EYE ON WASHINGTON

Timely, topical insights on a variety of payroll and reporting issues.

Detailed Look at State, Local and Federal Updates

Topics covered in this issue:

State/Territory/District

California Updates Guidance & Resources for Pay Data Reporting, Opens Portal

California's Civil Rights Division (CRD) has released **updated frequently asked questions, templates, and a user guide** for the 2023 pay data reporting period for employers with 100 or more employees. Employers must use the **CRD's online pay data reporting portal** to submit their annual reports. The portal is open. The reporting deadline for 2023 is **May 8, 2024**.

The Details:

Background:

A private employer that has 100 or more employees, with at least one California employee, must submit a pay data report covering the prior calendar year to the state on or before the second Wednesday of May each year, regardless of whether they are required to submit an EEO-1 report.

A private employer that has 100 or more employees, with at least one California employee, hired through labor contractors within the prior calendar year must also submit a separate pay data report to the state covering those employees. The private employer must also disclose on the pay data report the ownership names of all labor contractors used to supply employees. A labor contractor must supply all necessary pay data to the private employer.

Updated Guidance and Tools:

The CRD has updated its answers to frequently asked questions for the 2023 reporting period.

Here are a few key updates:

Updated Data Fields for Reporting Remote Workers:

Employers must now report the number of employees in an employee group who work remotely during the Snapshot Period. The CRD defines a remote worker as a payroll or labor contractor employee who is entirely remote, teleworking, or home-based, and has no expectation to regularly report in-person to a physical establishment to perform work duties.

The templates now have fields for: (1) the number of employees that don't work remotely, (2) the number of remote employees located within California, and (3) the number of remote employees located outside of California.

Note: Employees in hybrid roles or (partial) teleworking arrangements expected to appear in-person to perform work at a particular establishment for any portion of time during the Snapshot Period would not be considered remote workers for pay data reporting purposes.

Labor Contractor Demographic Data:

The updated guidance also makes clear that for Labor Contractor Employee Reports, reporting "unknown" race/ethnicity or sex of a labor contractor employee is no longer permitted.

Employee self-identification is the preferred method of identifying race/ethnicity information, according to the CRD. If an employee declines to state their race/ethnicity, employers must still report the employee according to one of the seven race/ethnicity categories, using (in the following order): current employment records, other reliable records or information, or observer perception.

The CRD says it recognizes the risk of inaccurate race/ethnicity identification based on observer perception alone; this method should only be used after making a good faith effort to obtain race/ethnicity information from the employee or from other reliable records. When an employer uses observer perception, the CRD encourages employers to utilize the clarifying remarks field to state they have done so, stating for example: "The race/ethnicity of [number] employees in this employee grouping is being reported based on observer perception."

Updated Templates:

The CRD has also updated templates for the 2023 reporting period. Employers shouldn't use Excel templates or .CSV examples from prior years; the portal will reject submissions based on outdated versions of the templates.

Next Steps:

If you are a covered employer:

- Read the updated **FAQs** and **user guide**.
- **Review the templates** (**Excel** and **CSV**).
- Determine your "Snapshot Period" to identify the employees who will be included in your report. Employees assigned to California establishments and/or who work from California must be included.

Note: The "Snapshot Period" is a single pay period between October 1 and December 31 of the Reporting Year. You are free to choose the single pay period between those dates that will serve as your Snapshot Period.

- Determine which establishments you have and gather information about each establishment.
- For all employees in the Snapshot Period, identify each employee's establishment, job category, race/ethnicity, sex, pay, pay band and hours worked in 2023. For 2023, the pay bands are the same as in 2022:
  - $19,239 and under
  - $19,240 – $24,959
  - $24,960 – $32,239
  - $32,240 – $41,079
  - $41,080 – $53,039
  - $53,040 – $68,119
  - $68,120 – $87,359
  - $87,360 – $112,319
  - $112,320 – $144,559
  - $144,560 – $186,159
  - $186,160 – $239,199
  - $239,200 and over

- Within each establishment, group employees who have the same job category, pay band and race/ethnicity/sex combination. Some groups may be a group of one, if no other employee in the establishment shares that employee's job category, pay band, race/ethnicity, and sex.
- Within each employee group in each establishment, calculate the total hours worked by the group.
- Within each employee group in each establishment, calculate the group's mean hourly rate and the group's median hourly rate.
- Within each employee group in each establishment, identify the number of workers who were remote workers during the Snapshot Period.
- Gather additional information about the employer and its establishments, such as:
  - Address on file with California's Employment Development Department (EDD);
  - Total number of employees in the United States;
  - Total number of employees in California;
  - Federal Employer Identification Number (FEIN);
  - California State Employer Identification Number (SEIN);
  - North American Industry Classification System (NAICS) code(s);
  - DUNS Number; and
  - Whether you are a state contractor.
- Build the **report in the portal**.
  - Provide establishment-level and employee-level information (Establishment and Employee Details) by uploading an Excel file by using the CRD's template, uploading a .CSV file, or using the portal's fillable forms.
- Provide any clarifying remarks in the relevant field(s) and correct any errors identified by the portal.
- Certify the final report and submit it through the online portal by **May 8, 2024**.

