

## As Calif. Goes On Equal Pay, So Goes The Nation?

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On Aug. 31, 2015, California S.B. 358 cleared its final hurdle in the California Senate and is now headed to Gov. Jerry Brown, who has promised to sign it by the state's Oct. 11 deadline. The California Assembly overwhelmingly approved the bill on Aug. 27 by a vote of 76-2. This bill amends California's Equal Pay Act (Labor Code Section 1197.5) and is modeled after the Paycheck Fairness Act, which has been introduced in Congress in every legislative session since 1994, but has never passed. Supporters praise it as the country's toughest equal pay legislation, and other states are expected to use it as a model for drafting similar laws. Assuming all goes as planned, the new law will take effect on Jan. 1, 2016.



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### Equal Pay for "Substantially Similar Work"

Much like the federal Equal Pay Act, California's current statute requires employers to pay employees of the opposite sex equally for "equal" work on jobs that require "equal" skill, effort and responsibility. The new law would require paying employees of the opposite sex equally for "substantially similar work" when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions.

The original version of S.B. 358 would have changed the "equal work" standard to "comparable work," further enlarging the pool of possible comparators. But the bill was later revised based on input from various opponents, including the California Chamber of Commerce, which noted that "trying to determine 'comparable' work for different job duties can be extremely subjective, leading to different interpretations and thus the potential for litigation." The Chamber proposed the "substantially similar" standard because it is the standard used under the regulations interpreting the federal Equal Pay Act, and California courts generally rely on the federal regulations to interpret the California Act since no equivalent state regulations exist. The California Assembly's Judiciary Committee bill analysis also explains that the "substantially similar" standard is designed to prevent employers from arguing "that the jobs performed by persons of opposite sex were not 'equal' in every way."

The change from "comparable" to "substantially similar" undoubtedly improved the bill, which is one of the key reasons that the Chamber now supports it. Nevertheless, many employers and employment law experts still view the bill as exceedingly vague and ambiguous, with a myriad of issues and high potential for increased litigation.

## Greater Burdens on Employers to Justify Wage Disparities

The updated burden of proof is perhaps the ripest area for interpretive disputes. Under current law, employers can defend wage differentials if they are based on one or more of the following factors:

- 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.

The new law would require employers to demonstrate that each factor relied upon is applied reasonably (without defining what it means to be “reasonable”), and the factors relied upon account for the *entire* wage differential (without explaining how to interpret this requirement or what proof to consider in evaluating it).

Moreover, the “bona fide factor other than sex” defense has various new ambiguous limitations. The bill provides a nonexhaustive list of what factors could fall under this defense, such as “education, training, or experience,” and it shifts the burden to employers to demonstrate that:

1. the factor is not based on or derived from a sex-based differential in compensation;
2. is job-related with respect to the position in question; and
3. is consistent with a business necessity (i.e., “an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve”).

The burden then shifts back to the employee who can revive the claim if he/she demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

The new burden shifting framework for the “bona fide factor other than sex” defense arguably models Title VII, but it leaves open many questions about when and whether any given compensation decision will be “job-related” or “consistent with business necessity.” Will employers be able to pay according “to the market” and factor in whether there is a tight supply of talented workers, other competitive offers or a lower prior salary? For example, consider a law department hiring two new lawyers at the same level in the same area and with the same background. One is an employment lawyer from a government agency and currently making \$100,000 per year and another is an associate from a private law firm and earning \$200,000 per year. If both are equal in their educational background and type and years of experience, can the employer offer each a 10 percent pay increase over their prior salary, or must the starting salary be equalized?

The Senate Judiciary’s bill analysis suggest that the bill is intended to target, among other things, “the practice of basing a starting salary on the employee’s prior salary” and the “inherently gender-biased” nature of the job market. Proponents of the bill argue that “employers should have control over the way they determine wages, and the employers should be choosing methods that do not have intentional or inherent wage discrimination.” If passed, the new law could increase the burden on employers when defending wage decisions based on factors such as market conditions, the employer’s financial circumstance, or the need to offer a raise to retain a given worker at a given moment. Employers will have to be prepared to point to a specific reason that the higher-paid employee adds more value to the company

than his or her lesser-paid counterpart. Employers will also have to be vigilant in ensuring that those employees hired when labor is in low demand have wages raised to match any hires made during a period of high demand. Practically speaking, the new law may also complicate moving for summary judgment, as most circumstances will involve intricate factual disputes as to whether the employer's decisions were "job related" and "consistent with business necessity."

