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California Fair Pay Act: the Revival of Comparable Worth

By Phyllis W. Cheng

Introduction

With a stroke of his pen and the unanimous support by the California Legislature, Governor Jerry Brown recently signed into law the Fair Pay Act,¹ reviving the dormant concept of “comparable worth” or “pay equity.”²

Effective January 1, 2016, the Fair Pay Act is launched with the purpose of closing the historic wage gap between women and men by: 1) requiring the use of bona fide factors to set wages; 2) expanding wage comparisons beyond local worksites; and 3) protecting employees’ right to inquire about and discuss their wages.³

This article examines the gender-based wage gap, development of fair pay law, new requirements under the California Fair Pay Act, and best practices for compliance.

¹ SB 358, 2015-2016 Reg. Sess., ch. 546, § 1, 2015 Cal. Stat., at 93 (Oct. 6, 2015).

² Although they are sometimes used interchangeably, “pay equity” should be distinguished from “comparable worth.” “Pay equity refers to the absence of pay differentials between jobs based on their sex or race compositions. *Comparable worth* refers to the practice of paying jobs in proportion to their worth to the employer, as measured by such indicators as the skill it takes to do them, the amount of responsibility they entail, the effort they involve, and the working conditions under which they are performed.” Donald J. Treiman & Phyllis W. Cheng, *California Comparable Worth Task Force Minority Report*, August 19, 1985, at 7 (emphasis in original).

³ SB 358, *supra* Note 1.

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California Fair Pay Act: the Revival of Comparable Worth

By Phyllis W. Cheng

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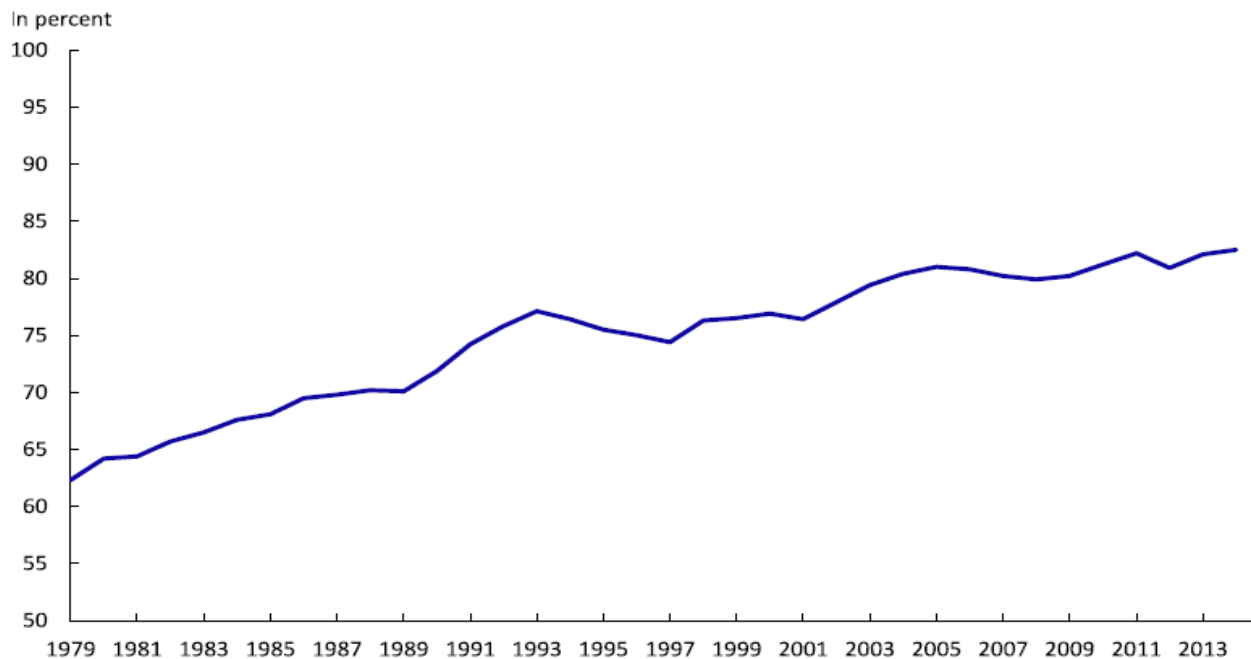
The Wage Gap

According to the United States Bureau of Labor Statistics, in 2014, female full-time wage and salary workers earned 83 percent (\$719) of the usual weekly earnings of their male counterparts (\$871).⁴ Even though the gender wage gap has narrowed since 1979 (when women's earnings were 62 percent of men's), the ratio after 35 years remains significant for women and men at all age groups and within racial-ethnic groups.⁵ See Charts 1 and 2 for historic trends and earning details.

