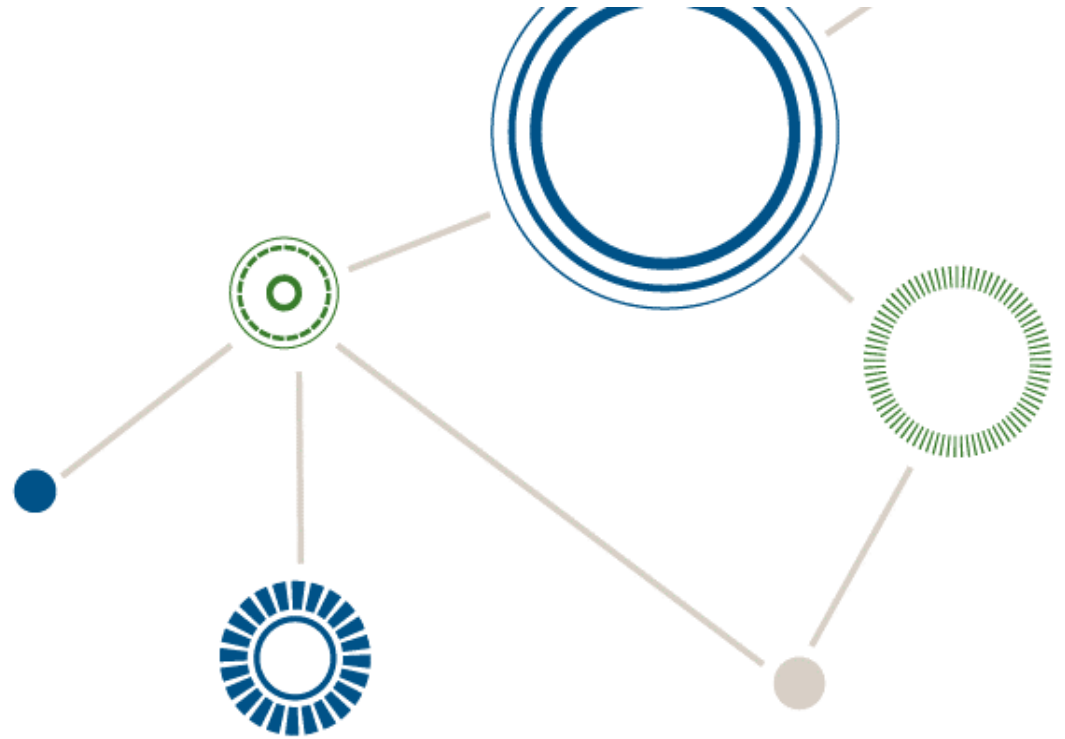




Hirschfeld  
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# California Leads the Nation with Equal Pay – For Everyone



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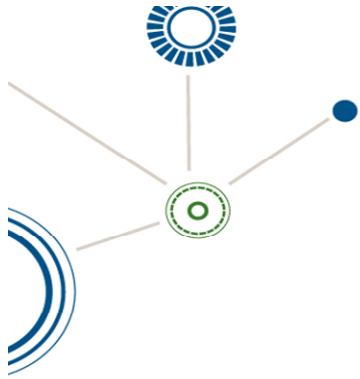


- President Obama cracked an equal pay joke while at a roundtable discussion in Pittsburgh in June 2014. "I will say, the first lady's kind of a bad example because the first lady doesn't get paid. And she works pretty hard," Obama said. He then noted, "Obviously, we're ok."



# Today's Discussion

- Fair Pay Act Refresher
- Recent Amendments
- Impacts of Election and Recent Amendments on Your Organization's Practices
- Circumstances under which Your Organization Should Conduct an Equal Pay Audit
- High Risk Industries for Fair Pay Act Claims



## Quick Reminder Re California Fair Pay Act Labor Code 1197.5 (effective January 1, 2016)

- Prohibits employers from paying members of opposite sex less for “substantially similar” [not “equal”] work.
  - Based on composite of skill, effort & responsibility.
  - Similar working conditions.
  - Need not be at same location/facility.





## Quick Reminder Re California Fair Pay Act Labor Code 1197.5 (effective January 1, 2016)

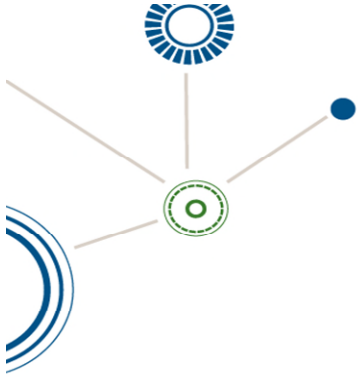
- Exceptions:
  - Seniority system [same];
  - Merit system [same];
  - Compensation system that measures earnings by production [same]; &
  - Bona fide factor other than sex [revised]*.





## Quick Reminder Re California Fair Pay Act Labor Code 1197.5 (effective January 1, 2016)

- Employees have legal right to discuss compensation.
- Recordkeeping – pay & performance for at least 3 years.
- Creates a private right of action for retaliation and discrimination.



