

Pay Equity Issues & Insights Blog



Pay Equity Extends to Race, Ethnicity, Without Banning Salary Inquiries

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Recent state pay equity initiatives (in [Massachusetts](#), [New Jersey](#), [New York](#)) have focused on gender. California is different. Leave it to the state that last year passed the nation's strictest pay equity law as to gender to take it up another notch. [SB 1063](#), dubbed the "Wage Equality Act of 2016," extends last year's Fair Pay Act amendments to Labor Code section 1197.5 to cover unequal pay as to race and ethnicity. Thus, effective January 1, 2017, California employers must not pay employees a wage rate less than the rate paid to employees of a different race or ethnicity for substantially similar work. (Read our prior [alert](#) for a description of the Act's requirements and prohibitions.) Meanwhile, newly enacted [AB 1676](#) will prohibit employers from using an employee's prior salary as the sole basis to justify a pay disparity. In the process, however, California has declined to follow the Massachusetts example of forbidding employer inquiries into an applicant's prior salary.

SB 1063 was introduced in February 16, 2016, just four months after Governor Jerry Brown signed into law [SB 358](#) (one of the nation's [most aggressive](#) gender pay equity bills). The move to include race and ethnicity was foreshadowed last summer when the California National Organization of Women—sponsor of this year's bill—[opposed](#) the Fair Pay Act (SB 358) for its failure to include pay equity protections for various additional categories protected by anti-discrimination laws (such as race, ethnicity, sexual orientation, gender identity, and disability status).

Senator Hall, who authored the Wage Equality Act of 2016, justified the opposition by saying that "the 65 year old California Equal Pay Act fails to include one of the largest factors for wage inequity—race and ethnicity." Senator Hall [cited](#) a 2013 study by the American Association of University Women reporting that "Asian American women make 90 cents, African American women make 64 cents, and Hispanic or Latina women make just 54 cents for every dollar that a Caucasian man earns. The wage gap isn't only between men and women, as African American men earn just 75% of the average salary of a Caucasian male worker."

Opponents of SB 1063 objected that it would go too far, too fast: SB 358 is [still in its infancy](#), with its standards likely to be tested over the next several years in litigation. Therefore, the opponents argued, "the legislature should allow time for employees, employers, and the courts to interpret and implement the new boundaries of the equal pay law before seeking to amend and expand it even further." Opponents also noted that employees have other ways to challenge pay discrimination. The Fair Employment and Housing Act already prohibits discrimination against people in many classifications, including race and ethnicity.

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AB 1676, which was passed concurrently with SB 1063, will amend Section 1197.5 (the same section SB 1063 amends) to prohibit employers from using prior salary as the sole justification for a pay disparity. In its original proposed form, AB 1676 would have prohibited employers from seeking an applicant's salary history information, just as its vetoed predecessor, AB 1017, had attempted to do last year. In vetoing [AB 1017](#), Governor Brown stated that further gender pay equity changes should wait until we see how [SB 358](#) plays out. The removal of any ban on asking about salary history likely made AB 1676 palatable to the Governor, and kept California from matching the new [Massachusetts law](#), which prohibits Massachusetts employers from requesting an applicant's pay history, unless the applicant has voluntarily disclosed that information.

What's an employer to do? First, self-assess where your company is on pay equity. If you've not analyzed the issue before, conducting a proactive pay equity analysis could be the first and best step to take to achieve fair pay and diminish legal risk. Through the use of statistical models and analyses (conducted by a labor economist), employers can test the extent to which permissible factors explain existing pay differentials. This "look under the hood" is especially important for companies considering making public proclamations about the company's state of pay equity. With SB 1063 now looming on the horizon, companies should not limit these analyses to gender. Engaging legal counsel to direct and conduct this work under attorney-client privilege minimizes risk that this analysis and related deliberations might be discovered in litigation. Even companies that are well-versed in pay equity are wise to revisit the issue with an eye to race and ethnicity. And all companies should review their written policies, practices, and hiring, promotion, and compensation factors to ensure that all comply with the requirements of the California Fair Pay Act.

[Join members of Seyfarth's Pay Equity Group](#) and top labor economists on November 30 for a robust discussion around strategies for navigating the complexities of "pay equity".

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