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Ten years of California's Equal Pay Act

CALIFORNIA'S EFFORTS TO OVERHAUL THE EQUAL PAY ACT AND LESSEN THE PAY GAP FOR WOMEN AND PEOPLE OF COLOR

Economic security remains out of the grasp of many working women and people of color. The concept is simple – equal pay for equal work – yet the problem persists. The federal Equal Pay Act passed in 1963 to ban pay disparity for women nationwide, though California enacted its own version in 1949. Recognizing the continuation of the pay gap in California based on gender, race and ethnicity despite decades of laws banning such pay inequality, the California legislature over the last 10 years has sought to strengthen our Equal Pay Act ("EPA") and enact new laws to help level the playing field and shine a light on unequal pay practices. Once a mirror of the federal EPA, California's version includes many requirements that surpass the federal model. Unfortunately, the pay gap has not significantly narrowed, and efforts continue.

Recently, on March 24, 2025, the California Civil Rights Department ("CRD") published a report timed for release before the Equal Pay Day – the day which symbolizes when women's earnings catch up to the prior year's men's earnings. In truth, this date reflects white women's earnings compared to white men. In a 2023 study, the American Association of University Women reported that black women earn 66 cents for every dollar earned by white, non-Hispanic men and Latinas earn 58 cents for every dollar. The CRD reviewed the pay data of 170,000 employers reported in 2023 to conclude that pay disparities persist based on gender, race and ethnicity in California. Women and people of color continue to be in the lowest pay ranges.

Before 2015, California simply promoted "equal pay for equal work." In the years since then, the Legislature has employed new methods to combat the pay gap. This has opened the possibilities for using litigation to help equalize pay between genders, races, and ethnicities in California.

Pay disparity harms families and the state's economy. While some employers look for loopholes in the law, it also often results from unconscious biases and historic inequalities that California has attempted to address head on through the EPA amendments and enactment of complementary statutes such as pay data reporting.

Broadening the burden of proof and tightening affirmative defenses

Before 2015, the latest version of Labor Code section 1197.5 prohibited employers from paying an employee at a wage rate less than the rates paid to employees of the opposite sex in the same establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility and which were performed under similar working conditions. Four exceptions existed: for seniority systems, merit systems, a system which measured earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex.

Recognizing that women continued to make less than their male counterparts despite a ban on such practices since 1949, the amendments to Labor Code section 1197.5 effective in 2016 sought to strengthen the EPA by clarifying the burdens of proof. In 2025, the legislature worked on making the following modifications: (1) "comparable work" replaced "equal work"; (2) it eliminated the "same establishment" requirement; and (3) the bona fide factor other than sex defense now requires employers to prove a business necessity. The goal was to reinforce the EPA by eliminating loopholes. (There was an effort at the time to re-brand the statute, but decades of short-handing it as the EPA remain.)

Combatting retaliation

The amendments to Labor Code section 1197.5 effective in 2016 also toughened the EPA by specifically prohibiting retaliation against workers discussing wages with co-workers. The legislature sought to discourage pay secrecy by prohibiting retaliation and discrimination against employees who discussed their own wages. The amendment empowered women to share their pay without fear as pay disparity thrives in the dark.

A rebuttable presumption in favor of an employee's retaliation claim was added to the EPA in 2023. If an employer engages in any action prohibited by the EPA within 90 days of an employee's protected activity, there is now a rebuttable presumption in favor of the employee's claim. Suffering adverse employment actions has been cited as one of the main reasons workers fear reporting workplace discrimination and retaliation.

The death of salary history and promotion of publicized pay scales

During the 2016 session, the Legislature made a bold move – prohibiting the use of employee salary history information. The legacy of this practice is likely continuing to affect pay disparity. When employees move between jobs, employers in California used to be able to inquire about the applicant's prior compensation. This was often used by prospective employers to make compensation offers. The effect of this was to perpetuate the wage gap by carrying forward discriminatory pay from employer to employer.

The Legislature noted that the pay gap starts early in a woman's career. A report from the Institute for Women's Policy Research noted that the gender wage gap nationwide would not close until 2058, though some studies put that higher. The Legislature expressed concern that the slow rate of progress was due in part to a preservation of historical inequality through salary histories. Prior salary now cannot be used to justify any disparity in compensation.

