

Bad Moon On The Rise: California's New Fair Pay Act

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Decrying a gender wage gap, the California Legislature has enacted amendments to the state's pay equity law that could potentially rewrite how pay discrimination cases are litigated in the Golden State. Prior law was modeled after the Federal Equal Pay Act, wherein an employer could look at the incumbents holding the same positions to assess whether men and women are paid equally, taking into account skill and experience. That regime proved too straight forward for Californians. In its place the legislature has enacted a scheme similar to the comparable worth models that were proposed in the 1970s. The new law will prohibit employers from paying any of its employees at wage rates less than the rates paid to employees of the opposite sex for "*substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions.*" The law does allow for pay differentials based upon seniority, "merit," quantitative or qualitative measures of production, or a bona fide factor other than sex, such as education, training, or experience, but only if the employer demonstrates 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.

In addition to placing an undue burden on employers to justify their pay practices, the vague language of the statute is likely to lead to a proliferation of litigation as plaintiffs challenge a variety of legitimate pay practices in an effort to contend that they are gender-based or not required by business necessity. Employers who must do business in California will want to consider reviewing their compensation structures to ensure they are in compliance with the new statute requirements.

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