

Special Alert: New Law Requires California Employers to Include Pay Scale in Job Postings and Expands Pay Data Reporting Obligations

September 28, 2022

Yesterday, California Governor Gavin Newsom signed into law SB 1162, creating new obligations for California employers related to pay scales and reporting of pay data. This law reflects the California Legislature's recent focus on pay equity concerns and updates several recently enacted laws regarding pay scales and pay data reporting. In sum, the law will:

- Require employers with fifteen or more employees to include a pay scale in all job postings;
- Require all employers to provide a pay scale to current employees upon request;
- Impose new recordkeeping requirements regarding pay and job titles on employers; and
- Require employers with 100 or more employees to submit detailed pay data reports including both data for workers secured via staffing agencies and data for all workers broken down by race, ethnicity, and sex.

Pay Scale Posting

Pay equity concerns have been a major recent focus for the California Legislature, including the enactment of new laws in 2017 (AB 168) and 2018 (AB 2282) precluding the usage of prior salary history for purposes of setting salary and requiring employers provide pay scale information to applicants. Presently, Labor Code section 432.3 requires an employer, upon reasonable request, to provide the pay scale for a position to an applicant after the applicant has completed an initial interview with the employer. However, while the so-called "pay gap" has narrowed in California, the Legislature has expressed concerns these earlier requirements did not go far enough to ensure both applicants and current employees had sufficient information about the relevant pay scales for the position sought and their current position with the employer.

Accordingly, SB 1162 law expands these obligations in different ways for smaller and larger employers.

- *All* employers must, upon reasonable request, provide "pay scale" information to current employees for the position in which the employee is currently employed. (Previously, the employer was only required to provide this pay scale to an applicant). For purposes of section 432.3, the definition of "pay scale" has been slightly modified to mean "the salary or hourly wage range that the employer reasonably expects to pay for the position."
- Employers with 15 or more employees must post the "pay scale" within any job posting and provide the "pay scale" to any third party engaged to announce, post, or publish a job posting for inclusion in any such job posting.
- *All* employers must maintain records of a job title and wage rate history for each employee for the duration of employment plus three years after the end of employment. The Labor Commissioner is entitled to inspect these records.

Employers face new liability risk in connection with these requirements. The law allows aggrieved individuals to file a civil action or a written complaint with the Labor Commissioner, establishes a civil penalty of \$100 to \$10,000 per violation and creates a rebuttable presumption in favor of an employee's claim if an employer fails to keep required records. There is a narrow safe harbor provision -- no penalty

shall be assessed for a first violation of the requirement to provide pay scale to applicants if the employer demonstrates that all job postings for open positions have been updated to include the pay scale as required by this section.

Employers should consider taking the following steps prior to SB 1162 taking effect on January 1, 2023:

1. Employers with 15 or more employees should immediately take steps to begin including pay scale in any job postings and ensure any third parties include such information in any postings on the employers' behalf.
2. All employers should prepare to respond to requests for pay scale information from current employees
3. All employers should review their recordkeeping and document retention policies to ensure they are maintaining the required information.

Annual Pay Data Reporting

In 2020, California enacted SB 973 requiring private employers with 100 or more employees that are required to file an annual Employer Information Report (EEO-1) pursuant to federal law to annually submit a pay data report to the DFEH, including the number of employees by race, ethnicity, and sex in specified job categories. SB 973 allowed employers to comply with this new reporting requirement by submitting an EEO-1 to DFEH containing the same or substantially similar pay data information. However, the California Legislature has expressed concerns that these EEO-1 reports did not identify all the information needed to be measured, particularly since the EEO-1 reports (and SB 973's requirements) did not include information about workers hired or staffed via third party labor contractors.

SB 1162 amends and expands these reporting requirements in several respects:

1. While SB 973 previously applied only to employers with 100 or more employees who were required to submit an EEO-1 report, SB 1162 removes the EEO-1 requirement such that *any* employer with 100 or more employees must annually submit a "pay data report" (as defined in Government Code section 12999) to the DFEH.
2. Employers with 100 or more employees hired through labor contractors (i.e., staffing agencies) must also submit a separate pay data report to the DFEH covering the employees hired through labor contractors in the prior calendar year (with the labor contractor being required to provide all necessary pay data to the employer). These separate reports must also disclose the ownership names of all labor contractors used to supply employees. For purposes of this new law, a "labor contractor" means an individual or entity that supplies, either with or without contract, workers to perform labor within the client employer's usual course of business.
3. These pay data reports – whether for the employees hired by the employer, or for the new labor contractor-related reports – are also now required to include median and mean hourly rates for each combination of race, ethnicity, and sex within each job category.
4. Employers are no longer permitted to submit an EEO-1 in lieu of a pay data report.
5. SB 1162 imposes new civil penalties of \$100 per employee on an employer who fails to file the required report for a first offense, and \$200 per employee for subsequent violations, but allows for apportionment of penalties if an employer is unable to submit a complete and accurate report because a labor contractor has not provided necessary pay data.

6. While these pay data reports were previously due by March 31st of each year, these reports will now be due by the second Wednesday of May 2023, and then annually thereafter by the second Wednesday of each May.

Employers with 100 or more employees should promptly begin to gather the information necessary to submit the amended reports before the May 2023 deadline.

If you have questions about how this new law will affect your business or advice about how to implement these new requirements, please contact us.

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