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California Adopts Nation's Toughest Equal Pay Protections

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Jennifer Lawrence may be Hollywood's highest-paid actress, according to *Forbes* magazine. But in a recent essay published in Lena Dunham's e-newsletter "Lenny Letter," the Oscar-winner describes how she learned, through the 2014 Sony email hack, that she was paid less than her male co-stars in the 2013 film, "American Hustle." The *Los Angeles Times* reported that Lawrence was paid only 7% of the film's profits, while Bradley Cooper and two other male co-stars each earned 9%.

This kind of gender-pay inequity is the subject of California's Fair Pay Act (the "Act"), which was signed into law by California Governor Jerry Brown just last month. The Act seeks to narrow the compensation gap between men and women in California by making various changes to strengthen California's existing Equal Pay Act. It applies to both public and private businesses and is said to be one of the toughest equal pay laws in the country.

What do employers need to know about the new law?

1. It Lowers the "Equal Pay for Equal Work" Standard to "Equal Pay for Substantially Similar Work": Both California and the federal government have laws banning employers from paying female employees less than men "in the same establishment" for performing "equal work," with some exceptions. *See* Cal. Lab. Code § 1197.5(a). These exceptions include: "where the payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex." *Id.*

The new California law broadens the general prohibition prohibition by stating that employer cannot pay employees less than those of the opposite sex for "***substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions*** . . . ." (emphasis added). The Act also eliminates the requirement that the wage differential be within "the same establishment."

2. It Creates New Protections for Employees: Next, the Act creates more employee protections by specifically prohibiting employers from discharging, or in any manner discriminating or retaliating against, any employee who invokes or assists in the enforcement of the Act's provisions, discloses his or her own wages, discusses others' wages, or seeks information about another's wages. The Act also clarifies the employee's right to bring a civil action seeking reinstatement and reimbursement for lost wages and benefits, as well as appropriate equitable relief, for any such discrimination or retaliation, and sets forth a one-year statute of limitations for these types of claims.
3. It Imposing a Heavier Burden of Proof on Employers: On the employer side, the Act imposes a heavier on those sued by employees by requiring an affirmative demonstration that any wage differential is based upon a seniority system, a merit system, a system that measures earnings by quality or quantity of production, or "a bona fide factor other than sex, such as education training, or experience," and which "is job related with respect to the position in question" and "consistent with a business necessity." In addition, the employer must further demonstrate that "[e]ach factor relied upon is applied reasonably," and that "[t]he one or more factors relied upon account for the entire wage differential."

4. It Increases Recordkeeping Requirements: Finally, the Act extends the duration of the employer's recordkeeping requirements from the two-year period under existing law to three years.

What can employers do to protect themselves?

The biggest concern about California's new law is the potential for increased litigation against employers. In order to minimize this risk, employers should survey employee job duties and pay practices across the business to ensure that any pay disparities are justified under the new law. Further, employers should clearly articulate and document the legitimate business reasons justifying these pay differentials, such as prior work experience, training, seniority, market factors, and/or the employer's financial condition. prior work experience, training, education, seniority, market factors, and the employer's. Employers should also review all policies and procedures related to employee compensation to ensure that criteria for determining compensation are objective and reasonable. Finally, employers should review all employee handbooks and written policies related to the confidentiality of pay information to ensure that employees are not prohibited from disclosing, discussing, or inquiring about their own wages or the wages of other employees.