

AMENDED IN SENATE JUNE 15, 2016

AMENDED IN ASSEMBLY MAY 31, 2016

CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

**ASSEMBLY BILL**

**No. 1676**

---

---

**Introduced by Assembly Members Campos and Gonzalez**

(Principal coauthor: Senator Jackson)

**(Coauthors: Assembly Members Bonilla, Chiu, Cristina Garcia,  
and Eduardo Garcia)**

(Coauthor: Senator Liu )

January 19, 2016

---

---

An act to ~~add Section 432.3 to~~ amend Section 1197.5 of the Labor Code, relating to employers.

LEGISLATIVE COUNSEL'S DIGEST

AB 1676, as amended, Campos. Employers: ~~salary information.~~ 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.

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.

~~Existing law imposes various restrictions on employers with respect to applicants for employment. A violation of those restrictions is a misdemeanor.~~

~~This bill would prohibit an employer, including state and local government employers, from seeking salary history information about an applicant for employment, except as otherwise provided. The bill would require an employer, except state and local government employers, upon reasonable request, to provide the pay scale for a position to an applicant for employment. The bill would specify that a violation of its provisions would not be subject to the misdemeanor provision.~~

Vote: majority. Appropriation: no. Fiscal committee: yes.  
State-mandated local program: ~~no~~-yes.

*The people of the State of California do enact as follows:*

- 1     SECTION 1. *The Legislature finds and declares all of the*
- 2     *following:*
- 3     (a) *Over the past decade, the wage gap has barely budged and*
- 4     *wage disparities continue to persist. In 2015, the gender wage gap*
- 5     *in California stood at 16 cents on the dollar. For women of color,*
- 6     *wage inequality is much worse. African American women in*
- 7     *California make just 63 cents and Hispanic women less than 43*
- 8     *cents for every dollar white non-Hispanic men make.*
- 9     (b) *The problematic practices of seeking salary history from*
- 10    *job applicants and relying on prior salary to set employees' pay*
- 11    *rates contribute to the gender wage gap by perpetuating wage*

1 *inequalities across the occupational spectrum. Women are paid*  
2 *less than men in 99.6 percent of occupations and are more likely*  
3 *to face financial penalties for taking time out of the paid workforce*  
4 *due to childbearing and family caregiving responsibilities.*

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

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

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

27 *(f) Courts also have warned against relying on salary history*  
28 *and have stated that prior salary cannot, by itself, justify a wage*  
29 *disparity. In Corning Glass Works v. Brennan, (1974) 417 U.S.*  
30 *188, the United States Supreme Court held that a pay differential*  
31 *which "ar[ises] simply because men would not work at the low*  
32 *rates paid women ... and reflect[s] a job market in which [the*  
33 *employer] could pay women less than men for the same work" is*  
34 *not based on a cognizable factor other than sex under the Equal*  
35 *Pay Act (Public Law 88-38) (Id., at 205). More recently, in Rizo*  
36 *v. Yovino, Fresno County Superintendent of Schools, United States*  
37 *District Court, Eastern District of California, Case No.*  
38 *1:14-cv-0423-MJS, the district court denied summary judgment*  
39 *on defendant's motion under the federal Equal Pay Act based on*  
40 *its finding that, "a pay structure based exclusively on prior wages*

1 *is so inherently fraught with the risk — indeed, here, the virtual*  
 2 *certainty — that it will perpetuate a discriminatory wage disparity*  
 3 *between men and women that it cannot stand, even if motivated*  
 4 *by a legitimate non-discriminatory business purpose.”(Id., at 16).*  
 5 *The court went on to explain that, “say[ing] an otherwise*  
 6 *unjustified pay differential between women and men performing*  
 7 *equal work is based on a factor other than sex because it reflects*  
 8 *historical market forces which value the equal work of one sex*  
 9 *over the other perpetuates the market’s sex-based subjective*  
 10 *assumptions and stereotyped misconceptions Congress passed the*  
 11 *Equal Pay Act to eradicate.” (Id., at 17).*

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

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

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

22 1197.5. (a) An employer shall not pay any of its employees  
 23 at wage rates less than the rates paid to employees of the opposite  
 24 sex for substantially similar work, when viewed as a composite of  
 25 skill, effort, and responsibility, and performed under similar  
 26 working conditions, except where the employer demonstrates:

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

29 (A) A seniority system.

