California Joins Growing List of Jurisdictions to Require Pay Scale Information in Job Postings: 7 Things You Need to Know

Insights
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As a result of Governor Newsom's signature on legislation yesterday, California will soon join a growing list of state and local jurisdictions that require job postings to include pay scale information. With the enactment of Senate Bill 1162 – which becomes effective January 1, 2023 – California will join Colorado, Washington, New York City and other local jurisdictions that have already adopted such requirements. Statewide legislation is currently pending in New York as well. SB 1162 also makes significant changes to California's existing pay data reporting requirements. What are the seven things California employers need to know about these new obligations?

1. Employers Will Need to Increase Wage Transparency with Employees

California currently prohibits employers from asking applicants about their salary history, including compensation and benefits, during the hiring process. It also requires employers to provide the pay scale for a position upon reasonable request by an applicant. However, SB 1162 increases these transparency requirements in several new ways.

- Not only can applicants request the pay scale for the position that they are applying for, but employers must now also provide the pay scale for the position that they are currently employed upon request.
- In addition, for employers *with 15 or more employees*, you must include the pay scale for a position in *any job posting*. A "pay scale" is defined as the salary or hourly wage range that the employer "reasonably expects" to pay for the position.
- If you use a third party to "announce, post, publish, or otherwise make known a job posting," you must provide the pay scale to the third party and it must include the pay scale on the job posting.
- You must further maintain records of job titles and wage rate history for each employee for the duration of their employment plus three years after the end of employment. The DLSE can inspect these records to see if there is a pattern of wage discrepancy.

Beyond these additional legal requirements, SB 1162 comes with some teeth. If you do not abide by any of these requirements, an employee or applicant who claims to be aggrieved may file a written complaint with the DLSE within one year after the date they learned of the violation. An employee or

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applicant may also file a civil action for injunctive relief or any other relief that a court deems appropriate.

If you are found to have committed a violation of these requirements, the DLSE may order you to pay a civil penalty between $100 and $10,000 **per violation**. Importantly, DLSE will not assess a penalty for the first violation if you can demonstrate that all job postings for open positions have been updated to include the required pay scale information. Finally, if you fail to keep records in violation of SB 1162, there will a rebuttable presumption in favor of the employee's claim.

The job posting requirements of SB 1162 will pose unique challenges to employers who hire nationally or may hire workers who work remotely. As more jurisdictions adopt such requirements, employers will need to evaluate whether they can maintain separate job postings and processes in different jurisdictions or whether it makes sense to adopt a uniform national process.

Moreover, the increased use of remote work can create challenges. Take, for example, an employer that may not be based in California but may he hiring from a pool of applicants who could be working remotely from California. For these reasons, you should work closely with counsel to ensure that your job postings are compliant come 2023.

2. You Will Need to Comply with Significant Changes to Pay Data Reporting Requirements

SB 1162 also makes a number of significant changes to California's existing law that requires large employers to submit pay data reports, including modifying the timing of when such reports must be submitted in beginning in 2023.

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 State of California upped the ante in 2020 by requiring California employers with 100 or more employees to submit pay data reports to the California Civil Rights Department (CRD, formerly known the California Department of Fair Employment and Housing) that contained specified wage information. SB 1162 modifies some of the requirements for these pay data reports and the timing of providing this information to the CRD.

Current law requires such reports to be submitted each March. SB 1162 now requires all private employers of 100 or more employees by the second Wednesday of May 2023, and on or before the second Wednesday of each May thereafter, to submit specific pay data to the CRD covering the prior calendar, or "Reporting Year." The report must include the following information:

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- 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 your choice between October 1 and December 31 of the Reporting Year. The 10 job categories are as follows:
    - 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
    - Service workers
- 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.
- With each job category listed above, for each combination of race, ethnicity, and sex, the **median and mean hourly rate**. This is a new data element added to the required information by SB 1162
- The total number of hours worked by each employee counted in each pay band during the Reporting Year.
- Your North American Industry Classification System (NAICS) code.
- The Report may include a section for clarifying remarks (however, it is not required).

3. Employers who Contract with Labor Contractors Need to Provide Separate Report

California law will also require employers with 100 or more employees hired through labor contractors to submit a separate pay data report to the CRD covering the employees hired through labor contractors in the prior calendar year. A labor contractor must supply all necessary pay data to the employer for the report, and the employer must also disclose in the pay data report the ownership of all labor contractors used to supply employees.

4. There is a Required Format That Must Be Followed

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

5. Employers With Multiple Establishments No Longer Required to Submit a Consolidated Report

SB 1162 eliminates language that requires employers with more than one establishment to also file a consolidated report that includes all employees. Employers with multiple establishments must submit a report that covers each establishment. It appears that this still allows for filing of one report that lists all of the establishments separately, but further clarification from the CRD is needed here.

6. There are Significant Consequences for Non-Compliance

The law authorizes the CRD to seek a court order requiring the employer to comply with all requirements and entitles the Department to recover costs associated with seeking said compliance. SB 1162 significantly raises the stakes for noncompliance by authorizing the CRD to now request a civil penalty for the failure to file the required report, up to $100 per employee for the first violation and up to $200 per employee for each subsequent violation.

Importantly, if the employer is not able to submit a complete and accurate report because a labor contractor has not provided it the required pay data, the Court can apportion the penalty amount to any labor contractor that has failed to provide the required pay data.

7. The Time to Act to Come into Compliance is Now

As SB 1162 certainly creates additional hefty burdens on covered employers' data reporting obligations, job posting requirements, and records maintenance duties, you are strongly encouraged to take action 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.

You should also make sure that all job postings, including those on third-party boards or websites, include the required pay scale information for all open positions. Taking care of this now would provide you time to correct and avoid continued disparity and missing job posting information through changed recruiting, hiring, and retention practices. By taking these invaluable actions now, you may avoid the prying eyes of a CRD or DLSE investigation, the large fines associated with non-compliance, and the onerous costs of a potential lawsuit.

Conclusion

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' Insight System to get the most up-to-

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date information. For further assistance with how to prepare for compliance with these new requirements, contact your Fisher Phillips attorney, the authors of this Insight, any attorney in one of our six California offices, or any attorney in our Pay Equity Practice Group.

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