According to the American Association of University Women (AAUW), California ranks fifth with a wage gap of 84 percent. AAUW also noted that the pay gap is worse for women of color, with Hispanic and African American women making 54 percent and 64 percent of white men's earnings respectively.⁶

Various studies have found that factors such as educational attainment, experience, demographic characteristics, job type, industry, or union status explain about half of the wage gap, but about 40 percent of

Chart 1. Women's earnings as a percentage of men's, for full-time wage and salary workers, 1979–2014 annual averages



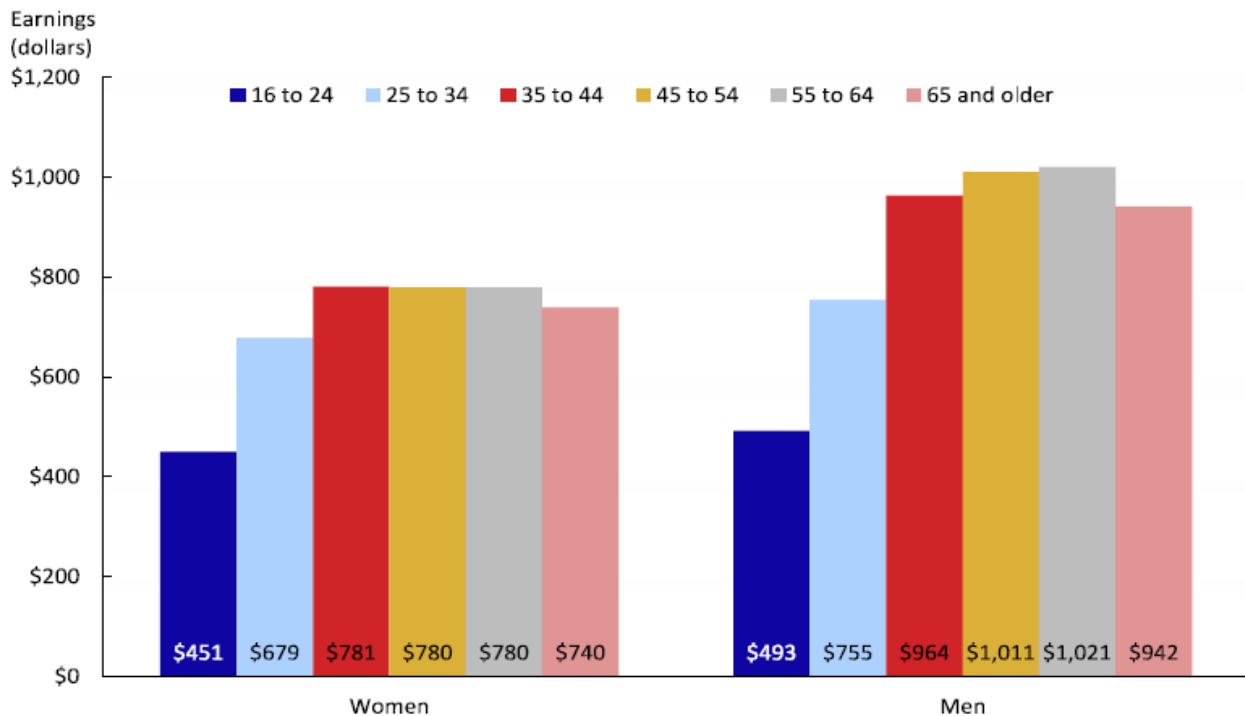
Note: Percentages are calculated from annual averages of median usual weekly earnings for full-time wage and salary workers.
Source: U.S. Bureau of Labor Statistics.

⁴ U.S. Bureau of Labor Statistics, BLS Report, *Highlights of Women's Earnings* (Nov. 2015), at 1, available at <http://www.bls.gov/opub/reports/cps/highlights-of-womens-earnings-in-2014.pdf>.

