

2023

California

STATE HR ADVOCACY &
LEGISLATIVE CONFERENCE



CALIFORNIA
STATE COUNCIL OF SHRM



Show Me the Money!

2023
California

STATE HR ADVOCACY &
LEGISLATIVE CONFERENCE



CALIFORNIA
STATE COUNCIL OF SHRM

AFFILIATE OF
SHRM
BETTER WORKPLACES
BETTER WORLD™



Bruce Sarchet
Shareholder
Littler, Sacramento

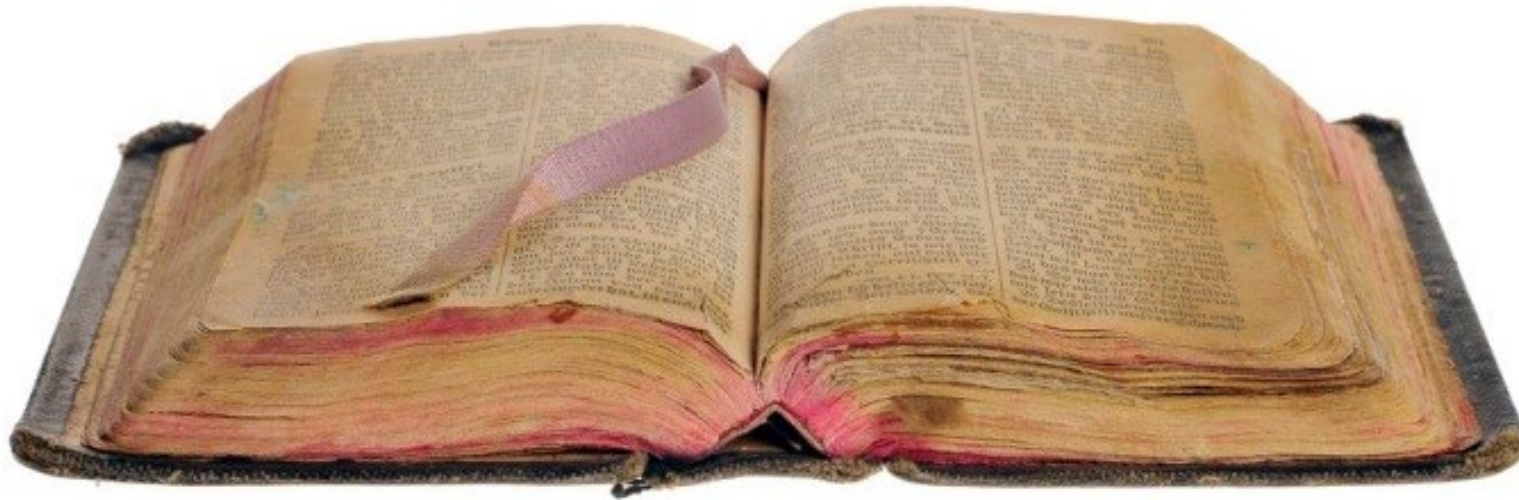


Joy Rosenquist
Of Counsel
Littler, Sacramento



Labor & Employment Law Solutions | littler.com

HISTORY LESSON: U.S. EMPLOYMENT LAWS





FDR's New Deal

1935: National Labor Relations Act

1938: Fair Labor Standards Act

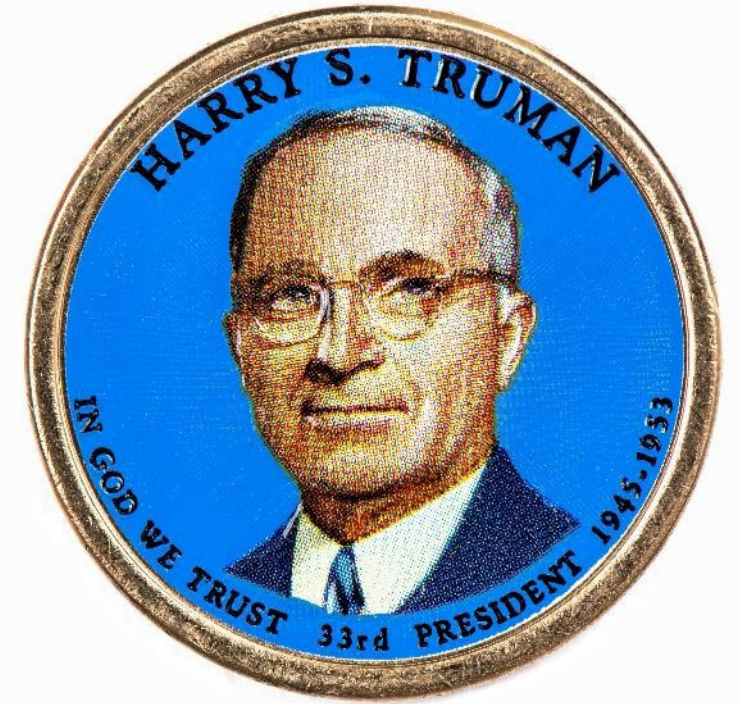
World War II

- **Abroad:** The U.S. Military is segregated
- **At Home:** Women enter the workforce in record numbers



Post-WW II

- **1948:** President Truman signed Executive Order 9981, officially ending segregation and racial inequality in the U.S. military.
- **1949:** California adopts the “Equal Pay” Act



California Equal Pay Act: 1949

“No employer shall pay any individual ... at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work...”

