

OCTOBER 6, 2015

California Passes Law Aimed to Bridge the Gender Wage Inequality Gap

BY DENISE M. VISCONTI AND JENNIFER E. SAVION

On October 6, 2015, California's Governor Edmund G. Brown, Jr. signed into law Senate Bill (SB) 358, legislation intended to increase wage transparency and which will make it more difficult for an employer to defend against an equal pay claim. This measure (commonly referred to as the California Fair Pay Act) which amends Section 1197.5 of the California Labor Code relating to private employment, will take effect on January 1, 2016. When it takes effect, California's law on this subject will be one of the strongest equal pay laws in the nation.

The Intended Purpose of the Amendments

According to the report of the California Assembly Appropriations Committee, SB 358 was introduced to rectify California's "gender wage inequality" by discouraging secrecy among employees regarding their pay. The bill's author asserted that in 2013 the average woman in California working full time earned a median of 84 cents to every dollar earned by a man, resulting in a loss of over \$33 billion each year. According to the author, SB 358 will allow open discussion and inquiries by employees regarding their own pay—as well as the pay of their co-workers—to enable employees to discover and challenge any wage differential and rectify this gap.

SB 358 also prohibits employers from discriminating or retaliating against employees who seek to enforce their rights under the amended statute. Employees who can prove they were discharged, discriminated against, or retaliated against in violation of the amended statutory scheme are entitled to seek reinstatement, recover lost wages and benefits, and obtain equitable relief against their employer.¹

¹ Amended Section 1197.5(j)(2) ("Any employee who has been discharged, discriminated or retaliated against, in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this section 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."). All Code references are to the section as amended effective January 1, 2016.

Requirements Under the Amended Statute

SB 358 borrows significantly from the yet-to-be-passed federal Paycheck Fairness Act, a bill that has stalled in Congress the last several years.² SB 358 substantially relaxes the evidentiary burden of proof on employees complaining of unequal pay based on their gender. Before the amendment, an employee had to demonstrate he or she was not being paid at the same rate as someone of the opposite sex at the same establishment for "equal work."³ Under SB 358, the requirement of "same establishment" has been deleted, and the employee need only show he or she is not being paid at the same rate for "substantially similar work."⁴ Substantially similar work means a composite of skill, effort, and responsibility, performed under similar working conditions – but it need not be the same exact job.

Once the employee has made such a showing, SB 358 shifts the burden to an employer to affirmatively demonstrate the pay difference being complained about is based on any or all of these specific factors:

1. a seniority system,
2. a merit system,
3. a system that measures earnings by quality or quantity of production, or
4. a *bona fide* factor other than sex, such as education, training, or experience.⁵

While these four factors were included in Section 1197.5 of the Labor Code prior to the amendment, with the passage of SB 358, the employer's ability to rely on the fourth factor as a defense has been weakened significantly. In fact, SB 358 vastly increases the employer's burden in defending a claim of unfair pay by requiring an employer to show, through competent evidence, that any difference in compensation is not sex-based, is related to the position in question, and there exists a business necessity for the wage differential.⁶ The employee still may rebut this defense, however, by demonstrating an alternative business practice exists that would serve the same business purpose without the difference in wages.

Under the current statute as amended, an employer must meet a new and higher standard of demonstrating that any pay difference is tied to an absolute business necessity. The employer also must demonstrate that its reliance on any or all of the above factors is reasonable,⁷ and that one or more of these factors accounts entirely for any wage differential,⁸ simply

2 The proposed federal Paycheck Fairness Act (S. 862, H.R. 1619), if passed, would add procedural protections to the Equal Pay Act of 1963 and the Fair Labor Standards Act to address male–female income disparity in the United States. The federal legislation was introduced for reasons similar to those set forth for the new California Code amendments: to make wages more transparent, to require that employers prove any wage differentials are tied to legitimate business justifications, and to preclude employers from retaliating against employees who raise concerns over a differential in their wages. See Ilyse Schuman, *Senate Committee Discusses Paycheck Fairness Act*, Littler ASAP (Apr. 2, 2015). Given the current political climate, passage of the Paycheck Fairness Act is unlikely. Versions of this bill have been introduced in every Congress since 1997.

3 See current Section 1197.5(a). The standard under the current version of Section 1197.5, before it was amended by SB 358, essentially mirrored that of the federal Equal Pay Act of 1963.

