

California's Focus on Pay Equity Increases Responsibilities for Employers

By James W. Ward, J.D.; Employment Law Subject Matter Expert/
Legal Writer and Editor, CalChamber

California has had equal pay laws on the books for decades, beginning in 1949 when the Equal Pay Act — a law aimed at correcting gender-based wage discrimination and rectifying “the segregation of women into historically undervalued occupations” — went into effect.

In recent years, however, the state has focused even greater attention on pay equity issues — not only on closing the gender pay gap, which has slowed in recent years, but also reducing disparities based on race and ethnicity.

For example, California passed the Fair Pay Act and the Wage Equality Act, which took effect in 2016 and 2017, respectively. Both laws bolstered Equal Pay Act protections by prohibiting unequal pay for employees of the opposite sex or different races or ethnicities, with certain exceptions. The law was amended to restrict the use of salary history and to require pay scale disclosures to job applicants upon request.

In recent years, California has focused increased attention on closing the gender pay gap and reducing race- and ethnicity-based disparities.

Then in 2021, in an effort to further reduce unlawful pay disparities, California enacted a pay data reporting law that requires large employers with 100 or more employees to report specific pay and demographic information to the California Civil Rights Department (CRD) each year. The state also expanded pay scale disclosure requirements effective in 2023.

On top of those requirements, the California Fair Housing and Employment Act (FEHA) also prohibits gender discrimination, which includes discrimination in compensation decisions.

This constellation of statutes combined with accompanying regulations has created robust employee protections against unlawful pay disparities — as well as complicated compliance issues regarding employers' compensation practices, including not only the basic equal pay law framework, but also the recent salary history restrictions, pay scale disclosures and pay data reporting requirements.

This white paper outlines those requirements with a focus on employer compliance issues, tips and best practices. The laws described, however, have nuances and subtleties that this white paper cannot cover in their entirety, so employers should consult more extensive resources and/or their legal counsel with questions about specific issues.

Employers paying different wages to employees of different genders, races or ethnicities who perform substantially similar work must justify those differentials based on a narrow list of factors.

Equal Pay Act Basics

Under California law, employers are prohibited from paying any of their employees an amount less than employees of the opposite sex or of another race or ethnicity for “substantially similar work.” “Substantially similar work” means a composite of skill, effort and responsibility that is performed under similar working conditions — but it doesn't have to be the exact same job title or function.

If employers are paying different wages to employees of different genders, races or ethnicities who are performing substantially similar work, employers must justify those differentials based on a narrow list of factors, which include a:

- Seniority system;
- Merit system;
- System that measures earnings by quantity or quality of production; or
- Bona fide factor other than sex, race or ethnicity, such as education, training or experience.

Employers must demonstrate that each factor they relied upon is applied reasonably and accounts for the entire wage differential.

If an employer is relying on a bona fide factor other than sex, race or ethnicity, the employer must also demonstrate that the factor:

- Is not based on or derived from a sex-, race- or ethnicity-based difference in pay; and
- 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 serves; however, this defense is not available if the employee can show that an alternative business practice would serve the same purpose without producing a wage differential.

In addition to education, training or experience, other potential bona fide factors might include geographic differences, and shift or hour differentials. For example, there could be legitimate reasons for pay disparities between employees in San Francisco versus employees in a rural central valley town, such as job market and cost of living differences. But remember — it's always the employer's burden to show that the pay difference is both consistent with business necessity and job related.

The law also prohibits pay secrecy, meaning employers cannot prohibit employees from disclosing their own wages, discussing the wages of others, asking about another employee's wages or encouraging others to exercise their rights under the law. The law does not, however, create an obligation for employees to disclose their wages when asked.

Employers also are prohibited from terminating, discriminating or retaliating against any employee who exercises their rights under the law or assists others in exercising their rights.

And, as with so many employment laws, there are record retention requirements: Records of employee wages and wage rates, job classifications, and other terms and conditions of employment must be kept for three years.

Employers cannot use prior salary to justify any disparity in compensation.

Salary History Restrictions

In 2018, California began restricting the use and consideration of salary history in compensation decisions. The rationale behind this change was that reliance on prior salary perpetuates previous pay disparities.

Employers cannot use prior salary to justify any disparity in compensation. They may, however, make a compensation decision based on a current employee's existing salary, so long as any wage differential is justified by one or more of the previously discussed factors.

With respect to job applicants, employers are prohibited from:

- Asking about a job applicant's salary history, including compensation and benefits; and
- Using salary history information to make decisions about hiring or how much to pay the prospective employee (except if an applicant voluntarily and without prompting discloses their salary history to an employer, the employer may consider that information in determining how much to pay that applicant).

Employers are allowed to ask an applicant about their "salary expectation" for the position to which they've applied.

Employers should ensure that their hiring managers are trained on the state's salary history rules, and should review their job application forms and/or online hiring platforms to confirm there are no questions asking about salary history — especially if they use large online multi-state platforms that may not be tailored specifically for California law.

