

Date of Hearing: July 29, 2020

**ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT**

Ash Kalra, Chair

SB 973 (Jackson) – As Amended June 18, 2020

**SENATE VOTE:** 29-9

**SUBJECT:** Employers: annual report: pay data

**SUMMARY:** Requires private employers with 100 or more employees to submit a report annually to the Department of Fair Employment and Housing (DFEH) with pay data for specified job categories broken down by race, ethnicity, and sex. Specifically, **this bill:**

- 1) Requires, on or before March 31, 2021, and on or before March 31 each year thereafter, a private employer with 100 or more employees and who is required to file an annual Employer Information Report (EEO-1 Report) under federal law, to submit a pay data report to the DFEH that, upon request, shall make the report available to the Division of Labor Standards Enforcement (DLSE).
- 2) Requires that the pay data report be broken down by specified job categories and include the number of employees by race, ethnicity and sex with annual earnings separated in pay bands used by the United States Bureau of Labor Statistics.
- 3) Requires that, for purposes of establishing the number of employees in each pay band, the employer create a “snapshot” that counts all the individuals in each job category employed during a single pay period of the employer’s choice between October 1 and December 31 of the reporting year.
- 4) Requires employers with multiple establishments to submit a report for each establishment and a consolidated report.
- 5) Permits an employer to make clarifying remarks regarding any of the information provided.
- 6) States that the report shall be made available in a format that allows DFEH to search and sort the information using readily available software.
- 7) Provides that if an employer submits to the DFEH a copy of its’ EEO-1 report containing the same or substantially similar pay data required under this section, then the employer shall be in compliance.
- 8) Provides that in the event an employer fails to submit the required report to the DFEH, the department may seek an order requiring the employer to comply and shall be entitled to recover the costs associated with seeking the order.
- 9) Requires the DFEH to maintain the pay data reports for a minimum of ten years.

- 10) Prohibits any officer or employee of the DFEH or the DLSE from making public any individually identifiable information obtained prior to the institution of a proceeding under California's Equal Pay Act or the employment anti-discrimination provisions of the Fair Employment and Housing Act.
- 11) Exempts from coverage under the California Public Records Act and considers confidential, any individually identifiable information disclosed to the DFEH under these provisions.
- 12) Permits the DFEH to develop and publicize aggregate reports based on the data obtained provided the aggregate reports are calculated to prevent the association of any data with an individual person or business.
- 13) Authorizes the DFEH to receive, investigate, conciliate, mediate, and prosecute complaints alleging unlawful pay discrimination under the Equal Pay Act (EPA). The DFEH shall, in conjunction with the DLSE, adopt procedures to ensure that the departments coordinate activities to enforce the EPA.
- 14) Defines "employee" as 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.

**EXISTING STATE LAW:**

- 1) Establishes the DLSE within the Department of Industrial Relations to administer and enforce provisions of the Labor Code governing wages, hours, and working conditions.
- 2) Establishes the DFEH to, among other things, receive and investigate complaints of illegal employment discrimination.
- 3) Provides that it is an unlawful employment practice, for an employer, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any person, to refuse to hire, discharge, or discriminate against the person in compensation or in terms, conditions, or privileges of employment.

**EXISTING FEDERAL LAW:**

- 1) Establishes the Equal Employment Opportunity Commission (EEOC) to enforce the anti-discrimination in employment provision, known as Title VII, of the Civil Rights Act of 1964.
- 2) Requires every employer with 100 or more employees that is covered by Title VII, to file annually with the EEOC, demographic information about its employees in the Standard Form 100, as revised (known as the EEO-1 Report).

**FISCAL EFFECT:** According to the Senate Appropriations Committee, DFEH would incur annual General Fund costs of up to the low millions of dollars, depending upon how the proposed pay reporting system is developed and implemented.

The bill would not have a fiscal impact on the Division of Labor Standards Enforcement (DLSE) within the Department of Industrial Relations (DIR). DLSE's only role in this bill is to request the data collected as necessary, which is not anticipated to significantly increase its workload.