California Labor Code § 1197.5

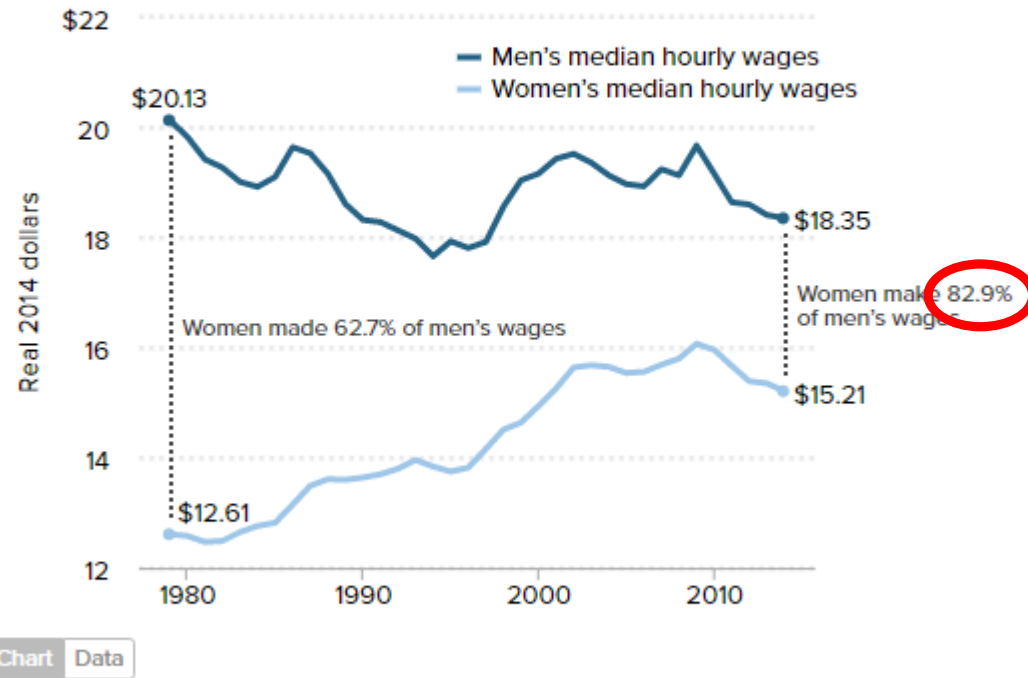
55 YEARS LATER...



FIGURE A

The gender wage gap persists, but has narrowed since 1979

Median hourly wages, by gender, 1979-2014



Source: EPI analysis of Current Population Survey Outgoing Rotation Group microdata

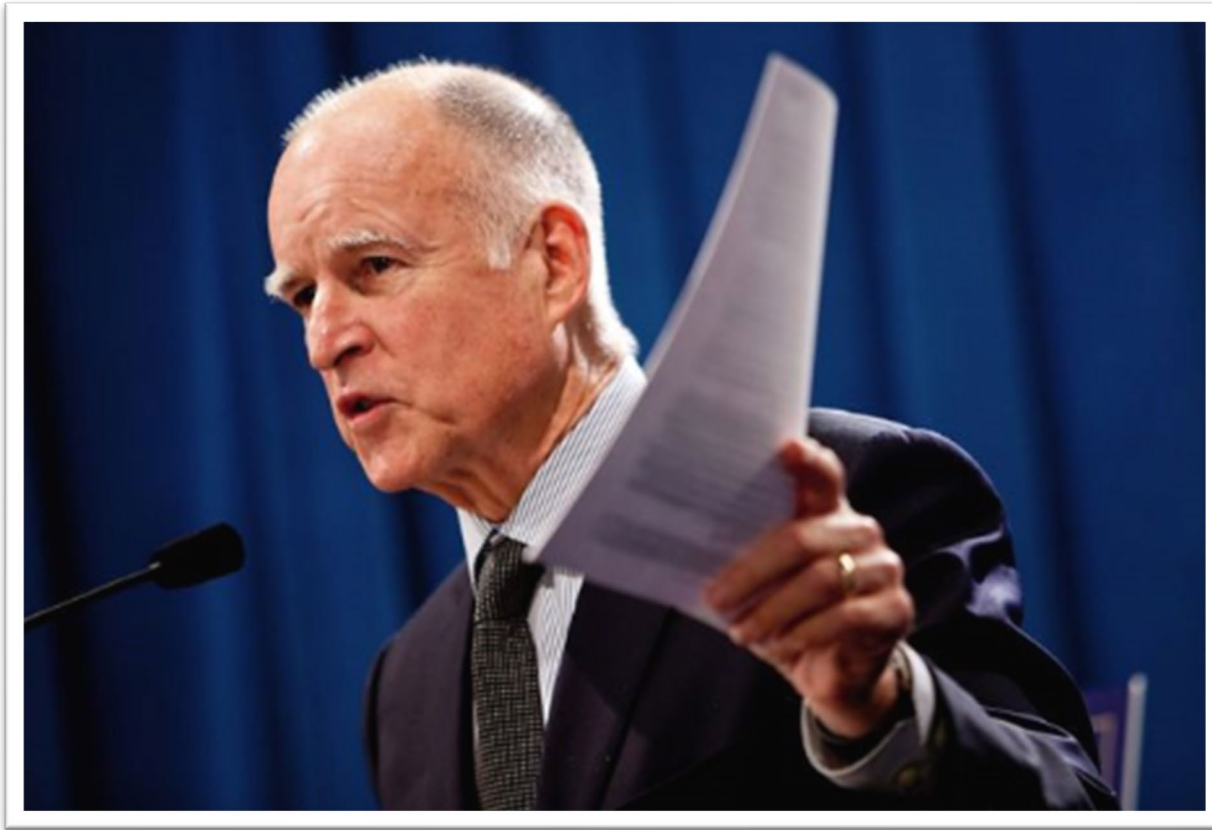
Economic Policy Institute

Equal Pay Act Amended!