⁵ See *Highlights of Women's Earnings*, *supra* Note 4, at 1.

⁶ Sen. Floor Analysis of Sen. Bill 358, 2015-16 Reg. Sess. (Aug. 27, 2015), at 5, available at http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0351-0400/sb_358_cfa_20150829_101001_sen_floor.html; American Association of University Women (AAUW), Economic Justice, *The Simple Truth about the Gender Pay Gap* (Fall 2015), available at <http://www.aauw.org/research/the-simple-truth-about-the-gender-pay-gap/>.

Chart 2. Median usual weekly earnings of women and men who are full-time wage and salary workers, by age, 2014 annual averages



Source: U.S. Bureau of Labor Statistics.

the gap is not explained by such factors.⁷ If women had the same education, experience, demographic characteristics, industrial and occupational distribution, and union coverage as men, the wage ratio would rise to about 91 percent of men's wages, with an 8 percent

unexplained difference that researchers suggest could be influenced by discrimination.⁸

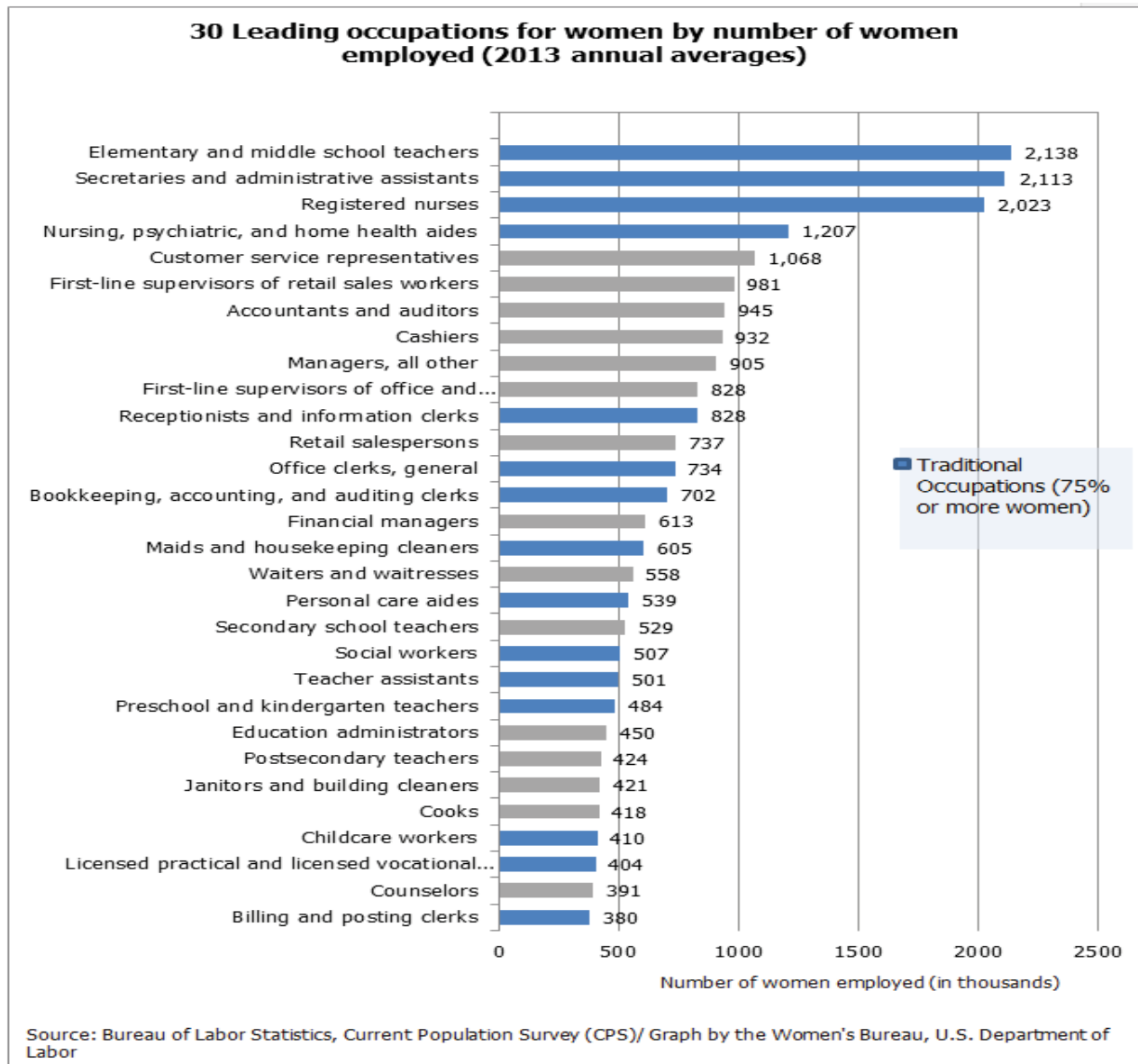
Part of the wage gap can be explained by the segregation of jobs. Jobs held mainly by women are paid less, in part because they are held mainly by women.⁹ Chart 3 illustrates the leading occupations held by women.

