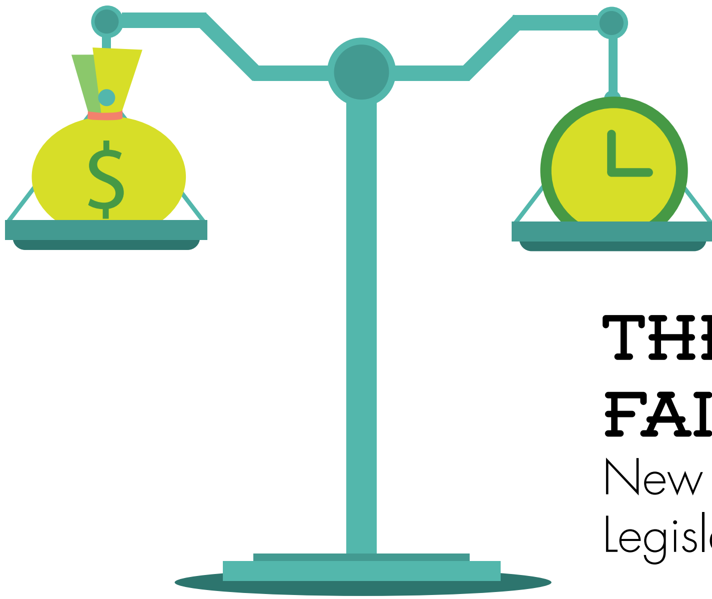

THE CALIFORNIA FAIR PAY ACT

New California Gender Pay Legislation in Effect from January 1

Jeremy Pasternak

On January 1, 2016, the California Fair Pay Act went into effect. It is widely considered to be the most progressive gender pay equity legislation in the country and applies to all California employers, regardless of size. The preamble to the legislation begins: "In 2014, the gender wage gap in California stood at $.16 on the dollar. A woman working full time year round earned an average of $.84 to every dollar a man earned." The preamble then continues to discuss how this is significantly worse for women of color.

If the stories are to be believed, a push for the legislation was Patricia Arquette's Oscar acceptance speech for best supporting actress in February 2015. Arquette closed her speech with a call for pay equity: "It's our time to have wage equality once and for all and equal rights for women in the United States of America." (Cut to shot of Meryl Streep exuberantly raising her right finger in the air and pointing at her conominee-now-victor.)

California State Senator Hannah-Beth Jackson (D–Santa Barbara) had already been working on a bill on the same subject, but seeking to catch the popular wave, two days later introduced Senate Bill 358, which passed handily and was signed by Governor Jerry Brown in October 2015; it amends California Labor Code section 1197.5 effective this year.

Some have argued that the bill does little to change existing law. Discrimination against women—including disparate pay—has long been unlawful pursuant to the California Fair Employment and Housing Act (FEHA) and Title VII of the Federal Civil Rights Act. And California Labor Code section 232 already prohibits employer bans on employees discussing the amount of their wages (another provision of the new law). But this misses the real strengths of the new law, which allows claims to proceed without proof of discriminatory intent, and shifts the burden to employers to justify disparate pay (as opposed to leaving it with employees to prove intentional discrimination).

What Constitutes a Violation—"Equal Work" Now "Substantially Similar Work"

The act amends California Labor Code section 1197.5, which in its prior iteration was similar to federal law (and had not been amended since 1985). The old version of the law required equal pay for "equal work" in the "same establishment," unless excused by certain delineated circumstances.

The new version of the law, instead of referring to "equal work," refers to "substantially similar work when viewed as a composite of skill, effort, and responsibility." Obviously, this is a much broader standard both on its face and in terms of litigating these matters in court or before the California Labor Commission. Put simply, it is much easier for an aggrieved employee to argue the "substantially similar work" standard than the "equal work" standard.

What Constitutes a Violation—No Intent Requirement and Shifting the Burden of Proof to the Employer

For a discrimination claim, one must prove intent. The new law *contains no such requirement*. In fact, if a pay disparity is shown, it is not incumbent upon the claimant to prove why; rather, *it is incumbent upon the employer to justify it based on a limited number of factors*.

