



California's New Fair Pay Act: Prepare to Defend Your Employee Compensation

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Kristina Launey
Annette Tyman
Christine Hendrickson

Speakers

Annette Tyman
atyman@seyfarth.com



Kristina Launey
klauney@seyfarth.com



Christine Hendrickson
chendrickson@seyfarth.com





Goals For Today's Presentation



Understand the Landscape

- Overview of the California Fair Pay Act

What's Changed

- How the California Fair Pay Act Differs from Other Laws

Where to Go From Here

- Group Employees and Factors
- Modify Policies and Practices
- Analyze Pay

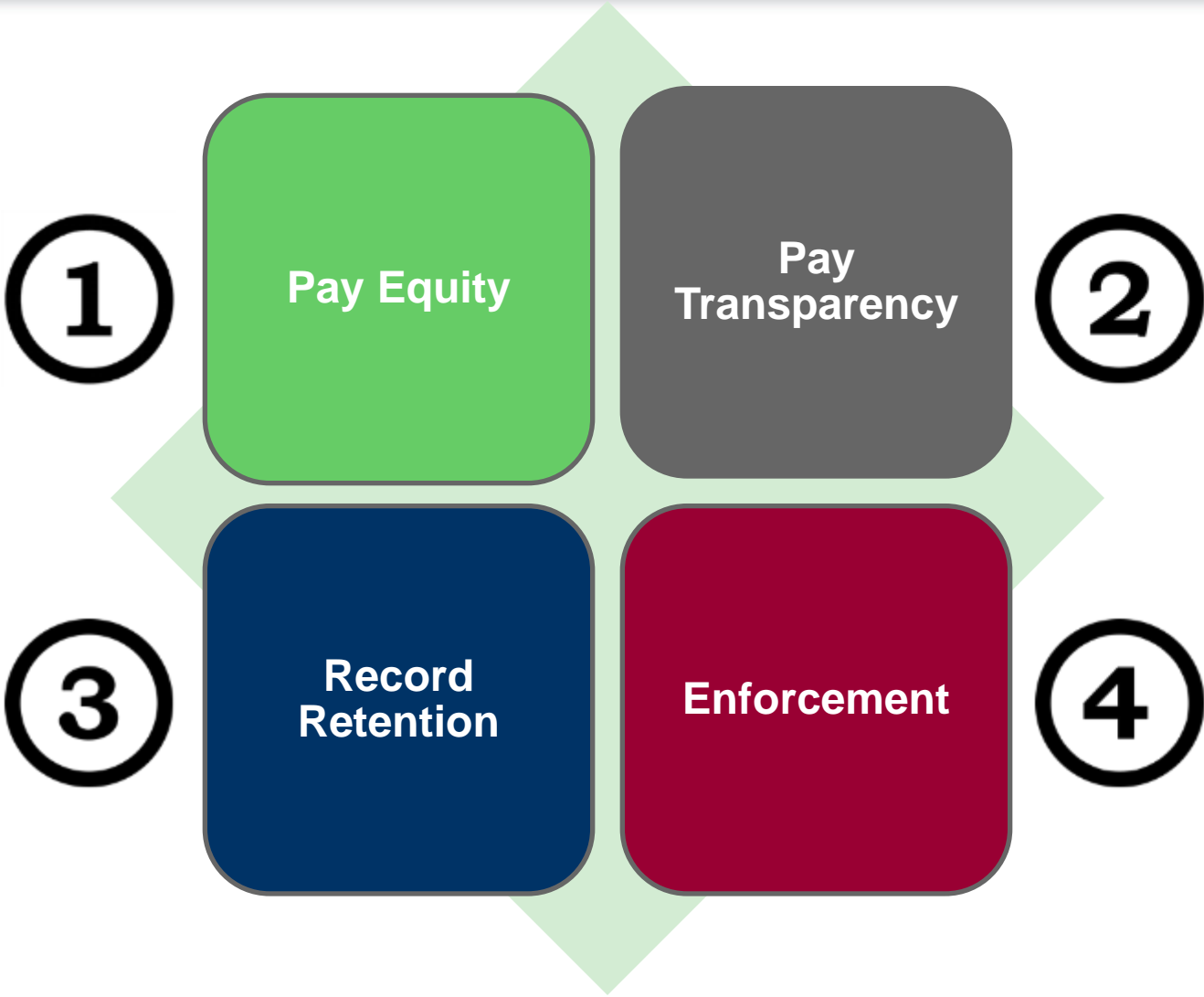
Overview of the California Fair Pay Act



California Fair Pay Act

- Signed by Governor Brown on October 6, 2015
- Effective January 1, 2016
 - California-based employers
 - Other employers with California-based employees
- Amends Labor Code Section 1197.5 to become the nation's most aggressive equal pay law
- Only focused on gender-based differences
 - Women paid less than men
 - Men paid less than women

California Fair Pay Act: Four Major Changes



Significant expansion upon existing law:

- Employees can be comparators even if they do not:
 - Work at the same establishment
 - *(i.e., even if they are 100s of miles apart...)*
 - Hold the “same” or “equal” jobs
- Instead it applies to employees performing “substantially similar work” based on:
 - Composite of skill, effort, and responsibility AND
 - Performed under similar working conditions



Pay Equity

1

- Employers' burden to justify pay differentials with limited factors:
 - Must be applied reasonably
 - Must explain the *entire* amount of the pay differential



“Wage Rate”

1

- "Wages" includes all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation.
- Not just base salary but other forms of compensation (e.g., bonuses, commissions, etc.)

California Labor Code Section 200



Permitted Factors



Permitted factors for explaining differences in pay are:

- A seniority system,
- A merit system,
- A system that measures earnings by quantity or quality of production, or
- A bona fide factor other than sex such as
 - education, experience, or training
 - *geographic, shift, or hours differentials*
 - *certifications*



Shift or Location Differentials

1

Geographic, shift, or hours differentials can be a BFF

