Let's talk salary (or not)

Combating pay secrecy and unfair pay practices in the workplace that lead to gender pay gap

By Eduard Meleshinsky and Mariko Yoshihara

Workers are best able to negotiate a fair market salary when they know what the employer is paying the rest of their similarly situated co-workers[1] and they are not pegged to prior discriminatory wages. However, a 2010 U.S. nationwide survey found that about half of all workers are subject to a company policy forbidding or strongly discouraging discussion of wage and salary information, i.e., pay secrecy policies.[2]

In the private sector, 62 percent of women and 60 percent of men report being subject to a company pay secrecy policy.[3] For example, an employer as large as T-Mobile, which employed approximately 40,000 affected employees at the time, was found to maintain almost a dozen pay secrecy policies until the National Labor Relations Board ("NLRB") intervened. Lawmakers across the country have largely been content with the pay secrecy status quo – only about a quarter of U.S. states have adopted privately enforceable laws to combat pay secrecy.[4]

Pay secrecy causes gender wage gap

There is reason to believe that workers' salaries have been pushed down year after year and that the gender wage gap has persisted at least in part because of companies' pay secrecy policies.[5] Full-time working women now typically earn just 80 cents for every dollar paid to their male counterparts. For women of color, the wage gap is even larger: African American women and Latinas typically make only 63 cents and 54 cents, respectively, for every dollar paid to white,

non-Hispanic men for full-time work. To make matters worse, while women often do not know they are being paid less than their male counterparts,[6] their lower salaries can be used against them further down the line when they apply for a new job and are required to disclose their lower prior earnings, which can be used to devalue their previous work or to anchor their incoming salary.

California, along with a minority of other states, has laid the groundwork to combat pay secrecy and other pay practices that serve to perpetuate the gender wage gap, and the early results are promising.[7] In this climate where publicly traded companies receive strong pushback from shareholders when they are inclined to raise wages for their workforce,[8] it is critical that the march to pay transparency and pay equity in the workplace continues at a brisk pace.

In this article, we will explain how worker advocates can deter California employers from maintaining pay secrecy policies, identify salient issues to consider when bringing such claims, and ultimately help eliminate the scourge of pay secrecy and unfair pay practices.

Pay secrecy

Section 7 of the National Labor Relations Act is not sufficiently enforceable.

Section 7 of the National Labor Relations Act (NLRA) provides that workers, even non-unionized workers, may "engage in other concerted activities for the purpose of ... mutual aid or protection."[9] This protection includes discussing wages and conditions of work among co-workers.[10] However, direct enforcement of Section 7 to oppose pay secrecy in the workplace is difficult to effectuate in practice because of limitations on remedies. For example, attorneys' fee awards are the exception and not the rule,[11] reinstatement can come years later, and the harmed employee is entitled only to backpay (which is also not mandatory).[12]

Moreover, supervisors are not covered by the protections of the NLRA, undermining the degree to which a broad class of workers can freely share wage data without fear of retaliation. For example, Lilly Ledbetter would likely not have qualified for Section 7 protection had she violated her employer's improper pay secrecy policy because Ms. Ledbetter was a supervisor, and thus, would have been excluded from coverage under Section 7.[13]

Accordingly, while Section 7 has been a longstanding tool to remedy wrongful terminations when certain groups of employees share wage information, it is overshadowed by more recent and effective state-law developments, discussed *infra*.

Statutory Relief under Sections 232 and 1197.5 of the Labor Code

The recent amendments to the California Fair Pay Act have been the subject of much-deserved fanfare and discussion.[14] However, one underappreciated aspect of the newly amended Section 1197.5 is subdivision k(1), which states in relevant part that: "An employer shall not prohibit an employee from disclosing the employee's own wages, discussing the wages of others, inquiring about another employee's wages, or aiding or encouraging any other employee to exercise his or her rights under this section. Nothing in this section creates an obligation to disclose wages."[15] The authors were unable to locate any cases analyzing subdivision k. However, this provision is notable in several respects.

