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**PAY EQUITY**

California's equal pay law bars payment of lower wages to "employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." In this BNA Insights article, Eric Tate, a partner in the San Francisco office of Morrison & Foerster LLP, looks at recent amendments to the law and discusses the potential impact of those changes for employers.

**California Raises Bar for Employers Again: Gender Pay Bias Claims Set to Take Off With New Gender Pay Equity and Anti-Discrimination Law**

BY ERIC TATE

**C**alifornia's equal pay law, Labor Code Section 1197.5, bars payment of lower wages to "employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions."

But on Oct. 6, 2015, Gov. Jerry Brown (D) signed into law SB 358, raising the bar for employers by amending the equal pay law in three significant ways. The changes reduce the standard for finding a violation of the statute, increase the requirements for an employer to successfully defend against a claim, and establish a private right of action for discrimination and retaliation under the statute.<sup>1</sup>

<sup>1</sup>Text of the statute is available at [http://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=201520160SB358](http://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB358).

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**What's New?**

Specifically, 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. Previously, a violation could only be established in the context of *equal* work and within the *same* establishment.

- 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 nondiscriminatory factors, including a seniority system, a merit system, quantity or quality of production standard, or bona fide factors other than sex. The prior version of the statute did not expressly state that the employer had the burden of proof.

- 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. The prior version of the statute did not address how much of the wage differential had to be explained by the non-discriminatory factors to avoid liability.

- 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. The prior version of the statute did con-

template that an employee could pursue a civil action right of action to recover for the amount of an improper wage differential plus interest, liquidated damages, and attorney's fees and costs of suit, but it had no private right of action for discrimination and retaliation.

- Increases the document retention period to three years. Previously, the document retention period was two years.
- 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 became easier for plaintiffs to pursue alleged gender pay disparities in California.

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 in California for other reasons.

The support of famous people can influence legislation. SB 358's author, State Sen. Hannah-Beth Jackson (D), reportedly cited Patricia Arquette's Feb. 22, 2015 best supporting actress Academy Award acceptance speech as giving SB 358 momentum for passage. Arquette ended her speech with the following comments: "To every woman who gave birth, to every taxpayer and citizen of this nation, we have fought for everybody else's rights. It's our time to have wage equality once and for all and equal rights for women in the United States of America."<sup>2</sup>

As often is the case in the law and other areas affecting society generally, don't be surprised if California's expanded gender pay equity law is used as an example to seek similar amendments to the federal Equal Pay Act and analogous state laws.

While the recent amendments to the statute were few, when coupled with California's generally employee-favored laws and litigation process (i.e., the Labor Code Private Attorneys General Act of 2004), the scale of future litigation over gender pay disparities in California under SB 358 has the potential to trump anything California employers have experienced before.

On the bright side, companies with employees in California have time before the new law takes effect on Jan. 1, 2016, to work with legal counsel to strategize about any potential pay equity concerns they may have.

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<sup>2</sup> Text of the speech is available at <http://www.oscars.org/press/onstage-speech-transcript-actress-supporting-role>.