

## How to Prepare for the New California Fair Pay Act

### ***Changes in the Act will increase the difficulty employers face in justifying pay differentials.***

On October 6, 2015, Governor Brown signed into law the California Fair Pay Act. The California Fair Pay Act amends Labor Code Section 1197.5 to expand the reach of California's fair pay law, and will take effect on January 1, 2016. California has prohibited gender-based wage discrimination since 1949, and has provided protections virtually identical to the Federal Equal Pay Act of 1963. Under the new law, California law will provide broader protections to employees by both expanding the scope of jobs that may be compared and narrowing the criteria that an employer may cite to justify discrepancies. The new law also shifts the burden of proof. An employee no longer has to prove that a pay disparity is unlawful. Instead, employers now have to prove that pay disparities are justified.

Prior to this amendment, Labor Code Section 1197.5 required equal pay for jobs that required "equal skill, effort and responsibility, and which are performed under similar working conditions..." Under the California Fair Pay Act, equal pay is required for "substantially similar work, when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions..." In practice this means that pay comparisons will not necessarily be limited to employees in the same job titles or with nearly identical duties. In addition, comparisons among employees in different locations may be allowed.

Perhaps most significantly, the law shifts the burden of proof to the employer. The employer must demonstrate that pay differentials are entirely attributable to one or a combination of specified factors: a seniority system, a merit system, or a system that measures earnings by quantity or quality of production. An employer may also rely on a bona fide factor other than sex, such as education, training or experience; however, the employer can only do so if it is prepared to prove that the factor is job related with respect to the position and consistent with business necessity. Moreover, even if the employer satisfies that standard, the employee can overcome it by showing there is an alternative business practice that would serve the same business purpose without producing the wage discrepancy.

### **What does the California Fair Pay Act do?**

- It requires equal pay between genders for substantially similar work, opening up comparisons among different job titles and facilities.
- It requires pay differentials between genders to be fully explainable by a limited number of factors specified in the statute.
- It shifts the burden of proof to the employer to demonstrate that pay differentials are fully attributable to the factors permitted by the law.

- It allows employees to request information about the compensation of other employees.
- It prohibits retaliation against employees who invoke the act or assist enforcement of the act in any manner.
- It specifies that employers cannot prohibit employees from discussing their own compensation (which is already the law) and *the compensation of other employees*.
- It expands from two years to three years, the period for which records of wages, wage rates, job classifications and other terms and conditions of employment must be retained.

## **What doesn't the California Fair Pay Act do?**

- It does not require employers to disclose wage information in response to an employee request.
- It does not allow employers to defend pay disparities based on education, training or experience criteria that do not satisfy the "business necessity" standard.

## **How is it enforced?**

- The remedy for a violation of the law's pay provisions is the amount by which the employee was underpaid, plus an equal amount paid as liquidated damages if the violation was willful. Interest and attorneys' fees are also recoverable.
- Employees may file complaints with the Division of Labor Standards Enforcement (DLSE) for violations of the equal pay and retaliation provisions of the law, which will be investigated on a confidential basis.
- The DLSE can pursue a civil action to recover the pay shortfall and liquidated damages on behalf of an individual employee or group of employees, unless the employee(s) request otherwise.
- If the employee does not consent to the enforcement action by the DLSE or the DLSE dismisses the action, the employee(s) may bring a civil action to recover the pay shortfall and liquidated damages.
- The remedy for violation of the retaliation provisions of the law is reinstatement, reimbursement of lost wages and benefits and other "appropriate equitable relief." Interest and attorneys' fees are also recoverable.
- The affected employee(s) may bring a civil action to enforce the anti-retaliation provisions.
- Actions for violations of the pay provisions of the law are subject to a two-year statute of limitations; actions for retaliation are subject to a one-year statute of limitations.

## **What questions remain open?**

- Because the statute, as amended, does not parallel an existing law, many of its terms will be subject to debate and interpretation. Significant questions that the courts will have to resolve include:
  - What qualifies as a "seniority system" or "merit system?" Plaintiffs could argue that the use of the term "system" implies something more specific than simply tenure or performance.
  - How broadly will "substantially similar work" be interpreted?

## What should you, as an employer, do before January 1, 2016?

- Determine whether you have multiple job titles that require substantially similar work, when viewed as a composite of skill, effort and responsibility, and which are performed under similar working conditions.
  - The standards for determining if a job is “substantially similar” are unclear; however, employers should pay particular attention to positions with fine distinctions in titles and duties.
- Compare the compensation among employees in the same job title and job titles that require substantially similar work, when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions to determine if there are gender differences.
  - Remember, compensation is not just base salary or wages, but also includes bonus, equity grants and other forms of compensation.
- If you find gender differences, determine if they can be *fully* explained by one or a combination of the following factors:
  - 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 — and that factor is job related with respect to the position and consistent with business necessity.
    - If you rely on this factor, make sure you consider whether there are alternative means to satisfy your business need without creating a wage differential.
- If you cannot fully explain any pay differences between genders by the factors listed above, promptly adjust compensation to comply.<sup>1</sup>

## What should an Employer do on an ongoing basis?

- Implement clear guidelines for setting compensation levels and adjustments to compensation based on the factors listed above
  - Make sure that your system addresses all forms of compensation — including bonuses and equity grants.
  - Tie salary increases, bonus amounts and equity grants to objective criteria as much as possible — and use those criteria consistently.
  - Document the basis for your compensation decisions.
- Do not rely upon salary history of employees you hire from outside to set initial compensation, unless you are prepared to demonstrate the absence of gender bias in the candidate’s past compensation or business necessity.

- Plan how you will respond to requests for comparative compensation information, keeping in mind the privacy rights of your employees.
- Make sure your whistleblower and anti-retaliation policies cover employees who assert rights under the California Fair Pay Act or who assist in the enforcement of it.

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**Endnotes**

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<sup>1</sup> Although the California Fair Pay Act has a two-year statute of limitations, because it does not become effective until January 1, 2016, employers should not need to remedy pre-2016 discrepancies under the standards of the new law.