**COMMENTS:** The EEOC, for decades, has required employer submission of workforce demographic information to it in order to assist the Commission achieve its purpose of administering and enforcing anti-discrimination laws in employment. In 2016, the Obama Administration announced its intent to revise the reporting rule to also require the submission of employee pay data by race and gender beginning in 2018. In August 2017, the federal Office of Management and Budget (OMB) halted implementation of the proposed rule and initiated an extensive review process of all proposed revisions. As a result, the EEOC could only collect demographic information and lacked access to any pay data based on protected characteristics. Litigation followed and a federal court ruled against the stay on implementation and ordered the EEOC to collect two years of pay data. However, the agency issued a public notice in 2019 that it will not seek renewal of the pay data collection beyond the court-ordered two years.

Despite the EEOC's current position on pay data reporting, one major U.S. company, Intel, has taken affirmative steps to publish salary information and implement strategies to correct identified disparities. According to their 2019 Diversity and Inclusion Report, which found a significant underrepresentation of women in the highest paying positions, Intel decided to disclose the information because "transparency and open sharing of our data enable us to both celebrate our progress and confront our setbacks." The company wants to "lead the industry in this space by raising the transparency bar for ourselves and, as a result, raising it for others." Unfortunately, there is little evidence that other major U.S. companies have followed suit.

According to the author, "Despite all the progress our state has made on equal pay, the pay gap remains a serious problem that costs an estimated \$79 billion in lost wages a year in California. The pay gap is especially concerning for women of color with African American women earning 61 cents and Latinas just 42 cents for every dollar earned by white, non-Hispanic men. You can't fix what you can't see. With SB 973, employers will have a chance to identify inequities in their pay and hiring practices and take action to fix them, particularly when it comes to the issue of job segregation – the clustering of women and people of color in lower paying positions in a company. In addition, SB 973 will allow DFEH to more efficiently identify patterns of wage disparities, particularly as they relate to job segregation by gender and race, which, with additional information, could lead to the targeted enforcement of equal pay and anti-discrimination laws. SB 973 is an important step towards closing the pay gap, especially during a global pandemic that is disproportionately impacting women and communities of color."

### **Arguments in Support**

According to the California Employment Lawyers Association, Equal Rights Advocates, and the American Association of University Women-California Chapter, sponsors of the bill, "SB 973 will ensure that, despite these setbacks at the federal level, this important pay data will continue to be compiled, aggregated, and reported in California. Modeled after the revised EEO-1 reporting requirements, SB 973 would require payroll data to be broken down by gender, race,

ethnicity, and job category. These reports would be submitted to the Department of Fair Employment and Housing and made available to the Division of Labor Standards and Enforcement upon request. The pay data would be in aggregate form and would not be publicly available or identifiable at the individual worker level, which should assuage employer concerns regarding privacy or confidentiality. If pay data collection is reinstated at the federal level consistent with the requirements of SB 973, an employer may comply with SB 973 by simply submitting a copy of their EEO-1 report.”

### **Arguments in Opposition**

A coalition of employer organizations, including the California Chamber of Commerce, are opposed and state, “SB 973 requires employers to collect pay data in the aggregate. Doing so will likely demonstrate wage disparity amongst employees in the different job classifications or titles according to gender. However, a disparity in wages does not automatically translate into wage discrimination or a violation of Labor Code Section 1197.5 (as amended by SB 358). Specifically, SB 973 seeks to collect pay data according to job title, not according to whether the jobs are ‘substantially similar’ for purposes of comparison.

Job titles are not determinative of whether two jobs are substantially similar for purposes of equal pay under Labor Code Section 1197.5 or the federal Equal Pay Law. *See Brennan v. Prince William Hospital Corp.*, 503 F.2d 282, 288 (4th Cir. 1974) (stating ‘[j]ob descriptions and titles, however, are not decisive. Actual job requirements and performance are controlling.’); *Ingram v. Brink’s, Inc.*, 414 F.2d 222, 231 (1st Cir. 2005) (stating ‘[t]he EPA is more concerned with substance than title’); *Chapman v. Pacific Tel. & Tel. Co.*, 456 F.Supp. 65, 69 (N.D. Cal. 1978) (holding ‘[t]he regulation and cases make it clear that it is actual job content, not job titles or descriptions which is controlling.’); and, *EEOC Compliance Manual Compensation Discrimination* (‘job titles and formal job descriptions are helpful in making this determination, but because jobs involving similar work may have different titles and descriptions, these things are not controlling.’)”