⁷ See *Highlights of Women's Earnings*, *supra* Note 4, at 1; Sen. Floor Analysis of Sen. Bill 358, *supra* Note 6; *The Simple Truth about the Gender Pay Gap*, *supra* Note 6; Francine D. Blau & Lawrence M. Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can?*, *ACAD. OF MGMT. PERSPECTIVES*, Vol. 21 Issue 1, (Feb. 2007), at 7, available at https://web.stanford.edu/group/scspi/_media/pdf/key_issues/gender_research.pdf at 847; Donald J. Treiman & Heidi I. Hartmann, *Women, Work and Wages: Equal Pay for Work of Equal Value*, Nat'l Acad. Press, Washington, D.C., 1981.

⁸ Blau & Kahn, *supra* Note 7, at 848.

⁹ Treiman & Hartmann, *supra* Note 7, at 93.

Chart 3. Leading Occupations for Women



Development of Fair Pay Law

Federal Legislation

The federal Equal Pay Act of 1963 prohibits covered employers from paying lower wages to female employees than male employees for “equal work” on jobs requiring “equal skill, effort, and responsibility” and performed under similar working conditions at the same location.¹⁰ Title VII of the Civil Rights Act of 1964 is designed to eliminate sex discrimination in employment.¹¹ The Bennett Amendment to Title VII

incorporates the Equal Pay Act’s affirmative defenses into Title VII.¹²

The much heralded Lilly Ledbetter Act of 2009 amended the Civil Rights Act of 1964 by resetting the 180-day statute of limitations for filing an equal pay lawsuit with each new paycheck affected by the

¹⁰ 29 U.S.C. § 206(d).

¹¹ 42 U.S.C. §§ 2000e-1 to 2000e-17.

¹² The Bennett Amendment, codified in the last sentence of 42 U.S.C. § 2000e-2(h) (1976), provides: “It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid . . . if such differentiation is authorized by the provisions of section 206(d) of Title 29.”

underlying discriminatory action.¹³ However, the Ledbetter Act did not break new ground on the comparable worth front.

The proposed Paycheck Fairness Act, which is a comparable worth initiative, has stalled in Congress.¹⁴ The proposed Paycheck Fairness Act would provide greater wage transparency as well as expand the Fair Pay Act to substitute “equivalent jobs” for the “equal work” standard.¹⁵

Sister State Legislation

A dozen states, including Alaska,¹⁶ Arkansas,¹⁷ Idaho,¹⁸ Illinois,¹⁹ Kentucky,²⁰ Maine,²¹ Massachusetts,²² North Dakota,²³ Oklahoma,²⁴ Oregon,²⁵ South Dakota,²⁶ and Tennessee²⁷ have enacted state comparable worth laws with standards of equal pay for work of a substantially similar or comparable character.²⁸

Nonetheless, the Society of Human Resource Management (SHRM) reports that states’ experience in trying

to implement comparable worth pay systems demonstrates the complexity of the process.²⁹ According to SHRM, during the late 1970’s and early 1980’s, 23 states conducted comparable worth job evaluation studies; however, only a small minority was able to successfully implement a comparable worth system.³⁰ Many states reportedly abandoned their comparable worth implementation efforts allegedly because evaluation teams could not agree on job evaluation criteria or the relative value of these criteria.³¹ According to SHRM, in New Mexico’s wage study, evaluators attempted to evaluate and assign job ratings to compare 896 job classifications, but were ultimately only able to agree on 72 classifications.³² SHRM also notes other problems complicating implementation including workforce morale, collective bargaining agreements, affirmative action plans, and living wage ordinances.³³ Thus, SHRM concludes that implementation of a comparable worth pay system can create significant challenges.³⁴

