Labor and Employment Alert: California's New Fair Pay Act Demands Equal Pay for Comparable Work

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Beginning January 1, 2016, California may have the most stringent equal pay law in the country. California has prohibited pay discrimination based on gender for more than 60 years. But California's new Fair Pay Act makes it easier for plaintiffs to assert gender-based wage claims and more difficult for employers to defend against them.

California Labor Code § 1197.5 required equal pay between men and women for "equal work" in the same place of employment, unless the unequal payment were the result of a seniority system, a merit system; a system measuring earnings by production quantity or quality of production, or a differential based on any bona fide factor other than sex. This is similar to what federal law requires under the Equal Pay Act.

The Fair Pay Act significantly changes Section 1197.5. Employees no longer need to prove they were engaged in "equal work" with an employee of the opposite sex. Instead, an employee only needs to provide that the work was "substantially similar work when viewed as a composite of skill, effort, and responsibility." This means that employees who perform "similar" work can be compared regardless of their job titles.

Next, an employee is no longer constrained to comparing himself or herself to coworkers in "the same establishment." The Fair Pay Act removes this language and so permits a comparison with pay practices at any location of the employer.

Finally, the Fair Pay Act specifies that the employer has the burden of proving that any differential in wages is the result of a seniority system, a merit system, a system measuring earnings by production quantity or quality of production, and/or a differential based on any bona fide factor other than sex (such as education, training, or experience). These factors must be "applied reasonably" and must account for the "entire" wage differential. Moreover, the "bona fide factor" exception applies only if the employer proves "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." But even so, the bona fide factor does not apply if the employee provides an alternative business practice that would serve the same business purpose without producing the wage differential.

The new law imposes other obligations on employers as well. It prohibits employers from retaliating against an employee who discloses his or her own wages, discusses wages, or inquires about wages of other employees – and authorizes a new civil cause of action against employers who do so. The law also expands the employer's recordkeeping obligations from two to three years for records of employees' wages and wage rates, job classifications, and other terms and conditions of employment.

In some respects, the Fair Pay Act merely restates how California's equal pay requirements had been interpreted and enforced (for example, the employer always bore the burden of justifying its compensation system) or reiterates existing California Labor Code provisions (for example, California law already prohibits taking adverse action against employees who discuss their wages). At the same time, it is unclear what the new "substantially similar" requirement means, what would be a "bona fide factor other than sex" for the position in question, or whether employees can look to coworkers' pay in their employer's establishments outside of California. This uncertainty portends more (class action) litigation in the future. Contact your Vorys lawyer if you have questions about how the Fair Pay Act will affect your California operations.