Pay Inequity
A Significant Barrier to Gender Equality in the Legal Profession - What Does that Mean and What Can Be Done to Close the Gender Pay Gap?

Saturday, November 5, 2016

PRESENTED BY
ASIAN PACIFIC AMERICAN WOMEN LAWYERS ALLIANCE (APAWLA)
Pay Inequity

Rebecca K. Lee
Associate Professor of Law
Thomas Jefferson School of Law
Lawyers’ Weekly Salary by Gender*


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<td>of male lawyers’ salary</td>
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Representation of Attorneys in the Nation’s 200 Largest Law Firms in 2015 by Gender*

Representation of Equity Partners in the Typical Large Law Firm in 2015 by Race*

Representation of Equity Partners in the Typical Large Law Firm in 2015 by Gender and Race*

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Pay Inequity
In the Legal Profession

Jerrilyn T. Malana
Chief Deputy/Special Advisor
San Diego County District Attorney's Office

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The Disparity

77.4%  Female lawyers earn 77.4 percent of the pay earned by males

71.8%  Female judges, magistrates and other judicial officers earn 71.8 percent of pay earned by males

73.7%  Female legal support workers earn 73.7 percent of the pay earned by males

94.0%  Female paralegals and legal assistants earn 94.0 of the pay earned by males

• Data from 2014 U.S. Census Bureau
Career Choices

* Law Firm
  → Associate to Partner/Shareholder
  → Special Counsel, Of Counsel, etc.

* Big Law vs. Small Firm

* Solo Practitioner

* In-House Counsel

* Public Sector

* Non-Profit

* Academia

* Full-Time/Part-Time

* Independent Contractor
Special Challenges for Women of Color
Pay Equity Developments
California Law Protections

Mariko Yoshihara
Legislative Counsel & Policy Director
California Employment Lawyers Association
SB 358 (Sen. Jackson) - Strengthened the CA Equal Pay Act by:

- Requiring equal pay for “substantially similar” work;
- Eliminating the outdated “same establishment” requirement;
- Replacing the “bona fide factor other than sex” catch-all defense with a list of specific affirmative defenses;
- Ensuring that any legitimate, non-sex-related factor(s) relied upon are applied reasonably and account for the entire pay differential; and
- Protecting workers who inquire about their own or co-workers’ wages.
1197.5. (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, except where the employer demonstrates:

(1) The wage differential is based upon one or more of the following factors:

(A) A seniority system.

(B) A merit system.

(C) A system that measures earnings by quantity or quality of production.

(D) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-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 purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

(2) Each factor relied upon is applied reasonably.

(3) The one or more factors relied upon account for the entire wage differential.

...
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(C) A system that measures earnings by quantity or quality of production.

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(2) Each factor relied upon is applied reasonably.

(3) The one or more factors relied upon account for the entire wage differential. Prior salary shall not, by itself, justify any disparity in compensation.
1197.5. (b) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of another race or ethnicity 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:

(1) The wage differential is based upon one or more of the following factors:

(A) A seniority system.

(B) A merit system.

(C) A system that measures earnings by quantity or quality of production.

(D) A bona fide factor other than race or ethnicity, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a race- or ethnicity-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 purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

(2) Each factor relied upon is applied reasonably.

(3) The one or more factors relied upon account for the entire wage differential. Prior salary shall not, by itself, justify any disparity in compensation.
Enforcement

Recovery of Wages

• May recover in a civil action the balance of the wages, including interest, and an equal amount as liquidated damages, plus costs and reasonable attorney’s fees.

• All payroll records shall be kept on file for a period of three years.

• A civil action may be commenced no later than 2 years after the cause of action occurs, or 3 years for willful violation.

Retaliation

• An employer shall not retaliate against any employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of this section. An employer shall not prohibit an employee from disclosing the employee’s own wages, discussing the wages of others, inquiring about another employee’s wages, or aiding or encouraging any other employee to exercise his or her rights under this section. Nothing in this section creates an obligation to disclose wages.

• Any employee who has been discharged, discriminated or retaliated against may recover in a civil action reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, including interest thereon, as well as appropriate equitable relief.

• A civil action brought under this subdivision may be commenced no later than one year after the cause of action occurs.
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Pay Equity Developments
California Law Protections

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Division of Labor Standards Enforcement

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CA’s Equal Pay Act

CA Labor Commissioner’s Office
Historically Few 1197.5 Claims Filed
Retaliation Unit Investigates

Implementation
New Complaint Forms
FAQs
Equal Pay Cases Handout
Statewide Pay Equity Task Force
CA’s Equal Pay Act

Key Terms

* Substantially Similar Work
* Accounts for the Entire Wage Differential
* Applied Reasonably
CA’s Equal Pay Act

Pay Transparency

Labor Code already says employers may not bar employees from “disclosing” their own wages (Labor Code section 232)

Now, employers may not bar employees from, or discriminate or retaliate against employees for:

* Discussing their own wage or wages of others
* Inquiring about another employee’s wages
* But, employer not required to disclose other employee’s wages
CA’s Equal Pay Act

Employer Best Practices

* Conduct Pay Audit and Job Classification Analysis
* Apply Compensation Policies Reasonably
* Eliminate Bias From Performance Evaluations
* Transparency
* “Prior salary shall not, by itself, justify any disparity in compensation.” CA Labor Code section 1197.5(a)(3)
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Pay Equity Developments
Federal Law Protections

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Senior Trial Attorney
U.S. Equal Employment Opportunity Commission

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Federal Laws against Compensation Discrimination

**Equal Pay Act of 1963**
Prohibits sex-based compensation discrimination for “substantially equal” jobs (in skill, effort, responsibility, and working conditions) within the same establishment.

