

The 12 Days of California Labor & Employment – Day 11 “Additional Pay Data Disclosure Requirements”

4 min read

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In the spirit of the season, we are using our annual “12 days of the holidays” blog series to address new California laws and their impact on California employers. On this eleventh day of the holidays, my labor and employment attorney gave to me: eleven pipers piping and SB 1162.

California is generally on the national forefront of pay equality. The Equal Pay Act has been law for decades and has been expanded over the years. In 2015, former Governor Brown signed the California Fair Pay Act, which became effective January 1, 2016. The California Fair Pay Act aimed to ensure equal pay for employees performing “substantially similar work” and also to make it more difficult for employers to justify pay disparities through the

“bona fide factor other than sex” defense. Existing federal law requires certain companies (private employers with 100 or more employees) to file an annual employer information report which includes data regarding demographics of the employer’s workforce (EEO-1) with the federal Equal Employment Opportunity Commission (EEOC). In our [2020 #12Days series](#), we discussed SB 973, which was the last California measure designed to minimize California’s gender pay gap.



California is now adding another pay equity measure with SB 1162. Surprisingly, California is not the first state to enact such legislation with Colorado leading the charge in 2019 and New York City this past November. California joins these other jurisdictions as of January 1, 2023, and requires employers with at least 15 workers to include pay ranges in job postings. It is not yet clear where these 15 employees need to be located. Do they all need to be located in California or do you include out of state employees as well? It is recommended that you comply with the new law if you have 15 employees located in any state.

Employers who meet the criteria must do the following:

- Upon reasonable request, the employer shall provide the pay scale for a position to an applicant applying for employment.
- Upon request, the employer shall provide an employee the pay scale for the position in which the employee is currently employed.
- An employer shall include the pay scale for a position in any job posting.
- An employer shall maintain records of job title and wage rate history for each employee for the duration of the employment plus three years after the end of the employment in order for the Labor Commissioner to determine if there is still a pattern of wage discrepancy. These records shall be open to inspection by the Labor Commissioner.
- An employer that engages a third party to announce, post, publish, or otherwise make known a job posting shall provide the pay scale to the third party. The third-party shall include the pay scale in the job posting.

Pay scale is defined as the salary or hourly wage range that the employer reasonably expects to pay for the position. Employers should take note that SB 1162 creates a rebuttable presumption in favor of an employee's claim if an employer fails to keep records in violation of these provisions.

An employer found in violation of this section may be ordered by the Labor Commissioner to pay a civil penalty of no less than one hundred dollars (\$100) and no more than ten thousand dollars (\$10,000) per violation. The Labor Commissioner shall determine the amount of the penalty based on the totality of the circumstances, including, but not limited to, whether the employer has previously violated this section. In addition, an employer shall not be assessed a penalty for a first violation upon the employer's demonstration that all job postings for open positions have been updated to include the pay scale as required by this section.

Employers should also remember that they cannot rely on the salary history information of an employment applicant as a factor in determining whether to offer employment to that applicant or what salary to offer. More importantly, an employer cannot request salary history information, including compensation or benefit information from an employment candidate.

In addition, SB 1162 makes some changes to the reporting requirements for pay data. With the enactment of SB 1162, a private employer with 100 or more employees must submit a pay data report to the department on or before the second Wednesday of May 2023, and for each year thereafter on or before the second Wednesday of May. The report must be filed if the employer has one employee in California. SB 1162 also requires a private employer with 100 or more employees hired through labor contractors, as defined, to also submit a separate pay data report to the department for those employees per the above timeframe, as specified. Thus, a qualified employer may need to submit two reports if they meet both criteria.

The pay data reports must include the median and mean hourly rate for each combination of race, ethnicity, and sex within each job category. Employers with multiple locations are no longer able to submit a consolidated report. Rather, each establishment must submit its own report. An employer who fails to file the required report

may be subject to a civil penalty not to exceed one hundred dollars (\$100) per employee and not to exceed two hundred dollars (\$200) per employee upon any employer for a subsequent failure to file the required report. These penalty payments will be deposited in the Civil Rights Enforcement and Litigation Fund.

Employers have until May 10, 2023 to file their first report. If you are a non-California employer with 100 or more employees but you have at least one person working in California, this law applies to you and you must file the required report.

For employers who do not already have pay ranges for each job position, they are recommended to create them as they will need to be posted for each hire moving forward in 2023. All 2023 job postings must contain the pay scale so regularly posted job postings should be updated. Human resource staff and other pertinent positions should be trained on the new requirements in addition to the record keeping rules set forth in SB 1162. It is also recommended to determine who will be in charge of creating the May 2023 report as quickly as possible and begin compiling information earlier rather than later so that the report can be timely submitted.

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Topics

California, Equal Pay Act, Pay Equity, #12Days, Payment Disclosure