CALIFORNIA FAIR PAY ACT: AMENDMENTS TO THE EXISTING EQUAL PAY ACT MAKE IT EASIER FOR EMPLOYEES TO PROVE UNLAWFUL WAGE DIFFERENTIALS BASED ON GENDER

By: Wendy Lane
WLane@GreenbergGlusker.com
(310) 785-6870

Effective January 1, 2016, California Employers of all sizes are required to comply with the Fair Pay Act, which requires that employers provide equal pay to male and female employees who perform "substantially similar" work.

The Act amends California Labor Code Section 1197.5 (known as the California Equal Pay Act) which generally prohibits employers from paying lower wages to employees of one gender as compared to employees of the opposite gender when those employees (a) work at the same establishment, and (b) perform "equal work" on jobs requiring "equal" skill, effort and responsibility and which are performed under similar working conditions in the same establishment.

The new law eliminates the "equal work" requirement and will now bar employers from paying disparate wage rates to employees of one sex as compared to the opposite sex where the employees perform "*substantially similar* work when viewed as a composite of skill, effort, and responsibility and performed under similar working conditions." The Fair Pay Act will also eliminate the current Section 1197.5 requirement that the wage differential be in the "same establishment." Now, employers must be mindful of paying equal wages to employees who perform substantially similar work throughout their entire company and not just at any given location.

The law, as amended, still excuses equal pay requirements where a wage differential is justified by (1) seniority, (2) merit, and/or (3) quantity or quality of production. However, employers will soon have a much higher burden in proving a pay differential falls under the fourth currently-available defense of a "*bona fide* factor other than sex." Beginning January 1, 2016, an employer cannot invoke that defense unless it can also prove that the factor is (1) not based on or derived from a sex based differential in compensation; (2) job-related with respect to the position in question; (3) consistent with a "business necessity;" and (4) applied reasonably and accounts for the entire wage differential.

Under the new law, "business necessity" is defined as "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve." However, the employee can defeat this defense by showing that another business practice would serve the same business purpose without causing pay inequality.

Finally, because the legislature made clear that it believes the gender wage gap is due to secrecy regarding wages that has, until now, prevented employees from knowing when wage discrimination is in effect, the law is now amended to prohibit discrimination or retaliation (including termination) against employees who seek to enforce or obtain assistance in enforcing the new law. Moreover, employers cannot prohibit employees from disclosing their own wages, discussing the wages of others, inquiring about another employee's wages, or helping another employee to exercise his or her rights under the Fair Pay Act.

The law explicitly states that it does not create an obligation for the employer or any employee to disclose wages. However, as a practical matter, that provision will have no effect in the event that an employee files a complaint with the Court or with the Division of Labor Standards Enforcement ("DSLE") which is charged with administering and enforcing the Act. In such a case, the DLSE or employee's attorney will undoubtedly conduct discovery requiring disclosure of other employees' wages. In fact, to assist with such discovery, the Act requires employers to maintain and to keep on file for three years the records of wages and wage rates, job classifications, and other terms and conditions of employment for all of its employees.

An employer who violates the Act may face severe consequences. An employee whose wages are negatively affected in violation of the law can recover not only the balance of wages that should have been paid, but also an equal amount as liquidated damages, plus interest, costs of suit, and attorney's fees. Moreover, there is no requirement that an employee exhaust administrative remedies with the DLSE before filing a lawsuit in court.

To avoid such a costly result, employers should carefully review their records and be mindful of apparent gender-related disparities in wages paid to employees who perform substantially similar work, regardless of their title or geographic location in the organization. We also encourage employers to implement the following best practices:

- Consider the wages of all employees already performing similar work when setting wages for a new employee, especially with respect to employees who have similar skills and responsibilities.

- Consider creating formal levels of job classification and wage tiers that account for varying levels of skill, experience and seniority.

- Make merit-based decisions about pay according to objectively measurable criteria when possible and document those factors underlying the decisions.

- Document when higher wages are set for an employee due to higher levels of skill, experience, or higher quality or quantity of production.

- Make sure that company confidentiality agreements, handbooks, and policies do not prohibit employees from discussing wages. Revise handbooks and written policies to emphasize the bar on retaliation against employees who invoke their rights under the Act.

- Provide training to supervisors and all employees involved in deciding wages and other compensation regarding the Act, including the anti-retaliation provisions.

- Consider engaging an attorney to assist in the evaluation of wage practices to shield communications and analyses under the attorney-client privilege.

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For more information, please contact any member of Greenberg Glusker's Employment Law Group: Sofia Aguilar, Nancy Bertrando, Paul Blechner, Olivia Goodkin, or Wendy E. Lane at (310) 553-3610.