First, subdivision k creates strict liability against companies which adopt pay secrecy policies. By contrast, subdivisions (a) and (b) – which forbid payment of different salaries to workers on account of sex or race, respectively – permit disparities between workers of opposite sex or of different races where it can be shown that one of four non-prohibited reasons explain the otherwise unlawful disparity.[16]

Second, the pay transparency provision does not merely protect an employee from discharge or discrimination for disclosing their own wages, but also prohibits retaliation for disclosing or inquiring into the wages of others. This is broader than the protection offered by Labor Code section 232 – the older, less expansive pay transparency statute – because section 232 only permits employees to disclose their own wages, but does not, by the plain text, protect an employee's inquiry about the wages of others or disclosure of wage survey information they have received from other workers. In this way, Section 1197.5(k)(1) is comparable to Section 7 of the NLRA in terms of the range of conduct protected, but, as discussed *infra*, lends itself to more effective enforcement using the remedies contained in the Private Attorney Generals Act of 2004 ("PAGA"), Cal. Lab. Code sections 2699 *et seq*.

Using PAGA Representative actions to enforce Section 1197.5(k)(1)[17]

PAGA is a type of qui tam action which permits employees to step into the shoes of the California Labor Commissioner and thereby collect civil penalties on behalf of the state. Following administrative exhaustion with the Labor Workforce Development Agency ("LWDA"), an aggrieved employee can collect civil penalties for all other aggrieved employees who have been harmed by an employer's violation of the Labor Code and portions of the Health and Safety Code.[18] With the 2015 amendment of the California Fair Pay Act, adding the anti-pay secrecy provision, an aggrieved employee may bring an enforcement action on behalf of the State of California to challenge an employer's use of a pay secrecy policy.

(1.) Notice to the LWDA

Before an aggrieved employee may collect civil penalties against an employer, PAGA requires that an aggrieved employee first provide to the LWDA and the employer written notification "of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation."[19] Courts have required more than a string cite of the relevant labor codes allegedly violated by the employer. Accordingly, it would be wise to gather as much information about the subject

employer's pay secrecy policy and include it in the written notification to the letter. For example, this is one of the T-Mobile pay secrecy policies found by the NLRB to have interfered with T-Mobile's employees' Section 7 rights because it "is so broadly written that it would chill employees in the exercise of their Section 7 rights:"

> This Employee Handbook is for the sole use by employees of T-Mobile and its U.S. based affiliates and subsidiaries. This Handbook is a confidential and proprietary Company document, and must not be disclosed to or used by any third party without the prior written consent of the Company.[20]

Because Section 7 of the NLRA has been litigated for decades, in contrast to the dearth of litigation interpreting Section 1197.5(k)(1), pay transparency advocates may look to Section 7 cases for inspiration about the types of policies which may interfere with employees' right to "aid[] or encourag[e] any other employee to exercise his or her rights under" Section 1197.5.[21]

(2.) Discovery Issues

The extent to which a PAGA plaintiff is entitled to state-wide discovery of contact information for all employees alleged to have been harmed by an employer's violations of the Labor Code is before the California Supreme Court in *Williams v. Superior Court*.[22] The court of appeal in *Williams* held that a trial court may limit discovery of employee contact information for a PAGA plaintiff alleging state-wide labor code violations to the facility in which he or she worked, and then broaden the scope of discovery incrementally.[23] However, other courts have permitted broader discovery without such incrementalism.[24] Stay tuned.