# California Fair Pay Act – The “Bona Fide Factor” Exception

- Bona Fide Factor Other than Sex Exception
  - Must be consistent with business necessity, such as difference in training, education or experience that is job-related.
  - Business necessity = overriding legitimate business purpose *and* factor effectively fulfills the purpose.
  - Business necessity does not apply if an alternative employment serves the same purpose without producing a wage differential.

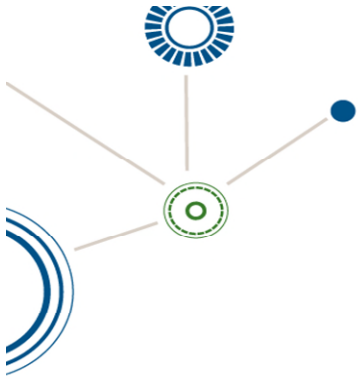




# California Fair Pay Act – The “Bona Fide Factor” Exception

- Factor must be applied reasonably.
- The factor(s) must account for entire wage differential.
- Burden on employer to prove.

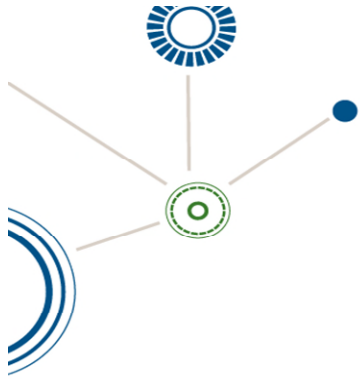




# Continued Momentum on the Pay Equity Front

January 1, 2017 – two new amendments went into effect:

- AB 1063: PROHIBITING WAGE INEQUALITY BASED ON RACE OR ETHNICITY FOR SUBSTANTIALLY SIMILAR WORK
- AB 1676: EMPLOYEE'S PRIOR SALARY CANNOT, BY ITSELF, JUSTIFY COMPENSATION DISPARITY



# New Pay Equity Laws Expanding Fair Pay Act (SB 1063)

Bill further expands the Fair Pay Act -strengthening prohibitions on gender-based pay differentials by adding a new Labor Code provision precluding wage differentials based on race or ethnicity.

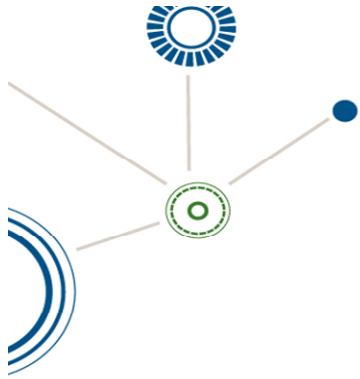




# New Pay Equity Laws

## Consideration of Prior Salary (AB 1676)

- **Salary History by Itself not a Bona Fide Factor Justifying Gender-Based Wage Differential (AB 1676)** - Amends Fair Pay Act to prohibit employers from considering prior salary to justify any disparity in compensation.
- Early version of the bill would have barred employers from asking job applicants about prior salary, and required private employers to provide an applicant with the pay scale for a position upon request. A similar version of this bill was vetoed by Gov. Brown in 2016.



## Four Main Differences Between the FPA and the EPA

Equal Pay Act of 1963 (amended by Lily Ledbetter  
FPA of 2009)

(1) EPA prohibits wage discrimination based on  
sex

“within any establishment”

- Under FPA, one work facility requirement is abandoned

(2) Statute of Limitations

- EPA (180 days – resets with every paycheck)

- FPA (3 years)





## Four Main Differences Between the FPA and the EPA

### (3) Burden of Proof

- EPA: Employee must prove similar
- FPA: Employer must prove dissimilar

### (4) Bona Fide Factor Other Than Sex

- EPA: Prior salary alone sufficient if reasonable and effectuated a business policy
- FPA: Prior salary alone insufficient





## Oh Yeah, It Matters: *Action - Reaction*

### ***California Today: With Trump's Rise, a Return to the 'Rebel State', NY Times, Nov. 9, 2016:***

- “As the nation delivered Donald J. Trump a stunning victory, **California went the other direction**, embracing a progressive agenda.”

### ***California Today: Democratic Dominance in Sacramento, NY Times, Nov. 29, 2016***

- “The Democrats’ victory does highlight California’s growing role as the **progressive counterpoint** to President-elect Donald J. Trump and the Republicans... “the supermajority achievement underscores the obvious: the Republicans are pretty much irrelevant to the policy-making process in Sacramento.”





# Five Biggest Myths About The FPA

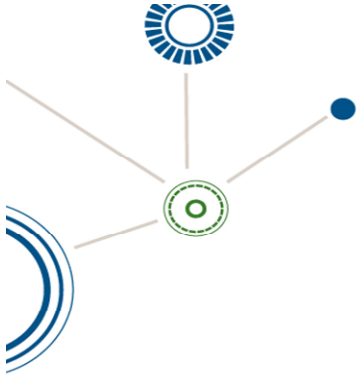
- **MYTH #1**
- MYTH: HR must tell employees what every co-employee is earning.
- TRUTH: Employer cannot prohibit employees from discussing wages.



