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AB-1676 Employers: wage discrimination. (2015-2016)

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Assembly Bill No. 1676

CHAPTER 856

An act to amend Section 1197.5 of the Labor Code, relating to employers.

[Approved by Governor September 30, 2016. Filed with Secretary of State September 30, 2016.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1676, Campos. Employers: wage discrimination.

Existing law generally prohibits an employer 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, and which are performed under similar working conditions. Existing law establishes exceptions to that prohibition, including, among others, where the payment is made based on any bona fide factor other than sex, such as education, training, or experience. Existing law makes it a misdemeanor for an employer or other person acting either individually or as an officer, agent, or employee of another person to pay or cause to be paid to any employee a wage less than the rate paid to an employee of the opposite sex as required by these provisions, or who reduces the wages of any employee in order to comply with these provisions. Existing law also makes it a misdemeanor for an employer to refuse or neglect to comply with the above provisions of law.

This bill would specify that prior salary cannot, by itself, justify any disparity in compensation under the bona fide factor exception to the above prohibition. By changing the definition of an existing crime, this bill would impose a state-mandated local program.

This bill would incorporate additional changes in Section 1197.5 of the Labor Code proposed by SB 1063 that would become operative only if SB 1063 and this bill are both chaptered and become effective on or before January 1, 2017, and this bill is chaptered last.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: yes

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) Over the past decade, the wage gap has barely budged and wage disparities continue to persist. In 2015, the gender wage gap in California stood at 16 cents on the dollar. For women of color, wage inequality is much worse. African American women in California make just 63 cents and Hispanic women less than 43 cents for every dollar white non-Hispanic men make.

(b) The problematic practices of seeking salary history from job applicants and relying on prior salary to set employees' pay rates contribute to the gender wage gap by perpetuating wage inequalities across the occupational spectrum. Women are paid less than men in 99.6 percent of occupations and are more likely to face financial penalties for taking time out of the paid workforce due to childbearing and family caregiving responsibilities.

(c) When employers make salary decisions during the hiring process based on prospective employees' prior salaries or require women to disclose their prior salaries during salary negotiations, women often end up at a sharp disadvantage and historical patterns of gender bias and discrimination repeat themselves, causing women to continue earning less than their male counterparts.

(d) Government officials have recognized the discriminatory impact that prior salaries can have on women in the job market. In 2015, on Equal Pay Day, the Chair of the Equal Employment Opportunity Commission (EEOC) advised employers on important steps they could take to ensure equal pay for equal work, including eliminating "discriminatory pay gaps on the basis of prior salary" and the 2005 EEOC Compliance Manual states that "[p]rior salary cannot, by itself, justify a compensation disparity."

(e) In July of 2015, the acting director of the federal Office of Personnel Management provided guidance on advancing pay equality in the federal government, warning that reliance on salary history "could potentially adversely affect a candidate who is returning to the workplace after having taken extended time off from his or her career or for whom an existing rate of pay is not reflective of the candidate's current qualifications or existing labor market conditions."

(f) Courts also have warned against relying on salary history and have stated that prior salary cannot, by itself, justify a wage disparity. In *Corning Glass Works v. Brennan*, (1974) 417 U.S. 188, the United States Supreme Court held that a pay differential which "ar[ises] simply because men would not work at the low rates paid women ... and reflect[s] a job market in which [the employer] could pay women less than men for the same work" is not based on a cognizable factor other than sex under the Equal Pay Act (Public Law 88-38) (Id., at p. 205). More recently, in *Rizo v. Yovino*, Fresno County Superintendent of Schools, United States District Court, Eastern District of California, Case No. 1:14-cv-0423-MJS, the district court denied summary judgment on defendant's motion under the federal Equal Pay Act based on its finding that, "a pay structure based exclusively on prior wages is so inherently fraught with the risk — indeed, here, the virtual certainty — that it will perpetuate a discriminatory wage disparity between men and women that it cannot stand, even if motivated by a legitimate non-discriminatory business purpose." (Id., at p. 16). The court went on to explain that, "say[ing] an otherwise unjustified pay differential between women and men performing equal work is based on a factor other than sex because it reflects historical market forces which value the equal work of one sex over the other perpetuates the market's sex-based subjective assumptions and stereotyped misconceptions Congress passed the Equal Pay Act to eradicate." (Id., at p. 17).

