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2017 Legal Education Conferences

Reference Materials

California's New Fair Pay Act Provides Greater Protection for Employees in 2016

On October 6, 2015, Governor Brown signed SB 358, the California Fair Pay Act, which will strengthen existing equal pay laws – specifically the California Equal Pay Act. The Fair Pay Act will be effective January 1, 2016 for employers with California-based employees.

While both state and federal laws currently prohibit gender-based pay discrimination, the Fair Pay Act expands upon existing laws in several significant ways:

- Provides wage protections beyond employees working in the same establishment. This means that the pay of employees of the opposite sex may be compared even if they do not work at the same office or even in the same city.
- Employers will be prohibited from paying any of their employees less than employees of the opposite sex for "substantially similar work," when viewed as a composite of skill, effort, and responsibility.
- The employer must demonstrate that a wage differential is based upon one or more factors, including a seniority system, a 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.

Specifically, the employer must show that the wage differential is not based on sex, is job related, and is consistent with a business necessity. "Business necessity" means that the factor relied upon for the pay differential fulfills an overriding legitimate business purpose. For example, if a male chef was being paid more than a female chef because he works weekend shifts, the employer would have to show that the weekend shifts are busier and require more work to account for the difference in wages. In addition, the employer would have to prove that the weekend shift position was open to all chefs, and that the employer hired the male chef because he was the most qualified or willing to work the shifts.

Employees may overcome the employer's claimed justification for the wage differential if the employee demonstrates an alternative business practice that would serve the same business purpose without the difference in pay.

Additionally, the bill contains an anti-retaliation provision expressly forbidding an employer from discharging, discriminating, or otherwise retaliating against any employee for attempting to enforce the new law. Employers who engage in such prohibited conduct could face a civil suit for reinstatement and reimbursement for lost wages, work benefits, applicable interest, equitable relief, and other legal damages. Successful plaintiffs would also be entitled to attorneys' fees and costs.

The new law also states that an employer may not prohibit an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under these provisions. The bill will also increase the duration of employer recordkeeping requirements from 2 years to 3 years.

Employees subjected to unfair pay would have up to two years after the violation occurs to file a civil action. The two years is increased to three years if the employee can establish a willful violation. Further, any willful violation triggers Labor Code section 1199.5, which carries with it a fine of not more than $10,000 and/or imprisonment for not more than six months for whoever violates the above provisions or reduces the wages of any employee in order to comply with Labor Code section 1197.5.

How Employers Can Prepare for the Fair Pay Act

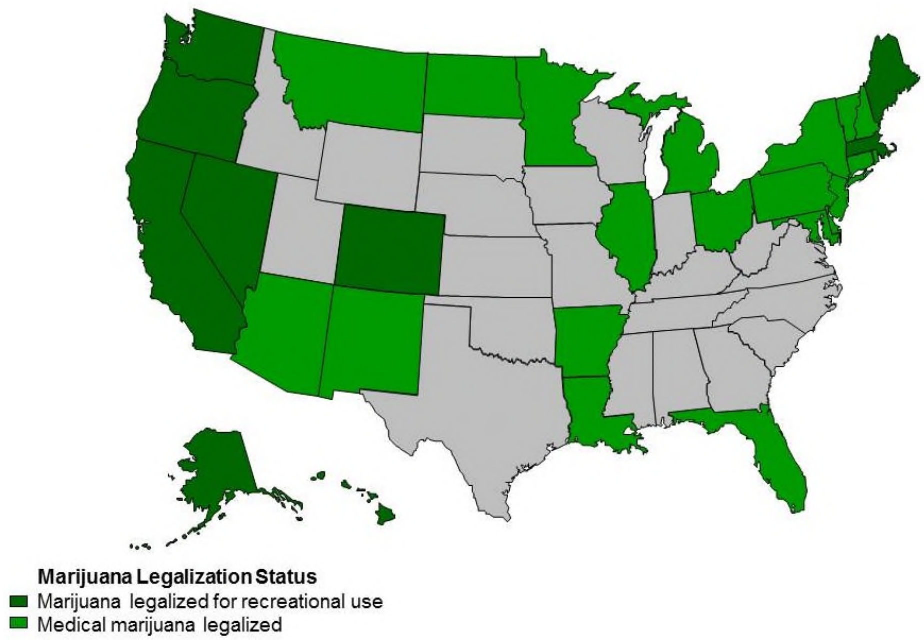
Prior to January 1, 2016, we recommend that employers check their current payroll practices to determine if any wage differentials exists. If they do, employers should be able to justify those wage differentials based on legitimate business factors. It is important to note, that the Fair Pay Act expressly forbids lowering the wage rates of employees to comply with the new law. In addition, employers should ensure that none of their handbooks or policies forbid employees from discussing wages.

