Pacific Employers
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October 2015

WHAT'S NEWS!

NEW EQUAL PAY LAWS!!!!

Gov. Jerry Brown has signed Californina's "Fair Pay Act" what media observers call the nation's most aggressive attempt yet to close the salary gap between men and women, SB 358 will substantially broaden California gender pay differential laws.

The Equal Pay Act (29 U.S.C. § 206(d)) has been on the books since 1963. And California has its own gender pay equality law—Labor Code section 1197.5. But California lawmakers think these laws are not enough. According to the legislative intent section of SB 358, the current law contains "loopholes" that make it difficult to prove a claim. And many employees, unaware of existing California law that prohibits employers from banning wage disclosures and retaliating against employees for doing so, are still afraid to speak up about wage inequity.

What Difference Will SB 358 Make?

Current law, Labor Code section 1197.5, prohibits an employer from paying an employee less than employees of the opposite sex who perform the same job, requiring the same skill, effort, and responsibility, in the same establishment, under similar working conditions. Exempt from this prohibition are payments made pursuant to systems based on seniority, merit, or that measure earnings by quantity or quality of production; or differentials based on any bona fide factor other than sex.

SB 358, which its supporters call the "Fair Pay Act," which will become effective January 1, 2016. The "Fair Pay Act" will expand pay equity claims by removing the requirement that the pay differential be within the same "establishment," and will modify the "equal" and "same" job, skill, effort, and responsibility standard. The new standard will require only a showing of "substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions." These changes will dramatically lower the bar for an equal pay suit, permitting the plaintiff to compare herself with men working at any location for the same employer, and in any similar—and not the necessarily the same—job.

The "Fair Pay Act" will also require employers to affirmatively demonstrate that the wage differential is based entirely and reasonably upon one or more factors. The "Fair Pay Act" will add to the three existing system-based factors (seniority, merit, or production-based) a "bona fide factor": a factor that is not based on or derived from a sex-based differential in compensation, that is related to the position in question, and that is consistent with a "business necessity" (defined as "an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve"). The "bona fide factor" defense expressly does not apply if the plaintiff demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

The "Fair Pay Act" will also extend—from two years to three—the employers' obligation to maintain records of wages and wage rates, job classifications, and other terms of employment.

The "Fair Pay Act" also would remind employers that they are not to forbid employees to disclose their own wages, discuss others' wages, ask about others' wages, or aid or encourage other employees to exercise their rights under Labor Code section 1197.5. Labor Code section 232 already contains a similar prohibition, but does not specifically prohibit inquiring about the wages of other employees if the purpose of that inquiry is to exercise the right to equal pay for equal work. In a small nod to employers, the "Fair Pay Act" will not require them to disclose wages.

The "Fair Pay Act" will expressly prohibit employers from discharging, discriminating against, or retaliating against employees who invoke or assist in the enforcement of Labor Code section 1197.5. [PE]

2016 Vacation Scheduler Enclosed!

President's Report
~Dave Miller~

Panel of Experts

October is our Guest Speaker Seminar - Annually we bring you speakers for a timely discussion of labor relations, HR and safety issues of interest to the employer.

This year we will have a panel discussion on preparing for the law changes that take place on before Jan. 1, 2016. It will include the increase in the minimum wage, Obamacare for 50 or more employees and the new year implementation of the 3 day sick leave law; Equal Pay Laws; GHS Haz Com, Harassment & Bullying, the DOL crackdown on Independent Contractors, and the new Exemption rules from Washington.

Our panel will include Al Benoy, Dave Turney, Wayne Yada, Candice Weaver & Dave Miller.

See you at the Builders Exchange on Thursday, October 15th, 2015, 10 - 11:30am. [PE]

EEO-1 REPORT DEADLINE MOVED

The Equal Employment Opportunity Commission (EEOC) announced a new deadline for the 2015 EEO-1 reports. Employers now have until October 30, 2015, to file the reports. The original deadline was September 30.

