

# Is Panic Really the Best Choice? One Lawyer's Approach to Analyzing "Substantially Similar Work" Under the California Fair Pay Act

*By: Charles Post*

Since the passage of the California Fair Pay act in late 2015 (effective January 1, 2016) and its recent amendments, many employers and commentators have criticized the statute for imposing a vague and dangerous standard on California employers.

The California Fair Pay Act replaces the former "equal work" standard of the Equal Pay Act with a "substantially similar" standard. The California Fair Pay Act (Labor Code section 1197.5) states: "(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 ...**".

Some adrenalized commentators have said that any effort to actually conduct this analysis is a fool's errand. The standard is so vague and shapeless that it is functionally meaningless until a court sharpens the standard with defined tests and definitive holdings. Other commentators suggest that employers abandon any attempt to determine if any two types of work are substantially similar to one another (an analysis required by the statute) and instead focus on the second half of the statutory analysis, which allows employers to justify wage disparities (along race or gender lines) on the basis of a bona fide factors other than sex or race.

While it is true that courts have not yet ordained a specific analysis on how to determine substantially similar work, the statutory standard is not so vague as to defy either analysis or application. Legislative examples propose that under this standard a male school janitor and a female hotel housekeeper may be engaged in substantial similar work.

Even if the standard were so vague as to defy application (and I don't believe it is) employers are well served to act reasonably and based upon a good faith and reasonable interpretation of the law. Yes, a court may later hold that some part of any analysis used is incorrect, but the use of a reasonable analytic process (before any court decision considering the law) will likely place an employer in a better position than a company that has skipped the first step of the required analysis.

What appears below is a general approach to conducting the "substantially similar" work analysis. Of course, it will need tailoring and modification depending on the nature of a particular employer, its size, the number of positions or job titles involved in a particular analysis.

## **Step One: Score Positions for Substantially Similar Work**

The center of the analysis, as I see it, is the use of the term "composite." A composite is something made up of distinct parts (as adjusted for similarity of work conditions). The parts need not be equal in any given composite, but this composite must consist of the statutorily required components: skill, experience, and responsibility. Thus, one might reasonably begin the

analysis with a simple grid or table that weights each position or job title in a company by these factors. While assigning a numerical weight to each factor seems arbitrary at first, that impression is reduced when actually applied to job titles. For this model, I believe the analysis is stronger when each component has the same potential weight. In this way, strengths in one area (skill for example) can compensate for a relative weakness in another (say experience) resulting in a composite of the three factors. See below for a sample of this analysis.

School Janitor (Day)

Effort		Skill		Responsibility	
Criteria		Criteria		Criteria	
Mental (on a scale of 1-20, 20 being greatest)		All factors 1-40. Do not exceed 40		1-40; Do not exceed.	
• Concrete/abstract Analysis	0	• Vacuuming/sweeping	8	• Profit and loss responsibility	0
• Computer use	0	• Empty wastebaskets	7	• Responsibility for Personnel	0
• Measurement – work to defined measure standards	2	• Making beds	0	• Customer Satisfaction	1
• Compliance with defined policies and procedures	5	• Cleaning lavatories	8	• Loss Prevention/Security	8
• [Other Factors]		• Clean glass surfaces/walls	5	• Regulatory Compliance	1
		• Mop/clean floors	3		
		• Comply with uniform procedures and policies	6		
Physical (1-20)					0
• Bending	3				
• Stretching	1				
• Standing	2				
• Prolonged sitting	0				
• Lifting	5				
• Use of powered equipment	4				
• Pushing carts/ equipment	5				
<b>TOTAL</b>	<b>27</b>		<b>37</b>		<b>10</b>

Hotel Housekeeper (Day)

Effort		Skill		Responsibility	
Criteria		Criteria		Criteria	
Mental (on a scale of 1-20, 20 being greatest)		All factors 1-40. Do not exceed 40		1-40; Do not exceed.	
• Concrete/abstract Analysis	0	• Vacuuming/sweeping	8	• Profit and loss responsibility	0
• Computer use	0	• Empty wastebaskets	6	• Responsibility for Personnel	0
• Measurement – work to defined standards	4	• Making beds	7	• Customer Satisfaction	5
• Compliance with defined policies and procedures	5	• Cleaning lavatories	7	• Loss Prevention/Security	5
• [Other Factors]		• Clean glass surfaces/walls	4	• Regulatory Compliance	1
		• Mop/clean floors	2		
		• Comply with uniform procedures and policies	6		