(g) This act will codify existing law with respect to the provision stating that prior salary cannot, by itself, justify a wage differential under Section 1197.5 of the Labor Code.

(h) This act will also help ensure that both employers and workers are able to negotiate and set salaries based on the requirements, expectations, and qualifications of the person and the job in question, rather than on an individual's prior earnings, which may reflect widespread, longstanding, gender-based wage disparities in the labor market.

SEC. 2. Section 1197.5 of the Labor Code is amended to read:

1197.5. (a) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates:

(1) The wage differential is based upon one or more of the following factors:

(A) A seniority system.

(B) A merit system.

(C) A system that measures earnings by quantity or quality of production.

(D) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph, "business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

(2) Each factor relied upon is applied reasonably.

(3) The one or more factors relied upon account for the entire wage differential. Prior salary shall not, by itself, justify any disparity in compensation.

(b) Any employer who violates subdivision (a) is liable to the employee affected in the amount of the wages, and interest thereon, of which the employee is deprived by reason of the violation, and an additional equal amount as liquidated damages.

(c) The Division of Labor Standards Enforcement shall administer and enforce this section. If the division finds that an employer has violated this section, it may supervise the payment of wages and interest found to be due and unpaid to employees under subdivision (a). Acceptance of payment in full made by an employer and approved by the division shall constitute a waiver on the part of the employee of the employee's cause of action under subdivision (g).

(d) Every employer shall maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment of the persons employed by the employer. All of the records shall be kept on file for a period of three years.

(e) Any employee may file a complaint with the division that the wages paid are less than the wages to which the employee is entitled under subdivision (a) or that the employer is in violation of subdivision (j). The complaint shall be investigated as provided in subdivision (b) of Section 98.7. The division shall keep confidential the name of any employee who submits to the division a complaint regarding an alleged violation of subdivision (a) or (j) until the division establishes the validity of the complaint, unless the division must abridge confidentiality to investigate the complaint. The name of the complaining employee shall remain confidential if the complaint is withdrawn before the confidentiality is abridged by the division. The division shall take all proceedings necessary to enforce the payment of any sums found to be due and unpaid to these employees.

(f) The department or division may commence and prosecute, unless otherwise requested by the employee or affected group of employees, a civil action on behalf of the employee and on behalf of a similarly affected group of employees to recover unpaid wages and liquidated damages under subdivision (a), and in addition shall be entitled to recover costs of suit. The consent of any employee to the bringing of any action shall constitute a waiver on the part of the employee of the employee's cause of action under subdivision (g) unless the action is dismissed without prejudice by the department or the division, except that the employee may intervene in the suit or may initiate independent action if the suit has not been determined within 180 days from the date of the filing of the complaint.

(g) Any employee receiving less than the wage to which the employee is entitled under this section may recover in a civil action the balance of the wages, including interest thereon, and an equal amount as liquidated damages, together with the costs of the suit and reasonable attorney's fees, notwithstanding any agreement to work for a lesser wage.

(h) A civil action to recover wages under subdivision (a) may be commenced no later than two years after the cause of action occurs, except that a cause of action arising out of a willful violation may be commenced no later than three years after the cause of action occurs.

(i) If an employee recovers amounts due the employee under subdivision (b), and also files a complaint or brings an action under subdivision (d) of Section 206 of Title 29 of the United States Code which results in an additional recovery under federal law for the same violation, the employee shall return to the employer the amounts recovered under subdivision (b), or the amounts recovered under federal law, whichever is less.

(j) (1) An employer shall not discharge, or in any manner discriminate or retaliate against, any employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of this section. An employer shall not prohibit 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 exercise his or her rights under this section. Nothing in this section creates an obligation to disclose wages.

(2) Any employee who has been discharged, discriminated or retaliated against, in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this section may recover in a civil action reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, including interest thereon, as well as appropriate equitable relief.

(3) A civil action brought under this subdivision may be commenced no later than one year after the cause of action occurs.

SEC. 2.5. Section 1197.5 of the Labor Code is amended to read:

1197.5. (a) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates:

(1) The wage differential is based upon one or more of the following factors:

(A) A seniority system.

(B) A merit system.

(C) A system that measures earnings by quantity or quality of production.

(D) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph, "business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

(2) Each factor relied upon is applied reasonably.

