

A black and white photograph of a coastal scene. In the foreground, several large, smooth, dark stones are balanced on a piece of weathered driftwood. The driftwood is positioned horizontally across the middle of the frame. In the background, the ocean waves are visible, breaking onto a sandy beach. The sky is a uniform light gray. The overall composition is minimalist and serene.

TRUSAIC

CALIFORNIA EMPLOYER ANNUAL PAY DATA REPORTING & EQUAL PAY ACT ENFORCEMENT UNDER SB 973

Representing a significant milestone in the history of pay equity, California Senate Bill 973 (“SB 973”) was signed into law on September 30, 2020. This new legislation makes pay data reporting mandatory for California employers beginning in 2021, and may serve as a harbinger of future pay equity laws to come.

In this guide to SB 973, we’ll cover what the law entails, who it affects, and how employers must respond.

APRIL 2021

Background of SB 973

Legislation regarding pay equity has a long history in the U.S. The Equal Pay Act, enacted in 1963, required that men and women in the same workplace be awarded equal pay for equal work. Title VII of the Civil Rights Act of 1964 also protects against pay discrimination, but has a wider scope, pertaining not only to gender but also race, ethnicity, and other protected categories.

However, such federal laws have been viewed as insufficient to protect against pay discrimination. More recently, in the last few years, there has been a significant uptick in individual state laws, enacted to accord greater protection against pay discrimination. Starting with California in 2016, followed by New York, New Jersey, Illinois, Massachusetts, and Oregon in 2019, multiple states have expanded the scope of pay equity to cover not only equal pay for equal work, but for “substantially similar” or “comparable” work. Some states, such as Massachusetts and Oregon, have further expanded pay equity to include safe harbors to incentivize pay equity. While these recent state laws undoubtedly encourage pay equity among employers, the enforcement of such laws is uneven, and largely triggered by one-off litigation between select employers and some of their employees.

SB 973 was signed into law to give the DFEH express authority “to receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful pursuant to Section 1197.5 of the Labor Code.”



The void of uniformity in pay equity may be filled through mandatory pay data reporting.

EEO-1 Reporting

The U.S. Equal Employment Opportunity Commission (EEOC) was established to enforce equal opportunity laws, and to investigate claims of discrimination based on the following factors:

- Race
- Color
- National origin
- Religion
- Sex
- Age
- Disability
- Sexual orientation
- Gender identity
- Genetic information
- Retaliation for reporting, participating in, and/or opposing a discriminatory practice

As part of its efforts to enforce equal opportunity legislation, the EEOC has long since established the requirement of employers to submit the EEO-1 Report. This report is a federally mandated compliance survey requiring that employee data be categorized by job category, gender, and race/ethnicity.

While the first priority of a pay equity audit is to assess evidence of pay discrimination, pay equity audits also assess diversity, identifying job segregation and discrepancies in job category representation.

More recently, under the Obama administration in 2016, pay data reporting was intended to be initiated through the anticipated EEO-1 Component 2 reports. These reports consist of pay and hours-worked data disaggregated by gender and race/ethnicity, for various wage bands and job categories. However, with the change in White House administration, this pay data reporting requirement was halted indefinitely, only to be reinstated by court order as a result of litigation initiated by employee and minority rights advocates, resulting in the requirement to report pay data but only for the 2017 and 2018 years.

In response, California's SB 973 is positioned to fill this void. The bill, introduced by Senator Hannah-Beth Jackson in February 2020, is explicitly modeled on Component 2 of the EEO-1 Report. SB 973 amends Section 12930 of the California Government Code and adds to Part 2.8 of Division 3 of Title 2 of the California Government Code with Section 12999.

With the new Biden administration coming on board in January 2021, the EEO-1 Component 2 reporting may be reinstated.

Who Does the Law Affect?

Under SB 973, a private employer with at least 100 employees and who is required to report to an annual "Employer Information Report" (EEO-1 Component 1) under federal law will be required to submit a pay data report of their workforce akin to Component 2 for the prior calendar year (the "Reporting Year").

SB 973 does not specify its scope in terms of which employers are covered. However, the DFEH recently issued FAQs for guidance. The DFEH guidance makes clear that SB 973 includes any employer — whether in California or not — with at least one employee in California is subject to SB 973.

Which Employees Are Included in the 100-Employee Threshold?