[T]he amendments to this bill that strike “work is performed at different geographic locations” and “work is performed on different shifts or at different times of day” should not be construed as the Legislature’s intent to make those factors unavailable to an employer responding to an equal pay complaint. Rather, the employer may claim a “bona fide factor,” that may be specifically described by the employer as work that is performed at different geographic locations or work that is performed on different shifts or at different times of day, so long as the employer can prove that the factor is consistent with business necessity, as specified in the bill.

Letter from Senator Jackson, printed in California Senate Daily Journal



Bona Fide Factor

1

Employer bears burden to demonstrate the BFF is:

- Not based on or derived from a sex-based differential in compensation,
- Job related with respect to the position in question, and
- Consistent with a “business necessity”.
 - “an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve”

Burden shifts back to employee to demonstrate an alternative business practice that would serve the same business purpose without producing the pay differential



Anti-Retaliation

②

New prohibition on discharge, discrimination, and retaliation against, any employee who invokes or assists in any manner the enforcement of the Act.

California Labor Code Section 1197.5(j)(1)

No Secrets Here...



Employers not allowed to prohibit employees from:

- Disclosing or discussing their own wages or the wages of others
- Inquiring about the wages of others
- Aiding or encouraging other employees to exercise their rights under the Act

Does not create obligation to disclose wages.

California Labor Code Section 1197.5(j)(1)



Recordkeeping

3

Obligation to maintain records of wages and pay rates, job classifications, and other terms of employment **extended** from 2 years to **3**

California Labor Code Section 1197.5(d)

DLSE

Now:

- No administrative exhaustion, unless the employee consented to the DLSE's bringing an action

Jan 1, 2016:

- Employees may also file complaints with the DLSE alleging employer violations of the new prohibitions on discrimination, retaliation, and restricting employee wage-information discussions

Direct, Private Right of Action

Now:

- 2-year SOL (3 for “willful” violation)
- Remedies: recover the balance of wages, interest, liquidated damages, costs, and reasonable attorney’s fees

Jan 1, 2016:

- Additional private right of action for retaliation/discrimination for engaging in protected activity
- 1-year SOL
- Remedies: reinstatement and reimbursement for lost wages and benefits, interest, and “appropriate equitable relief”

Direct, Private Right of Action

Class Action?

