

# Female Attorneys' Settlement of Equal Pay Dispute with Farmers Insurance Provides Little Guidance for California Employers

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California's Equal Pay Act (the "Act"), Cal. Lab. Code section 1197.5, is widely recognized as one of the most aggressive and pro-employee wage discrimination laws in the nation. The Act was intended to combat systemic wage discrimination by making it easier for employees to prevail on wage discrimination claims and by offering claimants greater protection from retaliation for bringing such claims. Recent amendments to the Act have left many employers uncertain of how to evaluate and justify wage anomalies and ensure compliance with the Act. Employers and practitioners hoped to receive additional guidance from the court in *Coates v. Farmers Group Inc. et al.*, Case No. 15-CV-01913-LVK ("*Coates*"), one of the first high-profile cases addressing wage discrimination under the revised Act. As discussed below, however, the case settled before trial late last year, leaving employers still in need of judicial guidance.

In *Coates*, a putative class of nearly three hundred female attorneys challenged Farmers' compensation and promotion practices. The plaintiffs alleged that the company systemically "groomed and promoted" male attorneys while female attorneys were not promoted as readily, resulting in lower pay grades and unequal promotions for female attorneys throughout the company. The lead plaintiff in *Coates* brought suit after discovering that her male litigation counterpart, who graduated law school a year after she had, earned nearly double her salary. The lead plaintiff further alleged that she was effectively demoted (by being assigned menial administrative tasks) after bringing the wage discrepancy to the attention of her supervisors.

The case settled for \$5 million and the settlement was approved by Judge Lucy Koh of the United States District Court for the Northern District of California late last year. The settlement came on the heels of Judge Koh's determination that, consistent with recent amendments to the Act, the putative class members could compare their wages to those of all Farmers attorneys *nationwide*, rather than restricting the plaintiffs' salary comparison to Farmers' San Jose office where the lead plaintiff was employed. Allowing broad comparisons was a significant departure from federal law and pre-amendment state law, which permitted comparisons only between employees performing the same job, at the *same location*. In *Coates*, the nationwide salary data was crucial to the plaintiffs establishing a gender-based wage gap within the organization – a gap which was mildly apparent in the San Jose office, but nearly quadrupled when the plaintiffs were permitted to compare their salaries to those of male attorneys nationwide.



The multi-million dollar settlement may have been a cost-saving choice for the company, which faced class-wide exposure including two years of back pay per plaintiff (as necessary to bring each plaintiff's salary into compliance) as well as statutory penalties under California's Labor Code Private Attorneys General Act ("PAGA"). In addition to payment of this large monetary sum, Farmers agreed to a variety of injunctive measures aimed at addressing and correcting salary disparities over the next three years. Specifically, Farmers agreed to retain an independent human resources consultant to conduct full scale audits of the company's compensation policies and practices, and to implement changes as necessary to avoid unlawful wage disparities. Farmers also agreed to appoint a full-time internal compliance monitor to provide the company with regular diversity training, and to provide statistical reports and compensation analytics to plaintiffs' class counsel on a yearly basis and verify Farmers commitment to ending wage discrimination within the company.

### **1. Then and Now: Significant Recent Amendments to California's Equal Pay Statute.**

Prior to recent amendments, the Act was written to implement the adage "*Equal Pay for Equal Work.*" To establish a prima facie case of unlawful wage discrimination under the pre-amendment statute, a claimant was required to demonstrate that despite performing "equal work" (i.e., same position, same tasks, performed at the same location), the claimant received a lower wage rate which was unlawfully based upon the claimants' sex or gender.

#### *a. Equal Pay for Substantially Similar Work.*

Amendments to the Act which became effective on January 1, 2016, eliminated the "*Equal Pay for Equal Work*" threshold for employer liability. Significantly, the amended statute no longer requires that a claimant demonstrate he or she performed "equal work" as compared to an employee of the opposite sex who received a higher salary. Instead, a claimant need only show the he or she was performing "*substantially similar work when viewed as a composite of skill, effort and responsibility*" – a substantially lower threshold than the previous "equal work" requirement. Further, as reflected in *Coates*, claimants are no longer restricted to making salary comparisons within a single location, but may now make salary comparisons to employees performing similar work at the employer's other facilities and locations, even if they are out of state. This change can create proof problems for employers who are called upon to justify compensation disparities based upon location-specific factors, such as the general profitability of the location, labor market conditions, and the local cost of living.

