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Do Generous Leave Policies Contribute to Pay Disparities?

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The image shows a grand, ornate interior of a state capitol building. The floor is a checkered tile pattern. In the center, there is a large, classical-style statue of a woman, possibly representing Justice or Liberty, standing on a pedestal. The walls are highly decorated with intricate carvings and arches. The ceiling is a large, vaulted dome with a decorative frieze. The lighting is warm and golden, creating a sense of grandeur and history.

California: The Most Generous State in the Union



Laws Governing Disabilities & Medical Illness

- ADA (as amended)
- FEHA
- FMLA
- CFRA
- PDL
- Paid Sick Leave
- Workers' Compensation



How Much Leave is Long Enough?

- Pregnant employee: up to 7 months of leave.
- Disabled employee: up to a year of leave? More?
 - Reasonable accommodation that is not an
 - Undue hardship
- FMLA/CFRA leave can be taken intermittently



Understanding the Gender Pay Gap



Gender Pay Gap: What is It?

Gender pay gap: the median annual pay of all women who work full time and year-round, compared to the pay of a similar cohort of men.

$$\text{EARNINGS RATIO} = \frac{\text{WOMEN'S MEDIAN EARNINGS}}{\text{MEN'S MEDIAN EARNINGS}}$$

$$\text{2017 EARNINGS RATIO} = \frac{\$41,997}{\$52,146} = 80\%$$

Association of American University Women, *The Simple Truth About the Gender Pay Gap*, 2018 Edition,
www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap

10 Occupations Where Women Collectively Lose the Most Money

	Women Employed	Men's Earnings	Women's Earnings	Pay Ratio	Profession Gap
Financial managers	554,104	\$100,575	\$65,237	65%	\$19,581,000,000
Physicians and surgeons	274,511	\$243,072	\$171,880	71%	\$19,543,000,000
Accountants and auditors	1,014,827	\$77,320	\$60,280	78%	\$17,293,000,000
First-line supervisors of retail sales workers	1,177,835	\$47,774	\$35,217	74%	\$14,790,000,000
Registered nurses	2,092,489	\$71,590	\$65,612	92%	\$12,509,000,000
Marketing and sales managers	383,998	\$100,288	\$71,066	71%	\$11,221,000,000
Lawyers	320,159	\$140,270	\$106,837	76%	\$10,704,000,000
Chief executives	266,890	\$148,867	\$111,236	75%	\$10,043,000,000
Medical and health services managers	456,984	\$87,451	\$67,129	77%	\$9,287,000,000
Education administrators	500,325	\$83,383	\$64,989	78%	\$9,203,000,000

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10 Largest Occupations for Women

	Women Employed	Men's Earnings	Women's Earnings	Pay Ratio	Profession Gap
Registered nurses	2,092,489	\$71,590	\$65,612	91.6%	\$12,509,000,000
Secretaries and administrative assistants	2,060,289	\$42,566	\$38,470	90.4%	\$8,439,000,000
Elementary and middle school teachers	1,933,074	\$55,197	\$50,766	92.0%	\$8,565,000,000
Customer service representatives	1,196,513	\$37,623	\$32,893	87.4%	\$5,660,000,000
First-line supervisors of retail sales workers	1,177,835	\$47,774	\$35,217	73.7%	\$14,790,000,000
Nursing, psychiatric, and home health aides	1,071,789	\$30,125	\$26,816	89.0%	\$3,547,000,000
Accountants and auditors	1,014,827	\$77,320	\$60,280	78.0%	\$17,293,000,000
Office clerks, general	734,622	\$39,160	\$35,226	90.0%	\$2,890,000,000
First-line supervisors of office and administrative support workers	729,985	\$57,466	\$46,555	81.0%	\$7,965,000,000
Bookkeeping, accounting, and auditing clerks	723,342	\$45,254	\$39,939	88.3%	\$3,845,000,000

