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**SENATE COMMITTEE ON LABOR, PUBLIC EMPLOYMENT AND RETIREMENT**  
**Senator Dave Cortese, Chair**  
**2021 - 2022 Regular**

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**Bill No:** SB 1162 **Hearing Date:** April 4, 2022  
**Author:** Limón  
**Version:** February 17, 2022  
**Urgency:** No **Fiscal:** Yes  
**Consultant:** Jake Ferrera

**SUBJECT:** Employment: Salaries and Wages

**KEY ISSUE**

Should the Legislature require employers of 100 or more workers hired through labor contractors to provide the Department of Fair Employment and Housing certain specified information, including pay data, about their workers?

Should the Legislature require employers to provide the pay scale for a position to an applicant for employment and include it in job postings?

Should the Legislature require all employers to inform current employees on the same day of an opportunity for promotion, as defined?

**ANALYSIS**

**Existing State law:**

- 1) Prohibits an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, sexual orientation, or military and veteran status of any person, to refuse to hire, discriminate against, or harass the person. (Government Code §12940)
- 2) Explicitly prohibits an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring. (Government Code §12940(k))
- 3) Establishes the Fair Employment and Housing Enforcement and Litigation Fund, funded by attorney's fees and costs awarded to the Department of Fair Employment and Housing (DFEH) for a civil action brought under the California Fair Employment and Housing Act. (Government Code §12907)
- 4) Prohibits an employer from relying on the salary history of an applicant for employment as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant.

- A) Requires an employer, upon reasonable request, to provide the pay scale for a position to an applicant applying for employment. “Reasonable request” means a request made after an applicant has completed an initial interview with the employer.

(Labor Code §432.3)

**Existing Federal Law:**

- 1) Requires that, on or before March 31 of each year, every employer that is subject to Title VII of the Civil Rights Act of 1964, as amended, and that has 100 or more employees, shall file with the Commission or its delegate executed copies of Standard Form 100, as revised (otherwise known as "Employer Information Report EEO-1"), in conformity with the directions set forth in the form and accompanying instructions. (29 CFR §1602.7)
- 2) Requires every employer, employment agency, and labor organization subject to the above subchapter must:
  - A) Make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed.
  - B) Preserve such records for such periods
  - C) Make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of this title.

(Federal Civil Rights Act of 1964, §709(c), Title VII)

**This bill:**

- 1) Requires, on or before the second Wednesday of May of each year, a private employer that has 100 or more employees hired through labor contractors within the prior calendar year submit a separate pay data report to the Department of Fair Employment and Housing (DFEH). Further requires these employers to disclose the ownership names of all labor contractors used to supply employees.
  - A) Defines “Labor Contractor” to mean an individual or entity that supplies, either with or without contract, a client employer with workers to perform labor within the client employer’s usual course of business.
  - B) Requires the pay data submitted to contain the number of employees by race, ethnicity, and sex in each of the following job categories:
    - a) Executive or senior level officials and managers
    - b) First or mid-level officials and managers
    - c) Professionals
    - d) Technicians
    - e) Sales workers
    - f) Administrative support workers
    - g) Craft workers
    - h) Operatives

- i) Laborers and helpers
- j) Service workers

Further requires the median and mean hourly rate within each job category for each combination of race, ethnicity, and sex. Prohibits DFEH from publishing any individually identifiable information associated with a specific person.

- C) Imposes a civil penalty of \$100 per employee on an employer who fails to file the required report for a first offence and \$200 per employee for subsequent violations. Any penalty imposed will be payable to the Fair Employment and Housing Enforcement and Litigation Fund.
- 2) Requires all employers provide the pay scale for a position to an applicant for employment by including it in the job posting and provide, upon request, the pay scale for the position a person is currently employed in.
- A) Requires an employer maintain records of a job description and wage rate history for each employee for the duration of their employment, plus 3 years. These records will be open to the Labor Commissioner for inspection.
  - B) Requires an employer that engages a third party to announce a job posting to provide the pay scale to the third party. The third party must make the pay scale available to applicants that view the posting.
  - C) Allows an aggrieved worker to file a written complaint with the Labor Commissioner within one year after the date the worker learned of the violation.
    - a) Requires the complaint must state the name and address of the employer and provide a detailed account of the alleged violation.
    - b) Allows a person who claims to be aggrieved by a violation of this section to also bring a civil action for injunctive relief and any other relief the court deems appropriate.
    - c) Allows the Labor Commissioner to order an employer found to be in violation to pay a civil penalty of between \$500 and \$10,000 per violation. These funds must be deposited into the Labor Enforcement and Compliance Fund.
  - D) If an employer fails to keep records in violation of this section, there is a rebuttable presumption in favor of the employee's claim.
  - E) Defines "pay scale" to mean a salary or hourly wage range.
- 3) Requires an employer to announce, post, publish, or otherwise make known any opportunity for promotion and the pay scale for the position to all current employees on the same day and **prior to making a promotion decision.**
- A) Requires that employers provide third parties the pay scale and that third parties ensure that applicants have access to the pay scale.

