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# Employment Practices

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# Employment Practices

## Employment Practices; equal pay for equal work

Labor Code §1199.5 (new); §§1197.5, 1199 (amended).

SB 1835 (Keene); STATS. 1982, Ch 1116

Support: Department of Finance; Department of Industrial Relations; Department of Labor

Under existing California law it is unlawful, except in designated circumstances,<sup>1</sup> for an employee<sup>2</sup> to pay any person a wage<sup>3</sup> lower than the wage paid to an employee<sup>4</sup> of the opposite sex for work<sup>5</sup> that requires equal skill, effort, and responsibility, and is performed under similar conditions.<sup>6</sup> This law<sup>7</sup> (hereinafter referred to as the Equal Pay Provision) codified the principle that an employee is entitled to equal pay for equal work without regard to gender.<sup>8</sup> If an employer violates the Equal Pay Provision, the employer is liable to the employee for the wages and interest<sup>9</sup> that the employee was deprived of by reason of the violation, and for court costs and reasonable attorneys' fees.<sup>10</sup> In an

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1. See CAL. LAB. CODE §1197.5(a) (except where payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production, or a differential based on any bona fide factor other than sex); see also *Marshall v. Aetna Ins. Co.*, 487 F. Supp. 717, 724 (E.D. Va 1978) (requiring similar exceptions in the federal law to be narrowly construed); 29 U.S.C. §206(d) (1976) (similar federal exceptions).

2. See CAL. GOV'T CODE §12926(c); CAL. LAB. CODE §350(a) (definition of employer). See also 29 U.S.C. §203(d) (1976) (definition of employer pursuant to federal law).

3. See CAL. LAB. CODE §200(a) (definition of wages); see also 29 U.S.C. §203(m) (Supp. IV 1981) (definition of wages pursuant to federal law).

4. See CAL. GOV'T CODE §12926(b); CAL. LAB. CODE §350(b) (definition of employee). See also 29 U.S.C. §203(e)(1), (2), (3) (1976) (definition of employee pursuant to federal law).

5. See generally *Mumbower v. Callicott*, 526 F.2d 1183 (8th Cir. 1975) (analysis of work pursuant to federal law).

6. See CAL. LAB. CODE §1197.5(a); see also *Gunther v. County of Washington*, 623 F.2d 1303, 1309 (9th Cir. 1979) (federal plaintiffs are not required to show that the jobs performed are identical, only that the skill, effort, and responsibility required are substantially equal).

7. CAL. LAB. CODE §1197.5(a)-(h).

8. See *Jones v. Tracy School Dist.*, 27 Cal. 3d 99, 104, 611 P.2d 441, 443, 165 Cal. Rptr. 100, 102 (1980); see also 623 F.2d at 1309 (under federal law, plaintiffs have the burden of proving that they did not receive equal pay for equal work); 29 U.S.C. §§202, 206(d) (1976).

9. See CAL. LAB. CODE §1197.5(b); see also *Marshall v. Burger King Corp.*, 509 F. Supp. 353, 356 (E.D.N.Y. 1981) (expressly upholding interest award pursuant to federal law); *Davis v. Jobs for Progress, Inc.*, 427 F. Supp. 479, 483 (D.C. Ariz. 1976); Annot., 17 A.L.R. Fed. 343 (1973) (recovery of interest under federal law).

10. See 27 Cal. 3d at 111, 611 P.2d at 447, 165 Cal. Rptr. at 106 (holding that the award of attorneys' fees under CAL. LAB. CODE §1997.5 is mandatory); CAL. LAB. CODE §1197.5(g). But see *Rau v. Darling's Drug Store, Inc.*, 388 F. Supp. 877, 887 (D.C. Pa 1975) (the award of attorneys' fees under federal law is discretionary). See generally 126 U. PA. L. REV. 128 (1977) (what constitutes reasonable court awarded attorneys' fees); Annot., 56 A.L.R.2d 13 (1959).

effort to conform the California Equal Pay Provision to the Federal Equal Pay Act,<sup>11</sup> Chapter 1116 increases the monetary liability of the employer by providing that an additional amount equal to the wages and interest owed to the employee will also be awarded as liquidated damages.<sup>12</sup> Since federal law also provides for a cause of action based on similar violations,<sup>13</sup> Chapter 1116 requires that any employee who recovers wages under *both* the federal and the state provisions, for the same violation, must return the lesser of the recovered amounts to the employer.<sup>14</sup>