## Five Biggest Myths About The FPA

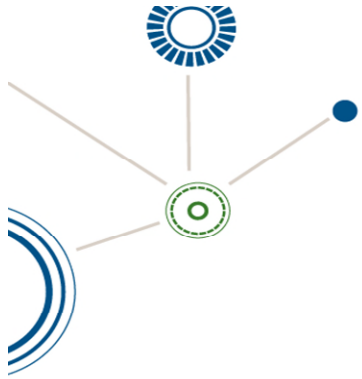
- **MYTH #2**
- MYTH: All employees in the same position must be paid equally.
- TRUTH: It depends on amount of work done, skill required, responsibility





## Five Biggest Myths About The FPA

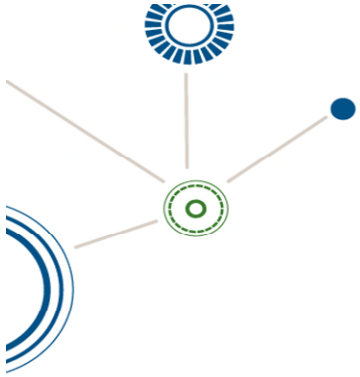
- **MYTH #3**
- MYTH: FPA prohibits wage differentials based on color, religion, sexual orientation, national origin and other protected classes.
- TRUTH: FPA only prohibits gender, race and ethnicity-based wage discrimination.



## Five Biggest Myths About The FPA

- **MYTH #4**
- MYTH: It is lawful to pay different wages to people based on color, religion, sexual orientation, national origin and other protected classes.
- TRUTH: Title VII and FEHA prohibit that. But... not the same burden of proof under those laws.





## Five Biggest Myths About The FPA

- **MYTH #5**
- MYTH: HR must provide pay records of comparable employees to any requesting employee.
- TRUTH: HR must provide allow employees to “inspect or copy records pertaining to their employment.”



# Proactive Steps You Should Consider Re FPA

While Obama administration pay equity momentum may be halted, California intends to eradicate unfair wage disparities

- Conduct a privileged wage audit/review of employee pay equity:
  - Compare “substantially similar” work, across all locations.
  - ID discrepancies not justified by differences in training/education, responsibility, skill.



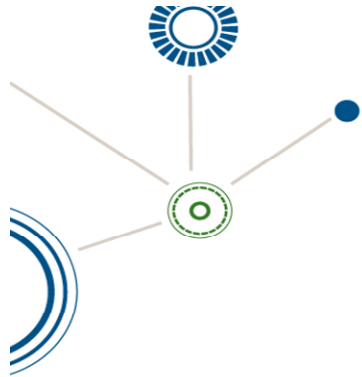
# Proactive Steps You Should Consider Re FPA

- Update job descriptions to accurately reflect actual duties.
- Update policies, handbooks & training to reflect commitment to equal pay and eliminate prohibitions on discussing pay.
- Train managers re rights to discuss pay and need for nondiscriminatory & justifiable compensation decisions.



# Proactive Steps You Should Consider Re FPA

- Train HR staff how to respond to requests for pay information and/or complaints re: pay equity
- Consider performing some or all of the foregoing under the shield of attorney work-product.
- Retain compensation and performance records for at least 3+ years.



# Doing the Analysis

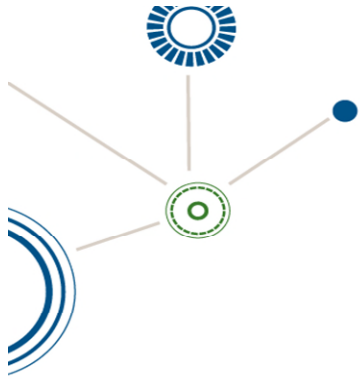
- Support of Executive Team
- Pre-Analysis Planning
  - Identifying data to collect, sources, and who will collect it
- Retention of Counsel



# Conducting the Analysis: How Do You Compare Employees Under The FPA?

- “Substantially Similar Work”
  - (1) Skill
  - (2) Effort
  - (3) Responsibility

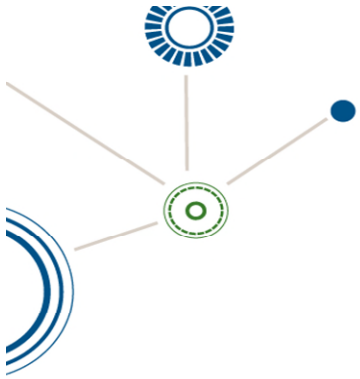




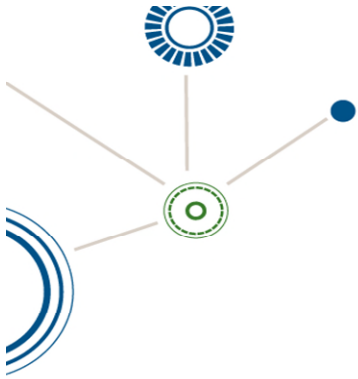
# Post Analysis Changes

- Consult with counsel under attorney client privilege
- Prepare plan to :
  - discuss with affected management
  - discuss with affected employee
    - had legitimate reasons for prior pay
    - excited to make change
    - current status of position within organization

# High Risk Industries



- Technology
- Healthcare
- Finance



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