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The California Fair Pay Act (SB 358) Toughens California's Equal Pay Protections

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On October 6, 2015, Governor Brown signed Senate Bill 358, the California Fair Pay Act (available at http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB358). The Act is correctly being characterized by news accounts as "one of the toughest equal pay laws in the country."

Employers should be prepared for the new law, which goes into effect on January 1, 2016. Although the California Labor Code has prohibited gender-based wage discrimination since 1949, the Act amends the Labor Code in four significant ways:

1. Employees must be paid equal wages if they perform "substantially similar work," whereas the preexisting law mandated equal wages for employees performing equal work in the same establishment.

2. The Act increases the burden on employers that attribute pay differences to factors other than sex. The Act adds the requirement that an employer show that each factor is applied reasonably, and that the factors account for the entire wage differential. The Act also imposes a new analysis of a "bona fide factor other than sex."

3. The Act prohibits employers from discriminating or retaliating against employees who inquire about or discuss other employees' wages, encourage or assist other employees to exercise rights under the Act, or "invoke or assist in any manner the enforcement" of the Act.

4. The Act extends the recordkeeping requirement for wage information from two to three years.

These changes are discussed in further detail below.

"Substantially Similar Work"

Existing law prohibits employers from paying employees less than employees of the opposite sex if they perform "equal" work in the same establishment in jobs that require "equal skill, effort, and responsibility." Courts had interpreted this standard to be the same as that under the federal Equal Pay Act of 1963, 29 U.S.C. section 206(d), which requires equal pay for equal or substantially equal work. The new Act changes this standard in two important respects: it eliminates the requirement that employees work in the same establishment for purposes of

comparing pay rates, and it prohibits pay differences between employees of the opposite sex where the employees perform "substantially similar work, when viewed as a composite of skill, effort, and responsibility."

These changes naturally will broaden the pool of employees who will be considered proper comparators for determining the existence of a gender pay disparity. First, by eliminating the requirement that the employees work in the same establishment, an employee who works in a facility in Sacramento may argue that her wages may be compared to wages of an employee who works in a facility in San Francisco, for example, even though the local job markets and pay scales may be different. Whether the elimination of the term "establishment" has the effect of opening up the comparator group to this extent will be an issue for the courts to determine.

Second, an employee will then have to show that the comparator employee performs "substantially similar" work, rather than "equal" or "substantially equal" work. An employee may argue that instead of comparing employees who hold the same positions, courts should compare the wages of different positions that have substantially similar duties. It remains to be seen how courts will interpret the "substantially similar" standard.

Employers evaluating their pay practices should be mindful of this new, broader standard when performing pay equity studies of California employees.

Factors Other Than Sex

Under existing law, wage differences between employees of opposite sexes may be justified if they are attributable to "a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex." While the Act retains this defense, the employer now bears the burden to show that it applied any of these factors reasonably, and that the factors other than sex account for the entire wage differential.

The Act alters the fourth, most general factor: a "bona fide factor other than sex, such as education, training, or experience." The employer must show that the factor is "job-related with respect to the position in question" and "consistent with business necessity." The employer also must show that the factor is "not derived from a sex-based differential in compensation." Neither the statute nor legislative documents define this phrase, but it arguably could encompass pay differences that are rooted in the practices of prior employers, depending on how courts interpret this provision.

The Act further defines business necessity as "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve." An employee may defeat this defense by showing an alternative practice that would serve the same purpose without causing a wage disparity.

These changes increase the burden on employers who can attribute a wage disparity to factors other than sex. Under the Act, courts may examine employers' pay practices more closely to

determine whether factors that cause wage disparities are applied reasonably, whether there are alternative practices available, and whether factors that appear neutral are derived from sex-based differences in compensation. If employers determine that there are pay differences among employees of different sexes who perform substantially similar work, employers should explore the root causes of the pay differences, decide whether there is a business necessity justification, and determine whether there are alternative practices that would mitigate any such differences.

Sharing Wage Information

Under existing California law, employees have the right to disclose and discuss their wages. The Act broadens the protection for employees who discuss wage information by prohibiting discrimination or retaliation against employees who request wage information from other employees, discuss other employees' wages, aid or encourage another employee to exercise rights under the Act, or otherwise assist in the enforcement of the Act. The Act provides a private right of action for employees who experience discrimination or retaliation as a result of engaging in activity protected by the Act. Employees may recover reimbursement for lost wages and benefits, equitable relief, and reinstatement. This right of action could also provide a new basis for a claim under the Private Attorneys General Act of 2004 (PAGA).

The Act does not create an obligation on any entity to disclose wages. Rather, it strengthens the protections for employees who discuss wage information voluntarily.

Recordkeeping Requirement

Existing law requires employers to retain wage-related records for at least two years. These records include records of "wage and wage rates, job classifications, and other terms and conditions of employment" of employees. Under the Act, employers must retain these records for three years.

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Employers should review their pay practices in California in light of the California Fair Pay Act, especially practices for documenting the reasons for compensation decisions. Employers should also plan for the new, three-year recordkeeping requirement and update anti-discrimination and anti-retaliation policies to include discussion of wage information. If you have any questions about the California Fair Pay Act, please contact us.