Insights: Alerts

California Broadens the Scope of Its Equal Pay Law

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On October 6, 2015, California Gov. Jerry Brown signed into law the California Fair Pay Act. This new law amends the existing California equal pay statute in ways that will make it easier for employees to establish claims of unlawful sex-based pay differentials. The new law also expands existing employee rights to discuss compensation and creates new protections against retaliation for challenging equal pay violations. The California Fair Pay Act will go into effect on January 1, 2016.

Changes Implemented by the California Fair Pay Act

California has had an equal pay law on the books since 1949. Like the federal Equal Pay Act, the existing California equal pay law generally prohibits employers from paying an employee a rate less than rates paid to employees of the opposite sex in the same establishment for equal work on jobs requiring equal skill, effort, and responsibility and performed under similar working conditions. The existing law permits differential pay rates, however, when they result from a seniority system, a merit system, or a system measuring earnings by quantity or quality of production or when they are based on a bona fide factor other than sex.

The California Fair Pay Act amends the state equal pay law to remove the requirement that the differential pay rates be paid for work performed in the same establishment. Therefore, an employee working at one facility may base an equal pay claim on the wage or salary paid to an employee of the opposite sex in a workplace of the same employer located in a different part of the state or, possibly, even in another part of the country. The new law also eliminates the requirement that the work of the comparator be "equal." Instead, an equal pay claimant will need to show only that the work in question is "substantially similar" when viewed as a composite of skill, effort, and responsibility, although the claimant will still have to show that the work is performed under similar working conditions. This change significantly broadens the scope of the potential comparators in an equal pay claim, as courts had previously given an extremely narrow construction to the concept of "equal work," basically requiring that the claimant show that the work in question was virtually identical. The new law does not define "substantially similar work," and it will be up to the courts to determine how broadly this concept may be applied.

The California Fair Pay Act imposes greater burdens on employers seeking to establish one of the statutory defenses to an equal pay claim. An employer maintaining that a pay differential is the result of a seniority or merit system, a system that measures earnings by quantity or quality of production, or a bona fide factor other than sex (such as education, training, or experience) will have the burden of proving that the particular defense factor it asserts was applied reasonably and accounted for the entire pay differential. In addition, an employer relying on the "bona fide factor other than sex" defense must demonstrate that the bona fide factor was 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. The "bona fide factor other than sex" defense will not apply, however, if the employee can show

that there is an alternative business practice that would serve the same business purpose without producing the pay differential.

The California Fair Pay Act adds a new anti-retaliation provision to the California equal pay law. This provision prohibits employers from discharging or otherwise discriminating or retaliating against an employee for taking any action to invoke or assist in the enforcement of the equal pay law. In addition, an employer may not prohibit an employee from disclosing the employee's own compensation, discussing the compensation of others, asking about another employee's compensation, or aiding or encouraging another employee to exercise his or her rights under the equal pay law.
The existing equal pay law requires employers to maintain records of wages and wage rates, job classifications and other terms and conditions of employment for a period of two years. The new law will extend the record-keeping requirement to three years.

Practical Implications

The new amendments to the California equal pay law will likely result in an increase in the number of equal pay claims that are filed in that state. By replacing the concept of "equal work" with "substantially similar work" and by eliminating the requirement that the more highly paid employee work in the same workplace as the claimant, the California Fair Pay Act substantially lowers the bar for establishing an equal pay claim while simultaneously raising the bar for employers seeking to establish a defense to such claims. Employers with employees in California should be cognizant of pay differentials throughout their business operations for work that could arguably be characterized as "substantially similar" to work performed by their California employees and should maintain documentation of the reasons for the differing compensation rates. Such employers should also pay close attention to the new California law when conducting compensation audits and establishing new compensation rates.

Related People



Susan W. Pangborn
t 404.815.6305
spangborn@ktslaw.com



James Smith
t 415.273.4317
james.smith@ktslaw.com