California toughens equal pay law

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California employers may no longer pay employees of one sex less than employees of the opposite sex for substantially similar work. This is because, earlier this month, Governor Jerry Brown signed Senate Bill No. 358, the Fair Pay Act, which strengthens California’s equal pay law. In the bill, the California Legislature found and declared that, “[]n 2014, the gender wage gap in California stood at 16 cents on the dollar” meaning that “[a] woman working full time year-round earned an average of 84 cents to every dollar a man earned.” The stated purpose of the Fair Pay Act is to improve California’s equal pay provisions and thereby eliminate the gender wage gap in California.

Equal pay for “substantially similar” work

Effective January 1, 2016, the bill amends Section 1197.5 of the California Labor Code to require equal pay for workers of each sex “for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.” The new law builds upon existing California law, which—like its federal counterpart, the Equal Pay Act of 1963—only prohibited disparate pay for “equal work” in the “same establishment.”

California’s new law puts the burden on employers to demonstrate that any discrepancy between male and female employees for substantially similar work is attributable to (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production, or (4) another bona fide factor other than sex, such as education, training, or experience. For most higher-level and professional employees, employers may find that they must rely upon the bona fide factors of education, training, or experience in defending any wage differentials. However, under the new law, this factor will constitute a defense only if the employer demonstrates 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.” The statute goes on to state that even this very limited defense will not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential. Each factor relied upon must be applied "reasonably" by the employer and the one or more factors relied upon must account for the "entire wage differential."

The strengthened California law is enforceable through a civil action to recover double the amount of wages lost by the employee, plus interest and attorneys' fees. The bill also prohibits retaliation against any employee invoking or assisting in enforcement of the equal pay law. An employee who is discharged, discriminated against, or retaliated against for engaging in activity protected by this equal pay law may sue for reinstatement, as well as lost wages and benefits.

Wage disclosure protections
In passing the bill, the California Legislature observed that “[p]ay secrecy also contributes to the gender wage gap, because women cannot challenge wage discrimination that they do not know exists.” The new law thus strengthens existing wage disclosure protections.

Section 232 of the Labor Code, without specifying a remedy, currently prohibits an employer from (1) conditioning employment on employees refraining from disclosing their wages, (2) requiring employees to waive their right to disclose their wages, and (3) discharging or discriminating against employees who disclose their wages. The new law expressly authorizes suit against an employer that prohibits employees from disclosing the amount of their own wages or that discharges, discriminates against, or retaliates against an employee based on wage disclosure. The bill also expands on Section 232 by protecting not only employees who disclose their own wages, but also those who discuss or inquire about the wages of others or encourage others to exercise their rights under the bill.

Implications

California’s Fair Pay Act provides a strong new remedy in the equal pay arena, as men and women must be paid equally for substantially similar work, which is not necessarily "equal" work. Reliance upon different job titles will be insufficient to meet the employer's burden of proof to justify wage differentials. The new law therefore requires employers to be diligent in monitoring their pay practices to ensure they can defend against claims that pay differentials are not based on bona fide job-related factors with an overriding legitimate business purpose.

This new California law is also noteworthy in forbidding employers from prohibiting employees, including managers and supervisors, from disclosing or discussing their salaries. The National Labor Relations Act has disallowed forbidding discussion or disclosure of compensation by nonsupervisory employees for decades, and the Office of Federal Contract Compliance Programs of the United States Department of Labor recently provided similar protection to all employees of United States government contractors. The new California law is noteworthy in that it now covers all California employees, allowing for open discussion and disclosure of pay discrepancies. California’s new law gives employers incentive to review their confidentiality policies to ensure that such policies, as written and as applied, are in compliance with this new law.