**Other Federal Discrimination Laws** *(Title VII, ADA, ADEA, GINA)*
Also prohibits compensation discrimination based on race, color, religion, sex, national origin, age, disability, genetic information, or protected activity, even if no person outside the protected class holds a “substantially equal” higher paying job.
Federal Laws against Compensation Discrimination

**Lilly Ledbetter Fair Pay Act of 2009**

Extends the time period in which claimants can bring pay discrimination claims
Examples of Discriminatory Practices

* Discriminatorily paying employees less or giving them lesser benefits on a prohibited basis

* Discriminatorily denying networking, mentoring, or training opportunities that facilitate promotion or assignment to higher paid positions

* Discriminatorily steering or classifying employees or applicants into lower paid positions – e.g., by refusing to place people into higher compensated positions
Equal Pay Act

**Prima Facie Case**

An employee is paid lower wages than another employee of the opposite sex for performing the same job of substantially equal work

Which shares the same or “common core” of tasks

- Which requires substantially equal skill, effort, and responsibility
- Which are performed under similar working conditions
- Which are performed in the same establishment
Equal Pay Act

Employer Defenses

* Seniority System
* Merit System
* Incentive System
* Any other factor, other than sex / gender
Equal Pay Act

Defense – Factors other than Sex / Gender

* Does not mean any other factor

* Factor must be a legitimate business reason

* Heavy burden to prove this defense
Equal Pay Act

Defense – Factors other than Sex / Gender

* Employer may offer higher compensation to applicants and employees who have greater education, experience, training, and ability, where the qualification is related to job performance or otherwise benefits the employer’s business

* Revenue Production

* Market Factors – only if it can prove assessed market place value of the particular individual’s job-related qualifications
Other Statutes v. Discrimination

Compare to Title VII and Other Discrimination Statutes

Employee’s Burden of Proof – Disparate Treatment

→ Direct evidence of discrimination

→ McDonnell Douglas Test for Circumstantial Evidence

* Employee’s Prima Facie Case – 1) member of protected class; 2) qualified; 3) adverse action; 4) employee treated differently (less favorably) than similarly situated individuals outside of protected class

* Employer’s articulation of legitimate, non-discriminatory reason for the employment decision;

* Employee’s burden to show employer’s reason was pretextual.
EPA & Other Statutes v. Discrimination

Compare to Title VII and Other Discrimination Statutes

Employee’s Burden of Proof – Disparate Impact Theory
* Policy / Practice has a significantly disproportionate exclusionary impact on the plaintiff’s protected class
* Evidence – includes direct / substantial evidence, statistical evidence

Employer’s Defense – Disparate Impact Theory
* Policy / Practice is “job-related for the position in question and consistent with business necessity”
EPA & Other Statutes v. Discrimination

EPA – Statute of Limitations

* 2 year statute of limitations – apply to filing of lawsuit, not filing of EEOC charge
* 3 years, if willful

Compare – Title VII, ADA, ADEA, GINA

* 180 days or 300 days (if there is a state discrimination law / agency) to file an EEOC Charge
* Lawsuit must be filed within 90 days after a right-to-sue letter
EPA & Other Statutes v. Discrimination

EPA – Coverage

Virtually all are covered: Only 1 employee needed for coverage

* Any employee who is “engaged in commerce or the production of goods in commerce”
* Interstate commerce, or
* Any employee working for entity “engaged in commerce or the production of goods in commerce” – of at least $500,000 in annual gross business volume.

Compare Title VII, ADA, ADEA, GINA

* Employers with 15+ employees for Title VII, ADA, GINA
* Employers with 20+ employees for age discrimination (ADEA).
EPA & Other Statutes v. Discrim.

EPA - Filing a Lawsuit

* Right to file a lawsuit directly in court without filing an EEOC Charge

Compare – Title VII, ADA, ADEA, GINA

* Need to file an EEOC Charge (or state charge) and get a right to sue letter before going to court
EPA & Other Statutes v. Discrim.

Prohibition against Retaliation against an individual who:

* Opposed an unlawful employer practice, or
* Made a charge, testified, assisted, or participated in an EEOC process
* (Title VII, ADA) Requested an accommodation (i.e. for disability, pregnancy)
Remedies and Relief

**EPA**

- Back pay – 2 years; 3 years, if willful
- Liquidated damages, if lacked good faith
- Compensatory damages / punitive for retaliation, not subject to statutory cap
- Injunctive relief – salary increases, policy changes, training
- Attorney’s fees

**Title VII**

- Back pay – no limit
- Punitive damages
- Compensatory damages / punitive damages for discrimination and retaliation – subject to statutory cap depending on size of employers
- Injunctive relief
- Attorney’s fees
Background on Lilly Ledbetter

* Shortly before retirement as a supervisor at Goodyear after almost 20 years, she learned that she was paid $1,000 to $2,000 less per month than male counterparts.

* Filed lawsuit under Title VII alleging compensation discrim. / retaliation. No Equal Pay Claim. Jury awarded her $3.3 million.


* Reversed, because she filed a claim more than 180 days after receiving her first discriminatory paycheck.

