

Client Alert

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California's New Equal Pay Law Portends Tidal Wave of Gender Pay Discrimination Claims

By Eric A. Tate

On October 6, 2015, California Governor Jerry Brown signed into law SB358, which amends Labor Code Section 1197.5, California's existing gender pay equality law.¹ Most of the previous statute remains intact, but the amendments, while few, may transform gender pay discrimination into the employment lawsuit *du jour* in California for years to come.

WHAT'S NEW?

California and federal law already prohibit employers from paying a worker of one sex less than the opposite sex for the same job by requiring equal pay for *equal* work. The new law:

- Expands the range of jobs that can be subject to a gender pay discrimination action by barring employers from paying employees less than other employees of the opposite sex for *substantially similar* work even if their job titles are different or they work at *different* locations;
- Provides that once a pay differential in *substantially similar* jobs has been shown, the employer has the burden of proof to establish that any pay differential is based on non-discriminatory factors, including a seniority system, a merit system, quantity or quality of production standard, or bona fide factors other than sex;
- Requires that the non-discriminatory "factors relied upon account for the *entire* wage differential" in order for the employer to avoid liability under the statute;
- Adds a private right of action for employees discriminated or retaliated against for exercising their rights under the statute with a one year statute of limitations period;
- Increases the document retention period from two to three years; and
- Goes into effect on January 1, 2016.

WHAT'S IT ALL MEAN?

- With the lowering of the standard to establish an unlawful pay differential and express shifting of the burden of proof to the employer to demonstrate that any pay differential was entirely due to non-discriminatory factors, it just got easier for plaintiffs to pursue alleged gender pay disparities in California.

¹ Text of statute available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB358.

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- The Legislature noted that women working full time in California collectively lose approximately \$33,650,294,544 each year due to gender pay disparities. While the discriminatory basis, if any, for such disparities is yet to be established, theoretically there is now a \$33,650,294,544 pot of gold for plaintiffs' attorneys to pursue.
- Employers can expect the number of gender pay individual and class action lawsuits in California to explode.
- Gender pay discrimination claims likely will be included in many more claims filed by female workers for other reasons.

Since our defense of *Kraszewski, et al. v. State Farm Gen. Ins. Co.*, which when originally filed in 1979 was the largest sex discrimination class action filed in U.S. history, Morrison & Foerster has represented employers in important gender and wage actions big and small. We note, however, that when California's generally employee-favored laws and litigation process (i.e., The Labor Code Private Attorneys General Act of 2004) are coupled with the reduced pleading standard and express shifting burden of proof in the new law, the scale of future litigation over gender pay disparities in California under SB358 may trump anything California employers have experienced before.

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