Representative
Action?

What's Changed?

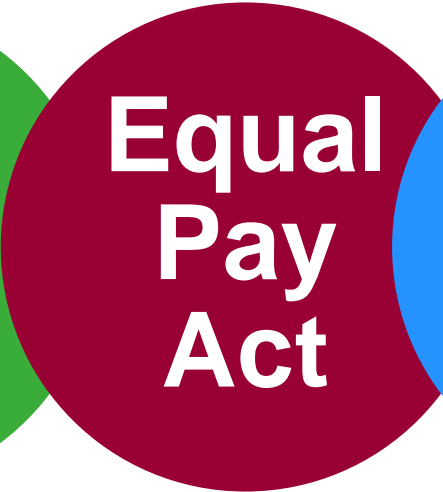
A Comparison with Other Laws



Other Laws Prohibit Pay Discrimination Based on Sex



**Title
VII**



**Equal
Pay
Act**



**Exec
Order
11246**



FEHA

How is the CA Fair Pay Act Different?

	CA Fair Pay Act	Federal Equal Pay Act	Title VII	Executive Order 11246	CA FEHA
Protected Classes	Sex Only	Sex Only	Sex, Race/Ethnicity, Color, Religion, National Origin	All from Title VII + Sexual Orientation and Gender Identity	All from EO 11246 + Age, Ancestry, Disability, Marital Status, Medical Condition, Genetic Information, Military & Veteran Status
Comparison Group	Substantially similar work and working conditions	Equal work and similar working conditions	Similarly Situated Employees	Similarly Situated Employees	Similarly Situated Employees
Same Establishment	No	Yes	No	Yes	No
Proof	No Intent Required	No Intent Required	Discriminatory Intent or Impact	Discriminatory Intent or Impact	Discriminatory Intent or Impact
Remediation	Must explain entire wage differential	Must explain entire wage differential	Typically only in statistically significant groups	Typically only in statistically significant groups	Typically only in statistically significant groups

How is the CA Fair Pay Act Different?

1

Jobs

Employees

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2

3

4

Where Should We Go from Here?



