

SENATE THIRD READING
SB 973 (Jackson)
As Amended August 24, 2020
Majority vote

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.

Major Provisions

- 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 Fair 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 Fair Pay Act (FPA). The DFEH shall, in conjunction with the DLSE, adopt procedures to ensure that the departments coordinate activities to enforce the FPA.
- 14) Requires that the Employment Development Department provide to the DFEH, upon its request and within 60 days, the names and addresses of all businesses with 100 or more employees.

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.

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.')

FISCAL COMMENTS:

According to the Assembly Appropriations Committee, annual General Fund costs in the range of \$1 million to \$5 million for DFEH to implement the bill. Costs will depend on how the proposed pay reporting system is developed and implemented.

VOTES:

SENATE FLOOR: 29-9-2

YES: Allen, Archuleta, Atkins, Beall, Bradford, Caballero, Dodd, Durazo, Galgiani, Glazer, Lena Gonzalez, Hertzberg, Hill, Hueso, Hurtado, Jackson, Leyva, McGuire, Mitchell, Monning, Pan, Portantino, Roth, Rubio, Skinner, Stern, Umberg, Wieckowski, Wiener

NO: Bates, Borgeas, Dahle, Grove, Jones, Melendez, Moorlach, Morrell, Nielsen

ABS, ABST OR NV: Chang, Wilk

ASM LABOR AND EMPLOYMENT: 5-2-0

YES: Kalra, Carrillo, Gonzalez, Jones-Sawyer, Luz Rivas

NO: Flora, Diep

ASM APPROPRIATIONS: 13-5-0

YES: Gonzalez, Bauer-Kahan, Bloom, Bonta, Calderon, Carrillo, Chau, Eggman, Gabriel, Eduardo Garcia, Petrie-Norris, Quirk, Robert Rivas

NO: Bigelow, Megan Dahle, Diep, Fong, Voepel

UPDATED:

VERSION: August 24, 2020

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FN: 0003342