CALIFORNIA ASSOCIATION OF
PROFESSIONAL SCIENTISTS

Memorandum
To: CAPS Board
From: Christiana Dominguez, Legal Counsel
Date: January 13, 2016
Re: Gender Discrimination Lawsuit

Summary

An equal pay law has been on the books in California since the 1940s. Recent changes to the law broaden protections afforded to employees against gender-based wage discrimination. However, even under the new Fair Pay Act, CAPS would face a big, if not insurmountable, challenge establishing a prima facie case of gender-based pay discrimination primarily because there is a substantial male population in Unit 10 jobs making the same wages as Unit 10 women. There is also a substantial female population in, for example, Unit 9 jobs that arguably execute duties substantially similar to their Unit 10 counterparts. Thus, it would be hard to say that Unit 10 women are paid less than Unit 9 men because they are women. Even if a comparator class is found, the merit appointment system also provides ample protection for the state's hiring practices and would not likely support a finding of gender-based pay discrimination.

Introduction

In October, 2015, Governor Brown signed into law amendments to the long-standing California Equal Pay Act – creating the new California Fair Pay Act. Several CAPS members have asked whether, given the demographic composition of Units 9 and 10, the similarity of work performed between classifications in the two bargaining units, and the pay disparity between them, the new California Fair Pay Act offers CAPS another viable claim for salary equity.

Two key questions and several other considerations must guide CAPS as it considers using the Fair Pay Act as another tool in the fight for salary equity.

First, can public employees avail themselves of this new law? While the previous Equal Pay Act was found to apply to public employees, the current law, which doesn't go into effect until January 1, 2016, has not yet been tested in this regard.

Second, if the law is available to CAPS members, can CAPS present evidence to satisfy the three-part test applied to pay discrimination cases?

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Even if public employees can bring a suit under the Fair Pay Act and CAPS can pass the three-part test, are there other, non-legal factors to consider before proceeding with a claim?

The New California Fair Pay Act

Since 1949, California has prohibited paying someone of one sex less than someone of the opposite sex for the same job. In 2015, Senator Hannah-Beth Jackson (D-Santa Barbara), introduced Senate Bill 358, seeking to close loopholes in the law.

Arguably, SB 358's biggest change broadens the comparisons available to would-be plaintiffs when bringing a claim under Labor Code Section 1197.5. Whereas existing law required same pay for the same job – with the same employer in the "same establishment" – the new law will require equal pay for "substantially similar work when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions," which can extend to workers in the same position with a different title or at a different worksite.

Employers are still allowed some latitude under the new Fair Pay Act, however. Equal pay is not required where the employer demonstrates that the wage differential is based upon one or more of the following factors:

A.) A seniority system
B.) A merit system
C.) A system that measures earnings by quantity or quality of production
D.) A bona fide factor other than sex, such as education, training, or experience. This factor shall apply only if the employer demonstrates that the factor is not based on or derived from a sex-based differential in compensation, is job related with respect to the position in question, and is consistent with a business necessity. For purposes of this subparagraph, "business necessity" means an overriding legitimate business purpose such that the factor relied upon effectively fulfils the business purpose it is supposed to serve. This defense shall not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential.

Additionally, the employer must show each factor relied upon is applied reasonably and that the one or more factors relied upon account for the entire pay differential.

The new law also makes it unlawful for employers to retaliate against employees who make a claim or complaint under the Act.

Does the Fair Pay Act, as amended, apply to public employees?

As noted by Tim Yeung on his blog, *California PERB Blog*, though the enacting clause reference "private employment," the bill amends California Labor Code Section 1197.5 which refers only to "employers" with no exception for public agencies. Courts have held that Section 1197.5 applies to public agencies in its current incarnation. There's nothing on the face of the current or impending law

indicating that the Legislature meant to carve out a new exception for public agencies. Until a court says otherwise, then, it seems that Section 1197.5 would be available to Unit 10 employees.[1]

Bringing a Successful Claim

There are comparatively few cases testing solely Labor Code Section 1197.5 as it previously existed. The changes enacted in SB 358 took effect January 1, 2016 and so have not yet been tested in court. The available cases discussing the existing Section 1197.5 can still provide guidance on the current question, as does federal precedent.

