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5 Questions Employers Are Asking About Calif. Pay Data Law

By **Vin Gurrieri**

Law360 (March 24, 2021, 9:24 PM EDT) -- Employers have just a week until California's inaugural deadline for submitting wage information about their workforces, but lawyers say the state's latest endeavor to combat the gender wage gap has left many businesses scrambling for answers.

Known as S.B. 973, the law requiring employers with over 100 nationwide employees to submit certain wage information to the state was signed into law in September with the **first annual reporting deadline** set for March 31. Businesses covered by the law must submit W-2 wage information and hours worked for their California employees according to sex, race, ethnicity, and job category within 12 specified pay bands.

Although California's Department of Fair Employment and Housing, the agency tasked with enforcing the new law, added some clarity to the process by recently releasing a series of frequently asked questions and a lengthy manual to guide employers, management-side lawyers say there are still plenty of questions left to be resolved for both the short and long terms.

"It's a challenge. Because there's not a lot of guidance, it's hard for employers to evaluate are they in compliance or not," said Dan Forman, managing partner of CDF Labor Law LLP's Los Angeles office. "Until we get more guidance, or [companies] unfortunately get sued for not being in compliance, then that's when down the road people will see it."

Here, experts discuss five questions being asked about the Golden State's new pay data reporting mandate.

How Should Employees Be Counted?

Although S.B. 973 clearly specifies that reporting requirements apply only to businesses with at least 100 employees, attorneys say the devil is in the details as employers try to figure out exactly how to tally their employees and how to approach scenarios in which their workforce numbers ebb and flow.

The threshold applies either if employers have 100 workers during a so-called "snapshot period" — one pay cycle from October through December of the reporting year — or if they regularly employed at least 100 workers during that year. In its guidance, the DFEH noted that the 100-employee reporting threshold encompasses a company's employees anywhere in the U.S., meaning that a business could have one employee in California and still be required to submit a report for that person if it has at least 99 workers elsewhere in the country.

One situation where things can get tricky for employers is if their total nationwide employee population fluctuates above and below 100, which could be a problem for businesses hit hard by the COVID-19 pandemic, according to Elvira Kras, a Los Angeles-based partner at McDermott Will & Emery LLP.

"One of the first concerns is understanding what data they need to provide," Kras said, noting that the public health crisis forced many employers to layoff or furlough workers in 2020.

That in turn caused employee headcounts at some businesses to drop below the 100-worker threshold, which has created uncertainty about whether they are still subject to the new reporting requirements.

"DFEH hasn't issued crystal clear guidance on that. And obviously it's a case-by-case analysis of exactly what … the numbers were and what time period they're looking at," Kras said. "Overall, probably the answer is [to be] better safe than sorry to get your data set and assume you need to report if you had 100 employees within the preceding reporting year even if it dipped."

Do Employers Have to Submit Data for Remote Workers?

Another potentially dicey area for employers surrounds teleworking, which has exploded amid the pandemic.

DFEH said in its recent FAQs that employers are required to report wage data only for employees assigned to work in the Golden State, even though they can voluntarily submit wage data for their nationwide workforce if they choose to do so.

However, people who are assigned to work in an office outside California but who telework from within the Golden State must be included in the reports employers submit. The same goes for people who are assigned to work in California but are located elsewhere in the country, according to the DFEH.

For employers, that means having to keep tabs on exactly where their workforce is located, especially if they're not required to physically be in their assigned office.

"So, it's putting an additional onus on the employer to track not only where people are working but where they're residing," Kras said.

Remote work in the context of pay data reporting, according to Kras, also gives rise to questions about whether it's fair to make salary comparisons between in-state California workers and those who telework from elsewhere.

"Is it fair to compare someone who may be living in Nevada versus living in California if both are 'working' in California in comparing their salaries if you're taking into account, maybe, cost of living?" Kras said.

How Do Employers Know if a Worker Identifies as Nonbinary?