- Amendments took effect on January 1, 2016
- The concept of “Equal” pay was replaced with “Fair” pay.

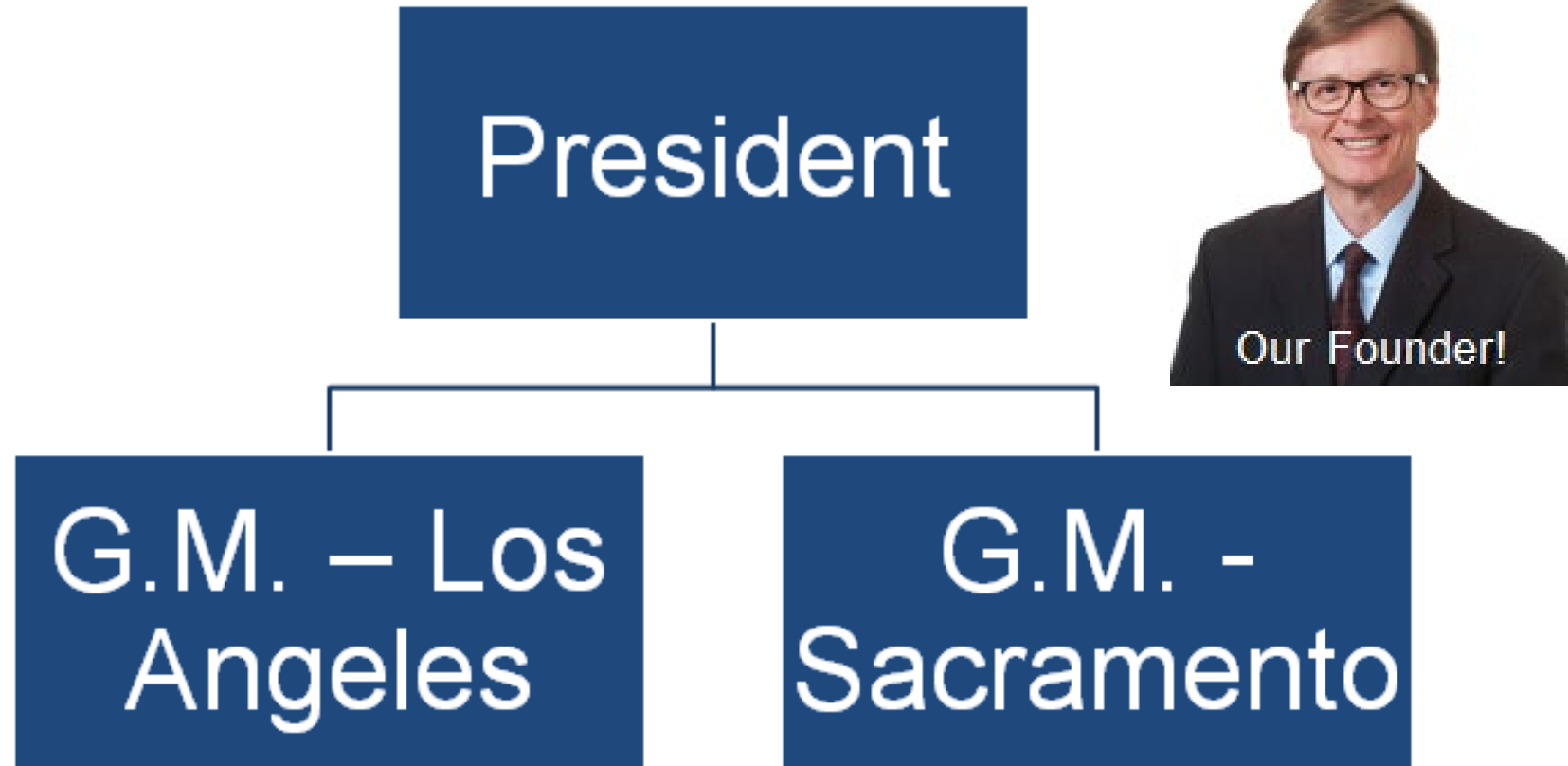


According to Gov. Brown:

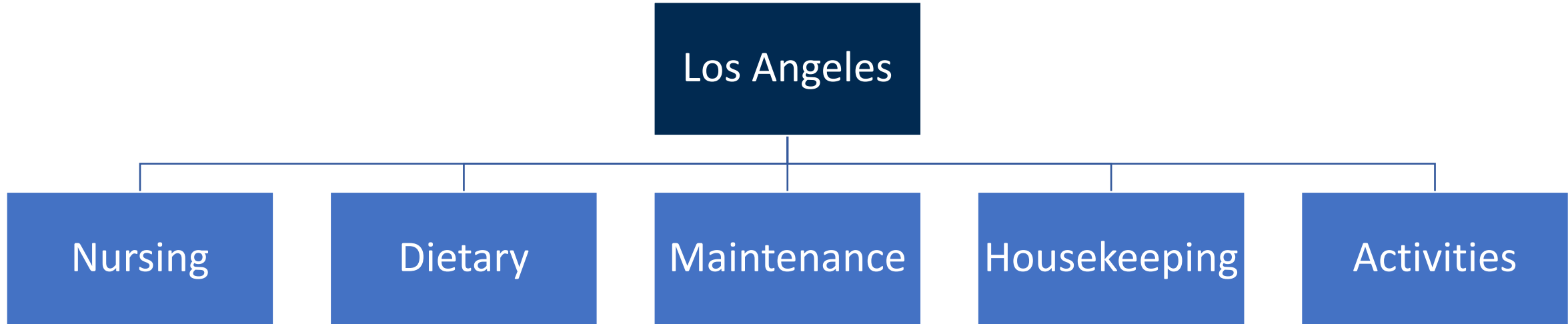


“The strongest equal pay act in the nation!”