(3.) Attorneys' fees and damages

PAGA penalties can accrue in three ways: (1.) violations of Labor Code sections listed in Section 2699.5, which includes Section 1197.5, (2.) violations of certain Health and Safety Code sections related to Cal-OSHA, and (3.) most other violations of the Labor Code so long as the employer has the opportunity to cure the violation within 33 days of the postmark date of the notice sent to the LWDA and the employer.[25] Because Section 1197.5 is listed in Section 2699.5, an employer cannot "cure" a violation of Section 1197.5 upon receiving the required LWDA/employer notices. Civil penalties accrue every pay period, and, unless the Labor Code provides otherwise, are $100 per pay period per type of violation for an initial violation.[26] If the employer receives notice of its unlawful conduct, then each violation "subsequent" to this notice generates a $200 civil penalty per pay period per type of violation.[27] While this may not sound astronomical, the penalties add up.

For example, in a case where the employer was alleged to have failed to provide suitable seats to its approximately 5,000 bank tellers, the employer estimated the aggregate civil penalties over approximately 2-3 years to be "approximately $5,616,000" in arguing that the claim satisfied the amount-in-controversy requirement for removal to federal court.[28]

Similarly, if a company maintains a pay secrecy policy, then the company is liable for penalties as follows: $100 * (total # of pay periods) * (total number of employees covered by the policies). If the company has received notice of its unlawful conduct, then the $100 base penalty increases to $200. Assuming a company employs 500 employees, maintains a written pay secrecy policy applicable to all 500 employees, pays its employees twice a month, and has received no notice of its unlawful conduct, then the company's exposure will be $100*24*500 = $1,200,000 on day one of the lawsuit. Seventy-five percent of the recovery would be disbursed to the LWDA, leaving $300,000 for the aggrieved employees. Unless the employer takes immediate action to eliminate the challenged pay secrecy policy, this exposure will grow with each passing pay period.

In addition, attorneys' fees for successful PAGA actions are mandatory, not discretionary.[29]

(4.) Procedural issues

PAGA actions are not class actions, and do not need to meet the requirements for class action certification.[30] As a result, firms that typically handle individual cases may also pursue representative PAGA actions without bringing a corresponding Federal Rule of Civil Procedure 23 action (or state law parallel).[31] Nevertheless, PAGA actions can be and often are brought as a class action.

Moreover, in the event a viable pay transparency claim is discovered in the course of an ongoing individual case, advocates have the option to file a wholly separate PAGA-only action to minimize any logistical burdens or prejudice to a client related to litigating a representative claim versus an individual claim.[32]

Employees bringing a PAGA-only action likely are not entitled to a jury trial (which may be another reason to bring a separate, PAGA-only action if a pay transparency claim is discovered in the midst of an individual action).[33]

Lastly, PAGA actions may not be compelled into arbitration,[34] and settlement of PAGA actions requires court approval.[35]

The next frontier

States like California are making efforts to improve pay data disclosure. This year, Assembly Member Gonzalez Fletcher has proposed a bill[36] that would require employers with 250 or more employees to report the mean and median difference in salary of male and female exempt employees, by each job classification or title. The bill would also require the employer to report the mean and median difference in salary of male and female board members. The employer would have to publish and revise this information annually on its public website. This bill is modeled after similar legislation that was recently passed in the UK.[37] Another bill making its way through the California legislature would require

employers to provide the pay scale for a position to an applicant applying for employment.[38] Such a requirement has already been enacted in Massachusetts.[39]

Prior salaries

Compounding the problem of pay secrecy in addressing the gender wage gap is the pernicious use of prior salaries, which many employers require job applicants to disclose in order to evaluate candidates and make salary decisions. The cumulative effect of these two common business practices is a severe imbalance of power and information, where the employer holds all of the pay data information while the employee is left in the dark to try and negotiate her salary or determine whether her salary is fair and equitable.

As with pay secrecy, employers' use of salary history disparately impacts women in the workplace.[40] Because women earn, on average, significantly less than men, basing salary decisions solely on prior earnings serves to perpetuate historical inequities.

