

# California Workplace Law Blog

Insight & Commentary on California Workplace Law Issues & Developments

## New California Law Eases Employees' Burdens in Proving Gender-Based Pay Claims and Creates Additional Protections for Employees to Discuss Their Wages

By [Conor J. Dale](#) on October 7, 2015

On October 6, 2015 Governor Jerry Brown signed Senate Bill 358 ("SB 358"), a law that substantially eases California employees' burden in proving gender-based pay claims. This law also increases the number of years that employers must retain employee records, and creates additional protections for employees who wish to discuss or disclose their wages.

### 1. California's Previous Equal Pay Laws

California has a long history of prohibiting gender-based pay disparities. California Labor Code § 1197.5 prevents employers from paying an employee "at wage rates 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..." To prove a claim under § 1197.5, an employee had to prove that a member of the opposite sex working "in the same establishment" earned more for equal work on jobs that require equal skill, effort, and responsibility; an employer could defend this practice by showing the pay difference was based on a factor unrelated to gender such as seniority.

The California Legislature determined that this "statutory language makes it difficult to establish a successful" equal pay claim. As a result, it passed SB 358 to improve "the state's equal pay provisions..." The new law takes three significant steps to achieve this goal: (1) amending § 1197.5; (2) increasing the number of years that an employer has to retain employee records; and (3) creating additional protections for employees who wish to disclose or discuss their wages.

### 2. Equal Pay Claims

SB 358 amends Labor Code § 1197.5 by prohibiting employers from paying employees less than a member of the opposite sex for “substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions...” This revised language appears to make it easier for an employee to establish an equal pay claim by only requiring an employee to prove that he or she is getting paid less for “substantially similar,” rather than “equal” work. SB 358 does not define the “substantially similar” standard, and also eliminates the “same establishment” requirement of § 1197.5.

The new law also increases the burden on an employer to explain the pay differential between employees. Previously, an employer only needed to prove that the pay difference was based on “a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or...any bona fide factor other than sex.”

An employer can still defend pay differentials through these reasons. However, it can only avoid liability by establishing that “[e]ach factor relied upon is applied reasonably” and that “one or more factors relied upon account for the *entire* wage differential.” To defend the wage differential through some other “bona fide factor other than sex,” an employer must also demonstrate that “the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the business in question, and is consistent with a business necessity.”

SB 358 allows employees to pursue an equal pay claim by submitting an administrative complaint with California’s Division of Labor Standards Enforcement or filing a civil lawsuit. An employer also cannot retaliate against an employee for exercising his or her rights under this law.

An employee who successfully proves an equal pay claim may recover backpay, a liquidated damages award equal to the backpay recovery, interest, and any costs and attorneys’ fees incurred in pursuing the action.

### 3. Recordkeeping

Current California law requires employers to maintain the records of employee wages “job classifications, and other terms and conditions of employment” for two years. SB 358 increases this period to **three** years.

### 4. Pay Disclosures and Retaliation

The California Legislature finally determined that pay secrecy “contributes to the gender wage gap,” and that while “California law prohibits employers from banning wage disclosures and retaliating against employees for engaging in this activity, in practice many employees are unaware of these protections and others are afraid to exercise these rights due to potential retaliation.”

As a result, SB 358 expressly forbids employers from prohibiting “an employee from disclosing the employee’s own

wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to" discuss or disclose wages. However, importantly, the law expressly states that "[n]othing in this section creates an obligation to disclose wages."

An employee can file a civil lawsuit or an administrative complaint with California's Division of Labor Standards Enforcement if the employee "has been discharged, discriminated, or retaliated against" for discussing, questioning, or disclosing employee wages. An employee may obtain reinstatement, backpay and interest for bringing a successful retaliation claim under this law.

## 5. Conclusion

SB 358 goes into effect on January 1, 2016. Employers should review their pay policies to ensure compliance with this law, and be prepared to face more frequent questions from employees regarding their wages. Please contact the Jackson Lewis attorney with whom you regularly work for additional information on SB 358 and its impact on employers.