In the event of a violation of the Equal Pay Provision, the three alternative remedies provided under existing law for an aggrieved employee are: (1) filing a complaint with the Division of Labor Standards Enforcement requesting administrative relief,<sup>15</sup> (2) allowing the Division to bring a civil action on behalf of the employee unless the employee objects,<sup>16</sup> or (3) commencing a civil action on the employee's own behalf.<sup>17</sup> Existing law requires that the civil action be brought no later than two years after the cause of action arises.<sup>18</sup> Chapter 1116 extends this time limit, in accordance with federal law,<sup>19</sup> to three years for a cause of action arising out of a *willful*<sup>20</sup> violation of the Equal Pay

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11. 29 U.S.C. §206(d)(1), (2), (3), (4) (1976) (Equal Pay Act); *see also* Marchak v. Observer Pub. Inc., 493 F. Supp. 278 (D.C.R.I. 1980) (an employee's private right of action under the federal Equal Pay Act is extremely limited in scope); Annot., 7 A.L.R. Fed. 707 (1971) (construction and application of the federal Equal Pay Act).

12. *Compare* CAL. LAB. CODE §1197.5(b) with CAL. STATS. 1976, c. 1184, §3, at 5288. *See generally* King v. Bd. of Educ., 435 F.2d 295 (7th Cir. 1970), *cert. denied*, 402 U.S. 908 (1971) (the award of liquidated damages is discretionary in certain circumstances); Lazarus v. State of Maryland, 79 F.R.D. 633 (D.C. Md 1978); Altman v. Stevens Fashion Fabrics, 441 F. Supp. 1318 (D.C. Cal. 1977) (issue of liquidated damages is to be determined by the court, whereas questions of back pay merit a jury trial); 29 U.S.C. §216(b) (Supp. IV 1981); *id.* §260 (1976); Annot., 26 A.L.R. Fed. 607 (1976) (award of liquidated damages pursuant to violations of the federal Equal Pay Act).

13. *See* 29 U.S.C. §206(d) (1976); *id.* §216(b) (Supp. IV 1981); *id.* §260 (1976). *Compare id.* §206(d) with CAL. LAB. CODE §1197.5. *See generally* Marshall v. City of Sheboygan, 577 F.2d 1, 5-6 (7th Cir. 1979); Usery v. Charleston County School Dist., 558 F.2d 1169, 1170-71 (4th Cir. 1977); Davis v. Jobs for Progress, Inc., 427 F. Supp. 479, 483 (D.C. Ariz 1976) (applicable federal law does not preempt state regulation nor imposition of state remedies for violations arising out of the same circumstances).

14. CAL. LAB. CODE §1197.5(i); *see* Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 445 (D.C. App. 1976), *cert. denied*, 434 U.S. 1086 (1978) (federal claimant cannot reap overlapping relief from the same wrong).

15. CAL. LAB. CODE §1197.5(e).

16. *Id.* §1197.5(f).

17. *Id.* §1197.5(g); *see* Bass v. Great Western S & L Assoc., 58 Cal. App. 3d 770, 773, 130 Cal. Rptr. 123, 125 (1976) (the employee may commence his own civil action without prior exhaustion of the administrative remedy).

18. CAL. LAB. CODE §1197.5(h).

19. *See* 29 U.S.C. §255(a) (1976).

20. *See* Marshall v. Union Pac. Motor Freight, 650 F.2d 1085, 1092-93 (9th Cir. 1981) (definition of willful pursuant to applicable federal law); Conklin v. Joseph C. Hofgesang Sand Co., 407 F. Supp. 1090, 1094 (W.D. Ky. 1975), *rem'd* 565 F.2d 405 (6th Cir. 1977).

Provision.<sup>21</sup>

Prior law imposed a \$50 fine or thirty days imprisonment, or both,<sup>22</sup> on an employer who either paid an employee a lesser wage than that paid to an employee of the opposite sex as required by statute,<sup>23</sup> or reduced the wages of any employee to comply with the Equal Pay Provision.<sup>24</sup> In the event of a *willful* violation, however, Chapter 1116 substantially increases the penalty to a fine of not more than \$10,000, imprisonment of not more than six months, or both.<sup>25</sup> Although Chapter 1116 increases the penalty for either of the above violations,<sup>26</sup> it establishes a prerequisite of willfulness before any penalty will be imposed;<sup>27</sup> arguably, there will be no penalization in the absence of a willful violation.<sup>28</sup> Finally, Chapter 1116 stipulates that no imprisonment will be imposed unless the employer has been previously convicted of an offense pursuant to the foregoing section.<sup>29</sup>

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21. CAL. LAB. CODE §1197.5(h).

