



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

**DIRECTIVE NUMBER
215**

**DISTRIBUTION DATE
October 9, 2017**

1. **SUBJECT: COMPLAINTS ALLEGING GENDER, RACE, OR ETHNICITY (NATIONAL ORIGIN, ANCESTRY) 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, race, or ethnicity (national origin, ancestry) discrimination and to describe the respective investigatory jurisdictions of the Labor Commissioner's Division of Labor Standards Enforcement and the Department of Fair Employment and Housing.
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." Equal pay cases typically allege that the pay differences between two jobs (which may or may not have precisely the same job title) are not justified because the jobs are substantially similar, require substantially similar skill, and are performed under similar working conditions.

A shorthand for the principle the California Equal Pay Act expresses is that individuals should receive "equal pay for substantially similar work." "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 jobs do not have to be in the same location for the California Equal Pay Act to apply.

4. **PROCEDURES:**

A. Pay Inequality Complaints:

- 1) The Department accepts complaints where there are allegations of pay inequalities based on sex, race, or national origin (including ethnicity and ancestry). These cases may stem from intentional discrimination or from instances where an employer's policy or practice results in otherwise unjustified pay disparities regardless of intent.

EXAMPLES OF COMPLAINTS DFEH WOULD ACCEPT:

- a) An employer has a policy of providing additional compensation to any employee who is the sole wage-earner in their household, even if the employee is doing exactly the same job as others in their unit. More males in the company are the sole wage-earner in their household.
 - b) A white female who has one year of elementary school teaching experience is employed as a teacher making \$15 an hour. An African-American male who also has one year of elementary school teaching experience is employed as an elementary school teacher at a different school in the same district, but is only paid \$14 an hour.
 - c) A county calls guards in its women's jail "matrons" but calls guards in its men's jail "jailers." Although they do the same work, matrons are paid less than jailers.
- 2) Equal pay 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 their own in order to measure the relative worth, value and equivalency of their position compared to the

dissimilar position. These cases do not constitute discrimination under the FEHA. However, DFEH staff **should** accept cases involving allegations of “comparable worth” at intake, and should attempt to determine whether the jobs in question are in fact “substantially similar.”

EXAMPLE: A man from Peru is employed as a construction foreman. He compares his job to that of a man from Mexico working as an architect on the same project for the same company in an effort to demonstrate equal pay discrimination based on national origin. Because an architect and a construction foreman are likely not substantially similar jobs the Peruvian man likely does not have an equal pay claim. However, if upon investigation by DFEH, it appears that foremen and architects in this company do the same job, this could be an equal pay case. Similarly, if it turns out that the company routinely classifies Peruvians as foremen and Mexicans as architects regardless of their education, the case may be an intentional discrimination case under other employment law principles.

2) Specific Procedures in “comparable worth” cases:

- 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 their 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 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. **HOW TO KNOW WHETHER THE LABOR COMMISSIONER'S DIVISION OF LABOR STANDARDS ENFORCEMENT OR DFEH HAS JURISDICTION:**

Under Senate Bill 358, the Labor Commissioner's Office is tasked with enforcing the California Equal Pay Act (under Labor Code section 1197.5). DFEH does not enforce the California Equal Pay Act. Similarly, the California Government Code makes DFEH responsible for enforcing the Fair Employment and Housing Act. DLSE does not enforce the FEHA.

Both the California Equal Pay Act and the FEHA are implicated in cases where an employee is paid less than another employee of a different sex, race, or ethnicity (national origin, ancestry) for substantially similar work, whether intentional or under a disparate impact theory. For example, in the example of the African American teacher discussed above, both the EPA and the FEHA are implicated, and either DLSE or DFEH may take this case. Both the EPA and the FEHA are also implicated by the example of additional pay for a primary wage earner.

An employee who claims that they are paid less than another employee who does substantially similar work because of their sex, race, or ethnicity (national origin, ancestry) may elect to have either the Labor Commissioner's Office or DFEH investigate the case. If a claim is filed with DLSE, it will investigate the case under the Equal Pay Act. If a claim is filed with DFEH, it will investigate the case under the FEHA.

However, employees should be aware that the Labor Commissioner's Office can only investigate pay differentials and seek remedies for pay differentials based on sex, race, or ethnicity (national origin, ancestry). All other types of cases should be filed with DFEH.

Examples of cases that can only be handled by DFEH are:

1. An employee or job applicant is discriminated against in pay because of sex, race, or ethnicity (national origin, ancestry) but is not claiming that another person doing similar work is being paid more. For example, if an employer pays female managers less than the men who report to them the female managers could file a complaint with DFEH. DLSE would not handle this case.
2. An employee claims a pay differential based on a protected characteristic other than sex, race, or ethnicity (national origin, ancestry) (i.e., religious creed, physical disability, mental disability, medical condition, genetic information, marital status, gender identity, gender expression, age, sexual orientation, or military and veteran status). For example, if an employer pays a man who uses a wheelchair less than a non-disabled man who does the same work, the individual with a disability could file a complaint with DFEH. DLSE would not handle this case.
3. An employer institutes unequal job assignments for jobs that are not substantially

similar work that segregate members of a protected class into lower paying jobs. For example, if an employer only allows Latinos to work in the kitchen and refuses to hire them to the front of the house, a Latino employee could file a complaint with DFEH. DLSE would not handle this case.

4. An employer pays equal wages to all staff doing substantially similar work, but offers certain groups better non-wage benefits, such as flex time, telework, training or promotions. For example, if an employer tells a Muslim stockroom worker that she cannot be promoted to a retail clerk unless she stops wearing her headscarf, the woman should file a complaint with DFEH. DLSE would not handle this case. Similarly, if an employer only allows women to work from home, a male employee could file a complaint with DFEH. DLSE would not handle this case.

Note: DFEH will generally have jurisdiction over any type of equal pay claim that could be filed with DLSE. An exception would be a case where there is a pay differential on the basis of sex, race, or ethnicity (national origin, ancestry), and there is no evidence of intentional discrimination or disparate impact. In other words, if a woman claims that she is being paid less than a man doing substantially similar work, and the investigation reveals that there was no particular discriminatory “reason” for the employer’s pay decision, the case should be referred to DLSE.

6. **APPROVAL:**



Kevin Kish, Director

October 6, 2017

Date