Lilly Ledbetter Fair Pay Act of 2009

* Compensation discrimination claim is timely as long as at least one discriminatory payment was received within filing period (180 / 300 days).
Payment Fairness Act to Strengthen the EPA

* Expand EPA remedies from back pay and liquidated damages to include compensatory and punitive damages
* Allow EPA lawsuit to proceed as class action
* Require employers to provide EEOC pay data identified by the race, sex, and national origin of the employees
* Prohibit retaliation against employees who share salary information
* Tightens employer’s affirmative defense to pay differential only when the employer can show that it is caused by something other than sex and is related to job performance
EEOC’s Enforcement of Equal Pay Laws

EEOC’s Strategic Enforcement Priorities for 2017-2021 – focus on enforcing Equal Pay Act, Title VII, and other discrimination laws against pay discrimination

* In 2015, EPA claims – 1% of 90,000 of charges nationally
* In 2014, sex discrimination claims – 29% of charges nationally

EEOC’s new rule requiring employer’s annual EEO-1 reports for 2017 to include summary pay data

* Currently, employers provide EEO-1 Reports to report on demographics (sex and race or ethnicity)
* New rule applies to employers and federal contractors with 100 or more employees
* Starting with 2017 EEO-1 report, Information required includes wages and hours worked by all employees sorted by job group and demographic categories, including sex and race or ethnicity
* Female employees claimed investment firm discriminated against them, including paying women in mid and upper level job less than men; and passing women over for promotions
* Settlement - $54 million; 3 year consent decree with training to combat discrimination, enhance promotional opportunities for women, and outside monitor

EEOC v. Woodward Governor Co. (N.D. Ill. 2006)
* Settlement of $2.6 million for a class of employees due to gender discrimination with respect to pay, promotion, and training

EEOC v. University of Denver (Dist. Col. 2016)
* Suit alleges that the law school had violated the Equal Pay Act by underpaying eight female law professors
Other Recent Federal Cases

*Lynn Coates, et al. v. Farmers Insurance Group (N.D. Cal. 2015)*

* Class action lawsuit alleges that Farmers violated federal and state laws by discriminating against its female attorneys resulting in lower pay and unequal promotions
* Settlement, includes $4 million to compensate the class;
* Settlement, including injunctive relief – retain independent consultant to review company policies; and increase representation of attorneys at higher salary levels.

*Kerrie Campbell v. Chadbourne & Parke LLP (S.D.N.Y. 2016)*

* $100 million class action lawsuit alleging the law firm of systematically excluding female partners from positions of decision-making authority and underpaying them.
Best Pay Practices for Employers

* Consistency in establishing starting salaries
* Have a written policy for promotional pay increases
* Communicate your policy; promote transparency
* Limit managerial discretion in setting pay
* Train key decision-makers
* Implement checks and balances to prevent discrimination and avoid liability
* Periodic review of pay scales
California Fair Pay Act
Senate Bill No. 358 by Senator Jackson
[Approved by Governor October 6, 2015. Enacted January 1, 2016.]

SECTION 1. The Legislature finds and declares the following:
(a) In 2014, the gender wage gap in California stood at 16 cents on the dollar. A woman working full time year round earned an average of 84 cents to every dollar a man earned. This wage gap extends across almost all occupations reporting in California. This gap is far worse for women of color; Latina women in California make only 44 cents for every dollar a white male makes, the biggest gap for Latina women in the nation.
(b) While the state’s overall wage gap is slightly lower than the national average of 78 cents to the dollar, the persistent disparity in earnings still has a significant impact on the economic security and welfare of millions of working women and their families. Collectively, women working full time in California lose approximately $33,650,294,544 each year due to the gender wage gap. The wage gap contributes to the higher statewide poverty rate among women, which stands at 18 percent, compared to approximately 15 percent for men, and the poverty rate is even higher for women of color and single women living with children.
(c) California has prohibited gender-based wage discrimination since 1949. Section 1197.5 of the Labor Code was enacted to redress the segregation of women into historically undervalued occupations, but it has evolved over the last four decades so that it is now virtually identical to the federal Equal Pay Act of 1963 (29 U.S.C. Sec. 206(d)). However, the state provisions are rarely utilized because the current statutory language makes it difficult to establish a successful claim.
(d) Pay secrecy also contributes to the gender wage gap, because women cannot challenge wage discrimination that they do not know exists. Although California law prohibits employers from banning wage disclosures and retaliating against employees for engaging in this activity, in practice many employees are unaware of these protections and others are afraid to exercise these rights due to potential retaliation.
(e) To eliminate the gender wage gap in California, the state’s equal pay provisions and laws regarding wage disclosures must be improved.

SEC. 2. Section 1197.5 of the Labor Code is amended to read:

1197.5. (a) No employer shall not pay any individual in the employer’s employ—of its employees—at wage rates less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal— for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and which are performed under similar working conditions, except where the payment is made pursuant to a seniority system, a merit system, a system which

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measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex. Employer demonstrates:

1. The wage differential is based upon one or more of the following factors:
   (A) A seniority system.
   (B) A merit system.
   (C) A system that measures earnings by quantity or quality of production.
   (D) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-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 purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

2. Each factor relied upon is applied reasonably.

3. The one or more factors relied upon account for the entire wage differential.

(b) Any employer who violates subdivision (a) is liable to the employee affected in the amount of the wages, and interest thereon, of which the employee is deprived by reason of the violation, and in an additional equal amount as liquidated damages.

