THE WAGE EQUALITY ACT OF 2016: PROMOTING EQUITY OR STUNTING EMPLOYMENT?

by TODD R. WULFFSON and EMILY K. BORMAN

Celebrated during the month of February, National African American History Month honors the contributions of African Americans to United States history, and recognizes the continuing struggle of many courageous individuals for fair and equal rights. The call for equality is not limited to African Americans, but encompasses the sacrifices and victories of women, other ethnic and racial minorities, and the LGBTQ community, who strive daily for inclusion in America's guarantees of civil liberties and rights. Thus, National African American History Month celebrates not only the civil rights legacy of African Americans, but also the progress of our entire nation toward ensuring that freedom and equality are guaranteed for all people.

It has long been recognized by the civil rights movement that African American history is inextricably intertwined with labor history. Jobs and justice go hand in hand, and access to employment and economic security are the foundation of equality in America. As W. Willard Wirtz stated: "The plain fact is that freedom and groceries are both important, and neither is enough without the other." Accordingly, this February, we examine California's enactment of the historic Wage Equality Act of 2016 (SB 1063) and AB 1676, which, taken together, are the strongest equal pay laws for racial and ethnic minorities in the nation. The potential effect of these new laws is both staggering and largely unknown, leaving many employers wondering exactly how the labor landscape will change and what they should be doing now to prepare.

Provisions of the Wage Equality Act of 2016

In order to understand the potential future implications of the Wage Equality Act, one must first examine the law's origins, beginning with the California Fair Pay Act, passed in 2015, which went into effect January 1, 2016. The Fair Pay Act—the strictest law of its kind in the nation—prohibits employers from paying employees wage rates that are less than what they pay employees of the opposite sex for "substantially similar" work, when viewed as a composite of skill, effort, and responsibility, and performed under similar working conditions. Cal. Lab. Code § 1197.5(a). The Fair Pay Act imposes a significant burden on employers for defending against gender-based wage discrimination claims. Specifically, it requires employers to prove that a wage differential is the result of the "reasonable" application of one or more of the following factors: (1) a seniority system; (2) a merit system; (3) a system that measures earnings by quantity or quality of production; and/or (4) a *bona fide factor* other than gender, such as education, training, or experience. The fourth exception only applies where the employer shows that the *bona fide factor* (a) is not based on, or derived from, a gender-based differential in compensation; (b) is related to the job at issue; and (c) is consistent with business necessity—which is defined as an "overriding legitimate business purpose." The foregoing factors must account for the entire wage differential. *Id.*

