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MAKING SENSE OF CALIFORNIA'S NEW FAIR PAY ACT

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California Governor Jerry Brown signed the California Fair Pay Act (FPA) ([SB 358](#)) into law on October 6, 2015. In an attempt to close the wage gap between men and women in the state, the FPA imposes standards more stringent than the long-standing California Equal Pay Act (EPA), which was enacted in 1949. While the EPA has long prohibited an employer from paying an employee less than an employee of the opposite sex who performs the same job, requiring the same skill, effort and responsibility, in the same establishment under the same working conditions, women in California still purportedly earn only 84 percent of what men in similar positions earn.

The FPA becomes effective on January 1, 2016, with no noted grace period. The FPA prohibits an employer from paying any employee a lower wage than that paid to employees of the opposite sex for substantially similar work. It also places the burden on employers to prove that any pay gap between workers is due to nondiscriminatory factors such as a seniority system, a merit system or a system that measures earnings by quantity or quality of production. An employer also may rely on a “**bona fide factor other than sex,**” such as education, training or experience; however, the employer can do so only if it is prepared to prove that the factor is job-related. Additionally, the legislation protects workers from retaliation for invoking protections under the act, sharing salary information or asking about their colleagues' compensation.

The new law bolsters and amends current law in several significant ways:

- Ensuring that employees performing substantially equivalent work are paid fairly by requiring equal pay for work “of comparable character” and eliminating the outdated “same establishment” requirement.
- Increasing the employer’s burdens of proof where a pay disparity exists.
- Preventing reliance on irrelevant and ill-defined “factors other than sex” to justify unfair pay differentials by replacing the “bona fide factor other than sex” catch-all defense with more specific affirmative defenses.
- Ensuring that any legitimate, nonsex-related factor(s) relied upon are applied reasonably and account for the entire pay differential.
- Discouraging pay secrecy by explicitly prohibiting retaliation or discrimination against employees who disclose, discuss or inquire about their own or co-workers’ wages for the purposes of enforcing their rights.

Employers must maintain records of the wages and wage rates, job classifications and other terms and conditions of employment of all employees for a period of three years. Remedies for a violation of the law’s pay provisions is the amount of underpayment, plus an equal amount paid as liquidated damages if

the violation was willful. For a violation of the retaliation provisions, an employee can seek reinstatement, reimbursement of lost wages and benefits and other “appropriate equitable relief.” An employee can also recover interest and attorneys’ fees for a violation of the law.

To avoid possible liability under the FPA, employers should consider:

1. Updating Employee Handbooks

Employers should add a provision stating that the company promotes and supports wage equality based on gender. In addition, employers should include a provision that employees may discuss their compensation and will not face retaliation for doing so.

2. Amending Practices of Setting New Hire Wage Rates Based on Prior Wage History

While it is fairly typical for employers to ask candidates about prior salary history, doing so may perpetuate prior wage discrimination. Businesses should take the extra step of analyzing the proposed rate for the new hire as compared to others in a similarly situated position and potentially paying a candidate more to ensure equality.

3. Adding a Cross-Checking Mechanism to the Salary Review Process

Within the context of performance review process or a compensation analysis, employers should review the wages of similarly situated employees to ensure equality. Correlate salary increases, bonus amounts and equity grants to objective criteria as much as possible and implement those criteria consistently. Because bias can be unintentional and a product of past salary history, companies will need to take a proactive approach to be sure they are not

inadvertently discriminating on the basis of gender. Employers should consider whether this analysis should be completed under the direction of their legal department or outside counsel to maintain the attorney-client privilege.

4. Analyzing and Curing Issues That Arise

Once issues are brought to an employer’s attention through an audit, internal review, or employee complaint, they should be promptly remedied to avoid becoming an easy target for litigation. If you become aware of gender differences, determine if they can be fully justified by one or a combination of the following factors:

- A seniority system
- A merit system
- A system that measures earnings by quantity or quality of production
- A bona fide factor other than sex, such as education, training or experience
 - i. The bona fide factor must be job-related with respect to the position and consistent with business necessity
 - ii. Make sure you consider whether there are alternative means to satisfy your business need without creating a wage differential

If you cannot fully explain any pay differences between genders by the factors listed above, be sure to promptly adjust compensation to comply.

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