Four Steps to Take Now

A

Group Substantially Similar Employees

B

Evaluate *Permitted* Factors that Explain Pay Differences

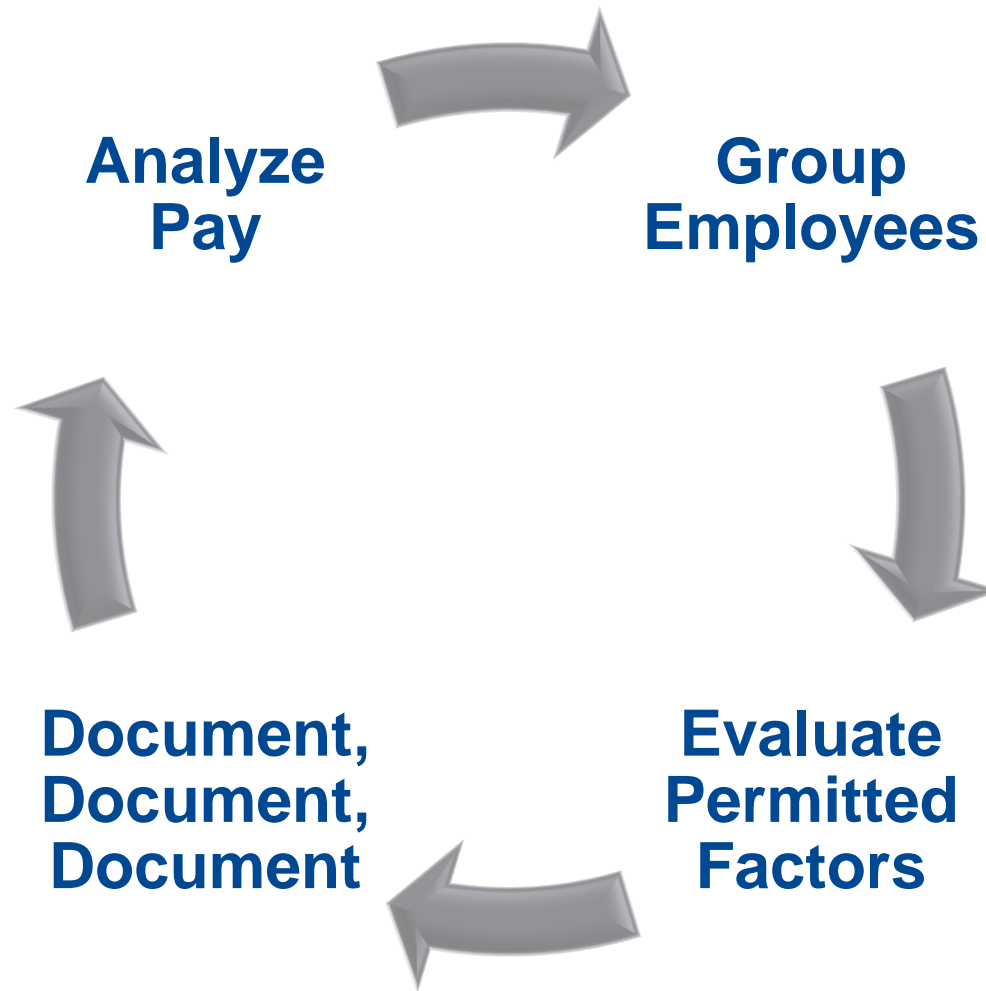
C

Analyze Pay

D

Modify Policies and Practices

Analyzing Pay: First and Last Step




Attorney-Client Privilege



Before you begin, understand the risks of proceeding without attorney-client privilege

- Partner with internal and external counsel
- Implement privilege protocol
- Not an “all hands on deck” exercise



Step A: Group Substantially Similar Employees

Develop groupings of “substantially similar” employees:

Job

**Working
Conditions**

Step A: Group Substantially Similar Employees

Develop groupings of “substantially similar” employees:

Job

Skills

Effort

Responsibility

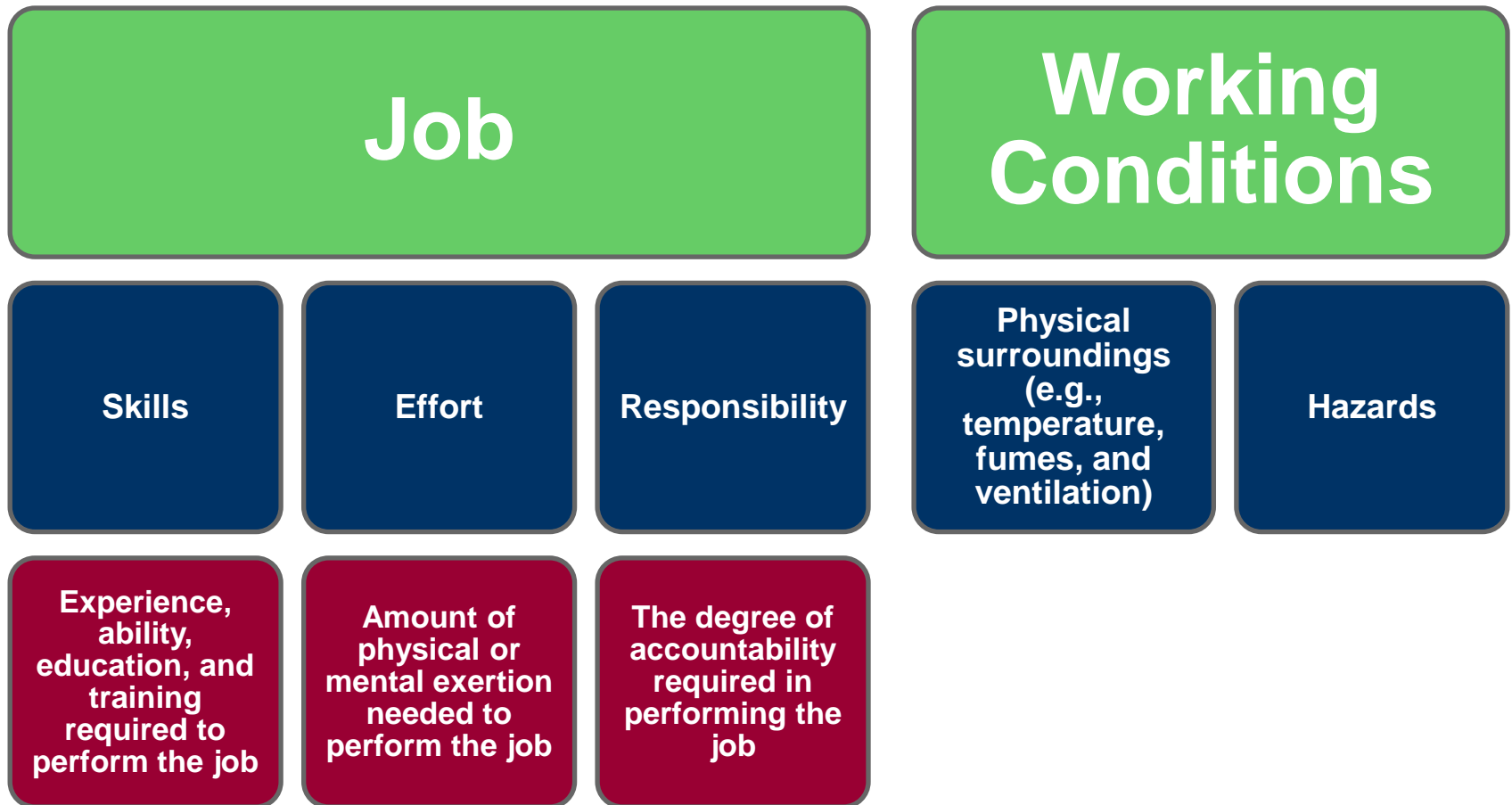
E.g., Experience, ability, education, and training required to perform the job

E.g., Amount of physical or mental exertion needed to perform the job

E.g., The degree of accountability required in performing the job

Step A: Substantially Similar Group Employees

Develop groupings of “substantially similar” employees:





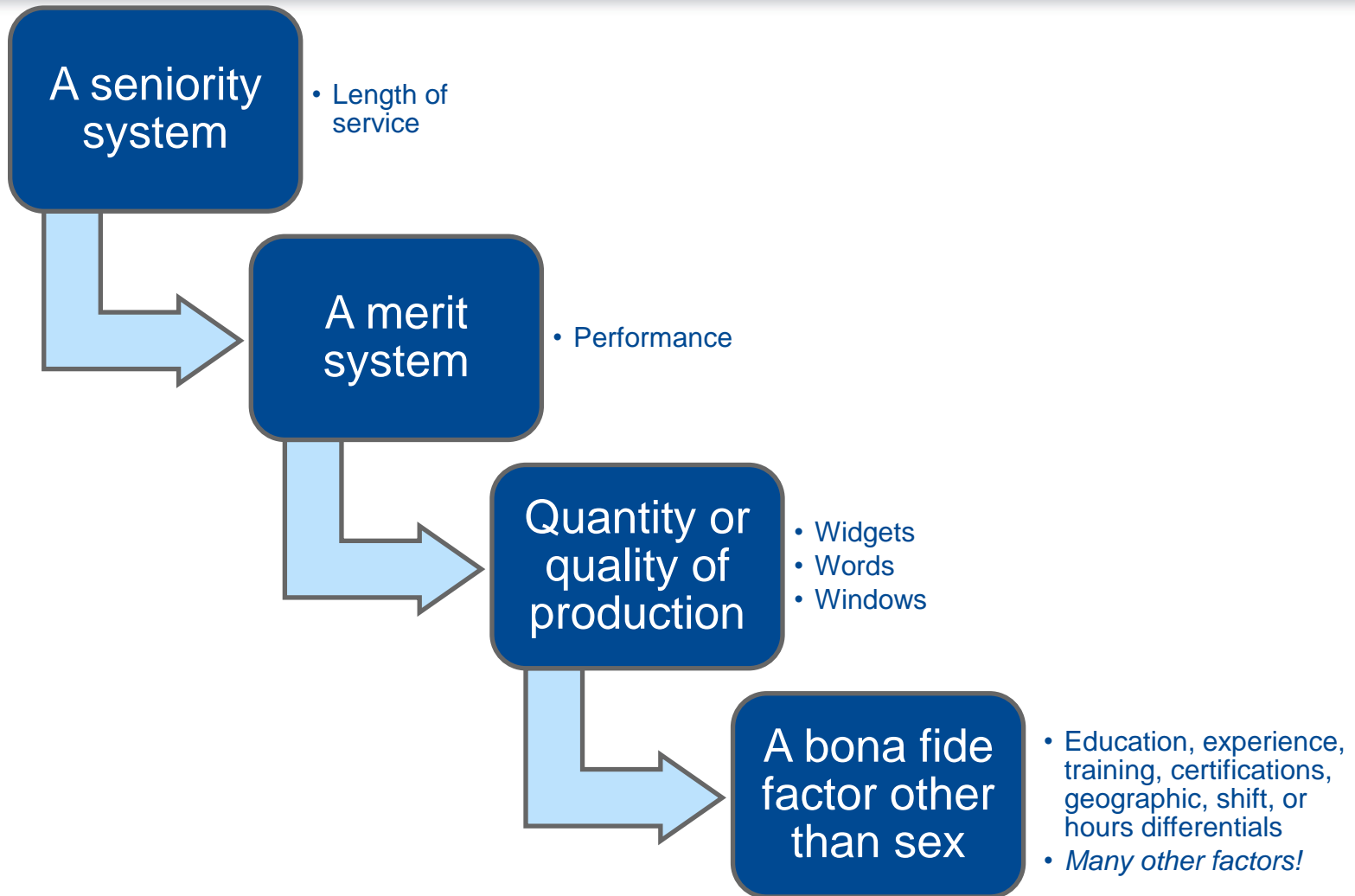
Step A: Where to Begin in Developing Employee Groups

A good place to start:

- Identify “buckets” of major job categories or groupings your company already uses
 - Grades and levels
 - Job functions, and job families
 - Job descriptions
 - Skills or job ladders
 - Wage and hour classifications
 - Other

OSHA and Cal/OSHA (i.e., Injury and Illness Prevention Program, Respiratory training, Hearing conservation programs, Blood borne pathogens, Heat stress training)