(c) The provisions of this section shall be administered and enforced by the Division of Labor Standards Enforcement. Division of Labor Standards Enforcement shall administer and enforce this section. If the division finds that an employer has violated this section, it may supervise the payment of wages and interest found to be due and unpaid to employees under subdivision (a). Acceptance of payment in full made by an employer and approved by the division shall constitute a waiver on the part of the employee of the employee’s cause of action under subdivision (g).

(d) Every employer shall maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment of the persons employed by the employer. All of the records shall be kept on file for a period of two three years.

(e) Any employee may file a complaint with the division that the wages paid are less than the wages to which the employee is entitled under subdivision (a). These complaints shall be investigated as provided in subdivision (b) of Section 98.7. The division shall keep confidential the name of any employee who submits to the division a complaint regarding an alleged violation of subdivision (a) or that the employer is in violation of subdivision (j). The complaint shall be investigated as provided in subdivision (b) of Section 98.7. The division shall keep confidential the complaint, unless the division must abridge confidentiality to investigate the complaint. The name of the complaining employee shall remain confidential if the complaint is withdrawn before the confidentiality is abridged by the division. The division shall take all proceedings necessary to enforce the payment of any sums found to be due and unpaid to these employees.

(f) The department or division may commence and prosecute, unless otherwise requested by the employee or affected group of employees, a civil action on behalf of the employee and on behalf of a similarly affected group of employees to recover

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unpaid wages and liquidated damages under subdivision (a), and in addition shall be entitled to recover costs of suit. The consent of any employee to the bringing of any action shall constitute a waiver on the part of the employee of the employee’s cause of action under subdivision (g) unless the action is dismissed without prejudice by the department or the division, except that the employee may intervene in the suit or may initiate independent action if the suit has not been determined within 180 days from the date of the filing of the complaint.

(g) Any employee receiving less than the wage to which the employee is entitled under this section may recover in a civil action the balance of the wages, including interest thereon, and an equal amount as liquidated damages, together with the costs of the suit and reasonable attorney’s fees, notwithstanding any agreement to work for a lesser wage.

(h) A civil action to recover wages under subdivision (a) may be commenced no later than two years after the cause of action occurs, except that a cause of action arising out of a willful violation may be commenced no later than three years after the cause of action occurs.

(i) If an employee recovers amounts due the employee under subdivision (b), and also files a complaint or brings an action under subdivision (d) of Section 206 of Title 29 of the United States Code which results in an additional recovery under federal law for the same violation, the employee shall return to the employer the amounts recovered under subdivision (b), or the amounts recovered under federal law, whichever is less.

(j) (1) An employer shall not discharge, or in any manner discriminate or retaliate against, any employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of this section. An employer shall not prohibit an employee from disclosing the employee’s own wages, discussing the wages of others, inquiring about another employee’s wages, or aiding or encouraging any other employee to exercise his or her rights under this section. Nothing in this section creates an obligation to disclose wages.

(2) Any employee who has been discharged, discriminated or retaliated against, in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this section may recover in a civil action reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, including interest thereon, as well as appropriate equitable relief.

(3) A civil action brought under this subdivision may be commenced no later than one year after the cause of action occurs.

SEC. 3. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

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Equal Pay for Equal Work Act of 2016  
Assembly Bill No. 1890 by Assembly Member Dodd  
[As Amended, JUNE 21, 2016.]

**SECTION 1.** This act shall be known, and may be cited, as the Equal Pay for Equal Work Act of 2016.

**SEC. 2.** (a) The Legislature finds and declares the following:

1. According to data from the United States Census Bureau, full-time working women, on average, over the last decade, have continued to earn just $0.79 for every dollar a man earns. The wage gap is greater for women of color, with African American women being paid an average of $0.60 for every dollar paid to white, non-Hispanic men in 2015 and Latinas being paid just $0.55 for every dollar paid to white, non-Hispanic men in the same year.

2. This wage disparity amounted to a yearly average wage gap of $10,762 in 2015 between full-time working men and full-time working women. In total, the disparity represents more than $490 billion in lost wages for working women every year.

3. Disparities in pay for women have numerous negative impacts. This pay differential shortchanges women and their families by thousands of dollars a year and potentially hundreds of thousands of dollars over a lifetime. Nearly 4 in 10 mothers are primary breadwinners in their households, and nearly two-thirds are significant earners, making pay equity critical to the economic security of their families.

4. Equal pay for equal work is a fundamental precept in our nation and in California. Federal law, including the federal Equal Pay Act of 1963 (Public Law 88-38), Title VII of the Civil Rights Act of 1964 (Public Law 88-352), and Executive Order 11246 of September 24, 1965, entitled Equal Employment Opportunity, specifically prohibits arbitrarily compensating men and women differently for the same work, as does California’s Equal Pay Act.

5. On August 6, 2014, the United States Department of Labor’s Office of Federal Contract Compliance Programs issued a notice of proposed rulemaking to require covered federal contractors and subcontractors with more than 100 employees to submit an annual equal pay report on employee compensation. In California, state contractors receiving public money are obligated to comply with equal pay laws and should provide the state with aggregate wage data to advance pay equity.

(b) It is the intent of the Legislature in enacting this act to promote pay equity and nondiscrimination in setting pay and making hiring or promotional decisions, and to obtain better data on pay equity to more wholly address the problem.

**SEC. 3.** Section 12990 of the Government Code is amended to read:

12990. (a) Any employer who is, or wishes to become, a contractor with the state for public works or for goods or services is subject to the provisions of this part relating to discrimination in employment and to the nondiscrimination requirements of this section and any rules and regulations that implement it.

