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Management Alert

California Governor Signs Strictest Equal Pay Law in U.S.

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Yesterday, October 6, California Governor Jerry Brown signed the California Fair Pay Act, which media observers have called the nation's most aggressive equal pay law. The Fair Pay Act will be effective January 1, 2016 for employers with California-based employees.

How Does This Law Differ From Current Laws Addressing Pay Discrimination?

Both federal and state laws already prohibit gender-based pay discrimination. On a federal level, the Equal Pay Act and Title VII of the Civil Rights Act of 1964 forbid employers to discriminate in pay and benefits based on sex. California, like most states, already has had its own statutes prohibiting such discrimination.

The new California Fair Pay Act signed yesterday expands upon those laws in several significant ways:

- Employees can be compared even if they do not work at the same establishment. This means that the pay of an employee may be compared to the pay of other employees who work hundreds of miles apart.

- Employees can be compared even if they do not hold the "same" or "substantially equal" jobs. The new law would require only a showing that the employees are engaged in "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions."

- The new law requires employers to justify pay differentials and limits the factors that employers can use: the factors must be applied reasonably and, when viewed together, must explain the entire amount of the pay differential.

Together, these changes dramatically lower the bar for an equal pay suit, permitting plaintiffs to compare themselves with persons of the opposite sex working at any location for the same employer, and in any similar—and not the necessarily the same—job. While Title VII does not require a showing of "equal work" within the same establishment, it does require a showing of discriminatory intent or a specific practice or policy with a discriminatory impact—a showing that is not required under the California Fair Pay Act.

The California Fair Pay Act puts upon employers the burden to affirmatively demonstrate that any pay differences are based on one or more of a limited number of factors. The permitted reasons for differences in pay are:

- A seniority system,

- A merit system,

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- A system that measures earnings by quantity or quality of production, or

- A *bona fide* factor other than sex such as education, experience, or training. This exception will 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" (i.e., the factor relied upon effectively fulfills the business purpose it is supposed to serve). This defense does not apply if the plaintiff can demonstrate an alternative business practice that would serve the same business purpose without producing the pay differential.

The California Fair Pay Act expressly removes from the existing California pay law, Labor Code section 1197.5, statutory exemptions that applied where work is performed "at different geographic locations" and "on different shifts or at different times of day." Nonetheless, employers may still justify pay differences based on geographic, shift, or hours differentials, as a bona fide factor other than sex, as clarified by Senator Hannah-Beth Jackson, who introduced the Fair Pay Act legislation. Senator Jackson entered this clarification into the legislative history by writing a letter to the President pro Tempore of the Senate and moving to have it printed in the California Senate Daily Journal. The letter, with the following language, appeared on May 26, 2015:

> [T]he amendments to this bill that strike "work is performed at different geographic locations" and "work is performed on different shifts or at different times of day" should not be construed as the Legislature's intent to make those factors unavailable to an employer responding to an equal pay complaint. Rather, the employer may claim a "bona fide factor," that may be specifically described by the employer as work that is performed at different geographic locations or work that is performed on different shifts or at different times of day, so long as the employer can prove that the factor is consistent with business necessity, as specified in the bill.

See the letter in the Senate Daily Journal *here*.

Anti-Pay Secrecy Redux

Under the California Fair Pay Act, employers may not prohibit employees from disclosing or discussing their own wages or the wages of others, or from aiding or encouraging other employees to exercise their rights under the law. These anti-pay secrecy requirements echo similar prohibitions under the National Labor Relations Act, under the California Labor Code, under an Executive Order that applies to federal contractors. More information about the final regulations implementing that Executive Order is available *here*.

New Methods of Enforcement, Too …

The existing California equal pay law vested enforcement authority in the California Department of Labor Standards Enforcement (DLSE). The law did not require employees to exhaust the administrative process before suing, unless the employee consented to the DLSE's bringing an action. An employee could sue directly in court—provided the employee did so within two years (or three if the violation was "willful")—to recover the balance of wages, interest, liquidated damages, costs, and reasonable attorney's fees.

The California Fair Pay Act creates an additional private right of action—this one with a one-year statute of limitations—for employees who allege they have been discharged, discriminated, or retaliated against for engaging in any conduct protected by the statute. These employees may seek reinstatement and reimbursement for lost wages and benefits, interest, and "appropriate equitable relief." The California Fair Pay Act also provides these employees an alternative: they may file complaints with the DLSE alleging employer violations of the new prohibitions on discrimination, retaliation, and restricting employee wage-information discussions.

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Time to Revisit Recordkeeping Requirements

The California Fair Pay Act will also extend—from two years to three—an employer's obligation to maintain records of wages and pay rates, job classifications, and other terms of employment.

What are the Next Steps?

Conducting a proactive pay equity analysis is often the first and best step employers can take to ensure fair pay and diminish legal risk. Through the use of statistical models and analyses, employers can test the extent to which permissible factors explain existing pay differentials. Conducting a multivariate regression analysis and determining how and when to remediate are not for the inexperienced. This sophisticated work includes developing the appropriate employee groupings, isolating the factors that explain pay, adjusting the model, and interpreting the results. Importantly, you minimize the risk that this analysis and related deliberations might be discovered in litigation by engaging legal counsel who routinely conduct these analyses to direct and conduct this work under attorney-client privilege.

Seyfarth Shaw has for many years been in the forefront of assisting employers to interpret pay equity laws and conducting pay analyses. Seyfarth's dedicated group of experienced attorneys and analysts have already begun to advise clients regarding the California Fair Pay Act. As this law goes into effect on January 1, 2016, employers with California-based employees should consider an attorney-client privileged pay review as soon as possible. Please contact your Seyfarth lawyer to learn more.

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