

Pay Equity: What Employers Need to Know

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Pay Equity: What Employers Need to Know

Presented by:

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Pay Equity:

What Employers Need to Know

Presented by Kara G., JD, SPHR

December 15, 2022

Not tax or legal advice | Powered by **Mineral**

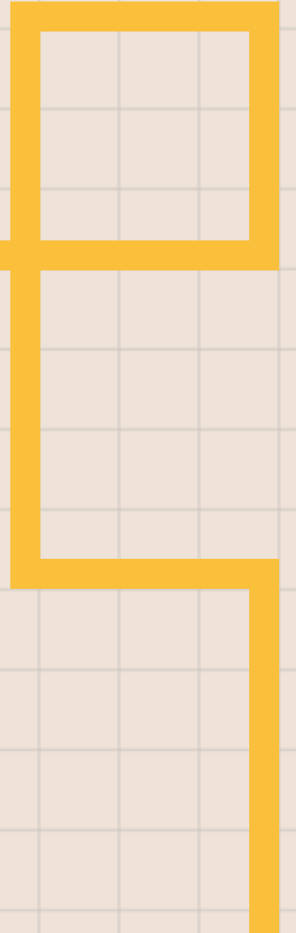


Agenda



- Federal Pay Equity Law
- State Pay Equity Laws
- Auditing: The 30,000' View
- Best Practices and Creating a Culture of Pay Equity

The Equal Pay Act of 1963





No Unequal Pay Based on Sex

Employees must be paid equally for equal work on jobs that require substantially equal skill, effort, and responsibility, and which are performed under similar working conditions in the same establishment.

Applies to employers of any size.

Intent is not required.





Skill

What's needed to do the job, not the skills possessed





Effort

Physical or mental exertion required





Responsibility

Individual contributions and management responsibilities



Working Conditions

Physical surroundings (heat, ventilation) and hazards



Establishment

Physical place of business and operations



Acceptable Reasons for a Pay Differential

1. A seniority system
2. A merit system
3. A system which measures earnings by quantity or quality of production, *or*
4. A differential based on any other factor other than sex.



The 9th Circuit Court of Appeals

The 9th Circuit has ruled (in *Rizo v. Yovino*) that a bona fide factor other than sex must be job-related, such as experience, skills and abilities, and education.

State courts often take cues from federal courts, so consider this foreshadowing for state law claims.

Don't use:

- Past salary history
- Market factors, e.g., "I had to pay more because it's so hard to find people right now"
- Negotiating skill

