



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

**DIRECTIVE NUMBER
216**

**DISTRIBUTION DATE
October 11, 2017**

1. **SUBJECT: REFERRAL OF EQUAL PAY CASES BETWEEN THE DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING AND THE DIVISION OF LABOR STANDARDS ENFORCEMENT (DLSE) LABOR COMMISSIONER'S OFFICE**
2. **PURPOSE:** To set forth the procedures for the appropriate referral of individuals with wage disparity claims based on sex, race, or ethnicity (national origin, ancestry) to the Division of Labor Standards Enforcement (DLSE) (Labor Commissioner's Office) and to differentiate the jurisdictions of the Labor Commissioner's Office and the Department of Fair Employment and Housing (DFEH).
3. **BACKGROUND:** The Labor Commissioner's Office and DFEH administer and enforce laws which prohibit wage discrimination on the basis of sex, race, and ethnicity (national origin, ancestry).

A. **DFEH Statutes:**

DFEH is responsible for enforcing the Fair Employment and Housing Act (FEHA), California Government code section 12900 et seq., which prohibits many forms of discrimination, including wage discrimination based on sex race, and national origin (including ancestry and ethnicity).

Government Code section 12940 provides, in part:

"It shall be an unlawful employment practice, unless based on a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

- (a) For an employer, because of the 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 or veteran status of any person,...to discriminate against the person in compensation or in terms, conditions or privileges of employment.”

B. Labor Code Statutes

The Labor Commissioner’s Office is responsible for administering and enforcing the provisions of the Labor Code, which prohibit wage disparities based on sex, race, or ethnicity. Labor Code section 1197.5, commonly referred to as the Equal Pay Act, defines wage inequality based on sex, race, or ethnicity, prohibits such disparities, and establishes the rights and duties of employees and employers in any situation in which such wage disparity is alleged and found to exist.

Labor Code section 1197.5 provides, in part:

“(a) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates:

(1) The wage differential is based upon one or more of the following factors:

(A) A seniority system;

(B) A merit system;

(C) A system that measures earnings by quantity or quality of production;

(D) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph, “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.

(2) Each factor relied upon is applied reasonably.

(3) The one or more factors relied upon account for the entire wage differential. Prior salary shall not, by itself, justify any disparity in compensation.

(b) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates:

(4) The wage differential is based upon one or more of the following factors:

(E) A seniority system;

(F) A merit system;

(G) A system that measures earnings by quantity or quality of production;

(H) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph, "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.

(5) Each factor relied upon is applied reasonably.

(6) The one or more factors relied upon account for the entire wage differential. Prior salary shall not, by itself, justify any disparity in compensation.

C. Responsibilities of Each Department:

1) DFEH and Labor Commissioner Staff Responsibilities

All professional staff in DFEH and the Labor Commissioner's Office and all other personnel whose duties may involve public contact are required to be familiar with the relevant statutory mandates and must be able to advise accurately any person contacting their offices of his/her rights and duties under these sections.

2) DFEH Procedural Instructions:

DFEH staff should refer to Directive 215, "Complaints Alleging Gender, Race, or Ethnicity (National Origin, Ancestry) Discrimination in the Form of Pay Inequalities" for instructions on handling cases of this nature.

4. PROCEDURES FOR COOPERATION AND REFERRAL:

The following procedures have been developed by DFEH and the Labor Commissioner's Office to promote cooperation between the agencies, avoid a duplication of effort, and provide guidance to staff in handling prospective Labor Commissioner's Office claimants and/or DFEH complainants.

A. General:

Persons inquiring about wage discrimination based on sex, race, or ethnicity should be given the opportunity, within the procedures of the relevant agency, to discuss their concerns with a member of the professional staff. The staff member should express the agency's willingness to accept and

investigate the claim or complaint, and render an objective determination based on all of the available facts.

B. Claimants Initially Contacting the Labor Commissioner's Office:

1) If the claim is solely one of wage disparity based on sex, race, or ethnicity, the Labor Commissioner's Office will accept the claim and advise the claimant that they also have the option of filing with DFEH. The Labor Commissioner's Office will refer the claimant to a DFEH document entitled "Equal Pay Cases" on the DFEH's and Labor Commissioner's websites for reference, or a copy of "Equal Pay Cases" will be mailed to the claimant if they do not have access to the Internet.

2) If a wage disparity claim based on sex, race, or ethnicity is combined with other issues of alleged discrimination, the claimant will be advised that they have the following alternatives:

a) Requesting the Labor Commissioner's Office to handle the claim for wage disparity.

If the claimant selects this alternative, the Labor Commissioner's Office will accept the claim and advise the claimant that they also have the option of filing with DFEH. The Labor Commissioner's Office will refer the claimant to a DFEH document entitled "Equal Pay Cases" on the DFEH's and Labor Commissioner's websites for reference, or a copy of "Equal Pay Cases" will be mailed to the claimant if they do not have access to the Internet. The claimant is responsible for contacting DFEH to file claims on issues other than wage discrimination; *or*

b) Filing all of his/her claims, including the claim for wage discrimination, with DFEH. If the claimant selects this alternative, DFEH shall process all claims. No further action will be taken by the Labor Commissioner's Office.

- 3) If the issue is one of sex, race, or ethnicity (national origin, ancestry) discrimination involving issues other than sex-, race-, or ethnicity-based wage disparity as defined by Labor Code section 1197.4, the claimant will be referred to DFEH with no further action by the Labor Commissioner's Office. Examples would include alleged discrimination in hiring, promotions, seniority systems, training practices, or termination.

C. Complainants Initially Contacting DFEH:

At the conclusion of the DFEH intake interview, complainants initially contacting DFEH with issues over which both the DFEH and the Labor Commissioner's Office have jurisdiction, will be advised that the Labor Commissioner's Office is also an avenue of redress. The DFEH will refer the complainant to a DFEH document entitled "Equal Pay Cases" on the DFEH's and Labor Commissioner's websites for reference, or a copy of "Equal Pay Cases" will be mailed to the complainant if they do not have access to the Internet. DFEH will accept the complaint if that is desired by the complainant.

5. INTERAGENCY COOPERATION:

A. Authority for Sharing Information:

The Labor Commissioner's Office and DFEH recognize that each is a law enforcement agency for purposes of the California Information Practices Act. The Labor Commissioner's Office and DFEH agree to share information in matters requiring joint investigation by the agencies (such as, in cases where the Labor Commissioner's Office is investigating a sex-based wage disparity claim while the DFEH is investigating allegations of other forms of discrimination). In addition, the Labor Commissioner's Office and DFEH agree to share information in cases where the agencies determined that the sharing of information would assist in the investigation, resolution, and prosecution of the case.

B. Procedures for Sharing Information:

Each agency may make appropriate information available to the other upon request. Requests will be made, and responded to, by the person in charge of the respective offices and will be made in writing. The agency receiving such shared information shall maintain the confidentiality of such shared information consistent with applicable sections of the California Information Practices Act, the California Public Records Act, and the California Labor Code.

C. Interpretation of this Directive:


Questions regarding the interpretation of this Directive should be referred through appropriate channels to the DFEH's Chief of Enforcement or the Deputy Chief of the Labor Commissioner's Office, or such other designated person.

6. APPROVAL:



Kevin Kish, Director

10/11/17
Date



Julie A. Su, CA Labor Commissioner

10/11/17
Date