

Eye on Washington State and Local Update



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



Leave

Colorado Allows 80 Hours of Paid COVID-19 Leave in 2021

We previously reported that on July 14, 2020, Colorado Governor Jared Polis signed into law the Healthy Family and Workplaces Act. The new law mandates that nearly all employees working for public and private employers in Colorado must begin accruing at least one hour of paid sick leave for every 30 hours worked, up to 48 hours total. The balance shall carry over year-to-year subject to the limit. This requirement goes into effect for covered employers with 16 or more employees on January 1, 2021, and for all other covered employers (regardless of how many employees they employ) on January 1, 2022.

On November 10, 2020, the Colorado Department of Labor and Employment Wage Protection Rules were updated to clarify that on the day a public health emergency is declared, employers are required to immediately provide each employee with hours of paid leave (in addition to those hours noted in the previous paragraph). Specifically, through 2020, employers must provide employees with a one-time supplemental number of hours which, when added to what the employee has already accrued for the year, will provide them with access to 80 hours of total paid leave.

On December 23, 2020, the Colorado Division of Labor Standards and Statistics adopted a temporary emergency rule that will allow employees to use 80 hours (or proportionally fewer for part-time employees) of paid leave for COVID-19 needs, beginning January 1, 2021. The "Healthy Families and Workplace Act" already granted 80 hours of paid COVID-19-related leave in 2020. This emergency rule expands the leave into 2021.

Further guidance on the rule can be found at

<https://cdle.colorado.gov/sites/cdle/files/INFO%20%236C%20%2812-23-20%29%2C%20How%20HFWA%20Differs%20by%20Year%20%26%20From%20Other%20Laws.pdf>

The link includes an elaboration of:

- (1) How an 80-hour COVID-19 leave has been triggered for 2021 by a public health emergency;
- (2) How limits on the scope or duration of federal paid leave laws or tax credits do not limit the paid leave required by Colorado law; and
- (3) How all employees and all employers, of all sizes and in all sectors, are covered by 80-hour COVID-19 leave (in both 2020 and 2021), with the exceptions that federal government employees and certain railroad employees are exempt. Certain small employers are exempt until 2022 from the separate paid leave requirement of up to 48 hours for a wider range of health or safety needs (but not from 80-hour COVID leave).

For a copy of the temporary emergency rule, click on the link provided below.

<https://cdle.colorado.gov/proposed/adopted-rules>

San Jose, California, Extends and Expands Emergency Paid Sick-Leave Policy

We previously reported that on April 7, 2020, San Jose, California, officials had unanimously approved an emergency paid sick-leave policy that guaranteed any essential employee in the city will be paid if they are affected by the growing COVID pandemic and unable to work.

On January 5, 2021, the City of San Jose extended its "COVID-19 Paid Sick-Leave Ordinance" until June 30, 2021, and expanded it to apply to all employers with employees working within the city. The extended Ordinance is retroactive back to January 1, 2021.

The original Ordinance was aimed at filling gaps created by the enactment of the Families First Coronavirus Response Act (FFCRA) that did not cover employees in private-sector companies with more than 500 people and provided potential exemptions for businesses of fewer than 50 employees. However, as the mandatory federal sick-leave provision under FFCRA expired on December 31, 2020, the San Jose ordinance now applies to all employers in the city.

It is important to note that businesses that already provide employees with at least 160 hours (including paid time off and vacation) are exempt from the Ordinance.

Highlights of the ordinance are as follows:

- Full-time employees are entitled to 80 hours of paid sick leave. Part-time employees are entitled to sick-leave hours equal to the average number of hours the employee works in a two-week period.
- Employers must compensate an employee for sick-leave hours used in accordance with this Ordinance at not less than the greater of the employee's regular rate of pay or the applicable minimum wage rate.
- In order to qualify for the emergency sick-leave protections, an employee must be experiencing symptoms related to COVID-19 or be under a quarantine or isolation order, caring for an individual with a suspected or confirmed case of coronavirus, or watching a child whose school has been closed while the stay-at-home order is in place.

For a copy of the San Jose Ordinance, click on the link provided below.

<https://www.sanjoseca.gov/home/showpublisheddocument?id=68359>



Payroll

Bernalillo County, New Mexico, Adjusts Previously Announced Minimum Wage for 2021

We previously reported that in October 2020, Bernalillo County announced that the County Commissioners had approved a minimum wage of \$9.35 per hour for 2021.

County Health Protection Manager, Lucas Tafoya, has now confirmed that it has been determined that the New Mexico minimum wage of \$10.50 per hour will take precedence over the previously approved county rate. The minimum cash wage for tipped employees will be \$2.55 per hour rather than the previously announced \$2.13 per hour.

It is important to note that New Mexico has stated the following in relation to conflicts between state law and local minimum wage ordinances:

"Businesses should be aware that the state will enforce the highest available rate."

<https://www.dws.state.nm.us/Minimum-Wage-Information>



Time & Labor

California Issues Information on its New Pay-Data Reporting Requirement

To support California's new annual pay-data reporting requirement, the California Department of Fair Employment and Housing (DFEH) has created a webpage on pay-data reporting (<https://www.dfeh.ca.gov/paydatareporting/>). The webpage includes a link to the new law (SB 973), with questions and answers organized by topic. Private employers with 100 or more employees and who are required to file an annual Employer Information Report (EEO-1) pursuant to federal law must submit a pay-data report to DFEH by March 31, 2021 for the first time and annually thereafter.

