

# EMPLOYMENT LAW COMMENTARY

Volume 29, Issue 9  
September 2017

## San Francisco

Lloyd W. Aubry, Jr., Editor  
Karen J. Kubin  
Eric A. Tate

## Palo Alto

Christine E. Lyon  
Tom E. Wilson

## Los Angeles

Tritia M. Murata  
Timothy F. Ryan  
Janie F. Schulman

## New York

Miriam H. Wugmeister

## London

Annabel Gillham

## Berlin

Hanno Timmer

## Beijing

Paul D. McKenzie

## Hong Kong

Stephen Birkett

## Sidebar:

UK Gender Pay Gap Reporting: A  
Step in the Right Direction?



## WORKPLACE BIAS AND GENDER PAY EQUITY IN SILICON VALLEY 2017

By [Eric Tate](#) and [Kathiana Aurelien](#)

It was only a couple of years ago, on March 27, 2015, that a jury rejected Ellen Pao's gender discrimination claims and rendered a defense verdict in favor of her former employer, a prominent Silicon Valley venture capital firm. The Ellen Pao case, and the media attention it received, helped place concerns about bias and gender pay equity in the spotlight in Silicon Valley. Now issues of bias and pay equity in the workplace are again taking center stage in Silicon Valley, with almost daily media reports about Silicon Valley's gender problem and a continuing list of companies and notable Silicon Valley figures being taken to task with allegations of inappropriate conduct towards women, including but not limited to Binary Capital co-founder Justin Caldbeck and 500 Startups founder Dave McClure. Also high-profile lawsuits recently have been filed, including against UploadVR with

Attorney Advertising

**MORRISON  
FOERSTER**

continued on page 2

allegations of a sex room in the office, and against Google for violation of the California Equal Pay Act.

Contrary to the Ellen Pao result, however, 2017 has witnessed CEOs, other employees, and board members lose their positions over bias and gender equity concerns, confirming that organizations unable to effectively address bias and gender pay equity issues in the workplace do so at their peril. This article highlights recent key legislative and case law developments involving issues of bias and gender pay equity in the workplace of which all employers with operations in California should be aware.

### **WORKPLACE BIAS LEGISLATION.**

*Investor liability for sexual harassment of entrepreneurs.* On August 17, 2017, California State Senator Hannah-Beth Jackson announced that she was proposing SB 224, a bill that would include an investor among those listed persons who may be liable to a plaintiff for sexual harassment under the Unruh Act.<sup>1</sup> The Unruh Act is a California law that generally proscribes discrimination and harassment in non-employment settings between parties to a business, service, or professional relationship. The bill would afford successful plaintiffs potential remedies under the Unruh Act, including actual damages and exemplary damages equaling three times the amount of actual damages that might be proven, in addition to attorneys' fees and costs. Senator Jackson proposed the bill in the wake of recent media reports in which dozens of women entrepreneurs reported being sexually harassed while seeking funding from tech investors. Senator Jackson noted, "[e]very woman deserves a workplace free from harassment, especially women who are starting their businesses and may be even more vulnerable to inappropriate coercion. Gender discrimination in business relationships must end." Given that the most recent Legislative session ended on September 15, Senator Jackson will formally introduce this new bill in January 2018. It obviously is too early to tell if the bill will pass and, if so, in what form. But this will no doubt be a closely watched bill in Silicon Valley.

*Expanding sexual harassment training to include gender identity/expression and sexual orientation for supervisors.* Since 2004, California companies with 50 or more employees have been required by law to provide at least two hours

## **UK Gender Pay Gap Reporting: A Step in the Right Direction?**

By [Annabel Gillham](#)

As we [reported](#) back in April this year, the UK has implemented a mandatory gender pay gap reporting for large employers. Approximately 9,000 employers will be required to publish pay gap data by April 4, 2018. So far, 81 employers have published in advance of the deadline. Figures are given for the mean and median gap in hourly pay, the percentage of men and women in each quarter of the payroll, the gap in bonus pay, and the percentage of men and women receiving a bonus.

