

SALARY IS NOT A FACTOR

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In *Marks v. Loral Corp.*, 57 Ca1.App.4th 30 (1997) the California Court of Appeal ruled that both the Age Discrimination in Employment Act (ADEA) and the California Fair Employment and Housing Act (FEHA) permit employers to make salary-based employment decisions even if such decisions disproportionately affect older workers (i.e., employees over the age of 40). The decision was important because it allowed employers to choose to retain younger lower-paid employees over otherwise similarly qualified older, more highly compensated workers without violating the ADEA or the FEHA provided the employment decision was based solely on salary considerations rather than the age of the employee. Not surprisingly, the ruling was not popular with a number of employee groups and sparked a concerted effort to enact legislation to nullify it. These efforts culminated in the enactment of California Government Code §12941.1, which becomes effective on January 1, 2000.

Government Code § 12941.1 rejects the holding in *Marks v. Loral Corp.*, and states that the use of salary as a basis for differentiating between employees when terminating employment may constitute age discrimination if older workers are adversely impacted as a group. Indeed, the statute specifically states that the disparate impact theory of proof may be used in claims of age discrimination. The legislation also mandates that courts interpret statutes prohibiting age discrimination in employment "broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers." In light of Government Code §12941.1, employers would be well advised to use other criteria when making employment decisions such as in a layoff. In these situations, employers should rely on traditional factors such as tenure or performance reviews. Moreover, employers should refrain from using any criteria which disproportionately impacts any protected group. Finally, employers should consult with employment counsel before finalizing employment decisions which will undoubtedly be questioned by the workers adversely affected.

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