



California Fair Pay Act

New law places a greater burden on employers to justify pay disparity, offers new avenues of employment litigation

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Effective January 1, 2016, California will have the strongest equal-pay protections in the nation, thanks to Governor Jerry Brown recently signing the California Fair Pay Act. The Fair Pay Act addresses the serious issue of gender pay disparity across all industries. The statistics relied on by the California Legislature in passing the Act demonstrate the severity of the problem: In 2014, a woman working full-time earned only 84 percent of what a man earned.

In California, it has been illegal to pay women less money for the same work since 1949. This is codified in Labor Code section 1197.5. However, while it

seems straightforward enough to require “equal pay for equal work,” in reality section 1197.5 has been rarely utilized because it was difficult to establish a successful claim. In the past, the major obstacles to the successful enforcement of section 1197.5 have been: (1) the law’s coverage being limited to employees at the same establishment performing equal work; (2) employers avoiding liability for gender wage differentials by relying on overly broad exemptions from the equal pay requirement; and (3) employers using pay secrecy to conceal the fact that there was a gender pay gap and punishing employees for investigating any pay discrepancy in the workplace.

The new Fair Pay Act addresses these issues by amending and adding new

provisions to Labor Code section 1197.5, discussed in detail below.

Legal significance

• *Substantially similar work performed under similar working conditions*

Prior to the enactment of the Fair Pay Act, Labor Code section 1197.5 was limited to forbidding wage disparity “in the same establishment for equal work on jobs” that require “equal skill, effort, and responsibility, and which are performed under similar working conditions.” The “same establishment” and “equal work” language was too narrow and allowed employers to avoid liability in circumstances when employees did substantially the same work but did not have exactly the same job title. In practice, companies



DECEMBER 2015

were able to dodge this old law by limiting equal pay requirements to workers at the same facility with the same job title, even if workers with different titles did comparable work.

The new law mandates equal pay for “substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.” Thus, male and female employees are entitled to equal pay if they perform comparable work, even if they have different job titles or work in different offices at the company. For example, male janitors and female housekeepers who do similar jobs at a hotel could be compared to each other to determine if there is a gender-based pay difference. Switching the focus to the similarity of the work, instead of job titles or job locations, expands the scope of protections and the pool of comparators that can be used to show pay disparity. It can also prevent companies from using job titles or shifting employees from different store or office locations in similar regions to mask comparable work and then using that as a justification for a gender-based pay difference.

• **Greater burden on employers to justify pay disparity**

Labor Code section 1197.5(a) contains four exemptions or factors that can be a defense when there is a gender pay disparity: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a bona fide factor other than sex, such as education, training, or experience.

In *Corning Glass Works v. Brennan* (1974) 417 U.S. 188, 196, the United States Supreme Court, in interpreting the comparable federal Equal Pay Act, held that the employee had the initial burden of proving that she was paid less for performing equal work. The employer then had the burden of proving that one of the four exemptions or factors in section 1197.5 justified the pay disparity. California appellate courts have held that the employee has an opportunity to

produce evidence that the reason given by the employer was pretext. (See, i.e., *Green v. Par Pools Inc.* (2003) 111 Cal.App.4th 620, 626.)

This framework, however, created an unreasonable obstacle for employees to enforce the Fair Pay Act. The four exemptions were broadly worded and contained few, if any, limitations. Thus, under the old legal framework, the most egregious employers that intentionally discriminated against women could set forth some explanation for the gender pay gap. Employers will rarely admit that they intentionally discriminate against women. In practice, this put female employees in the difficult position of having to prove that the employer was making up reasons for the gender pay gap. This framework ultimately rewarded employers who were the cleverest at devising excuses for paying women less than men.

The Fair Pay Act changes the burdens of proof for employers and employees in three meaningful ways.

