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California Leads the Way for Pay Data Collection and Reporting

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With the Equal Employment Opportunity Commission's (EEOC) announcement that it would abandon current efforts to collect the controversial Component 2 pay data, California has taken the first step in filling the void left behind by seeking to enact a state law requirement to collect employee compensation.

In a purported effort to promote transparency and combat pay discrimination, the California legislature recently passed Senate Bill 973 (SB 973). If signed by Governor Newsom as anticipated, SB 973 would require California private employers with 100 or more employees to submit a pay data report to the Department of Fair Employment and Housing (DFEH) by no later than March 31, 2021, and annually thereafter. Modeled after the federal EEO-1 Component 2 collection form, the state pay data report requires employers to collect aggregate W-2 earnings and report the number of employees in each of the 12 pay bands (spanning from $19,239 and under to $208,000 and over) for the 10 broad job categories (executive or senior-level officials and managers; first or mid-level officials and managers; professionals; technicians; sales workers; administrative support workers; craft workers; operatives; laborers and helpers; and service workers), classified by race, sex and ethnicity. Employers must also report total hours worked by each employee within a given pay band during the reporting year. Employers with multiple establishments must submit a report for each establishment, as well as a consolidated report that includes all employees.

The reported purpose of the data collection is to "identify wage patterns and allow for targeted enforcement of equal pay or discrimination laws." According to the bill, the DFEH will oversee the collection of pay data and will share information of alleged pay discrimination with the agency responsible for enforcing the California Equal Pay Act, the Division of Labor Standards Enforcement (DLSE), to coordinate enforcement. The bill also authorizes the DFEH to seek an order requiring non-reporting employers to comply with SB 973. While the DFEH's enforcement arm may only extend to California employees, the bill's definition of "employees" is not limited to those working within the state of California. According to the bill, an "employee" means "an individual on an employer's payroll, including a part-time individual, whom the employer is required to include in an EEO-1 Report

and for whom the employer is required to withhold federal social security taxes from that individual's wages." Therefore, covered California employers may have to report pay data for all of their employees, including those working in other states.

The many criticisms of the EEO-1 Component 2 pay data collection form also apply to SB 973, including that the collection of W-2 earnings will unnecessarily open the door to increased scrutiny and investigations because there is no context to explain legitimate non-discriminatory reasons for pay disparities (e.g., education, training, experience, tenure, merit, etc.). For example, when defending its decision to suspend collection of Component 2 pay data, the EEOC conceded in certified court filings that there were issues with data validity and reliability, and without a true pilot study, there was a significant risk that employers would not be reporting comparable data that could be used by the government, or others, in meaningful comparisons or analysis. *National Women's Law Center, et al., v. Office of Management and Budget, et al.*, 1:17-cv-02458-TSC, Doc. No. 54-1, filed Apr. 3, 2019, (D.D.C. 2019). This is especially concerning given that the data collection is clearly intended for enforcement purposes. In fact, on July 16, 2020, the EEOC announced that it was commissioning a study to examine the quality and utility of the pay data collected for 2017 and 2018 for, among other purposes, possible use for enforcement (see our previous discussion of that here). We note that the California bill does provide that the pay data report must include a section for employers to provide "clarifying remarks" regarding any of the information provided, although they are not required to do so.

With the anticipated signing of this bill, we recommend that employers with 100 or more employees in California work with legal counsel to conduct privileged audits to proactively identify any pay disparities and determine if legitimate, non-discriminatory business reasons for any discrepancies exist, or if remedial measures are warranted, prior to collecting and reporting pay data to California. Companies should also work with counsel to effectively make the best use of any option to provide such clarifying remarks.

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