

## Labor and Employment Alert

September 16, 2015

### If you read one thing:

- California legislature has passed amendments to the California Fair Pay Act, which the Governor has said he will sign into law.
- The amendments expand protections against inequality in pay between employees of the opposite sex, including extending wage comparisons to employees performing “substantially similar” work, eliminating the requirement that a wage disparity exist at the employee’s own work location, and placing the burden on employers to justify compensation decisions that result in a wage disparity.
- Many compensation practices could be challenged, and employers should be diligent in reviewing wage rates for employees in similar positions to detect and address potential wage disparities.



### California Passes New Equal Pay Law

The California State Senate recently approved S.B. 358, which amends California’s Fair Pay Act to significantly expand protections against gender inequality in wages beyond what is already imposed by existing California and federal law. Governor Jerry Brown has stated that he plans to sign the bill into law, which would take effect on January 1, 2016. It is being called the toughest equal pay law in the nation.

Under the new law, an employer may not pay any of its employees less than what it pays employees of the opposite sex for “substantially similar” work, unless the employer can affirmatively demonstrate that the difference is based on one or more of the following factors: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production (e.g., commissions); or (4) a bona fide factor other than sex, such as education, training or experience. However, this fourth factor applies only if the employer demonstrates that the factor is job related for the position in question and is consistent with a business necessity. A “business necessity” is an “overriding legitimate business purpose,” which does not apply if the employee can demonstrate that there is an alternative business practice that would serve the same business purpose without producing the wage differential. The employer must also show that it reasonably applied any factors relied upon and that those factors account for the entire wage differential.

As with existing law, the new law provides employees with a private right of action to sue, in addition to authorizing the Division of Labor Standards Enforcement to prosecute actions on behalf of aggrieved employees. There is a two-year statute of limitations, or three years for willful violations, and an employee

can recover the balance of wages due, liquidated damages equal to the wages due, interest, and costs and attorneys' fees. The new law adds an anti-retaliation provision, which protects employees who attempt to enforce their own rights or encourage others to do so, or who disclose their own wages, discuss the wages of others or inquire about another employee's wages. The law also increases record-keeping requirements from two to three years.

This amendment expands existing equal pay protections in several important ways. Notably, whereas current California law and the federal Equal Pay Act require equal pay for "equal" work, the new law requires equal pay for "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." Although this standard is vague, it appears to allow employees to point to someone of the opposite sex in a similar, although not identical, job position to demonstrate a wage disparity.

The new law also does not require that a wage differential exist at a single establishment, like current California and federal law does. California employees will now be able to compare their wage rates to those of employees at other, possibly distant, locations in the state in asserting equal pay claims. The law is unclear on whether the comparison should be made across some group of employees performing "substantially similar work" or whether employees can cherry-pick other specific employees (even at other locations) with whom to compare themselves.

Further, the new law places the burden of proof on the employer to demonstrate that any wage differential between employees of the opposite sex is not gender-based. Subjective compensation decisions, such as the valuation of an applicant's prior work experience, will be exposed to second-guessing and may be difficult for an employer to quantify and prove were necessary after the fact. Other common practices, such as paying based on prior salary, could likewise be challenged if they result in any wage disparity between genders.

In response to these changes in law, California employers will need to be especially diligent in reviewing wage rates for similar positions across all their locations in the state, in order to detect and address any potential wage disparities that could be associated with gender. This might also necessitate more uniform wage structures across locations, and reducing the discretion of local managers in making compensation decisions.

## Contact Information

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