Federal law requires all private employers with 100 or more employees to file the federal EEO-1 report annually. In addition, all federal government contractors and subcontractors with a contract of $50,000 or more and with 50 or more employees must file EEO-1 reports.

The survey requires company employment data to be categorized by race/ethnicity, gender and job category.

Visit the EEOC's EEO-1 survey website for EEO-1 reference documents, including the sample form, instructions, Q&As, a fact sheet and the EEO-1 Job Classification Guide. The website also lists important changes for the 2015 EEO-1 survey. http://www.eeoc.gov/employers/eeo1survey/index.cfm

Contact the EEO-1 Joint Reporting Committee at 866-392-4647 (toll-free) or via e-mail at e1.techassistance@eeoc.gov if your business:

- Meets the criteria above but had not received a 2015 EEO-1 notification letter by the end of August 2015;
- Filed an EEO-1 report in 2014 but did not receive the 2015 EEO-1 notification letter; or
- Has questions about the EEO-1 survey. [PE]

"Democracy is the worst form of government, except for all the others."
--- Winston Churchill ---

Recent Developments

Gov Brown Signs Job Protections for Grocery Workers

Gov. Jerry Brown signed a bill that requires that large grocery stores keep their workers for at least 90 days after a change in store ownership.

Assemblywoman Lorena Gonzalez (D-San Diego) said her measure protects grocery workers from losing their jobs in the event of a corporate merger.

"THE BILL WAS STRONGLY BACKED BY LABOR GROUPS, . . ."

"Wall Street mergers and acquisitions that make big money for corporations and private equity firms should not jeopardize jobs of the grocery workers who live and work in our communities," said Gonzalez in a statement. "This is a common sense opportunity to save people's jobs and make sure the most-experienced, best-prepared workers stay on the job during a complicated transition period."

The bill was strongly backed by labor groups, including the United Food and Commercial Workers, which represents grocery workers.

Business groups opposed the bill, arguing that it would force a company to keep its predecessor's employees and adhere to contracts that the new owner did not negotiate. The California Chamber of Commerce labeled the measure, AB 359, a "job killer." [PE]

No Anxiety and Stress Caused by a Supervisor's "Standard Oversight"

Michaelin Higgins-Williams worked for Sutter Medical Foundation as a clinical assistant. She reported to an immediate supervisor, who in turn, reported to a regional manager. Higgins-Williams reported to her treating physician that she was stressed because of her interactions with human resources and her manager. Her physician diagnosed her with having adjustment disorder with anxiety, and specifically noted that her stress resulted from "dealing with her Human Resources and her manager."

After exhausting her available leave entitlements under the California Family Rights Act (CFRA) and the Family Medical Leave Act (FMLA), Higgins-Williams briefly returned to work and was given a negative performance evaluation by her supervisors. Shortly thereafter, Higgins-Williams submitted an accommodation request for a transfer to a different department and a leave of absence through October 2010. Sutter eventually extended Higgins-Williams' leave into January 2011, and her treating physician represented that she could not work in the same department as the regional manager, but could return to work "without limitations" if she worked under different supervisors.

". . SHE WAS REQUIRED TO ESTABLISH THAT SHE SUFFERED FROM A MENTAL DISABILITY"

Thereafter, Higgins-Williams' physician informed Sutter that she could not return to work and asked that she be placed on light duty to start two months later. Sutter responded by informing Higgins-Williams that her physician did not provide any information about when she could return to work as a clinical assistant, that there was no information to support a conclusion that additional leave would ultimately lead to her return as a clinical assistant, and that if she did not provide such information within a week, she would be terminated. When Sutter did not receive this information by the deadline, it terminated Higgins-Williams.

Higgins-Williams alleged four causes of actions under the California Fair Employment and Housing Act (FEHA) relating to her mental disability, including disability discrimination, failure to engage in the interactive process, retaliation, and wrongful termination. Sutter Medical Foundation filed a motion for summary judgment, which the trial court granted. Higgins-Williams appealed, and the Court of Appeal affirmed.

