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THE MOVEMENT FOR EQUAL PAY IN THE WORKPLACE: PROGRESSIVE STATE LAWS CARRY THE TORCH

By [Austin James Marsh](#)

“Traditionally men have earned more than women in the workplace because they are considered the primary breadwinners for families. They need to make enough to support their families and allow the Mother to remain in the home to raise and nurture the children.

If businesses are forced to pay women the same as male earnings, that means they will have to reduce the pay for the men they employ, simple economics.

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If that happens, then men will have an even more difficult time earning enough to support their families, which will mean more Mothers will be forced to leave the home (where they may prefer to be) to join the workforce to make up the difference.”¹

Although strides have been made over the past few decades to achieve pay equity for women and other protected classes of individuals, the facts (and the sentiment expressed in the above quote) make clear that there is still a ways to go.

Indeed, new numbers from the U.S. Bureau of Labor Statistics reveal that women’s weekly earnings in California average approximately 15% below those of similarly situated male workers.² The gap equates to an approximate loss of \$7,000 per woman annually—the largest it has been since 2002. In fact, the gender pay gap grew in 31 states and in Washington, D.C.³ Nationally, women’s wages dropped to 81.1% of men’s wages in 2015—down from 82.5% in 2014.⁴

(LIMITED) FEDERAL REGULATION

The spotlight on unequal-pay issues intensified in the past year, when five senior members of the United States Women’s Soccer Team filed a complaint against the U.S. Soccer Federation for wage discrimination, citing being paid less than half the amount received by members of the Men’s U.S. Soccer team and their superior on-field achievements.⁵ Additionally, large corporations have recently disclosed their pay data in an effort to demonstrate transparency and further a public movement to eliminate unequal pay.⁶ Some large technology firms, including LinkedIn, Apple, and Facebook, now claim that they have eliminated gender wage gaps in their workforces.⁷

Despite the attention, little has been done at the federal level to bolster the protections offered by the Equal Pay Act of 1963 (EPA). The EPA, signed into law by John F. Kennedy, is included as a section of the Fair Labor Standards Act.⁸ At its core, the EPA was designed to prevent discrepancies in pay between people within the same job at the same company.⁹

Many pundits argue that the EPA provides too many loopholes that reduce its effectiveness.¹⁰ By design,

the Act allows for higher pay based on seniority, merit, productivity, and “a differential based on any other factor other than sex.”¹¹ This language has sometimes made it hard for women to prove they were paid less *because of their gender*.¹²

(ONGOING) FAILED EFFORTS TO STRENGTHEN EPA

Beginning in 1997, various iterations of the Paycheck Fairness Act have been proposed—all by Democrats—and ultimately rejected by the U.S. Congress. These proposed laws seek to punish employers for retaliating against employees who share wage information, and shifts the burden onto employers to justify why one individual is paid less than another.¹³ Perhaps more significantly, the proposed laws would allow employees to sue for punitive damages based on wage discrimination—one of the reasons many legislators have voted against enactment.

STATE REGULATIONS

Despite political (and other) gridlock at the federal level, a handful of states have embarked on a recent effort to increase regulatory measures designed to achieve pay equity for women and other protected groups. We have discussed a few of these protections in our [August 2016 Employment Law Commentary \[link\]](#).

Specifically, California, New York, and Massachusetts are leading the charge for bipartisan-backed equal-pay legislation.¹⁴

CALIFORNIA FAIR PAY ACT

California has its own version of the Equal Pay Act (California EPA) that, until 2016, provided protections essentially similar to those of the federal EPA. On January 1, 2016, California enacted the California Fair Pay Act, Cal. Lab. Code § 1197.5 (2016) (FPA), which strengthened the California EPA in several ways, including by:

- eliminating the requirement that the compared jobs be at the same establishment;
- replacing the requirement that the compared jobs entail “equal” work with one that the jobs involve “substantially similar” work;

- adding antiretaliation protections for workers who protect employees bringing claims or assisting with others' claims; and
- providing that employers cannot prohibit workers from disclosing their wages, or from discussing or inquiring about others' wages.

The FPA provides that employers can still defeat prima facie claims for equal pay by proving that the pay difference for substantially similar work is due to seniority, merit, a system that measures production, or a “bona fide factor other than sex.”¹⁵ A “bona fide factor other than sex,” in turn, is one that is (1) not based on or derived from a sex-based factor; (2) job related; and (3) consistent with business necessity. Examples may include education, training, or other experience.

CALIFORNIA WAGE AND EQUALITY ACT OF 2016

California added protections to the California EPA when the Wage and Equality Act of 2016, Cal. Lab. Code §§ 1197.5, 1199 (2016), (WEA) went into effect on January 1, 2017. WEA essentially extends the Fair Pay Act's protections to cover differences in pay between employees of different races and ethnicities. The legislation also prohibits employers from justifying a difference in employee pay by the employee's prior salary history alone—a protection the bill's sponsors believe will guard against a perpetuating cycle of unequal pay for those who have arguably been previously discriminated against.

The WEA, enacted into law only a year after the FPA, evidences California's ongoing efforts to expand protections afforded to suspect groups of employees. Judging from these newly enacted measures, California may well continue down the path of providing additional protections to other protected groups.

EMPLOYER BEST PRACTICES

Audit your workforce based on gender, race, and ethnicity. Conduct comparisons of the compensation levels as they apply to different genders, as well as to all different races and ethnicities, represented in your workforce. Note that while gender is typically readily identifiable, ethnicity and race may prove more challenging to articulate. Be sure that audits encompass all employees and are not limited to employees at a specific office or work site. Employers

are advised to consult with counsel to undertake this analysis, to ensure that audits remain protected by the attorney-client privilege.

