
SENATE COMMITTEE ON LABOR, PUBLIC EMPLOYMENT AND RETIREMENT

Senator Jerry Hill, Chair

2019 - 2020 Regular

Bill No:	SB 973	Hearing Date:	May 14, 2020
Author:	Jackson		
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Urgency:	No	Fiscal:	Yes
Consultant:	Jake Ferrera		

SUBJECT: Employers: annual report: pay data

Due to the COVID-19 Pandemic and the unprecedented nature of the 2020 Legislative Session, all Senate Policy Committees are working under a compressed timeline. This timeline does not allow this bill to be referred and heard by more than one committee as a typical timeline would allow. In order to fully vet the contents of this measure for the benefit of Senators and the public, this analysis includes information from the Senate Judiciary Committee.

KEY ISSUE

Should the Legislature require that employers with 100 or more employees provide the Department of Fair Employment and Housing with EEO-1 (Employer Information Report) pay data, as specified?

ANALYSIS

Existing state law:

- 1) Prohibits an employer, because of the 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, from refusing to hire, discriminating against, or harassing the person. (Government Code §12940)
- 2) Prohibits an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, from failing to take all reasonable steps necessary to prevent discrimination and harassment from occurring.
(Government Code §12940(k))
- 3) Prohibits an employer from paying any of its employees at wage rates less than the rates paid to employees of the opposite sex or employees of another race or ethnicity for substantially similar work, unless the employer can demonstrate that the wage differential is based upon one of the following:
 - a) A seniority system
 - b) A merit system
 - c) A system that measures earnings by quantity or quality of production
 - d) A bona fide, job-related factor other than sex, race or ethnicity, such as education, training or experience.

(Labor Code §1197.5)

Existing Federal Law

- 1) Requires every employer, employment agency, and labor organization subject to this subchapter to:
 - a) Make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed,
 - b) Preserve such records for such periods, and
 - c) Make such reports therefrom as the Equal Employment Opportunity Commission (EEOC) shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title.

(Federal Civil Rights Act of 1964, §709(c), Title VII)

- 2) Requires that, on or before March 31 of each year, every employer that is subject to Title VII of the Civil Rights Act of 1964, as amended, and that has 100 or more employees, shall file with the EEOC or its delegate executed copies of Standard Form 100, as revised (otherwise known as "Employer Information Report EEO-1"), in conformity with the directions set forth in the form and accompanying instructions. (29 CFR §1602.7)

This bill:

- 1) Requires that, 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) under federal law must submit a pay data report to the Department of Fair Employment and Housing (DFEH) that covers the prior calendar year, or "reporting year".
- 2) Requires that DFEH makes the reports available to the Division of Labor Standards and Enforcement (DLSE) upon request.
- 3) Requires that the pay data report includes the number of employees, categorized by race, ethnicity, and sex that are within the pay bands used by the United States Bureau of Labor Statistics in the Occupation Employment Statistics survey.
- 4) Requires the pay data report includes the number of employees, categorized by race, ethnicity, and sex in each of the following job categories:
 - a) Executive or senior level officials and managers
 - b) First or mid-level officials and managers
 - c) Professionals
 - d) Technicians
 - e) Sales workers
 - f) Administrative support workers
 - g) Craft workers
 - h) Operatives
 - i) Laborers and helpers
 - j) Service workers
- 5) Requires that, for the purposes of an employer calculating the numbers above, the employer create a "snapshot" that counts all of 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".

- 6) Requires, for the purposes of calculating annual earnings within federal pay bands, the employer must calculate W-2 total earnings for each employee in the "snapshot" for the entire "reporting year", irrespective of if the employees worked the entire year.
- 7) Requires that the employer must include the total number of hours worked by each employee counted in each pay band.
- 8) Requires that, for employers with multiple establishments, the employer must submit a report for each establishment and a consolidated report that includes all employees.
- 9) Requires that the pay data report include a section for employers to provide clarifying remarks regarding any of the information provided, but clarifies that the employer is not required to provide clarifying remarks.
- 10) Provides that, if an employer is required to file an Employer Information Report, otherwise known as the EEO-1 Report, the employer may satisfy compliance with the requirements above by submitting the Employer Information Report. This bill requires that the Employer Information Report must include the same or substantially similar pay data required under this section.
- 11) Requires that, if an employer fails to comply, DFEH may seek an order requiring the employer to comply with these requirements and seek an order requiring the employer to comply with these requirements, as well as recovery of costs associated with seeking the order for compliance.
- 12) Prohibits any officer or employee of the DFEH or DLSE from making public in any manner whatsoever any individually identifiable information obtained through the employer-submitted pay data prior to an investigation or enforcement action. "Individually identifiable information" includes data that is associated with a specific person or business.
- 13) Clarifies that the prohibition above does not prevent DFEH from publicizing aggregate reports on pay data if the aggregate reports are reasonably calculated to prevent the association of any data with an individual business or person.
- 14) Excludes any pay information disclosed to DFEH from disclosure pursuant to the California Public Records Act.
- 15) Requires that the DFEH maintain pay data reports for not less than 10 years.
- 16) Empowers the DFEH to receive, investigate, conciliate, mediate, and prosecute complaints alleging unlawful pay discrimination on the basis of sex, race or ethnicity, made illegal under the Equal Pay Act. Further orders the DFEH to coordinate with DLSE to ensure that only one of the departments investigates or takes enforcement action in response to the same operative set of facts.
- 17) Makes findings and declarations on the gender pay gap, as well as the need for a limitation on the public's access to the pay data under the California Public Records Act.