Note: If you are required to file a pay data report for labor contractors, you must follow a similar process for your labor contractor employee report and submit it through the portal separately from your payroll employee report.

Colorado Provides Guidance on Amended Pay Transparency Rules

The Colorado Department of Labor and Employment (CDLE) recently issued guidance on changes to the state's pay transparency rules. .

The Details:

Background:

In 2023, Colorado enacted legislation that amended the state's rules for pay and opportunity transparency in internal and external job postings. The amendments took effect **January 1, 2024**.

Under the amended law, employers must disclose all job opportunities (not just promotion opportunities) to all employees (with the required disclosures as set forth below), in addition to disclosing who was selected for the role. An employer is not required to have an external posting, but if they do, they must follow all the disclosure requirements.

However, if an employer is physically located outside of Colorado and has fewer than fifteen employees working in Colorado, all of whom work remotely, then through July 1, 2029, the employer is only required to provide notice of remote job opportunities.

An employer must in good faith disclose the following in the notification of each job opportunity:

- The hourly or salary compensation or range of the hourly or salary pay;
- A general description of benefits and other compensation applicable to the job opportunity; and
- The date the application window is expected to close.

Employers must make reasonable efforts to announce, post, or otherwise make known, within 30 calendar days after a candidate who is selected to fill a job opportunity begins working, the following information to, at a minimum, the employees with whom the selected candidate is expected to work regularly:

- The name of the selected candidate;
- The selected candidate's former job title if hired from within the company;
- The selected candidate's new job title; and
- Information on how employees may express interest in similar future opportunities, including who to reach out to for more information.

The law doesn't require identification of the selected candidate in any manner that would violate their privacy rights or would place their health or safety at risk.

A "job opportunity" is defined as a current or anticipated vacancy for which the employer is considering candidates or interviewing candidates, or that the employer externally posts. The definition of "job opportunity" excludes:

- "Career progression," which is defined as a regular or automatic movement from one position to another based on time in a specific role or other objective metrics.
- "Career development," which is defined as a change to an employee's terms of compensation, benefits, full-time or part-time status, duties, or access to further advancement in order to update the employee's job title or to compensate the employee to reflect work performed or contributions already made by the employee.

Recently Issued Guidance:

The **CDLE's guidance** addresses the amendments to the pay transparency rules and provides additional clarifications.

Career Development Exception:

The CDLE's guidance clarifies that for the career development exception to apply, the existing work or contributions must be part of the employee's existing job and not a part of a different position with a current or anticipated vacancy. Employers aren't required to send job opportunity notices of career development position changes.

Career Progression Exception:

The guidance also clarifies that for positions subject to the career progression exception, employers must provide a career progression notice to all eligible employees. The notice must include the requirements for career progression and each position's terms of compensation, benefits, full-time or part-time status, duties, and access to further advancement. Eligible employees are defined as "those in the position that, when the requirements in the notice are satisfied, would move from their position to another position listed in the notice as a 'career progression.'"

Application Deadline:

The guidance also addresses two exceptions to the requirement to disclose the application deadline. If the employer discloses that it accepts ongoing applications, no deadline is required.

An application deadline may also be extended if the original deadline was a good-faith expectation of what the deadline would be, and the posting is promptly updated with any deadline extension.

Temporary Hires:

A job opportunity notice isn't required for acting, interim, or temporary (AINT) positions of up to nine months — unless the same position was held by an AINT hire for seven months of the previous year, according to the guidance. Other employees must be notified if an AINT hire is for a position not scheduled to end in nine months.

Post Selection Notification:

The guidance also clarifies the post-selection notice requirements. If an employee informs their employer in writing, on their own initiative, and voluntarily that they believe disclosing their name and/or former job title would put their health or safety at risk, the employer must not disclose that information. Employees need not disclose what the risk is, or why they believe there is a risk, and employers must not interfere with or retaliate against an employee who exercises this right. If this opt-out is exercised, an employer must still provide a post-selection notice to employees that the position is filled and inform them how they can express interest in future job opportunities.

Next Steps:

- Read the **CDLE guidance in full**.
- Ensure your hiring practices comply with the changes.