Effort		Skill		Responsibility	
Criteria		Criteria		Criteria	
Physical (1-20)					
• Bending	4				
• Stretching	1				
• Standing	2				
• Prolonged sitting	0				
• Lifting	3				
• Use of powered equipment	5				
• Pushing carts/ equipment	5				
<b>TOTAL</b>	<b>29</b>		<b>40</b>		<b>11</b>

These composite scores have the Hotel Housekeeper at 80 points and the Day Janitor at 74. These score have these positions (as composite of skill, effort and responsibility) within 8% of one another. Substantially similar?

I do not propose that this method is the only or even the best approach to comparing jobs for purposes of a substantially similar work analysis. I do propose that that a documented analysis of the kind described above will put an employer in a good position to defend against a wage disparity claim brought under the California Fair Pay Act.

### Step Two: Identify Disparities

A numeric threshold should be set for establishing “substantial similarity” based on this analysis. (+/- %). Break out persons holding all substantially similar positions along gender and race lines and total annual compensation. Identify all disparities in pay along protected class lines.

### Step Three: Evaluate Pay Disparities

Labor Code section 1197.5 provides, in part, that “[a]n Employer shall not pay any of it employees at wage rates less than the rates paid to employees of the opposite sex [or race] 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” that the wage differential is based upon one of more of the following factors:

- A seniority system.
- A merit system.
- A system that measures earnings by quantity or quality of production.
- **A bona fide factor other than sex such as education, training or experience. This factor shall apply only if the employer demonstrates that factor is not based on or derived from a sex [or race] 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 purposes it is supposed to serve. This defense shall not apply if the employee**

demonstrates that an alternative practice exists which would serve the same business purpose without producing the wage differential.

Each factor relied upon must be applied reasonably. The one or more factors relied upon must account for the entire wage differential. Prior salary shall not, by itself, justify any disparity in compensation.

The form below can be used as a template for this analysis. Complete one form for each protected class member within a substantially similar work group that is paid less than any non-protected class employee in that group.

## Differential Worksheet

Protected Class Member

Non Protected Class Member<sup>1</sup>

Job Group Identifier <hr/> Employee Name (or Identifier) <hr/> Position Title <hr/> Annual Base Compensation <hr/> Bonus Entitlement <hr/> Commission Terms <hr/>	Job Group Identifier <hr/> Employee Name (or Identifier) <hr/> Position Title <hr/> Annual Base Compensation <hr/> Bonus Entitlement <hr/> Commission Terms <hr/>
---	---

1. Is some or all of the differential in pay explained by a seniority system? If so, explain the term of seniority (attached a copy of any seniority policy) that justifies the disparity of a percentage of the disparity.

---



---



---

2. Does a merit system explain some or all of the wage disparity? If so, explain the system (attach a copy of the merit compensation policy) and how the system justifies the disparity.

---



---

3. Can the some or all of the wage disparity be explained by a system that measures earnings by quantity or quality of production. If so, explain (attach any compensation plans) how the system accounts for some or all of the disparity.

---



---



---

<sup>1</sup> Where more than one employee is paid more than the protected class member, then salary and compensation ranges (encompassing both the highest and lowest of non-protected class members) may be used.

4. Can the some or all of the wage disparity be explained by a bona fide factor other than sex (or race) such as education, training or experience? If so, specifically explain how these factors inform, explain, or justify some or all of the wage disparity.

---

---

---

---

5. If any portion of the wag disparity is justified by a bona fide factor other than sex (or race) such as education, training or experience, can we demonstrate that this factor is not based on or derived from a sex (or race) based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity.

---

---

---

---

6. For purposes of question 5, “business necessity” means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purposes it is supposed to serve. Do the reasons identified in response to question 5, above, meet this test? How?

---

---

---

---

7. For purposes of answering question 5, is there an alternative practice exists which would serve the same business purpose without producing the wage differential? If so, the wage differential is not justified.

---

---

---

---