(b) Prior to becoming a contractor or subcontractor with the state, an employer may be required to submit a nondiscrimination program to the department for approval and certification.

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and may be required to and shall submit periodic reports of its compliance with that program. The department shall make the programs and reports available to the Commission on the Status of Women and Girls. The department may also require an employer with fewer than 100 employees in the state or a contract with the state that amounts to less than fifty thousand dollars ($50,000) to submit a nondiscrimination program and, if the department so requires, the employer shall comply with the requirements for employers with 100 or more employees in the state and a contract with the state that amounts to fifty thousand dollars ($50,000) or more. The department may require approval and certification of a nondiscrimination program. The department shall define an employee for the purposes of this paragraph.

(B) An employee in the construction industry covered by a valid collective bargaining agreement that expressly provides for the wages, hours of work, and working conditions of employees, premium wage rates for all overtime worked, and regular hourly pay of not less than 30 percent above the state minimum wage rate shall be excluded from calculation of the employer’s total number of employees for purposes of this paragraph.

(2) A nondiscrimination program shall include policies and procedures designed to ensure equal employment opportunities for all applicants and employees, a description of employment selection procedures, and employee compensation data, as follows:

(A) The total number of workers in a specific job category identified by worker race or national origin, and sex.

(B) The total wages required to be reported on Internal Revenue Service form W-2 for all workers in a specific job category identified by worker race or national origin, and sex.

(C) The total hours worked on an annual basis for all workers in a specific job category identified by worker race or national origin, and sex. For purposes of this subdivision, if an employer does not track exempt employees’ hours worked, full-time exempt employees shall be presumed to work 40 hours a week and part-time exempt employees shall be presumed to work 20 hours a week, unless the employer utilizes a different standard number of hours a week for exempt employees, in which case the employer shall report total hours worked on an annual basis by those employees based on that standard number.

(c) Every state contract and subcontract for public works or for goods or services shall contain a nondiscrimination clause prohibiting discrimination on the bases enumerated in this part by contractors or subcontractors. The nondiscrimination clause shall contain a provision requiring contractors and subcontractors to give written notice of their obligations under that clause to labor organizations with which they have a collective bargaining or other agreement. These contractual provisions shall be fully and effectively enforced. This subdivision does not apply to a credit card purchase of goods of two thousand five hundred dollars ($2,500) or less. The total amount of exemption authorized herein shall not exceed seven thousand five hundred dollars ($7,500) per year for each company from which a state agency is purchasing goods by credit card. It shall be the responsibility of each state agency to monitor the use of this exemption and adhere to these restrictions on these purchases.

(d) The department shall periodically develop rules and regulations for the application and implementation of this section, and submit them to the council for consideration and

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adoption in accordance with the provisions of Chapter 3.5 (commencing with Section 11340) of Part 1. Those rules and regulations shall describe and include, but not be limited to, all of the following:

1. Procedures for the investigation, approval, certification, decertification, monitoring, and enforcement of nondiscrimination programs.
2. The size of contracts or subcontracts below which any particular provision of this section shall not apply.
3. The circumstances, if any, under which a contractor or subcontractor is not subject to this section.
4. Criteria for determining the appropriate plant, region, division, or other unit of a contractor’s or subcontractor’s operation for which a nondiscrimination program is required.
5. Procedures for coordinating the nondiscrimination requirements of this section and its implementing rules and regulations with the California Plan for Equal Opportunity in Apprenticeship, with the provisions and implementing regulations of Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1, and with comparable federal laws and regulations concerning nondiscrimination, equal employment opportunity, and affirmative action by those who contract with the United States.
6. The basic principles and standards to guide the department in administering and implementing this section.

(e) Where a contractor or subcontractor is required to prepare an affirmative action, equal employment, or nondiscrimination program subject to review and approval by a federal compliance agency, that including an EEO-1 report that is subject to review by the United States Equal Employment Opportunity Commission, that program may be filed submitted with the department, instead of any nondiscrimination program regularly otherwise required by this section or its implementing rules and regulations. Such a program shall constitute a prima facie demonstration of compliance with this section. Where the department or a federal compliance agency has required the preparation of an affirmative action, equal employment, or nondiscrimination program subject to review and approval by the department or a federal compliance agency, evidence of such a program shall also constitute prima facie compliance with an ordinance or regulation of any city, city and county, or county that requires an employer to submit such a program to a local awarding agency for its approval prior to becoming a contractor or subcontractor with that agency.

(f) Where the department determines and certifies that the provisions of this section or its implementing rules and regulations are violated or determines a contractor or subcontractor is engaging in practices made unlawful under this part, the department may recommend appropriate sanctions to the awarding agency. Any such recommendation shall take into account the severity of the violation or violations and any other penalties, sanctions, or remedies previously imposed.

(g) The changes to this section made by the act adding this subdivision shall not be construed to negate an exemption to the requirements of this section in existence on January 1, 2017, created by the department through the exercise of its regulatory authority, or to otherwise require the department to reinterpret the validity of an exemption as a result of these changes.

