

THOUGHT LEADERSHIP

LEGAL UPDATES

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California Fair Pay Act Places the Burden on Employers

California is keeping employers on their toes with recent changes to its already complicated legal landscape. On October 6, 2015, Gov. Jerry Brown signed into law SB 358, the California Fair Pay Act (the Act), which is aimed at closing the wage gap between male and female employees. The bill imposes a stricter standard and shifts the burden of proof to employers in unequal wage claims.

Provisions of the Act

Current law prohibits employers from paying employees less than their counterparts of the opposite sex in the same establishment for “equal work” on jobs that require equal skill, effort and responsibility and that are performed under the same working conditions.

The Act does away with the “equal work” requirement, imposing a stricter standard, and shifts the burden of proof to employers in unequal wage claims. Now employers will be prohibited from paying lower wages to an employee of the opposite sex for “substantially similar work,” when viewed as a composite of skill, effort, responsibility and working conditions. If a wage differential exists, the Act requires the employer to show:

The wage differential is based on one or more of the following:

A seniority system

A merit system

A system that measures earnings by quantity or quality of production

A *bona fide* factor other than sex, such as education, training or experience.

This factor applies only if the employer demonstrates that the factor is not based on a sex-based differential in compensation, is job related and is consistent with a business necessity.

Each factor is applied reasonably.

One or more factors account for the entire wage differential.

The new law removes the requirement that employers evaluate the pay differential in the same establishment. The legislative history of the Act, however, emphasizes that employers may still use different locations, different shifts or different times of day as *bona fide* factors, so long as the employer can prove that the factors are consistent with a business necessity.

Employers must also retain their records of wages, wage rates, job classifications and other terms and conditions of employment for three years rather than the previously required two years.

What This Means to You

The Act does not go into effect until January 1, 2016, but employers should be mindful of the upcoming change. Because the new law shifts the burden to employers, employers are likely to see an uptick in unequal pay claims.

If you have questions regarding any of these recent changes, please contact one of Husch Blackwell's Labor & Employment lawyers.