PRACTICE POINTER: California Equal Pay Act

On December 3, attorney Doris Ng, Staff Counsel to the California Department of Labor Standards Enforcement (DLSE), described how the SB 358 amendments to California's Equal Pay Act will be enforced.

In a presentation to the Silicon Valley Industry Liason Group, Ng said that employees can file a complaint alleging that an employer is paying one gender less than another for doing "substantially similar work." She noted that under the amendments effective January 1, the existing definition of "bona fide factors other than sex" will only apply **if the employer** demonstrates that the factor is not "derived from a sex-based difference in compensation and is consistent with business necessity."

Complaints are to be filed and processed under Labor Code 98.7. Until now complaints filed under that section were processed by the Retaliation Complaint Unit (RCU) consisting of about 2 dozen deputies. Previously, most of their work was in investigating complaints under 40 other statutes, deciding which were meritorious and writing letters describing their findings and conclusions. Hearings conducted by that unit are relatively rare. Now the deputies are being retrained in job analysis in order that they may conduct the audits necessary to determine if pay disparities violate the amended statute.

Comparisons are no longer limited to the "same establishment." "Substantially similar work" will be evaluated **as a composite** of skill, effort, responsibility and similar working conditions for one job in comparison to the composite for those of another job. Ng did not know whether regulations will be issued under the amended statute, but expects that questions and answers will be posted on the agency's website "at some point."

Exceptions for merit systems, seniority systems, incentive systems and bona fide factors other than sex will apply only **if the employer** proves that they are "applied reasonably" and are responsible for the entire wage differential. These exceptions will not apply if the employee establishes that another factor would fulfill the function without creating the wage disparity.

The statute provides no definition for "applied reasonably." Ng gave examples such as "applied fairly" and "with no exceptions." She also said that the Department would await case law developments to provide a more precise meaning of that phrase.

Ng specified no internal administrative guidelines for case processing, noting that 60 to 90 days would be too short and that a year is more likely.

She noted that the anti-retaliation portion of the Act had been substantially strengthened. Employers may not retaliate **"in any manner"** for employees discussing their wages or those of other employees or for any action to invoke or assist in activity under the Act.

Statutes of limitation are 6 months to file a complaint with the DLSE and a year to sue in court.

Regarding best practices, Ng encouraged employers to conduct audits of their compensation practices such as are required of federal government contractors under regulations issued by the Department of Labor's Office of Federal Contract Compliance Programs. She anticipates that the cultural practice of keeping salary information private will give way as the revised statute becomes better known. (Note: Governor Brown vetoed legislation which would have prohibited employers from asking candidates about their prior compensation.)

Market forces will continue to play a role in compensation, but employers must now be able to show that those forces account for the entire disparity in pay and that they have been "applied reasonably."

Smullin's Observations:

Since the RCU has approximately 24 deputies assigned to pre-SB 358 cases, it is likely that some time will pass before the DLSE issues many determinations under the revised law. Given Ms. Ng's comments, questions and answers may appear on the DLSE website before many such case decisions. Absent funds for additional deputies and time to train them, we can expect that at some point the Division will have a significant case backlog.

Significance to Attorneys and Mediation:

Attorneys advising employers will want to alert their clients to the importance of self-audits and careful, thoughtful articulation of reasons for pay practices, especially disparities, at every level of hiring and supervision. **Attorneys representing employees** will need to familiarize themselves with compensation systems and the differences between gender-driven and non-gender-driven effects. The absence of important definitions and the likely backlog of cases make mediation especially valuable. It can provide a process in which both sides can fully assess the elements of their cases and a more expeditious, private resolution to them.

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