

California Legislature Passes Fair Pay Act Aimed at Closing Pay Gap Between Men and Women

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Citing the pay gap between men and women in California, and noting that the gap increases for women of color, the California Legislature recently passed a [bill](#) that would prohibit employers from paying an employee at wage rates that are less than the rates paid to employees of the opposite sex who are performing substantially similar work, unless the pay differential is justified by gender-neutral factors and consistent with business necessity. Governor Jerry Brown has promised to sign the bill and voiced his support on Twitter even before the bill's August 31, 2015, passage. The bill is entitled the "Fair Pay Act" and would amend California's existing equal pay law, Labor Code Section 1197.5. If signed, the Fair Pay Act would go into effect on January 1, 2016. The Fair Pay Act is intended to address persistent pay disparities between women and men, narrow the pay gap, and make it easier for employees to prove equal pay violations.

While the current equal pay law requires that men and women employed in the "same establishment" be paid the same wages for equal work, the Fair Pay Act would eliminate the "same establishment" language and would further require that men and women receive equal pay for performing "substantially similar" work, regardless of whether they are employed at the same physical location or share identical job titles. The determination of whether employees are performing substantially similar work for purposes of the Fair Pay Act would entail a comparison of the "skill, effort, and responsibility" that the work requires, as well as each employee's working conditions.

Under the Fair Pay Act, any pay discrepancy between employees of the opposite sex in substantially similar jobs must be warranted by one or more of the following:

- a seniority system;
- a merit system;
- a system that determines pay based on the quantity or quality of production; or
- another factor, such as education, training, or experience.

To successfully defend against a claim under the Fair Pay Act, the employer would need to demonstrate that the factors that explain the pay differential are gender neutral, job related, and consistent with business necessity. The factors justifying the difference in pay would need to be reasonably applied and account for the entire wage difference.

The Fair Pay Act would further prohibit employers from retaliating against an employee because he or she pursues a claim under the equal pay law or assists another employee in doing so. Also, and significantly, an employee could not be prohibited from discussing his or her wages, talking or inquiring about the wages of other employees, or encouraging other employees to pursue claims under the equal pay law. The Fair Pay Act would also expand the period that employers are required to retain records relating to employee wages and other employment terms from two years to three years.

Under the Fair Pay Act, employees could file administrative claims alleging violation of the law with the California Department of Labor Standard Enforcement or pursue a civil action in court. Employers found to have violated the law would be liable for unpaid wages and interest, and an equal amount of liquidated damages. In a civil lawsuit, the employee could also recover costs and reasonable attorneys' fees.

What California Employers Should Do Now

In anticipation of the Fair Pay Act becoming effective, employers should do the following:

- With the assistance of counsel in order to preserve confidentiality and privilege, conduct a review of job titling and compensation methodology to ensure compliance with the Fair Pay Act.
- Work with recruiters and others tasked with hiring new employees, so that the pay expectations for open positions are consistent with the Fair Pay Act.
- Review existing policies and training materials and update them as necessary to reflect the anti-retaliation provisions of the Fair Pay Act.
- Ensure that supervisors are aware of the anti-retaliation protections, particularly as they concern employee discussions of wages.

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