

## **Compliance with the New Equal Pay Laws: It's Not Just About Sex**

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Last year, California firmly established itself as the standard bearer on tough equal pay laws. This year, the State has dialed it up even more. The Fair Pay Act, which went into effect at the beginning of 2016, was designed to mitigate pay disparity between men and women in the workplace by substantially increasing an employer's burden in justifying disparities. California has now expanded those protections to include employees of different races and ethnicities. The Wage Equality Act, in place as of January 1, 2017, takes all of the requirements set forth in the Fair Pay Act and applies them verbatim to pay disparities between employees of different races or ethnicities. The new laws also preclude employers from justifying pay disparities based on prior salary alone.

Below is a summary of the new laws and what they mean for employers.

### **Quick Recap of Last Year's Changes to Equal Pay Laws**

For decades prior to 2016, California law already required employers to pay men and women the same wage for performing equal work in the same establishment. Data on pay disparity, however, demonstrated that those laws were not effectively closing the pay gap. Women, on average, were still earning just 84 cents to every dollar that men earned in similar jobs. In response, California enacted the Fair Pay Act of 2016. That law removed the term "equal work" and replaced it with "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." This means it is no longer necessary that the two employees perform the exact same job or have the same job title. If their day-to-day work is substantially similar, they will need to earn equal pay unless they meet one of the below justifications.

To justify a pay disparity between male and female employees who perform similar work, employers must demonstrate that the wage differential is based on one of the following acceptable reasons:

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

To the extent the employer is relying on a bona fide factor other than sex, the employer must also show that the factor is job related, consistent with a business necessity, and that no alternative business practice would serve the same purpose without resulting in a pay gap between men and women. Regardless of which legitimate factor an employer relies on, the employer must also show that the factors relied upon are reasonably applied and account entirely for the pay disparity.

## What is New in 2017

### *Equal Pay for Employees of Another Race or Ethnicity*

Last February, Sen. Isadore Hall announced the introduction of SB 1063, referred to as the Wage Equality Act of 2016. The new law takes the Fair Pay Act's language and applies it verbatim to employees of another race or ethnicity. When introducing the law, Sen. Hall cited studies that indicated pay disparities were not limited to employees of opposite sex. These studies showed, for example, that African American men earned only 75 percent for every dollar that a Caucasian male earned for similar work. The disparity is even larger between Caucasian men and African American and Latina women. The bill passed through the senate and Gov. Brown signed it into law last September. It became effective January 1, 2017.

### *Prior Salary not a Justification*

On the same day Gov. Brown signed SB 1063 into law, he also signed AB 1676 into law. AB 1676 clarifies that an employee's "prior salary cannot, by itself, justify any disparity in compensation under the bona fide factor exception" described above. In advocating for its enactment, AB 1676's sponsors argued that an individual's prior salary "may reflect widespread, longstanding, gender-based wage disparities" in the workforce. In other words, if women were making less than men in prior jobs, efforts to justify future pay disparities based on salary history will only feed into the same problem. Proponents of the bill also argued that relying on salary history can detrimentally impact women who may have temporarily left the workforce before returning.

As of January 1, both SB 1063 and AB 1676 are incorporated into California Labor Code section 1197.5—the same statute that codifies last year's Equal Pay Act. Among the statute's additional requirements is a mandate that employers maintain employee compensation data for at least three years. The law also precludes employers from retaliating against employees who exercise their rights under section 1197.5. Finally, while employers are not required to disclose other employees' compensation to an inquiring employee, section 1197.5 does forbid employers from prohibiting employees from openly discussing each other's compensation.

## What Happens if Employers Get it Wrong

Labor Code section 1197.5 allows aggrieved employees to file a claim with the Labor Commissioner or to bring an action in civil court. An employer will be found to have violated the law where a pay gap exists between similarly situated workers of different sex, race, or ethnicity that cannot be explained by one of the legitimate factors detailed above.

Lawmakers made sure the new law comes with teeth. Remedies for violations include back pay equal to the differences in earnings, an equal amount in liquidated damages (double pay, in effect), plus interest. If the employee brings the action in civil court and is represented by counsel, employers will be on the hook for the employee's attorney fees as well. Finally, if an employer or individual acting on an employer's behalf is found to have willfully violated section 1197.5, or to have reduced another

employee's wages in order to comply with 1197.5, that person is guilty of a misdemeanor punishable by both a fine and jail time.

### What This All Means for Employers

In a nutshell, employers can expect a lot more litigation over equal pay. Not only are such claims now more difficult to defend, it is clear that they will be a key focus of both the Labor Commissioner and plaintiff's attorneys moving forward. With the paint barely dry on last year's sex-based laws, it remains to be determined—likely through litigation—how courts will sort out the law's ambiguities.

Determinations of what constitutes "substantially similar work," whether a bona fide factor is job related and consistent with a business necessity, and whether it is reasonably applied will all turn on fact-specific analysis. As courts sort through these ambiguities, employers must now be mindful of the same potential impacts arising out of pay disparities between employees of different races or ethnicities. It remains to be seen what impact these new laws will have on employers moving forward.

### What Employers Should Do Next

#### *Ensure Current Compliance*

The Wage Equality Act is already in place, having become effective at the beginning of 2017. The critical first step for employers, therefore, is to ensure there are no current pay discrepancies between employees of different races or ethnicities that cannot be attributed to legitimate factors. Most employers already went through this process last year with regard to pay discrepancies between male and female workers. If so, employers should undergo the same process with regard to employees of different races or ethnicities. For employers who have not already done so, all of the following is recommended:

- *Audit:* Employers should first survey all jobs to determine categories of substantially similar work. Employers should then audit payroll within those categories to determine whether any pay discrepancies exist between employees of another race/ethnicity (and sex if it was not done last year) who are performing substantially similar work.
- *Analyze:* If a payroll audit reveals any race/ethnicity-based pay discrepancies, employers should undertake an analysis to determine whether the discrepancy can be explained by a legitimate factor such as more seniority, education, experience, or productivity. Where in doubt, employers should work with legal counsel to ensure that the factors they are relying on are justifiable, reasonably applied, and account entirely for the pay discrepancy. Even where employers conducted this same analysis already with regard to employees of opposite sex, a renewed analysis will need to be done to the extent the employer relied on prior salary history as justification for any discrepancy.
- *Adjust:* Should the above steps result in a determination that there are race/ethnicity/sex-based pay discrepancies that cannot be justified based on legitimate factors, employers will need to adjust accordingly to eliminate the gap in pay. Keep in mind that the law forbids employers from reducing another employee's earnings to come into compliance. Employers will

therefore need to increase pay for the employee earning less than their counterpart of a different race/ethnicity/sex.

#### *Ensure Future Compliance*

Once employers take the appropriate steps to ensure immediate compliance, the next step will be to make sure they are in compliance moving forward. Employers should work with employment counsel to review and update all handbooks, policies, and practices to ensure compensation decisions are based on legitimate factors. Employers should take particular care to review any interview or hiring practices or paperwork regarding prior salary history. While the new law does not forbid employers from asking about prior salary for legitimate reasons—such as ensuring the employer is setting salaries competitively in the market—employers need to ensure that they do not use prior salary as the basis for setting an employee’s compensation.

Employers should also train supervisors and appropriate personnel regarding compliant compensation standards. This should include guidance on both legitimate and unlawful factors that may be used to set compensation, record retention policies, and the appropriate way to handle employee inquiries about compensation. When in doubt as to the new Equal Pay laws, employers should work with legal counsel to ensure their policies and practices are compliant.