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SB 358: Expand wage equality protection

By Gary McLaughlin

Last October, Gov. Jerry Brown signed into law Senate Bill 358, which amends California's Fair Pay Act to significantly expand protections against gender inequality in wages. The new law took effect Jan. 1, and many have called it the toughest equal pay law in the nation.

Under the new law, an employer may not pay 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 of several factors: (1) a seniority system; (2) a merit system; (3) earnings that are measured by quantity or quality of production (e.g., commissions); or (4) a bona fide factor other than sex, such as education, training, or experience. The employer must demonstrate that any "bona fide" factor is job related and consistent with a business necessity, and the employee may defeat this defense by showing that an alternative practice would serve the same business purpose without producing the wage differential. The employer must also show that it reasonably applied any factor relied upon, and that the factor accounts for the entire difference in wages.

The new law also adds anti-retaliation protections for employees who seek to enforce their rights, or who disclose their own wages or discuss or inquire about another employee's wages. It does not appear, though, to create a right to actually obtain wage information for other employees.

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SB 358 has been called the nation's toughest fair pay law.

The 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." 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 limit wage comparisons to a single establishment, like current California and federal law does. California employees can now compare their wages 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 if employees can cherry-pick other specific employees (even at other locations) with whom to compare themselves.

The new law places the burden of proof on the employer to demonstrate that any wage differential is not gender-based. This means that 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, or even prior experience, could likewise be challenged if they result in any wage disparity between genders and cannot be justified by business necessity.

California employers should be diligent in reviewing wage rates for similar positions across all their locations in the state, and address any potential wage disparities that could be associated with gender. This might also mean implementing more uniform wages across locations, and reducing the discretion of local managers in making compensation decisions that could later be questioned.

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