance, skill,

training, and geography.<sup>xii</sup> 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>xiii</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>xiv</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>xv</sup>

- i. **Education.** An example of a bona fide factor is providing an employee higher compensation for an employee's education. That prior education must be job-related and serve a legitimate business purpose.
- ii. **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:** The starting salary for a female office manager was \$42,000. She \$50,000. She filed a charge claiming that the difference in starting salaries was unlawful. The employer proves that the salary difference was based on the successor's extensive experience as an office manager, as compared to her lack of any job-related experience. The difference in experience may qualify as a factor other than sex justifying the compensation disparity.

**Example:** The starting salary for a female office manager was \$42,000. She resigned after one year. Her male successor was hired at a starting salary of \$50,000. The evidence shows that the employer relies inconsistently on work experience in setting salaries for office manager jobs, and that men who lacked experience were offered higher starting salaries than her salary. This may be a violation.

**Example:** The starting salary for a female office manager was \$42,000. She resigned after one year. Her male successor was hired at a starting salary of \$50,000. She did have job-related experience, though her successor had a slightly greater amount of experience. The difference in their experience may not be commensurate with the \$8,000 difference in starting salaries.

- iii. **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>xvi</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.

**Example:** A female 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 may be found.

- iv. **Geography/Particular Assignment.** Another bona fide factor may be higher compensation given the geographical location of the employees and the cost of labor in a given region. Examples of bona fide assignment factors include: cost of living, cost of labor, shift differential, weekend/holiday work, hazardous location (e.g., high crime rate, high accident rates), working in a remote location (e.g. two hour commute), and working in inclement weather (e.g. inside v. outside work). Note, 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.



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.

#### **4. Taking Steps to Decrease Differences in Wage Rates**

If there is no factor listed above that justifies a difference in wage rates paid to employees doing substantially similar work, 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.

- a) **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. As of January 1, 2018, employers cannot ask an applicant about their prior salary. Additionally, the Fair 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. [\[LINK TO STARTING SALARY DOC\]](#)

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<sup>i</sup> See e.g., *Ewald v. Royal Norwegian Embassy*, 82 F. Supp. 3d 871 (D. Minn. 2014) (Although two employees at foreign consulate located in Minnesota held separate job titles, she was paid about \$30,000 less per year and evidence demonstrated that the positions were equally important and had almost identical responsibilities; court reasoned that “[w]hether two jobs are substantially equal requires a practical judgment on the basis of all the facts and circumstances . . . [n]either job classifications nor titles are dispositive for determining whether jobs are equal.”); *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 285-286 (4th Cir. 1974) (“One of the most common grounds for justifying different wages is the assertion that male employees perform extra tasks. These may support a wage differential if the create a significant variation in skill, effort, and responsibility between otherwise equal jobs.”); *Chapman v. Pacific Tel. & Tel. Co.*, 456 F.Supp. 65, 69 (N.D. Cal. 1978) (“The regulations and cases make it clear that it is actual job content, not job titles or descriptions which is controlling.”); *Beck-Wilson v. Principi*, 441 F.3d 353, 359–63 (6th Cir. 2006) (comparing pay of primarily male physicians’ assistance with primarily female registered nurses in same facilities and concluding jobs were substantially equal; “Whether a job is substantially equal for purposes of the EPA, is determined on a case-by-case basis and ‘resolved by an overall comparison of the work, not its individual segments.’”).

<sup>ii</sup> See *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 695–97 (7th Cir. 2006) (where one employee has broader strategic planning responsibilities, supervisory duties, and authority over personnel than another employee, the jobs are not “equal for purposes of EPA[, which requires that] courts look to whether the jobs have a ‘common core of tasks, i.e., whether a significant portion of the two jobs is identical; once a plaintiff establishes a ‘common core’ of tasks, court asks whether any additional tasks make the jobs substantially different” (quoting *Cullen v. Indiana Univ. Bd. Of Trs.*, 338 F.3d 693, 704 (7th Cir.2003)).

The EEOC Guidance, available at <https://www.eeoc.gov/policy/docs/compensation.html>, further provides:

If a significant portion of the tasks performed in the two jobs is the same, an inquiry should be made as to whether the comparators perform extra duties which make the work substantially different. Jobs with the same common core of tasks are equal, even though the comparators perform extra duties, if the extra duties are insubstantial. See, e.g., *EEOC v. Central Kansas Med. Ctr.*, 705 F.2d 1270, 1272-73 (10th Cir. 1983) (janitors and housekeepers performed equal work; any extra work performed by the janitors was insubstantial or was balanced by additional responsibilities performed by housekeepers), *overruled on other grounds by McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); *Corning Glass Works v. Brennan*, 417 U.S. 188, 203 n.24 (1974) (noting that Court of Appeals concluded that extra packing, lifting, and cleaning performed by night inspectors was of so little consequence that the job remained substantially equal to those of day inspectors); *Goodrich v. International Bhd. of Elec. Workers*, 815 F.2d 1519, 1525 (D.C. Cir. 1987) (job of female union employee was not substantially equal to that

of males who did the same work because males had additional duties which, though consuming little time, were essential to the operation and mission of the union); *Brock v. Georgia Southwestern College*, 765 F.2d 1026, 1034 (11th Cir. 1985) (two college teachers' jobs could be compared under EPA even though one served as Coordinator of Business Education Division because any additional duties he performed were ephemeral and took up insignificant amount of time), *overruled on other grounds by McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988) (adopting definition of "willful" violation announced in *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985)).

iii *Brennan v. South Davis Community Hospital*, 538 F. 2d 859, 862 (10th Cir. 1976) (comparing maids with janitors and concluding "we need not find precise identity of functions before an equal work determination is possible; only substantial equality of skill, responsibility, and effort and similar working conditions must be shown to preclude a wage differential . . . [t]he occasional or sporadic performance of an activity which may require extra physical or mental exertion is not alone sufficient to justify a finding of unequal effort"); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir. 1970) (10% wage differential not justified despite fact that male selector-packers spent up to 18% of their time on 16 tasks not performed by females, the work in general was "substantially identical" under EPA); OFCCP Sex Discrimination Guidelines Revised 2016 - 41 CFR 60.4(a) ("Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others."); EEOC Guidance ("[M]inor differences in the job duties, or the skill, effort, or responsibility required for the jobs will not render the work unequal. In comparing two jobs for purposes of the EPA, consideration should be given to the actual duties that the employees are required to perform."); EEOC Q&A Compliance Manual ("How similar do jobs have to be under the Equal Pay Act? Under the Equal Pay Act, jobs must be substantially equal, but not identical. Therefore, minor differences in job duties, or the skill, effort, or responsibility required for the jobs will not render them unequal. Also, differences between the people in the jobs are not relevant to whether the jobs are substantially equal, though differences in qualifications could ultimately be a defense to a claim of pay discrimination.").

iv *E.E.O.C. v. Port Authority of New York and New Jersey*, 768 F.3d 247, 256-258 (2nd Cir. 2014) (court rejects argument that "an attorney is an attorney is an attorney" and holds that a "successful EPA claim depends on a comparison of actual job content; broad generalizations drawn from job titles, classification, or divisions, and conclusory assertions of sex discrimination, cannot suffice"; in order for jobs compared to be "substantially equal," a plaintiff must establish that the jobs compared entail common duties or consent, and do not simply overlap in titles or classifications. "The use of identical evaluative criteria such as 'project management,' 'communication,' 'flexibility and adaptability,' ad 'attendance,' moreover speaks only to the breadth of the standards used, not to whether the attorneys subject to evaluation face varying workplace demands."); *Randall v. Rolls-Royce Corp.*, 637 F.3d 818, 822–23 (7th Cir. 2011) (assessing skill, effort, and responsibility when mixed within same

job title and rejecting application of “comparable worth”; court emphasized that job title is not determinative, as a “title covers a multitude of positions differing in authority (such as number of employees supervised) and responsibility”); *Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 288 (4th Cir. 1974) (“Job descriptions and titles, however, are not decisive. Actual job requirements and performance are controlling.”); *Ingram v. Brink’s, Inc.*, 414 F.2d 222, 231 (1st Cir. 2005) (“The EPA is more concerned with substance than title.”); EEOC Guidance (“Job content, not job titles or classifications, determines the equality of jobs.” (citing *Katz v. School Dist. of Clayton, Mo.*, 557 F.2d 153, 156-57 (8th Cir. 1977) (teacher’s aide performed duties of teacher and job was substantially equal to that of teacher).

<sup>v</sup> *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533 (11th Cir. 1992) (“A plaintiff establishes a prima facie case by comparing the jobs held by the female and male employees, and by showing that those jobs are substantially equal, not by comparing the skills and qualifications of the individual employees holding those jobs.”); EEOC Guidance (“The important comparison in determining whether the “equal work” requirement is met is the comparison of the jobs, not the people performing the jobs. Thus, a difference between the comparators has no bearing on whether the jobs are equal. The critical question at this point in the analysis is whether the jobs involve equal work. However, a difference between the comparators could qualify as a defense to a compensation disparity.”); OFCCP Final Rule (41 C.F.R. § 60-20.4 Discriminatory Compensation) (“Relevant factors in determining similarity may include tasks performed, skills, effort, levels of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others.”).

