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Preparing for 2016: The Fair Pay Act

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As the seasons change and 2015 comes to a close, employers should take note of a particular change coming to California's legal landscape in 2016: the Fair Pay Act ("FPA"). On October 6, 2015, Governor Jerry Brown signed Senate Bill No. 358 (the FPA) into law. The Act takes effect on January 1, 2016, applies to all employers regardless of size, and amends California's Equal Pay Act (Labor Code section 1197.5) in a number of significant ways:

The New "Substantially Similar" Standard

The most notable change that the FPA brings is the replacement of the current "equal work" standard with the new "substantially similar" standard. Prior to the FPA, section 1197.5 prohibited an employer from paying an employee of one sex less than an employee of the opposite sex for equal work on jobs requiring equal skill, effort, and responsibility, and performed under similar working conditions. This "equal work" standard was relatively unclear, as the Department of Labor Standards Enforcement ("DLSE") has never issued any regulations explaining what qualifies as "equal work." Additionally, only a handful of cases have interpreted section 1197.5, and those cases have consistently looked to the federal Equal Pay Act (29 U.S.C. § 206(d)), which also prohibits paying opposite sex employees differently for equal work, for guidance.

However, rather than clarifying section 1197.5, the California legislature enacted the FPA, which moved the statute further away from what little interpretive guidance existed in the first place. Under the FPA, section 1197.5 now prohibits employers from paying an employee of one sex less than an employee of the opposite sex for "substantially similar work when viewed as a composite of skill, effort, and responsibility under similar working conditions." Whereas courts have at least been able to look to the federal Equal Pay Act for assistance in interpreting section 1197.5 due to the similarity of the language, courts and employers are now left on their own to guess as to what constitutes "substantially similar work when viewed as a composite of skill, effort, and responsibility."

This vague standard opens up a number of questions and makes it difficult to be certain how to pay employees in various scenarios. For example, it is unclear whether jobs are only substantially similar when they require the same degree of skill, effort, and responsibility, or whether jobs with varying degrees of skill, effort, and responsibility may be considered substantially similar so long as the net job requirements meet some sort of threshold. These are questions that only the courts can answer. Until they do, two things are clear: (1) the FPA makes it more difficult for employers to establish fair and legally compliant pay policies and (2) the FPA increases the ability of employees to contest their wages through litigation.

Deletion of the "Same Establishment" Requirement

Prior to the FPA, employers were only prohibited from paying opposite sex employees who did equal work at the same establishment differently. The FPA, however, has deleted the "same establishment" requirement and now prohibits wage differentials for opposite sex employees doing substantially similar work in any of the employer's establishments. Thus, beginning on January 1, 2016, employees may challenge wage gaps that exist between substantially similar jobs at any of an employer's locations. For example, a woman who works at a facility in Oakland, California may now compare her pay to that of a man who works in the same position at a facility a mile away in Berkeley. Employers who run multiple work sites should take note of this change and make sure to review and compare the pay practices at all company locations.

Good News: Exceptions

Fortunately, the FPA did not amend away an employer's affirmative defenses and ability to protect itself. Section 1197.5 still authorizes employers to pay employees of the opposite sex who do substantially similar work differently where the employer is able to demonstrate that the wage differential is based entirely upon a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or upon a bona fide factor other than sex, such as education, training, or experience. However, the FPA specifically emphasizes that such a bona fide factor (1) may not be based on or derived from a sex-based differential in compensation; (2) must be job related with respect to the position in question; and (3) must be consistent with a "business necessity." Once again, the FPA fails to give employers clear guidance by vaguely defining "business necessity" as "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve." Note also that this defense will not apply if the employee is able to show that "an alternative business practice exists that would serve the same business purpose without producing the wage differential."

Retaliation Provision

The FPA also adds a retaliation provision, prohibiting employers from discharging, discriminating, or retaliating against any employee for bringing or assisting with a claim under section 1197.5. Further, while employers are not required to disclose the wages of one employee to another employee, they may not prohibit employees from disclosing their 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 section 1197.5.

Three-Year Record Keeping Requirement

Prior to the FPA, employers were required to keep records of the wages and wage rates, job classifications, and other terms and conditions of

employment of persons employed for a period of two years. Under the FPA, employers are now required to keep these records for three years.

The Takeaway

In sum, the Fair Pay Act has amended California's Equal Pay Act into a far more subjective and employee-friendly standard, thereby encouraging litigation. Employers in violation of the Act may be subject to administrative or civil actions brought by the DLSE, or civil actions by aggrieved employees to recover back pay, liquidated damages, interest, and costs of suit. Fortunately, there are steps that employers can take now to minimize their risk of liability. We highly recommend that employers take the following steps now to prepare for the Fair Pay Act's amendments in 2016:

- Make sure that job descriptions contain details that reflect legitimate reasons for any pay differentials
- Review pay policies and practices across all locations to determine whether any wage differentials exist among "substantially similar" jobs
- If wage differentials exist among substantially similar jobs, make sure you have a justification to support the differential that (1) is not based on sex or any other protected category, (2) relates to the job at issue, (3) and serves a substantial business purpose
- Ensure that there is no prohibition against the discussion of wages in company documents (e.g., Employee Handbooks), and that these documents contain appropriate anti-retaliation provisions
- Review and update training of any individuals who make compensation decisions and remind them of the appropriate job-related factors on which pay may be based
- Update record retention policies from two to three years

The FPA has complexities and ambiguities that warrant careful consideration. Accordingly, employers should conduct an analysis of their workforce wages in advance of the New Year (preferably with the assistance of an attorney to maintain the attorney-client privilege) to determine whether they are vulnerable to potential challenges under the FPA.

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