

**CALIFORNIA'S FAIR PAY  
AND TRANSPARENCY  
REQUIREMENTS**



**Blue Whale**  
**Compensation**

*2022 - Guide for*  
*Employers*

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# SECTION I: FAIR PAY ACT

## **BACKGROUND**

*Under prior state law, you could not pay an employee less than the rate paid to an opposite-sex employee in the same establishment for equal work on jobs that required equal skill, effort and responsibility.*

## **SENATE BILL 358 (FAIR PAY ACT) GENDER WAGE EQUALITY**

*California enacted the Fair Pay Act, which revises and expands previous state law (Labor Code section 1197.5) relating to gender pay inequality or disparity and provides greater protections than federal law. The Fair Pay Act become effective January 1<sup>st</sup>, 2016.*

## **SENATE BILL 1063**

*In 2017, SB 358 was added to extend Fair Pay Act protections to prevent race- and ethnicity-based disparities in pay.*

*With SB 358 and the expansion based on race and ethnicity brought by SB 1063, these provisions were removed from California law:*

- **JOB COMPARABILITY** - Under the California Fair Pay Act, employers are prohibited from paying any of their employees less than employees of the opposite sex, race, or ethnicity for “substantially similar work.”
- The term “substantially similar work” replaced the “equal work” for “equal skill, effort and responsibility” standard contained in the prior law.
- **EXPANDED WORKPLACE COMPARISON** - The amendment struck the requirement that employees compare jobs at the “same establishment”. Under SB 358, employees were able compare the pay of jobs at their current location with those across town—or across the state. However, cost of living can be used as a factor.
- **PAY SECRECY PROHIBITED** - Under California's Fair Pay Act, employers cannot prohibit employees from:
  - Disclosing their own wages
  - Discussing the wages of others
  - Asking about another employee's wages
  - Aiding or encouraging other employees to exercise their rights under the Fair Pay Act

*However, whereas the Act did not create an obligation to disclose wages when asked, SB 1162 will now require an employer to provide such information to an employee. It is important to remember that the ability of employees to discuss wages is already protected by other existing state and federal laws, even though the Fair Pay Act also includes this same protection.*

### **PROVING UNFAIR PAY**

*Under the California Fair Pay Act, employers must use “substantially similar work” as the framework to explain gender, race, and ethnicity pay gap differences among employees. “Substantially similar work” is defined as a composite of*

- Skill,
- Effort and
- Responsibility that is performed under similar working conditions. It does not have to be the exact same job title or function.



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### **EMPLOYER BURDEN TO SHOW NO DISPARITY**

*Paying different wages to employees of different genders who are performing substantially similar work can only be justified if the employer shows all the following:*

*1. The pay difference is based on one or more of the following four listed 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.*

*2. Each factor you rely on is applied reasonably; and*

*3. The one or more factors you rely on account for the entire pay difference.*

*To defend a pay differential based on the fourth factor —“bona fide factor other than sex”— an employer must also demonstrate that the factor:*

- 1. Is not gender, race, or ethnicity based;*
- 2. Is job related; and*
- 3. Is consistent with “business necessity.”*

## **BUSINESS NECESSITY**

*“Business necessity” is specifically defined under this law to mean that you have an overriding legitimate business purpose and the factor relied upon effectively fulfills the business purpose it is supposed to serve.*

*If the employee shows that an alternative business practice exists that would serve the same business purpose without creating the pay difference, you cannot rely on this defense.*

## **JUSTIFICATION FOR PAY GAP DIFFERENCES**

*The burden is on employers to justify pay differentials from an acceptable list of factors that must be applied reasonably. The relied upon factors must account for the entire wage differential. Unlike FEHA and Title VII, neither the state Fair Pay Act or the federal Equal Pay Act require an employee to show any discriminatory intent.*

*The California Fair Pay Act also enacted provisions to address “pay secrecy,” which the legislature found contributes to the gender wage gap “because women cannot challenge wage discrimination that they do not know exists.”*

## **SALARY HISTORY - ADDITIONAL PAY COMPLIANCE BILLS**

- Assembly Bill 1676 (1/2017) - prevents employers from using “prior salary ... by itself” to justify any pay disparities between workers. The law does not ban questions about prior salary; however, such questions cannot be the sole reason an employer pays one employee less than another for substantially similar work.
- Assembly Bill 168 (1/2018) - Prohibits an employer from relying on the salary history information of an applicant for employment as a factor in determining whether to offer an applicant employment or what salary to offer an applicant.
- Additionally, AB 168:
  - Prohibits an employer from seeking salary history information about an applicant for employment.
  - However, it does not prohibit an applicant from voluntarily and without prompting disclosing salary history information.
  - Does not prohibit an employer from considering or relying on that voluntarily disclosed salary history information in determining salary.



