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California Enacts Pay Transparency and Disclosure Requirements Effective January 1, 2023

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On September 27, 2022, Governor Newsom signed California's new pay transparency and pay scale disclosure law. This Alert summarizes the new requirements and enforcement mechanisms, including how they depart from California's previous pay transparency laws, as well as their impact on employers' pay reporting and disclosure obligations.

The new requirements are set to become effective January 1, 2023, with the first pay data reports due to the California Civil Rights Department (the "Department," formerly the Department of Fair Employment and Housing) in May 2023.

Pay Scale Disclosures in Job Postings to Employees and Applicants

The law expands California's existing salary history law to impose new pay scale disclosure requirements on covered employers.

Under the existing law, California employers were required to provide the pay scale, meaning the salary or hourly wage range, only upon request by an applicant who completed an initial interview. The new law maintains that applicant disclosure requirement and adds that, upon a current employee's request, covered employers will be required to provide the pay scale the employer reasonably expects to pay for such employee's currently-held position.

California employers with 15 or more employees will also be required to include a position's pay scale, meaning the salary or hourly rate an employer reasonably expects for the position, in any job posting, whether the employer itself posts the job or engages a third party to manage job postings.

The new law also imposes recordkeeping requirements on all employers, regardless of size, in that employers must maintain job title and salary history for all employees during their employment and for three years thereafter.

New Enforcement Mechanisms, Including Private Right of Action and Civil Penalties

The California Labor Commissioner is authorized to order civil penalties ranging from $100 to $10,000 for violations of the pay scale disclosure requirements. The Labor Commissioner will determine the penalty based on the totality of the circumstances, including prior violations.

Fortunately, the law provides that the Labor Commissioner will not assess a penalty for the first violation of the job posting requirements so long as the employer demonstrates that all job postings are updated to include the required disclosures.

Employers must also make available job title and salary history records for inspection

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upon request by the Labor Commissioner, with violations being subject to the same civil penalties as the pay data disclosure provisions, ranging from $100 to $10,000.

Finally, the Legislature created a private right of action for violations of the pay scale transparency law within a year of learning of such violations, giving aggrieved parties the right to seek injunctive and "any other appropriate relief." Perhaps most significantly, the law creates a rebuttable presumption in favor of an employee's claim should an employer fail to maintain the records of each employee's job titles and pay rate history for the specified timeframe.

More Employers Covered, and Additional Data Required

The new law also dramatically expands the scope of potential employers covered as well as their pay data reporting obligations.

Covered Employers

Previously, only private employers with 100 or more employees were required to submit pay data reports to the Department *if* they were already required to file an annual EEO-1 Employer Information Report. Employers were also permitted to submit their annual EEO-1 report to satisfy the state's pay data reporting obligations.

Now, all private employers with 100 or more employees will be required to submit pay data reports, without regard to federal EEO-1 reporting status. And employers are no longer permitted to submit an EEO-1 in lieu of a pay data report.

Although the Department has not yet published guidance interpreting the new law, the Department's guidance on the existing law provides that employers are covered by these requirements if they have 100 or more total employees with at least one employee in California. Existing guidance also directs employers to include remote employees in the pay data reports if the employees are assigned to a California establishment, regardless whether they reside in California, or the employees reside in California but are assigned to an establishment in another state.

In addition, under the new law, employers with multiple establishments must continue to submit a separate report for each establishment. Employers will no longer be required to submit a consolidated report that includes all employees across establishments as the existing law required.

Data Required

Similar to requirements under existing law, employers' pay data reports are to be based on a "snapshot" of W-2 earnings during a single pay period from October through December of the previous calendar year.

The pay data report must break out the number of employees by race, ethnicity, and sex in a series of job categories, and must report the number of employees by race, ethnicity, and sex whose earnings fall within each of the pay bands prescribed in the Bureau of Labor Statistics' Occupational Employment Statistics survey. Significantly, there is a new requirement that employers identify the median and mean hourly pay rate for *each combination* of race, ethnicity and sex (inter-sectionally) for each job category.

Contract Workers

In a further departure from existing requirements, private employers with over 100 employees *hired through labor contractors* in the prior year will also be required to submit a separate pay data report covering *contract workers*. The new law broadly defines "labor contractors" to include both individuals and entities "that supply workers, either with or without a contract," "to perform labor within the client employer's usual course of

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business."

Although the new law requires each labor contractor to provide employers with the necessary pay data to complete the reports, covered employers are ultimately responsible for the reports and must disclose the ownership names of any labor contractors who supplied workers in the previous year.

New Civil Penalties

Starting next year, employers who fail to submit the required annual reports may face fines of up to $100 *per employee* for initial violations, and up to $200 per employee for subsequent violations, in addition to potentially being responsible for the Department's costs associated with obtaining a court order to ensure compliance.

Key Takeaways

Covered employers should take steps to comply with the new requirements, including to disclose pay scales in job postings, as well as to maintain job title and pay rate history records, in advance of the January 1, 2023 effective date. Covered employers should be mindful of the fact that obtaining the required information from labor contractors may prove time consuming so employers should plan in advance of the May reporting deadline. In addition, preparing the requisite pay data reports will also require careful consideration and preparation to comply with the Department's guidance. Employers located in multiple states should also be mindful of other state salary transparency requirements such as those for Washington, Colorado, and New York City.

The following Gibson Dunn attorneys assisted in preparing this client update: Amanda R. Sansone, Jason C. Schwartz, Katherine V.A. Smith, Danielle J. Moss, Harris M. Mufson and Tiffany Phan.

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment practice group, or the following:

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