



**DEPARTMENT OF FAIR EMPLOYMENT
AND HOUSING
ENFORCEMENT DIVISION
DIRECTIVE**

**DIRECTIVE NUMBER
215
DISTRIBUTION DATE
August 22, 2016**

1. **SUBJECT: COMPLAINTS ALLEGING GENDER DISCRIMINATION IN THE FORM OF PAY INEQUALITIES**
2. **PURPOSE:** To set forth the procedures for accepting and processing complaints alleging pay inequalities resulting from sex discrimination.
3. **BACKGROUND:** The Fair Employment and Housing Act (FEHA) (Government Code section 12940, subdivision (a)), prohibits discrimination "...in compensation or in terms, conditions or privileges of employment."
4. **PROCEDURES:**
 - A. **Pay Inequality Complaints:**
 - 1) The Department accepts complaints where there are allegations of pay inequalities based on sex. These cases usually fall into two categories:
 - a) **"Equal pay"** cases which typically allege that pay differences between two jobs (which may or may not have the same job title) are not justified because the jobs require equal or substantially similar skill, effort, and responsibility and are performed under similar working conditions.

EXAMPLE: The comparison of a woman's position in a jail setting as a "matron" with that of a man's job as "jailer." Depending on the duties actually performed, paying the "matrons" differently could be a violation of the Fair Employment and Housing Act. (See DFEH v. County of Madera (1983) FEHC Dec. No. 83-22).
 - b) Sex based **"intentional discrimination"** cases where decisions regarding pay are based on vague and overbroad job classifications, failure to create job descriptions which accurately reflect actual duties, and other such actions which indicate that intentional sex discrimination was part of the reason for the pay disparity.

EXAMPLE: A woman classified as a clerk-typist performed many of the duties of a higher job classification previously held by a male. In this case, the supervisor was found to have opposed the classification of women into higher paying jobs, and to have viewed women only as secretaries. Also, statistical evidence demonstrated the underutilization of women in certain job categories. The evidence clearly showed that intentional sex discrimination was part of the reason for the pay disparity (DFEH v. City of Napa Housing Authority (1981) FEHC Dec. No. 81-12).

- 2) Equal pay and intentional discrimination cases will be processed routinely.
- 3) Refer to Directive 216, "Referral of Equal Pay Cases Between the Department of Fair Employment and Housing and the Labor Commissioner's Office" regarding the referral of cases involving allegations of equal pay to that agency.

B. Comparable Worth Cases:

- 1) Comparable worth cases arise when the complainant refers to characteristics of a position dissimilar to her own in order to measure the relative worth, value and equivalency of her position compared to the dissimilar position.

EXAMPLE: A secretary's job (female dominated occupation) could be compared with that of a carpenter (male dominated occupation) in an effort to demonstrate equivalent worth and establish any pay disparity as discrimination.

- 2) The Department does not consider "comparable worth" cases to constitute sex discrimination in violation of the FEHA. However, staff **should accept cases involving allegations of "comparable worth" at intake.**
 - a. Through interviews with the complainant, respondent employer and co-workers and from documentary evidence (such as, job descriptions), the investigator should establish the job duties, responsibilities and characteristics of complainant's position at issue, and the job duties, responsibilities and characteristics of the position(s) deemed to be of comparable worth.
 - b. The investigator assigned to the case should discuss with his/her supervisor whether the complainant's position and the position(s) deemed to be of comparable worth are sufficiently

similar to warrant continuation of the investigation. The investigator and supervisor should also discuss whether there is evidence of some other violation to warrant continuation of the investigation.

- c. If the complainant's position and position(s) deemed to be of comparable worth are sufficiently dissimilar so that there is insufficient evidence of sex discrimination, and there is also insufficient evidence of any other violation of the civil rights laws, the case should be closed under the "Insufficient Evidence" Closing Category.
- d. If the investigator and supervisor discuss the duties, responsibilities and characteristics of the positions at issue, and questions still remain as to the similarity of the positions, the investigator and supervisor will bring the matter up at case grading for input from the investigator's assigned case grading attorney.

5. **CASES INVOLVING THE DIVISION OF LABOR STANDARDS ENFORCEMENT (DLSE) LABOR COMMISSIONER'S OFFICE AND THE DFEH:**

Under Senate Bill 358, the Division of Labor Standards Enforcement (DLSE) Labor Commissioner's Office is tasked with enforcing the California Equal Pay Act (under Labor Code section 1197.5). Enforcing this statute is reserved solely for the Labor Commissioner's Office– the DFEH **does not** enforce the California Equal Pay Act.

Both the California Equal Pay Act and the FEHA are implicated in cases where sex discrimination and pay inequality occur as a result of sex discrimination. For example, where male and female school teachers perform the same work, but female school teachers are paid less than male school teachers because they are women, both the EPA and the FEHA are implicated, and the DFEH may take this case.

An employee who is paid less than employees of the opposite sex for the same or substantially similar work because of that employee's protected characteristic (e.g., race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status) can file a complaint of discrimination with the DFEH for violation of the FEHA.

“Substantially similar work” refers to work that is mostly similar in skill, effort, responsibility, and performed under similar working conditions. Skill refers to the experience, ability, education, and training required to perform the job. Effort refers to the amount of physical or mental exertion needed to perform the job. Responsibility refers to the degree of accountability or duties required in performing the job. Working conditions has been interpreted to mean the physical surroundings (temperature, fumes, ventilation) and hazards.

The employee facing pay inequality solely based on sex discrimination may elect to have the Labor Commissioner’s Office investigate the pay inequality under the EPA, and the DFEH to investigate the sex discrimination under the FEHA. Or, the employee may elect to have the DFEH investigate both the pay inequality and the sex discrimination solely under the FEHA (and not the EPA) and no further action will be taken by the Labor Commissioner's Office.

6. **CASES INVOLVING ONLY THE DFEH:** The DFEH has sole jurisdiction in cases where:

- Pay inequality is not based on sex, but on some other protected class (e.g., race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, gender identity, gender expression, age, sexual orientation, or military and veteran status.)
- Male and female employees are paid the same for identical or substantially similar work, but received different non-wage related benefits, advantages, perks to the job (e.g., flex time, alternate work schedules, training, promotional opportunities).
- An employer institutes unequal job assignments for jobs that are not substantially similar work that segregate one sex into lower paying jobs.

The above list is illustrative and not exhaustive.

7. **APPROVAL:**



Kevin Kish, Director

August 22, 2016

Date