The overall gender pay gap in the UK in 2016 was 18.1%. However, across the financial and professional services sector this seems to be significantly higher: the mean and median gap in hourly pay reported so far has, for many employers, reached over 30%. The message from employers is that the gap is largely explained by an uneven spread of women throughout their businesses, with a relatively low percentage occupying senior and/or highly paid positions. Many employers who have reported emphasize that a gender pay gap is not necessarily indicative of pay inequality across like

of sexual harassment training for supervisors every two years.<sup>2</sup> Ten years later, in 2014, the Legislature added a requirement that the two hours of mandatory supervisor training include instruction on “abusive conduct,” more commonly known as bullying.<sup>3</sup> SB 396, a bill introduced by California State Senator Ricardo Lara, would require that the two hours of mandatory supervisor training also address harassment based on gender identity, gender expression, and sexual orientation.<sup>4</sup> SB 396 does not extend the minimum duration of training or impose any other new requirements for the training.

### **GENDER PAY EQUITY DEVELOPMENTS.**

When California’s Equal Pay Act was revised in 2015, we wondered whether the amendments could usher in a tidal wave of gender pay discrimination litigation.<sup>5</sup> Among other changes, the amendments (1) expanded the range of jobs that could be compared from “equal work” within the same establishment to “substantially similar work” even if at different establishments, (2) provided that, once a pay differential is shown, the employer has the burden to prove the differential was not discriminatory, and (3) required that any proffered non-discriminatory factors had to account for the *entire* pay differential in order for the employer to not violate the statute. In other words, these amendments potentially made it easier for plaintiffs to prevail under the statute. If the most recent class action filed against Google on September 14 is any indication, now is likely a good time for Silicon Valley companies to batten down the hatches.

*Three former female Googlers file Equal Pay Act class action against Google.* Three weeks ago, a group of former female Googlers, Kelly Ellis, Holly Pease, and Kelli Wisuri, filed a lawsuit against Google in San Francisco Superior Court on behalf of a putative class comprising:

All women employed by Google in California at any time during the time period beginning four years prior to the filing of this Complaint through the date of trial in this action.

The Complaint alleges violations of the California Equal Pay Act, and other provisions of the California Labor Code and Business and Professions Code, and seeks monetary and injunctive relief. The Court has granted

work (the former gives a snapshot across the entire organization, the latter is concerned with ensuring that men and women performing like work or work of equal value are paid the same).

Action plans published by some employers for closing their gender pay gap include revisions to hiring practices to ensure a gender-balanced shortlist and implementing a gender pay analysis tool in annual pay and bonus review process. Overall it is fair to say that closing the gender pay gap is now firmly on the board agenda; UK employers will need a good explanation for any failure to close the gap by the time their report is published for 2018/19.

The UK government website hosting the gender pay gap data (and links to company-specific action plans) can be accessed [here](#).

the plaintiffs' request to designate the case as complex and the first case management conference in the case is scheduled for February 2018.

The *Ellis* lawsuit comes on the heels of a U.S. Department of Labor investigation into potential pay disparities at Google. Most recently, in July, an administrative law judge sided with Google and ruled that the request of the Office of Federal Contract Compliance Programs (OFCCP) for pay data up to 15 years old and addresses and contact information for over 25,000 employees was overbroad, but that a "much more limited" set of data would be acceptable.<sup>6</sup>

## **GENDER PAY REPORTING REGULATIONS.**

At the same time, gender pay reporting in general is being treated differently at the state and federal levels.

*Federal gender pay reporting requirement placed on hold.* Under the Obama administration, any employer with 100 or more employees was required to submit new, detailed W-2 compensation and hours-worked data for its entire workforce, divided into 12 separate pay bands designated by U.S. Equal Employment Opportunity Commission (EEOC). These revisions were in addition to the data already required regarding employees' race and sex. On August 29, 2017, however, Acting EEOC Chair, Victoria Lipnic, announced that the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs had initiated a review and immediate stay of the new EEO-1 pay reporting requirements scheduled to take effect in March 2018 in order to review the appropriateness of the revisions under the Paperwork Reduction Act. The OMB has stated that the decision was based, among other things, on "concerns that some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues."

The stay means that employers will need to complete EEO-1 reports in the same format as reports from previous years. When the expanded pay-data reporting requirements were put in place, the EEO-1 filing deadline of Sept. 30, 2017, was moved to March 31, 2018. The EEOC will leave the March 31, 2018 EEO-1 reporting deadline in place.

Ms. Lipnic said in a statement that the EEOC plans to review its options going forward, and that she hopes "that this decision will prompt a discussion

of other more effective solutions to encourage employers to review their compensation practices to ensure equal pay and close the wage gap."