10 Largest Pay Gaps for Women

	Women Employed	Men's Earnings	Women's Earnings	Pay Ratio	Profession Gap
Securities, commodities, and financial services sales agents	60,572	\$101,423	\$61,936	61%	\$2,392,000,000
Financial managers	554,104	\$100,575	\$65,237	65%	\$19,581,000,000
Personal financial advisors	109,105	\$108,199	\$71,154	66%	\$4,042,000,000
Production, planning, and expediting clerks	162,744	\$60,836	\$41,040	67%	\$3,222,000,000
Credit counselors and loan officers	150,841	\$77,214	\$52,257	68%	\$3,765,000,000
Inspectors, testers, sorters, samplers, and weighers	242,910	\$46,955	\$32,280	69%	\$3,565,000,000
Retail salespersons	644,453	\$40,182	\$27,800	69%	\$7,980,000,000
First-line supervisors of housekeeping and janitorial workers	71,736	\$43,968	\$30,461	69%	\$969,000,000
Insurance sales agents	212,096	\$61,768	\$42,951	70%	\$3,991,000,000
Sales and related workers, all other	83,106	\$67,634	\$47,543	70%	\$1,670,000,000

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10 Smallest Pay Gaps for Women

	Women Employed	Men's Earnings	Women's Earnings	Pay Ratio	Profession Gap
Wholesale and retail buyers, except farm products	65,395	\$41,903	\$45,496	109%	-\$235,000,000
Combined food preparation and serving workers, including fast food	87,640	\$20,886	\$20,592	99%	\$26,000,000
Writers and authors	78,568	\$56,059	\$55,092	98%	\$76,000,000
Pharmacists	111,516	\$122,441	\$120,173	98%	\$253,000,000
Counselors	416,330	\$47,207	\$46,104	98%	\$459,000,000
Social workers	586,871	\$46,906	\$45,644	97%	\$741,000,000
Clinical laboratory technologists and technicians	179,012	\$50,108	\$48,241	96%	\$334,000,000
Receptionists and information clerks	617,205	\$30,319	\$28,919	95%	\$864,000,000
Computer occupations, all other	137,341	\$73,301	\$68,923	94%	\$601,000,000
Security guards and gaming surveillance officers	156,280	\$32,003	\$30,072	94%	\$302,000,000

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Is Job Flexibility the Key?

- Claudia Goldin, Harvard University

The Problem

- Women, more often than men work fewer hours at some point in their lives.
- Students who cannot work during class
- Parents who must be home to care for children
- Adults caring for a parent or other family member
- Higher-income (mostly salaried) occupations: more hours of work are associated with significantly greater earnings per hour.
- Worst industries: business, finance, and legal
- Lower wage (mostly hourly) workers: large hourly wage penalty for working fewer than 40 hours per week.
- Both men and women who work fewer hours get less pay per hour.
- But: because women work fewer hours than men on average per week, they are affected the most.



Possible Solution?

- Pay based on productivity/outcome/quality of work, not hours worked, not timing of hours worked.
- Because of technology:
 - Employees can hand off clients, customers, and patients with little loss in efficiency.
 - Employees are better substitutes for each other.
 - Individual working 50 hours per week is no longer worth much more than twice than two 25-hour-per-week workers.
- Technology has increased the earnings of women relative to those of men when calculated as earnings per hour, even for salaried workers.

Hours Flexibility and the Gender Gap in Pay by Claudia Goldin, for the Center for American Progress, April 2015.



Understanding Pay Equity Laws



Equal Pay Laws in California

- **Fair Employment & Housing Act**
 - It is an unlawful employment practice, unless based upon a BFOQ, for an employer to discriminate against an employee in compensation on the basis of sex.
- **CA Fair Pay Act, Labor Code Section 1197.5**
 - An employer shall not pay an employee at wage rates less than the rates paid to an employee of the opposite sex, another race, or ethnicity, for **substantially similar** work unless the differential is based on one of several permissible factors..
- Aggrieved employee is entitled to lost wages, interest and liquidated damages.



2015 Amendments: California Fair Pay Act

- New standard: “substantially similar work”
- Employees being compared do not have to work at “same establishment.”
- Tougher standard for BFOQ defense
- Legitimate factor(s) relied upon by employer must account for **entire** pay difference.
- Retaliation is prohibited.
- Employers cannot prohibit employees from discussing or inquiring about their co-workers’ wages.
- Extended retention period for wage and other employment-related records from two years to three years.