Growing Like Weeds: How Employers Should Respond As More States Legalize Marijuana

On November 8, 2016 four more states voted to legalize marijuana. California, Nevada, Massachusetts, and Maine[1] all voted in favor of the legalized use, sale, and consumption of marijuana by adults over the age of 21. Once these laws go into effect, recreational marijuana will be legal for over 20 percent of the country.

Arkansas, Florida, Montana, and North Dakota all voted to legalize medical marijuana, bringing the total to 30 states that will permit at least limited use of cannabis.

Arizona's ballot initiative to legalize recreational marijuana failed with a 52 percent majority.



Marijuana Remains Illegal under Federal Law

Despite popular support for decriminalization, marijuana is still designated as a Schedule I controlled substance under the federal Controlled Substances Act, which criminalizes the possession, manufacture, distribution, and sale of the drug. Accordingly, employers are not required to accommodate its use under the federal Americans with Disabilities Act.

The Drug-Free Workplace Act requires that all federal grant recipients and federal contractors adopt a zero tolerance workplace drug policy and certify to the federal government that their workplaces are drug free.

State Law

State laws complicate the issue. Several states, including Arizona, Connecticut, Delaware, Maine, Minnesota, Nevada, and Pennsylvania, prohibit employment discrimination against employees solely on the basis that they use medical marijuana, unless doing so would violate federal law or regulations. These statutes prohibit status-based discrimination, and do not appear to preclude adverse action in response to a positive drug test.

Some states, such as New York and Nevada, go much further and require an employer to reasonably accommodate the medical needs of an employee who uses medical marijuana. For further analysis in these states, consult with legal counsel to determine what may be reasonable under the law.

Notwithstanding these laws, employers may continue to enforce drug-free workplace policies. Where state law includes anti-discrimination or accommodation provisions, employers should engage in a fact-specific inquiry prior to taking adverse action based on an employee's medical marijuana use.

Lessons from Colorado

Following the legalization of recreational marijuana in 2012, many Colorado companies implemented pre-employment drug testing. Over time, as the labor market grew increasingly tight and the use of marijuana became more acceptable, many employers have shifted to reasonable suspicion and post-incident drug testing. Employers simply could not afford to exclude every candidate who tested positive due to their off-duty smoking or to bear the upward pressure on wages associated with pre-employment testing. Indeed, starting salaries are as high as $12 an hour for many entry-level positions in the Denver metropolitan area at employers who continue to conduct pre-employment drug testing.[2]

Federal grantees and contractors and those hiring for safety sensitive positions should continue to conduct pre-employment drug testing.

Update Drug-Free Workplace Policies

We recommend updating policies to remind employees that, despite state laws permitting the use of recreational and medical marijuana, marijuana is still illegal under federal law and therefore prohibited under the company's Drug-Free Workplace policy. Remind employees that using, selling, or possessing marijuana or its paraphernalia at work, or having marijuana in their system when reporting to work or undertaking any work for the company will be considered a violation of the Drug-Free Workplace policy and will subject the employee to disciplinary actions to the fullest extent permitted by law.

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[1] The Maine referendum, Question 1, passed by a fraction of a percentage point. Opponents are calling for a recount.
[2] The minimum wage in Colorado is currently $8.31.

“Ban the Box” Comes to New York City: New Law to Limit and Regulate Employers’ Ability to Consider Criminal Background in Hiring

On June 10, 2015, the New York City Council passed the Fair Chance Act (“the Act”), which makes it unlawful for employers to inquire about an applicant’s criminal background during the initial stages of the application process. The law joins other “ban the box” legislation across the nation in an attempt to ban the checkbox indicating criminal history on employment application forms. Mayor Bill de Blasio is expected to sign the bill any day, and the law will go into effect 120 days later.

The Act makes it a discriminatory practice for employers or employment agencies to inquire into an individual’s arrest or conviction record or perform a criminal background check before an employer has extended a conditional offer of employment. The Act also restricts an employer’s ability to issue any solicitation, advertisement, or publication that in any way expresses any form of limitation in employment based on a person’s arrest or criminal conviction history. Applicants are not required to respond to illegal inquiries and cannot be disqualified for not responding.

Importantly, the law does not prohibit employers from inquiring about criminal history or running background checks; it just delays the background check until an applicant can demonstrate his or her qualifications. Employers may still inform prospective employees that employment is contingent on their responses to a criminal history inquiry or criminal background check.

If the employer decides to take adverse action based on the inquiry or criminal background check, the employer must first take a number of steps:

1. The employer must provide a written copy of the inquiry or background check to the applicant, in a manner that will be established by the NYC Commission on Human Rights (the “Commission”).
2. The employer must perform a multi-factor analysis under Article 23-A of the New York State Corrections Law and then has to provide that analysis to the applicant in writing in a manner to be determined by the Commission, which shall include the “supporting documents that formed the basis for the adverse action” as well as the employer’s reasons for taking the adverse action.
3. After giving the applicant the inquiry and analysis in writing, the employer must allow the applicant a reasonable time to respond, which the Act states should be at least three business days. Furthermore, during that time, the position must remain open for the applicant.