In 2015, the California Employment Lawyers Association and other worker-advocate groups lobbied the California government for passage of Assembly Bill 1017, by Assembly Member Campos, which would have prohibited employers from requesting prior salary history from job applicants. Unfortunately, Governor Jerry Brown vetoed the bill because of intense business opposition. The next year, Assembly Member Campos reintroduced the bill, but eventually amended the bill to instead clarify that prior salary alone could not be used to justify a disparity in compensation under the California Equal Pay Act, rather than banning inquiry into prior salaries. This year, Assembly Member Eggman is carrying a bill that follows the original approach of prohibiting employers from asking about prior salaries and additionally requiring employers to provide salary ranges to job applicants. Already, Massachusetts and several cities[41] have passed laws banning inquiries into prior salaries, and similar legislation is pending in states and cities across the U.S.[42] as well as in Congress.[43]

Challenging the use of prior salary history in hiring is more important than ever in light of the Ninth Circuit's April 27, 2017, decision in *Rizo v. Yovino*, which held that "the Equal Pay Act does not impose a strict prohibition against the use of prior salary, even though an employer could manipulate its use of prior salary to underpay female employees."[44] This decision only impacts cases brought under the federal Equal Pay Act, so California practitioners should be sure to consider California's Fair Pay Act law to combat prior salary practices in addition to strategies discussed below.

Statutory Relief under 1197.5 of the Labor Code

Luckily, the recent amendments to California's Equal Pay Act make clear that employers *cannot* rely solely on prior salary to justify paying a woman less than a man for substantially similar work.[45] Rather, the employer may only consider prior salary if it accurately reflects some other job-related qualification, such as education, experience, or ability. In addition, the entire pay differential must be accounted for by these non-gender-based factors.[46] Therefore, worker advocates should consider challenging policies where employers tie or limit salary decisions exclusively to prior salaries or use salary history to justify offering lower wages to a woman who has equal or better job-related qualifications when compared to her male counterpart. As with the federal Equal Pay Act, establishing liability under California's Equal Pay Act does not require a showing of animus or discriminatory intent.[47]

Challenging prior salary policies under disparate impact theory

Worker advocates may also consider challenging prior salary policies under a disparate impact theory under the Fair Employment and Housing Act ("FEHA") or Title VII.[48] An employer's compensation policies can be violative of the FEHA or Title VII even if it does not necessarily constitute a violation of the Equal Pay Act.[49] For example, facially neutral policies, like restricting new hire pay to a certain percentage above the employee's prior salary or where employers exclude candidates below a certain salary range (using prior salary as a purported proxy for job qualification) can have a disparate impact on women.

Courts have considered disparate impact claims in pay discrimination cases[50], but have not specifically analyzed prior salary policies under such theory. As stated in *Griggs v. Duke Power Co.*,[51] Title VII protects people from "not only overt discrimination, but also practices that are fair in form, but discriminatory in operation."[52] In order to establish disparate impact liability, the plaintiff must "demonstrate[] that an employer uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity."[53] Notably, no evidence of discriminatory intent/animus is required under a Title VII disparate impact theory of liability.[54]

In the pay-discrimination context, the Ninth Circuit has rejected disparate impact claims based on the practice of taking prevailing market rates into account in setting wages when statistics show that women historically have received lower wages than men in the labor market.[55] However, these cases were brought under "comparable worth" theories that involve salary comparisons of *different* jobs which the plaintiffs asserted were of comparable worth[56] to the employer.

In a disparate impact case challenging a company's use of an applicant's or employee's prior salary history to set their compensation, the salary comparison would involve men and women in the *same* job, and therefore would avoid the comparable worth theory that has been

disfavored by the courts.[57] Notably, the concurrence in *Spaulding* pointed out that the plaintiff could not prove a disparate impact claim "because they never attempted to show that any of the facially neutral practices of which they complain had a disparate impact upon women university faculty members as opposed to male faculty members….At best, they showed only that members of the nursing faculty were paid less than some male faculty members in other fields."[58] A disparate impact claim based on a company's policy of using prior salary to set compensation could avoid such pitfalls if the plaintiff shows a facially neutral practice, like utilizing prior salary to set compensation or to exclude job candidates, had a disparate impact specifically on women when compared to men in the same job category. This claim could be made by using statistical data to demonstrate that female employees earn less than male employees in a particular occupation and therefore the practice of utilizing prior earnings, which reflect gender wage disparities, adversely impacts women as a class. Furthermore, advocates may draw on lessons learned from successful disparate impact challenges to employers' use of prior criminal convictions, which frequently exclude African Americans and Latinos from employment prospects without individualized consideration in violation of Title VII.[59]

