

Gender Equality (and Nonprofits): California's Bold New Law

11.05.15 | Linda J. Rosenthal, JD



We've already cautioned nonprofits to be on the alert for new laws coming on the books, from time to time, around the nation.

The special status of 501(c)(3)s "lulls many boards and staff into a false sense of believing the rules that apply to regular corporations and regular workplaces don't apply to them."

California's "Avalanche" of New Laws

The California Legislature recently ended a marathon legislative session with a slew of important, high-profile bills, including the landmark right-to-die measure as well as comprehensive regulation of the medical marijuana industry.

Among the new laws is one of importance to all employers in the Golden State: the California Fair Pay Act, SB 358. Passed unanimously (39-0) by the California Senate at the end of August, it was signed by Governor Jerry Brown on October 6, 2015, and takes effect on January 1, 2016. It is perhaps the strongest equal pay measure in the United States.

California already had a fair pay law. The new law amends existing California Labor Code section 1197.5 with key changes, including: (1) giving "employees more leeway to challenge pay discrepancies"; and (2) allowing employees to discover information, and talk about, the pay of their coworkers.

Gender Pay Inequity

Legislators made an official finding that the wage gap between men and women in California remains significant and harmful – about 84 cents for women for every dollar earned by men. Minority women earn far less than male counterparts. While this disparity is smaller than in other parts of the nation, the lawmakers decided to act.

According to national studies and surveys, wage inequality is even worse in the nonprofit sector. SB 358's legislative sponsor, State Sen. Hannah-Beth Jackson (D-Santa Barbara), indicated that it was recent national media attention (including Patricia Arquette's acceptance speech at the Oscars earlier this year highlighting pay disparity in the entertainment industry) that spurred movement on this intractable problem.

"California has prohibited gender-based wage discrimination since 1949," declares the preamble to this important legislation:

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Section 1197.5 of the Labor Code was enacted to redress the segregation of women into historically undervalued occupations, but it has evolved over the last four decades so that it is now virtually identical to the federal Equal Pay Act of 1963 (29 U.S.C. Sec. 206(d)). However, the state provisions are rarely utilized because the current statutory language makes it difficult to establish a successful claim.

Legislators recognized, too, that “[p]ay secrecy also contributes to the gender wage gap, because women cannot challenge wage discrimination that they do not know exists.”

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Although California law prohibits employers from banning wage disclosures and retaliating against employees for engaging in this activity, in practice many employees are unaware of these protections and others are afraid to exercise these rights due to potential retaliation.

Governor Brown hailed this legislation, “which will give employees more grounds for challenging perceived discrimination, ‘a very important milestone.’” Gender pay advocates say “... the legislation [is] a model for other states and Congress, where similar efforts have stalled....”

What's New In This Law?

Both of the key changes to the Labor Code will help achieve the stated goal of eliminating pay inequity.

Jobs Compared

“Courts have interpreted current law to mean that male and female workers must hold exactly the same jobs to require equal pay,” explains Sen. Jackson. “Now they’re going to have to value the work equally.” When the new measure takes effect, “[b]osses cannot pay employees less than those of the opposite sex for ‘substantially similar work,’ even if their titles are different or they work at different sites.”

In connection with available employer defenses, the new law –

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revise[s] and recast[s] 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.

Wage Discussions and Retaliation

Under the new legislation, employees may not be prohibited from asking about, or discussing, wages of co-workers, and employees will have broader rights to assert improper retaliation.

Conclusion

Employment law experts recommend that, ahead of next year’s effective date, California employers prepare for this tougher pay-equity law. These steps include:

- learning about the new requirements;
- reviewing records to identify instances of “potential unequal pay for similar work – even if at different physical locations;”
- evaluating possible defenses based the new standard; and
- revising existing policies and publications.