- B) Allows an aggrieved person to file a complaint with the Labor Commissioner within one year of learning of the violation. The complaint must state the name and address of the employer and provide a detailed account of the alleged violation.
  - a) Allows a person who claims to be aggrieved to bring a civil action for injunctive relief and any other relief that the court deems appropriate.
  - b) Allows the Labor Commissioner to order an employer who violates this section to pay a civil penalty between \$500 and \$10,000 per violation. All penalties collected must be deposited into the Labor Enforcement and Compliance Fund.
- C) Defines “Opportunity for promotion” to mean an actual or anticipated vacancy in any existing or new position.
- D) Defines “Pay scale” to mean a salary or hourly wage rate.
- E) Requires all employers, including state and local government employers and the Legislature, to comply with this section.
- F) Exempts this section from the requirements of Labor Code Section 433.

## COMMENTS

### 1. Need for this bill?

#### A) The Equal Employment Opportunity Commission (EEOC) and Form EEO-1

The EEOC is a federal commission, created by the Civil Rights Act of 1964. Since its creation, the EEOC has fought discrimination throughout America’s workplaces, including discrimination based on race, color, religion, national origin, age, disability, and sex. The EEOC was an early pioneer in the fight for gender equality – as early as 1968, the EEOC argued 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 antidiscrimination laws throughout the country.

#### B) SB 1162 requirements and Labor Contractors

Notably excluded from the above EEO-1 process are the employers of independent contractors, who frequently work with large companies to contract for a variety of services. There are many incentives for this employers to utilize these contractors, including avoiding payment for workers’ compensation and unemployment insurance taxes, requiring contractors to use their own vehicles or equipment, and nominally falling beneath the

employee thresholds for statutory requirements like the EEO-1. These incentives have, over several decades, eroded the de facto status of the employee-employer relationship and made contractor-employer relationship more and more common. For the purposes of the EEO-1 and the overall goal of the EEOC, this means that data for thousands of workers is not collected. Furthermore and importantly, these contractors typically deal with industries like custodial services, maintenance, and grounds keeping; in other words, industries with high concentrations of immigrant, low-wage or other vulnerable workers, and with histories of labor code violations. These are exactly the types of industries that the EEOC was created to monitor. SB 1162 seeks to expand the information collection to include the thousands of workers at the statewide level, in more specified pools. This additional data could be important for antidiscrimination enforcement and targeted state programs to help specific type of workers.

### C) Job Posting and Opportunity for Promotion Requirements

SB 1162 would further require **all** employers to post the pay scale within any job posting and to ensure that any labor contractors they work with also post pay scales for contracts with that employer. Existing law currently requires employers to supply this information only after a request and once the applicant has completed one interview. Current law does potentially put applicants in a situation where they must expend their own time and effort before they can request a pay scale; however the change within SB 1162 requires employers to exercise more control over subcontractors, which might disrupt existing relationships.

Finally, SB 1162 requires **all** employers, **including public employers and the Legislature**, to announce any opportunity for promotion, as defined, to all current employees on the same calendar day. While it is important for employers to consider employees for advancement on a basis that gives each worker a fair chance, the language as written presents a few concerns. For example, at larger employers, promotions happen quite frequently and alerting every one of potentially thousands of employees in different locations might not be the best use of available resources. Furthermore, the above section and the requirement to post pay scales within job postings are subject to the Private Attorneys' General Act (PAGA), which inherently contains the risk of costly lawsuits and expended enforcement funds that could be used elsewhere.

## 2. Proponent Arguments

The California Employment Lawyers Association writes in support:

“Despite significant improvements to California’s equal pay laws in recent years, the gender and racial pay gap persists. According to the most recent analysis of pay data, California women in 2020 lost \$46 billion due to the gender pay gap and people of color in the state lost \$61 billion due to the race pay gap. These pay gaps are not only detrimental to women and workers of color, but also harm the families they support and the state’s overall economy. Unequal wages also contribute to the overall gender *wealth* gap, which is even larger than the wage gap, especially for women of color. Gender and race-based wealth disparities create long-term and intergenerational economic inequality. We therefore need continued strong policy responses to break the cyclical wage and wealth disparities that continue to hold back women and people of color.

In 2019, the Legislature passed SB 973, requiring employers with more than 100 employees to submit pay data reports to the Department of Fair Employment and Housing. That bill was an important step forward in augmenting oversight by our state enforcement agencies. However, it did not require that this information be publicly available, and did not include a large and growing part of the modern workforce: temporary, contract, and contingent workers hired through third-party staffing agencies.

One contributor to the wage gap is that pay disparities are often “hidden from sight” and worsen when no one is actively monitoring hiring practices. Thus, employees and in many cases employers themselves - especially in larger companies – may not be aware of gender or race-based pay disparities that exist in their workforce.

Another driver of these pervasive gender and race wage gaps is occupational segregation. Not only are male-dominated occupations generally higher paid than female-dominated occupations, but it is also common for women and people of color to be disproportionately concentrated in lower paid jobs *within* individual companies. This bill will help reveal if women and people of color are over-represented in lower paying job categories, which is key to addressing pay equity and closing the wage gap.”