California offers robust laws

As pay transparency and pay equity advocates continue to gain ground at state legislatures around the country, California has created what may be one of the most effective litigation mechanisms in the nation to close the gender wage gap. With such robust tools in place and more on the way in the legislative pipeline, it is up to each workers' advocate in California to spot opportunities where they can help close the gender wage gap, one unfair pay practice at a time.

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Endnotes

[1] Marlene Kim, *Pay Secrecy and the Gender Wage Gap in the United States* at 5 (2015) ("Although market wages are supposed to discipline both workers and employers in compensation, much information is unavailable to workers (such as what their colleagues earn), so market discipline may not work."), *available at* https://www.umb.edu/editor_uploads/images/cla_d_o/pay_secrecy_IR_march_1_2015.pdf.; *id.* at 9 ("A cross sectional examination of the data in 2011 and 2012, when pay secrecy had been outlawed in six of these seven states, indicates that women's wages are higher in states that have outlawed pay secrecy – but men's wages are higher, too."); G. Richard Shell, Bargaining for Advantage 149-150 (2d ed. 2006) ("In negotiation, information – especially information about what people want – is power. If the other negotiator is awake ... he will want you to disclose your interests and needs before disclosing his own. ... Negotiators on the other side will want to find out what you want so they can see if your needs provide them with leverage.").

[2] Institute for Women's Policy Research, *Pay Secrecy and Wage Discrimination* (2014), *available at* https://iwpr.org/wp-content/uploads/wpallimport/files/iwpr-export/publications/Q016.pdf

[3] *Id*.

[4] See Women's Bureau, U.S. Department of Labor, *Equal Pay and Pay Transparency Protections* (last visited May 11, 2017), *available at* https://www.dol.gov/wb/EqualPay/equalpay_txt.htm.

[5] Adrienne Colella *et al*, *Exposing Pay Secrecy*, 32 Academy of Management Review 55, 62 (2007) ("[P]ay secrecy can actually benefit organizations with respect to labor market immobility. Although the labor market inefficiency resulting from pay secrecy may be a cost to society as a whole and some employers in particular, as mentioned above, other employers can profit from this inefficiency by reducing the mobility of their productive workers. ... [A] policy of pay secrecy prevents employees from comparing their wages with others inside the firm, as well as wages of the firm with those in the job market. Such comparisons are needed for employees to switch jobs when it is to their advantage to do so. Thus, pay secrecy reduces this source of information and prevents employees from recognizing other good employment opportunities."); Kim, *supra* note 1, at 9.

[6] Council of Economic Advisers, "The Gender Pay Gap on the Anniversary of the Lilly Ledbetter Fair Pay Act," (January 2016) ("A pay gap stemming from discrimination is particularly likely to exist under conditions of pay secrecy, where it is harder for workers to know whether they receive lower compensation than similar colleagues."), *available at* https://archive.org/details/GenderPayGapIssueBrief (last visited May 10, 2017); see, e.g., Bourree Lam, "One Tech Company Just Erased Its Gender Pay Gap," (Nov. 10, 2015) (upon receiving inquiry from two female employees regarding pay gap at company, the company reviewed pay data for its 17,000-person workforce and discovered its female employees were underpaid; accordingly, company spent approximately $3 million to correct the gap), *available at* https://www.theatlantic.com/business/archive/2015/11/salesforce-equal-pay-gender-gap/415050/ (last visited May 10, 2017).

