The Developing Concept Of Fair Pay In Calif.

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In July, Gov. Jerry Brown approved AB 2282, yet another amendment to the fair pay laws in California. According to the bill's author, Assemblymember Susan Talamantes Eggman, pay equity continues to persist despite the passage of the Fair Pay Act and other laws: "On a national level, women still make roughly 80 cents for every dollar earned by their male counterparts. The disparity is even larger for women of color. African American women are paid 63 cents and Latinas are paid 43 cents on the dollar."

AB 2282 seeks to redress these disparities. This article provides a brief overview of fair pay laws in California and explains how employers can prepare themselves before the new laws take effect next year.

The Three Key Developments

In the past three years, California has made three major changes to the concept of "fair pay." Each change is briefly explained below.

1. Jan. 1, 2016 — The California Fair Pay Act

The California Fair Pay Act bolstered California's decades-old Equal Pay Act, which was aimed at promoting equal pay between the sexes for equal work. The Fair Pay Act did this by, (1) eliminating the requirement that work between the sexes must be "equal" to justify pay differentials; (2) eliminating the requirement that work must occur at the same establishment; (3) heightening the standard to prove that pay differentials are based on a "bona fide factor other than sex;" (4) requiring that wage differential factors be applied reasonably; (5) prohibiting retaliation against employees who attempt to enforce the Act; (6) adding race and ethnicity as protected categories; and (7) extending employer record-keeping requirements.

2. Jan. 1, 2018 — Labor Code § 432.3 (AB 168)

Labor Code Section 432.3 is specifically targeted at lessening unjustifiable wage gap disparities among employees. In short, the law: (1) prohibits employers from relying on an applicant's salary history as a factor in determining whether to offer employment or determining what salary to offer applicants; (2) prohibits employers from requesting salary history information about applicants; and (3) requires employers to provide applicants with a pay scale for the position applied to upon reasonable request.

3. Jan. 1, 2019 — AB 2282 (Amends Labor Code §§ 432.3 and 1197.5)

AB 2282, the most recent amendment to the fair pay laws, clarifies Labor Code section 432.3 in two ways. First, it clarifies how employers can use salary history information going

forward by defining the previously undefined terms, “applicant,” “pay scale” and “reasonable request.” As amended, Labor Code Section 432.3 contains the following additional definitions: “applicant” is an individual who seeks employment with the employer, not a current employee; “pay scale” means the salary or hourly wage range and it does not include bonuses or equity ranges; and “reasonable request” means a request made after the applicant has completed the initial interview. Second, the amended law makes clear that while employers cannot ask for an applicant’s salary history information, they may ask for an applicant’s salary expectations.

AB 2282 also amends the Fair Pay Act by making clear that employers may never use prior salary history to justify any pay disparity. In doing so, it essentially codified the recent Ninth Circuit en banc ruling in Rizo v. Yovino,[1] where the court held that “prior salary is not job-related and it perpetuates the very gender-based assumptions about the value of work that the Equal Pay Act was designed to end. This is true whether prior salary is the sole factor or one of several factors considered in establishing employees’ wages.”

Notably, AB 2282 still allows employers to make compensation decisions based on an existing employee’s current salary if any wage differential resulting from that compensation decision is justified by one or more specified factors, including a seniority system, merit system, a system that measures earnings by quantity or quality of production, or a bona fide factor other than sex, race or ethnicity, such as education, training or experience. This carveout allows employers to provide suitable raises or other incentives to existing employees without running afoul of the law.

Practical Steps to Ensure Compliance

Because the above changes mainly clarified existing legal requirements and prohibitions, many employers will find that they are already complying with the fair pay laws with one exception: any employer that previously used prior salary as one factor to justify wage differentials must discontinue this practice as of Jan. 1, 2019. Prior salary history cannot justify pay differentials at all.

Employers can also get ahead of the law by preparing for “reasonable requests” for pay scale information. They can do this by considering whether to create pay scale information in advance of the hiring process and whether to provide such information to “applicants” in writing. These practices may help safeguard against potential pay discrimination charges in at least three ways.

First, creating pay scales in advance of the interviewing process may mitigate against arguments from applicants that the pay scale information was created ad hoc or in response to certain applicants. Second, written pay scale responses provide documentary proof that responses to reasonable requests were given, should a dispute ever arise. Third, written documentation can demonstrate that the same pay scale information was given to all applicants, regardless of the sex, race, ethnicity or other characteristic of the applicant.

Employers with employees outside of California should be on the lookout for similar laws in other cities and states. Albany, New York; Connecticut; Delaware; Hawaii; Massachusetts; New York City; Oregon; Philadelphia; Vermont; and Westchester County, New York, have each passed legislation designed to prohibit employers from inquiring about prior salary

history information of job applicants.

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[1] Rizo v. Yovino, 887 F.3d 453 (9th Cir. 2018).