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MCLE SELF-STUDY:

WOMEN'S WAGES, PAY EQUITY, AND DATA REPORTING

INTRODUCTION

In 2015, Governor Jerry Brown signed into law the California Fair Pay Act¹ (CFPA or Act) to close 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.²

Since its enactment, several amendments have broadened and clarified the Act. In addition to gender, now the CFPA also bars wage gaps based on race and ethnicity for performance of substantially similar work.³ Another amendment to the Act clarifies that prior salary cannot, by itself, justify any disparity in compensation under the bona fide factor exception. Further, an employer is required, upon reasonable request, to provide the pay scale for a position to an applicant for employment.⁴ As amended, the Act also defines "employer" to mean

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ACCORDING TO THE UNITED STATES BUREAU OF LABOR STATISTICS, IN 2021, FEMALE FULL-TIME WAGE AND SALARY WORKERS EARNED 83.1% (\$912) OF THE USUAL WEEKLY EARNINGS OF THEIR MALE COUNTERPARTS (\$998).

both public and private employers, except public employers would not be subject to the misdemeanor provision for reducing the wages of any employee to comply with the CFPA's prohibition.⁵

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

THE WAGE GAP

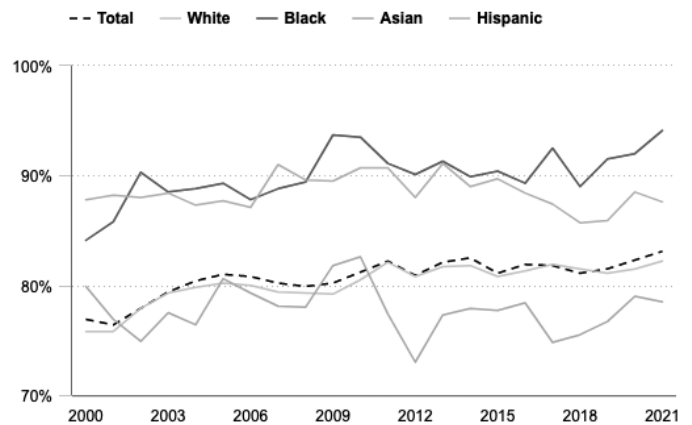
According to the United States Bureau of Labor Statistics, in 2021, female full-time wage and salary workers earned 83.1% (\$912) of the usual weekly earnings of their male counterparts (\$998).⁶ Even though the gender wage gap has narrowed since 1979 (when women's earnings were 62% of men's), the ratio after 35 years remains significant for women and men at all age groups and within racial-ethnic groups.⁷ White women earned 82.2% as much as their male counterparts, compared with 94.1% for Black women, 78.5% for Asian women, and 87.6% for Latinas.⁸

According to the American Association of University Women (AAUW), the COVID-19 pandemic's disproportionate economic toll on women, most notably women of color, will have economic ramifications for years—compounding the inequities of the existing gender wage gap.⁹ The AAUW reports that:¹⁰

- Between February and April 2020, women's unemployment rate rose by 12.8%, compared to 9.9% for men.
- Between the third quarter of 2019 to the third quarter of 2020, unemployment rose from 5.4% to 12.7% for Black women; 2.5% to 11.6% for Asian women; 4.8% to 12.5% for Latinas; and 3.7% to 8.6% for White women.

- Mothers of young children have lost jobs at three times the rate of fathers. Mothers of children under 12 lost nearly 2.2 million jobs between February and August, a 12% drop; fathers saw a 4% drop of about 870,000 jobs.
- In the third week of July 2020, 32.1% of unemployed women ages 25 to 44 were not working outside the home due to childcare demands, compared to only 12.1% of men in the same group.

Women's-to-men's earnings ratio, by race and Hispanic ethnicity, for wage and salary workers who usually worked full time, 2000–21 annual averages



Source: U.S. Bureau of Labor Statistics

As of March 2021, California ranks fourth with a gender wage gap of 88%, according to the National Women's Law Center.¹¹

Various studies 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% of the gap is not explained by such factors.¹² 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% of men's wages, with an 8% unexplained difference that researchers suggest could be influenced by discrimination.¹³

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.¹⁴

FEDERAL EQUAL PAY ACT

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.¹⁵

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 underlying discriminatory action.¹⁶ However, the Ledbetter Act did not break new ground on the pay equity front. The proposed federal Paycheck Fairness Act, a pay equity initiative, has stalled in Congress for many years.¹⁷

CALIFORNIA FAIR PAY ACT

The California Equal Pay Act,¹⁸ which has mandated equal pay for equal work since 1949, is virtually identical to its federal counterpart. The CFPA¹⁹ has substantially transformed equal pay with these additional requirements:

- Prohibiting an employer from paying its employees less than employees of the opposite sex, or of another race, or of another ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility.
- Eliminating the requirement that the employees being compared work at the “same establishment.”
- Making it more difficult for employers to justify inequities in pay through the “bona fide factor other than sex” defense.
- Ensuring that any legitimate factors relied upon by the employer for pay inequities are applied reasonably and account for the entire pay difference.
- Explicitly stating that retaliation against employees who seek to enforce the law is illegal, and making it illegal for employers to prohibit employees from discussing or inquiring about their co-workers’ wages.
- Extending the number of years that employers must maintain wage and other employment-related records from two years to four years.
- Covering public as well as private employers.
- Prohibiting employers, with one exception, from seeking applicants’ salary history information and requiring employers to supply pay scales upon the request of an applicant.

