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New Calif. Pay Data Law Could Come With Enforcement Uptick

By **Mike LaSusa**

Law360 (December 22, 2020, 4:33 PM EST) -- A new California law that takes effect next year requires employers to send state authorities pay data that's broken down by employees' sex, race and ethnicity, prompting some Golden State attorneys to predict an uptick in enforcement actions aimed at combating discrimination.

Starting next year, by March 31 employers with 100 or more employees will have to annually provide the state's Department of Fair Employment and Housing with data showing the demographic makeup of the workers in various job categories and pay bands.

Moreover, the new law empowers DFEH to take legal action against those who don't provide the data and those who are violating California pay equity laws. It also allows the DFEH to publish reports based on the data, as long as the figures are aggregated to prevent the identification of a specific business.

State Sen. Hannah-Beth Jackson, D-Santa Barbara, authored Senate Bill 973, which was signed into law in September. The lawmaker told Law360 that she sees the measure as a way "to fight pay discrimination with data."

"We can't fix what we don't know," Jackson said, estimating that pay disparities account for tens of billions of dollars in lost wages each year in California.

Amy Poyer, a senior staff attorney at the California Women's Law Center, which supported SB 973, told Law360 that the measure came in response to an about-face by the administration of President Donald Trump, which **halted efforts** started under President Barack Obama to collect similar pay data at the federal level.

"This was a failsafe for Californians to ensure that no matter what happens, this information is still getting collected in our state," Poyer said.

Although SB 973 doesn't allocate additional resources to DFEH, both worker advocates and employer defense attorneys expect the agency to become more aggressive in taking on pay discrimination.

"They're not just going to collect this data and then sit on it," Jeffrey S. Horton Thomas, a partner in Fox Rothschild LLP's Los Angeles office, told Law360.

Thomas advised employers to get an early start on checking out their information systems to make sure they are capturing the data that the new law requires them to send to state authorities, including the number of employees in each job category as well as their demographic identifiers and which pay band they fall into.

"We're going to find ourselves defending our clients in administrative actions before the DFEH and in court where the DFEH is suing, which is an important expansion of the DFEH's jurisdiction," the management-side attorney said.

Thomas also said that since the law requires employers to provide a "snapshot" of data from one pay

period in the last quarter of the prior year, employers should be careful in choosing which period they use.

"They need to involve qualified employment counsel and explore which snapshot pay period they're going to select, and do that exploration within the attorney-client privilege," he said.

Jeffrey Webb, a Los Angeles-based partner at management-side firm Paul Hastings LLP, cautioned that confidentiality concerns could arise if an employer found itself caught up in an enforcement action.

"Lawyers advising clients may want to talk through issues of attorney-client privilege and work product to the extent that the lawyers are involved in advising clients on how to comply with this new law," he said, citing "risks that certain communications that would otherwise be deemed privileged or protected work product might later be concluded by a judge to be communications that are subject to discovery."

While some aspects of the law are clear, several questions remain regarding the details of its implementation, said George Abele, also a Los Angeles-based partner at Paul Hastings.

"One of the things that we've noticed is that the legislation really leaves a lot of open questions with regard to compliance," he said.

For example, Abele said it's not clear whether the law applies to all employers with 100 or more employees, even if only a few of the employees work in California.

Given the uncertainty, Abele recommended keeping an eye on guidance from state authorities.

The push for pay data reporting in California didn't go unchallenged. The U.S. Chamber of Commerce urged Gov. Gavin Newsom to veto SB 973, arguing the data would be "worthless" for sussing out pay discrimination.

Abele echoed those comments, saying the data won't be helpful because it paints with too broad a brush to make meaningful comparisons between employees.

"Our concern with this legislation is that it collects data that on its face may suggest that something is wrong, when in fact nothing is wrong," Abele said.

Multiple attorneys who spoke with Law360 described SB 973's requirements as unnecessary and onerous. But some worker advocates say the data collection law doesn't go far enough, and they're pushing for stronger action.

Mariko Yoshihara, policy director at the California Employment Lawyers Association, told Law360 that her group supported SB 973, but sees it as just one step down a path toward even greater pay transparency.

Yoshihara also expressed hope that the incoming Biden administration will bring back federal efforts to collect pay data, calling the possibility of renewed cooperation between California and national authorities a "game-changer."

"I can see all that progress that was made under Obama now being able to continue rather than being pushed backwards," she said.

Poyer, of the California Women's Law Center, said she's hopeful companies will self-correct pay discrepancies, but SB 973 allows public authorities to serve as a backstop to protect workers.

"This sort of takes it out of the employees' hands to have to ask what everybody's making and what the trends are at the company," she said, "and sends it to the people who should be protecting those employees."

--Editing by Haylee Pearl.

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