In determining whether an employer reaches the 100-employee threshold, the following applies:

- All employees within a "single enterprise" are included. This means that employees of all affiliated companies with centralized ownership, control, or management are included in whether the 100-employee threshold is met.
- All employees are included, whether part-time or full-time, and whether on paid or unpaid leave.
- Temporary workers provided by a staffing agency or independent contractor are included if they fall within the definition of "employee," which means an "individual on an employer's payroll, 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."

- Remote employees outside of California, but who report to California.

There are two options an employer can choose to determine if the 100 employee-count threshold is met: (1) the employer employed 100 or more employees in the Snapshot Period or (2) it regularly (defined as "recurring" rather than "constant") employed 100 or more employees during the Reporting Year. The "Snapshot Period" is a single pay period between October 1 and December 31 of the Reporting Year. (Note, the prior EEO-1 Component 2 reporting only allowed for option (1).)

The DFEH can obtain from the Employer Development Department (EDD) the names and addresses of all Businesses with 100 or more employees to ensure compliance with SB 973.

When Does Annual Pay Reporting Start?

Annual pay reporting starts in 2021, with the first annual deadline on or before March 31, 2021.

What Does Reporting Include?

The annual pay data report is required to include the number of employees by race, ethnicity, and



gender in each of 10 categories, identical to those found in the former Component 2 reporting.

These 10 reporting categories are as follow:

- Executive or senior-level officials and managers
- First or mid-level officials and managers
- Professionals
- Technicians
- Sales workers
- Administrative support workers
- Craft workers
- Operatives
- Laborers and helpers
- Service workers

The numbers of employees in the Snapshot Period by race, ethnicity, and gender are reported by total earnings in the Reporting within each of the 12 pay bands used by the U.S. Bureau of Labor Statistics in the Occupational Employment Statistics survey. Notably, California recognizes nonbinary in addition to male and female gender, and requires applicable reporting of that gender category as well.

The Division of Labor Standards Enforcement (DLSE) may use information from the annual pay data reports as needed upon instituting an investigation or enforcement proceeding under California Equal Pay Act (Cal. Labor Code Section 1197.5)

The pay data report also requires the total number of hours worked by each employee counted in each pay band during the reporting year.

For employers with multiple establishments, the employer must submit a report for each establishment in addition to a consolidated report, including the employer's North American Industry Classification System (NAICS) code and major activity. Notably, an employer is not required to report for establishments outside of California with no California employees.

The employer will also need to certify accuracy of the report, signed by a certifying official and provide contact information of the contact person.

How Will the Data Be Submitted?

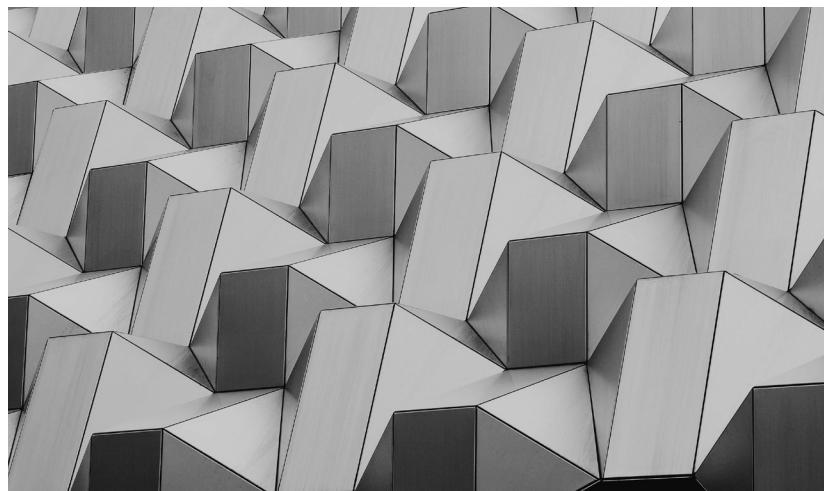
Data submitted under SB 973 will likely follow a single electronic file submission format similar to that used to collect EEO-1 Component 2 data. The DFEH expressly noted that comma-separated (csv) format, as an example, is permissible. The DFEH will issue standard forms, presumably in time to allow employers to submit their annual pay data report by the March 31 deadline.

