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Alerts & Publications

New California Fair Pay Act Strengthens Ban on Gender-Based Pay Discrimination

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On October 6, 2015, Governor Brown signed the California Fair Pay Act (the "Act"), which amends Labor Code Section 1197.5 and significantly strengthens California's existing prohibition of gender-based pay discrimination. Come January 1, 2016—when the Act goes into effect—California will have one of the most stringent equal pay laws in the country. Here is what California employers need to know before then.

"Substantially Similar Work"—Regardless of Location—is the New Standard

Under existing state and federal law, employers are prohibited from paying employees of one sex less than employees of the opposite sex for performing "equal work" at the same establishment. The Act, however, expands this ban and now prohibits an employer from paying 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." In so doing, the Act eliminates the requirement that the comparator-employee work in the "same establishment" and replaces the "equal work" standard with a broader "substantially similar work" standard. This means that employees in different roles and locations may now be used as comparators for purposes of establishing a violation of Section 1197.5. For example, as the Act's author explained, a female housekeeper who cleans hotel rooms could challenge the wages paid to a male janitor who cleans the lobby and banquet halls. The pay disparity at issue now does not have to be within the same job, department or same work location to be actionable.

The damages that employees may recover under Section 1197.5 remain unchanged: successful employees may recover (1) the amount by which the employee was underpaid, plus interest, (2) plus an equal amount as liquidated damages, and (3) costs and reasonable attorney's fees.

Employers Now Bear the Burden of Proof

The Act places the burden squarely on the employer to affirmatively demonstrate that the pay differential is *entirely attributable* to one or more of the following, permissible factors and that such factor has been applied by the employer *reasonably*:

- 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 that is job-related and consistent with a "business necessity."

It is no longer enough for an employer to identify one of these factors as a partial explanation. Further, the Act narrowly defines "business necessity" to mean "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve" and this defense is not available if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

Employee's Right to Disclose and Discuss Wages is Protected Activity

The Act designates as protected conduct an employee's disclosure of his or her wages, discussing the wages of others, inquiring about other employees' wages, or aiding or encouraging any other employee to exercise his or her rights under the Act. Employers cannot prohibit any such conduct by employees and cannot retaliate or discriminate against employees who exercise this right. The Act creates a specific private right of action for employees to enforce this provision. The Act does not, however, create any affirmative obligation for employers to disclose wages. As a reminder, under California Labor Code Section 232, employers are already prohibited from requiring an employee to refrain from disclosing the amount of his or her wages or requiring an employee to waive their right to discuss the amount of his or her wages. Similarly, under the NLRA, two or more employees addressing their employer about improving their pay is already considered protected concerted activity.

Retaliation & Discrimination is Prohibited

The Act expressly prohibits employers from discharging or in any manner discriminating or retaliating against any employee for taking any action protected by the Act. An employee who has been discharged, discriminated or retaliated against may pursue a civil action for reinstatement and reimbursement for lost wages and work benefits, including interest and appropriate equitable relief.

Enhanced Record Keeping Requirements for Employers

The Act increases the duration that employers must keep records of wages, wage rates, job classifications and other terms and conditions of employment from two years to three years.

How it Compares to Existing Federal Law

Prior to the present amendments, Section 1197.5 was virtually identical to the federal Equal Pay Act ("EPA"). Now, with the changes outlined above, Section 1197.5 is significantly more employee-friendly than the EPA in several important respects and thus employers likely will face a greater burden in defending against claims under California law. For example, the EPA prohibits paying one sex less than employees of the opposite sex for performing "***equal work***" within "any establishment." Establishment is a distinct physical place of business, as opposed to an entire business or enterprise and thus under federal law separate offices of an employer that are geographically and operationally distinct are not deemed a single establishment under the EPA. As discussed above, the Act deleted the "same establishment" requirement from Section 1197.5 and thus it appears that under the Act, employees may compare their salary to those who work in different locations. Similarly, the Act requires that the work of the comparator be "substantially similar" as opposed to "equal" as required by the EPA. Further, the EPA does not contain the requirement that the wage differential be *completely* explained by one of the four enumerated permissible factors.

What Employers Should Do Before January 1, 2016:

- Conduct a privileged review of current compensation for substantially similar positions across the entire company (based on skill, effort, and responsibility) to ensure compliance with the Act.
- Ensure that any pay disparities can be *completely* explained by seniority, merit, quantity or quality of production, or another bona fide factor other than sex and document that the factor has been *reasonably* applied.
- Adequately train all managers, supervisors, and HR professionals on the Act's requirements.
- Update record keeping policies to satisfy the new three-year requirement.
- Update handbooks, offer letters, confidentiality agreements, policies, and procedures to ensure that confidentiality provisions do not prohibit an employee from disclosing his or her wages, discussing with co-workers the wages of others, or inquiring about co-worker's wages.
- Update handbooks, policies, and procedures prohibiting retaliation and non-discrimination to include a specific reference to the Act.
- Ensure that you have an adequate internal complaint procedure available for employees wishing to address any wage disparity issue.

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