### 3. Opponent Arguments:

The California Chamber of Commerce writes in opposition:

“Less than two years ago, the California Legislature enacted SB 973 (Jackson). SB 973 requires all California employers with 100 or more employees to report pay data by sex, race, ethnicity, and job category to the Department of Fair Employment and Housing (DFEH). 2021 was the first year this information was reported. DFEH is permitted to use those reports to publish aggregate data regarding the workforce as a whole. SB 973 specified that those reports are confidential and not subject to Public Records Act requests... After only one year of this reporting requirement, **SB 1162** seeks to publicize all of this data identifiable by individual companies under the pretense that it would reveal gender and race-based pay disparities. As explained above, this data was never designed to show such disparities. Publicizing the data to target employers is a cynical and disingenuous manipulation of what the EEOC itself has acknowledged is not a reliable measure of pay disparities between similarly situated employees.

Further, ‘opportunity for promotion’ encompasses every single vacancy that a business has or may have. This requires providing notice of every vacancy or potential vacancy to every employee, including employees who have no interest or no experience in that area. **SB 1162** will inevitably lead to over-saturation with information, which produces diminishing returns. For workers who do not have email addresses, it will be impossible to ensure that all workers are being delivered notice of the opportunity for promotion on the same day. Any error in this process, even a good faith one, subjects employers to a private right of action and penalties under PAGA. At its core, this provision completely eliminates employers’ flexibility regarding hiring. A business of any size, small or large, that wants to move quickly in making a strategic hire must delay that process and opens itself up to litigation for even the slightest error in how it disseminates notice of a vacancy.”

### 4. Prior Legislation:

SB 973 (Jackson) Chapter 363, Statutes of 2020: Required employers with 100 or more employees provide the Department of Fair Employment and Housing with specified EEO-1 pay data.

**5. Double Referral**

Should SB 1162 be passed out of the Senate Labor, Public Employment and Retirement Committee, the bill will be sent to the Senate Judiciary Committee for hearing.

**SUPPORT**

California Employment Lawyers Association (sponsor)  
Equal Rights Advocates (sponsor)  
National Employment Law Project (sponsor)  
TechEquity Collaborative (sponsor)  
California Conference Board of The Amalgamated Transit Union  
California Conference of Machinists  
California Labor Federation, Afl-cio  
California State Association of Electrical Workers  
California State Pipe Trades Council  
California Teamsters Public Affairs Council  
Engineers and Scientists of California, Ifpte Local 20, Afl-cio  
Santa Barbara Women's Political Committee  
Trusaic  
Unite Here International Union, Afl-cio  
Utility Workers Union of America  
Western States Council Sheet Metal, Air, Rail and Transportation

**OPPOSITION**

Acclamation Insurance Management Services  
Allied Managed Care  
Antelope Valley Chambers of Commerce  
California Association for Health Services At Home  
California Beer and Beverage Distributors  
California Building Industry Association  
California Chamber of Commerce  
California Credit Union League  
California Employment Law Council  
California Hospital Association  
California Landscape Contractor's Association  
California Landscape Contractors Association  
California League of Food Producers  
California Legislative Conference of Plumbing, Heating & Piping Industry  
California Railroads  
California Restaurant Association  
California Retailers Association

California State Council of The Society for Human Resource Management (CALSHRM)  
Carlsbad Chamber of Commerce  
Citrus Heights Regional Chamber of Commerce  
Civil Justice Association of California  
Coalition for Small and Disabled Veteran Businesses  
Construction Employers' Association  
Corona Chamber of Commerce  
Danville Area Chamber of Commerce  
Edelstein Gilbert Robson & Smith, LLC  
Flasher Barricade Association  
Fresno Chamber of Commerce  
Greater Coachella Valley Chamber of Commerce  
Greater High Desert Chamber of Commerce  
Imperial Valley Regional Chamber of Commerce  
Job Creators for Workplace Fairness  
LA Canada Flintridge Chamber of Commerce  
Laguna Niguel Chamber of Commerce  
Lake Elsinore Valley Chamber of Commerce  
Lodi Chamber of Commerce  
Long Beach Area Chamber of Commerce  
Murrieta Wildomar Chamber of Commerce  
National Electrical Contractors Association (NECA)  
Northern California Allied Trades  
Oceanside Chamber of Commerce  
Orange County Business Council  
Paso Robles Chamber of Commerce  
Santa Maria Valley Chamber of Commerce  
Santee Chamber of Commerce  
Simi Valley Chamber of Commerce  
Southern California Glass Management Association (SCGMA)  
Southwest California Legislative Council  
True Blue  
United Contractors (UCON)  
Valley Industry & Commerce Association  
Visalia Chamber of Commerce  
Wall and Ceiling Alliance  
West Ventura County Business Alliance  
Western Growers Association  
Western Line Constructors Chapter, Inc., Neca, INC.  
Western Wall and Ceiling Contractors Association (WWCCA)  
Wine Institute

**-- END --**