In such a format, each row of that file will identify seven key data points:

1. the employer
2. either the establishment (and its location) or that the record pertains to the consolidated report
3. the job category
4. the combination of gender and race/ethnicity
5. the pay band
6. the number of employees in that group and,
7. the total annual hours worked by those employees

Is Reporting Confidential?

Although the pay data reports are confidential, SB 973 carves out certain exceptions to such confidentiality. For example, they may be disclosed "as necessary for administrative enforcement or through the normal rules of discovery in a civil action." Further, the Department of Fair Employment & Housing (DFEH) will maintain the reports for at least 10 years, and is entitled to publish on an annual basis, and publicize aggregated reports provided that such reports are reasonably calculated to prevent association with any person or business.



How Will SB 973 Be Enforced?

Under SB 973, the DFEH has the power to obtain a court order to compel employers to comply, and will be entitled to recover costs for seeking such an order.

Notably, intended to establish strict, enforceable consequences for employers who engage in pay discrimination, the new law includes a number of enforcement provisions. The DFEH will know which employers are not compliant. Under SB 973, the DFEH can obtain from the Employment Development Department (EDD) the names and addresses of all businesses with 100 or more employees to ensure compliance.

Additionally, and importantly, SB 973 also expressly empowers the DFEH to enforce California's Equal Pay Act, Labor Code 1197.5. This is reflected in the express authority "to receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful pursuant to Section 1197.5 of the Labor Code," which is California's Equal Pay Act.

The DFEH with the Division of Labor Standards Enforcement will "adopt procedures to ensure that the departments coordinate activities to enforce Section 1197.5 of the Labor Code."

Dynamic workforces call for dynamic analytics. For employers, annual reporting under SB 973 makes monthly workforce data tracking vital.



What Employers Should Do Now

For employers who already have pay equity reporting measures in place, SB 973, with the upcoming annual deadline on March 31, 2021, establishes a new sense of urgency and pressure to ensure accurate data, comprehensive tracking, and equal pay practices that are measurable and verifiable.

For employers who have not yet implemented comprehensive pay data tracking and reporting processes, it is essential to implement these processes as quickly as possible.

Here are a few key takeaways:

Monthly tracking is essential.

With the requirement of annual reporting, many employers overlook the critical component of monthly tracking. Given the complexity of workforce data, predicated on various factors in hiring, exits, promotions, furloughs, and other transitions, an exclusive focus on annual review may undermine consistent reporting with regard to diversity, equity, and inclusion (DEI) and equal pay.

“DESPITE ALL THE PROGRESS OUR STATE HAS MADE ON EQUAL PAY, THE PAY GAP REMAINS A SERIOUS PROBLEM THAT COSTS AN ESTIMATED \$79 BILLION IN LOST WAGES A YEAR IN CALIFORNIA... ESPECIALLY CONCERNING FOR WOMEN OF COLOR WITH AFRICAN AMERICAN WOMEN EARNING 61 CENTS AND LATINAS JUST 42 CENTS FOR EVERY DOLLAR EARNED BY WHITE, NON-HISPANIC MEN.”

FORMER SENATOR HANNAH-BETH JACKSON



Traditionally, many employers have conducted analysis once every 2-3 years. However, such an approach only allows for a restricted view, and does not allot sufficient time for remediation efforts in the event that pay inequities exist within an organization.

Employment data is often more complex than employers realize.

Employment data involves a number of components, including HR and benefits data, payroll data, and more, and is often spread over multiple platforms that are rarely fully integrated. Add to these issues elements such as entry errors, technological disparities, and other record-related considerations, and employers risk significant inaccuracies in reporting.

According to a report in the Harvard Business Review, **only 3% of companies' data meets basic**

quality standards. Having a structured system in place, either internally or outsourced, to address data quality management, is essential.

A proactive approach is crucial.