Consider performing additional audits. Many experts expect California's trend of offering greater protections to employees to continue. Accordingly, employers may want to consider, especially if they are already conducting gender, race, and ethnic audits as related to employee compensation, auditing other categories of potentially protected classes (i.e., disability or sexual orientation).

Focus on “bona fide” factors. Employers should be able to identify bona-fide factors justifying differences in pay between otherwise similarly situated employees. Employers are advised to consult with counsel when unsure if a factor is appropriate for consideration when determining employee pay.

Articulate job responsibilities and duties. If employers are paying different wages to employees performing similar jobs, they should be able to clearly define differences between the positions. These articulated differences must go beyond the job titles. Clearly documenting varying job responsibilities and duties will prove crucial to defending against unequal-pay claims.

Update company materials to reflect updated law. Employers (and counsel) should review new-hire packets, written job descriptions, and employee handbooks to ensure compliance with California's against and other states' laws. For example, company documents should not include prohibitions against discussing wages.

Take action. Identifying pay discrepancies is only the first step for employers wanting to comply with California's laws. If pay inequalities are discovered through an audit that are inconsistent with the law, employers should consider taking corrective action, such as raising the wages paid to the lower-paid employees.

CONCLUSION

The movement for equal pay for women and employees in protected classes is likely to continue to gain traction in this country. Although the federal government has been slow to act, several

states, including California, are leading a legal and legislative battle across the country designed to remove discrimination from company payrolls. Employers operating across state lines, and specifically in California, are advised to consult counsel and ensure that their policies (and payrolls) are compliant with new legislation.

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To view prior issues of the ELC, click [here](#).

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- 1 Excerpt from an open letter to the editors of *The Park Record* and *Wasatch Wave*, from James Green, Vice Chair of the Wasatch County Republican Party in Utah; February 15, 2017 (http://www.wasatchwave.com/view/full_story/27364685/article-Letters-to-the-Editor-2-15-17?instance=special%20_coverage_right_column); Mr. Green faced such a backlash from his comments that he resigned his political position within two days of the publication of his letters.
 - 2 "California pay gap for women grows to widest in more than a decade," *Silicon Valley Business Journal*, Feb. 21, 2017 (<http://www.bizjournals.com/sanjose/news/2017/02/21/california-silicon-valley-pay-gap-women.html>).
 - 3 "California pay gap for women grows to widest in more than a decade," *Silicon Valley Business Journal*, Feb. 21, 2017 (the gender pay gap in Washington, D.C., grew by the largest amount—8.6% in 2015). *Id.*
 - 4 "Out \$7,000: California pay gap for women grows," *Orange County Register*, Feb. 19, 2017 (<http://www.ocregister.com/articles/percent-744140-women-pay.html>).
 - 5 "Top U.S. Female Soccer Players Demand Equal [AV: ADD SOURCE]Pay," April 1, 2016 (<https://www.forbes.com/sites/niallmccarthy/2016/04/01/top-u-s-female-soccer-players-demand-equal-pay-infographic/#389c1f363f5c>).
 - 6 "Common Cents: Pay Equity Laws Gain Momentum," Bloomberg BNA, Aug. 5, 2016.
 - 7 "California pay gap for women grows to widest in more than a decade," *Silicon Valley Business Journal*, Feb. 21, 2017 (<http://www.bizjournals.com/sanjose/news/2017/02/21/california-silicon-valley-pay-gap-women.html>).
 - 8 29 U.S.C. § 206(d).
 - 9 The "same company" requirement requires the plaintiff to show that she and her comparators worked at the same physical place of business. See *Andreu v. Hewlett-Packard Co.*, No. 15-23270-civ-Moreno/O'Sullivan, 2016 WL 1713303 (S.D. Fla. Apr. 28, 2016).
 - 10 "Why Didn't The Equal Pay Act Close The Gender Gap? 50 Years Later, America Still Has A Major Problem"; Brinlee Morgan, April 12, 2016 (<https://www.bustle.com/articles/154078-why-didnt-the-equal-pay-act-close-the-gender-pay-gap-50-years-later-america-still>). [AV:CITE CHECKER]
 - 11 29 U.S.C. § 206(d). <https://www.eeoc.gov/laws/statutes/epa.cfm>
 - 12 See *Boaz v. FedEx Customer Information Services, Inc. et al.*, No. 15-CV-6012, 2016 U.S. Dist. LEXIS 15145 (6th Cir. 2016) (affirming judgment for employer, despite plaintiff's prima facie case of discrimination, because employer's affirmative defense for differing salaries between female plaintiff and male counterparts was due to the reorganization of its staff—a "different factor" than gender that was adopted for legitimate business reasons).
 - 13 "Senate GOP blocks paycheck bill," Cox, Ramsey and Bolton, Alexander, [THE HILL], April 9, 2014 (<http://thehill.com/blogs/floor-action/senate/203064-senate-gop-blocks-paycheck-fairness-bill>).
 - 14 "A Step Toward Equal Pay for Men and Women;" Foran, Clare, [THE ATLANTIC] August 3, 2016 (<https://www.theatlantic.com/politics/archive/2016/08/gender-wage-gap-massachusetts/494045/>) (recent laws in California and New York increasing protections for women in the workplace were enacted by Democratic governors; similar actions in Massachusetts were approved by a Republican governor).
 - 15 Previously, employers could rely on *any* factor other than sex.
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