Org Chart – The Bruce Sarchet Nursing Home Co.



The BS Nursing Home Co. – Branch Office Org. Chart



California Law: Before 2016

- Former test: employee must be paid the same as someone of the opposite gender at the same establishment for equal work.
- Pay disparities between L.A. and Sacramento cannot violate the law.
- Pay disparities between Dietary and Maintenance cannot violate the law.

California Law: After 2016

- New test: employee must be paid the same as someone of the opposite gender/race at the same employer for substantially similar work.
- Pay disparities between L.A. and Sacramento could violate the law.
- Pay disparities between Dietary and Maintenance could violate the law.

Employer's Affirmative Defense

- Pay Differential May Lawfully Be Based on:
 1. Seniority
 2. Merit
 3. Quantity/Quality of Production
 4. Bona Fide Factor Other than Sex
- But, Employer Must Explain Entire Wage Differential



Did It Work?

FIGURE A

The gender wage gap persists, but has narrowed since 1979

Median hourly wages, by gender, 1979–2014

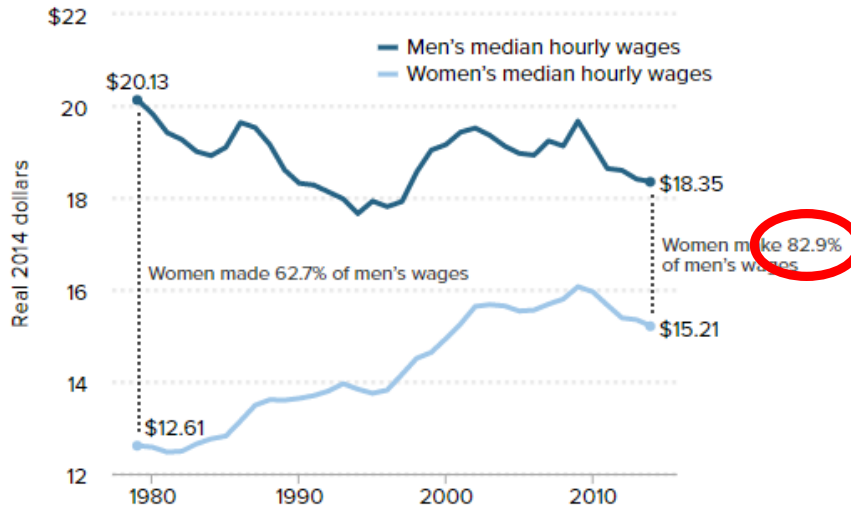
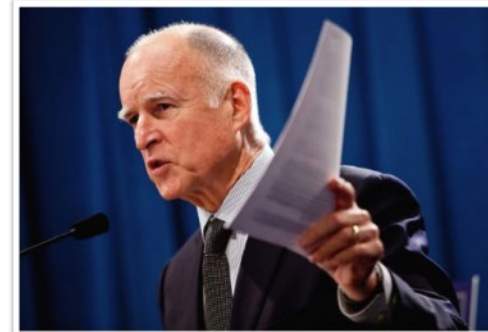


Chart Data

Source: EPI analysis of Current Population Survey Outgoing Rotation Group microdata

Economic Policy Institute

2016



"The strongest equal pay act in the nation!"

Did It Work?



Pew Research Center

MARCH 1, 2023



Gender pay gap in U.S. hasn't changed much in two decades

BY CAROLINA ARAGÃO

The gender gap in pay has remained relatively stable in the United States over the past 20 years or so. In 2022, women earned an average of 82% of what men earned, according to a [new Pew Research Center analysis](#) of median hourly earnings of both full- and part-time workers. These results are similar to where the pay gap stood in 2002, when women earned 80% as much as men.

**Ok, maybe that didn't work so great.
Let's try something else!**
Wage Transparency!

Agenda

1. Pay Scale Disclosures in Job Postings
2. Pay Scale Disclosures to Existing Employees
3. Employer Reports to the Civil Rights Department
4. What is a Labor Contractor?
5. Labor Contractor Reports
6. When Things Go Off the Rails
7. Enforcement and Status
8. State of the States



Standard Disclaimers!

- We will go fast!
- We won't cover everything
- (In part because we don't know everything yet!)
- This seminar does not substitute for the advice of counsel!



1. Pay Scale Disclosure in Job Postings

JOY ROSENQUIST

Pay Scale Disclosures: Overview

Applies to employers with 15 or more employees.
Includes the public sector.

Pay scale must be disclosed in any job opening.

Pay scale must be disclosed to all job seekers.

Employers with 15 or more employees.

- The statute does not specify how to count the employees for purposes of coverage, but the Labor Commissioner has issued guidance
- Labor Commissioner interprets the 15-employee threshold to apply when: 1) an employer reaches 15 employees at any point in a pay period, and 2) at least one employee is currently located in California.

- If an employer has more than one facility, all employees are counted, as well as out-of-state employees for purposes of making this calculation.



“Pay scale” must be disclosed in any job opening.

