



## Let's Talk Dollars and Cents: Making Sense of California's Fair Pay Act and the EEOC's Pay Data Proposals

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The gender pay gap is a complicated issue that has gained significant traction in recent years in the realms of politics, sociology and, of course, in the law. Recognizing that the pay gap continues to affect women, the California legislature has passed the California Fair Pay Act and the federal government has proposed new regulations that require employers to disclose certain pay data to provide transparency.

This article identifies some preventative measures that employers may adopt to prevent liability under the new law and proposed regulations.

### FPA Changes

The FPA makes several changes to existing law that will undoubtedly impact employers.

First, employers must pay employees of opposite sexes the same wages for “substantially similar work, when viewed as a composite of skill, effort, and responsibility.” This requirement even applies to employees who work at different locations or who have different job titles. Because the FPA does not define “substantially similar,” the meaning of the phrase will have to be explored through litigation and, perhaps, through agency regulation.

Second, the FPA places a higher burden on employers seeking to use the Act's safe harbors to justify existing wage discrepancies. Before the passage of the FPA, employers were permitted to justify wage discrepancies if such discrepancies were due to (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) any bona fide factor other than sex, such as education, training, or experience. The bona fide factor shall only apply if the employer can establish that the factor: (a) is not based on or derived from a sex-based differential in compensation, (b) is job-related with respect to the position in question, and (c) is consistent with business necessity.

Importantly, the statute's reference to bona fide factors (education, training, experience) is not exhaustive. This means that employers may be able to justify wage differentials with additional nondiscriminatory factors. However, employers should be cautious about relying on an employee's compensation with a previous employer to determine the employee's current compensation. This could result in the perpetuation of a wage gap that already existed with the previous employer.

Third, the new law expressly states that employers may not prohibit an employee from: (1) disclosing the employee's own wages, (2) discussing the wages of others, (3) inquiring about another employee's wages, or (4) aiding or encouraging another employee to exercise

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his or her rights under the FPA. Notably, the FPA does not require employers to disclose the compensation information of its employees if an employee makes such an inquiry. The FPA does not alter the obligation of employers to safeguard its employees' private information, including information regarding the compensation of individual employees.

Fourth, employers are prohibited from discharging, or in any manner discriminating or retaliating against, any employee by reason of any action taken by the employee to invoke or assist in the enforcement of rights under the FPA.

### FPA Enforcement and EEOC EEO-1 Compliance

To enforce their rights under the FPA, employees can file complaints with the Department of Labor Standards Enforcement ("DLSE"), which will confidentially investigate the claims. Employees can also file civil actions to recover the pay shortfall between what they received in wages and what they were entitled to receive, along with liquidated damages, and attorneys' fees and costs. Further, the FPA authorizes employees to file civil actions to enforce the FPA's retaliation provisions. If an employee can demonstrate that she was discharged, discriminated against, or retaliated against in violation of the FPA, she is entitled to reinstatement, reimbursement for lost wages, and attorney's fees and costs.

The federal government has also taken steps to combat the gender pay gap issue. On January 29, 2016, the Equal Employment Opportunity Commission ("EEOC") announced its proposal to require certain employers to report pay data as part of the Employer Information Report (EEO-1) compliance. The proposed revisions are currently available here. Currently, employers with 100 or more employees are required to report data about employees' ethnicity, race, and sex, by job category as part of their EEO-1 compliance. If the EEOC's proposed revisions are adopted, employers with 100 or more employees will also be required to provide the W-2 earnings and total hours worked of its employees for the year. Rather than reporting pay data for each individual employee, the EEOC's proposal would require employers to report using 12 "pay bands." For instance, an employer would report on the EEO-1 form that it employs 10 African-American men who are craft workers in the second pay band (\$19,240-\$24,439).

The EEOC has made its plans for this information quite clear—it intends to use the pay data (along with the data on ethnicity, race, and sex) to "more effectively focus agency investigations, assess complaints of discrimination, and identify existing pay disparities that may warrant further examination."

### Recommendations

Employers should expect to see equal pay claims "tacked on" to lawsuits for discrimination and harassment in state and federal court. For example, on February 23, 2016, a Plaintiff filed a complaint against Autozone (and its subsidiaries) that included causes of action under the FPA. *Diaz v. ALLDATA, et al.*, 2016 WL 865855 (Feb. 23, 2016). Notably, the

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complaint and the alleged facts alleged are largely about unwanted sexual advances, and seem mostly unrelated to any wage issue. However, alleging minimal pertinent facts, the plaintiff added claims for violation of the FPA and retaliation in violation of the FPA. This is an example of why employers should be proactive in complying with the FPA and investigate any employee complaints about wage differentials.

Until the full scope of the FPA and (proposed) EEOC regulations are established through court decisions or further regulations, we recommend that employers take the following steps to prevent liability:

(1) Evaluate potential wage gaps between employees performing “substantially similar” work at the same and different work locations (company-wide) and determine the reasons for such differences. Simply modifying job descriptions or job titles to reflect that employees are performing different work is not enough. Employers should pay special attention to positions that are notorious for having the largest pay gaps, including financial advisors, sales and related workers, retail workers, bartenders, housekeepers and janitorial workers, education administrators (including teachers), IT positions, and C-Suite employees (CEO, CFO, COO).

(2) When reviewing current practices, consider all forms of compensation, including objective and subjective bonuses, commissions, benefits, and the opportunity to receive overtime hours and training opportunities.

(3) Provide training and education for supervisors and Human Resources personnel regarding the appropriate response to an employee’s wage inquiry.

(4) Consult legal counsel before taking any adverse action against an employee who has recently complained or inquired about her wages compared to her male counterpart (or vice versa).

(5) Analyze whether any wage differential in the same or substantially similar position, can be fully explained by one or a combination of the following factors: (1) merit system, (2) seniority system, (3) system that measures earnings by quality or quantity of production, or (4) a bona fide factor other than sex (education, experience, training) that is job related and consistent with business necessity.

(6) Update employee handbooks to remove any prohibition on discussing wages. This is already prohibited by section 232 of the California Labor Code.

(7) Maintain employee records related to “wages and wage rates, job classifications, and other terms and conditions of employment” for three years, as required by the FPA.

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If you have questions about the Fair Pay Act, please contact Phil Kossy or Lauren Vega, or any other member of the Firm's Labor and Employment Group.



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