Although the DFEH said in its guidance that the state is trying to create a system for employers to submit the data that "closely resembles" the reporting system used by the U.S. Equal Employment Opportunity Commission, one key difference is the state's inclusion of "nonbinary" as a category employers can use to report employees' sex, along with male and female.

The EEOC in its EEO-1 employer information reports includes only male and female as options. The agency has long collected demographic data about employers' workforces through annual EEO-1 surveys, but it hasn't collected pay data aside from a two-year period that a federal judge **ordered it** to obtain in 2019.

The addition of the nonbinary category is notable for a survey that the law itself says is intended to allow regulators to "more efficiently identify wage patterns and allow for targeted enforcement of equal pay or discrimination laws." The DFEH for its part said in its guidance that self-identification is "the preferred method" for determining which sex, race or ethnic category a worker falls under, but it also acknowledged that workers may decline to provide that information.

"My view is that an employer may use information that employees have already provided regarding gender issues to them and can rely upon an employee self-reporting on various applications, health insurance information, that kind of thing," Forman said. "So, the employee self-reporting on that information I think is probably the best source for employers."

However, Forman noted that not all employers capture that sort of information, and some that did so

on forms collected before the state passed a law in 2017 recognizing three gender categories may now have information that is out of date.

To the extent that an employer doesn't have an accurate gender self-identification form on file, California-based Paul Hastings LLP partner Jeffrey Webb said the best evidence they have of a person's self-identified gender is through other employment records, including those in which workers share their pronouns.

"I think the most common way that employers have sought it is by having a voluntary self-identification form, primarily presented to folks when they begin employment," Webb said.

"But the onus is on the employer to identify the best source of information and keep those records," he added.

Will California Adjust Its Requirements?

In addition to immediate issues regarding reporting requirements that have some employers scratching their heads, the new law raises longer-term questions, including what the state will do if the EEOC decides at some point to revive its stunted pay data collection.

The commission during the Obama administration **introduced the idea** of tacking on a pay data reporting requirement — known as Component 2 — to existing EEO-1 demographic surveys as part of a broader effort to root out pay bias. Critics of the pay data collection, however, **called it** overly burdensome on employers and argued that it wouldn't yield the sort of meaningful information needed to combat pay inequity.

The Trump administration ultimately stymied that initiative, touching off a federal court fight that resulted in the EEOC being ordered to collect pay data for 2017 and 2018. The EEOC has put any future Component 2 data collection **on ice for now**, but it **has tapped** the National Academies of Sciences, Engineering and Medicine to analyze the usefulness of racial and gender pay data it already obtained with a public report expected once the study is finished.

While Webb said he hasn't yet heard of a problem with S.B. 973 that would necessitate a change in the law "in terms of the logistics of the process," it could be a different story should the EEOC decide to chart a new course on pay data.

"I think the most likely cause of a change at the state level is going to be something that changes at the federal level," Webb said. "So if the EEOC decides that they can get more useful data if they ask for different information, I think the California Legislature has already indicated they would be open to not putting an additional burden on California employers and look for ways to have the information that is submitted to the EEOC be deemed compliant for what the state is looking for."

Will Pay Data Pop Up in Lawsuits?

Although the DFEH has said the law was in part designed to spur employers to self-identify potential pay disparities and the law itself places strict limits on when information the state gleans can be made public, some employers are wondering whether the data they report may come back to haunt them in litigation.

Although Forman of CDF Labor Law said the law's enforcement mechanism "is pretty clear that it is the DFEH that is empowered to enforce it," that may still not stop creative worker-side attorneys from potentially trying to utilize the data in litigation.

"The good news is that at this point there does not appear to be a private cause of action that would incentivize plaintiffs' lawyers to generate new class actions or other kinds of lawsuits to enforce this," Forman said.

"I guess it [remains] to be seen whether they are going to utilize alleged violations of these regulations to generate litigation," he added.

--Editing by Haylee Pearl.