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SECTION 1. The Legislature finds and declares all of the following:
(a) Over the past decade, the wage gap has barely budged and wage disparities continue to persist. In 2015, the gender wage gap in California stood at 16 cents on the dollar. For women of color, wage inequality is much worse. African American women in California make just 63 cents and Hispanic women less than 43 cents for every dollar white non-Hispanic men make.
(b) The problematic practices of seeking salary history from job applicants and relying on prior salary to set employees’ pay rates contribute to the gender wage gap by perpetuating wage inequalities across the occupational spectrum. Women are paid less than men in 99.6 percent of occupations and are more likely to face financial penalties for taking time out of the paid workforce due to childbearing and family caregiving responsibilities.
(c) When employers make salary decisions during the hiring process based on prospective employees’ prior salaries or require women to disclose their prior salaries during salary negotiations, women often end up at a sharp disadvantage and historical patterns of gender bias and discrimination repeat themselves, causing women to continue earning less than their male counterparts.
(d) Government officials have recognized the discriminatory impact that prior salaries can have on women in the job market. In 2015, on Equal Pay Day, the chair of the Equal Employment Opportunity Commission (EEOC) advised employers on important steps they could take to ensure equal pay for equal work, including eliminating “discriminatory pay gaps on the basis of prior salary” and the 2005 EEOC Compliance Manual states that “[p]rior salary cannot, by itself, justify a compensation disparity.”
(e) In July of 2015, the acting director of the federal Office of Personnel Management provided guidance on advancing pay equality in the federal government, warning that reliance on salary history “could potentially adversely affect a candidate who is returning to the workplace after having taken extended time off from his or her career or for whom an existing rate of pay is not reflective of the candidate’s current qualifications or existing labor market conditions.”
(f) Courts also have warned against relying on salary history and have stated that prior salary cannot, by itself, justify a wage disparity. In Corning Glass Works v. Brennan, (1974) 417 U.S. 188, the United States Supreme Court held that a pay differential which “ar[ises] simply because men would not work at the low rates paid women ... and reflect[s] a job market in which [the employer] could pay women less than men for the same work” is not based on a cognizable factor other than sex under the Equal Pay Act (Public Law 88-38) (Id., at 205). More recently, in Rizo v. Yovino, Fresno County Superintendent of Schools, United States District Court, Eastern District of California, Case No. 1:14-cv-0423-MJS, the district court denied summary judgment on defendant’s motion under the federal Equal Pay Act based on its finding that, “a pay structure based exclusively on prior wages is so inherently fraught with the risk — indeed, here, the virtual certainty — that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a
legitimate non-discriminatory business purpose.” (Id., at 16). The court went on to explain that, “say[ing] an otherwise unjustified pay differential between women and men performing equal work is based on a factor other than sex because it reflects historical market forces which value the equal work of one sex over the other perpetuates the market’s sex-based subjective assumptions and stereotyped misconceptions Congress passed the Equal Pay Act to eradicate.” (Id., at 17).

(g) This act will codify existing law with respect to the provision stating that prior salary cannot, by itself, justify a wage differential under Section 1197.5 of the Labor Code.

(h) This act will also help ensure that both employers and workers are able to negotiate and set salaries based on the requirements, expectations, and qualifications of the person and the job in question, rather than on an individual’s prior earnings, which may reflect widespread, longstanding, gender-based wage disparities in the labor market.

SEC. 2. Section 1197.5 of the Labor Code is amended to read:

1197.5. (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, except where the employer demonstrates:

(1) The wage differential is based upon one or more of the following factors:
(A) A seniority system.
(B) A merit system.
(C) A system that measures earnings by quantity or quality of production.
(D) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-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 purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

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

(b) Any employer who violates subdivision (a) is liable to the employee affected in the amount of the wages, and interest thereon, of which the employee is deprived by reason of the violation, and an additional equal amount as liquidated damages.

(c) The Division of Labor Standards Enforcement shall administer and enforce this section. If the division finds that an employer has violated this section, it may supervise the payment of wages and interest found to be due and unpaid to employees under subdivision (a). Acceptance of payment in full made by an employer and approved by the division shall constitute a waiver on the part of the employee of the employee’s cause of action under subdivision (g).

(d) Every employer shall maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment of the persons employed by the employer. All of the records shall be kept on file for a period of three years.

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(e) Any employee may file a complaint with the division that the wages paid are less than the wages to which the employee is entitled under subdivision (a) or that the employer is in violation of subdivision (j). The complaint shall be investigated as provided in subdivision (b) of Section 98.7. The division shall keep confidential the name of any employee who submits to the division a complaint regarding an alleged violation of subdivision (a) or (j) until the division establishes the validity of the complaint, unless the division must abridge confidentiality to investigate the complaint. The name of the complaining employee shall remain confidential if the complaint is withdrawn before the confidentiality is abridged by the division. The division shall take all proceedings necessary to enforce the payment of any sums found to be due and unpaid to these employees.

(f) The department or division may commence and prosecute, unless otherwise requested by the employee or affected group of employees, a civil action on behalf of the employee and on behalf of a similarly affected group of employees to recover unpaid wages and liquidated damages under subdivision (a), and in addition shall be entitled to recover costs of suit. The consent of any employee to the bringing of any action shall constitute a waiver on the part of the employee of the employee's cause of action under subdivision (g) unless the action is dismissed without prejudice by the department or the division, except that the employee may intervene in the suit or may initiate independent action if the suit has not been determined within 180 days from the date of the filing of the complaint.

(g) Any employee receiving less than the wage to which the employee is entitled under this section may recover in a civil action the balance of the wages, including interest thereon, and an equal amount as liquidated damages, together with the costs of the suit and reasonable attorney's fees, notwithstanding any agreement to work for a lesser wage.