One, Labor Code section 1197.5(a)(2) now states that any factor relied upon by the employer for justifying the pay disparity must be “applied reasonably.” In our analysis, this is the employer’s burden. For employers who make bonus decisions based solely on the discretion of management, the Fair Pay Act puts those types of decisions under potential legal scrutiny.

Two, Labor Code section 1197.5(a)(3) states that any factor relied upon by the employer for justifying the gender pay disparity must “account for the entire wage differential.” This places the burden on an employer to directly link the entire wage differential to the justification for the gender pay gap.

With these amendments, any pay system that results in a gender wage gap should be transparent and articulated in advance to employees. Furthermore, the factors that are applied by the employer to determine pay rates should be entirely or primarily objective, such as relying on the amount of revenue or customers an employee brings in to the company. If an

employer chooses to rely on any subjective standards, the criteria and the consequences of meeting or failing to meet those criteria should be specified as clearly as possible.

Three, The Fair Pay Act also now severely restricts the “catch-all” fourth exemption in section 1197.5 which allows an employer to justify a gender pay disparity based on a vaguely defined “bona fide factor other than sex.” The broad language of this provision has, in the past, made it easier for employers to avoid liability by setting forth reasons for paying women less than men. Plaintiffs were in a difficult position demonstrating that those reasons were not “bona fide” reasons distinct from gender. The Fair Pay Act amends section 1197.5 to narrow this “catch-all” exemption by placing the burden on the employer to show that its “bona fide factor” defense: (1) is not derived from a sex-based differential in compensation; (2) is job-related; and (3) is consistent with business necessity. “Business necessity” is defined as an “overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve.” Examples of such bona fide factors could include an employee’s prior work experience, job-specific training, geographical location, and cost-of-living considerations. An employer relying on such exemption would bear the burden of proving it at trial.

However, even if an employer can set forth facts that arguably fall within the “bona fide factor” exemption, the new Fair Pay Act allows an employee to defeat an employer’s “bona fide factor” defense if the employee demonstrates that there is an alternative business practice that would serve the same business purpose without creating the wage difference.

This new language significantly narrows the “bona fide factor” exemption such that we cannot envision many employers successfully relying on this exemption going forward. Even assuming that an employer can show that the factor relied upon is not impacted, in any way,



DECEMBER 2015

by gender, the employer will have to show that the factor relied upon is job-related and constitutes a business necessity. Even if that high burden can be met, an employee can defeat this defense by showing that an alternative practice exists that would accomplish the same goal without resulting in a gender pay gap.

• **Anti-Retaliation and anti-secrecy provisions**

In order to combat pay secrecy and retaliation against employees who are seeking to challenge gender pay disparities, the Fair Pay Act amends Labor Code section 1197.5 to make it illegal to discharge, discriminate or retaliate against any employee who takes any action to assist in the enforcement of the Act. Anyone who has been discriminated against, discharged or otherwise been subjected to negative treatment as a direct result of investigating, challenging or opposing gender pay disparity may bring a lawsuit against the employer within one year after the discriminatory or retaliatory act. Employees who successfully prove retaliation may be reinstated and recover lost wages and benefits, as well as equitable relief. Courts have interpreted similar antidiscrimination statutes as prohibiting any adverse employment action that can be linked causally to the employee engaging in protected activities. California courts have traditionally interpreted the scope of the terms “protected activities” and “adverse employment actions” broadly. (See, i.e., *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1043, 1049-1055.)

Beyond the anti-retaliation provision, the Fair Pay Act makes it illegal for an employer to prohibit employees from disclosing their own wages, discussing the wages of others, or inquiring about the wages of another employee.

While no one is obligated to disclose their wages, it is illegal to prevent employees from taking efforts to discover if there is a gender pay gap. We feel that these protections can increase the likelihood of transparency about pay rates and allow workers to identify pay disparities.

Hopefully, this will result in employers rectifying any such disparities.