Consider the following scenario: Store A is run by Bob. Bob has all female employees and pays them $15.00 per hour. Store B within the same company is run by Steve. Steve has male employees and pays them $20.00 per hour. Under traditional antidiscrimination law a case is very hard to establish. Is Bob really discriminating against women? Is Steve really favoring men? Obviously it is not clear and a gender discrimination claim based on FEHA or Title VII would probably be an uphill battle. In fact,

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unless some sort of coordination between the managers could be established, or unless there were some evidence that Bob had intentionally paid women "less" (for example, if he had previously paid men more) the intent element of a discrimination claim would unlikely be met.

However, under section 1197.5, the employer has to justify the practice. It must affirmatively show that the wage differential is based on one or more of four factors, which must themselves be "applied reasonably":

1. A seniority system;
2. A merit system;
3. A system that measures earnings by quantity or quality of production; or
4. A bona fide factor other than sex, such as education, training, or experience.

This burden-shifting provision arguably existed in the old version of the statute, which contained the same four exceptions. And in fact, the California courts had previously held that there was a means of shifting the burden of proof to the employer; however, it was really no different than that employed in most discrimination cases. The analysis was that once an employee proved a gender pay disparity, she had established a prima facie case. The burden then

shifted to the employer to establish the existence of one of the exceptions. See *Green v. Par Pools, Inc.* (2003) 111 Cal. App.4th 620. The basis of this ruling was the McDonnell-Douglas burden-shifting test (used in most discrimination cases), and the *Green* court found it applicable to these cases. It further held that should the employer establish that one of the four exceptions applies, the burden shifts back to the employee to prove that the rationale is "pretextual." But that word—*pretext*—has always meant in this jurisprudence "pretext for discriminatory intent." And in fact, the *Green* court acknowledged that is the purpose of the McDonnell-Douglas test and that it was applying it for that purpose there, to prove "intent" to engage in "discrimination."

The new version of the law contains additional language in the fourth exception. First, it now continues the phrase "A bona fide factor other than sex . . . " (which really was a "catch-all" employers could hide behind) with the words, ". . . such as education, training, or experience." Second, the new statute goes much further, also adding this language:

> This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph, "business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

That language, particularly the last sentence, presents a *much* higher standard, amounting to no less than "there was no other legitimate way." That is a true burden shifting, and that language makes clear that intent is not a factor. If the employer has a pay disparity, it is going to have to provide not just a justification, but show there were no alternatives.

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This language is consistent with language from the Legislative Counsel's digest of the bill, which further makes clear that the new version of the law was intended to depart from the standards of the old:

> The bill would revise 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, as specified. The bill would also require 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.

Given these changes as well as the language in the preamble, it is apparent that the new law is intended to dispense with any requirement that a plaintiff prove intent at any stage, and bring the employer's responsibility closer to a strict liability standard. In other words, make employers *responsible* for gender pay differentials *and their prevention*.

For those who practice in the area of employment discrimination, where proof of intent is often so elusive—to the point we may pass on a case that we know in our hearts to be "true" simply because we have little confidence of proving it—this is a significant shift.

Proving a Violation—Elimination of the "Same Establishment" Standard

The former version of the law required that the pay disparity exist within the "same establishment." That language has been eliminated. The elimination of the "same establishment" standard is significant for a couple of reasons. First, of course, it allows a broader base of comparison for the employee making the claim; she (and yes, the statute is factually gender neutral, but obviously its premise is to remedy a gender gap that disadvantages women, not men) may look to comparators from various "establishments"—for example, retail locations—across an organization. Like the broader language of "substantial" versus "equal," this literally broader standard allows for examination of a larger group of individuals for statistical analysis of male and female compensation. This is particularly important for those "establishments" where all the employees in a particular job are women.

With respect to establishing these varying rates of pay, the new law also requires employers to maintain for a period of three years records of wages, classifications, "and other terms and conditions of employment."