30 (B) A merit system.

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

33 (D) A bona fide factor other than sex, such as education,  
 34 training, or experience. This factor shall apply only if the employer  
 35 demonstrates that the factor is not based on or derived from a  
 36 sex-based differential in compensation, is job related with respect  
 37 to the position in question, and is consistent with a business  
 38 necessity. For purposes of this subparagraph, “business necessity”  
 39 means an overriding legitimate business purpose such that the  
 40 factor relied upon effectively fulfills the business purpose it is

1 supposed to serve. This defense shall not apply if the employee  
2 demonstrates that an alternative business practice exists that would  
3 serve the same business purpose without producing the wage  
4 differential.

5 (2) Each factor relied upon is applied reasonably.

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

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

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

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

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

39 (f) The department or division may commence and prosecute,  
40 unless otherwise requested by the employee or affected group of

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

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

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

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

30 (j) (1) An employer shall not discharge, or in any manner  
31 discriminate or retaliate against, any employee by reason of any  
32 action taken by the employee to invoke or assist in any manner  
33 the enforcement of this section. An employer shall not prohibit an  
34 employee from disclosing the employee's own wages, discussing  
35 the wages of others, inquiring about another employee's wages,  
36 or aiding or encouraging any other employee to exercise his or her  
37 rights under this section. Nothing in this section creates an  
38 obligation to disclose wages.

39 (2) Any employee who has been discharged, discriminated or  
40 retaliated against, in the terms and conditions of his or her

1 employment because the employee engaged in any conduct  
2 delineated in this section may recover in a civil action reinstatement  
3 and reimbursement for lost wages and work benefits caused by  
4 the acts of the employer, including interest thereon, as well as  
5 appropriate equitable relief.

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

8 *SEC. 3. No reimbursement is required by this act pursuant to*  
9 *Section 6 of Article XIII B of the California Constitution because*  
10 *the only costs that may be incurred by a local agency or school*  
11 *district will be incurred because this act creates a new crime or*  
12 *infraction, eliminates a crime or infraction, or changes the penalty*  
13 *for a crime or infraction, within the meaning of Section 17556 of*  
14 *the Government Code, or changes the definition of a crime within*  
15 *the meaning of Section 6 of Article XIII B of the California*  
16 *Constitution.*

17 ~~SECTION 1. Section 432.3 is added to the Labor Code, to~~  
18 ~~read:~~

19 ~~432.3. (a) An employer shall not, orally or in writing,~~  
20 ~~personally or through an agent, seek salary history information,~~  
21 ~~including, but not limited to, compensation and benefits, about an~~  
22 ~~applicant for employment.~~

23 ~~(b) Except as provided in subdivision (e), an employer, upon~~  
24 ~~reasonable request, shall provide the pay scale for a position to an~~  
25 ~~applicant applying for employment.~~

26 ~~(c) Section 433 does not apply to this section.~~

27 ~~(d) This section shall not apply to salary history information~~  
28 ~~disclosable to the public pursuant to federal or state law, including,~~  
29 ~~but not limited to, the California Public Records Act (Chapter 3.5~~  
30 ~~(commencing with Section 6250) of Division 7 of Title 1 of the~~  
31 ~~Government Code) or the federal Freedom of Information Act~~  
32 ~~(Section 552 of Title 5 of the United States Code).~~

33 ~~(e) This section, except for subdivision (b), applies to all state~~  
34 ~~and local government employers, including, but not limited to, the~~  
35 ~~Legislature.~~