For each of Higgins-Williams' causes of action, she was required to establish that she suffered from a mental disability. A qualifying "mental disability" under FEHA includes "any mental or physiological disorder…such as…emotional or mental illness" that "limits a major life activity." In order to establish a prima face case of mental disability discrimination under FEHA, a plaintiff must show that (1) she suffers from a mental disability; (2) she is otherwise qualified to do the job with or without reasonable accommodation; and (3) she was subjected to an adverse employment action because of the disability.

Relying on past precedent, the Court of Appeal held that an employee's inability to work for a particular supervisor because of anxiety and stress related to standard supervision regarding the employee's job performance is not a covered disability under FEHA. Given the ruling that Higgins-Williams did not have a FEHA-qualifying mental disability, each of her claims failed.

On occasion, public employees claim that they cannot continue to work for a particular supervisor or manager due to stress or anxiety that the supervisor allegedly is causing the employee. This case clearly holds that anxiety or stress caused by a supervisor's "standard oversight" of the employee's job performance is not a recognized disability. Accordingly, a public employer generally does not have to accommodate an employee who requests a transfer to a different supervisor due to stress or anxiety that the employee's current supervisor is causing the employee. Employers should keep in mind that this case analyzed "standard oversight" of the employee's job performance as opposed to the supervisor allegedly engaging in some type of misconduct towards the employee, such as harassment. In addition, employers should remain sensitive to the "big picture" and carefully consider any request for an accommodation before determining that the request is not reasonable, or that the alleged disability that triggered the request is not a recognized disability under state or federal law.

Higgins-Williams v. Sutter Medical Foundation (2015) 237 Cal.App.4th 78. [PE]

Human Resources Question with Candice Weaver

The Month's Best Question

New Hire Checklist

Q: "I am new in business and am not familiar with the issues I should address when I hire a new employee. What employment practices should I consider?"

A: Speaking with new employers, I am made aware of the overwhelming confusion those new in business have in setting up employment policies in California. While it can be a daunting task, I recommend that the key approach is a systematic process. With a system in place, compliance can be very easy. There are many issues employers need to review, but here are the ones on the top of my list:

New Hire Process And Packets

Employers should review their hiring process, including:

- New hire documents (have a consistent package given to each new hire)
- Terms to include in offer letters

Be careful about the use of background checks.

Meal And Rest Breaks

California employers are still being sued for meal and rest break violations. This should be a primary concern for all California employers, and simply part of standard operating procedures clearly stated in the employee handbook.

Paid Sick Leave Compliance

Since July 1, 2015, employers must provide employees paid sick leave under California law.

The basic entitlement is 3 days or 24 hours of sick leave granted annually, or earned at the rate of 1 hour for every 30 hours worked.

Exempt Vs. Non-Exempt Employee Classifications

Know the difference between exempt and non-exempt employees and the analysis that is required in order for an employee to qualify as exempt. There are many different exemptions.

If non-exempt, review to ensure the appropriate overtime is being paid at the proper rate, and that all overtime is being paid for work done over eight hours in a day and 40 straight time hours in a week. Also be aware of the potential problems of paying a salary to a non-exempt employee.

Uncompensated Work-Time

Employers need to be careful and have policies in place to address claims from employees that they were not paid for all time worked. These claims can take many different forms:

- Travel time
- Off-the-clock work
- On-call time
- Pre-shift or post-shift work. [PE]

Dinner for 2 at the *Vintage Press!*

That's right! When a business that you recommend joins Pacific Employers, we treat you to dinner for two at the *Vintage Press.*

Call 733-4256 or 1-800-331-2592.

No-Cost Employment Seminars

Pacific Employers hosts this Seminar Series at the Builders Exchange at 1223 S. Lover's Lane at Tulare Avenue, Visalia, CA. RSVP to Pacific Employers at 733-4256.

These mid-morning seminars include refreshments and handouts.