## **JOB LEVELING**

YOUR GUIDE TO ACHIEVING PAY EQUITY  
THROUGH A POINT-FACTOR ANALYSIS

**A Users Guide - Download**



## GEOGRAPHIC DIFFERENCES, SHIFT OR HOUR DIFFERENTIALS

### Question:

What happens if employees do not work at the same establishment or even within the same geographic location?

### Answer:

The previous version of this law stated that the employee had to show that the pay difference was between employees “within the same establishment.”

Under the Fair Pay Act, the employee does not need to meet this requirement. Employees who claim that they are being paid unfairly based on gender can compare themselves to employees working in different geographic locations. However, the author of the legislation submitted a letter into the legislative file, stating that differences in geographic locations can be considered a “bona fide factor.” The letter also notes that work performed on different shifts or at different times of day can also be considered bona fide factors.

It will be the employer's burden to show that a pay difference based on different geographic location, different shifts, or different times of day is consistent with business necessity and job related, as specified above.

If the pay of an employee in Bakersfield, for instance, is being compared to the pay of an employee in San Francisco it does not automatically disqualify the claim. Instead, the employer must justify why this is a “bona fide factor.”

## EQUAL PAY FOR COMPARABLE WORK



### GENERAL PREMISE

In order to achieve pay equity, you need to establish a process that outlines what comparable work means. By using defined parameters and sub parameters, you are able to establish the hierarchy that dictates which jobs require a justified higher salary range.

Internally, you and your team can create levels that group the jobs that are most similar. Base on a review that considers the job's skill, effort, responsibility and working conditions, you can feel confident that the qualifications and work done by different titles justifies them being paid similarly. Or you can feel confident that one title is more complex than another and deserves a higher salary.

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## **RETALIATION PROHIBITED**

*The Fair Pay Act also prohibits employers from terminating, discriminating, or retaliating against an employee who exercises his/her rights under the Act, assists others in exercising their rights or acts in any way to invoke or enforce the Act, such as bringing a complaint with the Labor Commissioner.*

## **FAIR PAY ACT REMEDIES**

*The law provides different enforcement methods and remedial measures.*

### **ADMINISTRATIVE REMEDIES**

- An employee can file a complaint with the Division of Labor Standards Enforcement (DLSE) that the employer has violated the Fair Pay Act. The DLSE can investigate and enforce any payment owed to the employee(s).
- The Department of Industrial Relations (DIR) or the DLSE can bring a civil action on behalf of the employee and other similarly affected employees to recover unpaid wages, an additional equal amount as liquidated damages and costs of suit. In other words, if \$15,000 of wages were owed due to the unlawful wage differential, the employee would get an additional \$15,000 in liquidated damages.

### **CIVIL REMEDIES**

*An employee can bring a civil action for the amount of wages not fairly paid, an equal amount of liquidated damages, interest, costs of suit and reasonable attorneys' fees. A civil action must be brought within two years after the cause of action occurs; if the violation is willful, then the claim must be brought within three years.*

*An employee who has been retaliated or discriminated against for asserting his/her rights or for protected wage discussions can file a civil action for reinstatement, reimbursement of lost wages and work benefits, interest, and other equitable relief. A civil action under this provision must be brought within one year after the cause of action occurs.*

### **RECORDKEEPING UNDER THE FAIR PAY ACT**

*You must keep the following employee records for three years:*

- Wages and wage rates
- Job classifications
- Other terms and conditions of employment
- SB 1162 expanded record keeping requirements and employers should also keep track of the bands, ranges, and pay information as published in their job posts.



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## **HOW TO EVALUATE WHETHER A PAY DIFFERENTIAL EXISTS**

- *Employers may want to examine pay rates for the same or substantially similar jobs considering the California Fair Pay Act. When determining whether a pay differential may exist, group all employees of the same gender that do substantially similar work into one group. This will be the “comparator group” that must be used by the employee to demonstrate a gender wage disparity. When grouping employees, look at the skills, effort, and responsibilities of the job as well as the working conditions. For example, if male employees in the comparator group are paid \$10,000 more a year than a female employee in the same comparator group, then a gender pay disparity exists.*
- *If pay disparity exists, among employees based on gender, ethnicity, or race, review the four factors listed above and determine whether, based upon the four factors reasonably applied, the differential is justified and accounts for the entire pay difference. Remember that if you rely on the fourth factor — “bona fide factor other than sex, race, and ethnicity” — you must also demonstrate that the factor is not gender based and is job related and consistent with business necessity, as defined.*
- *Pay close attention to market factors when evaluating whether a pay differential exists. While market factors may be relevant when negotiating a compensation package, market factors alone will not overcome a pay differential.*
- *Additionally, take note of any geographic differences between employees located in different locations. Like market*

