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SB-358 Conditions of employment: gender wage differential. (2015-2016)

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Senate Bill No. 358

CHAPTER 546

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

[Approved by Governor October 06, 2015. Filed with Secretary of State October 06, 2015.]

LEGISLATIVE COUNSEL'S DIGEST

SB 358, Jackson. Conditions of employment: gender wage differential.

Existing law regulates the payment of compensation to employees by employers and prohibits an employer from conditioning employment on requiring an employee to refrain from disclosing the amount of his or her wages, signing a waiver of the right to disclose the amount of those wages, or discriminating against an employee for making such a disclosure.

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 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. 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.

This bill would revise that prohibition to eliminate the requirement that the wage differential be within the same establishment, and instead would prohibit an employer from paying any of its employees at wage rates less than those paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility, as specified. The bill would revise and recast the exceptions to require the employer to affirmatively demonstrate that a wage differential is based upon one or more specified factors, including a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a bona fide factor other than sex, as specified. The bill would also require the employer to demonstrate that each factor relied upon is applied reasonably, and that the one or more factors relied upon account for the entire differential. The bill would prohibit an employer from discharging, or in any manner discriminating or retaliating against, any employee by reason of any action taken by the employee to invoke or assist in any manner the enforcement of these provisions. The bill would authorize an employee who has been discharged or discriminated or retaliated against, in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in these provisions, to 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. The bill would prohibit an employer 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 exercise his or her rights under these provisions. The bill would also increase the duration of employer

recordkeeping requirements from 2 years to 3 years. By changing the definition of a crime, this bill would impose a state-mandated local program.

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 the following:

(a) In 2014, the gender wage gap in California stood at 16 cents on the dollar. A woman working full time year round earned an average of 84 cents to every dollar a man earned. This wage gap extends across almost all occupations reporting in California. This gap is far worse for women of color; Latina women in California make only 44 cents for every dollar a white male makes, the biggest gap for Latina women in the nation.

(b) While the state's overall wage gap is slightly lower than the national average of 78 cents to the dollar, the persistent disparity in earnings still has a significant impact on the economic security and welfare of millions of working women and their families. Collectively, women working full time in California lose approximately \$33,650,294,544 each year due to the gender wage gap. The wage gap contributes to the higher statewide poverty rate among women, which stands at 18 percent, compared to approximately 15 percent for men, and the poverty rate is even higher for women of color and single women living with children.

(c) California has prohibited gender-based wage discrimination since 1949. Section 1197.5 of the Labor Code was enacted to redress the segregation of women into historically undervalued occupations, but it has evolved over the last four decades so that it is now virtually identical to the federal Equal Pay Act of 1963 (29 U.S.C. Sec. 206(d)). However, the state provisions are rarely utilized because the current statutory language makes it difficult to establish a successful claim.

(d) Pay secrecy also contributes to the gender wage gap, because women cannot challenge wage discrimination that they do not know exists. Although 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.

(e) To eliminate the gender wage gap in California, the state's equal pay provisions and laws regarding wage disclosures must be improved.

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.

(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. 3. 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.