Labor Code § 432.3: Salary History Ban

- Effective Jan. 1, 2018; applies to all CA employers
- Employers may not:
 - Ask applicants about their current or past salaries or benefits
 - Seek such information from other sources or through an agent, or
 - Rely on such information to decide whether to offer a job or what salary to offer.
- If applicant volunteers salary/benefit info, employer can use.
- At applicant's request, employer must provide position's pay scale.



AB 2822: Clarification of Salary History Ban

- Effective Jan. 1, 2019
- “Applicant” = someone who is seeking employment with the employer
 - Existing employee applying internally ≠ “applicant”
- “Pay scale” = a salary or hourly wage range.
- Employers *may* ask applicant about ***salary expectations***.



California Equal Pay Task Force

- Launched in 2016 by CA Commission on the Status of Women and Girls
- Provides good wage equity analysis template
- <https://women.ca.gov/california-pay-equity-task-force/ca-pay-equity-resources//>



Pay Equity Analysis: 3-Step Analysis

Step 1: Are the positions substantially similar?

- If yes, move to Step 2
- If no, end of inquiry

Step 2: Is there a wage differential?

- If yes, move to Step 3
- If no, end of inquiry

Step 3: Is the wage differential based upon:

- A seniority system
- A merit system
- A production-based pay system
- A BFOQ (bona fide factor other than sex, race or ethnicity)
- If no, end of inquiry



The Positions vs. The Incumbents

- In Steps 1 and 2, compare the ***positions***, without regard to the qualifications of the incumbents.
- If you get to Step 3, compare the relative qualifications/performance of the ***incumbents***.



Step 1: Substantially Similar Work

A composite of:

- Skill: The experience, ability, education, and training required to perform the job;
- Effort: The amount of physical or mental exertion needed to perform the job;
- Responsibility: The degree of accountability or duties required in performing the job; and
- Performed under similar working conditions: The physical surroundings (temperature, fumes, ventilation) and hazards.



Step 2: Wage Differential?

- Must consider all forms of compensation for the employees' performance
 - Salary/hourly wages
 - Bonuses
 - Commissions
 - Stock options
 - Vacation
 - Pension
- **Any** difference in total compensation violates the law.



Step 3: Is Wage Differential Justified?

Can the **entire** difference be explained by:

- Seniority system
 - Well-established and based on pre-determined criteria
 - Communicated to employees
 - Applied consistently and even-handedly
 - Based upon length of time of employment
- Merit: a system that rewards employees for exceptional job performance
 - Same requirements as above
- Incentive/Production: compensation based on quality/quantity of production
 - Same requirements as above
- BFOQ



Bona Fide Occupational Qualification (BFOQ)

- Education, training or experience.
- Factor cannot be based on or derived from a sex-based differential in compensation.
- Factor must be job-related with respect to the position in question.
- Factor must be consistent with business necessity
 - “Business necessity” = an overriding legitimate business purpose such that the factor effectively fulfills the business purpose it is supposed to serve.
 - Not a business necessity if an alternative business practice exists that would serve the same purpose without producing the wage differential.



BFOQ: Geography/Particular Assignment

- OK to give higher compensation based on geographical location/cost of labor in the region.
- Cost of living
- Shift differential
- Weekend/holiday work
- Hazardous location (e.g., high crime rate, high accident rates)
- Remote location (e.g., two-hour commute)
- Inclement weather (e.g., inside vs. outside work)



How to Conduct a Pay Equity Audit

- Always, always: at the direction of an attorney!
- Collect the right data.
 - Human Resources
 - Job titles/classifications
 - Job descriptions, candidate resumes
 - Performance evaluations/talent assessments
 - Employer pay/internal employment history
 - Company practices
 - Payroll: pay data
 - External data: salary surveys
- Analyze the data



If You Find Wage Differentials

- Analyze whether differentials are justified by the four exceptions
- If no exceptions, may have violation of law
- Solutions:
 - Increase wage of underpaid employee;
 - Compensate employee for back pay; and
 - Set the proper wage rate/salary for new hires.



THANK YOU!!

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