

AMENDED IN SENATE APRIL 6, 2015

SENATE BILL

No. 358

Introduced by Senator Jackson
(*Coauthor: Assembly Member Gonzalez*)

February 24, 2015

An act to amend ~~Sections 232, 232.5,~~ and *Section 1197.5* of the Labor Code, relating to private employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 358, as amended, Jackson. Conditions of employment: ~~wages and working conditions:~~ 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 ~~discharging~~ *discriminating against* an employee for making such a disclosure. ~~Existing law establishes similar prohibitions in connection with disclosing an employer's workplace conditions.~~

~~This bill would extend the prohibitions described above to discussions and inquiries regarding the wages of an employee, the wages of other employees, and workplace conditions. The bill would require an employer to post these provisions in a conspicuous location frequented by employees during the hours of the workday.~~

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 pay differential be within the same establishment, and would replace the terms ~~“equal” work “and” equal skill, effort, and responsibility “with” comparable work “and” comparable skill, effort, and responsibility.~~ *“equal work” with “work of a comparable character” “equal skill, effort, and responsibility” “comparable skill, effort, and responsibility.”* The bill would revise and recast the exceptions to require the employer to affirmatively demonstrate that a pay 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 that work is performed at different geographic locations, on different shifts, or at different times of day. cost-of-living differences due to geographic location, or a bona fide factor that is not based on or derived from a sex-based differential in compensation and is consistent with a business necessity, as defined.* 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 prohibit an employer from prohibiting an employee from disclosing the employee’s own wages, discussing the wages of others, or inquiring about another employee’s wages if the purpose of the disclosure, discussion, or inquiry is to invoke or enforce the rights granted by these provisions.* 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.
State-mandated local program: yes.

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

1 SECTION 1. The Legislature finds and declares the following:

2 (a) In ~~2013~~, 2014, the gender wage gap in California stood at
3 16 cents on the dollar. A woman working full time year round
4 earned an average of 84 cents to every dollar a man earned. This
5 wage gap extends across almost all occupations reporting in
6 California. This gap is far worse for women of color; Latina women
7 in California make only 44 cents for every dollar a white male
8 makes, the biggest gap for Latina women in the nation.

9 (b) While the state's overall wage gap is slightly lower than the
10 national average of ~~77~~ 78 cents to the dollar, the persistent disparity
11 in earnings still has a significant impact on the economic security
12 and welfare of millions of working women and their families.
13 Collectively, women working full time in California lose
14 approximately ~~\$36,971,379,159~~ \$33,650,294,544 each year due
15 to the gender wage gap. The wage gap contributes to the higher
16 statewide poverty rate among women, which stands at 18 percent,
17 compared to approximately 15 percent for men, and the poverty
18 rate is even higher for women of color and single women living
19 with children.

20 (c) California has prohibited gender-based pay discrimination
21 since 1949. Section 1197.5 of the Labor Code was enacted to
22 redress the segregation of women into historically undervalued
23 occupations, but it has evolved over the last four decades so that
24 it is now virtually identical to the federal Equal Pay Act of 1963
25 (29 U.S.C. Sec. 206(d)). However, the state provisions are rarely
26 utilized because many loopholes make it nearly impossible to
27 establish a successful claim.

28 (d) Pay secrecy also contributes to the gender pay gap, because
29 women cannot challenge pay discrimination that they do not know
30 exists. Although California law prohibits employers from banning
31 pay disclosures and retaliating against employees for engaging in
32 this activity, in practice many employees are unaware of these
33 protections and others are afraid to exercise these rights due to
34 potential retaliation.

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

4 ~~SEC. 2. Section 232 of the Labor Code is amended to read:~~

5 ~~232. An employer shall not do any of the following:~~

6 ~~(a) Bar an employee from disclosing, discussing, or inquiring~~
7 ~~about the amount of his or her wages, or from inquiring about or~~
8 ~~discussing the wages of other employees.~~

9 ~~(b) Require an employee to sign a waiver or other document~~
10 ~~that purports to deny the employee the right to disclose, inquire~~
11 ~~about, or discuss the amount of his or her wages, or to inquire~~
12 ~~about or discuss the wages of other employees.~~

13 ~~(c) Discharge, discipline, or otherwise discriminate against an~~
14 ~~employee who discloses, discusses, or inquires about the amount~~
15 ~~of his or her wages, or who discusses or inquires about the wages~~
16 ~~of other employees.~~

17 ~~(d) An employer shall post a copy of this section and keep it~~
18 ~~posted in a conspicuous location frequented by employees during~~
19 ~~the hours of the workday.~~

20 ~~SEC. 3. Section 232.5 of the Labor Code is amended to read:~~

21 ~~232.5. An employer shall not do any of the following:~~

22 ~~(a) Bar an employee from disclosing, discussing, or inquiring~~
23 ~~about the employer’s working conditions.~~

24 ~~(b) Require an employee to sign a waiver or other document~~
25 ~~that purports to deny the employee the right to disclose, discuss,~~
26 ~~or inquire about information about the employer’s working~~
27 ~~conditions.~~