CALIFORNIA PAY DATA REPORTING

Since 1966, the federal Equal Employment Opportunity Commission (EEOC) has required employers with 100 or more employees to submit EEO-1 forms, which show the representation of men and women of different ethnic groups in nine different occupational classifications.²⁰ According to the EEOC, the EEO-1 data was invaluable in enforcing anti-discrimination laws and conducting public hearings throughout the country to bring attention to the issue of discrimination in the workplace. The EEO-1 continues to be required by the EEOC to enforce anti-discrimination laws throughout the country.²¹

In 2020, S.B. 973 was enacted, amending the Fair Employment and Housing Act (FEHA),²² to require most California employers to report similar EEO-1 pay and hours-worked data by establishment, job category, sex, race, and ethnicity to the Department of Fair Employment and Housing (DFEH) annually.²³ Specifically, S.B. 973 requires that, on or before March 31, 2021, and on or before March 31 each year thereafter, a private employer with 100 or more employees and who is required to file an EEO-1 under federal law must submit a pay data report to DFEH that covers the prior calendar year, or reporting year.²⁴

Among other things, S.B. 973 authorizes the DFEH to receive, investigate, conciliate, mediate, and prosecute complaints alleging discriminatory payment practices under Cal. Lab. Code § 1197.5. The statute further orders DFEH to adopt procedures to coordinate activities to enforce § 1197.5 with the Division of Labor Standards Enforcement (DLSE). It also requires that DFEH makes the reports available to DLSE upon request. The law empowers the DFEH to receive, investigate, conciliate, mediate, and prosecute complaints alleging unlawful pay discrimination on the basis of sex, race or ethnicity, made illegal under the California’s equal pay laws. It further orders the DFEH to coordinate with DLSE to ensure that only one of the departments investigates or takes enforcement action in response to the same operative set of facts. As an additional interagency coordination effort, S.B. 973 requires Employment Development Department (EDD) to provide DFEH with the names and addresses of all businesses with 100 or more employees no later than 60 days from the date of a request. Finally, the statute makes findings and declarations on the gender pay gap, as well as the need for a limitation on the public’s access to the pay data under the California Public Records Act.²⁵

In the current legislative session, a pending bill proposes to make additional amendments to pay data reporting.²⁶

THE CALIFORNIA FAIR PAY ACT
PROHIBITS AN EMPLOYER FROM PAYING
ITS EMPLOYEES LESS THAN EMPLOYEES
OF THE OPPOSITE SEX, OR OF ANOTHER
RACE, OR OF ANOTHER ETHNICITY
FOR SUBSTANTIALLY SIMILAR WORK,
WHEN VIEWED AS A COMPOSITE OF
SKILL, EFFORT, AND RESPONSIBILITY.

EMPLOYERS' BEST PRACTICES FOR COMPLYING WITH THE CALIFORNIA FAIR PAY ACT

Employers should observe the following best practices:

- Review all jobs to identify "substantially similar" skill, effort, and responsibility throughout the organization.
- Document each and every bona fide reason for wage disparity, including: merit, seniority, quantity or quality of production, higher costs of living due to geography, education, training, experience, and other business reason not based on discrimination.
- Accurately prepare and submit annual pay data reporting to both the DFEH and EEOC.
- Update employee handbooks to include reference to the CFPA.
- Maintain recordkeeping for four years, as required by the CFPA.
- Train employees on pay equity compliance.
- Bear in mind that a violation of the CFPA can lead to a violation of the FEHA and the California Labor Code, as well as form the basis for a Private Attorney General's Act (PAGA)²⁷ claim.

CONCLUSION

California's Fair Pay Act offers some of the strongest pay equity protections to eliminate any pay gap driven by discriminatory factors. California employers should invest the time and resources on pay equity in their workplaces.

