

# Defining Key Terms of the Fair Pay Act (SB 358)

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# Legal research conducted

- ▶ Review of 43 state equal pay statutes, federal Equal Pay Act of 1963, EEOC regulations, state and federal cases, model jury instructions, and various secondary sources
  - ▶ Summary of state equal pay laws available at [www.ncsl.org/research/labor-and-employment/equal-pay-laws.aspx](http://www.ncsl.org/research/labor-and-employment/equal-pay-laws.aspx)
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# Key terms

- ▶ “Substantially similar” work
  - Two other states use this term: Illinois and Louisiana
  - Most judicial interpretation from federal equal pay cases which use a “substantially equal” test
  - Substantially equal means share a common core of tasks, ok if one job involves an additional but peripheral task, skills possessed by the individuals themselves not determinative (*Hein v. Oregon College of Education* (Ninth Circuit))

# Work as composite of skill, effort and responsibility

## Skill:

- Includes experience, training, education and ability
- What it doesn't include:
  - Skills not required for the job
  - Efficiency of employee's performance
  - Frequency in exercising the skill

## Effort:

- ▶ Physical and mental exertion needed for a job
  - ▶ Ok if effort exerted in different ways
  - ▶ Ok if sporadic performance of an activity requiring additional exertion
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## Responsibility

- ▶ Accountability required in the performance of a job
- ▶ Extent that employee supervises others is considered (*Howard v. Lear Corp. Eeds & Interiors* (7<sup>th</sup> Circuit))

## Similar working conditions

- Surroundings and hazards
- Time of day worked, i.e. shift, not a relevant factor (*Corning Glassworks v. Brennan* (S Ct.))
- Travel required by job included in hazards analysis

# Employer affirmative defenses to Fair Pay Act claim

## Seniority system:

- ▶ Preferential treatment in employee rights based on length of time employed
- ▶ Courts like to see a *specific* seniority system: i.e. one that addresses when seniority starts to be counted, under what circumstances it can be forfeited, how it accrues (*California Brewers Assoc. v. Bryant* (Title VII race discrimination case)).

## Merit system:

- ▶ Evaluation based on work performance
- ▶ Must be well-established to be a valid defense (*Ryduchowski v. The Port Authority of New York* (Federal equal pay act case))

“Bona fide” factor other than sex

- ▶ Education, training or experience
  - ▶ Term not found in federal Equal Pay Act
  - ▶ In a handful of state statutes, also referred to as factor “exercised in good faith”
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