CALIFORNIA ENACTS "FAIR PAY ACT" – EFFECTIVE JANUARY 1, 2016

California's employment climate has gotten even less employer friendly. On Tuesday, October 6, 2015, Governor Brown signed SB 358, the California "Fair Pay Act" into law, amending California's version of the Federal Equal Pay Act, Labor Code § 1197.5. The new legislation promises to be a fertile source of litigation.

As noted by the Legislative Counsel's Digest, prior California law generally prohibited an employer from paying an employee at wage rates less than the rates paid to employees of the opposite sex working in the same establishment for equal work on jobs the performance of which requires equal skill, efforts, and responsibility, and which are performed under similar working conditions. Prior California law also provided for exceptions to the requirement of equal pay where the wages of otherwise equal employees differ because they are the result of a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex.

The California Fair Pay Act eliminates the requirement that the unlawful wage differential be within the same establishment, and instead prohibits an employer from paying any of its employees at wage rates less than those paid to employees of the opposite sex "for substantially similar work" when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except in situations where the employer demonstrates:

(1) The wage differential is based upon one or more of the following factors:

   (A) A seniority system.

   (B) A merit system.

   (C) A system that measures earnings by quantity or quality of production.

   (D) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply 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. For purposes of this subparagraph, "business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

(2) Each factor relied upon is applied reasonably.

(3) The one or more factors relied upon account for the entire wage differential.

An employee who believes he or she has been underpaid because of sex has the option of filing a claim with the California Labor Commissioner, or alternatively, may file a civil lawsuit against the employer. The Act retains the remedy of liquidated damages equal to the amount of economic damages sustained by the employee, together with costs of suit and reasonable attorney's fees, notwithstanding any agreement to work for a lesser wage.

And there's more. An employer may not terminate, or in any manner discriminate or retaliate against, any employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of this law. An employer also shall not prohibit an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under this law. However, nothing in the Fair Pay Act creates an obligation to disclose wages.

Employers are required to keep on file for three years records relating to wage rates, job classifications "and other terms and conditions of employment of the persons employed by the employer."

An employee who has been discharged , discriminated against, or retaliated against because the employee engaged in any conduct set forth in the new law may recover in a civil action reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, including interest thereon, as well as appropriate equitable relief. Such an action must be brought no later than one year after the cause of action "occurs."

What does it all mean?

Well, for starters, it means that a female Customer Service Representative in one geographic location may now compare her wage rate to that of a male Customer Service Representative in another establishment operated by the employer elsewhere in the State of California, the United States, or even abroad, as opposed to being limited to comparisons between the wages or men and women working within the same "establishment." Once a disparity in wages is established, the burden will then shift to the employer to prove that a differential between the two pay rates was accounted for by 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. And proving a "bona fide factor other than sex" may not be the easiest task in the world. Why? Because to establish that defense, the employer *also* needs to demonstrate (a) that the relied upon bona fide factor or factors are not based on or derived from a sex-based differential in compensation, (b) that the relied upon factor or factors are job related with respect to the position in question, and (c) that the relied upon factor or factors are consistent with a "business necessity" – meaning "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve."

Suppose a female employee working in California demonstrates that a male working 3,000 miles away in New York City, but holding the same job title, duties and responsibilities, earns 20% more in base pay than she does. The employer used to be able to defend by pointing out that the employees worked in different establishments. No more.

So what, you say? The employer can just show that it pays more in New York City because of the higher cost of living there. Even that doesn't stop the lawsuit: what if the New York City establishment has always been predominately male, whereas the California location is predominately female. Is it cost of living, or a sex-based differential, or a bit of both? The employee may also argue that the employer has over-compensated the male employee based on this cost of living differential. Remember that the bona fide factor defense now works only if it

accounts for the entire wage differential – an employer who proves that only three quarters of the 20% wage differential is tied to cost of living will be on the hook for the remaining 5% of the differential. And if it's a cost of living differential, the employer must also prove that the cost of living differential is job related and is consistent with a business necessity. Expert witnesses in employee compensation and labor markets can expect full employment from Fair Pay Act litigation.

But let's say the employer has jumped through all those hoops successfully. The employee still gets yet another chance. She can negate the employer's defense by demonstrating that "an alternative business practice exists that would serve the same business purpose without producing the wage differential." Here, unlike almost all other existing anti-discrimination legislation, will the Fair Pay Act allow the employee to torpedo the employer's "bona fide factor other than sex" defense by second-guessing the employer's legitimate, non-discriminatory reason for taking action, and by showing that there was another way for the employer to address the problem without producing the offending wage differential!

Thus far, we've only looked at how much the law has changed to disadvantage California employers who have pay differentials within the same job classification. The Fair Pay Act, though, does more. It is now unlawful for an employer to have pay differentials between employees "for substantially similar work" performed under similar conditions." Count on employees and their counsel to push this language towards the long-discredited "comparable worth" analysis.

We have some pretty good ideas where this type of litigation is heading, and what employers can do now to get out in front of it. Give us a call if you want to learn more.

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