2015 Topic Schedule

♦ **October is our Guest Speaker Seminar - Annually we bring you a speaker for a timely discussion of labor relations, HR and safety issues of interest to the employer. This year we will have a panel discussion on preparing for the law changes that take place on before Jan. 1, 2016. It will include the increase in the minimum wage, Obamacare for 50 or more employees and the new year implementation of the 3 day sick leave law; Equal Pay Laws; GHS Haz Com, Harassment & Bullying, the DOL crackdown on Independent Contractors, and the new Exemption rules from Washington.**

Thursday, October 15th, 2015, 10 - 11:30am

♦ **Discipline & Termination -** The steps to take before termination. Managing a progressive correction, punishment and termination program.

Thursday, November 19th, 2015, 10 - 11:30am

NOTE - There is No Seminar in December

Sexual Harassment & Abusive Conduct Training

Visalia Chamber of Commerce & Pacific Employers, will host a Supervisors' Sexual Harassment & Abusive Conduct Prevention Training Seminar & Workshop with a continental breakfast on October 21st, registration at 7:30am Seminar 8:00 to 10:00am, at the Lamp Liter, Visalia.

RSVP Visalia Chamber - 734-5876

PE & Chamber Members $35

Non-members $50

Certificate – Forms – Guides – Full Breakfast

2016 Vacation Scheduler Enclosed!

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Articles in this Newsletter have been extracted from a variety of technical sources and are presented solely as matters of general interest to employers. They are not intended to serve as legal opinions, and should not be deemed a substitute for the advice of proper counsel in appropriate situations.

Cement Masons Union Settles Whistle-blower Suit

Federal officials in Los Angeles say trustees for a Southern California cement masons union and their administrative firm will pay $630,000 to settle a whistle-blower lawsuit.

The suit accused officials with Cement Masons Union Local 600 in Bell Gardens of firing three employees for speaking up about alleged financial wrongdoing by the labor organization's leader.

In announcing the settlement, the U.S. Department of Labor said the money will be paid to the former employees in lost wages and damages.

The Los Angeles Times reports the official accused of wrongdoing, business manager Scott Brain, remains a defendant in a separate civil suit. A trial is set for February. [PE]

Company To Pay $200,000 For Allegedly Unlawful Pre-Hire Medical Exams

Celadon Trucking Services, Inc., a trucking company, has agreed to pay $200,000 to settle a disability discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC).

The lawsuit, EEOC v. Celadon Trucking Services, Inc., alleged that the company violated the Americans with Disabilities Act (ADA) by subjecting applicants to medical examinations before making a conditional offer of employment and by discriminating against applicants based on disability or perceived disability.

Judge Sarah Evans Barker ruled that Celadon violated the ADA by conducting unlawful medical inquiries and examinations of applicants for over-the-road truck driving positions. The Court also determined that two of the class members were qualified for the truck driving position, but Celadon dismissed them from driver orientation program because of their disabilities in violation of the ADA. [PE]

Obama Orders Paid Sick Leave for Fed Contractors

On Labor Day, President Obama signed an executive order mandating up to seven days of paid sick leave a year for the employees of federal contractors and subcontractors.

According to a fact sheet released by the administration, the mandate will provide approximately 300,000 people working on federal contracts with paid sick leave.

The paid sick leave mandate will not be effective until 2017, and the Department of Labor must issue regulations first.

Workers will earn a minimum of one hour of paid sick leave for every 30 hours worked. This is the same statutory accrual rate that California employers can use, although California law also provides other accrual options.

Contractors will be allowed to cap the total amount of accrued paid sick leave per year at 56 hours. In California, employers can cap the total amount accrued at 6 days or 48 hours and can also limit use of paid sick leave in any one year to three days or 24 hours.

Workers can use the time off for themselves or a family member, as defined. Similar to California law, the paid sick leave mandate also applies to absences resulting from domestic violence, sexual assault or stalking.

The executive order states that "it does not supersede other federal, state or local laws or collective bargaining agreements that provide greater benefits." Accordingly, beginning in 2017, employers with covered federal contracts will need to take a close look at how to apply federal law along with any California and municipal requirements. [PE]

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