28 ~~(c) Discharge, discipline, or otherwise discriminate against an~~
29 ~~employee who discloses, discusses, or inquires about information~~
30 ~~about the employer’s working conditions.~~

31 ~~(d) This section is not intended to permit an employee to disclose~~
32 ~~proprietary information, trade secret information, or information~~
33 ~~that is otherwise subject to a legal privilege without the consent~~
34 ~~of his or her employer.~~

35 ~~(e) An employer shall post a copy of this section and keep it~~
36 ~~posted in a conspicuous location frequented by employees during~~
37 ~~the hours of the workday.~~

38 ~~SEC. 4.~~

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

1 1197.5. (a) An employer shall not pay any employee at wage
2 rates less than the rates paid to employees of the opposite sex for
3 ~~comparable~~ work of a comparable character on jobs the
4 performance of which requires comparable skill, effort, and
5 responsibility, and ~~which that~~ are performed under similar working
6 conditions, except where the employer demonstrates:

7 (1) The pay differential is based upon one or more of the
8 following factors:

9 (A) A seniority system.

10 (B) A merit system.

11 (C) A system that measures earnings by quantity or quality of
12 production.

13 ~~(D) Work is performed at different geographic locations.~~

14 ~~(E) Work is performed on different shifts or at different times~~
15 ~~of day.~~

16 (D) *Cost-of-living differences due to geographic location.*

17 (E) *A bona fide factor that is not based on or derived from a*
18 *sex-based differential in compensation and is consistent with a*
19 *business necessity, such as a difference in education, training, or*
20 *experience that is job related with respect to the position in*
21 *question. For purposes of this subparagraph, "business necessity"*
22 *means an overriding legitimate business purpose such that the*
23 *factor relied upon is necessary to the safe and efficient operation*
24 *of the business, that the factor relied upon effectively fulfills the*
25 *business purpose it is supposed to serve, and there is no alternative*
26 *practice to the factor relied upon that would accomplish the*
27 *business purpose.*

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

29 (3) The one or more factors relied upon account for the entire
30 differential.

31 (b) Any employer who violates subdivision (a) is liable to the
32 employee affected in the amount of the wages, and interest thereon,
33 of which the employee is deprived by reason of the violation, and
34 ~~in~~ an additional equal amount as liquidated damages.

35 (c) The Division of Labor Standards Enforcement shall
36 administer and enforce this section. If the division finds that an
37 employer has violated this section, it may supervise the payment
38 of wages and interest found to be due and unpaid to employees
39 under subdivision (a). Acceptance of payment in full made by an
40 employer and approved by the division shall constitute a waiver

1 on the part of the employee of the employee's cause of action
2 under subdivision (g).

3 (d) Every employer shall maintain records of the wages and
4 wage rates, job classifications, and other terms and conditions of
5 employment of the persons employed by the employer. All of the
6 records shall be kept on file for a period of two years.

7 (e) Any employee may file a complaint with the division that
8 the wages paid are less than the wages to which the employee is
9 entitled under subdivision (a). The complaint shall be investigated
10 as provided in subdivision (b) of Section 98.7. The division shall
11 keep confidential the name of any employee who submits to the
12 division a complaint regarding an alleged violation of subdivision
13 (a) until the division establishes the validity of the complaint,
14 unless the division must abridge confidentiality to investigate the
15 complaint. The name of the complaining employee shall remain
16 confidential if the complaint is withdrawn before the confidentiality
17 is abridged by the division. The division shall take all proceedings
18 necessary to enforce the payment of any sums found to be due and
19 unpaid to these employees.

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

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

39 (h) A civil action to recover wages under subdivision (a) may
40 be commenced no later than two years after the cause of action

1 occurs, except that a cause of action arising out of a willful
2 violation may be commenced no later than three years after the
3 cause of action occurs.

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

11 (j) *An employer shall not discharge, or in any manner*
12 *discriminate or retaliate against, any employee by reason of any*
13 *action taken by the employee to invoke or assist in any manner the*
14 *enforcement of this section. An employer shall not prohibit an*
15 *employee from disclosing the employee’s own wages, discussing*
16 *the wages of others, or inquiring about another employee’s wages*
17 *if the purpose of the disclosure, discussion, or inquiry is to invoke*
18 *or enforce the rights granted by this section. Nothing in this section*
19 *creates an obligation to disclose wages.*

20 (k) *As used in subdivision (a), “work of a comparable*
21 *character” means work, the requirements of which, are*
22 *substantially equivalent when viewed as a composite of level of*
23 *skills, effort, responsibility, and working conditions.*

24 ~~SEC. 5.~~

25 SEC. 3. No reimbursement is required by this act pursuant to
26 Section 6 of Article XIII B of the California Constitution because
27 the only costs that may be incurred by a local agency or school
28 district will be incurred because this act creates a new crime or
29 infraction, eliminates a crime or infraction, or changes the penalty
30 for a crime or infraction, within the meaning of Section 17556 of
31 the Government Code, or changes the definition of a crime within
32 the meaning of Section 6 of Article XIII B of the California
33 Constitution.