# New California Pay Data Reporting Obligations Aimed At Closing Pay Gap

Insights
10.01.20

Governor Newsom just signed into law a requirement that private employers with 100 or more employees must annually report to the state detailed pay data categorized by gender, race, and ethnicity. SB 973, signed into effect late on September 30, will require covered businesses to report this data to the Department of Fair Employment and Housing (DFEH) on March 31, 2021 and every March 31 thereafter. That date will be here before you know it, so California employers should begin to take compliance steps at once. What do you need to know about this significant new obligation?

**Federal Law Flip-Flops On Pay Data Collection – And California Steps Into Breach**
Many employers with 100 or more employees are likely familiar with their federal reporting obligation to the Equal Employment Opportunity Commission (EEOC) through the execution of the standardized form known as the "Employer Information Report EEO-1." Covered employers are required to annually submit the EEO-1 form to provide data about the representation of men and women of different ethnic groups in nine distinct occupational classifications or job categories.

The federal government upped the ante by requiring employers to report pay data in specific pay bands on their annual EEO-1 form for 2017 and 2018. However, after a protracted legal battle, the Trump Administration changed course and included no such request for pay data for 2019. Due to the pandemic, the federal government delayed EEO-1 reporting to March 2021 – but has provided no indication of whether pay data collection will be reinstated.

In response to the lack of clarity, we predicted that state governments would take it upon themselves to fill in the gap left by the federal government. Accordingly, the new California law does just that, now imposing the additional obligation on large employers in the state to annually report pay data to the DFEH.

**The Basics: Who, What, When, Where And How**
The law requires all private employers of 100 or more employees to, on or before March 31, 2021, and on or before March 31 each year thereafter, submit specific pay data to the DFEH covering the prior calendar, or "Reporting Year." The report must include the following information:

1. The number of employees by race, ethnicity, and sex for 10 job categories. This is established by providing a "snapshot" that counts all employees in each job category by race, ethnicity, and sex, employed during a single pay period of the employer's choice between October 1 and December

31 of the Reporting Year. The 10 job categories are as follows:

1. Executive or senior level officials and managers.
2. First or mid-level officials and managers.
3. Professionals.
4. Technicians.
5. Sales workers.
6. Administrative support workers.
7. Craft workers.
8. Operatives.
9. Laborers and helpers.
10. Service workers.

2. The number of employees by race, ethnicity, and sex, whose earnings fall within each of the pay bands used by the U.S. Bureau of Labor Statistics in its Occupational Employment Statistics Survey. This is established by calculating the total earnings shown on the IRS Form W-2 for each employee in the "snapshot" for the entire Reporting Year, regardless of whether an employee worked the full calendar year.
3. The total number of hours worked by each employee counted in each pay band during the Reporting Year.
4. The employer's North American Industry Classification System (NAICS) code.
5. The Report may include a section for the employer to provide clarifying remarks; however, it is not required.

You should utilize the opportunity to provide clarifying remarks if you need to explain wage practices, including but not limited to practices based on a seniority system, a merit system, systems measuring earnings by quality or quantity, and other bona-fide job-related factors other than sex, race, and ethnicity such as education, training and experience. Before doing so, however, you should consult with your employment attorney.

***Required Format***

All employers subject to the law must submit the required data in a format that allows the DFEH to "search and sort the information using readily available software."

***Employers With Multiple Establishments***

Employers with more than one establishment must submit a report for each establishment and a consolidated report that includes all employees. "Establishment" is defined as "an economic unit producing goods or services."

***Consequence for Non-Compliance***

The law authorizes the DFEH to seek an Order requiring the employer to comply with all requirements and entitles the Department to recover costs associated with seeking said compliance. Importantly, the law vests the DFEH with the power to receive, investigate, conciliate, mediate, and prosecute complaints alleging unlawful practices in violation of Equal Pay Act. The DFEH is thus now required to adopt procedures ensuring the coordination of activities to enforce discriminatory wage rate provisions under California law.

The law further requires the DFEH to make the data available to the Department of Labor Standards Enforcement (DLSE) upon request. Additionally, the DFEH must maintain the pay data for at least a period of 10 years. Both the DFEH and DLSE are required to keep all individually identifiable information strictly confidential except as necessary for administrative enforcement through the rules of discovery in a civil action. However, the DFEH may develop and publish annual aggregate reports based on the data obtained provided said reports are "reasonably calculated to prevent the association of any data with any individual business or person."

An employer will be deemed compliant by submitting an EEO-1 Report "containing the same or substantially similar pay data" required under the new law. Notably, however, there is no indication as to what may constitute "substantially similar." Accordingly, it is strongly recommended covered employers provide all information delineated above.

**Conclusion**

The proponents of this legislation consider the new law to be an important step towards closing the pay gap. This is especially true given that the pay gap remains glaringly disparate for women of color, with African-American women earning 61 cents and Latinas 41 cents for every dollar earned by white men. Worker advocates believe the new reporting requirements will motivate large employers to internally evaluate pay data and correct potential disparities that may not be identifiable at a macro level.

Despite the importance of the law's purpose, however, there are concerns regarding the compliance burdens it will create, as large employers will soon be required to report detailed salary information. Further, the data provided may reflect a disparity when in fact none exists, as a myriad of other non-discriminatory factors could potentially lead to pay gaps. For example, over the course of one's career, pay is increasingly influenced by one's chosen career path, which includes varying factors like previous jobs, experience, education, performance, level of responsibilities, and geographic locations. Moreover, additional disparities may exist due to overtime pay, shift differentials, bonuses, and the exercise of stock options, to name a few variables contributing to one's wages.

In compiling the required data, you should keenly evaluate your pay practices to uncover previously hidden disparities and patterns of occupational segregation. It thus behooves all employers to evaluate potential wage inequities now and allow for necessary self-correction in recruitment, hiring, and retention practices; thereby avoiding the pricey consequences of non-compliance.

As the new law certainly creates additional hefty burden on covered employers' data reporting obligations, you are strongly encouraged to begin internal auditing and analysis now. You should partner with counsel to conduct a proactive pay equity audit of your workforce to ensure legal compliance – working with counsel will ensure that the work is conducted under attorney-client privilege and thus not discoverable in litigation. Taking care of this now would provide you time to correct and avoid continued disparity through changed recruiting, hiring, and retention practices. By conducting this invaluable analysis now, you may avoid the prying eyes of a DFEH or DLSE investigation, the large fines associated with non-compliance, and the onerous costs of a potential lawsuit.

We will continue to monitor developments related to this new law and its effect on California employers. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further assistance with how to prepare for compliance with these new requirements, contact your Fisher Phillips attorney, any attorney in one of our six California offices, or any attorney in our Pay Equity Practice Group.

---

*This Legal Alert provides an overview of a specific new state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

## *Related People*

**Alexa Greenbaum**
Associate
916.210.0405
Email

## *Service Focus*

Employment Discrimination and Harassment

Pay Equity and Transparency

## *Related Offices*

Irvine

Los Angeles

Sacramento

San Diego

San Francisco

Woodland Hills