(h) A civil action to recover wages under subdivision (a) may be commenced no later than two years after the cause of action occurs, except that a cause of action arising out of a willful violation may be commenced no later than three years after the cause of action occurs.

(i) If an employee recovers amounts due the employee under subdivision (b), and also files a complaint or brings an action under subdivision (d) of Section 206 of Title 29 of the United States Code which results in an additional recovery under federal law for the same violation, the employee shall return to the employer the amounts recovered under subdivision (b), or the amounts recovered under federal law, whichever is less.

(j) (1) An employer shall not discharge, or in any manner discriminate or retaliate against, any employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of this section. An employer shall not prohibit an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee’s wages, or aiding or encouraging any other employee to exercise his or her rights under this section. Nothing in this section creates an obligation to disclose wages.

(2) Any employee who has been discharged, discriminated or retaliated against, in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this section may recover in a civil action reinstatement and
reimbursement for lost wages and work benefits caused by the acts of the employer, including interest thereon, as well as appropriate equitable relief.

(3) A civil action brought under this subdivision may be commenced no later than one year after the cause of action occurs.

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SECTION 1. Section 1197.5 of the Labor Code is amended to read:

1197.5. (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, except where the employer demonstrates:
(1) The wage differential is based upon one or more of the following factors:
(A) A seniority system.
(B) A merit system.
(C) A system that measures earnings by quantity or quality of production.
(D) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-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 purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.
(2) Each factor relied upon is applied reasonably.
(3) The one or more factors relied upon account for the entire wage differential.
(b) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of another race or ethnicity 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:
(1) The wage differential is based upon one or more of the following factors:
(A) A seniority system.
(B) A merit system.
(C) A system that measures earnings by quantity or quality of production.
(D) A bona fide factor other than race or ethnicity, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a race- or ethnicity-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 purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.
(2) Each factor relied upon is applied reasonably.
(3) The one or more factors relied upon account for the entire wage differential.
Any employer who violates subdivision (a) or (b) is liable to the employee affected in the amount of the wages, and interest thereon, of which the employee is

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deprived by reason of the violation, and an additional equal amount as liquidated damages.

(d) The Division of Labor Standards Enforcement shall administer and enforce this section. If the division finds that an employer has violated this section, it may supervise the payment of wages and interest found to be due and unpaid to employees under subdivision (a)–(a) or (b). Acceptance of payment in full made by an employer and approved by the division shall constitute a waiver on the part of the employee of the employee’s cause of action under subdivision (g)–(h).

(e) Every employer shall maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment of the persons employed by the employer. All of the records shall be kept on file for a period of three years.

(f) Any employee may file a complaint with the division that the wages paid are less than the wages to which the employee is entitled under subdivision (a) or (b) or that the employer is in violation of subdivision (j)–(k). The complaint shall be investigated as provided in subdivision (b) of Section 98.7. The division shall keep confidential the name of any employee who submits to the division a complaint regarding an alleged violation of subdivision (a)–(b), or (j)–(k) until the division establishes the validity of the complaint, unless the division must abridge confidentiality to investigate the complaint. The name of the complaining employee shall remain confidential if the complaint is withdrawn before the confidentiality is abridged by the division. The division shall take all proceedings necessary to enforce the payment of any sums found to be due and unpaid to these employees.

(g) The department or division may commence and prosecute, unless otherwise requested by the employee or affected group of employees, a civil action on behalf of the employee and on behalf of a similarly affected group of employees to recover unpaid wages and liquidated damages under subdivision (a)–(a) or (b), and in addition shall be entitled to recover costs of suit. The consent of any employee to the bringing of any action shall constitute a waiver on the part of the employee of the employee’s cause of action under subdivision (g)–(h) unless the action is dismissed without prejudice by the department or the division, except that the employee may intervene in the suit or may initiate independent action if the suit has not been determined within 180 days from the date of the filing of the complaint.

(h) Any employee receiving less than the wage to which the employee is entitled under this section may recover in a civil action the balance of the wages, including interest thereon, and an equal amount as liquidated damages, together with the costs of the suit and reasonable attorney’s fees, notwithstanding any agreement to work for a lesser wage.

(i) A civil action to recover wages under subdivision (a) or (b) may be commenced no later than two years after the cause of action occurs, except that a cause of action arising out of a willful violation may be commenced no later than three years after the cause of action occurs.

(j) If an employee recovers amounts due the employee under subdivision (b)–(c), and also files a complaint or brings an action under subdivision (d) of Section 206 of Title 29 of the United States Code which results in an additional recovery under federal law for the same violation, the employee shall return to the employer the amounts

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recovered under subdivision (b), (c), or the amounts recovered under federal law, whichever is less.

(k) (1) An employer shall not discharge, or in any manner discriminate or retaliate against, any employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of this section. An employer shall not prohibit an employee from disclosing the employee’s own wages, discussing the wages of others, inquiring about another employee’s wages, or aiding or encouraging any other employee to exercise his or her rights under this section. Nothing in this section creates an obligation to disclose wages.

(2) Any employee who has been discharged, discriminated or retaliated against, in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this section may recover in a civil action reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, including interest thereon, as well as appropriate equitable relief.

(3) A civil action brought under this subdivision may be commenced no later than one year after the cause of action occurs.

