

## California Set to Enact Aggressive Equal Pay Legislation

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This week, the California Senate passed the California Fair Pay Act (SB 358) (the Act). The Act, which now awaits Governor Jerry Brown's signature, amends the California Equal Pay Act (California Labor Code Section 1197.5) and purports to be an effort to close the "gender wage gap." The Act is set to take effect January 1, 2016.

The Act represents an aggressive effort to attempt to ensure pay equality by taking an expansive view of what constitutes "substantially similar work," by placing the burden on employers to establish one or more defenses to any pay differential, by making those defenses narrow and difficult to establish, and by creating substantial penalties for non-compliance.

Specifically, the Act requires employers to pay employees the same wage rate for "substantially similar work" when viewed as a "composite of skill, effort, and responsibility, and performed under similar working conditions." Thus, employees in different roles and different departments and locations may be used as comparators. Furthermore, once an employee makes this relatively basic showing, an employer can escape liability only if it carries its burden to establish that the wage differential is based upon (a) a seniority *system*; (b) a merit *system*; (c) a *system* that measures earnings by quantity or quality of production; or (d) a bona fide factor other than sex, such as education, training, or experience. An employer may only rely upon this last defense, however, where it can demonstrate that the factor (i) is not based on or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity. The Act defines "business necessity" quite narrowly, as "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve." Moreover, the Act provides that the business necessity defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same purpose without producing the wage differential. To escape liability, an employer must also affirmatively demonstrate that the factor relied upon was reasonably applied and that the factor in fact accounts for the entire wage differential.

The Act also contains anti-retaliation provisions and prohibits employers from preventing employees from disclosing their own wages, discussing the wages of others, or inquiring about other employees' wages.

Remedies for violations of the Act include the "balance of wages," double-damages, attorney's fees and costs, and appropriate equitable relief.

Employers should review the Act carefully and consult with counsel to ensure its pay policies and practices are in compliance with the Act prior to its effective date on January 1, 2016.

The full text of the Act can be found [here](#).

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