District of Columbia to Require Job Listings That Disclose Pay Information

The District of Columbia has enacted an ordinance that will require employers to disclose in job listings the projected minimum and maximum salary or hourly rate for the position. The ordinance takes effect **June 30, 2024**.

The Details:

The ordinance applies to any employer with at least one employee in the District of Columbia, except for the District of Columbia government and the federal government.

Beginning June 30, 2024, employers must provide the minimum and maximum projected salary or hourly pay in all job listings and position descriptions advertised.

In stating the minimum and maximum salary or hourly pay for the position, the employer must extend the range from the lowest to the highest salary or hourly pay that they in good faith believe at the time of the posting they would pay for the advertised job, promotion or transfer opportunity.

Before the first interview, employers must also disclose to prospective employees the existence of healthcare benefits available to the employee.

The ordinance also prohibits employers from:

- Screening prospective employees based on their wage history, including by requiring that a prospective employee's wage history satisfy minimum or maximum criteria or by requesting or requiring as a condition of being interviewed or as a condition of continuing to be considered for an offer of employment that a prospective employee disclose their wage history; or
- Seeking the wage history of a prospective employee from a person who previously employed the individual.

Employers must post a notice in the workplace notifying employees of their rights under the District's Wage Transparency law as amended by the ordinance. The notice must be posted in a conspicuous place in at least one location where employees congregate.

Next Steps:

District of Columbia employers should review policies and procedures to ensure compliance with the ordinance.

Pennsylvania Adds Employer Background Screening and Hiring Protections

Pennsylvania has enacted legislation (House Bill 689) that clarifies employer background screening and hiring responsibilities. House Bill 689 takes effect on **February 12, 2024**.

The Details:

Under Pennsylvania law, an employer may generally only consider felony convictions or job-related misdemeanors in making hiring decisions.

House Bill 689 clarifies that an employer is immune from liability for any claim related to the lawful use of criminal record history information when an applicant voluntarily discloses an expunged conviction.

In addition, HB 689 provides, among other things, that employers are prohibited from using criminal history record information that has been expunged or granted limited access, unless required by federal law.

See the **text of the law** for details.

Next Steps:

- Review background screening and hiring policies and procedures.
- Train HR personnel on **House Bill 689** to help ensure compliance by February 12, 2024.

Local

New York City Increases Employee Earned Safe and Sick Time Protections

New York City has enacted a law (Int. 0563-2022) that eases the process for an employee to file an Earned Safe and Sick Time Act (ESSTA) lawsuit. Int. 0563-2022 takes effect on **March 20, 2024**.

The Details:

As background, before a judge can rule on a case alleging a violation of the Earned Safe and Sick Time Act (ESSTA), an individual must file a complaint with the New York City Department of Consumer and Worker Protection (DCWP), and the DCWP must investigate the claim.

In October of 2023, New York City issued a **Final Rule** relating to ESSTA that clarified topics such as calculating employer size, covered employees, calculating the rate of pay for safe and sick time purposes, accrual and pay statement requirements.

Int. 0563-2022:

Int. 0563-2022 amends Section 20-924 of the New York City administrative code to:

- Require lawsuits to be filed within two years of learning of an ESSTA violation; and
- Remove the requirement for an individual to notify or file a complaint with the DCWP before filing an ESSTA lawsuit in court.

Note: An individual may file a lawsuit and a DCWP complaint for the same violation. See the **text of the law** for details on DCWP processes.

Enforcement:

Entities found to have violated ESSTA may face penalties on a per employee, per instance basis. See the **text of the law** for further details.

Next Steps:

Review safe and sick leave policies to help ensure compliance with ESSTA and prepare for **Int. 0563-2022** by March 20, 2024.

Philadelphia Updates Employer Background Screening Requirements

The City of Philadelphia has amended an ordinance to add provisions regarding convictions that result in exoneration. The amendment took effect on **January 19, 2024**.

The Details:

The City amended its **Philadelphia Fair Criminal Record Screening Standards Ordinance** to provide that it will be considered an unlawful discriminatory practice for employers to reject an applicant or employee on the basis of a conviction that has been exonerated (reversed or vacated by the court or other government official).

An employer may consider the conviction record of an applicant or employee for job-related employment purposes to the extent that the conviction:

- Did not result in exoneration; and
- Occurred fewer than seven years from the date of the inquiry.

Note: A period of incarceration is not included when calculating the seven-year period.

Next Steps:

- Review background screening and hiring policies and procedures.
- Train HR personnel to help ensure compliance with **the ordinance**.

Minimum Wage

Minimum Wage Announcements: 1/16/24 – 2/15/24

The following states or localities have announced new minimum wage increases.