*conditions, geographic differences can be considered a “bona fide factor,” when justifying the existence of a wage disparity. However, it is no longer the case that geographic differences alone will justify a wage differential.*

- *Because of potential exposure to a Fair Pay Act claim, consider conducting any analysis of pay rates with the advice of an attorney. In addition, documentation of salary decisions is crucial.*

## **PAY EQUITY ANALYSIS Why Conduct a Pay Equity Analysis?**

Beyond complying with federal and state requirements such as SB 1162, most companies are addressing what employees expect—and deserve—fair treatment and fair pay. Companies looking to implement commitments to employees about transparent and equitable pay can start by analyzing employees’ pay. This can process can build employee trust and motivate and engage your workforce.

Even if your company is not required to have an affirmative action plan, fair pay is mandatory in California and quickly moving forward in various other states.

For any employer, a proactive compensation analysis can guard against reputational risks and bolster your employer’s brand—making you an employer of choice in your market.

Blue Whale Compensation offers expert consulting services to help employers identify—and correct—potential patterns of disparity and adverse impact so you can bring your pay equity strategy to life. Our services are fast, reliable, and affordable.

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## ***FAIR PAY ACT GUIDANCE***

*Take into account the following recommendations:*

- *Ensure that compensation decisions are based on objective considerations. This includes increases for retention purposes, as well as discretionary bonuses.*
- *For purposes of establishing consistency across all forms or rewards, remember that compensation doesn't just mean straight salary, but 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.*
- *Review job descriptions to ensure that they support salary decisions and reflect actual job duties, functions, skills, and responsibilities.*



- *Ensure that you do not discipline employees for discussing wages and review employee handbooks to remove any prohibitions that may exist.*
- *Remember that, while an employee can ask about wages, the employer is not required to disclose the wages of other employees.*
- *Train hiring managers and others that make salary related decisions in compliance with the Fair Pay Act.*
- *Update, if necessary, your record retention practices to account for the three-year record retention requirement under the new law.*

- *Prohibit retaliation against employees for asserting rights under the Fair Pay Act and ensure that you have a reporting mechanism in place. This can be part of your existing equal employment opportunity policy.*
- *Again, strongly consider working with counsel to develop any fair pay analysis.*

## **SECTION II:**

# **PAY TRANSPARENCY FOR PAY EQUITY ACT**

### **Senate Bill 1162 - Pay Transparency for Pay Equity Act**

## **PAY SCALE POSTING**

*All employers in the state with at least 15 workers must include the hourly rate or salary range on all job listings and provide the pay scale to current employees upon request.*

### **POSTING REQUIREMENTS**

*Under existing California law, after an external applicant completes an initial interview for a position, an employer must provide the position's salary or hourly wage range upon the applicant's reasonable request. SB 1162 amends existing this requirement - employers with 15 or more employees must be prepared to include in any job posting the pay scale for a position.*

*What is a "pay scale"? Pay scale is defined as salary or hourly wage range for a position. An employer who intends to pay a set hourly amount or a set piece rate amount, and not a pay range, may provide that set hourly rate or set piece rate in response to a reasonable request for a pay scale.*



### **DISCLOSURE TO EMPLOYEES**

*Before SB 1162, California employers did not have to disclose to current employees the pay ranges for any position. SB 1162 would expand this requirement to cover current employees who request the pay scale for the position in which they are currently employed, as well as any external applicant seeking employment with the employer who makes such a request. This is significant for employers because previously this requirement only applied to applicants who had completed an initial interview.*

### **RECORD KEEPING & CALIFORNIA FAIR PAY ACT-SB358**

*California Fair Pay Act-SB358 requires that employers maintain records of a job title and wage rate history for each employee throughout the employment plus three years after the employment ends. With SB 1162, employers must be prepared to maintain the pay scale records as well.*

## **OUT-OF-STATE EMPLOYEES / EMPLOYERS**

Although California-based companies hiring outside of the state won't be required to include salary ranges on those job listings, companies based out-of-state and hiring for jobs to be performed in California will be required to disclose pay ranges.

## **PENALTIES - JOB POSTING REQUIREMENTS**

SB 1162 would also establish a civil penalty of up to \$10,000 per violation of its pay scale disclosure and job posting requirements. However, no penalty would apply for a first violation of the job posting requirement if the employer can show that all job postings for open positions have been updated to include the pay scale.

**The new obligation take effect on January 1, 2023**

## **DATA REPORTING**

### **PREVIOUS / CURRENT PROVISION - Senate Bill 973 (SB 973)**

Under SB 973, private employers with 100 or more employees are required to submit a pay data report to the California Department of Fair Employment and Housing (DFEH) that includes the number of employees by race, ethnicity and gender. The report was limited to company employees and it only required the employer to report the tabulated count within (1) each establishment, (2) by race, ethnicity, and sex with each, (3) the job category, (4) and the number of employees with each of the 12 specific pay band during the prior year.

