

2016 California Equal Pay Act

WHAT EMPLOYERS NEED TO KNOW

Welcome

Business & People Strategy Consulting Group

Free Webinar Series

Labor, Employment & HR Laws and Practices

Website: www.bpscllc.com

Today's Presenter

Dr. Carlyle Rogers

- President and CEO
- Over 25 years' experience with HR, compliance, labor & employment law
- Doctorates in Jurisprudence (JD) and Psychology (PsyD)
- Certified Interrogator
- Author of "Dirty Little Secrets: Declassifying the Employment Game"

Today's Agenda

The basis for the new law (how we got here)

Overview of the existing CA Labor Code (what was in place)

Discuss the new Fair Pay Act amendment (what is new)

Employer requirements (what is required)

The legal front

Best practice tips (good ideas to stay out of legal & financial trouble)

How we got here...

The California Legislature established that:

- In 2014, the gender wage gap in California stood at **16 cents on the dollar**.
- A woman working full time year round earned an average of **84 cents to every dollar a man earned**.
- This wage gap **extends across almost all occupations** reporting in California.
- This gap is far **worse for women of color**; Latina women in California make only 44 cents for every dollar a white male makes, **the biggest gap for Latina women in the nation**.

How we got here...

While the state's overall wage gap is **slightly lower than the national average** of 78 cents to the dollar, the persistent disparity in earnings **still has a significant impact on the economic security and welfare** of millions of working women and their families.

Collectively, women working full time in California **lose approximately \$33,650,294,544** each year due to the gender wage gap.

The wage gap contributes to the **higher statewide poverty rate among women**, which stands at 18 percent, compared to approximately 15 percent for men, and the poverty rate is even **higher for women of color and single women living with children**.

How we got here...

California has **prohibited gender-based wage discrimination since 1949.**

Section 1197.5 of the Labor Code was enacted to **redress the segregation of women into historically undervalued occupations**, but it has evolved over the last four decades so that it is now virtually identical to the **federal Equal Pay Act of 1963** (29 U.S.C. Sec. 206(d)).

However, the **state provisions are rarely utilized** because the current statutory language makes it **difficult to establish a successful claim.**

How we got here...

Pay secrecy also contributes to the gender wage gap, because women cannot challenge wage discrimination that they do not know exists.

Although California law **prohibits employers from banning wage disclosures and retaliating against employees for engaging in this activity**, in practice many employees are **unaware** of these protections and others are afraid to exercise these rights due to potential retaliation.

CA Labor Code § 1197.5

Existing law regulates the payment of compensation to employees by employers and prohibits an employer from conditioning employment on requiring an employee to...

- Refrain from disclosing the amount of his or her wages,
- Signing a waiver of the right to disclose the amount of those wages, or
- Discriminating against an employee for making such a disclosure.

What this means for CA employers...

The law sets forth the regulations for payment of wages to employees.

It prohibits employment actions against employees for discussing their wages with others (including other employees).

It also protects employees from employers requiring them to sign an agreement not to disclose their wages.

CA Labor Code § 1197.5

Existing law generally prohibits an employer from paying an employee at wage rates less than the rates paid 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.

What this means for CA employers...

Men and women must be paid comparable rates when performing equal (related) jobs requiring the equal skills, responsibilities, etc.

CA Labor Code § 1197.5

Existing law establishes exceptions to that prohibition where the payment is made pursuant to...

- A seniority system,
- A merit system,
- A system which measures earnings by quantity or quality of production, or
- A differential based on any bona fide factor other than sex.

What this means for CA employers...

There must be a bona fide reason when there is a discrepancy in the pay between men and women performing equal work and requiring equal skills and responsibilities.

The variance must be able to be clearly demonstrated as the company's practice and be based upon specific criteria that makes sense (think...industry or role standards...don't try to be creative).

CA Labor Code § 1197.5 Amended

An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer:

1. Demonstrates one or more of 4 defined factors AND
2. Those factors relied upon are applied reasonably AND
3. The one or more factors relied upon account for the entire wage differential.

Substantially Similar Work

The amended law...

1. Significantly lowers the previous equal work standard.
2. Specifically prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work...
 - ...when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, subject to exceptions.

Substantially Similar Work

This modification makes it easier for employees to demonstrate unequal pay by lowering the standard for comparing their wages to the wage of another employee.

This will effectively expand the pool of employees deemed doing the “same work” or holding the “same position.”

For example, a female housekeeper who cleans hotel rooms, may challenge higher wages paid to a male janitor who cleans the lobby and banquet halls.

What this means for CA employers...

The new standard means that the barriers are not limited to employees with the same job titles or even being in the same departments.

Roles, responsibilities, skills and other key factors need to be considered and compared on a company wide basis.

