

## California Women's Caucus again targets pay equity

By Holly Culhane, Contributing Columnist



California's Legislative Women's Caucus has unveiled its 2016 "economic equity agenda," which the lawmakers contend will build on last year's passage of the state's Fair Pay Act – thought to be the nation's toughest pay equity law.

No doubt "pay equity," particularly when it comes to women being paid less than men, who are doing comparable work, is a loud election-year issue. It is roiling presidential campaigns in both political parties, and promoting debate in contests for federal, state and local posts.

Members of the Legislative Women's Caucus now want to add even more requirements on employers to address pay equity, as well as other workplace issues that are seen to more heavily impact female workers.

To characterize last year's victory – the passage of California's Fair Pay Act, which went into effect in January – as a "done deal" is to mislead Californians into believing that with the wave of the magic political wand "pay equity" will be achieved.

In fact, uncertainties and ambiguities in the act will open the flood gates of litigation. It will take years for the dust to settle over the Fair Pay Act. Adding significantly to its reach at this time may only further delay enactment.

In a nutshell, the state's new Fair Pay Act, which was passed by the Legislature and signed into law by the governor last year, ensures male and female employees who perform "substantially similar" work will receive equal pay, even if their job titles differ, or if they work in different offices for the same employers. For example, unless the employer can document widely different skills and responsibilities, a hotel's housekeepers, who are generally women, should be paid the same as its janitors, who are generally male.

A significant feature of the new act is that it places on the employer the burden of proving a man's higher pay is based on factors other than gender bias. The act also protects employees from retaliation if they ask about pay disparities and discuss wages with their co-workers.

Workers can complain to the state Division of Labor Standards Enforcement about perceived pay discrimination, or file a lawsuit in superior court. Employers found to have violated the act can be liable for unpaid wages, interest and costs, including court and attorney's costs.

While there are a number of issues with this new law that will likely invite court challenges, the central one is the switch from the old law that required equal pay for "equal work" to requiring equal pay for "substantially similar work."

The struggle for employers will be to apply this new standard when paying wages. The burden for proving that a "bona fide" reason exists for pay disparities is on the employer.

In the past, workers struggled to prove that they were not receiving equal pay because it was difficult to argue jobs were "equal." Titles, workplace locations and many other minor differences could be used to defend pay differences.

The new law only requires workers to contend their jobs are "substantially similar" to others that pay more. Arguing the gray areas of "substantially similar" may be a years-long full employment program for lawyers.

The Legislative Women's Caucus now proposes to ban employers from requiring job applicants to disclose their pay histories. The reasoning seems logical. If a woman, for example, is leaving a job in which she received lower pay than her male colleagues, she might be perpetuating the inequities she had endured.

But this seemingly logical prohibition also could backfire on job applicants and employers. Generally, hiring and pay-setting is "negotiable." Withholding relevant pay information from these negotiations could have the unanticipated consequences of chasing away top applicants who are inadvertently given "lowball" pay offers.

Passing the landmark California's Fair Pay Act was like throwing a rock into the employment pool. It sent waves throughout the nation. Let these waves calm before adding more.

And while the act is being implemented and tested, prudent employers should review their pay structures to ensure pay disparities can be justified and are not, in fact, based on bias.

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