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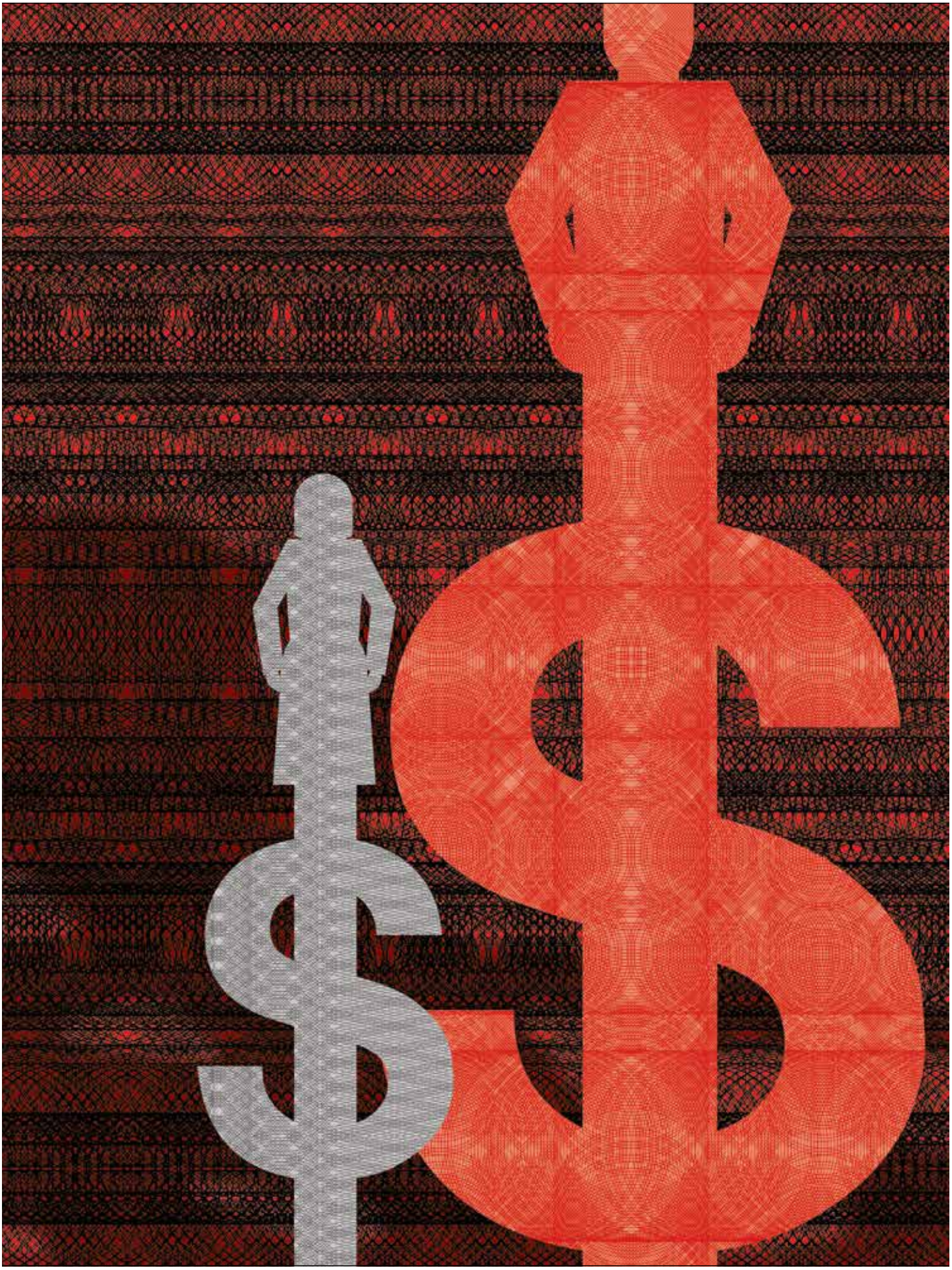
The Wage Equality Act of 2016, which took effect January 1, 2017, was introduced one month after the Fair Pay Act went into effect—and long before any courts had a chance to interpret the Fair Pay Act. The Wage Equality Act amends Labor Code Section 1197.5, and expands the Fair Pay Act's protections verbatim, to race and ethnicity. Accordingly, the new law prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of another race or ethnicity for "substantially similar" work. Sen. Bill 1063 (2016, Reg. Sess.). AB 1676, which was passed concurrently with SB 1063, provides that prior salary, by itself, cannot justify any disparity in compensation between workers of the opposite sex, race, or ethnicity.

The Wage Equality Act also extends the Fair Pay Act's enforcement mechanism and penalties to wage discrimination based on race or ethnicity. Accordingly, an employer who is found to have engaged in racial or ethnic wage discrimination may be liable for the amount of the wages the employee lost, plus interest, as well as an additional



equal amount as liquidated damages, and, of course, attorneys' fees. Further, pursuant to Labor Code Section 1199.5, any violation of Section 1197.5 carries with it a fine of up to $10,000 and potential jail time for multiple offenses. Since it is a crime and a statement of the public policy of the State, any violation also carries with it a potential public policy violation lawsuit, retaliation claims for blowing the whistle on non-compliance, unfair competition claims, and class action or private attorney general actions (PAGA) for any or all of the foregoing.

