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Would Ellen Pao Still Lose Under New Calif. Fair Pay Act?

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Law360, New York (May 26, 2017, 11:02 AM EDT) -- Most of us are familiar with the Ellen Pao case, which sent waves through Silicon Valley's tech industry and made national news. Pao's case culminated in a high-profile jury trial lasting 24 days, and a complete verdict for her employer on all counts.

Pao alleged that she suffered gender discrimination and retaliation when her firm did not promote her to senior partner at a high-tech venture capitalist firm. In the end, the case was a solid loss for Pao under California's Fair Employment and Housing Act (FEHA). But would it end the same way if she was able to file her claim under California's newly amended Fair Pay Act provisions? The answer is not so clear, and speaks volumes to where your clients' liability — and plaintiffs' potential gains — now exist.

The New Fair Pay Act Amendments

First, some background: California's Fair Pay Act was originally enacted in 1949, but has been rarely used. The 2016 and 2017 amendments will change that. The law formerly prohibited employers from paying any employees at wage rates less than those paid to employees of the opposite sex for "equal work." However, under the new amendments, gender pay disparities are also prohibited for employees who perform "substantially similar work, when viewed as a composite of skills, effort, and responsibility, and performed under similar working conditions." Cal. Labor Code Section 1197.5. In other words, the law now permits the comparison of apricots to plums, or at least to pluots (a hybrid plum-apricot).

The practical implications of the amendment are that employees can now be analyzed for gender pay equality even when they have different job titles or duties. The new "composite" test compares employees who exert different levels of effort and responsibility, but who may provide substantially similar contributions, or who are governed by substantially similar job requirements. The amendment also allows jobs to be compared across different worksite locations.

In another sweeping change, it is now the employer's burden under the Fair Pay Act to prove that any gender pay differential is not only (1) based on a "bona fide factor" other than gender, such as a seniority or merit system, productivity, education or experience; but that the bona fide factor being used is also (2) reasonably applied, (3) job related, (4) consistent with an overriding "business necessity," and (5) actually fulfills the employer's stated business purpose. Labor Code Sec. 1197.5(a)(1)(D)&(a)(2). Moreover, the plaintiff can destroy the "bona fide factor" defense by demonstrating that an alternative business practice would serve the same business purpose without producing the wage differential.

The ultimate risk factor: there is no direct legal precedent to show us how to interpret and apply the new legal factors and required elements under the Fair Pay Act.

The Amendments Applied to Ellen Pao's Case

So, taking one high-profile case as our example, how does Pao's case fare under this new law?

During the trial against her employer Kleiner Perkins Caufield & Byers, testimony was introduced about the unequal pay between Pao and the senior partners at her firm. As a junior partner, Pao earned more than $500,000 in 2011, comprised of a base salary and a bonus. In fact, she actually earned more than three male junior partner comparators from 2004 to 2011. No plaintiff's attorney would agree to take on a Fair Pay Act claim for Pao based on a comparison between her and the other junior partners.

However, part of Pao's case argued that she was unfairly denied a promotion despite making contributions similar to those of male counterparts who were promoted. Could she compare her role to those senior partners and argue that they were "substantially similar" under the new Fair Pay Act? There is definitely a pay disparity worth exploring there. Promotion to a Kleiner Perkins senior partner role gives the employee a share of the company's investment profits and revenues. Pao's male counterparts who were hired around the same time or after her, and promoted to senior partner, saw their pay balloon by 3 to 5 times, as high as $2.6 million a year.

But were those positions "substantially similar"? One of Pao's expert witnesses opined that an internal investigator hired by Kleiner Perkins to look into unequal pay practices did an incomplete job because he "only looked at apples, he didn't look at apples and oranges." Both junior and senior partners had the main job responsibilities of finding new companies for the firm to invest in, and returning investment profits for the firm. At trial, the sides presented differing stories. Pao's attorney argued that she generated more revenue at Kleiner Perkins than any of the men who were promoted in 2012, even as she was denied investment opportunities that senior partners were given. Pao also argued that she brought several opportunities to Kleiner that were rejected, but turned out to be profitable, such as Twitter. In Pao's view, her contributions to the firm's investments were more valuable than the operational roles.