### **Prior Legislation**

SB 171 (Jackson) of 2019 was substantially similar to this bill. SB 171 was held in the Assembly Appropriations Committee.

SB 1284 (Jackson) of 2018 was substantially similar to this bill. SB 1284 was held in the Assembly Appropriations Committee.

AB 2282 (Eggman) Chapter 127, Statutes of 2018 clarified that, while prior salary information cannot justify disparities in compensation, an employer may make a compensation decision based on an applicant’s current salary as long as any wage differential resulting from that compensation decision is justified by: (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; or (d) a bona fide factor other than sex, such as education, training, or experience.

AB 46 (Cooper) Chapter 776, Statutes of 2017 clarified that the California Equal Pay Act applies to public as well as private sector employers.

AB 168 (Eggman) Chapter 688, Statutes of 2017 prohibited an employer from seeking or relying on the salary history information of an applicant as a factor in determining whether to offer an

applicant employment or what salary to offer an applicant. The bill also required an employer, upon reasonable request, to provide the pay scale for a position to an applicant.

AB 1209 (Gonzalez-Fletcher) of 2017 would have required employers with 500 or more employees in California to provide the Secretary of State with specific information regarding gender wage differentials for exempt employees and board members every two years as part of their corporate filings. The measure was vetoed by Governor Brown.

SB 1063 (Hall) Chapter 866, Statutes of 2016 expanded the prohibitions on pay discrimination to include discrimination based on race or ethnicity.

AB 1676 (Campos) Chapter 856, Statutes of 2016 provided that prior salary shall not, by itself, justify any disparity in compensation.

SB 358 (Jackson) Chapter 546, Statutes of 2015 amended the Equal Pay Act to require employers to justify any gender pay differential with a legitimate non-sex-based factor and prohibited retaliation against employees for disclosing or discussing their wages with their co-workers.

## **REGISTERED SUPPORT / OPPOSITION:**

### **Support**

Aauw - California

American Civil Liberties Union/Northern California/Southern California/San Diego and Imperial Counties

Business & Professional Women of Nevada County

California Employment Lawyers Association

California Labor Federation

California State Council of Service Employees International Union (seiu California)

California Women's Law Center

Closing the Women's Wealth Gap

Community Legal Services in East Palo Alto

Consumer Attorneys of California

Equal Rights Advocates

Freefrom

Friends Committee on Legislation of California

Legal Aid At Work

National Association of Social Workers, California Chapter

National Council of Jewish Women Los Angeles

National Council of Jewish Women-California

National Women's Law Center

National Women's Political Caucus of California

Public Counsel

Santa Barbara Women's Political Committee

Stronger California Advocates Network

The Women's Foundation of California

Voices for Progress

Women Lawyers of Sacramento

Work Equity Action Fund

**Oppose**

Acclamation Insurance Management Services  
Allied Managed Care  
Associated General Contractors  
Auto Care Association  
California Association for Health Services At Home  
California Association of Winegrape Growers  
California Bankers Association  
California Chamber of Commerce  
California Construction and Industrial Materials Association  
California Farm Bureau Federation  
California Food Producers  
California Grocers Association  
California Hospital Association  
California Hotel & Lodging Association  
California Landscape Contractors Association  
California Manufacturers and Technology Association  
California Professional Association of Specialty Contractors (CALPASC)  
California Restaurant Association  
California Retailers Association  
California Travel Association  
Cawa - Representing the Automotive Parts Industry  
Civil Justice Association of California  
Computing Technology Industry Association  
National Federation of Independent Business (NFIB)  
Western Growers Association

**Analysis Prepared by:** Megan Lane / L. & E. /