[7] Recent studies suggest that states which adopt enforceable pay transparency laws see a marked reduction in the gender wage gap. See, e.g., Kim, *supra* note 1, at 17 ("I find that wages are higher for women in states that have outlawed pay secrecy, especially among those with college degrees."); Olga Fetisova, "Effects of Anti-Secrecy Pay Laws on the Gender Wage Gap," at 15 (May 2014), *available at* econ-server.umd.edu/~edinger/undergraduate/Fetisova_Honors_Thesis2014.pdf.

[8] Matthew Yglesias, "American Airlines gave its workers a raise. Wall Street freaked out." (Apr. 29, 2017), *available at* https://www.vox.com/new-money/2017/4/29/15471634/american-airlines-raise.

[9] 29 U.S.C. § 157.

[10] See, e.g., *Ambriola, Co. v. Unnamed Charging Party*, NLRB No. 22-CA-061632 (2011) (supervisor fired employee for admitting to discussing then-recent round of raises, company settled with employee for $25,000 in back pay).

[11] See, e.g., *HTH Corp. v. N.L.R.B.*, 823 F.3d 668, 681 (D.C. Cir. 2016) (reversing NLRB's award of attorneys' fees despite company's repeated violations of labor law and bad-faith litigation).

[12] 29 U.S.C. § 160(c).

[13] See *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 643 (2007), overturned due to legislative action (Jan. 29, 2009); 29 U.S.C. § 152(3) (excluding supervisors from protection under the NLRA).

[14] A good overview of the amendments to the Fair Pay Act is available in a past issue of this magazine. See generally Lisa P. Mak and Aron K. Liang, *California Fair Pay Act*, Plaintiff, December 2015, *available at* http://www.plaintiffmagazine.com/images/issues/2015/12-december/reprints/Mak-and-Liang_California-Fair-Pay-Act_Plaintiff-magazine.pdf.

[15] Cal. Lab. Code § 1197.5(k)(1).

[16] Cal. Lab. Code § 1197.5(a)-(b). It should be noted that the plaintiff need only establish a gender wage differential to meet his or her prima facie burden. Unlike our anti-discrimination laws, the initial burden is, in practice, on the employer to make its case as to why the gender wage differential exists. Practitioners should take advantage of this and consider adding an equal pay act claim whenever they spot a gender or race disparity in compensation. See, e.g., *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) ("The Equal Pay Act creates a type of strict liability; no intent to discriminate need be shown. Once the plaintiff establishes a prima facie case, the burden of persuasion shifts to the employer to show that the wage disparity is permitted.") (internal quotation marks and

citations omitted); *Hein v. Or. Coll. of Educ.*, 718 F.2d 910, 916 (9th Cir. 1983) ("Thus, to make out a prima facie case, the plaintiff must show only that he or she is receiving different wages for equal work.").

[17] The authors assume some background familiarity with the Private Attorneys General Act of 2004. For helpful background information on the recent amendment to PAGA, the reader may wish to consult past issues of this magazine regarding PAGA. *See generally* Lisa P. Mak, *PAGA procedural amendments*, Plaintiff, February 2017, *available at* http://www.plaintiffmagazine.com/images/issues/2017/02-February/Mak_PAGA-procedural-amendments_Plaintiff-magazine.pdf; Cecilia Guevara Zamora, PAGA: A Decade of Victories, Plaintiff, September 2014, *available at* http://www.plaintiffmagazine.com/recent-issues/item/paga-a-decade-of-victories. A more exhaustive discussion of the various technical aspects of PAGA litigation is outside the scope of this article.

[18] Cal. Lab. Code § 2699.

[19] Labor Code § 2699.3(a)(1)(A).

[20] *T-Mobile USA, Inc. & Commc'n Workers of Am. T-Mobile Usa, Inc. & Commc'n Workers of Am., Local 7011, AFL-CIO MetroPCS Commc'ns, Inc. & Commc'n Workers of Am. T-Mobile USA, Inc. Respondent & Commc'n Workers of Am., AFL-CIO*, 2015 L.R.R.M. (BNA) ¶ 178934 (N.L.R.B. Div. of Judges Mar. 18, 2015), *available at* http://apps.nlrb.gov/link/document.aspx/09031d4581b62e9b.