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In 2017, Labor Code section 432.3 passed, bolstering the EPA. The new statute barred employers from relying upon prior salary history. Section 432.3 further required employers, upon reasonable request, to provide pay scales to applicants.

In 2018, the Legislature amended Labor Code section 432.3 to provide clarity. A "reasonable request" is now defined as after the completion of an initial interview. "Pay scale" was then defined as a salary or hourly wage range.

The Legislature subsequently overhauled Labor Code section 432.3 to require: (1) employers to provide pay scales to current employees upon request; (2) employers with 15 or more employees to include pay scales in any job posting, including job postings created by third parties; and (3) employers to maintain records of job title and wage history for each employee for the duration of employment plus three years. Failure to keep the required records creates a rebuttable presumption in favor of an employee's claim. Also in that amendment, the definition of "pay scale" was expanded to mean the salary or hourly wage range the employer reasonably expects to pay for the position.

Expansion to coverage based on race and ethnicity

Given that the pay gap historically affects non-white employees in greater disparity than white employees, in 2016 the Legislature expanded the EPA. The 2016 amendments prohibited employers from paying a wage rate less than the rate paid to employees of a different race or ethnicity for substantially similar work.

Application to public employees

The EPA was additionally amended to state specifically that it applies to public as well as private employers. A report from the California Department of Human Resources found female public employees earned 79.5 cents on the dollar.

A later amendment to the EPA also included the Legislature, the state, and local government employers from seeking salary history information about applications.

Reporting requirements

Government Code section 12999 was added in 2020 to require annual pay data reporting by private employers with 100 or more employees. In 2022, that was expanded to include workers hired through labor contractors. Within each job category, employers are now required to report by race, ethnicity and sex the median and mean hourly rate.

The reported pay data is not publicly available but the reporting allows state agencies to more proficiently identify wage patterns to allow for state enforcement of the EPA.

The future of California's Equal Pay Act

This year, the tenth anniversary of continuing efforts to enhance the EPA, new legislation is pending. The bill (SB 642-Limón) making its way through the Legislature seeks to: (1) revise the definition of "pay scale" in job postings to curb the potential for abuse where employers post largely meaningless pay scales with wildly large ranges of potential compensation; (2) clearly define "wages" to include compensation like stock options and profit sharing, echoing the federal EPA definition; (3) increase the statute of limitations to parallel the Fair Employment & Housing Act ("FEHA"); (4) codify the continuing violations doctrine as applicable to the EPA, as it is under FEHA; and (5) update binary gender language to refer to employees of "another" sex rather than "opposite" sex, as has been done in the FEHA.

The pay gap persists, and California continues to seek ways to encourage employers to ensure all workers are paid equal pay for comparable work.

The present EPA prima facie case

To establish liability in a pay-equity case, the plaintiff must demonstrate that: (1) the employee was paid less than individuals of another gender, race, or ethnicity; (2) the employee was performing work that was substantially similar to that of other individuals, considering the overall combination of skill, effort, and responsibility; and (3) the employee was working under similar conditions as the other individuals. (See CACI 2740.)

Demonstrating a wage disparity is a fundamental element of a plaintiff's case. In a single-plaintiff case, that requires the identification of one or more comparator employees of another sex, race or ethnicity, who were paid at a higher rate. Plaintiffs can also use statistics to establish a wage disparity, but that is a more common approach in class and representative actions.

The most recent discussion of California's EPA can be found in *Allen v. Staples* (2022) 84 Cal.App.5th 188. *Allen* followed a motion for summary judgment of an EPA cause of action granted in an employer's favor that was reversed on appeal. The EPA claim was based on a pay disparity between a female and male employee. In an EPA action, plaintiffs must not just show that they were paid lower wages than a comparator for substantially similar work, but that the worker has selected the proper comparator. The employer in *Allen* argued that the male comparator was paid a higher salary based on bona fide factors other than gender. The court of appeal held that the employer failed to provide evidence supporting bona fide factors other than sex led to the disparity between those two employees – the female plaintiff and the male comparator.