Potential areas of litigation

Under the new Labor Code section 1197.5, we anticipate that there will be future litigation regarding whether or not two individuals are engaged in “substantially similar work” under “similar working conditions,” which is the new standard for comparing gender-based differences in pay. Experts in vocational science may be hired to argue these points in litigation. Federal courts, in interpreting the federal Equal Pay Act, have held that the jobs of male and female employees should be compared to determine if they are “substantially equal.” (*Stanley v. Univ. of S. California*, 178 F.3d 1069, 1073-1074 (9th Cir. 1999); citing 29 C.F.R. § 1620.13.) However, given that the California Fair Pay Act’s statutory language is broader, we anticipate that California courts will read section 1197.5 to cover gender pay gaps in a greater number of situations than in the past, when the language of section 1197.5 more closely mimicked the language of the federal Equal Pay Act.

Given that the burden of proof has increased for employers to meet one of the four exemptions from equal pay, we anticipate there is also likely to be litigation regarding whether those exemptions, such as seniority or merit systems, were “applied reasonably” and “account for the entire wage differential,” as now required by the new law. In our view, the new language of section 1197.5 dramatically shifts the balance of these claims in favor of employees. In the absence of clearly defined standards or criteria in a compensation system, it may be difficult for employers to defend their unequal compensation practices. If these purported seniority or merit-based compensation systems are not implemented and rigorously enforced in an objectively reasonable and transparent manner, we anticipate that employers will have a hard time proving that any such system was reasonably applied as a matter of law and

demonstrably accounts for the entire wage differential.

The new language limiting the catch-all “bona fide factor other than sex” defense exemption also potentially could result in further litigation. While we anticipate that the Fair Pay Act will severely limit future reliance on the catch-all defense, some employers may still utilize this defense, which will likely result in litigation over the definition of the term “business necessity” and what burden an employee must meet to show the existence of an alternative business practice which has less adverse impact. However, these concepts have been litigated before in similar contexts, such as in disparate impact discrimination cases, and that case law will likely be persuasive, at a minimum, in future California Fair Pay Act litigation.

Given the California Fair Pay Act’s ban on prohibiting employees from sharing wage information or discussing wages, we anticipate some employers will resort to “strongly discouraging” such activity, without explicitly prohibiting it. In our view, any such policy, whether express or implied, would be in violation of Labor Code section 1197.5(j)(1). However, this is another potential area of litigation.

What does this mean?

The federal Equal Pay Act and California Labor Code section 1197.5 have provided, at least on paper, equal pay rights for decades. However, gender pay disparity remains a serious problem in the United States, demonstrating a radical need for strengthening the law. The California Fair Pay Act significantly alters the legal landscape by directly addressing prior major obstacles to enforcement of equal pay laws.

From an employee perspective, the new Fair Pay Act provides significant legal protections to women who proactively inquire about gender pay disparity and who advocate to change discriminatory systems. Employees who have evidence of a gender pay gap or who work at a company where the pay system is either not



DECEMBER 2015

transparent, or is based substantially on the discretion of management, should feel more secure in asking about pay rate disparities. If an employer is unwilling to make the necessary changes to remedy the disparities or is unwilling to even investigate, employees should consult with an employment attorney.

From an employer perspective, the Fair Pay Act should be viewed as an opportunity to review a companies' pay systems and to eliminate any policies or procedures that result in unequal pay for different genders. Best practices for companies include carefully reviewing how they pay employees and ensuring that the details of any seniority and/or merit system that impacts pay are set forth clearly and in advance. Moreover, any seniority or merits pay system needs to be carefully enforced and monitored. A system where the employer has substantial discretion to determine pay, using subjective standards without trans-

parency or assurance of equal application, may result in lawsuits. Employers who do not want their compensation systems examined under the microscope in litigation are advised to proactively take a hard look at their systems to ensure compliance with the new law.

California's new Fair Pay Act is a big step in the right direction for eliminating the gender pay gap, and will hopefully inspire other states to enact similar measures to address this persistent inequality.



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