

California Issues New Guidance Regarding Employer Pay Data Reporting Requirements

December 17, 2020

On November 23, the California Department of Fair Employment and Housing (DFEH) [issued updated guidance](#) clarifying employers' reporting responsibilities under newly enacted California Senate Bill 973. This guidance provides answers to many key questions that were left unanswered by the law, which was signed by Governor Gavin Newsom on September 30.

What is SB 973?

SB 973 requires large employers to report certain pay and other data to the DFEH (which will enforce SB 973) by March 31, 2021, and annually thereafter. In enacting this legislation, the legislature found that despite "significant progress made in California in recent years to strengthen California's equal pay laws, the gender pay gap persists, resulting in billions of dollars in lost wages for women each year in California. Pay discrimination is not just a women's issue, but also harms families and the state's economy." Recognizing that there are legitimate and lawful reasons for paying some employees more than others, the legislature concluded that "pay discrimination continues to exist, is often 'hidden from sight,' and can be the result of unconscious biases or historic inequities."

What does SB 973 require?

SB 973 requires private employers that have 100 or more employees, and are required to file an annual Employer Information Report EEO-1 under federal law, to submit a pay data report to the DFEH on or before March 31, 2021, and on or before March 31 each year thereafter, that contains specified wage information covering the prior calendar year.

The pay data report must include the number of employees by *race*, *ethnicity* and *sex* in each of the following 10 job categories (which track the federal EEO-1 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

To determine the number of employees required to be reported, employers must create a "snapshot" that counts all of the individuals in each job category by race, ethnicity and sex employed during a single pay period of the employer's choosing between October 1 and December 31 of the prior calendar year. In essence, this is the "pool" of all employees in each job category, broken down further by race, ethnicity and sex.

In addition, the pay data report must include the number of employees by *race*, *ethnicity* and *sex* whose annual earnings fall within each of the pay bands used by the US Bureau of Labor Statistics in its [Occupational Employment Statistics survey](#). Even though California has a higher minimum wage than is established under federal law, employers' pay data reports must utilize the pay bands

established by the BLS. To determine the annual earnings number for each employee, employers must calculate the total earnings during the prior calendar year, as shown on the IRS Form W-2, for each employee, regardless of whether the employee worked for the full calendar year.

Employers must then tabulate and report the number of employees in each job category whose W-2 earnings during the prior calendar year fall within each pay band. This compensation information, together with the “pool” of all employees referenced above, could then be analyzed to attempt to identify wage patterns between employees of different races, ethnicity and sex within each job category.

For example, an employer’s report that shows that nine out of 10 female employees in the executive job category fall within pay band #8, whereas five out of five male employees in this same executive job category *fall within the higher pay band #12*, could prompt the DFEH to possibly conclude – based solely upon the numbers – that the female executives are underpaid relative to the male executives, unless there are legitimate nondiscriminatory factors that explain the apparent pay differential.

Employers must also include in the report the total number of hours worked by each employee counted in each pay band during the prior calendar year.

What questions have been raised by SB 973 and how has the DFEH addressed them?

SB 973 failed to address a number of key questions, leaving employers unsure how to prepare for the upcoming reporting deadline. However, on November 2, and again on November 23, the DFEH provided much needed guidance regarding the following questions:

1. Do the reporting requirements apply only to employers with 100 or more employees in California or 100 or more employees overall?

The DFEH explained in its November 23 guidance that employees “located inside and outside of California are counted when determining whether an employer has 100 or more employees.” For example, an employer that has 50 employees inside California and 50 employees outside of California would be required to submit a pay data report to the DFEH. In contrast, an employer with no employees in California would not be required to file a pay data report with the DFEH.

2. Which employees should be reported in the pay report and how should employers treat employees working remotely outside of California?

The DFEH explained that employers must include their employees assigned to California establishments and/or working within California, and employers *may* include their other employees located outside of California.

The DFEH further explained that if employees telework from a residence in California, but are assigned to an establishment outside of California, they should be included on the pay data report. Likewise, employees assigned to an establishment in California, but who work at client sites outside of California, should also be included in the employer’s pay data report.

3. How should employers assemble and submit their pay data reports to the DFEH?

The DFEH explained that it is in the process of securing an independent contractor to provide the necessary IT infrastructure, including an employer submission portal on the DFEH website that will specify the required information. The DFEH anticipates that this portal will be available in advance of the March 31, 2021, filing deadline. The DFEH further explained that it intends to issue standard forms for employers to use submit their pay data reports.

4. What information must be contained in the pay data report?

The DFEH explained that, among other things, the following information must be included in the report:

- The number of employees by race, ethnicity and sex in each of the above-referenced 10 job categories
- The number of employees by race, ethnicity and sex whose annual earnings fall within each of the pay bands used by the BLS in the Occupational Employment Statistics survey
- The total number of hours worked by each employee counted in each pay band during the prior calendar year
- The calendar year, pay period, report type and the total number of reports being submitted by the employer
- The employer's name, address, headquarters' address (if different), Employer Identification Number, number of employees inside and outside of California, number of establishments inside and outside of California and whether the employer is a California state contractor
- Any clarifying remarks
- A certification that the information contained in the pay data report is accurate and the name, title, signature and date of signature of the certifying official
- The name, title, address, phone number and email address of someone who can be contacted about the report

Finally, the DFEH's November guidance indicates that additional guidance regarding "pay," "hours worked," "multi-establishment employers," "acquisitions and mergers" and "spinoffs" will be forthcoming and that the DFEH intends to issue regulations implementing the statute going forward.

Notwithstanding the DFEH's November guidance, questions still remain. For example, SB 973 does not address how employers should calculate "hours worked," including for exempt employees whose hours typically are not tracked by employers.

SB 973 and the DFEH also fail to address how the DFEH will analyze the data, which lumps together seemingly dissimilar jobs into very broad job groups, to determine whether pay disparities exist based on race, ethnicity or sex. California's equal pay law requires that for pay equity purposes, employees who perform "substantially similar work" should be compared.

Finally, SB 973 also fails to account for the fact that employers often have legitimate, nondiscriminatory explanations for differences in pay between employees in broad job categories, although the law does provide that employers will have the opportunity to provide "clarifying remarks" regarding any of the information provided.

What should employers do to prepare?

Employers subject to SB 973 should begin to prepare for the March 31, 2021, reporting deadline. In particular, employers should start compiling the background data now (if they do not already have it), and they should conduct a privileged pay equity analysis based upon this data to determine if they have any issues before reporting this data to the DFEH.

For questions or more information on how to comply with these new requirements, please contact a member of Cooley's employment group.

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