

## NEW EQUAL PAY LAW IN CALIFORNIA January 2016

A new year brings new changes for employers with employees working in California, who are now subject to one of the most stringent equal pay laws in the country. Effective January 1, 2016, the California Fair Pay Act (“Act”) aims to shrink the gender wage gap by making several significant changes to California’s equal pay law. The Act provides greater protections to employees by broadening the scope of individuals who may be compared and by narrowing the factors an employer may rely on to justify a wage discrepancy. The Act also shifts to the employer the burden of proof to show that wage differences are not gender-based. This article summarizes the Act’s most significant provisions and

**EMPLOYERS MAY HAVE TO COMPARE  
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JOB TITLES IN DIFFERENT LOCATIONS**

recommends best practices to comply with the new law.

### **New “Substantially Similar Work” Standard and No More “Same Establishment” Requirement**

Prior to the Act, California law was similar to the federal Equal Pay Act, which requires men and women working in the *same establishment* to receive *equal pay for equal work* on jobs that require *equal skill, effort, and responsibility*, and which are performed under *similar working*

*conditions*. The California Act varies from this standard in two significant ways.

First, the Act eliminates the requirement that employees work in the “same establishment” for purposes of comparing pay rates. As a result, pay comparisons may be made among employees in different locations or work sites of the same employer. For example, a female worker in an employer’s San Diego office may now argue that her wages should be compared to a male worker in the San Francisco office. However, it remains to be seen how much leeway employers will have to justify pay disparities due to potentially legitimate differences in geography, such as distinctions in local job markets and costs of living.

Second, the Act now requires employees of the opposite sex to be paid the same rate for “*substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.*” The change from “equal pay for equal work” to “substantially similar work” will undoubtedly make it easier for employees to show unequal pay between employees who hold different positions that have substantially similar job functions. Because there is little legislative guidance on what “substantially similar” work means, judges and juries will be tasked with defining and applying the term as cases under the new law are litigated.

Overall, the changes will expand the pool of employees whose wages will be compared to determine the existence of an unlawful gender pay disparity.

## Increased Burden on Employers to Explain Wage Discrepancies

Perhaps most significantly, the Act increases and shifts the burden of proof to the employer to justify a wage disparity. Previously, a California employer could avoid liability by showing that a pay difference was based on one or more of the following factors:

- A seniority system;
- A merit system;
- A system that measures earnings by quantity or quality of production; or
- A *bona fide* factor other than sex.

While the Act retains this defense, the employer now has the burden to prove that it applied one or more of these factors reasonably, and that the factors relied upon account for the *entire* wage difference. Moreover, the “bona fide factor other than sex” defense now has several limitations. The Act specifies that a “bona fide factor other than sex” includes “education, training, or experience,” and will apply only if the employer proves that:

- the factor is not based on or a result of a sex-based differential in compensation;
- is job related with respect to the position in question; and
- is consistent with “business necessity,” defined as “an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve.”

Under the new law, an employee can defeat this defense by establishing that an alternative business practice exists that would serve the same business purpose without producing the wage difference. This new burden shifting framework mimics the burden shifting in discrimination claims under Title VII.

Together, the changes increase the employer’s burden to attribute a wage difference to factors other than sex. California courts will more closely examine pay practices to see if factors that cause wage differences are applied reasonably and whether there are alternative business practices available that could serve the same business purpose without a resulting wage difference.

## Protecting an Employee’s Right to Inquire about Wages

California’s old equal pay law specified that employers could not prohibit employees from discussing their own compensation. The Act expands upon that by also banning employers from preventing employees from disclosing or discussing the compensation of other employees. Those changes are in line with provisions of the National Labor Relations Act which protect employees’ rights to discuss terms and conditions of employment.

If an employer discriminates or retaliates against an employee for disclosing, discussing, or inquiring about their own wages or the wages of others, an employee may file suit within one year to seek reinstatement and reimbursement for lost wages and work benefits, as well as appropriate equitable relief. These enhanced anti-retaliation provisions are designed to increase pay transparency among employees.

## Three Year Record-Keeping Requirement

The Act increases, from two years to three, the amount of time that an employer must maintain records of wages, wage rates, job classifications, and other terms and conditions of employment of employees.

## Same General Enforcement Scheme but Increased Exposure

The Act does not change how California's equal pay law is enforced. Employees may file complaints with the California Division of Labor Standards Enforcement ("DLSE") for violations of the equal pay and retaliation provisions of the law. The DLSE can investigate and pursue a civil action on behalf of employees. Alternatively, employees can pursue their own civil action as long as they file suit within two years, or three years if the employer's actions were willful.

An employer who is liable for unpaid wages must pay the difference in wages owed, an equal amount in liquidated damages, plus interest, costs, and reasonable attorneys' fees. Employers will also be subject to civil penalties—\$100 per employee per pay period for each initial violation and \$200 for each aggrieved employee per pay period for each subsequent violation. To the extent wage differences span across large groups of employees or job classifications, penalties and overall damages could cumulate very quickly.

## What Should Employers With Employees Working in California Do?

In light of the various new changes to California's equal pay law, it is essential that companies

understand the risks associated with using historical pay practices and that they take steps to ensure that their practices comply with the Act. Employers should determine whether multiple jobs or positions require substantially similar work when setting wages. A proper analysis requires careful consideration of job titles and duties, as well as any legitimate factors that may explain pay differences, such as seniority, education, and experience. Merit-based pay decisions should be based on objectively measurable criteria that can be documented. Additionally, employers should not rely on salary histories of recently hired employees to set initial compensation, unless they can show that gender bias did not contribute to the employee's prior compensation.

Legal counsel should coordinate this effort in order to maintain attorney-client privilege over the analyses and related communications. Finally, company handbooks, confidentiality agreements, and policies should not prohibit employees from discussing wages. Taking these and other steps is critical to mitigating potential risks from future pay claims in the New Year and beyond.

This article is a summary of recent legal developments and is provided for informational and educational purposes only. It is not intended as legal advice or to create an attorney-client relationship. For more information or assistance contact:

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