Potential Benefits of the Wage Equality Act

Defenders of the Wage Equality Act and AB 1676 claim that the laws are the "next logical step" in pay equity. The bill's supporters point to a recent report by the American Association of University Women, which states that "African American and Hispanic men and women have a tendency to be paid less than their white counterparts notwithstanding when they have the same instructive foundation." Specifically, the study shows that compared to every dollar a white male makes, Asian American women make 90 cents, African American women make 64 cents, and Latina women make 54 cents. Since the Wage Equality Act of 2016 takes the Fair Pay Act a step further and extends the protections of the statute to race and ethnicity, proponents argue that SB 1063 builds upon the important steps California has already taken to address wage inequality.

Potential Disadvantages of the Wage Equality Act

Despite the admirable purpose of SB 1063, it has a significant number of detractors. These opponents largely point to two weaknesses of the legislation. First, they object that SB 1063 simply goes too far, too fast. Specifically, the Fair Pay Act is still in its infancy, with its standards likely to be tested over the next several years in litigation. The enactment of the Wage Equality Act did not allow time for employees, employers, and the courts to interpret and implement the new boundaries of the Fair Pay Act. Accordingly, many employers are left wondering exactly how the new law will impact their businesses and the legal landscape.

Second, critics of the legislation note that SB 1063 expressly removes geographic location as a criterion for wage differentials. In the past, employers could justify wage disparities due to employees' working in different offices or on different shifts. Such justifications are no longer automatic. In fact, this omission will likely affect not only California employers, but those operating in multiple states. By removing geographic location as a criterion for a pay disparity, the law opens the argument that an employee's pay must be compared to all employees doing substantially similar work for that company, *anywhere*.

For California employers, this could be an invitation to a massive amount of litigation. The citizens of California are—through no fault of employers or alleged institutional racism—not evenly spread out based on race or ethnicity throughout the State. If a business has offices in say, Newport Beach, but has a regional office in Bakersfield, the managers in Newport Beach are likely going to be less Hispanic than the managers in Bakersfield, and could be paid more primarily to cover the cost of living at the coast. To a reader of SB 1063 looking to file a potential lawsuit, it may look like the company pays 80% of its white managers considerably more than what it pays 80% of its Hispanic managers. The courts are going to have to interpret the new law and decide whether extreme geographic differences (which California has in abundance) are a *bona fide* defense to a race or ethnicity discrimination claim based on the new law.

AT-A-GLANCE
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Similarly, the law may affect recruitment of employees if someone is being recruited from an expensive area within or outside of the state, and having them keep that level of compensation would bring up the average for employees of their race within the company. The employee's prior salary cannot, in and of itself, justify the new salary—in other words, the excuse of "we had to offer her or him more to recruit them" may not be available. The combination of these geographical issues may make it yet another reason why businesses may choose to locate somewhere other than California if they have a choice.

Next Steps and Best Practices for California Employers

While the future effects (and effectiveness) of SB 1036 and AB 1676 remain to be seen, it is important for employers to take affirmative steps to protect themselves from liability in 2017. Employers should assess where they stand with regard to pay equity. If employers have not analyzed this issue before, conducting a proactive pay equity analysis could be the first and best step toward achieving fair pay and diminishing legal risk. Ideally, this should be done with the assistance of competent employment law counsel who can provide both guidance on the self-audit, as well as attorney-client privilege on the result. The last thing you want to do is create discoverable information that can be the basis for a lawsuit when you are taking the first step to comply with the new law. Even companies well versed in pay equity are advised to revisit the issue with a focused eye on race and ethnicity. Companies should also review their written policies and practices with respect to hiring, promotion, and compensation to ensure compliance with the new Wage Equality Act.

There is a great deal of debate as to whether the Wage Equality Act is necessary in light of already existing anti-discrimination laws, whether it goes far enough to address perceived income inequality, and whether it is appropriate to put this level of burden on employers to solve societal problems that likely have a number of causes. This African American History Month, regardless of where you fall on this debate spectrum, find inspiration in the fact that informed self-awareness acquired through appropriate introspection, particularly with respect to such an important and sweeping piece of legislation, is the right thing to do, as well as being the prudent thing to do for your business.

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