California Legislation

Usually in the vanguard, California is not among the first to adopt comparable worth. Notably, 30 years prior to the enactment of the just adopted California Fair Pay Act, the State Legislature had charged the Commission on the Status of Women to establish a Comparable Worth Task Force. The Task Force’s mission was to study gender-based wage gaps and make legislative recommendations on changes to California law on equal pay for jobs of equal value.³⁵ Comprised of appointees of the Governor, Assembly Speaker, Senate Rules Committee, and the Commission on the Status of Women, the 11-member Task Force (which included the author) met and held hearings throughout California for 15 months from 1984-1985. However, the Task Force’s legislative recommendations were

¹³ S. 181, Pub. L. No. 111—2009, 111th Cong. (Jan. 29, 2009).

¹⁴ S. 84, 113th Cong. (introduced Jan. 23, 2013), available at <https://www.congress.gov/bill/113th-congress/senate-bill/84>.

¹⁵ S. 84, *supra* Note 14.

¹⁶ ALASKA STAT. ANN. § 18.80.220(a)(5).

¹⁷ ARK. CODE ANN. § 11-4-601 et. seq.

¹⁸ IDAHO CODE § 44-1701 et. seq.

¹⁹ 820 ILL. COMP. STAT. 112/1 et. seq.

²⁰ KY. REV. STAT. § 337.420 et. seq.

²¹ ME. REV. STAT. ANN. Tit. 26 § 628.

²² ANN. LAWS OF MASS. GEN. LAWS ch. 149, § 105A.

²³ N.D. CENTURY CODE, 34-06.1-01 et. seq.

²⁴ 40 OKLA. STAT. ANN. § 198.1 et. seq.

²⁵ OR. REV. STAT. § 652.220 et. seq.

²⁶ S.D. CODIFIED LAWS § 60-12-15 et. seq.

²⁷ TENN. CODE ANN. § 50-2-201 et. seq.

²⁸ Nat’l Conference of State Legislatures (NCSL), *State Equal Pay Laws - July 2015*, available at <http://www.ncsl.org/research/labor-and-employment/equal-pay-laws.aspx>; Sen. Com. on Labor Relations Analysis of Sen. Bill 358, 2015-2016 Reg. Sess. (Apr. 22, 2015), at 4, available at https://leginfo.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB358#.

²⁹ *It’s Equal Pay Day: SHRM Addresses Comparable Worth Issue*, News, HR Hub.com, (Apr. 3, 2001), available at <http://www.hrhub.com/doc/its-equal-pay-day-shrm-addresses-comparable-w-0001>.

³⁰ *It’s Equal Pay Day*, *supra* Note 29.

³¹ *It’s Equal Pay Day*, *supra* Note 29.

³² *It’s Equal Pay Day*, *supra* Note 29.

³³ *It’s Equal Pay Day*, *supra* Note 29.

³⁴ *It’s Equal Pay Day*, *supra* Note 29.

³⁵ Assem. Concurrent Res. No. 38, Resolution Ch. 111, Statutes of 1983.

splintered into three reports.³⁶ Thus, no clear guidance resulted, and comparable worth had lain in legislative dormancy until 2015.³⁷

Case Law

Comparable worth has developed narrowly in the courts. In early cases, courts generally declined to extend Title VII to apply to comparable worth claims unless the claim proved a differential in pay based on sex for performing “equal” work. In *Christensen v. State of Iowa*,³⁸ for example, the Eighth Circuit Court of Appeals found no cause of action on the theory of comparable worth beyond existing statute where clerical employees sought to compare their wages with that of physical plant employees at a university. Similarly, in *Lemons v. City & County of Denver*,³⁹ the Tenth Circuit found no remedy for municipal nurses who asserted that their compensation should be compared to that of male-dominated jobs within the city, rather than by market forces that could perpetuate historic sex discrimination.

Departing from this line of cases in *IUE. v. Westinghouse Electric Corporation*,⁴⁰ the Third Circuit allowed

a sex-based wage discrimination claim to be brought under Title VII where female plaintiffs performed work comparable to that of more highly compensated males, rather than on allegations of equal work.

