

RESOLUTION 12-04-2017

DIGEST

Equal Pay Act: Clarification of Accrual of Cause of Action

Amends Labor Code section 1197.5 to make the statute of limitations on state and federal wage discrimination claims consistent, so that the claim accrues with each discriminatory paycheck instead of when the wages are initially established or the discriminatory practice is first adopted.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Labor Code section 1197.5 to make the statute of limitations on state and federal wage discrimination claims consistent, so that the claim accrues with each discriminatory paycheck instead of when the wages are initially established or the discriminatory practice is first adopted. This resolution should be approved in principle because it assures that an employee who has been subjected to continuing wage discrimination does not lose the right to recover for harm that occurred outside the limitations period.

In *Ledbetter v. Goodyear Tire & Rubber Co.* (2007) 550 U.S. 618, the United States Supreme Court held that the statute of limitations for filing an equal-pay lawsuit before the Equal Employment Opportunity Commission (EEOC) began to run at the date the pay was agreed upon, rather than the date of the subsequent paychecks. One provision of the Lilly Ledbetter Fair Pay Act of 2009 (Pub. L. No. 111-2) overturned that decision, providing that the act is violated: (1) when a discriminatory compensation decision or other practice is adopted; (2) when a person becomes subject to a discriminatory compensation decision or other practice; or (3) when a person is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid. (29 U.S.C. § 626(d)(3).)

This resolution brings the application of the limitations period under California’s Equal Pay Act into conformity with the federal law and allows an injured employee to recover damages for discriminatory pay practices that occurred even if the discriminatory pay rate began before the limitations period.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Labor Code section 1197.5 to read as follows:

- 1 § 1197.5
- 2 (a) An employer shall not pay any of its employees at wage rates less than the rates paid
- 3 to employees of the opposite sex for substantially similar work, when viewed as a composite of
- 4 skill, effort, and responsibility, and performed under similar working conditions, except where
- 5 the employer demonstrates:

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

7 (A) A seniority system.

8 (B) A merit system.

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

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

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

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

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

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

26 (A) A seniority system.

27 (B) A merit system.

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

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

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

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

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

43 (d) The Division of Labor Standards Enforcement shall administer and enforce this
44 section. If the division finds that an employer has violated this section, it may supervise the
45 payment of wages and interest found to be due and unpaid to employees under subdivision (a) or
46 (b). Acceptance of payment in full made by an employer and approved by the division shall
47 constitute a waiver on the part of the employee of the employee’s cause of action under
48 subdivision (h).

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

52 (f) Any employee may file a complaint with the division that the wages paid are less than
53 the wages to which the employee is entitled under subdivision (a) or (b) or that the employer is in
54 violation of subdivision (k). The complaint shall be investigated as provided in subdivision (b) of
55 Section 98.7. The division shall keep confidential the name of any employee who submits to the
56 division a complaint regarding an alleged violation of subdivision (a), (b), or (k) until the
57 division establishes the validity of the complaint, unless the division must abridge confidentiality
58 to investigate the complaint. The name of the complaining employee shall remain confidential if
59 the complaint is withdrawn before the confidentiality is abridged by the division. The division
60 shall take all proceedings necessary to enforce the payment of any sums found to be due and
61 unpaid to these employees.

62 (g) The department or division may commence and prosecute, unless otherwise requested
63 by the employee or affected group of employees, a civil action on behalf of the employee and on
64 behalf of a similarly affected group of employees to recover unpaid wages and liquidated
65 damages under subdivision (a) or (b), and in addition shall be entitled to recover costs of suit.
66 The consent of any employee to the bringing of any action shall constitute a waiver on the part of
67 the employee of the employee's cause of action under subdivision (h) unless the action is
68 dismissed without prejudice by the department or the division, except that the employee may
69 intervene in the suit or may initiate independent action if the suit has not been determined within
70 180 days from the date of the filing of the complaint.