#### *b. Burden Shifting.*

The amended Act also shifts the burden of proof to the employer to demonstrate that any disparity in wages is not based on the claimant's sex (or other protected status, as discussed below). Thus, it is now the employer's burden to defend its compensation structure and demonstrate that any wage differential between employees performing substantially similar work resulted entirely from one of more of the following "reasonably applied" factors: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; or (4) a bona fide factor other than sex, such as education, training, or experience. The amended statute further prohibits a "*bona-fide factor other than sex*" from being based on, or derived from, any sex-based differential in compensation. Additionally, a bona fide factor other than sex must be: (1) related to the position in question, and (2) consistent with a business necessity. "Business necessity" is further defined by



the statute as "*an overriding legitimate business purpose such that the factor relied upon fulfills the business purpose it is designed to serve*" and accounts for the entire wage differential.

Even when an employer can demonstrate that a factor other than sex *accounts for the entire wage differential* between two employees of the opposite sex performing substantially similar work, the burden shifts back to the claimant to demonstrate that an alternative business practice exists that could serve the same business purpose without producing the inequitable wage differential. If the claimant is successful in demonstrating an alternative business practice, the employer's presumptive defense becomes invalid and despite effectively demonstrating that the wage differential was not caused by a sex-based policy or practice, the employee still prevails on his or her wage discrimination claim under the statute.

*c. Prior Salary History.*

Under additional amendments that became effective on January 1, 2017, the Act specifically prohibits employers from relying on a job applicant's prior salary history alone in setting compensation. The policy reasons for the amendment recognized that prior salary may be a historical artifact of a sex-based differential which, if relied upon to defend lower wages, would perpetuate systemic inequalities which have contributed to the wage gap.

In a recent case arising under the federal Equal Pay Act, *Rizo v. Yovino* (9th Cir. 2017) 854 F.3d 1161, the Ninth Circuit held that an applicant's prior salary could be relied upon as a factor other than sex which justified a pay differential, provided that the employer showed that prior salary "effectuate[s] some business policy" and the employer used salary history "reasonably in light of [its] stated purpose as well as other practices." In *Rizo*, a school teacher filed suit against Fresno County after discovering that she was paid less than male teachers performing the same work. Because the teacher filed her claim under the federal Equal Pay Act, California's prohibition on using salary history alone to justify a differential was not applicable. Thus, it remains to be seen how California courts will interpret the restriction on use of salary history.

*d. Retaliation.*

The Act, as amended, prohibits retaliation against claimants for exercising their rights under the Act or making inquiries about the wages paid to themselves or other employees. An employer need not provide information about another employee's wages, but cannot retaliate against an employee for making the inquiry. The Act also makes it unlawful for an employer to prohibit its employees from disclosing or discussing their wages with one another. Additionally, employers must maintain and provide at least three years of the employee's own compensation records for the employee's review following his or her request. The revised Act provides claimants with a private right of action if they are discharged or retaliated against after making a compensation inquiry.

*e. Race Based Wage Discrimination.*

Finally, in addition to lowering the threshold for a viable equal pay claim based on sex, amendments to the Act which became effective in January of 2017 extended the same protection from gender discrimination to race and ethnicity. California is the first state in the nation to protect employees from race and/or ethnicity-based wage discrimination. Under the Act, as amended, an employer has the burden of demonstrating that any differential in compensation is entirely based on legitimate factors and not an employee's race or ethnicity.



## 2. Where to From Here? Achieving Compliance with California's Amended Equal Pay Act.

As described above, significant changes to California's Equal Pay Act took effect in 2016 and 2017. While plaintiffs and their counsel begin to test new theories and their wage discrimination claims make their way through California's courts, employers will gradually receive additional judicial guidance regarding compliance with the amended Act.

In the meantime, employers can work to minimize risk by conducting privileged compensation audits and analyzing wage disparities across a wide range of comparable positions. Specifically, positions which have similar job descriptions, or which require comparable skill, effort, or responsibility should be closely analyzed for any wage disparities between employee of different genders, races or ethnicities. When wage disparities are detected, each such disparity should be individually addressed and accounted for by the employer based on at least one of the following factors: (1) a seniority system; (2) a merit system; (3) a system that measures earning by quantity or quality of production; (4) a bona fide factor other than sex.

Additionally, when instances of disparate compensation are identified, employers should conduct an unbiased analysis of whether the factor(s) relied upon may reasonably account for the entire wage differential. When relying on a "bona fide factor other than sex" to justify a differential, employers should consider whether the factor may stem from an applicant's prior salary history alone which by itself no longer qualifies as "bona fide factors other than sex." Finally, whenever wage disparities are identified, employers should consider whether another business practice might be identified which could serve the same business purpose without producing the inequitable wage differential.

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