### **EXPANDED REPORTING**

SB 1162 expands SB 973 by requesting that The Civil Rights Department (formally DFEH) receives aggregate pay data broken down by race, ethnicity, and sex for both direct employees and one separate report for employees hired through a third-party or a temporary staffing agency. The "ownership names of all contractors used to supply employee".

In addition, the employer will be required to report the median and mean (average) hourly rate for each combination, that is:

- By location
- By Race, Ethnicity, and Sex
- By regular employees and those hired through labor contractor
- By Job Category
- By Each of the 12 specific pay band during the prior year

### **REPORTING DEADLINE, NEW REQUIREMENTS**

For the new report requirements, the deadline is May 10, 2023

### **PENALTIES**

SB 1162 provided the California Civil Rights Department (CRD) to impose a civil penalty of up to one hundred dollars (\$100) per employee on any employer who fails to file the required reports. In addition, the CRD may request a civil penalty of up to two hundred dollars (\$200) per employee for any subsequent failures.

## SUMMARY

### **RATIONAL FOR PAY TRANSPARENCY**

*Pay transparency is viewed as one of several steps designed to eliminate pay gaps due to gender, ethnicity, and race. Studies suggest that in California alone, women lost over 50 billion dollars lost due to gender pay differences. People of color also were found to have lost billions due to race pay gaps. Politicians, media, and the public are concerned about pay inequality, as women and other historically marginalized groups are paid less for the same work. Increasing pay transparency is viewed as a critical component to narrowing the wage gap, including at the hiring stage.*

*The push for pay transparency is also a byproduct of Corporate America emphasizing the importance of diversity, equity and inclusion (DEI) following the racial protests in the summer of 2020. Considering that nearly half (46%) of Americans would consider switching to an employer with a more comprehensive DEI strategy, according to beqom's 2022 Compensation and Culture Report and given that diversity and equity are a critical part of America's work culture, support for pay transparency policies sends strong signals of a company's commitment to its workforce.*

### **FURTHER LEGISLATIVE ACTION OUTLOOK**

*According to one of the bill's sponsors, Senator Monique Limon, California is already behind other states and local jurisdictions in requiring the disclosure of salary ranges, including Washington State, Colorado, New York City, and soon to be the State of New York. Employers can expect the trend for greater pay transparency to continue in 2023 and beyond, with similar bills under consideration in South Carolina and Massachusetts. In California, employers can expect greater efforts to pass additional amendments to SD 1162 - including one that would made companies' pay data reports publicly available.*

### **RECOMMENDATIONS AND HOW TO PREPARE**

*To comply with SB 1162, employers are encouraged to consult with employment counsel on their job listings and should develop pay bands for each role in advance of posting the role. To prepare for potential new job posting requirements, employers should develop a process for consistently publishing wage range information in internal and external job postings, as well as a process for preserving such publications to prove compliance. Employers should train managers, recruiters, and human resources professionals on these processes and the new law's requirements. Employers must also carefully evaluate the comparability between jobs and the documentation – which is discoverable – as prescribed the California's Pay Act.*

*To prepare for potential expanded public reporting in 2023, employers may also consider an internal audit of current employee wages to ensure there are not any significant discrepancies or inequities. A pay equity analysis is highly recommended.*

### **PAY BANDS AND CALIFORNIA'S FAIR PAY ACT**

*In developing bands, grades, or ranges, California employers must exercise care to eliminate extreme cases of wage differences where the job can be determined to be comparable to other similar classifications that are in a higher grade or band.*

# Employer Resources

**California Equal Pay Act**

[SB-358](#)

**California Equal Pay Act – FAQs**

[SB-358 CA Equal Pay Act](#)

**Employment: Salaries and Wages (Pay Transparency Act)**

[SB 1162](#)

**Pay Equity, Review Assistance – Blue Whale Compensation LLC**

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**Current Development on Equal Pay Litigation – Seyfarth Shaw LLP**

[2022 Update](#)

**50 State Pay Equity Desktop Reference – Seyfarth Shaw LLP**

[What Employers Need to Know about US Pay Equity Law](#)



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*BLUE WHALE'S MISSION IS TO IMPROVE THE COMPETITIVENESS OF A CLIENT'S ENTERPRISE BY CONDUCTING HUMAN CAPITAL MODELING AND OFFERING SCALABLE ONLINE SOLUTIONS THAT ADD VALUE TO THE TOTAL REWARD PROGRAMS, COMPENSATION FUNCTIONS, EMPLOYEE BENEFITS, AND EMPLOYEE PERKS.*

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