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

75 (i) A civil action to recover wages under subdivision (a) or (b) may be commenced no
76 later than two years after the cause of action occurs, except that a cause of action arising out of a
77 willful violation may be commenced no later than three years after the cause of action occurs.
78 For purposes of this section, a cause of action to recover wages under subdivision (a) or (b)
79 occurs when a wage decision or other practice which violates subdivision (a) or (b) is adopted,
80 when an employee becomes subject to a wage decision or other practice which violates
81 subdivision (a) or (b), or when an employee is affected by application of a wage decision or other
82 practice which violates subdivision (a) or (b), including each time wages are paid, resulting in
83 whole or in part from such a decision or other practice. An aggrieved employee may obtain
84 relief as provided in subsections (g) and (h), where the wage decision or other practice which
85 violates subdivision (a) or (b) that has occurred during the charge filing period is similar or
86 related to unlawful employment practices with regard to the wage decision or other practice
87 which violates subdivision (a) or (b) that occurred outside the time for filing a charge.

88 (j) If an employee recovers amounts due the employee under subdivision (c), and also
89 files a complaint or brings an action under subdivision (d) of Section 206 of Title 29 of the
90 United States Code which results in an additional recovery under federal law for the same
91 violation, the employee shall return to the employer the amounts recovered under subdivision
92 (c), or the amounts recovered under federal law, whichever is less.

93 (k) (1) An employer shall not discharge, or in any manner discriminate or retaliate
94 against, any employee by reason of any action taken by the employee to invoke or assist in any
95 manner the enforcement of this section. An employer shall not prohibit an employee from
96 disclosing the employee's own wages, discussing the wages of others, inquiring about another

97 employee's wages, or aiding or encouraging any other employee to exercise his or her rights
98 under this section. Nothing in this section creates an obligation to disclose wages.

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

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

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

The Problems: The current law requires equal pay for employees who perform substantially similar work, when viewed as a composite of skill, effort, and responsibility. An aggrieved employee may commence action "two years after the cause of action occurs, except that a cause of action arising out of a willful violation may be commenced no later than three years after the cause of action occurs." *Labor Code section 1197.5*

California's Equal Pay Act has existed for decades. However, in 2009, The Lilly Ledbetter Fair Pay Act was signed into federal law, which reset the statute of limitations for filing an equal pay claim against an employer to reflect each time that an employee receives a paycheck, benefits or "other compensation." *42 U.S. 2000 §706 et.seq.*

Commencing January 1, 2016, California's Equal Pay Act was amended in order to provide more stringent protections for employees. However, the provision regarding the statute of limitations was never amended to reflect the principle that the statute of limitations should run from the time the employee receives their final paycheck, not from the time the discriminatory paycheck is issued. Other provisions of California law which protect employees from gender- and race-based pay differentials, such as the Fair Employment and Housing Act ("FEHA") adhere to the principals of the continuing violations doctrine, which provides that an employee claiming gender or racial discrimination can commence action outside of the statute of limitations period if the employee can show that the employer performed acts outside the limitations period that are sufficiently linked to unlawful conduct within the limitations period. *Cucuzza v. City of Santa Clara* (2002) 104 Cal. App. 4th 1031 at 1042.

As a result, it can be confusing for both employees and employers regarding their rights and record keeping responsibilities. Thus, Labor Code section 1197.5 should reflect the same provisions that are currently provided for under FEHA and the federal law.

The Solution: Amend Labor Code section 1197.5(i) to mirror 42 U.S. 2000 §706 (3)(A) and (B) which states:

For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice

(B) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.

This amendment would bring the law in congruence with FEHA and the Lilly Ledbetter Fair Pay Act, and make clear that discriminatory claims under section 1197.5 “accrue” whenever an employee receives a discriminatory paycheck, as well as, when a practice or decision is adopted, or when a person becomes subject to or is otherwise affected by, the practice or decision. In effect, each discriminatory paycheck “resets” the relevant time limit for filing a claim.

IMPACT STATEMENT

This resolution does not affect any other law, statute or rule, other than those identified above.

CURRENT OR PRIOR RELATED LEGISLATION

None known.

AUTHOR AND/OR PERMANENT CONTACT: Suzanne V. Chamberlain, Esq., PO Box 7728, Newport Beach, CA 92658-7728, Phone: (949) 476-8303, Fax: (949) 476-0636, candvlaw@msn.com

Melissa A. Petrofsky, Esq., 260 Newport Center Dr. #106, Newport Beach, CA 92660, Phone: (949) 999-3334, Fax: (949) 606-0433, melissa@petrofskyfirm.com

RESPONSIBLE FLOOR DELEGATE: Suzanne V. Chamberlain, Esq. and Melissa A. Petrofsky, Esq.