LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
THURSDAY, AUGUST 16, 2018

Important amendments to California's pay equity laws

By Tara Presnell

California's pay equity laws received much-needed clarification on July 18, when Gov. Jerry Brown signed into law amendments to the new "prior salary history" ban, "pay scale" disclosure requirement, and California Fair Pay Act, or Labor Code Sections 432.3 and 1197.5, respectively. The amendments, which go into effect Jan. 1, 2019, help employers better understand their obligations under California law and determine how to adjust their pay practices for current and prospective employees.

New York Times News Photo

California Gov. Jerry Brown in Washington in March 2017. Last month, Brown signed into law amendments to existing pay equity statutes in order to clarify the law.

Here is a summary of the most common questions from employers since the new laws went into effect and how the recent amendments do (and do not) provide clarification:

Prior History and Pay Scale (Labor Code 432.3)

What does "pay scale" mean? The original law simply stated that employer "shall provide a pay scale" to an applicant. There was no definition of "pay scale" in the statute. Could providing the median or average salary meet the requirement? What about the minimum and/or maximum pay for the position? The vague wording of the statute left many employers with more questions than answers.

The amended law now defines a "pay scale" to mean "a salary or hourly wage range." The use of the word "range" suggests that providing a starting salary or median salary alone will be insufficient. Employers should make sure that their pay scale has a bottom and top number, but they are free to decide for themselves if they want to structure their range around the median salary, or provide the highest and lowest pay for the position, or something in between.

The amended language does not refer to bonuses, profit sharing or on-hire equity grants as part of "pay scale," inferring these items do not need to be included in the pay scale disclosure to applicants. These non-salary items can be a significant factor to many applicants, particularly those working for technology companies or start-ups.

When does a pay scale need to be provided to an applicant? The original text of the law stated that an employer had to provide a pay scale "upon reasonable request." The term "reasonable request" was not defined and employers had difficulty applying this requirement in practice because it was unclear at what stage in the application process that a request would be considered "reasonable." For example, was a request "reasonable" if made upon first contact by a recruiter? Or once an application was submitted? Or after the initial screening interview? Or at some other point closer to the offer or acceptance stage?

The amendment clarifies that a "reasonable request" means "a request made after an applicant has completed an initial interview with the employer." Employers should make sure that the people in their organization tasked with initial interviews — whether that is done by recruiters, human resources, or hiring managers — understand their obligation to provide pay scale information if asked.

Can an employer ask an applicant what salary they expect to make in the position? Many employers responded to the "prior salary" ban by instead asking applicants what salary or compensation package they expected to make if chosen for the position. However, the original statute was entirely silent whether salary expectations were fair game, causing some uncertainty about whether this was an acceptable approach. The amended law clarifies that an employer is not prohibited "from asking an applicant about his or her salary expectations for the position being applied for."

Does the prior salary history ban or pay scale disclosure apply to current employees or only prospective applicants? The law originally did not define "applicant." As a result it was unclear whether an "applicant" included current employees applying for other roles within their company. This was particularly tricky for employers when it came to prior salary considerations because the employer is most likely already in possession of the applicant's salary history at the company.

The amended statute defines "applicant" and "application for employment" to mean "an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position." In other words, the ban on salary history does not necessarily apply to transfers (with some caveats, more on that below) and there is no requirement to provide pay scale data to internal applicants.

California Fair Pay Act

Can an employer consider prior salary as a factor in setting compensation, or are employers prohibited from considering it as the only factor when setting compensation? The answer under the amended law is going to differ depending on whether the applicant is a current employee or prospective candidate.

The CFPA currently provides

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that where there is a wage differential between substantially similar employees of different genders or races, the entire pay differential must be explained by: (1) a seniority system; (2) a merit system; (3) a qualitative or quantitative measuring system; or (4) a bona fide factor other than race or sex, such as education, training or experience, provided that it is both job-related to the position and consistent with a business necessity. A "business necessity" is narrowly drawn so that an employer cannot rely on "business necessity" if the "employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential."

The CFPA goes further to expressly provide that reasonable reliance on any of the four affirmative defenses above has to account for the *entire wage differential* and, importantly, that "[p]rior salary shall not, by itself, justify any disparity in compensation." (Emphasis added.) The "by itself" language caused confusion, as it was unclear whether prior salary could be considered at all as long as it was not the sole factor determining compensation. The recent 9th U.S. Circuit Court of Appeals case *Rizo v. Yovino*, decided after the CFPA went into effect, cast doubt on this interpretation when it held that prior salary cannot be considered as a factor when setting compensation, either standing alone or in combination with other factors.

The amended CFPA removes the "by itself" language and replaces it with the following paragraph: "Prior salary shall not justify any disparity in compensation. Nothing in this section shall be interpreted to mean that an employer may not make a compensation decision based on a current employee's existing salary, so long as any wage differential resulting from that compensation decision is justified by one or more factors in this subdivision." (Emphasis added.)

The amended language permits employers to consider a current employee's salary in limited circumstances, such as when any wage differential can be fully explained by a seniority system, a merit system, a system that measures earnings by quality or quantity of production, or some other bona fide factor such as education, experience or training. In other words, considering a current employee's salary as a factor in setting compensation is not a death knell if the employer can fully explain the wage differential by these factors.

The amended language does not similarly carve out circumstances for consideration of a prospective applicant's prior salary. Employers should not consider salary history as a factor in determining compensation for soon-to-be employees, whether it can be justified or not.

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