The 4 Factors (The Exceptions)

The wage differential is based upon one or more of the following factors:

1. A seniority system.
2. A merit system.
3. A system that measures earnings by quantity or quality of production.
4. A bona fide factor other than sex, such as education, training, or experience.

What this means for CA employers...

Employers need to:

1. Pay all employees in the same or substantially similar roles the same wage OR
2. Have a clearly defined compensation structure that defines and relies upon factors (the more the merrier) such as:
 - Time/tenure in position
 - Accomplishments, achievements, performance, metrics, KPIs
 - Defined program that accounts for employees with skills, experience, and education exceeding (but related to) the role.

A note about the “bona fide factor”...

This factor shall 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.

For purposes of this subparagraph, “business necessity” means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve.

This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

Other Important Amendments

The amendments also include laws related to:

- Record retention
- Pay secrecy
- Burden of proof
- Claims and damages

Record Retention

The previous law required employers to maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment of the persons employed by the employer for a two year period.

The amended law extended this records retention requirement to three years.

Pay Secrecy

The amended law includes a provision to reduce “pay secrecy” by protecting employees inquiring about the wages of other employees.

Specifically, it restricts employers from prohibiting an employee from disclosing the employee’s own wages, discussing the wages of others, inquiring about another employee’s wages, or aiding or encouraging any other employee to exercise his or her rights under this section.

BEWARE

A stated goal of the bill was to make it easier for plaintiffs to bring claims under Labor Code section 1197.5...

- to increase employee awareness of the pay equity law, and
- to strengthen prohibitions against employer bans on employees' disclosing their wages

The amended law has received so much publicity, that it is very likely there will be an increase in lawsuits alleging violations of section 1197.5, including class or representative actions.

Anti-Retaliation Cause of Action

The new amendment expressly prohibits employers from discharging, discriminating or retaliating against any employee for invoking or assisting the enforcement of the law.

It creates a new private cause of action whereby an employee may bring a civil action seeking reinstatement and reimbursement for such discrimination or retaliation.

Employee Complaints

Any employee receiving less than the wage to which the employee is entitled to recover in a civil action the balance of the wages, including interest, and an equal amount as liquidated damages, together with the costs of the suit and reasonable attorney's fees, notwithstanding any agreement to work for a lesser wage.

The department or division may commence and prosecute, unless otherwise requested by the employee or affected group of employees, a civil action on behalf of the employee and on behalf of a similarly affected group of employees **to recover unpaid wages and liquidated damages**, and in addition, **shall be entitled to recover costs of suit.**

Who has the burden?

Under the revised law:

- Claimants no longer need to show that they were engaged in “equal work” with someone of the opposite sex.
- They only have to show it was substantially similar.
- This means that the standard has been lowered and comparisons can be made based upon similar tasks regardless of title.

Who has the burden?

Under the revised law:

- Claimants no longer need to show comparisons with the same establishment.
- They can now freely examine pay practices at any location the employer maintains.

Who has the burden?

Under the revised law:

- The employer now bears the burden of demonstrating that any wage differential falls into one of the four specified exemptions.
- The laws verbiage seems to support that if an employee can come up with any alternative business practice that “would serve the same business purpose”, the employer’s defense will not apply.

Some best practices tips...

Review your current compensation practices and policies and job descriptions.

Job descriptions should evaluate and define the specific requirements, skills, education, training and duties for all roles.

Create a structured compensation program that clearly reflects how employee compensation is determined, including defining and classifying substantially similar roles.

Require supervisors and managers who make decisions about compensation to document the reasons employees are paid what they are paid.

Some best practices tips...

Detail the skill required, effort expended, responsibility given, seniority, merit, quantity and/or quality of work.

Create or enhance internal complaint procedures and mechanisms so that potential problems can be addressed before they result in litigation.

Train supervisors and managers about the nuances of the new law and make compliance a factor in evaluating those managerial personnel.

Don't prohibit, threaten, or take action against employees for discussing their compensation.

How we can help...

Review and draft clearly defined job descriptions, responsibilities and requirements based upon the company and generally accepted standards.

Review and analyze the company's compensation practices, employee pay, and potential liabilities.

Provide current compensation ranges for roles.

Draft company compensation program, policies and policies.

QUESTIONS

Thanks for Attending Today's Webinar

To listen to today's webinar again or to download a copy of the presentation, please visit our website at www.bpscllc.com. The webinar and materials will be available on our Past Webinars page by the end of the business day Thursday April 21.

If you need assistance or would like to talk to us about your needs, please feel free to contact us at any of the following:

Phone: 661-621-3662, 661-312-737

Email: serviceteam@bpscllc.com, Carlyle@bpscllc.com