

Pay Equity Issues & Insights Blog



New DLSE FAQs: Unequal Guidance On Equal Pay Law

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Seyfarth Synopsis: New FAQs from DLSE offer some guidance on California's "new and improved" Equal Pay Act. Most helpful is discussion of factors (skill, effort, responsibility) affecting whether work by different employees is "substantially similar" enough to require equal wages.

As Seyfarth has reported previously [here](#), as of January 1, 2016, California has one of the most aggressive pay equity laws in the country. On April 6, 2016, California's Division of Labor Standards Enforcement issued a "[Frequently Asked Questions](#)" on the California Equal Pay Act, as strengthened by enactment of the California Fair Pay Act of 2015.

While the FAQ provides a handy roadmap for employees wishing to sue, it provides little guidance for an employer hoping to avoid claims of unequal pay or, if a claim is made, to defend itself. The phrasing of the FAQs is employee-focused. For example, the document addresses these questions for employees:

"What do I have to prove to prevail on my Equal Pay Act claim?"

"When do I have to file my claim?"

"What do I get if I prevail?"

But the advice for employers is limited.

As a quick reminder, the CA Equal Pay Act (Labor Code section 1197.5) requires employers to pay employees of both sexes the same "wage rates" for "substantially similar work," unless the employer proves that the wage differential is based on (a) seniority, (b) merit, (c) a system that measures earnings by quantity or quality of production, or (d) some other bona fide factor other than sex, such as education, training or experience.

In the FAQs, the DLSE recaps the key differences in the current law from its predecessor: employees can be compared even if they do not work at the same establishment or hold the "same" or "substantially equal" jobs, and employers have the burden to justify pay differentials based on a limited number of factors. Also new: employers must keep records of wages, wage rates, job classifications, and other terms and conditions for three years (rather than two), and (consistent with existing law) employers may not prohibit employees from discussing their wages.

What Employers Need To Consider in Light Of the FAQs

The DLSE leaves many questions unanswered from the employer's perspective. Perhaps this is not surprising, given the nuanced and fact-specific nature of the questions with which employers must grapple to comply with the law. Nonetheless, there are a few nuggets of information that employers should take to heart when performing pay equity analyses.

The meaning of "substantially similar work." As noted, the law requires employers to pay employees of both sexes the same wage rates for "substantially similar work." The FAQs define substantially similar work to mean "work that is **mostly similar** in skill, effort, responsibility, and performed under similar working conditions." (The imprecise term "mostly similar" is arguably an improvement on the "when viewed as a composite of" language used in the statute.) The FAQs go on to define (more helpfully) the terms "skill," "effort," "responsibility," and "performed under similar working conditions":

Skill = experience, ability, education, and training required to perform the job;

Effort = the amount of physical or mental exertion needed to perform the job;

Responsibility = the degree of accountability required in performing the job; and

Performed under similar working conditions = the hazards and physical surroundings of the job such as temperature, fumes, and ventilation.

How do you define "wage rates"? The FAQs do not define "wage rates"; it merely repeats what we already knew—the law refers to wages or salary paid, and other forms of compensation and benefits. Notwithstanding the lack of guidance, we think employers should consider all forms of compensation, not just base or hourly pay, and give special attention to setting starting salaries for new hires.

Employee questions about wages. As the DLSE points out, an employer cannot retaliate against employees who talk or inquire about their own wages or the wages of others. At the same time, the employer continues to have no duty to disclose wages of other employees.

Seyfarth's Pay Equity Group Is Positioned To Assist Employers

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