- Job Opening is not defined.
- “Help Wanted?”
- A social media post that reads "Manufacturing jobs available, apply now online.”
- Washington and Colorado: A job posting is covered if it includes qualifications or references a specific position for a desired applicant.

Pay scale must be disclosed to all job seekers.

- Prior to enactment of SB1162, applicants for employment were entitled to request the pay only if they had completed an initial interview.
- Now any job seeker is entitled to this information upon reasonable request, without having to interview.
- An applicant is defined as someone who is “seeking employment with the employer and is not currently employed with that employer in any capacity or position.”

“Pay Scale” Defined

“The salary or hourly wage range that the employer reasonably expects to pay for the position.”

Reasonably expects vs.
minimum/maximum

What are you actually prepared to pay?

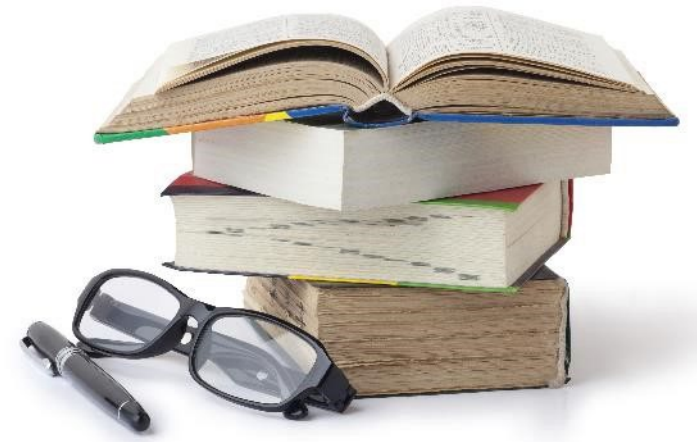


“Pay Scale” Defined

“The salary or hourly wage range that the employer reasonably expects to pay for the position.”

Questions:

- Bonuses?
- Commissions?
- Incentive Pay?
- PTO and other benefits (considering other jurisdictions' interpretations)



What about remote employees?

- 15 employee threshold
- California based companies
- California based employees
- Remote employees who live out of state and report to a Supervisor in CA?
- California resident works virtually for a Washington company?



Is Any of this Working?

2023
California

STATE HR ADVOCACY &
LEGISLATIVE CONFERENCE



CALIFORNIA
STATE COUNCIL OF SHRM

AFFILIATE OF
SHRM
BETTER WORKPLACES
BETTER WORLD™

Compensation And Benefits

Research: The Unintended Consequences of Pay Transparency

by Leon Lam, Bonnie Hayden Cheng, Peter Bamberger, and Man-Nok Wong

August 12, 2022

However, there may a dark side to pay transparency as well. Our recent global study of pay transparency involving employees in the U.S. and UK, as well as over 100 Chinese firms, suggests that there are some key caveats to consider. Here are the unintended consequences to be aware of — and how to avoid them.



Pay transparency compresses pay.

that transparency drives managers to make employees' performance-based incentives more similar to each other — in other words, compressing them — thereby reducing the pay dispersion driving employee concerns and complaints about pay inequity. Our findings are consistent with other research. For example, one study found that, when the government of California made city managers' pay transparent in 2010, average compensation dropped by about 7% in 2012. The drop occurred mainly at senior levels, which is indicative of pay compression.

LOS ANGELES BUSINESS JOURNAL

THE COMMUNITY OF BUSINESS™

ECONOMY > LABOR

Study: SB1162 Could Lower Wages

BY DIANE HAITHMAN

“A key insight is that employers credibly refuse to pay high wages to any one worker to avoid costly renegotiations with others under transparency,” the document states. The study also reports that declines are “progressively smaller” in occupations with high unionization rates because of collective bargaining.

“There are two countervailing forces,” Nix said. “On the one hand, evidence has shown that it’s been pretty good in decreasing pay gaps for certain groups, men and women, and both underrepresented and non-underrepresented minorities. (But) it does maybe put a ceiling on performance pay increases...what they think is happening here is that say I’m an employer posting a higher wage — if I see that I’m paying so much more than the other guys, I’ll drop my pay.”



Deragon

2. Pay Scale Disclosures To Existing Employees

BRUCE SARCHET

Does this law apply to existing employees?

- Play Vignette

Existing Employees Entitled to Pay Scale

Employers must provide current employees the pay scale for their current position.



When Employees Compare Notes...

Comparing pay scale leads to questions about pay differences.

Document your reasons for differences:

- Education, Industry Experience, Training, Certifications
- Longevity at company?
- Is this a good enough reason for a disparity? (If not, adjust!)

No retaliation for comparing notes.

HR Management of Salary Requests

- One designated email address or one point person to handle employee requests.
- Designated email inbox allows for documentation.
- Maintain all employer communications about salary:
 - public, applicants and employees

Also Important: Records Retention Requirement

Employers must retain records of job titles and wage rate history for employees for the duration of their employment plus three years.

Labor Commissioner can inspect these records.

In the absence of records, rebuttable presumption in favor of employee's claim.

Penalties and Employee Remedies

- 1 year statute of limitations – starts the date the employee *learned* of the violation.
- Labor Commissioner investigations of EPA Claims.
- Penalties of \$100 - \$10,000, per violation.
- No penalty for first violation if all job posting is cured.
- Private right of action for Injunction.

Don't Forget about Retaliation Claims

- Labor Code allows retaliation claims for reporting EPA violations
- EPA prohibits an employer from retaliating against any employee for any action taken by the employee regarding enforcement of the EPA.
- Employee has 1 year to file a claim with Commissioner
- Can skip the LC and file suit

HR Tips

- Consider conducting pay equity audits under attorney-client privilege.
- Who is above or below the pay band? Why?
- Collect or maintain current employee wage data now to preserve your records.