<sup>vi</sup> *Marshall v. Dallas Indep. Sch. Dist.*, 605 F.2d 191, 195 (5th Cir. 1979) (concluding work performed by “custodial helpers” and “maids” was not substantially equal where custodial helpers” worked all months of year and performed work requiring heavier physical labor than seasonal maids. “In applying the various tests of equality to the requirements for the performance of such jobs, it will generally be necessary to scrutinize the job as a whole and to look at the characteristics of the jobs being compared over a full work cycle. This will be true because the kinds of activities required to perform a given job and the amount of time devoted to such activities may vary from time to time.”); *Conti v. Universal Enters., Inc.*, 50 F. App’x 690, 696 (6th Cir. 2002) (noting that to determine substantial equality “an overall comparison of the work, not its individual segments” is necessary); *Buntin v. Breathitt County Board of Education*, 134 F.3d 796 (6th Cir. 1998) (same).

<sup>vii</sup> *Hunt v. Neb. Pub. Power Dist.*, 282 F.3d 1021, 1030 (8th Cir. 2002) (“Whether two jobs are substantially equal ‘requires a practical judgment on the basis of all the facts and circumstances of a particular case’ including factors such as level of experience, training, education, ability, effort, and responsibility.”) (quoting *Buettner v. Eastern Arch Coal Sales, Co.*, 216 F.3d 707, 719 (8th Cir. 2000).

The EEOC Guidance further provides: “If two jobs generally share a common core of tasks, the fact that one of the jobs includes certain duties that entail a lower level of skill would not defeat a finding that the jobs are equal. For example, if two people work as bookkeepers, and one of the individuals performs clerical duties in addition to bookkeeping tasks, the skill required to perform the two jobs would be substantially equal. . . . On the other hand, if the jobs require different experience, ability, education, or training, then the jobs are not equal. For example, a vice president of a trade association could not show that her work was equal to the work performed by other vice presidents, where they performed key policymaking for the association, a skill that her position did not require.” See *Stopka v. Alliance of Am. Insurers*, 141 F.3d 681, 685 (7th Cir. 1998).

- “The fact that jobs are in different departments is not determinative, although in some cases it may be indicative of a difference in job content.” See *Strag v. Board of Trustees*, 55 F.3d 943, 950 (4th Cir. 1995) (professorship in Mathematics department of university was not substantially equal to professorship in Biology department because of difference in skills and responsibilities required by the departments).

<sup>viii</sup> *Chapman v. Pacific Tel. & Tel. Co.*, 456 F.Supp. 65, 69-70 (N.D. Cal. 1978) (“Effort is measured by the amount of physical and mental exertion needed for the performance of the job. Responsibility reflects the degree of accountability required in the performance of the job. In this case, involving a comparison of managerial jobs, these two factors are closely related; the greater the responsibility imposed, the greater the exertion necessary to discharge”).

<sup>ix</sup> See 29 C.F.R. § 1620.17 (differences in the degree of responsibility required in the performance of otherwise equal jobs cover a wide variety of situations); *Sims-Fingers v. City of Indianapolis*, 493 F.3d 768, 770 (7th Cir. 2007) (job of female manager who supervised six-acre park with limited facilities was not equal in terms of skill, effort, and responsibility required to that of male manager who was to oversee much larger park with extensive facilities including pool).

<sup>x</sup> See e.g., *Shultz v. American Can Co.-Dixie Prods.*, 424 F.2d 356, 361 (8th Cir. 1970) (No justification for paying male night-shift workers more than female day-shift workers; males had to load heavy rolls of paper, but this consumed only small amount of time, and employer’s own pay practices suggested that this was not real reason for disparity.); EEOC Guidance (“While a difference between night and day work is not a difference in “working conditions,” it could constitute a “factor other than sex” that justifies a compensation differential. A shift differential operates as a defense only if both sexes have an equal opportunity to work either shift, if sex was not the reason the employer established the compensation differential, and if there is a business purpose that the shift differential is being used reasonably to serve.”).

<sup>xi</sup> *Bearden v. International Paper Co.*, 529 F.3d 828, 833 (8th Cir. 2008) (“Once an employee has established a prima facie case, the burden shifts to the employer to prove any of four statutory affirmative defenses.”)

<sup>xii</sup> *Beck-Wilson v. Principi*, 441 F.3d 353, 363 (6th Cir. 2006) (“Because the comparison at the prima facie state is of the jobs and not the employees, ‘only the skills and qualifications actually needed to perform the jobs are considered.’ Factors like education and experience are considered as a defense to an employer’s liability rather than as part of a plaintiff’s prima facie case.”); *Merillat v. Metal Spinners, Inc.*, 470 F.3d 685, 695 (7th Cir. 2006) (“Under the EPA, differences in education and experience may be considered factors other than sex . . . . “An employer may take into account market forces when determining the salary of an employee.”).

<sup>xiii</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>xiv</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>xv</sup> *See Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 878 (1982) (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.").

<sup>xvi</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).