*New California gender pay reporting obligations proposed.* While the federal government is reviewing the implementation of expanded pay reporting in EEO-1 reports, the California legislature is looking to codify similar measures into state law. On February 17, 2017, California Assembly Member Gonzalez Fletcher introduced AB 1209, which is awaiting signature by Governor Jerry Brown.<sup>7</sup> AB 1209 would add Section 2810.6 to the California Labor Code to require employers with more than 500 employees in California to submit the following information to the California Secretary of State by July 1, 2020, and biennially thereafter:

- (A) the difference between the mean wages of male and female exempt employees by job classification or title;
- (B) the difference between the median wages of male and female exempt employees by job classification or title;
- (C) the difference between the mean wages of male and female board members;
- (D) the difference between the median wages of male and female board members; and
- (E) the number of employees used for the determination of subparagraphs (A) and (B).

AB 1209 would also require the secretary of state, upon receiving necessary funding and establishing adequate mechanisms and procedures, to publish the information on a website available to the public. AB 1209 defines "exempt" as including employees within the administrative, executive, and professional exemptions. The proposed statute is silent on whether it would also apply to outside salespeople and computer professionals, who are not expressly listed under one of the three recognized exemptions, but nonetheless are treated as exempt from overtime under California law.

*Takeaways.* *Ellis, et al. v. Google, Inc.* promises to be one of the most watched cases (involving gender pay equity issues or otherwise) in Silicon Valley in 2018. Employers, particularly in Silicon Valley,

should expect plaintiffs' attorneys to be emboldened by the Google suit and consider taking steps to understand the extent of any exposure they may have and work with legal counsel on strategies to mitigate what in many cases may be exposure that comes with many layers of complexity. For instance, the answers to the questions of whether, and, if so, how and when, to conduct a pay audit may differ from employer to employer and should only be made on the advice of legal counsel. Similarly, the new bias legislation and seemingly weekly press reports of a new Silicon Valley company or executive embroiled in harassment or other bias issues should cause all employers to take a critical look at their policies for

preventing incidents and procedures for responding to concerns, and at the overall workplace culture, to determine if improvements should be made.

**Eric Tate is a partner in our San Francisco office and can be reached at (415) 268-6915 or [etate@mofo.com](mailto:etate@mofo.com).**

**Kathiana Aurelien is an associate in our Los Angeles office and can be reached at (213) 892-5319 or [kaurelien@mofo.com](mailto:kaurelien@mofo.com).**

To view prior issues of the ELC, click [here](#).

---

1 <http://sd19.senate.ca.gov/news/2017-08-17-jackson-introduces-bill-address-sexual-harassment-venture-capital-industry>.

2 [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=200320040AB1825](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200320040AB1825).

3 [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB2053](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB2053).

4 [https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201720180SB396](https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180SB396).

5 See "California's New Equal Pay Law Portends Tidal Wave of Gender Pay Discrimination Claims," *Morrison & Foerster Client Alert*, October 8, 2015; Daily Labor Report, 223 DLR I-1, 11/19/2015. Copyright © 2015 by The Bureau of National Affairs, Inc. (800-372-1033) <http://www.bna.com>.

6 [https://www.oalj.dol.gov/Decisions/ALJ/OFC/2017/OFCCP\\_-\\_SAN\\_FRANCISCO\\_v\\_GOOGLE\\_INC\\_2017OFC00004\\_\(JUL\\_14\\_2017\)\\_195652\\_CADEC\\_SD.PDF](https://www.oalj.dol.gov/Decisions/ALJ/OFC/2017/OFCCP_-_SAN_FRANCISCO_v_GOOGLE_INC_2017OFC00004_(JUL_14_2017)_195652_CADEC_SD.PDF).

7 [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201720180AB1209](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180AB1209).

---

We are Morrison & Foerster — a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, and Fortune 100, technology, and life sciences companies. We've been included on *The American Lawyer's* A-List for 12 straight years, and the *Financial Times* named the firm number six on its 2013 list of the 40 most innovative firms in the United States. *Chambers USA* honored the firm as its sole 2014 Corporate/M&A Client Service Award winner and recognized us as both the 2013 Intellectual Property and Bankruptcy Firm of the Year. Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger.

Because of the generality of this newsletter, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. The views expressed herein shall not be attributed to Morrison & Foerster, its attorneys, or its clients. This newsletter addresses recent employment law developments.