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Senator Thomas Umberg, Chair
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SB 1162 (Limón)

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SUBJECT

Employment: Salaries and Wages

DIGEST

This bill seeks to narrow race and gender-based pay gaps through greater transparency with respect to internal advancement opportunities, pay scales, and the pay equity data reports of large California companies.

EXECUTIVE SUMMARY

Because of occupational segregation and disparities in pay, it is well documented that white men regularly receive greater compensation than their counterparts who are female and/or people of color. Recent California initiatives have sought to reduce that pay gap by increasing transparency around employee pay. This bill expands upon those initiatives in three ways. First, with respect to the pay equity data reports that large California employers must already report to the Department of Fair Employment and Housing (DFEH) annually, this bill would now require the inclusion of data about contract employees. It would also direct DFEH to publish each company's pay equity data, rather than just the aggregate, statewide report published currently. Second, the bill obligates employers to include the pay scale in any job posting, rather than merely providing the pay scale in response to an applicant's request as the law requires now. Finally, the bill requires employers to notify all workers about opportunities for internal advancement when they arise.

The bill is sponsored by the California Commission on the Status of Women and Girls, the California Employment Lawyers Association, Equal Rights Advocates, the National Employment Law Project, and TechEquity Collaborative. Support comes from civil and workers' rights organizations who believe the additional transparency created by the bill will help resolve the pay gap. Opposition comes from employer trade associations who contend that the bill unnecessarily complicates hiring procedures, increases exposure to liability, and unfairly shames businesses for pay differences that could be legally permissible. The bill passed out of the Senate Labor, Public Employment and Retirement Committee by a vote of 4-1. If the bill passes out of this Committee, it will next be heard in the Senate Appropriations Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Prohibits, under the California Equal Pay Act, an employer from paying an employee wage rates less than the rates paid to employees of the opposite sex for substantially similar work requiring the same skills, effort, and responsibility when performed under similar working conditions. (Lab. Code § 1197.5(a).)
- 2) Prohibits employers from paying employees a wage rate less than the rate paid to employees of a different race or ethnicity for substantially similar work requiring the same skills, effort, and responsibility when performed under similar working conditions. (Lab. Code § 1197.5(b).)
- 3) Sets forth exceptions to these prohibitions when a wage differential is based on one or more of the following: (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; or (d) a bona fide factor other than sex, such as education, training, or experience. (Lab. Code §§ 1197.5(a)(1)(A-D) and 1197.5(b)(1)(A-D).)
- 4) Specifies that prior salary by itself may not justify any disparity in compensation. (Lab. Code §§ 1197.5(a)(3) and 1197.5(b)(3).)
- 5) States that any employer who violates the California Equal Pay Act is liable for the amount of the compensation and interest that the employee is deprived of, in addition to liquidated damages. (Lab. Code § 1197.5(c).)
- 6) Authorizes the Department of Industrial Relations (DIR) or the Division of Labor Standards Enforcement to commence and prosecute, unless otherwise requested by the employee or affected group of employees, a civil action on behalf of the employee and on behalf of a similarly affected group of employees to recover unpaid wages and liquidated damages for violations of the California Equal Pay Act, and to recover costs of suit. (Lab. Code § 1197.5(g).)
- 7) Requires every private sector employer to maintain records of the wages and wage rates, job classifications, and other terms and conditions of employment of the persons employed, to be kept on file for three years. (Lab. Code § 1197.5(e).)
- 8) 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. (Lab. Code § 432.3(a).)

- 9) Requires an employer, in response to a request made after an applicant has completed an initial interview with the employer, to provide the pay scale for a position. (Lab. Code § 432.3(c).)
- 10) Makes it an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California, for an employer, because of the employee's race or gender, to discriminate against an employee in compensation or in terms, conditions, or privileges of employment. (Gov. Code § 12940(a).)
- 11) Requires employers with more than 100 employees to submit data to the DFEH showing the number of employees in each of the following job categories and the pay range that they fall within, as specified, broken down by race, ethnicity, and sex:
 - 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; and
 - j) service workers. (Gov. Code § 12999(b).)
- 11) Requires DFEH and DIR to keep all individually identifiable information pay equity data reported to DFEH confidential prior to the institution of an investigation or enforcement proceeding. (Gov. Code § 12999(i).)
- 12) Authorizes DFEH to develop, publish, and publicize aggregate annual reports based on the pay equity data reported to it, provided that the aggregate reports are reasonably calculated to prevent the association of any data with any individual business or person. (Gov. Code § 12999(k).)