The topics covered in the questions and answers are background information related to the new law (Introduction), Filing Requirements, and Required Content, which covers the specific information required on the new form. Several additional topic headings are listed as placeholders (Pay, Hours Worked, Multi-Establishment Employers, Acquisitions and Mergers, and Spinoffs) accompanied by the statement, "Guidance coming soon."

The DFEH will continue to issue additional information. In addition to updating the pay-data reporting page with more questions and answers, the DFEH still needs to issue regulations implementing the new law, as well as the new form, an online reporting system and corresponding technical specifications.

<https://www.dfeh.ca.gov/paydatareporting/>

Background

On September 30, 2020, California Governor Gavin Newsom signed into law Senate Bill 973, a new pay-data reporting requirement. Covered employers will have to provide California's 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.

Pay-Data Report

Based on the information currently provided by the DFEH, the new California pay report mirrors much of the Equal Employment Opportunity Commission's (EEOC) now-halted EEO-1 Component 2 reporting requirement.

Under the new law, covered employers must submit a pay-data report to the DFEH for the prior calendar year (the "Reporting Year").

An employer has the requisite number of employees if the employer either employed 100 or more employees in the Snapshot Period chosen by the employer or regularly employed 100 or more employees during the Reporting Year. "Regularly employed 100 or more employees during the Reporting Year" means employed 100 or more individuals on a regular basis during the Reporting Year.

Employees located inside and outside of California are counted when determining whether an employer has 100 or more employees. The questions and answers provide an example of employees located inside and outside of California. An employer that had 50 employees inside California and 50 employees outside of California during the Reporting Year would be required to submit a pay data report to DFEH. An employer with no employees in California during the Reporting Year would not be required to file a pay-data report.

Part-time employees, including those who work partial days and fewer than each day of the workweek, are counted the same as full-time employees. Employees on paid or unpaid leave, including California Family Rights Act (CFRA) leave, pregnancy leave, disciplinary suspension or any other employer-approved leave of absence, are counted.

The questions and answers also address affiliated companies in a manner consistent with federal EEO-1 filing requirements and how to count temporary workers provided by a staffing agency or independent contractors. For purposes of pay-data reporting to DFEH, an employee means "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." If any temporary worker provided by a staffing agency or any independent contractor meets this definition of "employee," then that individual is counted.

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.

One difference from the EEOC's current report and prior EEO-1 Component 2 reporting requirements pertains to gender.

The EEO-1 report has historically had fields for male and female gender only. **By contrast, the DFEH anticipates that the California pay data report will have three gender category fields:** male, female, and non-binary.

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.

Portland, Oregon, Bans Use of Face Recognition Technology by Private Entities

Effective January 1, 2021, an ordinance in Portland, Oregon, prohibits the use of "face recognition" technology by "private entities" in any "places of public accommodation" within the city limits.

Background:

Increasingly, companies use facial recognition technology to run their operations. This technology can be used to authenticate employees and customers, to enhance physical security, to reduce fraud and theft or to customize online services. Other cities such as Boston, San Francisco and Oakland have passed laws barring public institutions from using facial recognition, but Portland is the first to prohibit private use.

Definitions:

Key definitions under the Ordinance include the following:

Private entities - "any individual, sole proprietorship, partnership, corporation, limited liability company, association, or any other legal entity, however organized." A private entity does not include a government agency.

Places of public accommodation - any "place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements, transportation or otherwise." It does not include: an institution, bona fide club, private residence or place of accommodation that is in its nature distinctly private.

Face recognition - any "automated searching for a reference image in an image repository by comparing the facial features of a probe image with the features of images contained in an image repository (one-to-many search)."

Face recognition technologies - automated or semi-automated processes using face recognition to assist in identifying, verifying, detecting or characterizing facial features of an individual or capturing information about an individual based on an individual's face.

Exceptions:

The prohibition in the Ordinance does not apply to use of face recognition technologies under the following circumstances:

- To the extent necessary for a private entity to comply with federal, state or local laws;
- For user verification purposes by an individual to access the individual's own personal or employer-issued communication and electronic devices; or
- In automatic face detection services in social-media applications.

Penalties and Enforcement:

The Ordinance grants any person injured by a material violation of the ordinance by a private entity a private right of action against the private entity. The individual can request penalties equal to the damages sustained as a result of the violation or \$1,000 per day for each day of violation, whichever is greater, and such other remedies as may be appropriate.

In addition, a court may award attorney's fees to the plaintiff who prevails in such action, at trial and on appeal, in a reasonable amount as determined by the court. The award of attorney's fees is contingent on the plaintiff demanding payment from the defendant and their insurer not less than 30 days before filing suit.

For a copy of the Ordinance, click on the link provided below.

<https://static1.squarespace.com/static/5967c18bff7c50a0244ff42c/t/5f3ad787ba3fd27776e444af/1597691785249/Ordinance+to+ban+use+of+FRT+in+Places+of+Public+Accommodation+plus+code+amendment+-Final.pdf>

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.

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