State or Locality	Minimum Wage Rate	Minimum Tipped Cash Wage	Effective Date(s)	New or Updated Poster Requirement?	Notes
East Palo Alto, CA	$17.00	$17.00*	1/1/24		Previously East Palo Alto announced that the 2024 minimum Wage would be $17.10. Due to a rounding error in that calculation, the city has revised the amount to $17.00 per hour. For more information, see the correction here.
Los Angeles (City)	$17.28	$17.28*	7/1/24	Yes	Poster once provided found here.
Malibu, CA	$17.27	$17.27*	7/1/24	Yes	
Santa Monica, CA	$17.28	$17.28*	7/1/24		Poster once provided found here.
Santa Fe City, NM	$14.60	$3.00	3/1/24	Yes	
Santa Fe County, NM	$14.60	$4.36	3/1/24	No	

*CA does not allow the use of a tip credit.

Download a PDF of a comprehensive listing of state and local minimum wage rates.

Federal

Industry-Specific Guidance on Expanded Protections for Nursing Employees

The U.S. Department of Labor (DOL) has released industry-specific guidance on expanded protections for nursing employees under federal law.

The Details:

Background:

Effective December 29, 2022, the Providing Urgent Maternal Protections for Nursing Mothers Act amended the Fair Labor Standards Act (FLSA) to entitle more employees to reasonable break time to express breast milk for their nursing child.

As a result, employers must provide reasonable break time to both exempt and nonexempt employees, so they can express breast milk for their nursing child for one year after the child's birth. The employee is entitled to reasonable break time each time they have a need to express the milk.

Employers are also required to provide a place, other than a bathroom, that is shielded from view and free from intrusion from co-workers and the public, which may be used by an employee to express breast milk.

The break time may be unpaid unless otherwise required to be paid by federal, state or municipal law, provided the employee is completely relieved from duty during the entirety of the break.

Note: With limited exceptions, federal law requires employers to pay exempt employees their full salary in any workweek in which they perform any work, regardless of the quantity or quality of the work. As such, deductions from any exempt employees' salary for such breaks are prohibited.

As was the case prior to the amendment, employers with fewer than 50 employees are exempt from the requirements, if the requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business. Crewmembers of air carriers are also exempt from the law. There are also special rules for rail carriers.

Industry-Specific Guidance:

The U.S. Department of Labor (DOL) has begun releasing industry-specific guidance on the expanded law, covering the agriculture, retail and restaurant, healthcare, education, and transportation industries. The guidance consists of a prerecorded presentation and answers to frequently asked questions (FAQs).

For example, the FAQs for the **retail and restaurant industries include answers** to the following inquiries.

- Can employers require employees to make up time that nursing employees spend on pump breaks in order to meet productivity measures?

  No. Employers cannot hold the time that employees take for pump breaks against them when determining whether they met a productivity measure or quota. Employees also cannot be required to make up the time they took for pump breaks. An employer adding work time to an employee's normal schedule could be considered prohibited retaliation under the FLSA.

- I work for a fast-food restaurant that has locations in many different states. If my employer follows federal law, do they also have to follow different state laws that require accommodations for nursing employees?

  Yes. Many states have laws related to pumping milk at work. Employees may have greater protections under such state or local laws or ordinances. The FLSA provides that the reasonable break time and space requirements do not preclude greater employee protections provided under these laws.

For example, some states may require that all breaks for pumping be paid or may require that breaks be made available for more than one year. Employers must follow all the laws that apply to them.

- I work in a bookstore that has three bathrooms. One of the bathrooms is designated as a family bathroom. It has one stall and a changing table. My supervisor put an out of order sign on the stall door and placed a chair in the family bathroom for me to take pump breaks. Can I be required to use the bathroom to pump breast milk if it is not being used as a bathroom?

  No. The FLSA requires that nursing employees have access to a place to pump breast milk at work that is not a bathroom. Using a bathroom to pump breast milk raises health and safety concerns, which may include the risk of contracting bacteria in breast milk or breast pump equipment.

See the full list of **industry-specific guidance**.

Next Steps:

Employers in the covered industries should review the guidance and ensure their practices and policies comply.

Proposed Legislation Would Limit Further Employee Retention Credit Claims

Read the article here.

ADP Compliance Resources

ADP maintains a staff of dedicated professionals who carefully monitor federal and state legislative and regulatory measures affecting employment-related human resource, payroll, tax and benefits administration, and help ensure that ADP systems are updated as relevant laws evolve. For the latest on how federal and state tax law changes may impact your business, visit the ADP ***Eye on Washington*** Web page located at **www.adp.com/regulatorynews.**

If you have any questions regarding our services, please call 855-466-0790.

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