Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Calif.'s Fair Pay Act: Practical Advice For Employers

Matthew Schechter

Michael Warren

Law360, New York (December 10, 2015, 11:00 AM ET) -- As widely reported, beginning on Jan. 1, 2016, employers will need to adapt to California's new Fair Pay Act (SB 358), which was signed into law by Gov. Jerry Brown on Oct. 6, 2015. Existing law already prohibits employers from paying employees lower wages than paid to employees of the opposite sex when they perform equal work that requires equal skill, effort and responsibility, under equal conditions at the same establishment. The new Fair Pay Act, however, is more employee-friendly because it relaxes the burden that employees need to meet to show that they are receiving unequal pay, and narrows the defenses available to employers.

In particular, the new law eliminates the "same establishment" and "equal work" standards and instead requires that equal pay be given to male and female employees who perform "substantially similar work, when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions[.]" The new law also identifies the defenses that employers may rely on as a reason for any wage differential: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; (4) a bona fide factor other than sex (such as education, training or experience). The employer bears the burden of not only showing that one of the factors applies, but also that the factor(s) relied upon is "applied reasonably" and that the factor(s) account for the entire wage differential. Moreover, if an employer seeks to use a bona fide factor as a defense, it bears the additional burden of showing that such factor is job-related for the position at issue, and consistent with a "business necessity." A "business necessity" is one where the factor fulfills the intended business purpose, and there is no other business practice that would serve the same purpose without resulting in any difference in wages.

Finally, in order to assist employees in bringing cases under the new law, the Fair Pay Act provides that employers cannot prohibit employees from (1) disclosing what they are paid; (2) discussing the pay rates of other employees; or (3) inquiring about the wages of other employees. However, employers have no

obligation under the new law to disclose information concerning other employees' wages. It also requires that records regarding the terms and conditions of employment — including but not limited to wages, wage rates and job classifications — be kept for a minimum of three years, up from the current two-year requirement.

Given these significant changes made by the Fair Pay Act, the question for employers is what steps should they consider to be in compliance with the law come the new year. Here are a few practical recommendations:

• **Conduct a wage audit.**

Conducting an audit of your company's wage data can be a proactive way of identifying a potential wage differential between male and female employees in the same or substantially similar jobs. Unlike the prior law, conducting an effective audit that is responsive to the new law requires the collection of more comparative data. For example, comparative data is no longer limited to the "same establishment" and must now include a comparison of data within a broader geographic region. Along with relevant criteria such as gender, compensation, job title, seniority and experience, other factors unrelated to gender may now be relevant under the new law.

Whereas market factors, such as demand or cost of living, were not relevant when comparing the pay of two employees in the same position at the same establishment, market factors unrelated to gender may now be relevant when comparing the pay of employees that work in different, but "substantially similar" jobs. This is because while two different positions may perform substantially similar work, for reasons unrelated to gender, differences in the number of qualified individuals available for one of those positions in a geographic market may result in differences in their compensation. Therefore, the market may view two "substantially similar" positions differently. Considering differences in the cost of living among the many geographic markets in California, employees with "substantially similar" positions at establishments in different markets may receive different pay. Whether market factors unrelated to gender will ultimately be considered by the courts to explain pay differences remains to be seen. However, those factors may arguably fall within the "working conditions" category of the new law.

Every wage audit will differ depending upon the particularities of the employer and the jobs to be analyzed. All audits should start with an initial assessment as to what positions will be considered "substantially similar" for purposes of comparison. Whether positions are substantially similar under the new law will depend upon an analysis of the composite skill, effort, responsibility and working conditions of those positions. Employers must now collect and maintain information on these factors to determine which employees are in similar jobs for comparison. One approach is to quantify each factor using an objective scale for comparison, e.g., from low (1) to high (5). Only those jobs that share a particular combination of scores will be considered "similar." Other analytical approaches may be appropriate and should be considered with an attorney. What approach or approaches will be deemed permissible under the new law again remains to be seen. It is important, however, to consult with an attorney before developing and applying criteria for a wage audit.

• **Review (and update) employee handbooks and compensation policies or practices.**

Employers should remove any reference in their employee handbooks to the law's prior "equal work" standard and update the language to comply with the new law. Employers should also ensure that there are no policies preventing employees from discussing or asking about other employees' compensation, as such policies are specifically prohibited under the law. Finally, employers should review their compensation policies and practices to ensure that compensation decisions are based on factors

unrelated to gender in compliance with the law.

• **Review (and update) job descriptions.**

The new law looks at substantially similar work performed under similar working conditions. If job descriptions are vague or incomplete, it could be easier for a court to conclude that such standards have been met. In identifying and setting out distinct job duties or working conditions, an employer will potentially be in a better position to defend different wage rates due to the dissimilarity between the positions at issue.

• **Keep good records.**

Not only do employers need to keep at least three years' worth of records, but those records should clearly identify what each employee's job classification, duties and wages are over the entire course of his or her employment. Moreover, if an employer pays different wages to individuals of the opposite sex based on the criteria identified above, those reasons should be applied reasonably and consistently across all employees. Records must be kept on a proactive basis to identify and explain how the factor or factors are applied to account for the pay difference.

• **Training.**

Make sure your HR personnel, senior management and anyone involved in hiring, promotion and wage increases are well-versed on the specifics of what is and is not allowed under the new law. Having everyone on the same page will help ensure there is consistency in wage rates across job classifications.

While the suggestions above are some steps employers can take, they do not make up an exhaustive list. Moreover, as the law does not take effect until the new year, and thus courts have not had the opportunity to speak on how the law's provisions will be defined and enforced, other recommended steps are not identifiable until the courts begin to interpret the new statutes. While this leads to uncertainty, and will not prevent employees from bringing suit come the new year, consulting with an attorney (now and into the new year) about what can be done to comply with the law, is a good place to start.

—By Michael Warren and Matthew Schechter, McManis Faulkner

Michael Warren is a partner at McManis Faulkner, where he heads the firm's labor and employment practice. He represents and counsels employers on a variety of workplace-related issues including wage and hour, discrimination, harassment, leaves of absence, disability accommodation, workplace investigations, employment policies and class actions.

Matthew Schechter is a partner at McManis Faulkner. He has a varied civil litigation practice with a particular emphasis in employment law.

The authors recognize Dr. Bo Martin, a statistician with Navigant, for his contribution to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.
All Content © 2003-2015, Portfolio Media, Inc.