(3) The one or more factors relied upon account for the entire wage differential. Prior salary shall not, by itself, justify any disparity in compensation.

(b) An employer shall not pay any of its employees at wage rates less than the rates paid to employees of another race or ethnicity for substantially similar work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions, except where the employer demonstrates:

(1) The wage differential is based upon one or more of the following factors:

(A) A seniority system.

(B) A merit system.

(C) A system that measures earnings by quantity or quality of production.

(D) A bona fide factor other than race or ethnicity, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a race- or ethnicity-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph, "business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfills the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

(2) Each factor relied upon is applied reasonably.

(3) The one or more factors relied upon account for the entire wage differential. Prior salary shall not, by itself, justify any disparity in compensation.

(c) Any employer who violates subdivision (a) or (b) is liable to the employee affected in the amount of the wages, and interest thereon, of which the employee is deprived by reason of the violation, and an additional equal amount as liquidated damages.

(d) The Division of Labor Standards Enforcement shall administer and enforce this section. If the division finds that an employer has violated this section, it may supervise the payment of wages and interest found to be due and unpaid to employees under subdivision (a) or (b). Acceptance of payment in full made by an employer and approved by the division shall constitute a waiver on the part of the employee of the employee's cause of action under subdivision (h).

(e) Every employer shall maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment of the persons employed by the employer. All of the records shall be kept on file for a period of three years.

(f) Any employee may file a complaint with the division that the wages paid are less than the wages to which the employee is entitled under subdivision (a) or (b) or that the employer is in violation of subdivision (k). The complaint shall be investigated as provided in subdivision (b) of Section 98.7. The division shall keep confidential the name of any employee who submits to the division a complaint regarding an alleged violation of subdivision (a), (b), or (k) until the division establishes the validity of the complaint, unless the division must abridge confidentiality to investigate the complaint. The name of the complaining employee shall remain confidential if the complaint is withdrawn before the confidentiality is abridged by the division. The division shall take all proceedings necessary to enforce the payment of any sums found to be due and unpaid to these employees.

(g) The department or division may commence and prosecute, unless otherwise requested by the employee or affected group of employees, a civil action on behalf of the employee and on behalf of a similarly affected group of employees to recover unpaid wages and liquidated damages under subdivision (a) or (b), and in addition shall be entitled to recover costs of suit. The consent

of any employee to the bringing of any action shall constitute a waiver on the part of the employee of the employee's cause of action under subdivision (h) unless the action is dismissed without prejudice by the department or the division, except that the employee may intervene in the suit or may initiate independent action if the suit has not been determined within 180 days from the date of the filing of the complaint.

(h) An employee receiving less than the wage to which the employee is entitled under this section may recover in a civil action the balance of the wages, including interest thereon, and an equal amount as liquidated damages, together with the costs of the suit and reasonable attorney's fees, notwithstanding any agreement to work for a lesser wage.

(i) A civil action to recover wages under subdivision (a) or (b) may be commenced no later than two years after the cause of action occurs, except that a cause of action arising out of a willful violation may be commenced no later than three years after the cause of action occurs.

(j) If an employee recovers amounts due the employee under subdivision (c), and also files a complaint or brings an action under subdivision (d) of Section 206 of Title 29 of the United States Code which results in an additional recovery under federal law for the same violation, the employee shall return to the employer the amounts recovered under subdivision (c), or the amounts recovered under federal law, whichever is less.

(k) (1) An employer shall not discharge, or in any manner discriminate or retaliate against, any employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of this section. An employer shall not prohibit 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 exercise his or her rights under this section. Nothing in this section creates an obligation to disclose wages.

(2) Any employee who has been discharged, discriminated or retaliated against, in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this section may recover in a civil action reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer, including interest thereon, as well as appropriate equitable relief.

(3) A civil action brought under this subdivision may be commenced no later than one year after the cause of action occurs.

SEC. 3. Section 2.5 of this bill incorporates amendments to Section 1197.5 of the Labor Code proposed by both this bill and Senate Bill 1063. It shall only become operative if (1) both bills are enacted and become effective on or before January 1, 2017, (2) each bill amends Section 1197.5 of the Labor Code, and (3) this bill is enacted after Senate Bill 1063, in which case Section 2 of this bill shall not become operative.

SEC. 4. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.