The above provisions do not always apply. The law excludes certain positions that require criminal background checks by federal, state or local laws where a conviction prohibits employment, as well as police officers, peace officers, and law enforcement agencies (as those terms are defined by law). The Act also does not apply to certain positions that involve law enforcement, are susceptible to bribery or other corruption, or entail the provision of services to or safeguarding of individuals vulnerable to abuse, though if any employers in this category take adverse action based on criminal history, they must comply with item 2 above. The positions that qualify for this exemption will be enumerated by the commissioner of citywide administrative services, published as a commissioner’s calendar item, and listed on the website of the department of citywide administrative services.

The Act modifies the New York City Human Rights Law, Section 8-101 et seq. of the Administrative Code of the City of New York; thus, it does not apply to employers with less than four employees. However, for those it does cover, the damages available are among the broadest of all employment discrimination protection statutes and include the potential for back pay, front pay, unlimited compensatory damages, and unlimited punitive damages.

New York City employers are advised to take steps now to prepare for when the Act goes into effect. These steps may include, but are not limited to:

- reevaluating and revising employment application forms.
- updating handbook provisions and other policies and procedures as needed.

- examination of the Article 23-A factors, to fully understand the written analysis that must be performed in the event a candidate is rejected due to their criminal history. Employers may want to create a template for the analysis, to increase the likelihood that no factor will be overlooked in the analysis.
- providing training to all employees involved in recruiting, hiring and interviewing, to ensure they understand the parameters of the law and how, if at all, they must adjust their prior practice.

$54 Million Verdict Against Wal-Mart Illustrates Dangers of Using Flawed Piece-Rate Compensation System

On November 23, 2016, a jury ruled in the U.S. District Court in San Francisco that Wal-Mart owed its approximately 850 truck drivers nearly $54 million for violations of California's minimum wage law when Wal-Mart failed to pay its drivers under a piece-rate compensation model for all tasks they performed (other than driving), a decision that extends well beyond the trucking industry. Such non-driving tasks at issue included time spent filling out federally mandated trip slips, routine maintenance and sitting through inspections. Jurors also found that Wal-Mart failed to provide rest breaks to its drivers and failed to adequately compensate them for federally mandated layover breaks.

Liquidated damages, plaintiffs' attorneys' fees and penalties have yet to be determined. However, if the judge finds Wal-Mart's defense was not carried out in good faith, such a finding could double the jury's $54 million award to well over $100 million.

While this case pertains to Wal-Mart's truck drivers, its implications reach far beyond the trucking industry. Here, Wal-Mart utilized a piece-rate compensation system common in many other industries. Under the piece rate model, employees are paid per completed task (e.g. $2 per widget) rather than compensated for the actual time spent performing their duties (e.g. $10 per hour). The potential downside of such a model is that employees may perform work that is not accounted for under an employer's piece-rate model or employees may not be compensated for time spent at their place of work, but not actively producing for their employers.

The seminal case illustrating the dangers of a piece-rate compensation model is *Gonzalez v. Downtown LA Motors, LP* (215 Cal. App. 4th 36). The Supreme Court in *Gonzalez* ruled that auto technicians, who were paid on a piece-rate basis, must also be paid at least the minimum hourly wage for the time that they are required to wait between their piece-rate paid repair jobs.

The legislature, recognizing that many employers' piece-rate compensation systems are non-compliant and acknowledging the potentially devastating impact of such rulings has instituted a "safe harbor" period allowing employers to provide back pay for uncompensated time. Enacting, AB 1513 the legislature codified the Supreme Court's holding in *Gonzalez* by requiring that piece-rate employees be paid for rest and recovery periods and any other "non-productive" time at an hourly rate that is no less than the legal minimum wage. However, AB 1513 also provides that an employer may avoid liability for certain kinds of damages and penalties, if the employer: (a) by no later than July 1, 2016, provided written notice to the Department of Industrial Relations of the company's election to pay back wages, (b) by no later than December 15, 2016, provides such compensation for past uncompensated time from July 1, 2012 to December 31, 2015 to current and former employees who were paid on a piece rate basis; and (c) provides specified notices to the affected employees regarding the compensation being provided under the safe harbor law. If safe harbor was taken, the employer can raise it as an affirmative defense to related wage and hour claims.

