

## CLIENT ALERT

### California Legislature Passes Fair Pay Act; Governor Brown Poised to Sign

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The California Senate has unanimously passed the state's new Fair Pay Act, following unanimous support for the bill in the California Assembly. Governor Jerry Brown has already promised to sign the bill when it reaches his desk. Once signed, the California Fair Pay Act may become the model for other state legislatures, as the "pay equity" drum beat continues and as attempts to amend the federal Equal Pay Act continue to meet resistance on Capitol Hill.

The California bill amends existing law to require employers to pay men and women equally if they perform "substantially similar" work, even if they have different job titles or work at different locations. "Substantially similar" work, according to the statute, is defined by a "composite of skill, effort, and responsibility," and must be performed under "similar working conditions." The law also identifies circumstances under which pay differentials may be permissible, such as when pay is based on seniority, merit, quantity or quality of production, or when pay is based on a "bona fide factor other than sex," such as education, training, or experience. Importantly, the list of "bona fide factors" contained in the legislation is a non-exhaustive list, so employers will be able to point to factors other than "education, training or experience," including performance. Employers are required to apply these factors "reasonably," and the factor(s) must account for the entire pay differential.

The new legislation is part of a broader nationwide push to achieve pay equity between men and women. The bill states that its purpose is to address the pay disparities among California employees, including an overall gender wage gap of 16 cents on the dollar and a gap of 44 cents on the dollar for Latina women. Those figures, like many of the figures cited in the national debate over pay equity, do not account for differences in the jobs held or other legitimate factors that can impact pay. The bill's author has hailed the California bill as the strongest pay equity legislation in the country.

In addition to its unanimous support in the legislature, the bill also received support from the California Chamber of Commerce after the bill was revised to specify the circumstances under which an employer may justify pay differentials.

Employees who believe that they are paid in violation of the new law will be able to file a complaint with the California Division of Labor Standards Enforcement or file a civil lawsuit directly. Additionally, the bill specifies that employers may not prohibit employees from discussing their own wages or the wages of others; that provision mirrors a new federal requirement imposed upon government contractors and subcontractors via an Executive Order issued by the Obama Administration.

Much of the language in the new legislation is vague, which will inevitably lead to litigation over employer pay decisions and the justifications for any wage differentials. The legislation underscores the need for employers to conduct regular privileged analyses of their compensation systems and pay data, potentially re-assess their groupings of jobs for pay purposes, and identify, with particularity, the legitimate factors that impact pay within their workplaces.

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