Legal Bric-a-Brac

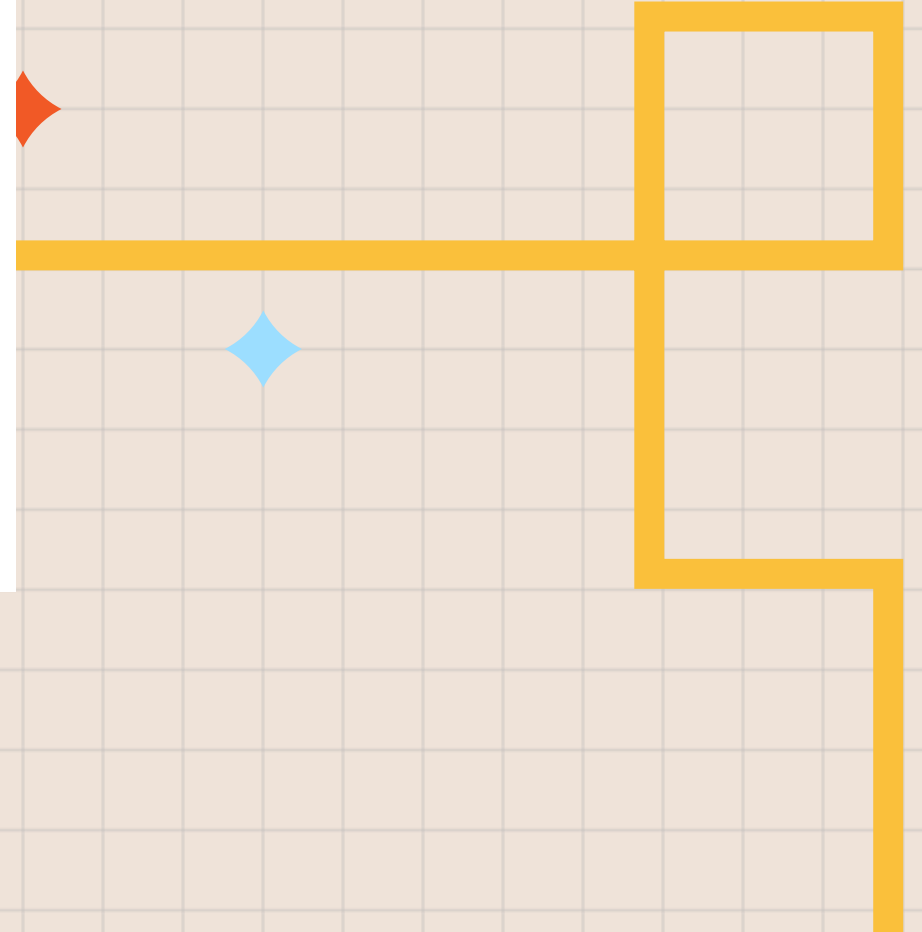
- The statute of limitations is two years from the last unequal paycheck
- Wages cannot be reduced to come into compliance with the law
- Employees can sue directly, without going through a government agency
- Two-year statute of limitations (or three if willful)
- No compensatory or punitive damages
- Successful plaintiffs get double back pay, attorneys' fees, and a raise to bring their pay up to the amount made by employees of another sex



Poll Question

**Did you know that
the NLRA gives
employees a right
to discuss their
wages?**

A look at California's Pay Equity and Transparency Laws





California's Law

Requires equal pay for those who do “substantially similar work” when viewed as a composite of skill, effort, and responsibility, under similar working conditions.

Applies to sex, race, and ethnicity.



CA: Reasons for Differences

Reasons for unequal pay must be reasonable and explain the entire difference.

Allowable explanations:

1. Seniority;
2. Merit;
3. A system that measures production; or
4. A bona fide factor other than sex, race, or ethnicity

Salary history is specifically excluded.



A close-up photograph of a person wearing a grey and blue plaid suit jacket over a light blue checkered shirt and a red tie with thin gold and blue stripes. The person's hand is visible in the foreground, slightly out of focus.

CA: Bona Fide Factors Other Than Sex, Race, or Ethnicity

Potentially education, training, or experience

But if challenged, the employer must prove the factor is:

- Not derived from a factor based on sex, race, or ethnicity,
- *Job related, and*
- Consistent with a business necessity



CA: Salary Discussions and Inquiries Allowed

Employees may discuss their wages and the wages of other employees.

They may also inquire about others' wages, whether asking the person directly or asking management. But there is no obligation for employers or employees to provide this information.

This, of course, includes anti-retaliation provisions.

CA: Salary History Ban



- Can't ask about past salary history.
- Can't decide whether to offer someone a job based on past salary.
- Can't use it as an explanation for differences in pay, even if asked back when it was legal or if the applicant volunteered the information.
- Salary history can be used for current employees, if based on bona fide factors.

California Pay Range Disclosure



The Basics

- Effective January 1, 2023.
- Applies to employers with 15 or more employees (at least one in CA)
- Employers must post the pay scale for an open position in their job postings. *Pay scale* is defined as the salary or hourly wage range that the employer reasonably expects to pay for the position.
- Upon request, employers of all sizes will be required to provide an employee with the pay scale for their current position.
- Employers of all sizes will need to keep records of job title and wage rate history for each employee throughout their employment and for three years after termination.





How This Relates to Pay Equity

Employees are going to start talking.

