

# Eye on Washington

## Regulatory Update



## California Enacts New Pay Data Reporting Requirement

On September 30, 2020, California Governor Gavin Newsom signed into law Senate Bill 973, a new pay data reporting requirement. The new California law applies to private employers (a) with 100 or more employees and (b) that are required to file an annual Employer Information Report (EEO-1) pursuant to federal law. Covered employers will have to provide California's Department of Fair Employment and Housing (DFEH) with pay data by specified job categories and by race, ethnicity and sex. The reports will be due on an annual basis, starting March 31, 2021, for calendar year 2020.

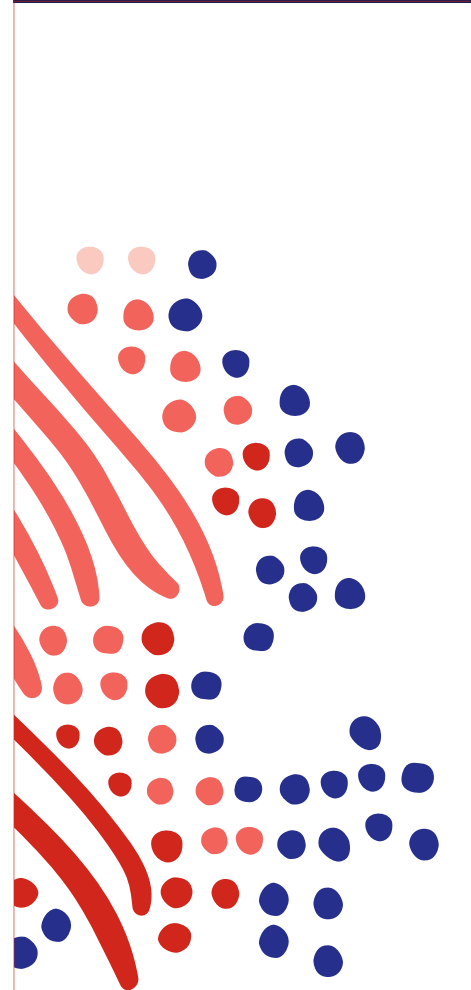
The new California pay report largely mirrors the Equal Employment Opportunity Commission's (EEOC) now-halted EEO-1 Component 2 reporting requirement. Some significant questions remain, however, including how many employees an employer must have in California to be covered, and whether an employer must report on employees who only worked in California for a short time.

### Background

The EEOC has been collecting demographic data about employer workforces ("Component 1") since 1966 as part of its mandate to prevent discrimination in employment under Title VII of the Civil Rights Act of 1964.

The requirement to submit Component 2 data, which includes detailed information about employee pay and hours worked, started in 2016 when the EEOC announced that certain employers would be required to provide compensation data with their annual EEO-1 Component 1 reports. In 2017, the federal Office of Management and Budget decided to indefinitely suspend the EEOC's collection of pay data, which led to federal court litigation. Eventually, pursuant to court order, the EEOC reinstated the collection. Private employers — including federal contractors and first-tier subcontractors — with 100 or more employees were required to submit 2017 and 2018 Component 2 data to the EEOC by September 30, 2019.

In a September 11, 2019 notice, the EEOC announced that it would complete its collection of 2017 and 2018 reports, but would not seek authorization to collect Component 2 data for future years. The EEOC concluded that the burden on employers "far outweigh[s] the pay data's unproven utility." At this point, employers are no longer required to submit pay data under federal law.



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### California Legislation

In response to the EEOC's decision to stop pay data collection, California legislation was proposed to ensure that Component 2 pay data will "continue to be compiled and aggregated in California." In the final bill, the Legislature explained the underlying public policy:

- (a) Despite significant progress made in California in recent years to strengthen California's equal pay laws, the gender pay gap persists, resulting in billions of dollars in lost wages for women each year in California.
- (b) Pay discrimination is not just a women's issue, but also harms families and the state's economy. In California, in 2016, women working full time, year-round made a median 88 cents to every dollar earned by men and, for women of color, that gap is far worse.
- (c) Although there are legitimate and lawful reasons for paying some employees more than others, pay discrimination continues to exist, is often "hidden from sight," and can be the result of unconscious biases or historic inequities.

Governor Newsom signed the bill on September 30, 2020.

### Pay Data Report

The California law is modeled after the EEO-1 Component 2 reporting requirement. Under the new law, private California employers with 100 or more employees that are required to file an annual Employer Information Report (EEO-1) under federal law must submit a pay data report to the DFEH for the prior calendar year (the "Reporting Year"). Employers will be required to report on all full- and part-time employees working during a "workforce snapshot period" — which is any pay period between October 1 and December 31 of the Reporting Year (e.g., between October 1 and December 31, 2020, for the report due March 31, 2021).

The report will include:

- The number of employees by race, ethnicity and sex in the workforce snapshot period, by EEO-1 job category.
- The number of employees by race, ethnicity and sex whose annual earnings fall within each of the pay bands the U.S. Bureau of Labor Statistics uses in the Occupational Employment Statistics survey (\$19,239 and under, \$19,240-\$24,439, \$24,440-\$30,679, and so on). The earnings are calculated using the total earnings shown in Box 1 of the employee's IRS Form W-2 for the relevant reporting year.
- The total number of hours worked by each employee counted in each pay band during the Reporting Year.

The statute defines an "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 from that individual's wages."

The law states that employers can comply with the new law by submitting a copy of their federal EEO-1 report containing the same or substantially similar pay information required above, yet pay data must no longer be submitted to the EEOC.

The law states that employers with multiple establishments must submit a report for each establishment as well as a consolidated report that includes all employees. Employers also have the option to provide clarifying remarks concerning the information in the report, should they choose to do so.

Employers must provide the data in a form that allows the DFEH to search and sort the information using readily available software. At this point, the DFEH has not provided a specific form or template for filing the report.

If a covered employer fails to submit a pay data report, the DFEH may seek an order requiring compliance and will be entitled to recover costs associated with seeking the order.

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## How Will This Data Be Used?

The law states that the pay data reports are intended to allow for the designated state agencies to collect wage data to “more efficiently identify wage patterns and allow for targeted enforcement of equal pay or dissemination laws.” The DFEH will make the reports available to the Division of Labor Standards Enforcement (DLSE) upon request and maintain the data for at least 10 years. Both the DFEH and DLSE must keep the data confidential except as necessary for administrative enforcement or through the normal rules of discovery in a civil action.

## What's Next?

In the months leading up to the September 30, 2019 Component 2 filings, there were many open questions and employers eagerly awaited technical and substantive details from the EEOC. The California law has answered some of those open questions by referring back to or relying on the Component 2 methodology. The DFEH is expected to

issue additional guidance on key questions relating to the filing, including whether employers must provide data for employees temporarily in California, multi-establishment reporting and calculating hours worked.

ADP® is closely monitoring all activity related to the California pay data reporting requirement and will provide updates as information is made available. As a reminder, please subscribe to *Eye on Washington* for updates.

## ADP Compliance Resources

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