



California Legislature Adds Extra Set Of Teeth To Fair Pay Act's Protections

NEW LAW EXTENDS PROVISIONS TO RACE AND ETHNICITY

Insights

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On September 30, 2016, California Governor Jerry Brown signed the Wage and Equality Act of 2016 (SB 1063) into law, which will prohibit employers from paying employees of one race or ethnicity a lower wage than employees of different races or ethnicities. The bill is a virtually verbatim extension of the Fair Pay Act's requirements that apply between workers of opposite genders. It will go into effect on January 1, 2017.

California businesses have had less than a year to acclimate themselves to what was already regarded as the most aggressive equal pay protection law in the country. A California employer's work never ends, and businesses must now scramble to ensure that they meet the same pay equity requirements between workers of differing races and ethnicities by the start of the new year.

What Does The Fair Pay Act Currently Require?

Last year, the Fair Pay Act amended the Equal Pay Act to require employers to pay the same wage as between male and female workers who perform substantially similar work. We covered this amendment in a previous Legal Alert, which can be located [here](#).

Prior to the amendment, the Equal Pay Act only compared the pay of men and women who worked in the same establishment. After the Fair Pay Act was signed into law, the comparison was expanded to men and women who perform "substantially similar work," even if the employees work at different facilities in different states. Whether a job is "substantially similar" is determined by evaluating the skill, effort, responsibility, and working conditions of the position. The practical effect of the Fair Pay Act was that plaintiffs have a greater chance of prevailing in a lawsuit against their employers.

Adding Even More Bite To The Fair Pay Act

SB 1063 amends Labor Code section 1197.5 by adding a provision that prohibits employers from paying employees of one race or ethnicity a different wage than employees of a different race or ethnicity if those employees perform substantially similar work.

A pay differential between workers of different races or ethnicities is allowed if it is based on a reasonably applied factor that is based on (1) a seniority system; (2) a merit system; (3) a system that

measures earning by quantity or quality of production; or (4) a bona fide factor other than race or ethnicity.

If the employer wishes to rely on a bona fide factor other than race or ethnicity (e.g., training, education, or experience), then the employer must demonstrate that the factor is not based on or derived from a difference in compensation that is based on race or ethnicity, is job related, and is consistent with a business necessity. The factor or factors that the employer chooses to rely on must account for the entire wage differential.

The same enforcement mechanisms and penalties that applied to wage disparities between genders will continue to apply to the race and ethnicity protections: aggrieved employees will be entitled to the amount of the wage disparity plus interest and liquidated damages, which is administered and enforced through the DLSE.

Employers Bite Back: An Action Plan

The new law goes into effect on January 1, 2017. While the general effect of the Fair Pay Act was to make it easier for plaintiffs to prevail in a lawsuit based on a pay disparity, SB 1063 makes it easier for Plaintiffs to bring more of these lawsuits. However, apart from these general observations, the Fair Pay Act is still too new to determine what effects it will have on businesses. Therefore, any predictions as to SB 1063's impact are premature as well.

Last year, many employers partnered with their labor and employment counsel to undertake audits of their pay rates for the same or similar positions to determine whether any disparities existed between the sexes. This time around, the same exercise will be required, but the task will grow exponentially.

Instead of limiting the determination of whether a disparity exists between just two set categories (male or female), you will need to conduct a wholesale comparison of the compensation levels as they apply to all the different races and ethnicities in your workforce. In addition, gender is usually a more readily identifiable classification compared to race or ethnicity. Because of the sensitivities involved, you should undertake this analysis with the advice and assistance of your labor and employment counsel to ensure that it is protected by the attorney-client privilege.

You should expect to see legislation in the coming years to add other protected classes to the Fair Pay Act. Thus, you may wish to conduct audits without limiting the comparison to race and ethnicity in order to anticipate the addition of classes, such as disability and sexual orientation.

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

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