- If the ranges are too large, they'll think you're acting in bad faith or wonder who among them makes that *little* or that *much*.
- If the ranges are reasonable, but you have current employees outside of those ranges, there may be gossip, organizing, confrontations, or all of the above.
- If the ranges are reasonable and your current employees are paid in line with what you've posted (phew), you still may get inquiries about how someone's position in the range is determined – try to be ready to answer that.



Pay Transparency in Job Postings is Spreading

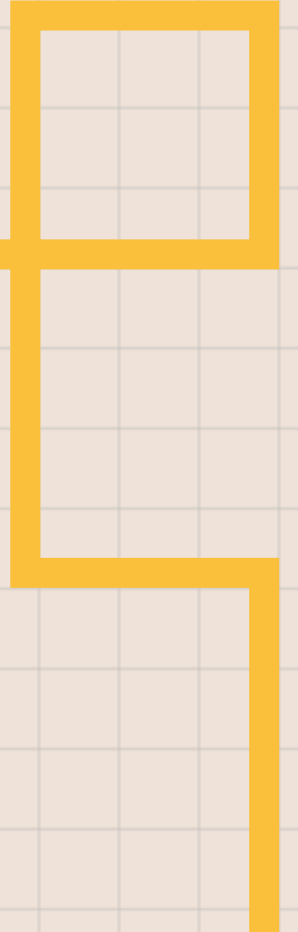
Done deals, to be required by law: California, Colorado, New York*, Washington

In the pipe: Massachusetts, New Jersey

And it's not a bad thing

- Increases applicants by 40%
- Tactical advantage over competitors
- Saves you and the applicants' time
- Helps you stick to your equal pay systems

Auditing for Compliance





Two Common Types of Pay Equity Audit

- Regression analysis: best for large employers and considered the gold standard in litigation.
- Cohort study: generally looking at small groups and requires more qualitative analysis.

Step 1 – Gather the Data

* Step 1 and 2 can be done at the same time, but since Step 1 may take the longest, I'd suggest getting started here

Info you'll need for each employee who is part of the analysis:

- Job classifications (title, level, grade, etc.)
- Full-time or part-time status
- Seniority and hire date (for all positions with a company)
- Flexible work arrangement history
- Performance reviews and ratings
- Educational qualifications and any relevant training, licenses, or credentials
- Notable responsibilities (e.g., working extra hours in the field)
- Prior job experience
- Exemption status
- Location(s)
- Sex, age, race, and other potentially relevant protected characteristics
- Total yearly compensation

Step 2 – Form Your Comparable Character Groups

- Try to group employees together who perform work of comparable character, or work that is substantially similar, as defined either by the applicable state law (if all your employees are in one state or you feel comfortable only assessing by state), or the broadest state law.
- This is going to take some thought!
- If you're large enough, or have the funds, this would be the time to bring in a professional.

Step 3 – Do the Analysis

You may have a team of statisticians and lawyers, or you may be using an internet tutorial and figuring it out on your own.



Step 4 – See if You Can Explain the Results

When you find differences, see if you can explain why they exist, using only the reasons available to you.



Step 5 – Make (or start to make) Corrections

- Smaller adjustments may be easy to fold into annual or bi-annual reviews.
- Significant disparities may warrant more immediate and obvious correction and you may want to consult with an attorney to gauge risk.