How California courts will interpret the second element, substantially similar work, remains an open question. "Substantially similar" clearly does not mean that jobs must be identical or require exactly the same duties. As interpreted by the California Labor Commissioner, substantially similar work is mostly similar in skill, effort, responsibility and performed under similar working conditions. Skill refers to experience, ability, education and training required to perform a job. Effort refers to the amount of physical or mental

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exertion needed to perform the job. Responsibility refers to the degree of accountability or duties required to perform the job.

Under the federal EPA jobs need not be identical to constitute equal work, only substantially equal. (*Hein v. Oregon College of Education* (9th Cir. 1983) 718 F2d 910, 913.) The parameters of substantially "equal" versus "similar" has yet to play out in California's appellate courts, but the California standard was meant to be broader. Keep in mind that the more regimented an employer's job classification system, the simpler it should be to identify comparators performing substantially similar work. How companies group employees together in job categories and salary ranges is significant to the analysis.

As to the third element, the labor commissioner has interpreted working conditions to mean the physical surroundings and hazards.

EPA affirmative defenses

If a plaintiff meets this burden of proof, employers can defend themselves using seniority or merit systems, production-based earnings measurements, or another bona fide factor like training, education, or experience. The factor relied upon by the employer must reasonably explain the entire wage gap. Prior salary cannot justify current pay disparity. (See CACI 2741.) The intent of California's EPA is to make it more difficult for employers to justify unequal pay across genders, race and ethnicities.

Bona fide factors other than sex, race or ethnicity can justify a pay differential only if the factor is: (1) not based on or derived from a sex/race/ethnicity-based differential in compensation; (2) is job related with respect to the position at issue; and (3) is consistent with business necessity. The business necessity must serve an overriding legitimate business purpose such that the factor effectively fulfills the business purpose it is meant to serve. A plaintiff can rebut an asserted explanatory factor by proving that an alternative business practice exists that would serve the same business purpose without producing a pay differential. (See CACI 2742.)

How an employer arrives at compensation on a macro level is a helpful starting place for determining whether an affirmative defense here has merit.

Litigating as class and representative actions

Equal Pay Act cases can also be brought as Private Attorney General Act ("PAGA") representative actions under Labor Code section 2698 et seq. and as class actions.

The Legislature has placed the EPA in the Labor Code, meaning it can be enforced through PAGA. While unpaid wages cannot be sought under PAGA, there is no need to demonstrate the elements of class certification and there is no delay in seeking the discovery necessary to demonstrate liability.

Recent examples of class-wide settlements in California include the *McCracken v. Riot Games, Inc.* settlement of $100 million for 1,447 class members, the *Ellis v. Google LLC* settlement for $118 million for 17,000 class members and the *Jewett v. Oracle America, Inc.* settlement for $25 million for 3,200 class members. Both the *Ellis* and *Jewett* cases had been certified as class actions, but the *Jewett* case was later decertified before it was settled. Hopefully these numbers encourage employers to reflect on and correct pay disparities in their organizations.

Key to litigating claims on a class and representative basis is an analysis of an employer's job classification system and practices. Litigating EPA cases on a class or representative basis largely relies on statistical analysis. Labor economists, statisticians and industrial organizational psychologists are often employed to assist with the analysis necessary to meet the burden of demonstrating commonality in class cases and liability in class and representative cases.

A labor economist can perform a regression analysis of the class data. A regression analysis is a statistical method used to model an organization's compensation system based on data regarding factors that may influence pay. It helps determine the extent to which various factors impact employees' compensation. An industrial organizational psychologist looks at job codes or families within an organization to identify substantially similar work.

The EPA and FEHA

Finally, consider the potential overlap with FEHA's anti-discrimination provisions. Think about whether including a discrimination claim in addition to an EPA claim will enhance your client's case. An employer may discriminatorily assign women a lower level of responsibility and salary range than men with comparable experience and education. Always keep in mind that in an EPA case, there is no need to prove intent. (*Green v. Par Pools, Inc.* (2003) 111 Cal.App.4th 620, 629.)

The Civil Rights Department (CRD) settled a FEHA discrimination and EPA case against Activision Blizzard for $54 million on behalf of direct employees and contract workers. The CRD alleged the employer discriminated by denying promotion opportunities and paying female workers less than men for doing substantially similar work.

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