4 See amended Section 1197.5(a).

5 Amended Section 1197.5(a)(1)(a)-(d).

6 See amended Section 1197.5(A)(1)(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." [Emphasis added.]

7 Amended Section 1197.5(a)(2).

8 Amended Section 1197.5(a)(3) ("The one or more factors relied upon account for the entire wage differential.").

pointing to a factor as partial explanation no longer is sufficient. As a result, the burden for employers in defending against an equal pay claim under SB 358 appears to be significantly greater than the burden under the federal Equal Pay Act of 1963.⁹

The damages to which an employee may be entitled remain the same under the existing law: a successful employee may recover the amount of wages the employee was not paid due to the wage differential along with interest, plus an additional equal amount as liquidated damages.¹⁰

SB 358 also expressly prohibits an employer from preventing its employees from disclosing their own wages, discussing the wages of others, inquiring as to other employees' wages, or assisting another employee in asserting his or her rights under Labor Code Section 1197.5.¹¹ However, employers should note the law provides that no one, including the employer, is obliged to make any disclosures concerning employees' wages.¹²

The law also prohibits employers from discriminating or retaliating against any employee for invoking the employee's own rights under this amended section, or assisting others to invoke their rights under the newly amended law. An employee may, within one year of the accrual of a cause of action, bring a civil action for such discrimination or retaliation to recover lost wages and benefits, along with interest and appropriate equitable relief.¹³ There is no administrative exhaustion required before an employee files suit.

SB 358 also extends the time period for keeping records related to employees' terms and conditions of employment (including but not limited to employees' wages and job classifications) from two to three years.

Recommendations for Employers

Once SB 358 becomes law, employers may begin to see more complaints filed with the California Division of Labor Standards Enforcement (DLSE) – and in court – alleging a failure to provide equal pay. There are several steps an employer may wish to consider to help minimize the risks of noncompliance with newly amended Section 1197.5:

1. Review all compensation-related policies and procedures with counsel to ensure all additional requirements are met.
2. Review employees' job descriptions and current salaries to ensure any pay differentials are completely accounted for by any or all of the above-mentioned factors.¹⁴
3. Train anyone who makes compensation-based decisions on the amended statute's requirements and on what factors compensation decisions can be based.
4. Confirm there is an adequate internal complaint procedure to bring to light and address any wage differential issues.
5. Review any references to compensation in employee handbooks to ensure their provisions are consistent with the newly-amended statute, including revising any blanket prohibitions in the handbook on employees disclosing their compensation to others.
6. If an employer receives an inquiry from an employee about other employees' salary information, it may not preclude the employee from making such inquiry, but it may decline to disclose the salary of any of its employees.

9 Under the federal Equal Pay Act (29 U.S.C. § 206), the prohibition against compensation discrimination applies only to jobs within the same establishment; courts must compare the wages of men and women performing the same jobs for the same company when considering a complaint brought under the Act. Additionally, in defending a claim under the federal Equal Pay Act, an employer can rebut an allegation of discrimination in pay by showing that some other factor or reason resulted in the pay differential, which then requires the plaintiff to prove either that (i) the reasons the defendant advanced actually are pretext for sex discrimination, or (ii) that the differential either currently or, at one time, only could be explained by sex. See *Ryduchowski v. Port Auth.*, 203 F.3d 135, 142 (2d Cir. 2000); *Yant v. U.S.*, 588 F.3d 1369, 1373 (Fed. Cir. 2009) (citing 109 Cong. Rec. 9208 (1963)). See also H.R. Rep. No. 88-309, at 3 (1963) (noting that the Equal Pay Act "declares that wage differentials based solely on the sex of the employee are an unfair labor standard" (emphasis added)); 109 Cong. Rec. 9196 (1963) (statement of Rep. Thompson) ("[The Equal Pay Act] only applies to instances where men and women are doing work and where there is a wage differential based solely on sex." (emphasis added)).

10 This is the primary difference between California's amended Section 1197.5 and the proposed Paycheck Fairness Act—the federal bill calls for almost unlimited compensatory and punitive damages.

11 Section 1197.5(j)(1) ("An employer 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 section.")

12 Section 11997.5(j)(1) ("Nothing in this section creates an obligation to disclose wages.")

13 Section 1197.5(j)(3).

14 There are no retroactivity or grandfather provisions in the law; accordingly, employers should determine whether their compensation policies are compliant by the time the law goes into effect.

7. Update internal record retention requirements to reflect the new three-year retention period for records of the wages and wage rates, job classifications, and other terms and conditions of employment of the persons employed by the employer.
8. Remind supervisors of employees' limited right to ask co-workers about their compensation for the purpose of ascertaining their rights under the amended statute.