San Francisco Employers Face New Gender Equality Laws

Insights
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The San Francisco Board of Supervisors has just added two new employment ordinances to the burgeoning list of employment-related ordinances in the City by the Bay. First, the Parity in Pay Ordinance prohibits employers from inquiring about an applicant's salary history. The second ordinance, the Lactation in the Workplace Ordinance, requires employers to provide accommodations to nursing mothers.

Prohibitions On Inquiries Into And Consideration Salary History
Mayor Lee signed the Parity in Pay Ordinance on July 19, 2017. Starting on July 1, 2018, the Parity in Pay ordinance will prohibit those employers required to register to do business within the City of San Francisco (including city contractors and subcontractors, and employment agencies) from considering an applicant's current or past salary when either determining whether to hire the applicant, or determining the salary to offer the applicant. The ordinance also precludes employers from asking applicants about their current or past salaries. Further, employers may not disclose a current or former employees' salary history without the employees' consent unless the information is already publicly available.

Background

The impetus for the ordinance was a finding by the San Francisco Board of Supervisors that women working in the city are paid on average 84 cents for every dollar that a man earns, and that women of color are paid even less. The ordinance attempts to combat the presumption that employers perpetuate wage gaps by relying on an applicant's salary history.

Scope

The ordinance covers anyone who applies for employment that will be performed within the geographical boundaries of San Francisco and whose application will be "solicited, received, processed or considered" within the boundaries of San Francisco. Whether an interview takes place has no effect on the ordinance's application. Notably, the ordinance excludes employees who are applying for positions with their current employer.

What Is An "Inquiry"?

Employers should note that actions that constitute an "inquiry" under the ordinance are extremely broad: any "direct or indirect statement, question, prompting, or other communication" that is intended to gather information qualifies as an inquiry. Thus, it is conceivable that simply mentioning an applicant's past pay could run afoul of the ordinance. However, if applicants disclose their salary history voluntarily and "without prompting," the employer may consider the salary history in determining their salary.

Application Of Fair Pay Act Standards

Even if an applicant were to self-disclose their salary history, that disclosure by itself cannot justify paying an employee of a different sex, race, or ethnicity less than the applicant or other prospective employee for doing substantially similar work under similar working conditions, as provided by the California Fair Pay Act. Under the Fair Pay Act, whether a job is "substantially similar" is determined by evaluating the skill, effort, responsibility, and working conditions of the position. A pay differential between workers of different races, ethnicities, or genders 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 an employer wishes to rely on a bona fide factor other than race, ethnicity, or gender, it must demonstrate that the factor is (1) not based on or derived from a difference in compensation that is based on race, ethnicity, or gender; (2) is job related; and (3) is consistent with a business necessity. The factor or factors that the employer chooses to rely on (such as experience, education, or training) must account for the entire wage differential.

Remedies

In keeping with most new legislation on this topic, the ordinance contains an express prohibition against retaliating, refusing to hire, "disfavoring," or "injuring" an applicant for refusing to disclose salary history. The ordinance has a statute of limitations of one year and does not permit private parties to initiate litigation; rather, it relies on the Department of Labor Standards Enforcement or the city itself to enforce any alleged violation of the ordinance.

Increased Protections For Nursing Mothers

Mayor Lee signed the Lactation in the Workplace Ordinance on June 30, 2017. The ordinance will take effect on January 1, 2018, and will require businesses to provide employees with breaks and a designated location for lactation. Additionally, employers must also implement policies that notify employees of their right to an accommodation for lactation. The ordinance also requires newly constructed or renovated buildings designated for certain uses to include lactation rooms, and amends the San Francisco building code to specify technical specifications of lactation rooms.

Scope

The ordinance applies to anyone employed within the geographical boundaries of the City of San Francisco, and includes part-time employees. Likewise, the ordinance will apply to employers with employees who are working in San Francisco.

Lactation Breaks

The ordinance does not define a specific period of time for a "lactation break," but expressly provides that the break should run concurrently with any break time that the employer already provides to the employee, if possible. Moreover, any break time that does not concurrently run with a rest break provided by California law need not be paid.

Lactation Rooms

According to the ordinance, a "lactation location" or "lactation room" is a space, room, or location that the employer must provide to the employee or designate for nursing mothers to express breast milk. A bathroom does not qualify. Moreover, the location should be in close proximity to the employee's work area and be shielded from view and free from intrusion from coworkers and the public. It also must include a surface to place a breast pump or other personal items on, a suitable place to sit, and electricity.

Other Amenities

Further, the employer must provide access to a refrigerator where the employee can store breastmilk and access to a sink with running water. Both the refrigerator and the sink should be in close proximity to the employee's work area. The lactation location or room may be a multipurpose location provided that the "primary function" of the location or room is a designated lactation location at whatever time the employee needs to express milk. The employer must provide notice to others that the room or location must be used accordingly in the case of a multipurpose location.

Undue Hardship Exemption

Employers can obtain an exemption from the ordinance's requirements if they can show that providing the lactation location and room would impose an "undue hardship" by which they would incur "significant expense or operational difficulties." Examples of undue hardship include construction renovations or removing seating from a restaurant such that the company's ability to generate business is affected.

Remedies

Like the ordinance on salary history, the lactation ordinance does not permit a private citizen to file a lawsuit to enforce the ordinance. Instead, the office of labor standards enforcement for the city of San Francisco shall be responsible for initiating any legal action to enforce the ordinance.

Conclusion

If you have any questions about these new laws or how they may affect your business, please contact your Fisher Phillips attorney or one of the attorneys in our San Francisco office at 415.490.9000.

This Legal Alert provides an overview of specific new San Francisco laws. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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