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Subcommittee: Challenges and Barriers

SB 358 (Jackson) was intended to create a balance between ensuring employees are provided fair wages that are not influenced or based upon gender, while still maintaining an employer's flexibility to determine appropriate wage rates based upon non-gender specific reasons. The balance that was achieved at the legislative level when SB 358 was drafted and moved through the process is the same balance that must be achieved in the implementation of SB 358 to ensure its success. Both employees and employers should be provided guidance on the implementation of SB 358. We have identified the following challenges and barriers that employers and employees will likely face and a list of action items we believe this Task Force can develop to address these issues.

Employer Challenges/Barriers:

The primary challenges and barriers that we believe employers will face in ensuring compliance with SB 358 are as follows:

1. Understanding the terms included in SB 358: "substantially similar work," "entire wage differential," and the "reasonable" application of factors;
2. Understanding the differences between SB 358 and related federal and state statutes, such as FEHA and Title VII;
3. Conducting pay audits to ensure compliance with SB 358;
4. Remedying pay disparities that may be attributed to gender;
5. Inconsistencies between state and federal agencies regarding interpretation of standards under SB 358;
6. Ensuring that once audited and remedied, that pay inequities do not creep back into employee compensation;
7. Maintaining appropriate documentation/defending against legal challenges of data collected from self-audits.

Action Items to Remove Employer Challenges/Barriers:

1. Provide objective definitions of the terms referenced above. Definitions and modern industry-specific examples are critical for both large and small employers who are attempting to comply with SB 358 in their ongoing pay structure. It is also necessary to help employers who are conducting audits of existing pay practices to identify any potential areas of concern and remedy those pay disparities. With the expertise of legal counsel on the Task Force, as well as the subcommittee regarding definitions, the Task Force should be able to provide objective definitions.
2. A FAQ should be developed for both employees and employers that explains how SB 358 is different from Title VII and other California discrimination statutes and providing answers to other frequently asked questions, such as:
 - a. Should employers look to Title VII for guidance? Why or why not?
 - b. Do employers have to account for the entire difference in pay?
 - c. Is a 2.0 deviation ok?
 - d. How frequently should an employer look for inequity?
3. Provide an employer a step-by-step self-evaluation template. This tool is especially important for smaller employers that do not have the financial resources to hire outside consultants and attorneys to conduct a pay audit for them. This item could be achieved with the guidance provided by the definitions, as well as the expertise of Task Force members who have conducted pay audits.
4. Provide a best practice guide for employers on how to resolve any pay disparities identified through a pay audit, including communication with employees, issuance of wages, and documentation. This action item can be achieved through the expertise of legal counsel and employee representatives on the Task Force.
5. Ensuring that the state and federal agencies are coordinated in their efforts and interpretation of SB 358 is important for successful implementation as well as certainty for employers. This consistency can be achieved through collaboration of agency representatives on the Task Force, as well as public messaging by each agency regarding such collaboration and reference to any guidance developed by the Task Force.
6. Provide a best practices guide for employers with practical ideas they can adopt to create a culture and practice of compensation equity consistent with SB 358's requirements. E.g., conduct a privileged pay equity analysis; exclude prior salary from applicant disclosure; limit discretion in compensation decisions; address subtle drivers of discrimination - improve workplace flexibility.

7. Provide a best practice guide for employers on how to guard against any future legal challenges. If employers have bona fide reasons for any pay disparities, they should maintain documentation regarding these bona fide reasons to protect themselves against future challenges. Employer representatives on the Task Force can assist in developing this checklist for document retention best practices.

Employee Challenges/Barriers:

The primary challenges and barriers that we believe employees will face in the implementation of SB 358 are as follows:

1. Understanding what pay disparities SB 358 is intended to address and those that it does not;
2. Access to existing wage information employees can utilize in determining what wage rate the employee should be requesting/receiving and comparison to other employees;
3. Contact information for questions or complaints regarding SB 358

Action Items to Remove Employee Challenges/Barriers:

1. Provide objective definitions of the terms included in SB 358, including potential examples as well as FAQ's that highlight the type of wage disparity SB 358 addresses and those that it does not. SB 358 is not meant to eradicate all disparity in pay, just the disparity that is based upon gender. Creating a reasonable expectation amongst employees as to what claims they may have under SB 358 will eliminate employee confusion and frustration. With the expertise of legal counsel on the Task Force and employee representatives, as well as the subcommittee regarding definitions, this should be a deliverable the Task Force can provide.
2. The Employment Development Department currently provides wage data by region and specific occupations. Easy access to this information by employees can assist in their understanding of the wages they should be negotiating, requesting, or earning. It also provides information for comparison with other employees who are performing substantially similar work. As a part of any public outreach, the Task Force should highlight this resource for employees.
3. Employees should be notified of the state and federal agencies that can answer any questions or concerns they may have with regard to potential pay disparities as well as the contact information for those agencies. Task Force members from various agencies can develop this employee notification.