Unintended (but Happy) Consequences—The Law's Potential Effects on Walmart v. Dukes

Whether intended or not, the elimination of the "same establishment" requirement, coupled with the employer's affirmative obligations and the burden of proof, suggests an interesting additional result, one that may effectively overturn (in California) a four-year-old decision of the United States Supreme Court.

In 2011, the United States Supreme Court, in *Wal-Mart Stores, Inc. v. Dukes* 564 U.S. 338 (2011), rejected the gender discrimination and pay disparity claims of the plaintiffs and the class that had been certified by the trial court. Though much of the court's analysis hinged upon the Federal Rules of Civil Procedure as they pertain to class actions (something well beyond the scope of this article) the essentials of the Court's holding were as follows:

The high court noted that the thrust of the claim was that Wal-Mart had left to the discretion of local managers determination of pay and promotions, that it could statistically be shown that women were being disfavored, and that because management was aware of this and did nothing about it, this constituted discriminatory treatment on a classwide basis. The Supreme Court, in an opinion by the late Justice Antonin Scalia, disagreed, decertified the class, and effectively threw out the case.

Again, this had much to do with the administration of class actions; the Court's rejection of class certification was based in part on the fact that these different managers were acting independently, and therefore "commonality" could not be found for the purposes of class certification.

Under the new California law, on similar facts, presumably this would not be required. By requiring the employer to come up with affirmative justifications for a pay disparity that is otherwise demonstrable—even across different establishments—the "commonality" question as presented in *Dukes* is effectively avoided. And as referenced above, the new California Labor Code section also avoids the "intent" requirement, something else that was repeatedly referred to by the Court in *Dukes*.

In short, though the amendments are brand new and have

not been tested, it would appear that an employer with widespread pay disparity, who cannot establish one of the four defenses set forth above, will likely find itself facing a viable class-action case. And it will be far less able to defeat an otherwise meritorious case simply by defeating class certification by way of the types of commonality arguments employed in "intent" cases.

Enforcement—Private Rights of Action

The new law also contains a private right of action, something that not every Labor Code section does. It provides that an aggrieved employee may bring a complaint to the California Labor Commissioner. An employee may also bring suit in court. The statute also provides for "liquidated damages" in an amount equal to the amount unpaid, as well as interest.

The statute of limitations on the pay differential is two years. A "willful violation" carries with it a three-year statute of limitations. It is worth noting that this language, "willful violation," makes clear that this is not an "intent statute," and that it really does create an affirmative obligation to ensure pay equity as opposed to a proscriptive requirement against discrimination.

The statute also contains an antiretaliation provision (section 1197.5(j)(1)). It prohibits employers from firing or otherwise retaliating against employees who seek to enforce the section (which presumably includes complaining). This subsection also includes language similar to that of Labor Code section 232 regarding employee disclosure of wages.

Damages for such retaliation are set forth in subsection (j)(2), which provides for a private right of action for "reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, including interest thereon, as well as appropriate equitable relief." The statute of limitations for such an action is one year (subsection (j)(3)).

The damages provisions of the statute do not provide for general damages, punitive damages, or attorneys' fees and costs. However, given the legislative history and preamble language, the statute almost certainly constitutes the "public policy" of the State of California sufficient to implicate California's common-law cause of action for "wrongful termination in violation of public policy." Any time an employee's termination "offends" the public policy of state or federal law (or its spirit), it gives rise to this cause of action. See *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 89. The wrongful termination cause of action, which carries with it a two-year statute of limitations, does provide for general and punitive damages, though not attorneys' fees and costs. Until the law is better developed, it would probably make sense for practitioners to abide by the one-year statute of limitations in the statute. That said, there is substantial jurisprudence from the Fair Employment and Housing Act context that would suggest otherwise (individuals who seek to bring a wrongful termination claim based on discrimination prohibited by FEHA may do so within two years, even though FEHA has a one-year administrative filing requirement; see California Government Code section 12965 et seq.)

In closing, the California Fair Pay Act is certainly a significant step toward remedying the gender pay gap, and may in the end go even farther than its drafters intended.

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