



California Employers Should Brace For Significant New Equal Pay Law

Insights

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California employers will soon be subject to a new equal pay law that will create a much stricter standard for gender pay equity. Passed by the state legislature with broad bipartisan support and signed into law by Governor Jerry Brown on September __, 2015, this new law is considered the most aggressive equal pay law in the nation. California employers will want to begin preparing immediately for its impact.

What Will The New Law Prohibit?

The new law (SB 358) will amend California's Equal Pay Act to prohibit an employer from paying employees of one sex lower than employees of the opposite sex for "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."

Exceptions Available To Employers

If a wage differential exists, the law will allow employers to escape liability if they can show that the wage differential is based on:

- a seniority system;
- a merit system;
- a system that measures earnings by quality or quantity of production; or
- some other bona fide factor other than sex such as education, training, or experience.

Should an employer attempt to justify a pay differential under this law as a bona fide factor other than sex, it must demonstrate that the factor is not based on or derived from a sex-based differential in compensation, is job-related with respect to the position in question, and is consistent with a 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. This exception will not apply if the employee can show that an alternative practice exists that would serve the same business purpose without producing the wage differential.

Significant Changes Will Lead To Increased Litigation

California's existing equal pay law does not go quite so far as the new law will. The current law limits the comparison of wage rates to employees in the same establishment, and requires employees seeking to challenge the arrangement to prove that the jobs being compared involve equal work and require equal skill, effort, and responsibility. Because of these burdens, lawsuits under the current law are relatively rare.

The new law places its focus directly on pay equity and provides a rather easy standard for employees to satisfy to get into court. These changes are likely to trigger a rash of unequal pay lawsuits in coming years.

It will not be difficult for employees to argue that jobs across the company, even at other locations, involve "substantially similar work." Given that the comparison of jobs is no longer limited to the same facility, one question not yet answered is whether a comparison to jobs outside of California will be permissible.

Remedies Available To Employees

Under the new law, employees may pursue unequal pay claims through the Labor Commissioner or in lawsuits. An employee who is successful can recover the pay differential plus an additional equal amount as liquidated damages. Employees who file lawsuits can also recover interest, litigation costs, and attorneys' fees. An agreement by the employee to work at a lower rate of pay will not bar such a claim or lawsuit.

"Wage Transparency" Also Mandated By The New Law

The new law also bars employers from prohibiting employees from disclosing their own wages to others, discussing their wages, or inquiring about the wages of another employee. However, it doesn't require that the employer disclose another employee's wages or that an employee disclose his or her own wages in response to a co-worker's inquiry.

Another related bill also passed the legislature this year. AB 1017 prohibits an employer from seeking salary history information, including compensation and benefits, about an applicant for employment. It prohibits in-person inquiries as well as inquiries through recruiters or placement agencies. The stated rationale for this legislation is that inquiries about an applicant's current or prior wage rates can perpetuate sex-based pay differentials.

When Will It Go Into Effect And How Can I Prepare?

The new law will become effective January 1, 2016, but California employers should begin preparing now.

You should begin by examining your pay rates for the same or similar jobs to see if disparities exist based on sex. If disparities exist, check to see whether they can be justified within the new law. As with all examinations of potential exposure to wage and hour claims, this analysis should be

conducted with the advice and assistance of an attorney so that the analysis may be protected by the attorney-client privilege.

You will also need to remove questions about wages or salary for current and prior positions from employment applications, and you will want to modify candidate interview protocols to ensure compliance.

If you have any questions about this new law, or how it may affect your business, please contact your Fisher Phillips attorney or one of our attorneys in our California offices:

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