22. See CAL. STATS. 1973, c. 1007, §10, at 2005 (amending CAL. LAB. CODE §1199).

23. See *id.*

24. See *id.* Cf. 29 U.S.C. §206(d)(1) (1976).

25. CAL. LAB. CODE §1199.5(a), (b).

26. Compare *id.* §1199.5 with CAL. STATS. 1973, c. 1007, §10, at 2005.

27. CAL. LAB. CODE §1199.5.

28. Compare CAL. LAB. CODE §1199.5 with *id.* §1199.

29. CAL. LAB. CODE §1199.5. See generally Annot., 5 A.L.R.2d 1080 (1959) (for what constitutes a former conviction within a statute enhancing the penalty for a second or subsequent offense).

## Employment Practices; harassment

Government Code §§12940, 12960 (amended).

AB 1985 (Johnston); STATS. 1982, Ch 1193

Support: California Labor Federation, AFL-CIO; California School Employees Association; California State Employees Association; Commission on the Status of Women

Existing law provides that prohibitions against discriminatory practices in employment are necessary to protect and safeguard the right and opportunity of all persons<sup>1</sup> to seek, obtain, and hold employment.<sup>2</sup> In addition, existing law states that the right to employment without discrimination based on race, religious creed,<sup>3</sup> color, national origin,<sup>4</sup>

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1. CAL. GOV'T CODE §12925(d) (definition of person).

2. See *id.* §12920.

3. See 2 CAL. ADMIN. CODE §§7293.0-7293.4 (definition of religion); see also 42 U.S.C. §2000e(j) (1976); 29 C.F.R. §§1605.1-1605.3 (1981) (guidelines on discrimination because of religion).

ancestry, physical handicap,<sup>5</sup> medical condition,<sup>6</sup> marital status,<sup>7</sup> sex,<sup>8</sup> or age (these conditions are hereinafter referred to as classification) is a civil right.<sup>9</sup> Furthermore, existing law makes it an unlawful employment practice for an employer,<sup>10</sup> labor organization,<sup>11</sup> or employment agency<sup>12</sup> to discriminate against an individual in terms of selection, dismissal, or conditions of employment or membership because of the individual's classification, unless based on a bona fide occupational qualification<sup>13</sup> or applicable security regulations.<sup>14</sup>

Chapter 1193 supplements existing law by declaring that it is also an unlawful employment practice for any employer, labor organization, employment agency, or training program, to *harass*<sup>15</sup> an employee<sup>16</sup> or applicant<sup>17</sup> because of the person's classification.<sup>18</sup> Chapter 1193 further declares that harassment by a fellow employee, other than an agent or supervisor, is unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct<sup>19</sup> and fails to take

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4. See generally 29 C.F.R. §§1606.1-1606.8 (1981) (guidelines on discrimination because of national origin).

5. CAL. GOV'T CODE §12926(h) (definition of physical handicap). See 2 CAL. ADMIN. CODE §§7293.5-7294.2.

6. CAL. GOV'T CODE §12926(f) (definition of medical condition).

7. See 2 CAL. ADMIN. CODE §§7292.0-7292.6 (marital status discrimination).

8. 2 CAL. ADMIN. CODE §7290.7(a) (definition of sex); see also 42 U.S.C. §2000e(k) (Supp. IV 1980); 29 C.F.R. §§1604.1-1604.11 (1981) (guidelines on discrimination because of sex).

9. CAL. GOV'T CODE §12921; 2 CAL. ADMIN. CODE §7286.3. See Gay Law Students Assn. v. Pac. Tel. & Tel. Co., 24 Cal. 3d 458, 470, 595 P.2d 592, 599, 156 Cal. Rptr. 14, 21 (1979); 42 U.S.C. §1983 (Supp. IV 1980). State courts often look to federal cases dealing with violations of Title VII of the Civil Rights Act to interpret State Fair Employment statutes. See *Sail'er Inn, Inc. v. Kirby*, 5 Cal. 3d 1, 13, 485 P.2d 529, 537, 95 Cal. Rptr. 329, 337 (1971); *Albertson's, Inc. v. Washington State Human Rights Comm'n.*, 14 Wash. App. 697, 699, 544 P.2d 98, 100 (1976).

10. CAL. GOV'T CODE §12926(c); 2 CAL. ADMIN. CODE §7286.5(a) (definition of employer); see also U.S.C. §2000e(b) (1976).

11. CAL. GOV'T CODE §12926(e); 2 CAL. ADMIN. CODE §7286.5(d) (definition of labor organization); see also 42 U.S.C. §2000e(d) (1976).

