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## SENATE COMMITTEE ON APPROPRIATIONS

Senator Anthony Portantino, Chair  
2019 - 2020 Regular Session

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### **SB 973 (Jackson) - Employers: annual report: pay data**

**Version:** February 11, 2020

**Urgency:** No

**Hearing Date:** June 9, 2020

**Policy Vote:** L., P.E. & R. 4 - 1

**Mandate:** No

**Consultant:** Robert Ingenito

**Bill Summary:** SB 973 would require that employers with 100 or more employees provide the Department of Fair Employment and Housing (DFEH) with EEO-1 (Employer Information Report) pay data.

#### **Fiscal Impact:**

- DFEH indicates that its costs to implement the bill would range from \$1 million to \$5 million annually, depending upon how the proposed pay reporting system is developed and implemented (General Fund, see Staff Comments).
- The bill would not have a fiscal impact on the Division of Labor Standards Enforcement (DLSE) within the Department of Industrial Relations (DIR). The DLSE's only role in this bill is to request the data collected as necessary, which is not anticipated to significantly increase its workload.

**Background:** Studies consistently show that women continue to earn less than their male counterparts. In 1963, women who worked full-time year-round made 59 cents on average for every dollar earned by a man according to the American Association of University Women (AAUW). Today, women working full time in the United States typically are paid just 80 percent of what men are paid, a gap of 20 cents.

The persistent gender pay gap has resulted in significant state efforts to curb wage discrimination. In 1949, California enacted the California Equal Pay Act, which targeted wage discrimination against women by prohibiting an employer from paying an employee a wage rate that is less than the rate of an employee of the opposite sex who does comparable work. SB 358 (Jackson, 2015) proposed a number of procedural and substantive changes to the California Equal Pay Act in order to make it easier for a victim of wage discrimination to identify an unlawful wage disparity and seek an appropriate remedy. Most notably, it changed the terminology so that an employee can more reasonably prove that he or she received lower wages for "substantially similar" work; clarifies the employer's burden to demonstrate that a wage disparity is based on some legitimate factor other than sex; and prohibits employers from interfering with employees' ability to discuss and share information about their wages. Additionally, in 2016 AB 1676 (Campos) was enacted which specifies that prior salary cannot, by itself, justify any disparity in compensation under the bona fide factor exception in the existing Equal Pay Act law. Also in 2016, SB 1063 (Hall) was enacted to expand the prohibitions laid down in the California Equal Pay Act regarding gender, to include discrimination based on race or ethnicity.

The EEOC is a federal commission, created by the Civil Rights Act of 1964. Since its creation, the EEOC has fought discrimination in all forms throughout America's workplaces, including discrimination based on race, color, religion, national origin, age, disability, and of either sex. The EEOC was an early pioneer in the fight for gender equality – as early as 1968, the EEOC was arguing in court that state laws that prevented women from certain occupations were illegal and preempted under federal law.

Starting in 1966, the EEOC required employers with 100 or more employees to submit EEO-1 forms, which showed the representation of men and women of different ethnic groups in nine different occupational classifications. According to the EEOC, the EEO-1 data was invaluable in enforcing anti-discrimination laws and conducting public hearings throughout the country to bring attention to the issue of discrimination in the workplace. The EEO-1 continues to be required by the EEOC, and continues to be used to enforce anti-discrimination laws throughout the country.

In 2016, in an attempt to end gender-based pay discrimination, the Obama Administration required employers to report pay data in specified bands on the EEO-1 form. This requirement went through the necessary rule making, and the first reporting deadline was March 31, 2018. However, in August of 2017, the current federal Administration, through the Office of Management and Budget (OMB), suspended the rule requiring the reporting of pay data due to compliance burdens.

**Proposed Law:** This bill would, among other things, do the following:

- Require that, on or before March 31, 2021, and on or before March 31 each year thereafter, a private employer with 100 or more employees and who is required to file an annual EEO-1 under federal law must submit a pay data report, as specified, to DFEH that covers the prior calendar year, or "reporting year".
- Require that DFEH make the reports available to DLSE upon request.
- Require the pay data report to include specified information, including the number of employees, categorized by race, ethnicity, and sex in each of several specified job categories.
- Require that, if an employer fails to comply, DFEH may seek an order requiring the employer to comply with these requirements and seek an order requiring the employer to comply with these requirements, as well as recovery of costs associated with seeking the order for compliance.
- Prohibit any officer or employee of the DFEH or DLSE from making public in any manner whatsoever any individually identifiable information obtained through the employer-submitted pay data prior to an investigation or enforcement action. "Individually identifiable information" includes data that is associated with a specific person or business.
- Clarify that the prohibition above does not prevent DFEH from publicizing aggregate reports on pay data if the aggregate reports are reasonably calculated to prevent the association of any data with an individual business or person.

- Exclude any pay information disclosed to DFEH from disclosure pursuant to the California Public Records Act.
- Require that the DFEH maintain pay data reports for not less than 10 years.
- Empower DFEH to receive, investigate, conciliate, mediate, and prosecute complaints alleging unlawful pay discrimination on the basis of sex, race or ethnicity, made illegal under the Equal Pay Act. Further orders DFEH to coordinate with DLSE to ensure that only one of the departments investigates or takes enforcement action in response to the same operative set of facts.

**Related Legislation:**

- SB 171 (Jackson, 2019), was substantially similar to this bill, and was held under submission on the Suspense File of the Assembly Appropriations Committee.
- SB 1284 (Jackson, 2018) was also very similar to this bill, and was also held under submission on the Suspense File of the Assembly Appropriations Committee.
- SB 358 (Jackson), Chapter 546, Statutes of 2015 prohibited an employer from paying any of his or her employees at wage rates less than those paid to employees of the opposite sex for substantially similar work, when viewed as a composite of skill, effort, and responsibility.

**Staff Comments:** As noted above, DFEH anticipates implementation costs ranging from \$1 million to \$5 million annually, depending upon the scope and complexity of the proposed pay reporting system. Specifically, DFEH would incur one-time costs related to the development and maintenance of the data collection system and technology systems hardware, and engaging in community outreach to inform employers of their requirements. Ongoing costs include maintenance of the hardware and storage. Legal costs would include reviewing data for compliance, statistical analysis of the data, and systemic enforcement, and may also include the use of statistical and data analysis experts. Costs related to community outreach (to inform employers of the requirements and how to submit reports through the electronic system) would likely include legal staff time, data analysts to develop instructions for employers on computing hourly pay, IT staff time for the development of informational FAQs, webinars, and an IT help desk.

Unlike SB 171, this bill would give DFEH enforcement authority over the Equal Pay Act (Labor Code section 1197.5), currently only administered by the Labor Commissioner's Office. DFEH indicates that this would result in minor and absorbable costs.

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