In *County of Washington v. Gunther*,⁴¹ the county’s own job evaluation study found female jail-guard jobs to be worth 95 percent of that of male jail guards, but compensated the women at 70 percent of the salary of the men.⁴² Without ruling on comparable worth, the United States Supreme Court in *Gunther* narrowly held that claims of discriminatory undercompensation are not barred by the Bennett Amendment to Title VII merely because female jail guards did not perform work equal to that of male jail guards.⁴³

Finally, *AFSCME v. State of Washington*⁴⁴ involved union employees who sued because the state’s own job evaluation study had found a 20 percent wage gap between female and male-dominated jobs. The Ninth Circuit held that statistics alone, absent a discriminatory motive, did not justify a court’s interference with the county’s reliance on a market-based system of compensation.⁴⁵

The common theme of *Gunther* and *AFSCME* is that once an employer adopts a compensation system using objective factors absent sex bias, it should do so consistently.

California Fair Pay Act

The California Equal Pay Act, which has mandated equal pay for equal work since 1949, is virtually identical to its federal counterpart.⁴⁶ Current law protects the right to “equal pay for equal work” for women and men performing work that requires equal skill, effort, responsibility, and working conditions within the same establishment. However, according to legislative findings, the state provisions are rarely utilized because successful claims to bridge California’s 16-percent gender-based wage gap are hard to prove under the law’s current language. While existing law already prohibits employers from paying women less than men in the same establishment for work that requires equal skill, effort, and responsibility that is performed

³⁶ The three Comparable Worth Task Force reports included: *California Comparable Worth Task Force Report to the Legislature* (1985) (majority report recommending amendments to the Fair Employment and Housing Act (FEHA) (Cal. Gov’t Code § 12900 et seq.) that would have required all California FEHA employers to conduct job evaluation studies and create compensation systems based on skill, effort, responsibility, and working conditions); Treiman & Cheng, *California Comparable Worth Task Force Minority Report*, *supra* Note 2 (minority report recommending that only FEHA employers with 500 or more employees be required to conduct job evaluations, and removal of only the sex discriminatory factors in setting wages); John B Golper, Pamela L Hemminger & Susan G Zepeda, *Comparable Worth Pay Methodology Should Not be Legislated in the State of California: A Report to the California Legislature* (Aug. 1985) (minority report recommending continued reliance on market forces to set wages).

³⁷ Dan Walters, *Do Reports Have Any Worth?*, LODI NEWS-SENTINEL, June 26, 1985, at 4, available at <https://news.google.com/newspapers?nid=2245&dat=19850626&id=-zgzAAAIBAJ&sjid=pDIHAAAIBAJ&pg=4714,6916975&hl=en>; *Dissent Mars Comparable Worth Study*, UKIAH DAILY J., Sept. 4, 1985, at 7, available at <http://www.newsapers.com/newspage/4729742/>; Jerry Gillam, *Task Force Report on Comparable-Worth Pay Assailed*, LOS ANGELES TIMES, Sept. 4, 1985, available at http://articles.latimes.com/1985-09-04/news/mn-23173_1_employers.

³⁸ 563 F.2d 353 (8th Cir. 1977).

³⁹ 620 F.2d 228 (10th Cir. 1980).

⁴⁰ 631 F.2d 1094 (3d Cir. 1980).

⁴¹ 452 U.S. 161, 181 (1981).

⁴² 452 U.S. at 162.

⁴³ 452 U.S. at 166.

⁴⁴ 770 F.2d 1401 (9th Cir. 1985).

⁴⁵ 770 F.2d at 1408.

⁴⁶ CAL. LAB. CODE § 1197.5.

under similar working conditions, the new statute requires the State to investigate and prosecute these allegations.⁴⁷

The Fair Pay Act now transforms equal pay into comparable worth with these additional requirements:⁴⁸