3. Employer Reports to the Civil Rights Department

JOY ROSENQUIST

Pay Data Report

Applies to private employers who have 100 or more employees,

and

Employers who have 100 or more workers hired through labor contractors
within the prior calendar year

- New! Must disclose ownership names of all Labor Contractors
- New! Disclose mean and median pay of all employees, contract workers in the report
- New! Must submit two reports if employer falls under both criteria
- New! Due date moved from March 31 to the second Wednesday of May (5/10/2023)
- Portal is open for filing

Employer Report

2023
California

STATE HR ADVOCACY &
LEGISLATIVE CONFERENCE



CALIFORNIA
STATE COUNCIL OF SHRM

AFFILIATE OF
SHRM
49
BETTER WORKPLACES
BETTER WORLD™

The WHO...

- Who files?
 - All private employers with 100 or more U.S employees and at least 1 employee in California
 - Removed a prior tether to the EEO-1 report



Remote Workers

- What about
 - Remote workers
 - Living in California but report to another state?
 - Living outside of California but report into a California location?



A Snapshot

Pick a single pay period between October 1, 2022
– December 31, 2022

All employees within the Snapshot Period who:

- Sit in California AND/OR
- Remote and assigned to a California location



The WHAT...

For each employee, you will need the following data points:

- **Employee Id or unique number**
- **Gender**
 - female, male, and non-binary
- **Ethnicity/Race**
- **Hourly rate**
- **Location Name**
- **Location Address**
- **Location City**
- **Location State**
- **Location Zip**
- **EEO-1 Unit Number**
- **W2 Earnings in 2022**
 - **Box 5*** should be used to place an employee into one of the 12 pay bands
 - If Box 5 is blank, then use **Box 1***
- **Number of hours worked in 2022**
 - Include the number of hours each employee was on ANY form of PAID time off for which the employee was paid, such as vacation time, sick time or holiday time

The Report

- **NEW** – the mean and median hourly rate for each grouping

1. Number of employees by race, ethnicity, and sex in the ten job categories

2. Within each of the above job categories, for each combination of race, ethnicity and sex, the mean and median hourly rate (using W-2s);

3. Number of employees by race, ethnicity, and sex whose annual earnings fall within each of the pay bands used by the US Bureau of Labor Statistics in the Occupational Employment Statistics Survey (using W-2s);

4. The total number of hours worked by each employee counted in each pay band during the reporting year; and

5. Populate template provided by California

But everyone is really talking about....



The Labor Contractor Report!

2023
California

STATE HR ADVOCACY &
LEGISLATIVE CONFERENCE



CALIFORNIA
STATE COUNCIL OF SHRM

AFFILIATE OF
SHRM
BETTER WORKPLACES
BETTER WORLD™

I have to report on Who?

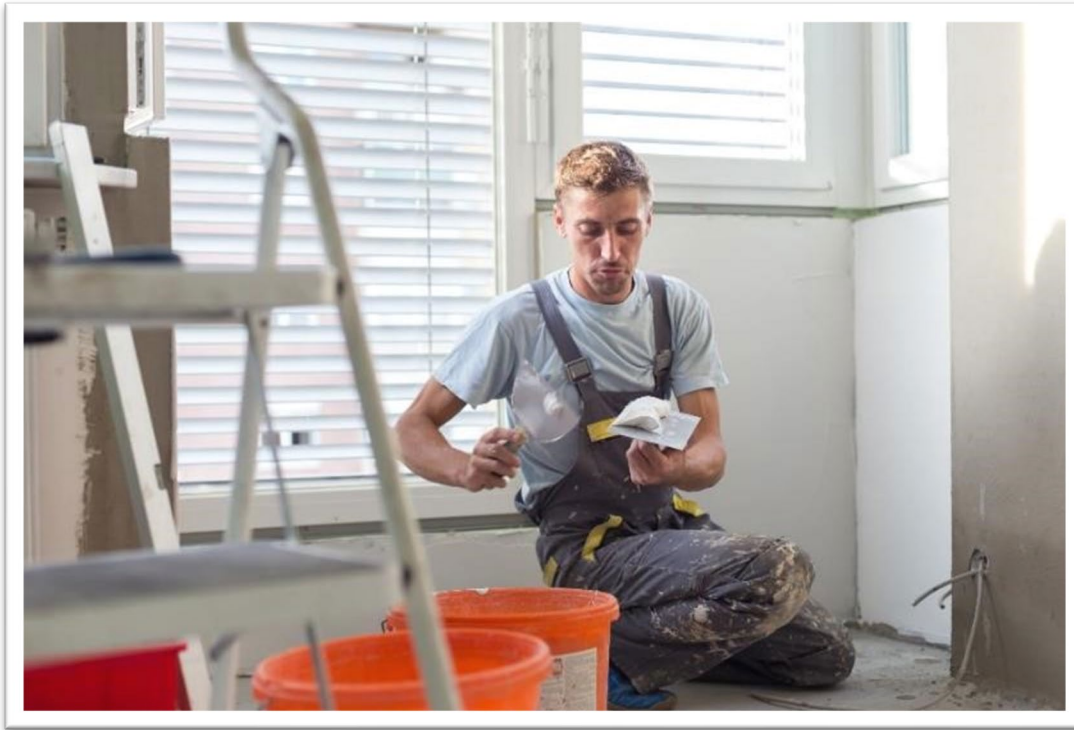
Yes, Labor Contractors!