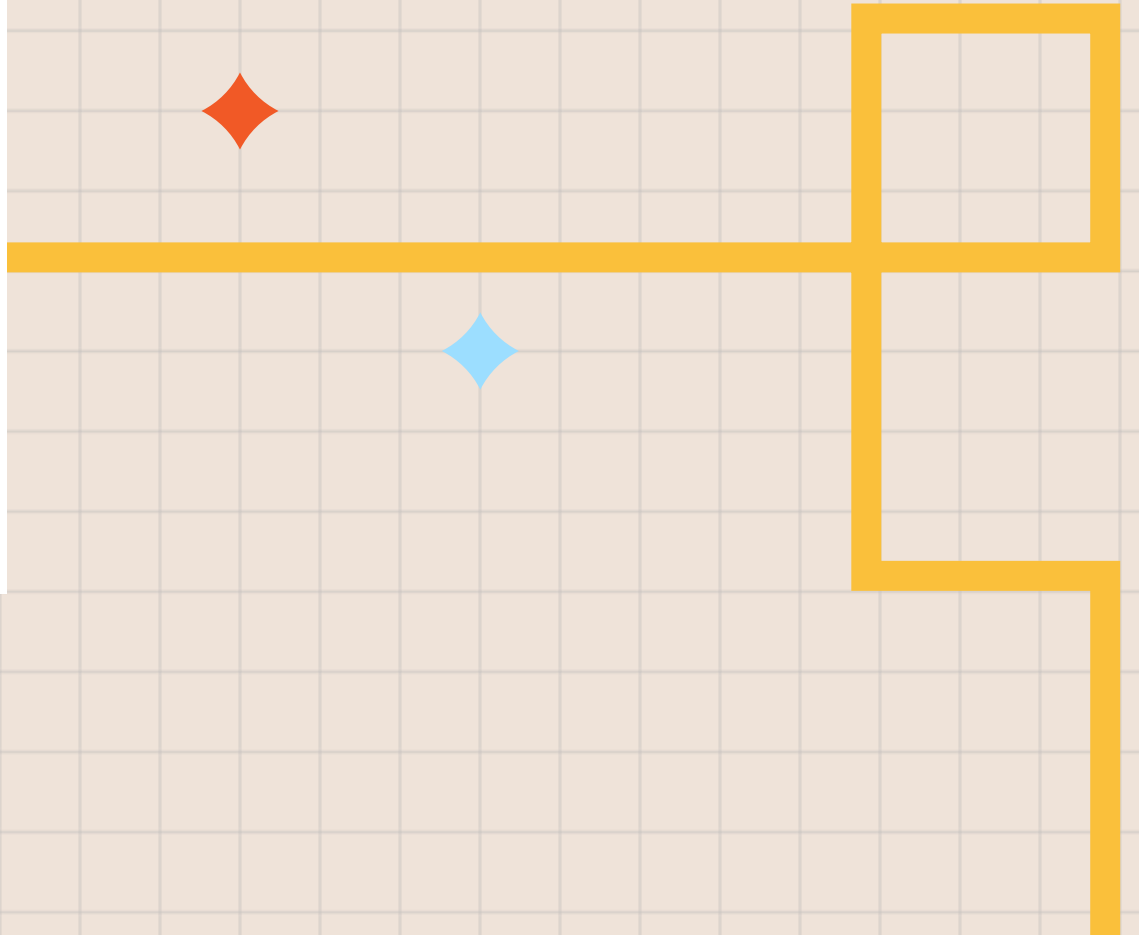




Poll Question

Have you done any
kind of pay audit?

Best Practices and Creating a Culture of Pay Equity





Make Sure HR is Running the Hiring Show

- Managers gone wild can bring your new equitable pay structure down in a matter of months.
- Do educate those involved in hiring as to *why* you need to keep compensation locked down.
- Don't expect or trust them to fully grasp the law or the extent of the company's potential liability.

Be Intentional with Your Pay Structures

- Get granular – if you only have a few levels, you may need more differentiation in your salary structure.
- Don't make pay grades so wide they're meaningless.
- Have a system for how you place and move people within a pay grade.
- Don't assume that two workers being in the same pay grade is the same as equal pay.