This bill:

- 1) Changes the date by which large, private California employers must submit pay equity data to the DFEH each year from March 31 to the second Wednesday of May.
- 2) Modifies the data that large, private California employers must submit as part of their annual pay equity data reports to include:

- a) data regarding the pay of employees hired through labor contractors, as defined, if the employer had 100 or more employees hired through labor contractors within the prior calendar year; and
 - b) the median and mean hourly rate of pay, within each specified job category, for each combination of race, ethnicity, and sex.
- 3) Clarifies that an employer with multiple establishments must file a single pay equity data report which covers each of those establishments.
 - 4) Authorizes DFEH to seek a court order for monetary penalties, as specified, in the event that an employer who is obligated to submit a pay equity data report fails to do so.
 - 5) Instructs the DFEH to publish each private employer's pay equity data report on a publicly available website and, accordingly, eliminates the requirement that DFEH provide these reports to the Division of Labor Standards Enforcement upon request.
 - 6) Specifies that, when publishing pay equity data reports, DFEH must not publish any individually identifiable information that is associated with a specific person.
 - 7) Requires employers to include pay scale information for the position in any job announcement. Requires employers to provide pay scale information to third parties posting job announcements on behalf of the employer and requires the third party to include the pay scale information to anyone who views the announcement.
 - 8) Requires employers to provide pay scale information for the position to any employee currently occupying that position, upon request.
 - 9) Requires employers to maintain job description and wage rate history for each employee for the duration of the employment plus three years after the end of the employment, and makes these records open to inspection by the California Labor Commissioner. Provides that the failure to maintain these records as required shall be a rebuttable presumption in favor of the employee's claim of a violation.
 - 10) Requires employers to make any actual or anticipated vacancy in any existing or new position known to all current employees on the same calendar day and prior to filling the vacancy, together with pay scale information for the vacancy.
 - 11) Provides that an aggrieved applicant or employee may seek redress for violations of (7) through (10), above, through either a complaint to the Labor Commissioner or a civil action for injunctive relief and any other relief that the court deems appropriate. Directs the Labor Commissioner to investigate any complaint made to the Labor Commissioner and authorizes the Labor Commissioner to impose civil

penalties between \$500 and \$10,000 per violation, depending on the totality of the circumstances, upon finding that a violation occurred.

COMMENTS

1. Evidence of the problem the bill is intended to address

The overarching purpose behind this bill is to decrease or eliminate the pay gap: differences in how much people are paid based on race and gender. The existence of this pay gap is well-documented. U.S. Census data shows that the gap between men and women is 17 cents on every dollar.¹ African-American (87 percent), Latino (91 percent), Native American (91 percent), and Pacific Islander (95 percent) men make less than what their white counterparts, according to a study by the compensation data and software firm PayScale.² The greatest disparities appear where the categories intersect. For example, the National Women’s Law Center estimates that the average black woman earns just 63 percent of what her white male counterpart makes.³ Of course, these gaps compound over time, meaning that even relatively small pay gaps add up to earnings disparities ranging into the hundreds of thousands of dollars or more over the course of a lifetime of work.

There are at least two factors behind these pay gaps: (1) disparities in pay with respect to similar work; and (2) occupational segregation. As recently explained by the U.S. Department of Labor:

[T]he data shows that the majority of the gap between men and women’s wages cannot be explained through measurable differences between workers, such as age, education, industry or work hours. It is highly likely that at least some of this unmeasured portion is the result of discrimination, but it is impossible to capture exactly in a statistical model.

Of the portion of the wage gap that can be explained, by far the biggest factor is the types of jobs that women are more likely to have than men; and these are jobs that tend to pay less. This industry and occupational segregation – wherein women are overrepresented in certain jobs and industries and

¹ Wisniewski. *What is the Gender Wage Gap in Your State?* (Mar. 1, 2022) United State Census Bureau <https://www.census.gov/library/stories/2022/03/what-is-the-gender-wage-gap-in-your-state.html> (as of Apr. 16, 2022).

² *Black Workers Still Earn Less than Their White Counterparts* (Jun. 26, 2020) Society for Human Resources Management <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/racial-wage-gaps-persistence-poses-challenge.aspx> (as of Apr. 16, 2022).

³ Tucker. *It’s Time to Pay Black Women What They’re Owed* (Jul. 2021) National Women’s Law Center <https://nwlc.org/wp-content/uploads/2020/07/BWEPD-2021-7.26.21.pdf> (as of Apr. 16, 2022).

underrepresented in others – leads to lower pay for women and contributes to the wage gap [...].⁴

This bill is intended to address both contributors to the wage gap using transparency as its primary tool.

