

AMENDED IN SENATE AUGUST 19, 2016

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~~ *Liu*)

January 19, 2016

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

LEGISLATIVE COUNSEL'S DIGEST

AB 1676, as amended, 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.
State-mandated local program: 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
- 12 inequalities across the occupational spectrum. Women are paid
- 13 less than men in 99.6 percent of occupations and are more likely
- 14 to face financial penalties for taking time out of the paid workforce
- 15 due to childbearing and family caregiving responsibilities.
- 16 (c) When employers make salary decisions during the hiring
- 17 process based on prospective employees' prior salaries or require
- 18 women to disclose their prior salaries during salary negotiations,
- 19 women often end up at a sharp disadvantage and historical patterns

1 of gender bias and discrimination repeat themselves, causing
2 women to continue earning less than their male counterparts.

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

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

20 (f) Courts also have warned against relying on salary history
21 and have stated that prior salary cannot, by itself, justify a wage
22 disparity. In *Corning Glass Works v. Brennan*, (1974) 417 U.S.
23 188, the United States Supreme Court held that a pay differential
24 which “ar[ises] simply because men would not work at the low
25 rates paid women ... and reflect[s] a job market in which [the
26 employer] could pay women less than men for the same work” is
27 not based on a cognizable factor other than sex under the Equal
28 Pay Act (Public Law 88-38) (*Id.*, at *p.* 205). More recently, in *Rizo*
29 *v. Yovino*, Fresno County Superintendent of Schools, United States
30 District Court, Eastern District of California, Case No.
31 1:14-cv-0423-MJS, the district court denied summary judgment
32 on defendant’s motion under the federal Equal Pay Act based on
33 its finding that, “a pay structure based exclusively on prior wages
34 is so inherently fraught with the risk — indeed, here, the virtual
35 certainty — that it will perpetuate a discriminatory wage disparity
36 between men and women that it cannot stand, even if motivated
37 by a legitimate non-discriminatory business purpose.” (*Id.*, at *p.*
38 16). The court went on to explain that, “say[ing] an otherwise
39 unjustified pay differential between women and men performing
40 equal work is based on a factor other than sex because it reflects

1 historical market forces which value the equal work of one sex
2 over the other perpetuates the market's sex-based subjective
3 assumptions and stereotyped misconceptions Congress passed the
4 Equal Pay Act to eradicate." (Id., at p. 17).

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

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

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

15 1197.5. (a) An employer shall not pay any of its employees
16 at wage rates less than the rates paid to employees of the opposite
17 sex for substantially similar work, when viewed as a composite of
18 skill, effort, and responsibility, and performed under similar
19 working conditions, except where the employer demonstrates:

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

22 (A) A seniority system.

23 (B) A merit system.

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

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

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

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

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

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

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

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

34 (f) The department or division may commence and prosecute,
35 unless otherwise requested by the employee or affected group of
36 employees, a civil action on behalf of the employee and on behalf
37 of a similarly affected group of employees to recover unpaid wages
38 and liquidated damages under subdivision (a), and in addition shall
39 be entitled to recover costs of suit. The consent of any employee
40 to the bringing of any action shall constitute a waiver on the part

1 of the employee of the employee's cause of action under
2 subdivision (g) unless the action is dismissed without prejudice
3 by the department or the division, except that the employee may
4 intervene in the suit or may initiate independent action if the suit
5 has not been determined within 180 days from the date of the filing
6 of the complaint.

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

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

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

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

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

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

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

5 1197.5. (a) An employer shall not pay any of its employees
6 at wage rates less than the rates paid to employees of the opposite
7 sex for substantially similar work, when viewed as a composite of
8 skill, effort, and responsibility, and performed under similar
9 working conditions, except where the employer demonstrates:

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

12 (A) A seniority system.

13 (B) A merit system.

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

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

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

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

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

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

39 (A) *A seniority system.*

40 (B) *A merit system.*

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

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

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

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

19 ~~(b)~~

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

24 ~~(e)~~

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

33 ~~(d)~~

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

38 ~~(e)~~

39 (f) Any employee may file a complaint with the division that
40 the wages paid are less than the wages to which the employee is

1 entitled under subdivision (a) *or* (b) or that the employer is in
2 violation of subdivision ~~(j)~~: (k). The complaint shall be investigated
3 as provided in subdivision (b) of Section 98.7. The division shall
4 keep confidential the name of any employee who submits to the
5 division a complaint regarding an alleged violation of subdivision
6 ~~(a) or (j)~~ (a), (b), *or* (k) until the division establishes the validity
7 of the complaint, unless the division must abridge confidentiality
8 to investigate the complaint. The name of the complaining
9 employee shall remain confidential if the complaint is withdrawn
10 before the confidentiality is abridged by the division. The division
11 shall take all proceedings necessary to enforce the payment of any
12 sums found to be due and unpaid to these employees.

13 ~~(f)~~

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

27 ~~(g) Any~~

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

34 ~~(h)~~

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

40 ~~(i)~~

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

8 ~~(j)~~

9 (k) (1) An employer shall not discharge, or in any manner
 10 discriminate or retaliate against, any employee by reason of any
 11 action taken by the employee to invoke or assist in any manner
 12 the enforcement of this section. An employer shall not prohibit an
 13 employee from disclosing the employee’s own wages, discussing
 14 the wages of others, inquiring about another employee’s wages,
 15 or aiding or encouraging any other employee to exercise his or her
 16 rights under this section. Nothing in this section creates an
 17 obligation to disclose wages.

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

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

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

34 ~~SEC. 3.~~

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

- 1 the Government Code, or changes the definition of a crime within
- 2 the meaning of Section 6 of Article XIII B of the California
- 3 Constitution.

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