Post the Pay Range for Open Positions

- Attracts more applicants
- Makes your job easier
- Salary negotiation skills aren't job-related
- Market factors aren't job-related
- Remember that all benefits count





Eliminate Negotiation

- Makes your job easier
- Salary negotiation skills aren't job-related
- Market factors aren't job-related
- Remember that all benefits count

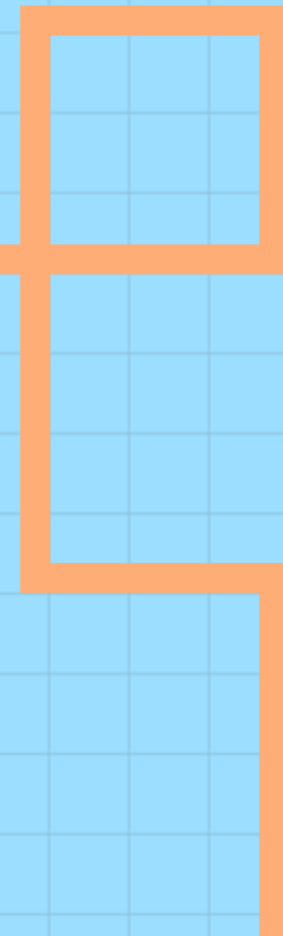
Feel free to tell candidates why you don't negotiate – this is going to become common.



If You Have to Pay New
Employees More to Get
Them in the Door, Give
Current Employees the
Same Increase



Q&A



ICW Group Policyholder Website!

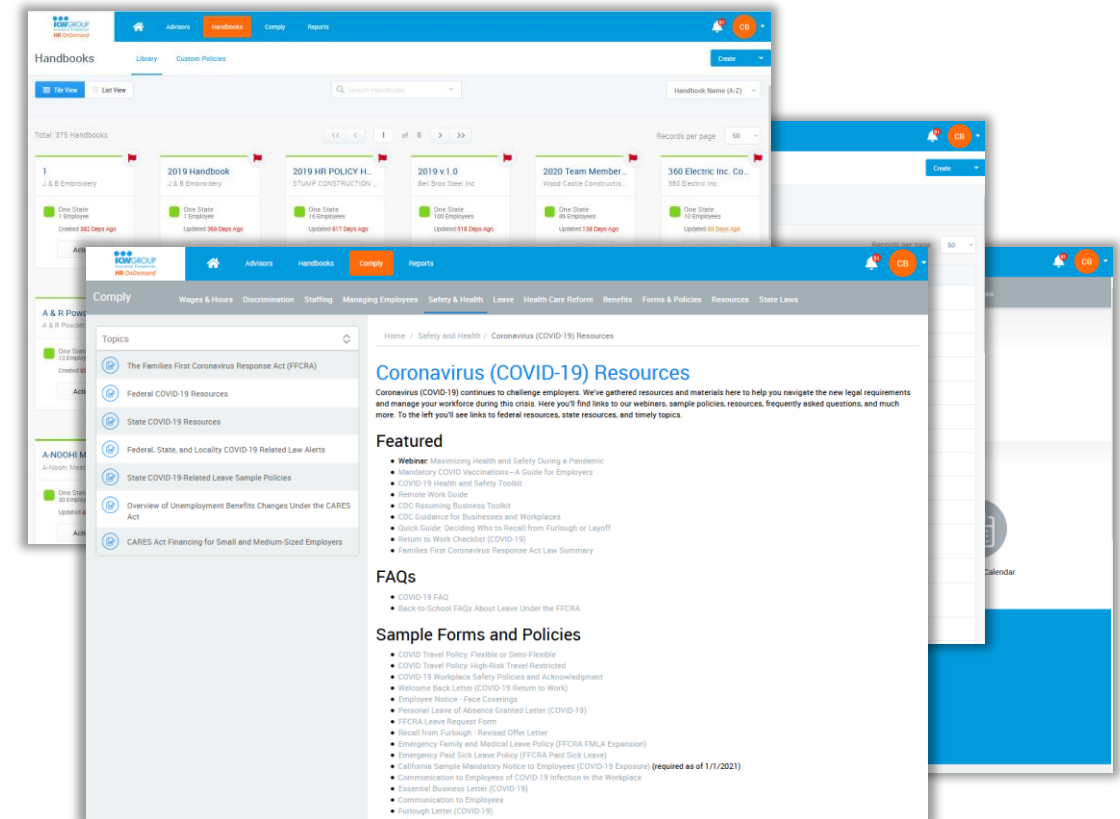


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Pay Equity: What Employers Need to Know

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