

CLIENT ALERT

CALIFORNIA FAIR PAY ACT – EMPLOYERS SHOULD ACT NOW DESPITE THE MYSTERY

Companies with California employees are bracing for the January 1, 2016, effective date of the California Fair Pay Act. This unprecedented expansion of the law regarding gender pay equality will be particularly challenging for employers with nationwide operations. Despite the lack of clarity, HR and in-house counsel will be expected to fashion workable solutions that will meet the high expectations of the Department of Labor Standards Enforcement. This guidance will summarize the issues and provide a 5-step program toward compliance.

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NO ANSWERS IMMINENT

The CFPA casts a far wider net for unlawful pay practices and imposes significant affirmative burdens on employers to ferret out potential disparities and then correct or justify them. With a unanimous vote in the state Senate and Governor Brown's resounding support, the Division of Labor Standards Enforcement will likely enforce the CFPA with the enthusiasm of popular mandate. There is little guidance on how to follow the new law, but employers should not wait for clear direction to begin compliance.

The costs of inaction are high. Even beyond the monetary penalties of back pay and liquidated damages, big companies do not want to be part of headlines that serve as a cautionary tale for others. For smaller companies, the resources drained by a charge, audit or lawsuit could become a "bet the company matter." The CFPA may even impose individual liability on executives and managers.

THE BOTTOM LINE

Employers can immediately refine HR policies and procedures, educate managers, and adjust document retention systems. Given the ambiguous standards, the DLSE will likely look at the effort that goes into identifying and rightsizing gender pay disparity as well as at compliance itself. To that end, employers should undertake a realistic comparison of workers in arguably similar jobs (possibly under cloak of legal privilege) and document business reasons for any pay disparities. To benefit from the CFPA's few defenses, employers need to put systems in place that ensure fair pay and be able to show that those systems work.

ACT NOW ON THE "EASY" STUFF

What we know: The CFPA has a few bright-line requirements that employers can implement immediately. As a wage law, the CFPA does not allow employees to waive CFPA rights and it requires DLSE approval to resolve claims. Employers cannot retaliate against employees for exercising rights under the CFPA, including discussing or inquiring about their own or another's wages. The CFPA also increases pay recordkeeping requirements from two to three years.

What we don't know: Is DLSE approval always required for waiver of a pay claim? What qualifies as a protected discussion about pay? What specific records fall under the nonspecific standard "other terms and conditions of employment"?

PAY ANALYSIS MUST BE ROBUST

What we know: A comparison of workers with the same job title is not enough. Rather than simply require "equal pay for the same job" at the same work location, the new law requires no gender pay disparity between jobs that are "substantially similar" when viewed as a composite of "skill, effort, and responsibility." To complicate matters, the compared jobs can be in different geographic locations.

What we don't know: If it is not enough to compare pay in a particular job title, what jobs will be considered "substantially similar," meaning a sufficient "composite of skill, effort, and responsibility"? What analysis, policy, and application will pass muster? Will an employer's pay analysis be sufficient to catch disparities or will another metric used by the DLSE yield a different result and trigger liability?

MEETING BUSINESS NEEDS

What we know: The CFPA continues exceptions for pay disparities based on "a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or another *bona fide* factor that is

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job-related and consistent with business necessity.” Employers face a high burden not only to justify that pay disparities meet these standards, but also to show that each factor both effectively fills the purported business purpose and is reasonable in its application.

What we don’t know: What reasoning and documentation is necessary for an employer to avail itself of the exceptions that justify certain gender pay disparities? How will an employer show that an application of a standard yields a “reasonable” result?

IMMEDIATE COMPLIANCE STEPS

Step 1: Determine Privilege

At the outset, employers should identify, with the assistance of counsel, what portion of the analysis will be conducted under cloak of privilege. For some employers, this analysis may identify deficiencies under the current standards that could result in liability. For others, transparency of the process may be the way to meet an employer’s affirmative burdens under the CFPA. When utilizing privilege, counsel should be fastidious with the foundation of the applicable privilege while also identifying what non-privileged documents will be used to meet CFPA requirements.

Step 2: Assemble the Right Team

The best approach will differ for every company, but all employers should start by assembling the right team. Ideally, that team would be led by counsel and HR in consultation with first line managers who know how a job description can differ from what actually happens day-to-day. One way for employers to find pay disparities – real or perceived is by putting themselves in the position of a female employee or DLSE investigator. Walking in the shoes of a potential claimant will greatly inform employers as to the practicalities of what to do and how much to tell employees about their pay.

Step 3: Know Where You Are Going

To be most efficient, employers should work with counsel to create a checklist of CFPA requirements as well as steps to compliance. The pay analysis portion will be the most daunting of the tasks and should include, at a minimum, consideration of job descriptions, potential comparators, potential for quantitative pay analysis, and consultations with

managers. The goals should be to distill the process into a straightforward gender-neutral pay standard, to create a sustainable system that will confirm that the pay standard works in application, and to establish a periodic audit process to ensure ongoing compliance.

Step 4: Act Now Where You Can

Even before undertaking a pay analysis, employers can take immediate action by strengthening employment policies and internal procedures to comply with the CFPA’s retaliation and protected speech provisions. They can train HR and first line managers on the rights of employees to exchange certain pay information. It is also critical to suspend record purging pending an assessment of the new retention requirements.

Step 5: Repurpose Current Systems

Employers can no longer rely on a cursory review of job titles and wages, but that does not mean that they need to start from scratch. Major efficiencies can be gained by repurposing current systems that are used to evaluate pay issues and by adding resources where necessary to satisfy the breadth of CFPA requirements. Existing seniority, merit, or production-based systems can be fortified to demonstrate that pay rates do not have a gender-based disparate impact.

Because of the generality of this alert, it should not be relied upon without specific legal advice based on an employer’s particular circumstances. Closely collaborate with your attorney to determine the best course of action for your company. The guidance in this alert is covered by all applicable IP protections and should not be posted or duplicated without attribution to the author.

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