

Labor and Employment Alert

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California Passes SB 1162, Expanding Pay Data Reporting and Pay Transparency

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On September 27, 2022, Governor Newsom signed Senate Bill 1162 (SB 1162), which amends California Government Code section 12999 and California Labor Code section 432.3. SB 1162 expands pay data reporting and increases pay scale transparency. The new requirements take effect on January 1, 2023.

Pay Data Reporting – Cal. Gov. Code § 12999

Changes to Pay Data Reporting Requirements

Under existing California law, private employers with 100 or more employees who are required to submit an annual Employer Information Report (EEO-1) to the federal Equal Employment Opportunity Commission are also required to submit a pay data report to the California Civil Rights Department (formerly the California Department of Fair Employment and Housing) on or before March 31 each year. See Cal. Gov. Code § 12999(a). Existing law allowed employers to satisfy this California reporting requirement by submitting a federal EEO-1 containing the same or substantially similar pay data information to the California Civil Rights Department.

SB 1162 instead requires all private employers with 100 or more employees to submit a pay data report to the department by the second Wednesday of May each year, beginning on May 10, 2023. Under the new law, employers can no longer satisfy this requirement by submitting an EEO-1 with similar information.

SB 1162 also expands the data that must be reported. Under existing law, the pay data report must include the number of employees by race, ethnicity and sex in specified job categories. SB 1162 mandates that the pay data report also include the median and mean hourly rate for each combination of race, ethnicity and sex within each job category.

Employers with multiple establishments previously had to submit a report for each establishment and a consolidated report that includes all employees. SB 1162 removes the requirement to submit a consolidated report.

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New Reporting Requirement for Contracted Workers

Significantly, SB 1162 imposes an additional reporting requirement aimed at increasing pay transparency and protections for contracted workers. Private employers with 100 or more employees hired through labor contractors within the previous calendar year must submit a separate pay data report covering those workers. Employers must also disclose in the pay data report the ownership names of all labor contractors used to supply employees. This pay data report is also due by the second Wednesday of May each year, beginning on May 10, 2023.

Under SB 1162, a “labor contractor” is defined as “an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer’s usual course of business.” Accordingly, employers may exclude from the report labor contractors that supply workers who perform work outside of the employer’s usual course of business (e.g., a labor contractor that supplies a technology company with janitorial personnel).

SB 1162 does not address the situation where a labor contractor supplies both workers who perform work within the employer’s usual course of business as well as workers who perform work not within the employer’s usual course of business. Nor does it expressly limit the reporting requirement to workers who perform contracted services on the client employer’s premises. Thus, until there is regulatory guidance or case law further defining or limiting this reporting requirement, for any labor contractor that supplies workers to perform services within the employer’s usual course of business, the report should include **all** individuals supplied to the employer by that labor contractor (including those performing services outside of the employer’s usual course of business), including contracted individuals who do not perform services on the employer’s premises.

To assist with this new reporting requirement, SB 1162 requires labor contractors to “supply all necessary pay data to the private employer.” However, SB 1162 does not define what “all necessary pay data” includes and does not impose a deadline for labor contractors to supply the data to the employers. Employers should ensure that their labor contractors are aware of their responsibility to provide the necessary pay data in advance of the May reporting deadline and should include this obligation as a term of the contractual relationship.

Civil Penalties

Under prior law, the California Civil Rights Department could seek an order requiring employers to comply with these reporting requirements and recover associated costs. SB 1162 gives section 12999 teeth by permitting a court to impose a civil penalty of up to \$100 per employee on any employer who fails to file the required report and a civil penalty of up to \$200 per employee for any subsequent violation.

Pay Transparency – Cal. Lab. Code § 432.3

Pay Scale Disclosures

Under existing California law, employers are required to provide applicants with the pay scale for a position upon reasonable request. See Cal. Lab. Code § 432.3. Under SB 1162, employers with 15 or more employees must affirmatively include the pay

scale for a position in any job posting. This obligation extends to any third party the employer engages to announce, post, publish or otherwise make known a job posting.

SB 1162 also expands section 432.3 to require employers to provide employees with the pay scale for the position in which the employee is currently employed, upon reasonable request.

Recordkeeping Obligations

SB 1162 adds a new recordkeeping requirement—*i.e.*, employers must keep records of the job title(s) and wage rate history for each employee for the duration of the employment, plus three years after termination. These records must be open to inspection by the Labor Commissioner. The new law creates a rebuttable presumption in favor of an employee's claim if an employer fails to keep such records.

Enforcement Mechanisms

SB 1162 requires the Labor Commissioner to investigate complaints alleging violations of these requirements and authorizes the Commissioner to order an employer to pay a civil penalty for any violations. The new law also authorizes a person aggrieved by a violation of these provisions to bring a civil action for injunctive and any other appropriate relief.

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