Pay Transparency and Workplace Culture: SB1162 and Beyond

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The march toward greater gender equity in employment has been a steady, if sometimes rocky, climb. The flawed Equal Pay Act of 1963 was a start, but its exceptions allowed pre-existing pay discrimination and disparity to continue to frustrate true equity. The Lilly Ledbetter Fair Pay Act of 2009 was an effort to allow a greater reach back in time to locate and correct pay disparities, but again seemed to be a patch rather than a cure.

In 2016, California enacted the California Fair Pay Act, which closed many of the federal loopholes left over from the 1963 Act, by requiring equal pay not only for identical work, but for similar work done under similar working conditions. It also outlawed pay discrepancies based on prior pay history, and outlawed inquiries about pay history. Many industrialized states have followed California's lead with their own versions of pay equity law updates.

At the same time, the EEOC and NLRB have promulgated rules banning employer policies forbidding discussion between workers of pay, pay equity, and pay comparisons. The EEOC has also for years required annual reporting of gross pay statistics broken down by demographic categories for larger employers. Collectively, these efforts came to be termed "pay transparency" initiatives.

A major new development in the fight for pay equity in recent years has been the promulgation by several states and municipalities of rules requiring employer reporting of pay data both to regulators and to employees and applicants. One of the most important of these laws is California's SB1226, effective January 1, 2023. This article will summarize the requirements of SB1226, discuss some anecdotal reporting about how large employers may be dealing with it, and focus on the need for thoughtful conversations in the workplace about pay, pay differences, and corporate policies on gender pay equity.

What Does SB1126 Provide?

The law has two major sub-parts. One amends section 12999 of the CA Government Code to establish new requirements for employers of 100 or more employees in California to report annually to the state Department of Civil Rights their median and mean hourly rate for pay for various combinations of race, gender and ethnicity categories in each job family. This report

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creates a kind of pay transparency, in that the state watchdog civil rights agency will be able to track and evaluate disparities in pay between groups, and within groups.
The second part of SB1266 is a true pay transparency enactment, amending Labor Coder section 432.3 in these particulars:

--it outlaws the inquiry into an applicant's pay history, or the use of that data in setting compensation; and

--it requires an employer to tell any employee, on request, the "pay scale" for the job in which the employee is currently employed; and

--it requires that the employer disclose in any job postings the "salary or hourly wage" the employer expects to pay for the position being advertised.

What Other Pay Transparency Laws are on the Books?

A growing number of states and municipalities have enacted some version of pay transparency resembling SB1126. The most widely known and discussed are the laws in Washington state, Illinois, New York City, and similar laws slated for adoption in other jurisdictions. Triggers and disclosure requirements vary.

In addition, both Title VII and the National Labor Relations Act prohibit employer rules forbidding employees from discussing their compensation with other employees or, in appropriate cases, with union organizers or government enforcement agents.

How are Employers Reacting to SB1126?

Early anecdotal evidence suggests that employers are beginning to attempt compliance, but the disclosure strategies vary widely—likely as a result of uncertainties in the legal definitions in the law itself. One recent report noted that the advertised pay scale for a high tech recruitment for a software engineer announced a pay scale ranging from $90 to $900 per hour—obviously an attempt by the company to state as broad a range as might end up being paid in order to avoid a potential claim under the law. A recent Wall Street Journal editorial satirized the California law as engendering confusion and lack of clarity, rather than useful data about discrimination.

Other employers who try to report a more narrow band of "probable" or "desired" pay worry that they might be deterred from hiring a super-qualified person who commands a higher rate because of unique multiple skills, or, on the other end, a less qualified but promising applicant who could be hired on the equivalent of "probation" and then grow into the normal pay range.

Still another problem made more difficult by the law is the challenge of fair pay banding, such as is required by the California Fair Pay Act. That law, in general terms, requires equal pay regardless of gender for similar work being done under substantially similar conditions. What it leaves open, however, is the propriety of gradients of pay within a job family reflecting time in grade, ancillary skills, customer familiarity, and other soft skills, as well as any clear rule about how long a differential made at the time of hire can continue after the new hire is doing the same work as incumbents.

What Challenges do These New Laws Pose for Workplace Conversations and Dialogue?

One predictable result of the pay transparency movement will be heightened workplace chatter and dialogue about who is getting paid what amount for which work. There is significant danger that unless properly managed, these conversations can undermine morale, create or fuel resentments, or leave a company with hard choices in how it explains that "Susan" gets higher pay than "John"—or the like. There is an old saying that nothing, absolutely nothing, provokes more angst between employees than small differences in compensation.

To my way of thinking, management would be well advised to develop and implement supervisory trainings to explain the transparency movement and goals; to equip managers with information about how pay ranges are to be calculated; to ensure that salary history does not play a role; and to teach them how to conduct and mediate workplace conversations about pay equity. Complaints of pay inequity are likely protected expressions under various laws, and like complaints of harassment must be taken seriously and investigated and remediated with dispatch. On the human side, employees with the courage to speak up about their own perception of their worth, and the fairness of employer actions, deserve our very best listening and support. We should encourage appropriate questioning and self-advocacy, not punish it. Good luck!