Even though they are not your employees, the law now requires you report labor contractor pay data.

4. What Is A Labor Contractor?

BRUCE SARCHET

Labor Contractor: Special Definition



An individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's *usual course of business*.

What is the “Usual Course of Business?”



CRD Guidance keeps changing

CRD Guidance

- A client employer's "usual course of business" means the regular and customary work of the client employer.
- "Regular and customary work" means work that is performed on a regular or routine basis that is either part of the client employer's customary business or necessary for its preservation or maintenance.
- "Regular and customary work" does not include isolated or one-time tasks

CRD Example: Janitorial staff

“Example: Janitorial staff performing nightly cleaning and general maintenance of a client employer’s premises would be performing work within the employer’s usual course of business because the work is performed on a regular basis and is necessary for the maintenance of the client employer’s customary business.”

If I am in the business of selling ski gear at my company, why am I reporting on janitorial staff?

The CRD is taking the position that janitorial staff are necessary to maintenance of the business location.

CRD Example: Audits

“Example: Accountants hired to perform an external audit of a fitness company’s financial statements would not be performing work within the client employer’s usual course of business, assuming financial auditing is an isolated occurrence for the company.”



Another twist:

- Only report on Labor Contractor Employees
 - LC must be employees of their hiring entity in order to be in the reported.
- This excludes 1099 staff by default.

Are you sure?

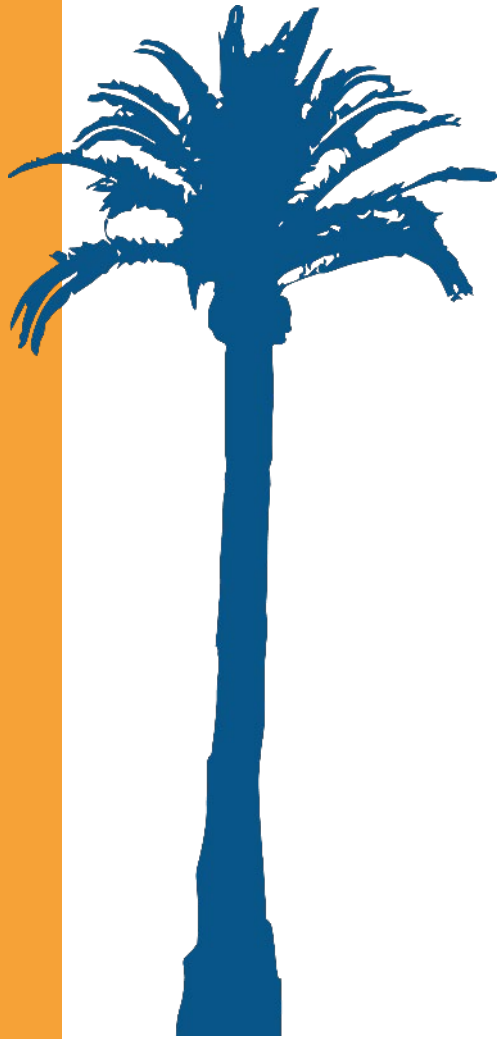
Yes! The CRD has issued this guidance:

“An individual performing work within the client employer’s usual course of business is a labor contractor employee if that individual is on a labor contractor’s payroll and the labor contractor is required to withhold federal social security taxes from that individual’s wages.”

A photograph of three people (two men and one woman) sitting at a table in a modern office setting, looking at documents. The image is overlaid with a semi-transparent blue filter.

5. What's *in* the LC Report?

JOY ROSENQUIST



First things first – The Big Question

- Do you have 100 or more workers hired through Labor Contractors within the prior calendar year across U.S. *and* at least one in California?
- Contract workers located inside and outside of California are counted when determining whether an employer has 100 or more contract workers.

The Who: Another Snapshot

- Same rule for Labor Contractors

LC Pick a single pay period between October 1, 2022
– December 31, 2022

Contract workers assigned to California
establishments and/or who worked from California
must be included in the report



The WHAT... the data

Labor contractors need to supply the following:

1. Name or Employee ID of worker
2. Role/Job Title
3. EEO-1 Job Category
4. Race/Gender
5. Wage information

- If contract worker worked for you *and* other companies during the reporting year, the Labor Contractor should provide you the W2 Box 5 wages for *only* the time spent with you.
 - For example, Worker A made \$100,000 during 2022. They worked 50% of the year for you and 50% for another company. You should be provided with a W2 Amount of \$50,000 and you should then place them in the pay band for the \$50,000 amount

6. Hours paid for the time spent working for your company
7. Location to where worker was assigned or reported
8. Legal entity to which worker was assigned or reported
9. Name of Labor Contractor



Reach out to your Labor Contractors

- Once you have identified which LC need to be included in your report
 - This is new for everyone, so allow time for your LC to gather the data
 - Your LC can either:
 - Provide you with the data for each contract worker
- OR**
- They can provide you with the report filled in

The Report

Same as the Employer Report – calculate the mean and median hourly rate for each grouping

1. Number of contract workers by race, ethnicity, and sex in the ten job categories

2. Within each of the above job categories, for each combination of race, ethnicity and sex, the mean and median hourly rate (using W-2s);

3. Number of contract workers by race, ethnicity, and sex whose annual earnings fall within each of the pay bands used by the US Bureau of Labor Statistics in the Occupational Employment Statistics Survey (using W-2s);

4. The total number of hours worked by each contract worker counted in each pay band during the reporting year; and

5. Populate report provided by California

6. When Things Go Off the Rails

BRUCE SARCHET

What happens if Labor Contractor goes silent?



