

SB 358: California Employers Face Tough Equal Pay Law in 2016

On October 9, 2015, Governor Brown signed SB 358, also known as California's Fair Pay Act. SB 358 significantly amends California's Equal Pay Act, which has been codified in Labor Code section 1197.5 since 1949.^[1]

Expanded Protection For Employees

SB 358 expands wage protections for employees in two respects. First, under Labor Code section 1197.5, an employee complaining of unequal pay needs to show he or she is being paid less than a member of the opposite sex who performs "equal work."^[2] California courts interpret "equal work" to mean the same job title, which historically has made it a difficult standard for employees to meet. Now, under SB 358, employers must pay employees the same for "substantially similar work," not just "equal work."^[3] "Substantially similar work" is a "composite of skill, effort, and responsibility, and is work performed under similar working conditions."^[4] As a result, employers now need to pay employees the same wage, even those employees with different job titles, if their jobs require the same skill, effort, and responsibility, and are performed under similar working conditions. As one can imagine, this new standard is rife with subjectivity.

Second, Labor Code section 1197.5, limited the requirement that employers pay members of the opposite sex equally to the "same establishment."^[5] As a result, employers could pay a male employee in Oakland more than a female employee in San Francisco without running afoul of the law. SB 358 eliminated the "same establishment" requirement.^[6] Employers will now be required to pay men and women the same regardless of the location of their work.

The most immediate and obvious impact of SB 358 is that its expanded protections broaden the universe of comparators, allowing employees to compare their wages to coworkers who have different job titles and work in different locations.

Increased Burden For Employers

Under Labor Code section 1197.5 and SB 358, in order to defend successfully against a claim of unequal pay, an employer must



by Diane Marie O'Malley

affirmatively show that the differential is based on one of four factors: (1) a seniority system, (2) a merit system, (3) a system that measures earnings by quantity or quality of production, or (4) a bona fide factor other than sex, such as education, training, or experience.^[7]

SB 358 makes it harder for an employer to rely on bona fide factors other than sex, such as education, training, or experience to justify a wage disparity. Now, if an employer relies on a factor other than a seniority system, merit system, or a system that measures earnings by quality or quantity of production, to defend the wage disparity, the employer must also show that the difference in pay is unrelated to sex, is job related, and is consistent with business necessity.^[8] SB 358 defines "business necessity" as "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve."^[9] Even if the employer can meet this heightened standard, the employee will still have the opportunity to rebut the employer's proffered bona fide factor by showing an alternative business practice exists that would serve the same business purpose without a discrepancy in pay.^[10]

SB 358 also increased the employer's burden by requiring employers to show affirmatively that each factor is applied reasonably and that the factors relied upon account for the entire wage differential.^[11]

Extended Record Keeping Requirements

Under Labor Code section 1197.5, employers were required to retain records of employees' wage and wage rates, job classifications, and other terms and conditions of employment for two years. Under SB 358 the record keeping requirement has been extended to three years.^[12]

Prohibition On Wage Secrecy

SB 358 also added new prohibitions on wage secrecy amongst employees. Specifically, under SB 358, employers are prohibited from preventing employees from disclosing their own wages, discussing the wages of others, or inquiring as to other employees' wages.^{[13][14]}

Labor Code section 232 already prohibits employers from requiring an employee to sign an agreement not to disclose wages, requiring an employee not to disclose wages as a condition of employment, and discharging or disciplining an employee for disclosing wages. However, SB 358 expanded these protections to cover not only an employees' discussion of their own wages, but also a discussion of the wages of other employees. Additionally, it is now illegal to prevent employees, in any manner, not just as a condition of employment or agreement, from discussing wages.

The National Labor Relations Act also already makes it an unfair labor practice to discipline an employee for discussing his or her wages. Thus, with the passage of SB 358, an employer is now susceptible to attack on multiple fronts—a civil action under Labor Code section 232 and an unfair labor practice charge under the NLRA, and a civil action under amended Labor Code section 1197.5.

New Causes of Action for Retaliation and Discrimination

SB 358 provides employees the new opportunity of bringing a cause of action for discrimination or retaliation. SB 358 prohibits employers from discharging, discriminating, or retaliating against employees for exercising their rights under Labor Code section 1197.5.^[15] The statute of limitations for bringing a cause of action for discrimination or retaliation under Labor Code section 1197.5 is one year.^[16]

What Should Employers Do To Prepare?

Presumably, employers are already paying their employees based upon merit and not based upon gender. However, given that this law will shed a heightened scrutiny on an employer's pay practices, it is a good idea to review positions where disparities exist. In addition, there is a new record keeping requirement.

Labor Code section 1197.5 is effective, January 1, 2016. Thus, employers should consider taking the following action to protect against any challenges:

1. Implement new record retention policies such that they retain all required records for three years;
2. SB 358 applies to both non-exempt and exempt employees. Thus, an employer should conduct an audit of hourly wage and salary practices, including a review of any employee handbooks, policies, and job descriptions to ensure that there is no indefensible disparity in pay between individuals who perform *substantially similar* work. In other words, ensure that any difference in pay between members of the opposite sex who perform substantially similar work can be explained by either (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production, or (4) a bona fide factor other than sex;
3. Check pay practices across all California locations; and
4. Train employees who make decisions regarding pay to ensure uniformity of decisions and compliance with the new law.

^[1] For purposes of this article, all references to Labor Code section 1197.5 refer to the current statute. References to SB 358 refer to the amended version of Labor Code section 1197.5, which will take effect January 1, 2016.

^[2] Current Labor Code section 1197.5(a) ("No employer shall pay any individual in the employer's employ 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...")

^[3] Amended Labor Code section 1197.5(a) ("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...")

^[4] Amended Labor Code section 1197.5(a).

^[5] Current Labor Code section 1197.5(a).

^[6] Amended Labor Code section 1197.5(a).

^[7] Current and Amended Labor Code section 11975.(a).

^[8] Amended Labor Code section 1197.5(a)(1)(D) ("The 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.")

^[9] Amended Labor Code section 1197.5(a)(1)(D).

[\[10\]](#) Amended Labor Code section 1197.5(a)(1)(D).

[\[11\]](#) Amended Labor Code section 1197.5(a)(2)-(3).

[\[12\]](#) Compare Current Labor Code section 1197.5(d) with Amended Labor Code section 1197.5(d).

[\[13\]](#) Amended Labor Code section 1197.5(j)(1) ("An employer shall not prohibit 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.)

[\[14\]](#) Under SB 358, employers are not, however, required to disclose the wages of other employees.

[\[15\]](#) Amended Labor Code section 1197.5(j)(2).

[\[16\]](#) Amended Labor Code section 1197.5(j)(3)

For more information, please contact:

Diane Marie O'Malley, Partner
415-995-5045
domalley@hansonbridgett.com