[21] Cal. Lab. Code § 1197.5(k)(1).

[22] *Williams v. Superior Court*, 236 Cal.App.4th 1151, 187 *review granted*, 354 P.3d 301 (2015).

[23] *Id*.

[24] See, e.g., *Currie-White v. Blockbuster, Inc.*, 2010 WL 1526314, at *3 (N.D. Cal. Apr. 15, 2010) (in a case involving whether an employer provided suitable seating to its customer service representatives in compliance with the relevant wage order: "Defendant shall produce the contact information of putative class members for the two stores in which Plaintiff worked, plus ten additional stores which Plaintiff shall select.").

[25] Cal. Lab. Code § 2699.3.

[26] Cal. Lab. Code § 2699(f)(2).

[27] *Amaral v. Cintas*, 163 Cal.App.4th 1157, 1207-1209 (2008).

[28] *Garrett v. Bank of Am., N.A.*, 2014 WL 1648759, at *6 (N.D. Cal. Apr. 24, 2014).

[29] Cal. Labor Code § 2699(g)(1); *see Abasolo v. CrystalView Tech. Corp.*, 2009 WL 2871891, at *22 (Cal. Ct. App. Sept. 8, 2009), *as modified* (Sept. 15, 2009) (unpublished) ("Section 2699's fee-shifting provision is mandatory, while the fee-shifting provision of Code of Civil Procedure section 1021.5 is discretionary.").

[30] *Arias v. Superior Court*, 46 Cal.4th 969 (2009) (PAGA need not be brought as a class action).

[31] However, counsel should review the decision in *Janik v Rudy, Exelrod & Zieff*, 119 Cal.App.4th 930, 937 (2004), and advise clients regarding any Labor Code violations left unpursued.

[32] Cal. Lab. Code § 2699(g)(1) ("Nothing in this part shall operate to limit an employee's right to pursue or recover other remedies available under state or federal law, either separately or concurrently with an action taken under this part.").

[33] See, e.g., *Mendoza v. Ruesga*, 169 Cal.App.4th 270, 288, fn. 9 (2008) ("a claim for civil penalties . . . is a matter for the trial court rather than a jury")

[34] *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal.4th 348, 386–87 (2014); *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 439-40 (9th Cir. 2015).

[35] Cal. Lab. Code § 2699(l)(2).

[36] Assembly Bill 1209 (2017).

[37] U.K. Government Equalities Office, "Mandatory Gender Pay Gap Reporting: Government Consultation on Draft Regulations" (2016), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504398/GPG_consultation_v8.pdf.

[38] Assembly Bill 168 (2017).

[39] S.2119 (2015-2016).

[40] See EEOC Compl. Man. § 10-IV.F.2.g., *available at* https://www.eeoc.gov/policy/docs/compensation.html.

[41] Massachusetts (S.2119, 2015-2016), City of New York (Int. No. 1253-A, 2016), City of Philadelphia (Bill No. 160840).

[42] Texas (House Bill 290, 2017).

[43] S. 819 (115th Congress).

[44] 2017 WL 1505068, at *3 (9th Cir. Apr. 27, 2017) (internal citations and quotation marks omitted).

[45] Cal. Lab. Code § 1197.5(a)(3), (b)(3) ("Prior salary shall not, by itself, justify any disparity in compensation.").

[46] *Id*. ("The one or more factors relied upon account for the entire wage differential.").

[47] *McCullough v. Xerox Corp.*, No. 12-CV-6405L, 2016 WL 7229134, at *4 (W.D.N.Y. Dec. 14, 2016) ("an EPA claim [under federal law] does not require intentional discrimination on the part of the employer in order for liability to attach"); Cal. Lab. Code § 1197.5.

