

LABOR AND EMPLOYMENT

ALERT

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## California's New Pay Equity Data Reports Due March 31

By Scott J. Wenner

Last fall, late on the final day he was permitted to sign legislation under California law, Governor Gavin Newsom affixed his signature to SB 973, a law that imposes on covered employers a significant employee data reporting requirement. All private employers who are required to prepare and file annual EEO-1 forms (Employer Information Report) and employ any employees in California must file the new reports annually with the Department of Fair Employment & Housing (DFEH). This new law has been codified as section 12999 of the California Government Code.

The data reporting requirement purportedly is intended to help achieve equal pay for women and persons of color by mandating the collection and submittal to the DFEH by covered employers of data that can be used by the DFEH “to investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful by [the Fair Employment & Housing Act].” (SB 973, Sec. 2(f)(3)). Its premise is that potential public disclosure by the DFEH of employers whose data suggest pay inequality in their workforces based on race, sex or ethnicity will prompt compliance with California’s Fair Pay Act — California’s equal pay law that became effective in 2016. Echoing the language of Sec. 1 of SB 973, the DFEH maintains that mandatory reporting of pay data by sex, race and ethnicity will both help trigger voluntary pay equity efforts and “allow DFEH to more efficiently identify wage patterns and allow for effective enforcement of equal pay or anti-discrimination laws, when appropriate. DFEH’s strategic vision is a California free of discrimination.”

Reporting of data based on race and ethnicity in addition to data based on sex was mandated by SB 973 because unlike the federal Equal Pay Act,

California’s Fair Pay Act protects employees from pay discrimination based on their race or color and their ethnicity in addition to their sex. The California law also relaxed the federal *equal* work requirement, requiring only that a comparator’s job be “substantially similar.”

### Who must report?

As noted, private employers with 100 or more employees (anywhere in the US) that are required to file an annual EEO-1 report under federal law must submit a “pay data report” to DFEH with data covering the prior calendar year (reporting year). The report is due by March 31, 2021 and on or before March 31 every subsequent year.

The DFEH has announced that it will determine whether an employer has the requisite 100 employees if either (1) it employed 100 or more employees in a “Snapshot Period”— a single pay period between October 1 and December 31 of the Reporting Year chosen by the employer, or (2) it employed 100 or more employees on a “regular basis” during the Reporting Year. Part-time employees are included in the count. Temporary employees are not, unless they appear on the employer’s payroll and social security is withheld.

### What must be reported?

The information to be provided in the pay data report resembles the content of the gender pay equity portion of the [EEO-1 report](#) the Obama EEOC was set to require, but expanded to include pay data by race and ethnicity in addition to sex. The EEOC rescinded its mandate requiring submittal of the gender-based pay equity report during the Trump Administration after determining that the yearly burden it would

impose on employers outweighed what limited probative value the data would provide to the agency.

Under the new California pay data report, employers must provide the number of California employees by race, ethnicity and sex who work in each of the ten job categories that appear on the EEOC's EEO-1 report: (i) executive or senior level officials and managers; (ii) first or mid-level officials and managers; (iii) professionals; (iv) technicians; (v) sales workers; (vi) administrative support workers; (vii) craft workers; (viii) operatives; (ix) laborers and helpers and (x) service workers. For each of these ten job categories the report must specify the number of employees, broken down by race, ethnicity and sex, whose annual earnings for the Reporting Year (defined as the prior calendar year) fall within each of the pay bands defined by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics survey.<sup>1</sup> Annual earnings are to be taken from each employee's Form W-2 Box 5. In addition, the total number of hours worked by each employee as well as paid time off hours, including vacation, sick, and holiday time during the entire Reporting Year also must be reported.

Importantly, while employees outside California must be counted to determine whether an employer is covered, *only employees who either reside or work in the state must be included in the report.* Any employee who teleworks from outside California to an office or other location in California also must be included.

Finally, information about the employer also must be reported. The employer must report its name, address, headquarters address (if different), California

and federal Employer Identification Number, NAICS code, Dun and Bradstreet number, number of employees inside and outside of California, number of establishments inside and outside of California, whether the employer is a California state contractor, and, if applicable, the name and address of the employer's parent company or companies. Where the employer has multiple establishments, for each one it must provide name, address, number of employees and major activity.

In February, the DFEH [website](#) will include links to a data submission portal, user guide and template. FAQs already have been posted.

### Potential Problems with the Law.

1. Critics of this measure point to the lack of probative or analytical value of the information to be presented in or derived from these reports. They note that the report consists of overly broad groupings of disparate jobs that cannot yield valid comparisons into fabricated pay bands. Taking a simple example, a large hospital would include its doctors, nurses, accountants and other professionals it may employ together in the same "professionals" category on the report despite profound differences in what they do. Yet, as noted above, to find a violation of the Fair Pay Act, which was the purported intent of SB 973, the employees being compared must perform "substantially similar" work. Comparing the pay of a diverse group of professionals hardly can demonstrate whether there are pay disparities based on gender, race or ethnicity, rather than market forces, education level, experience and other factors that drive compensation decisions. As a consequence, the reporting may generate "false positives" by requiring comparison of dissimilar positions.
2. In a similar vein, lumping together full- and part-time employees as comparators is unsound analytically and for reasons beyond the fact that earnings will differ as a function of hours worked, not race, sex or ethnicity.

<sup>1</sup> Current pay bands are:

\$19,239 and under  
 \$19,240 – \$24,439  
 \$24,440 – \$30,679  
 \$30,680 – \$38,999  
 \$39,000 – \$49,919  
 \$49,920 – \$62,919  
 \$62,920 – \$80,079  
 \$80,080 – \$101,919  
 \$101,920 – \$128,959  
 \$128,960 – \$163,799  
 \$163,800 – \$207,999  
 \$208,000 and over

Eligibility for certain benefits typically differs for part-time employees and the opportunity to earn premium pay for overtime may be less for part-timers, especially if they work shorter shifts (given eligibility in California after eight hours).

3. There is a lack of clarity on whether and when the information reported will be made public, effectively creating a “name and shame” vehicle despite the flaws in the report discussed above. The DFEH points to the law’s prohibition of disclosure by it or the Division of Labor Standards Enforcement (DLSE) of “individually identifiable information” in an employer’s pay equity report, which refers to data submitted in a report “that is associated with a specific person or business.” However, that prohibition only prohibits disclosure “prior to the institution of an investigation or enforcement proceeding by” the DFEH or DLSE.
4. Section 1(f) of SB 973 specifically contemplates that an employer’s pay equity reports may be disclosed “through the normal rules of discovery in a civil action.” The implications of disclosure to litigants of pay equity reports that easily permit misleading conclusions to be drawn about an employer’s compensation practices are concerning. At the very least a pay equity report would provide a plaintiff with a blueprint for discovery and a basis for expanding the scope of an existing lawsuit.

The DLSE plans to post a pay equity report template by February 15. It is not too early, though, to begin gathering and analyzing the necessary data to avoid any surprises before transmittal to the DFEH by the March 31 deadline. ◆

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