While Wal-Mart argued that activities like inspections, fueling, washing, weighing, and paperwork are subsumed within other activities for which drivers are paid, the judge disagreed holding that a "piece-rate formula that does not compensate directly for all time worked does not comply with California Labor Codes…." Wal-Mart intends to appeal the verdict as well as several of the judge's rulings.

There are many benefits to a piece-rate model of compensation for employees but employers would be wise to double check that their piece-rate systems are compliant and adequately compensate their employees for all time spent at work. This verdict should be taken as a warning to employers and employers should have legal counsel review their current written polices *and* their implementation.

Employer Analysis of Pay Data is a Critical Risk Avoidance Tool

You are entering the fourth quarter, which for those on the calendar year, is a critical time. The "final push" is underway to achieve maximum profitability and results. At the same time, employee performance is reviewed; salaries are evaluated; and bonuses are determined. Each of these actions can and should be analyzed to ensure that performance evaluation ratings, salaries, and bonuses are being awarded to employees on an equitable, non-discriminatory, and lawful basis. You may not be aware, but this is particularly important now, given the state of the market and the recent uptick in litigation over these matters. Faced with these potential risks, the prudent move is to conduct an analysis of the performance ratings, salaries and bonuses. Doing so is a safeguard against possible government agency audits, as well as serves as a proactive measure if you are faced with a lawsuit.

Move Forward with an Analysis

Before conducting your analysis, you first need to determine which areas of your organization need to be studied. This will include categories such as lines of businesses, departments, job groups, locations, etc… Next, begin collecting information regarding your company's pay and performance evaluation practices. This will include background information on the pay systems that are used, the evaluation and compensation procedures in place, the management and retention of compensation data, and other similar information. This also entails looking at your pay practices, from both a business and legal perspective, analyzing your pay, and determining whether you believe there are disparities involving market equity or internal equity or legal issues that can be analyzed under the Equal Pay Act, Title VII, or the applicable state law.

Lastly, to optimize your compensation practices, you should also decide what type of compensation needs to be studied. The compensation review will include hourly wages, annual wages, incentives, overtime, variable pay, and total compensation. The grouping of employees into various sectors, like those who perform similar work, those who occupy positions which have similar levels of responsibility, and those who occupy positions which require similar training, certifications and skill levels, is also necessary.

For most employers, an important step in the analysis will be building and implementing a statistical model to analyze compensation data for each position and among cohorts of similarly situated employees to ensure that these employees are paid fairly. Be prepared to anticipate and address any potential vulnerabilities in advance of any regulatory or employee challenge.

Cloak the Analysis in the Attorney-Client Privilege

Before embarking on these types of analyses, it is critical that the employer address the question of whether the analysis will be privileged. Since an employer starting the analysis, is likely unaware of what the results will be, the conservative approach is to take appropriate steps to protect the analysis and its results to the greatest extent possible. In most cases, it will make sense to have the pay analysis conducted under privilege. An analysis that is conducted without the protection of the attorney-client privilege may be subject to disclosure, either during a government agency investigation or discovery in litigation.

Conducting an analysis is an important way to monitor equal pay issues and ensure that potential problems are not slipping through the cracks long before they become the subject of a regulator's interest or even a full-blown lawsuit. However, companies must ensure that a lawyer is involved in the process so that any analysis the company undertakes can be kept confidential. Without ensuring the appropriate steps to assert the privilege, companies can create unnecessary risk in an attempt to be proactive. Moreover, having the attorney-client privilege from the outset will provide the employer with the freedom and flexibility to communicate regarding the relevant issues and solutions without fear that those communications will be disclosed at a later date.

Fix Unexplained Disparities

A pay equity analysis involves analyzing an employer's statistical pay data to determine whether there are disparities. A typical analysis compares the average pay of men to the average pay of women (or other protected groups) within relevant job classifications to determine whether significant disparities exist. An analysis can also involve an analysis of an individual employee's pay compared to others in a relevant job classification.

Often pay disparities are not the result of intentional discrimination per se, but due to weaknesses in employer policies and practices. Once an employer has completed the statistical analysis, it should also review whether it needs to make any modifications to existing compensation policies, procedures and practices, which can help prevent unexplained disparities from continuing to occur. Failure to take this step could create an ongoing risk of future pay disparities developing — precisely what the employer was seeking to avoid by conducting the pay analysis in the first instance.

If a privileged audit turns up pay disparities that simply cannot be explained between men and women or workers with other protected characteristics, then the employer must be prepared to address those results. However, before proceeding to remedy compensation, businesses should also critically review the results to determine if there are legitimate legal and business factors causing the differences in pay. The statistical analysis helps identify the issue, but does not conclude the analysis.

Ultimately, for those pay disparities that simply cannot be explained, even when more than one statistical model is employed to analyze the data and other factors are taken into account, employers may wish to make adjustments to workers' compensation to make sure that the company does not end up getting slapped with a lawsuit.