12. CAL. GOV'T CODE §12926(d); 2 CAL. ADMIN. CODE §7286.5(c) (definition of employment agency); see also 42 U.S.C. §2000e(c) (1976).

13. CAL. GOV'T CODE §12940; see *Sterling Transit Co., v. Fair Employment Practice Comm'n.*, 121 Cal. App. 3d 791, 796, 175 Cal. Rptr. 548, 550 (1981); see also *Long v. State Personnel Bd.*, 41 Cal. App. 3d 1000, 1016, 116 Cal. Rptr. 562, 573 (1974); 29 C.F.R. §1604.2 (1981) (sex as a bona fide occupational qualification); 2 CAL. ADMIN. CODE §§7286.7(a), 7290.8.

14. CAL. GOV'T CODE §12940; see also 42 U.S.C. §§2000e-2 to -3 (1976) (discrimination and other unlawful employment practices).

15. CAL. GOV'T CODE §12940; see 29 C.F.R. §1604.11 (1981); 2 CAL. ADMIN. CODE §7287.6 (harassment includes verbal, physical or visual harassment). See 2 CAL. ADMIN. CODE §7287.6(b)(1)(A) (definition of verbal harassment); 2 CAL. ADMIN. CODE §7287.6(b)(1)(B) (definition of physical harassment); 2 CAL. ADMIN. CODE §7287.6(b)(1)(C) (definition of visual harassment).

16. 2 CAL. ADMIN. CODE §7286.5(b) (definition of employee).

17. *Id.* §7286.5(h) (definition of applicant).

18. CAL. GOV'T CODE §12940(j). By virtue of respondeat superior an employer is liable for harassment of an employee or applicant by its agents or supervisors even if the employer has no knowledge of the harassment and even if it has a policy of discouraging these actions. See *Miller v. Bank of America*, 600 F.2d 211, 213 (1979); 2 CAL. ADMIN. CODE §§7286.6(b), 7287.6(b)(2); see also 29 C.F.R. §1604.11(c) (1981).

19. See *Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382, 1390 (1978). Under existing law

immediate and appropriate corrective action.<sup>20</sup> Chapter 1193 also requires the entity to take all reasonable steps to prevent harassment from occurring.<sup>21</sup> Furthermore, Chapter 1193 declares that loss of tangible job benefits is not necessary to establish harassment.<sup>22</sup>

When a hospital employee reports to the appropriate authorities<sup>23</sup> that a patient transferred from certain other specified facilities<sup>24</sup> exhibits an injury or condition that reasonably appears to be the result of abuse or neglect,<sup>25</sup> existing law provides that the employee cannot be discharged, suspended, disciplined, or harassed.<sup>26</sup> Chapter 1193 broadens this protection by stating that employers, labor organizations, and employment agencies are prohibited from violating these provisions and adds that the employee cannot be otherwise discriminated against for making this report.<sup>27</sup>

Remedies for a victim of harassment under the California Fair Employment and Housing Act<sup>28</sup> include awarding back pay, past employment benefits and reinstatement.<sup>29</sup> Prior law required that complaints alleging discrimination by a training program be filed according to specified procedures.<sup>30</sup> Since the statute governing these procedures was repealed in 1981,<sup>31</sup> Chapter 1193 removes this requirement and provides that the procedure for alleging training program discrimina-

the employer has an affirmative duty to investigate any complaints concerning sexual or other harassment by an employee. *See id.* at 1390.

20. CAL. GOV'T CODE §12940(i). The employer is also liable for failure to take steps to correct the situation; *see* *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 466 (1977).

21. CAL. GOV'T CODE §12940(i). *See* 29 C.F.R. §1604.11(f) (1981); 2 CAL. ADMIN. CODE §7287.6(b)(3) (these steps may include affirmatively raising the subject of harassment, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise the issue of harassment and exerting that right, and developing methods to sensitize all persons concerned).

22. CAL. GOV'T CODE §12940(i); *see* *Bundy v. Jackson*, 641 F.2d 934, 943-44 (1981). *Bundy*, which dealt with sexual harassment, stated that sexual harassment *by itself* was discriminatory. When an employer condones or creates a discriminatory work environment, there has been discrimination regardless of whether any tangible job benefits were lost as a result of the discrimination.

23. *See* CAL. PENAL CODE §11161.8.

24. *See id.*

25. *Id.* §11165(c) (definition of neglect).

26. *Id.* §11161.8.

27. CAL. GOV'T CODE §12940(e).

28. *See id.* §12900.