SEC. 2. Section 1199.5 of the Labor Code is amended to read:

1199.5. Every employer or other person acting either individually or as an officer, agent, or employee of another person is guilty of a misdemeanor and is punishable by a fine of not more than ten thousand dollars ($10,000), or by imprisonment for not more than six months, or by both, who willfully does any of the following:

(a) Pays or causes to be paid any employee a wage less than the rate paid to an employee of another sex, race, or ethnicity, as required by Section 1197.5.

(b) Reduces the wages of any employee in order to comply with Section 1197.5.

No person shall be imprisoned pursuant to this section except for an offense committed after the conviction of the person for a prior offense pursuant to this section.

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Equal Pay and Compensation Discrimination

The right of employees to be free from discrimination in their compensation is protected under several federal laws, including the following enforced by the U.S. Equal Employment Opportunity Commission: the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and Title I of the Americans with Disabilities Act of 1990.

The law against compensation discrimination includes all payments made to or on behalf employees as remuneration for employment. All forms of compensation are covered, including salary, overtime pay, bonuses, stock options, profit sharing and bonus plans, life insurance, vacation and holiday pay, cleaning or gasoline allowances, hotel accommodations, reimbursement for travel expenses, and benefits.

Equal Pay Act

The Equal Pay Act requires that men and women be given equal pay for equal work in the same establishment. The jobs need not be identical, but they must be substantially equal. It is job content, not job titles, that determines whether jobs are substantially equal. Specifically, the EPA provides that employers may not pay unequal wages to men and women who perform jobs that require substantially equal skill, effort and responsibility, and that are performed under similar working conditions within the same establishment. Each of these factors is summarized below:

- **Skill**
  Measured by factors such as the experience, ability, education, and training required to perform the job. The issue is what skills are required for the job, not what skills the individual employees may have. For example, two bookkeeping jobs could be considered equal under the EPA even if one of the job holders has a master’s degree in physics, since that degree would not be required for the job.

- **Effort**
  The amount of physical or mental exertion needed to perform the job. For example, suppose that men and women work side by side on a line assembling machine parts. The person at the end of the line must also lift the assembled product as he or she completes the work and place it on a board. That job requires more effort than the other assembly line jobs if the extra effort of lifting the assembled product off the line is substantial and is a regular part of the job. As a result, it would not be a violation to pay that person more, regardless of whether the job is held by a man or a woman.
Responsibility
The degree of accountability required in performing the job. For example, a salesperson who is delegated the duty of determining whether to accept customers’ personal checks has more responsibility than other salespeople. On the other hand, a minor difference in responsibility, such as turning out the lights at the end of the day, would not justify a pay differential.

Working Conditions
This encompasses two factors: (1) physical surroundings like temperature, fumes, and ventilation; and (2) hazards.

Establishment
The prohibition against compensation discrimination under the EPA applies only to jobs within an establishment. An establishment is a distinct physical place of business rather than an entire business or enterprise consisting of several places of business. In some circumstances, physically separate places of business may be treated as one establishment. For example, if a central administrative unit hires employees, sets their compensation, and assigns them to separate work locations, the separate work sites can be considered part of one establishment.

Pay differentials are permitted when they are based on seniority, merit, quantity or quality of production, or a factor other than sex. These are known as “affirmative defenses” and it is the employer’s burden to prove that they apply.

In correcting a pay differential, no employee’s pay may be reduced. Instead, the pay of the lower paid employee(s) must be increased.

Title VII, ADEA, and ADA
Title VII, the ADEA, and the ADA prohibit compensation discrimination on the basis of race, color, religion, sex, national origin, age, or disability. Unlike the EPA, there is no requirement that the claimant’s job be substantially equal to that of a higher paid person outside the claimant’s protected class, nor do these statutes require the claimant to work in the same establishment as a comparator.

Compensation discrimination under Title VII, the ADEA, or the ADA can occur in a variety of forms. For example:

- An employer pays an employee with a disability less than similarly situated employees without disabilities and the employer’s explanation (if any) does not satisfactorily account for the differential.
- An employer sets the compensation for jobs predominately held by, for example, women or African-Americans below that suggested by the employer’s job evaluation study, while the pay for jobs predominately held by men or whites is consistent with the level suggested by the job evaluation study.
- An employer maintains a neutral compensation policy or practice that has an adverse impact on employees in a protected class and cannot be justified as job-related and consistent with business necessity. For example, if an employer provides extra compensation to employees who are the “head of household,” i.e., married with dependents and the primary financial contributor to the household, the practice may have an unlawful disparate impact on women.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on compensation or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII, ADEA, ADA or the Equal Pay Act.
Panel: “Pay Inequity—A Significant Barrier to Gender Equality in the Legal Profession—What Does That Mean and What Can Be Done to Close the Gender Pay Gap?”

Session No. 405
Saturday, November 5, 2016, 9:15-10:30 a.m.

List of Informative and Practical Resources
Publications presented by the American Bar Association (ABA) Presidential Task Force on Gender Equity and the Commission on Women in the Profession:

- Closing the Gap: A Road Map for Achieving Gender Pay Equity in Law Firm Partner Compensation (2013)
- ABA Toolkit for Gender Equity in Partner Compensation (2013)
- What You Need to Know about Negotiating Compensation (2013)

[All of the above publications are available to download at no cost at the ABA Task Force on Gender Equity website at: http://www.americanbar.org/groups/women/gender_equality_task_force.html]

American Bar Association – Presidential Diversity Initiative, Diversity in the Legal Profession: The Next Steps (April 2010),
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