- ***No more “same establishment” limitation:*** eliminates wage differentials in the same worksite or locality, although regional differences based on cost of living differences are acceptable.
- ***“Substantially similar” replaces “equal” work standard:*** prohibits an employer from paying any of its employees at wage rates less than those paid to employees of the opposite sex for substantially similar work, based on a composite of skill, effort, and responsibility.
- ***Employer’s affirmative duty to show bona fide factors responsible for wage difference:*** revises and recast the exceptions to require the employer to affirmatively demonstrate that a wage differential is based upon one or more specified 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.
- ***Employer to demonstrate reasonable application of factors:*** requires the employer to demonstrate that each factor relied upon is applied reasonably, and that the one or more factors relied upon account for the entire differential.
- ***Civil action:*** authorizes an employee who has been discharged, or discriminated or retaliated against in the terms and conditions of his or her employment for exercising these rights to recover in a civil action through reinstatement, reimbursement for lost wages and work benefits, interest thereon, equitable relief, attorneys’ fees, and costs.
- ***Employee right to disclose, inquire, discuss and, organize around wages:*** already considered an unfair labor practice under the National Labor Relations Act, the Act allows a private right of action for prohibiting an employee from disclosing his/her 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.

- ***Extended recordkeeping:*** increases the duration of employer recordkeeping requirements to three years.

Employers’ Best Practices for Complying with California Fair Pay Act

The California Fair Pay Act may spur litigation on what constitutes “substantially similar” work when viewed as a composite of skill, effort, and responsibility. Because all the gender-based wage difference between substantially similar jobs within a given workplace must be explained by bona fide factors, a battle of the experts employing different multiple regression analyses may very well be an essential part of each lawsuit. In addition, employees may be motivated to inquire about their own and discuss colleagues’ compensation, compounding both wage-and-hour as well as discrimination causes of action.

To prepare for increased scrutiny under the Fair Pay Act, employers should observe the following best practices:

1. Review all jobs to identify ‘substantially similar’ skill, effort, and responsibility throughout the organization.

Employers should proactively identify job classifications that are “substantially similar” as to skills, effort, responsibility, working conditions, and other bona fide factors. Because employees have the right to inquire about and discuss gender-based wage disparity, devising a transparent and defensible wage setting system demonstrates good faith. Transparency and evenhandedness can avoid pay equity claims and/or resolve them.

2. Document each and every reason for wage disparity.

If wage discrepancies exist between male and female-dominated occupations in substantially similar jobs, employers must document bona fide reasons for the wage gap, including:

- Merit
- Seniority
- Quantity or quality of production
- Higher costs of living due to geography
- Education
- Training

⁴⁷ CAL. LAB. CODE § 1197.5.

⁴⁸ SB 358, *supra* Note 1.

- Experience
- Other business reason not based on sex.

Documenting these legitimate reasons for wage gaps can protect employers from discrimination claims.

3. Update employee handbooks to include reference to Fair Pay Act.

Employers should update policies, procedures, and handbooks to include all the new provisions of the Fair Pay Act, including employees' right to inquire about their own and discuss colleagues' compensation without discrimination, harassment, or retaliation.

4. Maintain recordkeeping.

Employers should ensure the business maintains all employee records, including job descriptions, wage analyses, and compensation records for at least three years.

5. Train employees on pay equity compliance.

Employers should train managers, recruiters, and human resources professionals on compliance with the California Fair Pay Act.

6. Bear in mind that a violation of the Fair Pay Act can lead to a PAGA claim.

The California Private Attorneys General Act of 2004 (PAGA)⁴⁹ allows a private citizen to launch a representative action to pursue civil penalties on behalf of the State of California Labor and Workforce Development Agency, provided the formal notice and waiting

procedures of the law are followed. California Labor Code section 1197.5, as amended by the Fair Pay Act, is listed among the enumerated serious violations under PAGA.⁵⁰

Conclusion

California's Fair Pay Act offers some of the strongest comparable worth protections to eliminate the pay gap between women and men in the United States. Like the experience of sister states, the new law is a Pandora's box likely to usher in a period of compensation reform when finer points of the law may need to be resolved in court. California employers should invest the time and resources to prepare for the increased scrutiny on pay disparity in 2016 and beyond.

Phyllis W. Cheng is a Partner in the Employment Group of DLA Piper LLP (US). She formerly served for nearly seven years as Director of the California Department of Fair Employment and Housing, the largest state civil rights agency. Thirty years ago, Ms. Cheng also served as Vice Chair of the former California Comparable Worth Task Force, which was charged to study and make recommendations on eliminating gender-based pay inequities. She can be contacted at phyllis.cheng@dlapiper.com.

⁴⁹ CAL. GOV'T CODE § 2698.

⁵⁰ CAL. GOV'T CODE § 2699.5.