29. 2 CAL. ADMIN. CODE §7286.9. Additionally, the harassed individual may wish to bring a complaint with the Federal Equal Employment Opportunity Commission, a civil action in tort, file for unemployment insurance compensation, or bring an action based on the United States and California Constitutions. *See generally* 42 U.S.C. §2000e-5(c) (1976); *Prescod v. Unemployment Ins. Appeals Bd.*, 57 Cal. App. 3d 29, 39, 127 Cal. Rptr. 540, 546 (1976); *Perales v. Dep't of Human Resources Dev.*, 32 Cal. App. 3d 332, 336, 108 Cal. Rptr. 167, 170 (1973); *Hardy v. Stumpf*, 37 Cal. App. 3d 958, 961, 112 Cal. Rptr. 739, 741 (1974); *Women's Law Forum, Sexual Harassment in the Workplace: A Practitioner's Guide to Tort Actions*, 10 GOLDEN GATE U.L. REV. 879, 906-28 (1980).

30. CAL. STATS. 1980, c. 992, §4, at 3155 (enacting CAL. GOV'T CODE §12960).

31. *See* CAL. STATS. 1981, c. 625, §4, at — (repealing CAL. LAB. CODE §3096).

tion is the same procedure used for alleging all other discriminatory practices.<sup>32</sup> In summary, Chapter 1193 is declaratory of existing law which prohibits harassment of applicants, employees, or members of labor organizations.<sup>33</sup>

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32. Compare CAL. GOV'T CODE §12960 with CAL. STATS. 1980, c. 992, §4, at 3155 (enacting CAL. GOV'T CODE §12960).

33. CAL. GOV'T CODE §12940; see CAL. ADMIN. CODE §7287.6; see also 29 C.F.R. §1604.11 (1981) (determination of sexual harassment).

## **Employment Practices; talent agencies**

Labor Code §1700.46 (repealed); §§1701, 1702, 1703, 1704 (new and repealed); §§1700.4, 1700.44 (amended, repealed, and new).  
AB 997 (Robinson); STATS. 1982, Ch 682

Chapter 682 creates the California Entertainment Commission to study the laws and practices of the entertainment industries in California, New York, and other entertainment capitals of the United States.<sup>1</sup> This Commission has until October 1, 1984 to recommend legislation regarding the licensing of talent agencies.<sup>2</sup> Until January 1, 1985, the following provisions of Chapter 682 will apply.<sup>3</sup>

Under existing law, a talent agency is any person or corporation that engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist<sup>4</sup> or artists.<sup>5</sup> Prior to the enactment of Chapter 682, all talent agencies were subject to the regulations and licensing requirements of the State.<sup>6</sup> Moreover, it was a misdemeanor, punishable by a fine of \$25 to \$250, imprisonment for up to 60 days, or both, to operate a talent agency without a license.<sup>7</sup> Under Chapter 682, the activities of procuring, offering, or promising to procure recording contracts for an artist or artists will not of itself subject a person or corporation to the regulation and licensing requirements.<sup>8</sup> Since Chapter 682 no longer requires a license in all cases, the criminal sanctions have been repealed.<sup>9</sup>

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1. CAL. LAB. CODE §§1701, 1702.

2. *Id.* §§1702, 1703.

3. *See id.* §§1700.4, 1700.44.

4. *Id.* §1700.4(a) (definition of artists).

5. *Id.*

6. *Id.* §1700.5.

7. *See* CAL. STATS. 1959, c. 888, §1, at 2928 (adding CAL. LAB. CODE §1700.46).

8. CAL. LAB. CODE §1700.4(a).

9. *See* CAL. STATS. 1982, c. 682, at —.

Additionally, an unlicensed person or corporation may now lawfully act in conjunction with, and at the request of, a duly licensed and franchised agency to negotiate employment contracts.<sup>10</sup> Chapter 682 also establishes a statute of limitations for controversies in the talent agency field.<sup>11</sup> An aggrieved party now has only one year to refer the controversy to the Labor Commissioner.<sup>12</sup> The provisions of Chapter 682 will only be applicable until January 1, 1985, at which time either the legislation recommended by the Entertainment Commission will become effective, or the law will revert back to its prior status, if the Legislature has not extended the date or enacted other legislation.<sup>13</sup>

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10. Compare CAL. LAB. CODE §1700.44 with CAL. STATS. 1967, c. 1567, §2, at 3762 (amending CAL. LAB. CODE §1700.44).

11. CAL. LAB. CODE §1700.44.

12. *Id.*

13. *Id.* §§1700.4(b), 1700.44.