COMMENTS

1. Need for this bill?

The EEOC is a federal commission, created by the Civil Rights Act of 1964. Since its creation, the EEOC has fought discrimination in all forms throughout America's workplaces, including discrimination based on race, color, religion, national origin, age, disability, and of either sex. The EEOC was an early pioneer in the fight for gender equality – as early as 1968, the EEOC was arguing in court that state laws that prevented women from certain occupations were illegal and preempted under federal law.

Starting in 1966, the EEOC required employers with 100 or more employees to submit EEO-1 forms, which showed the representation of men and women of different ethnic groups in nine different occupational classifications. According to the EEOC, the EEO-1 data was invaluable in enforcing anti-discrimination laws and conducting public hearings throughout the country to bring attention to the issue of discrimination in the workplace. The EEO-1 continues to be required by the EEOC, and continues to be used to enforce anti-discrimination laws throughout the country.

In 2016, in an attempt to end gender-based pay discrimination, the Obama Administration required employers to report pay data in specified bands on the EEO-1 form. This requirement went through the necessary rule making, and the first reporting deadline was March 31, 2018. However, in August of 2017, the current federal Administration, through the Office of Management and Budget (OMB), suspended the rule requiring the reporting of pay data due to compliance burdens.

2. Proponent Arguments:

According to the California Employment Lawyers Association, the sponsor of bill:

“SB 973 would allow for the designated state agencies to more efficiently identify patterns of wage disparities and occupational segregation, and allow for targeted enforcement of California's equal pay laws, when appropriate. Importantly, it will also encourage employers to analyze their own pay practices to ensure they are fair and lawful and allow for self-correction and voluntary compliance with the law. Simply compiling the data will uncover previously hidden pay disparities and/or patterns of occupational segregation, prompting some businesses to make necessary changes to recruitment, hiring, and retention practices to ensure better representation of workers at all wage levels.”

3. Opponent Arguments:

The Society for Human Resource Management writes in opposition:

“Comparing employees based on their pay is not as simple as it may seem, and relying on W-2 earnings may identify a disparity in pay when none exists. Over someone's career, pay is increasingly influenced by their chosen career path, which include previous jobs, experience, education, performance and geographic locations, along with level of responsibility. Other disparities may exist due to overtime pay, shift differentials, bonuses, the exercise of stock

options, and other variable pay approaches. Consequently, differences in pay may exist that have nothing to do with pay discrimination.”

4.

5. Prior Legislation:

SB 171 (Jackson, 2019), Held in Assembly Appropriations Committee was substantially similar to this bill.

SB 1284 (Jackson, 2018), Held in Assembly Appropriations dealt with EEO-1 reporting to DFEH and was very similar to this bill.

SB 358 (Jackson), Chapter 546, Statutes of 2015 prohibited an employer from paying any of his or her employees at wage rates less than those paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility.

SUPPORT

California Employment Lawyers Association (Co-Sponsor)
Equal Rights Advocates (Co-Sponsor)
American Association of University Women – California (Co-Sponsor)
American Civil Liberties Union/northern California/southern California/san Diego and Imperial Counties
Asian Americans Advancing Justice - California
California Women's Law Center
Consumer Attorneys of California
Friends Committee on Legislation of California
Legal Aid At Work
National Women's Political Caucus of California
Public Counsel
The Women's Foundation of California
Voices for Progress Education Fund
Work Equity Action Fund

OPPOSITION

Acclamation Insurance Management Services
Allied Managed Care
Associated General Contractors of California
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 Hotel & Lodging Association
California Manufacturers & Technology Association
California Professional Association of Specialty Contractors (CALPASC)
California Restaurant Association
California Retailers Association
Cawa - Representing the Automotive Parts Industry
Civil Justice Association of California
Computing Technology Industry Association
National Federation of Independent Business (NFIB)
Society for Human Resource Management
Western Growers Association

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