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## Employment Law Bulletin

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### California Fair Pay Act Protections Expand To Include Race and Ethnicity

Effective January 1, 2017, the Fair Pay Act (FPA) expanded to protect employees on the basis of race and ethnicity in addition to gender. Employers must not only know the Act, but be familiar with their workforce and how the law affects their company's wage structure. Don't be taken by surprise – the FPA does not just mean equal pay for equal work. Rather, it more broadly requires employers to pay the same wage to employees who do substantially similar work unless there are *bona fide factors* to justify a pay differential. Bona fide factors include seniority or merit systems or any other job related factor that is consistent with "business necessity" such as education, training or experience. Employers should also be aware that employees with different job titles or work locations can be compared to one another when considering whether an employee is being paid fairly.

To avoid the ripple effect of pay discrimination continuing from one employer to the next, the FPA makes clear that an employer cannot justify a pay differential on the basis of an employee's prior pay without other factors. Employers are also forbidden from attempting to comply with the law by lowering a current employee's pay to match a new employee's pay. In order to justify a pay differential based in part on prior pay, there must be some other bona fide factor that impacted the employer's decision. This means that employers will need to consider whether bona fide factors exist for any pay differentials between new and current employees and if not, whether current employee pay should be increased in order to comply with the law.

How do you avoid claims under the FPA? Start with a thorough audit of the company's pay structure according to the protected status composition of the workforce and comparable job descriptions. Second, pinpoint jobs that are similar and examine the reasons any pay differentials exist. If there are discrepancies and the numbers appear to be tied to gender, race or ethnicity instead of job-related factors like education, experience and skills, check the history of the pay practice and the reasons for the rate. You will need to identify the bona fide factors for supporting any pay differential among employees doing substantially similar work, and document those factors in the employee's personnel file. Going forward, employers should create lists of bona fide factors that apply to the entry level positions and use them in the hiring process and document any time bona fide factors are identified when deciding pay for an individual employee. Another way to help avoid claims is to stop asking job applicants for their salary history and instead request salary expectations. Finally, keep records. The FPA requires employers to keep records of wages, rates of pay, job classifications, and conditions of employment for a minimum of three years.

Following the guidelines and practices described above will help employers properly screen applicants and help avoid any potential prior pay-related wage claims under the FPA. If you have questions or need help in reviewing your pay structure, please contact us. We're here to help.

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