These changes may ultimately leave more discretion in the hands of judges and juries to determine what attributes employers should value in their employees as they make pay and promotion decisions. But there is much more to pay and promotion decisions than meets the eye, and values differ from industry to industry, employer to employer, job to job and employee to employee. Each case will present new challenges for fact finders as they try to determine whether pay disparities arise from discrimination. (For more on the complexities of pay bias, see our American Bar Association Journal of Labor and Employment Law article here).

### **No More "Same Establishment" Requirement**

In addition, S.B. 358 eliminates a requirement in the existing Equal Pay Act that a discrimination claim be based on a comparison of the wages of employees in "the same establishment," which takes it one step further than the federal Paycheck Fairness Act. According to the bill analysis, this would now allow, for example, a female manager at a department store who has discovered that she makes less than a similarly situated male manager at a branch across town to file suit, so long as the other exceptions listed above don't apply.

In light of this change, how much room will employers have to justify pay disparities due to differences in establishment and geography? Will comparators be limited to those who work across town? What if they work in different markets altogether, like downtown San Francisco versus downtown Oakland or Walnut Creek? What about San Francisco compared to Eureka?

### **Enhanced Anti-Retaliation Provisions**

S.B. 358 prohibits employers from retaliating against employees who seek to enforce the provisions of the Act and expands the protections currently provided to employees for disclosing the amount of their wages in Labor Code Section 232. The amendment would prohibit employers from retaliating against employees for disclosing the employee's own wages, discussing others' wages, inquiring about another employee's wages or aiding or encouraging another employee to exercise their rights under the Act.

The new law would allow an employee who suffered from retaliation to file suit within a year of the alleged action to seek reinstatement and reimbursement for lost wages and work benefits, including interest, as well as appropriate equitable relief.

These enhanced anti-retaliation provisions are designed to improve transparency about salaries. But they do not go as far as the federal Paycheck Fairness Act, which would require employers to take the added step of producing specified pay information to the government. Nevertheless, this provision also leaves many open questions. For instance, if employees can "inquire about another employee's wages," what does such an "inquiry" mean? Must the employer provide such information to any employee? Are there any limits on the disclosure? What about a representative of an employee? What about the personal privacy rights of employees who don't want their information known or shared?

### **Three Year Record-Keeping Requirements**

S.B. 358 increases, from two years to three, the period of time that the employer must maintain records relating to wages and job classifications, and other conditions of employment of the employees.

## **Enforcement**

S.B. 358 does not change how the law is enforced. The Division of Labor Standards Enforcement (not the Department of Fair Employment and Housing) administers and enforces the Act and supervises any amounts due to employees. Employees can pursue their own civil action so long as they file it within two years, or three years if the employer's actions were willful.

An employer who violates the Act is liable for unpaid wages, an equal amount in liquidated damages, interest, costs and reasonable attorneys' fees. Unlike the Paycheck Fairness Act, S.B. 358 does not expand an employee's ability to recover punitive damages. However, the California Equal Pay Act is, and has always been, specifically enumerated in California's Private Attorneys General Act. This means that, in addition to the recovery outlined above, individuals can stand in the shoes of the labor commissioner and recover civil penalties on behalf of themselves and other alleged "aggrieved employees." Since the Equal Pay Act does not already provide a specific penalty, it defaults to \$100 per employee per pay period for each initial violation and \$200 for each aggrieved employee per pay period for each subsequent violation. A one-year statute of limitations applies.

Being able to use PAGA to prosecute these cases could be a powerful tool for plaintiffs. For example, in 2009, the California Supreme Court ruled that PAGA actions are not subject to California's class certification rules (though that question is still up for debate under Federal Rule of Civil Procedure 23). Last summer, the court also held that PAGA claims cannot be waived in arbitration agreements. And, this summer, the Ninth Circuit held that PAGA penalties cannot be aggregated for purposes of establishing diversity jurisdiction. These developments, coupled with the possibility of broader comparator pools under S.B. 358, could spark a flurry of equal pay representative actions, and penalties could add up very quickly.

## **What Should You Do Now to Prepare?**

Now, more than ever, employers should prospectively examine their pay practices and determine whether any practices could be viewed as discriminatory. In conducting these analyses, it is important to ensure that the right data is analyzed. A proper analysis — either for a pay audit or for a defense to a pay claim — involves carefully identifying the proper comparator pools (those who perform "substantially similar work" under "similar working conditions") as well as any legitimate factors that may explain pay disparities (e.g., seniority, education and experience, performance ratings, training, etc.). Legal counsel (ideally, both inside and outside counsel) should direct these analyses from the start to establish and maintain attorney-client privilege over the analyses and any related communications. Counsel may also engage statistical experts, where appropriate, to address more nuanced issues. Pay decisions are often highly individualized, and thinking critically about the results of any analyses you conduct is critical for understanding and mitigating potential risk for future pay claims.

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