Pay Scale Disclosure Requirements

California began instituting pay scale disclosure requirements in 2018, with the most recent expansion of those requirements taking effect in 2023.

Under current state law, employers must, upon reasonable request, disclose pay scale information to:

- Job applicants, for the position to which they are applying; and
- Current employees, for the position in which they currently are employed.

The law defines pay scale to mean the “salary or hourly wage range that the employer reasonably expects to pay for the position.”

Additionally, employers with 15 or more employees must include in any job posting the pay scale information for the position being advertised. If an employer uses a third party to “announce, post, publish or otherwise make known a job posting,” the employer must provide the pay scale to the third party, who must include it in the job posting. This means employers using third parties, such as online platforms or recruiters, need to make sure the third party has the pay scale information and includes it in the posting.

Under the most recent expansion of this law in 2023, employers must, for each employee, maintain records of job title and wage rate history for the duration of the employment plus three years after the end of employment, which must open to inspection by the California Labor Commissioner.

Under current law, employers may be required to submit two types of reports to the California Civil Rights Department.

Pay Data Reporting for Large Employers

In 2021, California instituted pay data reporting requirements for large employers, similar to pay data reporting required by the Equal Employment Opportunity Commission (EEOC). The rationale is that requiring large employers to report pay data annually to the CRD encourages employers to self-assess any pay disparities along gendered, racial and ethnic lines, and to promote voluntary compliance with equal pay and anti-discrimination laws.

Under current law, there are two types of reports employers may be required to submit to the CRD:

- Employers with 100 or more employees on their direct payroll must submit a payroll employee report.
- Employers with 100 or more workers hired through labor contractors must submit a labor contractor employee report.

For purposes of coverage, employers must count all their payroll employees and labor contractor employees (typically through temporary/staffing agencies), including full time, part time, and those out on paid or unpaid leave — even employees working out of state. These are separate reports with distinct coverage thresholds; labor contractor employees don’t count toward the threshold for payroll employee reports, and vice versa.

Employers that meet the reporting threshold will compile their reports based on their snapshot period, which is a single pay period between October 1 and December 31 of the reporting year of the employer's choosing. This snapshot period is used to identify the payroll employees and labor contractor employees included in the pay data reports.

An employer's payroll employee report must include all of its employees — and a labor contractor employee report must include all labor contractor employees — assigned to California establishments and/or working within California during the snapshot period.

For all California payroll employees and labor contractor employees in the snapshot period, employers must identify each employee's establishment, job category, race/ethnicity, sex, pay, pay band, hours worked and hourly rates (including the mean and median hourly rates), and then group together the employees that have the same establishment, job category, pay band and race/ethnicity/sex combination.

To help ensure compliance with the law and avoid costly penalties and/or litigation, employers should follow best practices.

The pay data reports are quite complicated. Employers are strongly encouraged to review the CRD's [pay data reporting website](#) and resources when compiling their payroll employee and labor contractor employee reports. There, employers can access the pay data reporting portal, a detailed user guide, and sample Excel and .csv templates. Also available are frequently asked questions that comprehensively address everything from the basic reporting requirements to subtle nuances and issues employers may encounter in this process.

Equal Pay Tips and Best Practices

With all of these recent developments, equal pay laws in California are becoming increasingly complicated and creating more compliance issues for employers. To help ensure compliance with the law and avoid costly penalties and/or litigation, consider the following tips and best practices:

- Ensure that compensation decisions are based on objective considerations. This includes pay increases for retention purposes, as well as discretionary bonuses.
- Remember that compensation doesn't just mean straight salary; it includes all forms of compensation, such as bonuses or commissions.
- Document all compensation decisions. This includes all factors relevant to the employee's compensation, such as market factors, geographic location, etc.
- If you have 15 or more employees, make sure all job postings include pay scale information.
- Ensure there are procedures in place for disclosing pay scales upon reasonable request to current employees and job applicants.
- Review job descriptions to ensure that they support salary decisions and reflect actual job duties, functions, skills and responsibilities.
- Make sure you don't discipline employees for discussing wages, and review employee handbooks to make sure no policies prohibit or discourage such discussions.

- Follow the rules relating to prior salary history.
- Ensure your record retention practices account for the three-year record retention requirement under the law.
- Prohibit retaliation against employees for asserting rights under the law, and ensure that you have a reporting mechanism in place. This can be part of your existing equal employment opportunity policy.
- If you have 100 or more employees or labor contractor employees, be sure to review CRD resources for pay data reporting well in advance of the deadline, the second Wednesday of May each year, so you have enough time to compile the appropriate report.
- Train hiring managers and others who make salary-related decisions on how to comply with the law, including the rules relating to prior salary history, pay scale requests, and disclosures and retaliation protections.

v05012023

Get a FREE 7-Day Trial of HRCalifornia.com

Don't miss out on valuable HR content, easy tools, and quick access to California's employment laws.

Test out [HRCalifornia.com](https://www.hrcalifornia.com), our member's only website, and you'll find hundreds of resources.

Sign up for a free 7-day trial of HRCalifornia.com.

There's no obligation or credit card required.