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1. Cal. Lab. Code §§ 432.3 and 1197.5, S.B. 358 (Jackson), 2015-2016 Reg. Sess. (2015 Cal. Stat. 546).
2. *Id.*
3. Cal. Lab. Code §§ 1197.5 and 1199.5, S.B. 1063 (Hall), 2015-2016 Reg. Sess. (2016 Cal. Stat. ch. 866).
4. Cal. Lab. Code § 1197.5, A.B. 1676 (Campos), 2015-16 Reg. Sess. (2016 Cal. Stat. ch. 856).
5. Cal. Lab. Code § 432.3, A.B. 168 (Eggman), 2017-18 Reg. Sess. (2017 Cal. Stat. ch. 688).
6. Bureau of Labor Statistics, U.S. Department of Labor, *The Economics Daily*, Median earnings for women in 2021 were 83.1 percent of the median for men at <https://www.bls.gov/opub/ted/2022/median-earnings-for-women-in-2021-were-83-1-percent-of-the-median-for-men.htm> (last visited Jun. 27, 2022).
7. *Id.*
8. *Id.*
9. *The Simple Truth about the Gender Pay Gap: 2020 Update*, AAUW (2020), available at https://www.aauw.org/app/uploads/2020/12/SimpleTruth_2.1.pdf (last visited Jun. 26, 2022).
10. *Id.*
11. *The Wage Gap: The Who, How, Why, and What to Do, September 2021 Fact Sheet*, National Women's Law Center (2021), available at <https://nwlc.org/wp-content/uploads/2021/11/2021-who-what-why-wage-gap.pdf> (last visited Jun. 26, 2022).
12. See, e.g., Elise Gould, Jessica Schieder, and Kathleen Geier, *What is the gender pay gap and is it real?* Economic Policy Institute, October 20, 2016, available at <https://www.epi.org/publication/what-is-the-gender-pay-gap-and-is-it-real/> (last visited Jun. 26, 2022).
13. Francine D. Blau and Lawrence M. Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can*, Academy of Management Perspectives, 21 ACADEMY OF MANAGEMENT PERSPECTIVES 1, 7-23 (Feb. 2007), available at <https://www.jstor.org/stable/4166284> (last visited Jun. 26, 2022).
14. See, e.g., Donald J. Treiman & Heidi I. Hartmann, *Women, Work and Wages: Equal Pay for Work of Equal Value*, Nat'l Acad. Press, Washington, D.C., 93 (1981).
15. 29 U.S.C. § 206(d).
16. S. 181, Pub. L. No. 111-2009, 111th Cong. (Jan. 29, 2009).
17. H.R. 7, 17th Congress (2021-2022), available at <https://www.congress.gov/bill/117th-congress/house-bill/7> (last visited Jun. 26, 2022).
18. Cal. Lab. Code §§ 432.3 and 1197.5.

19. *Id.*, as amended, see n. 1-5.
20. 42 U.S.C. § 2000e-8(c), and 29 CFR 1602.7-14 and 41 CFR 60-1.7(a).
21. Sen. Rules Com., Office of Sen. Floor Analyses, Rep. on S.B. 973 (2019-2020 Reg. Sess.) as amended Aug. 24, 2020, 5-6.
22. Cal. Gov't Code §§ 12900-12999.
23. Cal. Gov't Code §§ 12930 and 12999, S.B. 973 (Jackson) (2019-2020 Reg. Sess.) (2020 Cal. Stat. 363).
24. *Id.*
25. *Id.*
26. S.B. 1162 (Limón), as amended June 14, 2022, would revise the timeframe in which a private employer is required to submit this information to require that it be provided on or before the second Wednesday of May 2023, and for each year thereafter on or before the second Wednesday of May. This bill would also require a private employer that has 100 or more employees hired through labor contractors to also submit a separate pay data report to DFEH for those employees in accordance with the above timeframe. It would also require an employer, upon request, to provide to an employee the pay scale for the position in which the employee is currently employed. The bill would require an employer with 15 or more employees to include the pay scale for a position in any job posting. It would require an employer to maintain records of a job title and wage rate history for each employee for a specified timeframe, to be open to inspection by the Labor Commissioner. The bill would create a rebuttable presumption in favor of an employee's claim if an employer fails to keep records in violation of these provisions. It would require an employer with 15 or more employees that engages a third party to announce, post, publish, or otherwise make known a job posting to provide the pay scale to the third party and would require the third party to include the pay scale in the job posting. The bill would require the Labor Commissioner to investigate complaints alleging violations of these requirements and would authorize the commissioner to order an employer to pay a civil penalty upon finding an employer has violated these provisions. The bill would also authorize a person aggrieved by a violation of these provisions to bring a civil action for injunctive and any other appropriate relief. It would require deposit of the civil penalties collected pursuant to these provisions into the Labor Enforcement and Compliance Fund, and would authorize these funds to be used, upon appropriation by the Legislature, for administration and enforcement of these provisions. Finally, the bill would require the Labor Commissioner to adopt regulations as necessary to carry out these provisions. S.B. 1162 (Limón), as amended Jun. 14, 2022, 2021-2022 Reg. Sess.
27. Cal. Lab. Code §§ 2698 - 2699.8.

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