Given the substantive similarities between California's new equal pay laws and federal equal pay laws, courts have borrowed from federal jurisprudence when interpreting California law. One aspect adopted in California courts is the three-stage burden-shifting test used to establish sex discrimination under the federal Equal Pay Act.

Three-Stage Test

To establish discrimination, a plaintiff – in our case, CAPS – must pass a three-stage test:

1.) The plaintiff must show that the employer pays workers of one sex more than workers of the opposite sex for equal work.
2.) If the plaintiff can show a pay disparity, the burden shifts to the employer to show that a statutory exception allows it to do so.
3.) Finally, if the employer can claim a statutory exception, then the plaintiff employee must show that the employer's stated reasons are pretextual – meaning the plaintiff employee must show the employer is lying about the stated reasons.

Application of the Three-Stage Test to Our Situation

Equal pay laws exist to ensure that employees performing equal work are paid equal wages without regard to gender. To prove a violation of the law, CAPS would need to show that, based on gender, the State pays different wages to Unit 10 employees doing substantially similar work under substantially similar conditions than it pays to an appropriate comparator class of employees. CAPS would need to be able to allege facts supporting this contention to survive an initial challenge by the State that our case lacks merit, which the State would surely bring.

For each prong of the test, CAPS would face one or more challenges:

Stage 1 Challenge: Comparator Class Problem

CAPS would likely face a problem identifying an appropriate comparator class to which the Unit could be compared to establish a prima facie case of gender-based discrimination.

In the federal case *Shulte v. State of New York* (1981, 533 F.Supp. 31), a woman sued the State of New York for wage discrimination alleging that she was part of a predominantly female class of psychiatric

[1] Anecdotally, the *Los Angeles Times* agrees that the bill applies to "public and private businesses." See "California equal pay bill may be the toughest in the nation" http://www.latimes.com/business/la-fi-equal-pay-20150902-story.html)

social workers (70% female, 29% male) and performed substantially the same work for less pay than the predominantly male psychologists (67% male, 31% female). The court did not reach the question of whether the work performed was substantially similar or not, but rather found that because there was a substantial representation of the "minority sex" within each classification, the differing salaries didn't establish wage discrimination. This was because the equal pay law was not "intended to address the situation where the employer pays different wages to two different job classifications, each of which includes both men and women."[2]

To summarize, there was no violation because both men and women social workers were paid less than men and women psychologists, so the plaintiff couldn't prove her claim.

California has adopted the federal court's reasoning in *Shulte* in *Hall v. County of Los Angeles* (2007, 18 Cal.App.4th 318). In that case, a contract attorney for the County of Los Angeles who was employed by a private company exclusively contracted by the county was paid less than male attorneys who worked directly for the County Counsel's office. Relying on *Shulte*, the California court said that the plaintiff was wrong to compare her salary to that of male county counsels and that her proper comparator class would've been men employed in the private company in which she worked. As with the social workers and psychologists, the contract attorneys and county counsels were paid similarly within their own classes and each population contained significant numbers of both men and women.

While the new Fair Pay Act amends the previous Equal Pay Act, it is not clear from the statutory language that the new law would enable or prompt courts to depart significantly from the current understanding of what constitutes and appropriate comparator class and what does not.

Unit 10 is staffed by majority women but not by a wide margin (53% women to 47% men). Women within Unit 10 classifications would likely not be successful comparing themselves to men in Unit 9 classifications. While Unit 9 is predominately male by a wider margin than Unit 10 is predominately female, both women *and men* in Unit 10 classifications are paid similarly for substantially similar work and both women *and men* are paid less than *both women and men* in Unit 9 classifications. Unit 10 women would have difficulty legally comparing themselves to Unit 10 men because *both* are underpaid. Unit 10 women can't compare themselves to Unit 9 men because they are joined in their unequal pay by Unit 10 men and higher paid women exist in sufficient numbers within Unit 9.[3]

(Additionally, it isn't likely that CAPS could show that, across the board, Unit 10 and Unit 9 employees are *all* engaged in substantially similar work, as proven in our LPLW litigation. There are certainly some classifications where arguments can easily be made that Unit 10 and Unit 9 employees are doing the

[2] It is interesting to note that the court, in summarizing the uncontested facts presented by the State in its defense, specifically cited the graduation rates for male psychologists and female social workers, noting that the graduation rates paralleled the gender breakdown of each employee class. This would be data to which CAPS would need to look if filing a similar claim. Data showing that graduation rates mirror – or don't – California employee gender breakdowns between the respective classifications could be a factor in determining discriminatory hiring practices.