Step B: Permitted Factors that Explain Pay Differences



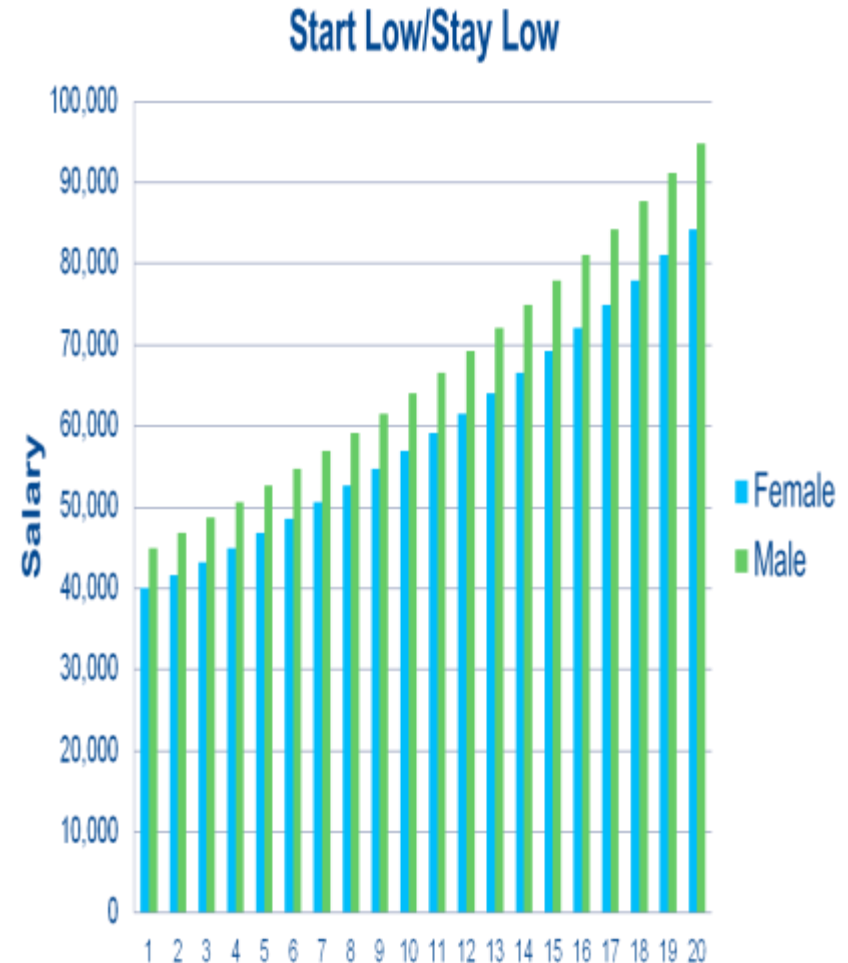


Document, Document, Document

- Job
 - Relative skill, effort, responsibility and working conditions of positions so you are positioned to distinguish roles
 - Job matrix
 - Job evaluation system
 - Job descriptions
- Factors that influence pay
 - Update electronically available data fields
 - Experience, Education, Market at Start, Performance Evaluations

Importance of Documenting Starting Salary Decisions

- Starting salary is typically the most important pay decision
 - “Start Low/Stay Low” phenomenon
- Consider developing a formal policy regarding how the company sets starting salary
- Document market at time of hire





Step C: Practical Realities of Conducting Pay Analysis

- Employers likely need additional resources & budget to:
 - Conduct appropriate compensation analyses
 - Correct any disparities found
 - Defend claims
- Consider timing
 - Align with the compensation cycle



Step D: Modify Policies and Practices



Review employee handbook to remove any prohibitions on employees disclosing their compensation to others



Update retaliation policy



Modify code of conduct, if any, to permit reporting on violations of California Equal Pay Act



Update record retention policy



Train HR, managers, and supervisors regarding the California Fair Pay Act and its anti-pay secrecy provisions



***NEW!* Seyfarth's Employment Analytics Group**

- *Seyfarth is launching the “Employment Analytics Group”*
 - Stand-alone group within the Labor & Employment Department
- Focus Areas:
 - Compensation Analysis (privilege critical now)
 - Hiring & scrutiny of screening processes
 - Promotions and terminations
 - Reductions in force
 - Diversity metrics



**Thank You for Joining
Us!**