

TOP Women Lawyers



Women's wages and the California Fair Pay Act

BY PHYLLIS W CHENG

Introduction

In 2015, Governor Jerry Brown signed into law the California Fair Pay Act (Cal. Lab. Code §§ 432.3 and 1197.5) 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.

As amended in 2017, the Fair Pay Act now also prohibits employers from paying their employees less than those of the opposite sex, of another race, or of another ethnicity for substantially similar work. A 2018 amendment to the Act further bars employers from relying on the salary history information of an applicant as a factor in determining offer of employment or salary.

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). Even though the gender wage gap has narrowed since 1979 (when women's earnings were 62% of men's), the ratio after four decades remains significant for women and men at all age groups and within racial-ethnic groups. 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.

According to the American Association of University Women, 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. The AAUW reports that:

- 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 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 experienced 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 child-care demands, compared to only 12.1% of men in the same group.

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

Various studies have found that fac-

tors 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. 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.

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.

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.

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. However, the Ledbetter Act did not break new ground on the pay equity front. The proposed federal Paycheck Fair-

ness Act, a pay equity initiative, has stalled in Congress for many years.

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. The California Fair Pay Act 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 three 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.

Employers’ Best Practices for Complying with 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 reasons not based on discrimination.
- Update employee handbooks to include reference to the Fair Pay Act.
- Maintain recordkeeping.
- Train employees on pay equity compliance.
- Bear in mind that a violation of the Fair Pay Act can lead to a PAGA claim.

Conclusion

California’s Fair Pay Act offers some of the strongest pay equity protections towards eliminating discriminatory factors that contribute to pay gaps. California employers should invest the time and resources on pay equity in their workplaces.



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