

New CA Law Requires Employers to Submit Annual Pay Data Reports

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A bill recently signed into law in California will require private employers to submit annual “pay data reports” to the Department of Fair Employment and Housing (“DFEH”) beginning in March 2021. The California law implements a previously announced program rolled back by the Trump administration to expand federal reporting requirements to include employee pay data by race, gender, and ethnicity.

What Is the Purpose of SB-973?

SB-973’s stated purpose is to combat discriminatory wage practices. To that end, the new law authorizes the DFEH to investigate and prosecute complaints alleging pay disparities that violate Labor Code section 1197.5, California’s equal pay law. Opponents of the law point out, however, that the data will be prone to false positives because the collected data provides an oversimplified view. Individuals within the broad groups may not perform substantially similar work and W-2 data can easily reflect differences that are not discriminatory.

Who Is Subject to SB-973?

The law applies to private employers in California that (1) have 100 or more employees and (2) are required to file an annual Employer Information Report (also known as an “EEO-1 Report”) under federal law. The law is unclear as to whether the 100 employees must work in California in order for an employer to be subject to this law, or if an employer with 100 employees is subject to this law so long as one employee works in California.

What Does SB-973 Require?

On or before March 31, 2021 (and each March 31 thereafter), covered employers must submit a pay data report that includes the following information:

(1) The number of employees, by race, ethnicity, and sex, in each of 10 specified job categories;

(2) The number of employees, by race, ethnicity, and sex, whose annual earnings (based on their W-2s for the year) fall within each of the pay bands used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey. The employer is also required to include the total number of hours worked by each employee counted in each pay band.

An employer with more than one establishment is required to submit a separate report for each establishment and a consolidated report that includes all employees. Employers may include clarifying remarks, if they choose. Employers may also submit their federal EEO-1 Reports containing the same or substantially similar data, instead of preparing a new report for the DFEH.

Another important, but unanswered question, is whether the data can be limited to an employer's California employees. SB-973 does not expressly limit its scope to California employees, and, by allowing employers to comply with this law by submitting their EEO-1 Reports, it suggests that California expects employers to submit data for all employees, including those outside of California. On the other hand, the DFEH should not need nationwide data in order to enforce California Labor Code section 1197.5, the stated purpose of the law.

Is the Pay Data Report Confidential?

SB-973 appears to make the pay data reports confidential in most circumstances. The law prohibits the DFEH from disclosing "individually identifiable information," except as necessary for purposes of an enforcement proceeding. The law defines "individually identifiable information" as "data submitted pursuant to this section that is associated with a specific person or business." This should mean that a third party cannot obtain pay data for a specific individual or a specific company through a public records act request. However, the legislative findings in support of SB-973 indicate that the pay data reports could be disclosed through normal discovery in a civil action.

What Is the Takeaway?

Beginning March 31, 2021, the DFEH will have access to employee pay data based on race, ethnicity, and sex, which will make it much easier for this government agency to prosecute alleged violations of California's equal pay law. Employers subject to SB-973 should review their equal pay practices now, while there is still time to address any pay disparities that could lead to an enforcement action down the road.

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