- They ignored our letter!
- They disagree with our letter!
- We have no information or incomplete information. Now what?

Frequently asked Questions

- Do we have to report on all contract workers, including those in other states?
- What if we have 98 employees in our snapshot period? Do we still have to file?
- What about 1099 workers – do they need to be included?
- What if we don't file?



HR Tips

Designate

Designate a single person in the organization with overall responsibility and who can liaison with CRD.

Map out

Map out a timeline for compliance – 1 month left!

Use

Use the A/C privilege where needed

- Contract workers: who is in and who is out
- Pay Equity Assessments
- Indemnity/Penalty Issues

How to make life easier in the future



- **Amend contracts** to require Labor Contractors to provide pay data
- Consider **indemnity provisions** in your contracts
- You may get a letter identifying **YOU** as a Labor Contractor

CRD Resources



User Guide

<https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2021/01/CA-Pay-Data-Reporting-User-Guide.pdf?emrc=d6de85>



FAQs

<https://calcivilrights.ca.gov/paydatareporting/faqs/>



Littler – We are only a phone call (or email!) away

7. Regulation and Enforcement

JOY ROSENQUIST

Enforcement: Civil Rights Department

- First report is due May 10, 2023.
- Civil Rights Department (CRD) can seek an order requiring compliance – can recover costs.
- EDD will provide names of employers per CRD's request.

New Penalties

- Penalties of \$100/employee for first violation and \$200/employee for subsequent failure to file.
- Penalties may be apportioned against labor contractors who fail/refuse to provide pay data to employers.



Is CRD Actually Enforcing these Reports?

- Yes!
- Even if no reports have been filed in 2021 or 2022, comply going forward; no retro penalties can be assessed.
- CRD has pursued and settled with several companies: Press Releases....

Public Notice!



STATE OF CALIFORNIA | Business, Consumer Services and Housing Agency

Civil Rights Department
2218 Kausen Drive, Suite 100 | Elk Grove | CA | 95758
800-884-1684 (voice) | 800-700-2320 (TTY) | California's Relay Service at 711
calcivilrights.ca.gov | contact.center@dfeh.ca.gov

GAVIN NEWSOM, GOVERNOR
KEVIN KISH, DIRECTOR

September 2, 2022
For Immediate Release

Contact: Fahizah Alim (916) 585-7076
fahizah.alim@dfeh.ca.gov

**California Civil Rights Department Settles with [REDACTED]
[REDACTED], [REDACTED] Over Failure to File Pay Data Reports**
Required Report Is Key Tool in Fighting Gender and Racial Pay Discrimination

Sacramento - The California Civil Rights Department (CRD) (formerly DFEH) has settled two cases against [REDACTED] and [REDACTED] over the employers' failure to comply with a requirement that large employers report annually on gender and ethnic and racial breakdowns in the job categories and pay of their employees.

More HR Tips

- Designate a single person in the organization with overall responsibility and to act as liaison with CRD.
- Assemble your team: HR, Procurement, IT, Legal...
- Map out a timeline for compliance.
- Use the attorney-client privilege where needed.



What's Next?

- Guidance from CRD: FAQs and Exemplars
- Proposed Regulations on the Horizon?
 - Regulations were supposed to be enacted back in 2020!
- Clean-up Legislation: Nothing has been introduced this session



8. State of the States

BRUCE SARCHET

It's not Just California...



Pay Transparency Across the States

- **California:** Wage range in all postings
- **Colorado:** Salary, bonus, commission in all postings
- **Connecticut:** Wage range upon applicant/employee request
- **Jersey City, NJ:** Min/Max salary in all postings
- **Washington:** Salary, plus 'benefits and all other compensation'
- **Maryland:** Wage range, after application
- **New York:** Min/Max salary in all postings
- **Nevada:** Wage range, after interview
- **Ohio (Toledo/Cincinnati):** Wage range once an offer is made
- **Rhode Island:** Wage range, upon request

Multistate employers

Nationwide Approach or State-by-State?

Should you comply in only those states requiring pay scale disclosures?

Considerations

- Equal access to data by all applicants: How do you limit?
- Where are you doing business? The higher paying job markets in the east coast, west coast and pacific northwest tend to require that pay be disclosed up front.
- Accuracy of job postings, focused candidate pool, productive interviews.

Trends in Pay Transparency

- Aon's October 2022 Pay Disclosure Pulse Survey
 - 44% of companies plan to disclose pay ranges only when required
 - 31% of companies plan to disclose salaries nationwide regardless of laws



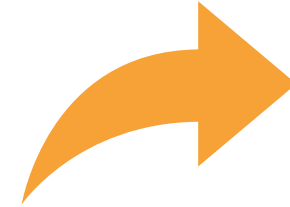
Trends in Recent Legislation

- Trend toward requiring disclosure in postings, as opposed to during hiring process
- Trend toward covering remote jobs in posting requirement



Trends in Proposed Legislation

- States with existing pay transparency laws already proposing amendments (CO, NY)
- At least 6 states, D.C. and P.R. have introduced pay transparency bills



Status in California

- There are no proposed regulations by the CRD on the pay data reporting.
- There are no proposed regulations from the Labor Commissioner on job posting requirements.
- State agencies are issuing guidelines and “FAQs” more frequently.
- Further clarity will only come through enforcement.

2023

California

STATE HR ADVOCACY &
LEGISLATIVE CONFERENCE



CALIFORNIA
STATE COUNCIL OF SHRM

Thank You