Proving that junior and senior partner venture capitalist positions are substantially similar, however, would likely be an uphill battle. Senior partners at Kleiner Perkins, of course, have operating roles in making business decisions for the firm, and higher-level and higher-profile roles in the firm's investments, in a way that junior partners do not. In a Fair Pay Act lawsuit brought against University of Southern California 20 years ago by a women's basketball coach, for example, the court found that the men's basketball coach was paid more, but required to generate much larger revenue for his team. Stanley v. University of Southern California, 13 F. 3d 1313 (9th Cir. 1994). Nevertheless, the new Fair Pay Act statutory language would give Pao's attorneys plenty to argue about as to whether some of the more recently promoted senior partners were actually doing substantially similar work to Pao, "when viewed as a composite of skills, effort and responsibility, and performed under similar working conditions." Section 1197.5.

The new Fair Pay Act amendments give Pao room to contest the bona fide nature of Kleiner Perkins' seniority/merit system of promoting employees, under arguments similar to those she presented in her trial. But — unlike in her FEHA trial — in a Fair Pay Act case, Kleiner Perkins would have the burden of proving that its seniority or merit system is "job related," is "consistent with an overriding "business necessity," and "effectively fulfills" Kleiner Perkins' stated business purpose, and is "applied reasonably." Lab. Code Sec. 1197.5(a)(1)(D)&(a)(2). These standards are not yet defined through case law, but would give Pao plenty to challenge — as she did in her trial — about Kleiner Perkins' stated reasons for not promoting her, or whether they actually panned out into the profitability and business rationale offered by Kleiner Perkins.

Unlike in Pao's trial, in a Fair Pay Act case, the employer bears the burden to show that its stated seniority/merit system or other business factors accounts for every dollar of the wage differential. Lab. Code Sec. 1197.5(a)(3). In other words, in a Fair Pay Act case where the jobs were deemed similar, Kleiner Perkins would have to justify not only its decisions with respect to Pao, but also the performance, investment revenues and productivity of the senior partners, to show that the entire wage disparity came from those business factors.

Perhaps the most subjective of the new legal elements under the revised Fair Pay Act is the requirement that the employer show that its seniority/merit system is "reasonably applied." Kleiner Perkins' main reason offered for not promoting Pao was her poor performance ratings as compared to her peers. However, Pao challenged these ratings at trial as being based on

personality more than productivity. In meeting its burden in a Fair Pay Act trial, Kleiner Perkins would not be allowed to rest solely on the subjective mix of factors introduced in the FEHA trial to distinguish Pao.

Instead, it would need to devise a way to quantify the other partners' merit and show that its evaluation of this merit was reasonable, effective, and led to the stated business rationale being achieved. In an industry whose sole goal is to make profits, this necessarily would involve some type of dollar-for-dollar comparison. Moreover, beyond just herself, Pao presented evidence of other former female Kleiner Perkins junior partners who were not promoted and who left. In a Fair Pay Act trial, or class action, Pao might be able to introduce such evidence (and be permitted greater discovery rights to it) in order to make her statistical case as to unequal pay, or to question whether the business factors were applied reasonably.

Lessons Learned and Steps Forward

Where do California employers go from here? Perhaps Pao can provide us with some insight on that front, as well. Following her employment with Kleiner Perkins, she took on a role as the CEO of Reddit. Within days after her Kleiner Perkins trial ended, Pao announced that Reddit had conducted a gender pay audit and was introducing a new set of methods to deal with fair pay issues, including a scale-based, no-negotiation pay standard. Many companies in California have already started doing the same, which is becoming an increasing part of the advice given to employers by their employment law attorneys.

The amended Fair Pay Act provisions set new standards and burdens upon employers. In addition, at the beginning of 2017, the Act's amendments were expanded to give a racial component as well, and pay equity is now required under the law for employees regardless of race or ethnicity. It is unclear whether or how far Pao could proceed against Kleiner Perkins on a Fair Pay Act case. However, it's not difficult to see that her lawsuit, or others like it, would pass the pleadings stage, and may make it to another trial. Due diligence, prelitigation analysis and compliance efforts will be an employer's best defense against such future exposure.

New York Magazine called Ellen Pao's trial loss an example of "the sexism you can't quite prove." Will California's amendments to the Fair Pay Act make sexism easier to prove in some circumstances? Time will tell. In the meantime, both plaintiff and defense employment lawyers will be very busy.

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