Key Dates for SB 973

February 11, 2020	Introduced to Assembly
August 26, 2020	Passed in Assembly
August 30, 2020	Passed in Senate
September 4, 2020	Enrolled
September 30, 2020	Signed into Law
January 1, 2021	Goes into Effect
March 31, 2021	Reporting Deadline for Employers

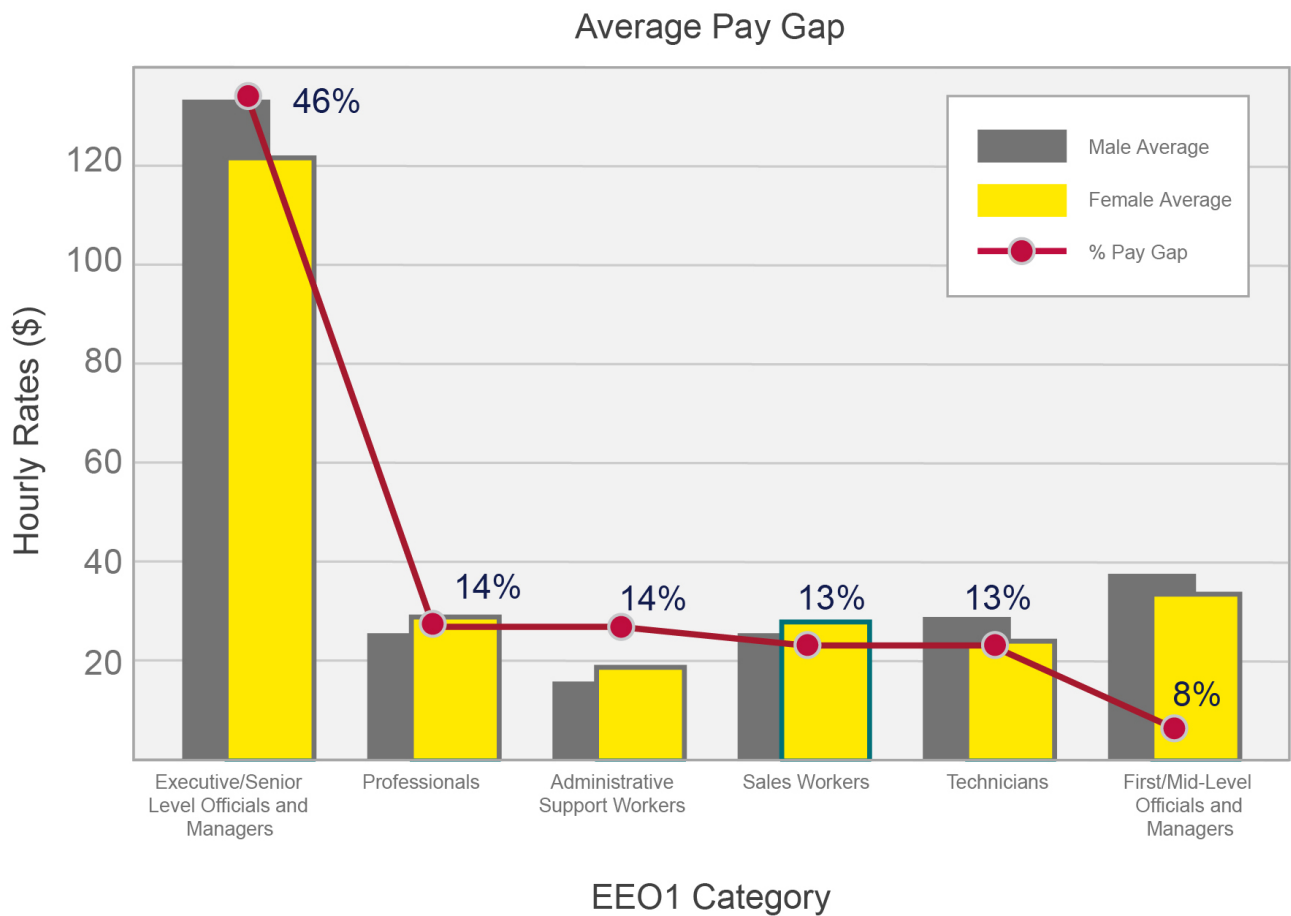


As Senator Jackson has noted, **“You can’t fix what you can’t see.”** Conducting a pay equity audit provides vital intelligence into existing pay inequities, and the insights required to correct them.

When it comes to timely, accurate, and comprehensive workforce tracking and reporting, employers cannot afford to wait. Early visibility into DEI and pay equity issues with an eye toward remediation is essential.

Ultimately, the implementation of SB 973 establishes new standards and urgency to demonstrate fairness in pay, reduce the risk of litigation, and promote diverse, equitable, and inclusive workplaces.

To learn more about achieving pay equity, and to receive a free Pay Gap Risk Assessment, [click here](#).



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