

## California Moves to Level the Paying Field

On September 30, California Governor Jerry Brown signed into law two bills aimed at narrowing wage gaps. One bill prohibits the use of prior salary to justify a wage disparity between employees performing similar work. The other prohibits employers from paying employees less than their co-workers because of their race or ethnicity. Employers will want to review their pay practices and consider whether they have pay disparities that should be addressed before the new laws take effect on January 1.

### Background

Until this year, California's Equal Pay Act generally prohibited paying an employee of one sex at a lower wage rate than employees of the opposite sex in the same establishment for equal work on jobs that require equal skill, effort, and responsibility, and are performed under similar working conditions. While the law generally prohibits gender-based pay disparities, it allows for wage variations based on seniority, merit, quantity or quality of production, or a *bona fide* factor other than sex (such as education, training or experience).

Effective January 1, 2016, the California Fair Pay Act ([SB 358](#)) amended the state's Equal Pay Act to expand protections against gender-based pay disparities. Targeting the gender wage gap, the Fair Pay Act prohibited gender-based differentials for "substantially similar" rather than "equal" work — minimizing the ability of employers to use different job titles to justify lower wage rates for similar work. The Fair Pay Act also eliminated the requirement that the employees being compared work at the "same establishment," raised the bar for the "bona fide factor other than sex" defense, and made it unlawful for employers to prohibit employees from disclosing their wages, or discussing or inquiring about co-workers' pay. In addition, the law required employers seeking to justify a differential based on a *bona fide* factor other than sex to show that it is job related and consistent with business necessity.

### Expanded Pay Equity Protections

On September 30, California Governor Jerry Brown signed into law two bills targeting wage inequality — one aimed at closing the gender wage gap and the other at eliminating race- or ethnicity-based pay differences. Notably, the bills were tied to each other, requiring the governor to approve both bills for either one of them to become law and



operative on January 1, 2017. The new laws generally prohibit employers from using prior salary history to set pay rates for new hires and extend the same protections that now exist against gender-based pay inequities to wage disparities based on race or ethnicity.

### Gender Wage Gap

The Fair Pay Act established that men and women doing substantially similar work under similar working conditions be paid equally, barring certain factors. While it did not address the practice of basing an employee's pay solely on his or her prior salary, the legislature now has. To avoid perpetuating potentially discriminatory wage inequities, [AB 1676](#) specifies that prior salary cannot, by itself, justify any disparity in compensation.

**Comment.** Massachusetts' new pay equity law effectively prevents employers from using salary in applicant screening, evaluating an applicant's candidacy, or formulating a job offer by barring them from requesting or requiring an applicant's current pay or salary history prior to a job offer. (See our [August 3, 2016 FYI Alert](#).) Although California Governor Brown vetoed a bill ([AB 1017](#)) during the state legislature's 2015-2016 session that also would have prohibited employers from seeking applicant salary history information, the legislature may revisit the issue in its next session.

### Race- and Ethnicity-Based Differentials

The Wage Equality Act of 2016 ([SB 1063](#)) amends California's Equal Pay Act to prohibit employers from paying employees of one race or ethnicity at a lower rate than employees of different races or ethnicities for substantially similar work. Among other things, the bill:

- Extends the statutory protections against gender-based pay discrimination to wage discrimination based on race or ethnicity
- Expands the Equal Pay Act's enforcement mechanism and applies the same penalties for gender-based pay discrimination to wage discrimination based on race or ethnicity

### In Closing

With certain narrow exceptions, California already requires equal pay for men and women doing substantially similar work under similar working conditions. However, the two new laws will impose broader equal pay obligations on California employers starting next year. To minimize potential exposure to pay equity claims, employers should consider whether they have pay disparities that should be addressed before the new laws take effect on January 1.

### Targeting Wage Gaps

California's new laws reflect an increasing focus on pay equity from coast to coast. Recently, New York, Maryland and Massachusetts also enacted broad equal pay laws. (See, for example, our [December 18, 2015 FYI](#).)

To combat pay discrimination at the federal level, the Equal Employment Opportunity Commission has expanded its EEO-1 reporting requirements. Starting in 2018, it will require employers with at least 100 employees to report pay data as part of the annual EEO-1 filing. (See our [October 6, 2016 FYI](#).)

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