[48] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1982).

[49] This is because FEHA and Title VII compensation discrimination claims are not limited to claims of unequal pay for equal work. See EEOC Compliance Manual, Section 10. Compensation Discrimination, 12/05/00, *available at* https://www.eeoc.gov/policy/docs/compensation.html; *Washington Cty. v. Gunther*, 452 U.S. 161, 180 (1981) (holding that liability for gender-based pay claims under Title VII is broader than under Equal Pay Act because: "In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes.") (internal quotation marks and citations omitted) (emph. in original).

[50] In *County of Washington v. Gunther*, 452 U.S. 161, 170 (1981), the Supreme Court noted that Title VII's incorporation of the EPA's "any other factor other than sex" defense "could have significant consequences" for Title VII litigation of sex-based compensation cases under the disparate impact theory. Several Courts of Appeals and the Equal Employment Opportunity Commission have recognized the disparate impact theory as a viable claim in sex-based Title VII compensation cases. *See Aldrich v. Randolph Cent. Sch. Dist.*, 963 F.2d 520, 528 (2d Cir. 1992), *cert. denied*, 506 U.S. 965 (1992) ("In order to establish a valid claim under Title VII for sex-based wage discrimination, a plaintiff can demonstrate a disparate impact from use of a facially neutral employment practice, or present evidence of intentional sex-based wage discrimination.") (internal citations omitted); *EEOC v. J.C. Penney Co.,* 843 F.2d 249, 252 (6th Cir. 1988); *Spaulding v. University of Washington*, 740 F. 2d 686 (9th Cir. 1984), EEOC Compliance Manual, Section 10. Compensation Discrimination, 12/05/00, available at https://www.eeoc.gov/policy/docs/compensation.html.

[51] *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971).

[52] See also *Dothard,* 433 U.S. at 328-29, 97 S.Ct. at 2726-27 (height and weight requirement disproportionately excluded women); *Griggs,* 401 U.S. at 430-31, 91 S.Ct. at 853-54 (requirement of high school diploma or satisfactory performance on standardized tests disproportionately affected minorities); *Harriss v. Pan American World Airways, Inc.,* 649 F.2d 670, 674 (9th Cir.1980) (policy mandating maternity leave immediately upon learning of pregnancy had an adverse impact on women); *Gregory v. Litton Systems,* 472 F.2d 631, 632 (9th Cir.1972) (policy excluding applicants with arrest records adversely affected minorities).

[53] 42 U.S.C. § 2000e-2(k)(1)(A)(i).

[54] *See Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1480 (9th Cir. 1987) ("Illicit motive is irrelevant because impact analysis is designed to implement Congressional concern with "the *consequences* of employment practices, not simply the motivation.").

[55] See *Spaulding*, 740 F. 2d 686; *Am. Fed. of S., C., & Mun. Emp. v. State of Wash*., 770 F. 2d 1401 (9th Cir. 1985).

[56] The comparable worth theory postulates that sex-based wage discrimination exists if employees in job classifications occupied primarily by women are paid less than employees in job classifications filled primarily by men, if the jobs are of equal value to the employer, though otherwise dissimilar.

[57] *Spaulding*, 740 F. 2d at 708 ("We cannot manageably apply the impact model when the kernel of the plaintiff's theory is comparable worth").

[58] *Id*. at 709-710.

[59] *See* Equal Employment Opportunity Commission, Notice No. 915.002, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (April 25, 2012), *available at* https://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf; see, e.g., *Gonzalez v. Pritzker*, 2016 WL 5395905 (S.D.N.Y. Sept. 20, 2016) (granting final approval of $15 million settlement on behalf of African American and Latino applicants denied employment with the Census Bureau on accounts of the Bureau's criminal background check screening process); see generally Noah D. Zatz, Disparate Impact and the Unity of Equality Law (2016), Boston University Law Review, 2017, forthcoming, *available at* https://ssrn.com/abstract=2730845.