[3] What constitutes a sufficient or significant number of the opposite gender within the class? The courts don't provide us with a bright line test. However, in the *Shulte* case, minority-gender populations in the 29-31% range were deemed "sufficient" by the court to prohibit the use of a mixed-gender class as a comparator. In the California *Hall* case, the minority-gender populations fell within a similar range of 22-29%. Unit 10 is roughly 53% female to 47% male. Unit 9 is roughly 20% female to 80% male. Whether a drop from 22% to 20% reduces a minority-gender population from sufficient to insufficient is an open question.

substantially similar, if not the same, work under two different job titles but take home dramatically different pay. But such perfect analogs do not exist for each Unit 10 classification.)

To get out from under the comparator class problem that likely exists, CAPS may have to expand its claim to allege that the state is discriminatory in its hiring practices and seeks to hire women for the lower paid Unit 10 positions. That would be a tall order because of the . . .

Stage 2 Challenge: Merit System Problem

The Fair Pay Act specifically excepts wage differentials based upon merit systems. The California Civil Service system is certainly a long-standing, codified merit system. The merit system not only provides the State with ample cover for most wage differentials, but would also make it astronomically difficult to prove discriminatory hiring practices with the wage differential protections provided by a merit system.

Minimum qualifications are clearly established for all civil service classifications. Scientists get scientist jobs by meeting the minimum qualifications for those classes. Engineers get engineering jobs by meeting the minimum qualifications for those classes. The State can't selectively place people in classes where they do not meet the minimum qualifications.

Simply put, no evidence exists to support an allegation that the state engages in discriminatory hiring practices. To provide evidence of discrimination, we could look to hiring practices in departments employing both Unit 9 and 10 classifications. For example, if all water boards scientists were women and all water boards engineers were men, that could prove problematic for the state. But current demographics provide us no traction here.

Stage 2 Challenge: Bona Fide Factors Other Than Sex

Aside from the cover provided by the Civil Service Act, the State is also allowed to pay differing wages if it can show that it relies on a bona fide factor other than sex, such as education, training, or experience in a way consistent with business necessity. To defend itself from a charge of discrimination brought by CAPS by comparing Unit 10 women to Unit 9 men, it is likely that the State will defend itself by arguing that engineers within both the public and private sector generally received higher compensation which requires the state to offer those positions at their current rates to attract and retain qualified candidates. Additionally, the State could argue that professional certifications exist for Unit 9 employees that do not exist for Unit 10 employees in all cases.

Stage 2 Challenge: Reasonable Reliance on Non-Gender Factors; Factors Account for the Entire Differential

The State has at its disposal a bevy of non-gender factors that explain the wage differential between Unit 10 women and Unit 9 men: certification requirements, the merit system on which hiring and promotion are based, collectively bargained wages and benefits, and legislative appropriation for wages and benefits. It would be a herculean – likely impossible - task for CAPS to unpack the state's reasonable reliance on these non-gender factors to find gendered motivation for the inequities between Unit 10 women and Unit 9 men performing substantially similar work.

Stage 3 Challenge: Pretext Is Everything

If a court accepts that the appropriate comparison to be made is between Unit 10 women and Unit 9 men, and if the court rejects the State's likely claim that wage differentials are allowed under the state merit system and otherwise constitute bona fide factors other than sex relied upon out of business necessity, CAPS's final challenge would be to prove that the merit system and bona fide factors offered by the state are, in fact, not the real reason Unit 10 women are paid less than Unit 9 men for doing substantially similar work.

CAPS would need to prove that the State is using the merit system in a discriminatory manner. We currently have no evidence that such is the case.

Conclusion

While gender representation gaps in the scientific and engineering professions exist and are especially pronounced in comparison with the Unit 9 classifications, Unit 10 is comprised nearly equally of men and women, both of whom are paid far less than their Unit 9 counterparts – where easily identified counterparts exist. Given that both units are comprised of significant populations of both genders, finding a comparator class that establishes a prima facie case of gender-based wage discrimination appears difficult at best. Additionally, the merit system and bona fide, non-gender reasons for paying incumbents in both units differently returns the burden of proof to CAPS to prove that the State's averred reliance on non-gender reasons are pretextual.