2. Proposed changes to California’s pay equity data reporting program

In 2020, California enacted SB 973 (Jackson, Ch. 363, Stats. 2020) in an effort to better understand and help close the pay gaps detailed in Comment 1, above. In broad strokes, SB 973 required California employers with 100 or more employees to compile data showing how much they pay their employees, broken down by rough category of work performed and cross-referenced by race, ethnicity, and gender. (Gov. Code § 12999(b).) Under SB 973, the covered employers have to submit this pay equity data to the DFEH annually by March 31. (Gov. Code § 12999(a).) DFEH must keep each individual employer’s data confidential (Gov. Code § 12999(i)), but it has the authority to develop and publish a yearly report based on the aggregate data. (Gov. Code § 12999(k).)

Employers submitted their first SB 973 pay equity data reports in 2021 and, on March 15 of this year, DFEH published its inaugural report on the overall results. As summarized in its press release about the report, DFEH concluded the following based on the data:

[T]he statewide findings related to sex include:

- Among workers in the lowest pay bands (earning \$30,679 or less in 2020), women were overrepresented. Women made up 55% of workers in the lowest pay bands, compared to 48% of the total reported worker population.
- Among workers in the highest pay bands (earning \$128,960 or more in 2020), women were underrepresented. Women made up 36% of workers in the highest pay bands.
- Among executives or senior level officials or managers, 34% were women.
- Among administrative support workers, 70% were women.

The findings related to race/ethnicity include:

- Among workers in the lowest pay bands (earning \$30,679 or less in 2020), Hispanic/Latino and Black/African American workers were overrepresented. Hispanic/Latino workers made up 50% of workers in the lowest pay bands, compared to 37%

⁴ Glyn and Boesch. *Connecting the Dots: “Women’s Work” and the Wage Gap* (Mar. 14, 2022) U.S. Department of Labor Blog <https://blog.dol.gov/2022/03/15/connecting-the-dots-womens-work-and-the-wage-gap> (as of Apr. 21, 2022).

of total reported workers. Black/African American workers made up 8% of workers in the lowest pay bands, compared to 6% of total reported workers. The lowest pay bands also included 25% Whites, 10% Asians, 5% two or more races, 1% Native Hawaiian or Other Pacific Islander, and 1% American Indian or Alaskan Native

- Among workers in the highest pay bands (earning \$128,960 or more in 2020), Hispanic/Latino and Black/African American workers were underrepresented.
- Hispanic/Latino workers made up 9% of workers in the highest pay band, compared to 37% of total reported workers. Black/African American workers made up 3% of workers in the highest pay bands, compared to 6% of total reported workers. The highest pay bands also included 3% two or more races, 1% Native Hawaiian or Other Pacific Islander, and 0.3% American Indian or Alaskan Native.
- White and Asian workers were overrepresented in the highest pay bands (earning \$128,960 or more in 2020). White workers made up 51% of workers in the highest pay bands, compared to 34% of total reported workers. Asian workers made up 33% of workers in the highest pay bands, compared to 18% of total reported workers.⁵

This bill now proposes a series of modifications to how this pay equity data program operates. The two most significant and contentious of those proposed modifications are detailed below. Other proposed modifications to the pay equity data reporting program include: authorizing DFEH to seek penalties in court against employers who fail to submit their data as required; including mean and median wages for each pay band; clarifying that an employer with multiple establishments only needs to file reports covering each establishment; and changing the annual deadline on which the pay data reports are due.

a. Inclusion of contract labor in reporting data

Under SB 973, employers only have to report pay equity data for individuals who are on the employer's payroll, including part-time workers for whom the employer is required to withhold federal social security taxes from that individual's wages. This leaves out people who work for a company through a third party contractor, such as a staffing agency.

⁵ *California Pay Data Reports Show Women, Latinos, and Other Groups Overrepresented Among Low-Wage Workers* (Mar. 15, 2022) California Department of Fair Employment and Housing <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2022/03/DFEH-Pay-Data-Results-Press-Release-2022-03-15-1.pdf> (as of Apr. 16, 2022).

The author and sponsor point out that contracted labor makes up an increasingly large fraction of the labor force at many companies.⁶ They highlight the example of Google where, according to a recent New York Times story, contract workers now outnumber direct hires.⁷ As a result, pay equity data which excludes contracted workers may give an inaccurate picture of pay disparities at any given company. As the author and sponsors conclude “temporary workers are a lynchpin of the California workforce, and of the success of the staffing industry overall. They are, however, currently excluded from the same transparency measures as the rest of the state’s workforce.”

To ensure that California’s pay equity data reporting program more adequately captures what is actually going on at each employer, the bill proposes to require employers to account for their workers brought on through a labor contractor in the data that they must submit to DFEH. Specifically, if the employer has at least 100 such workers, the employer would have to file a separate pay equity data report about them and include the name of the labor contractors involved.

Including contracted labor within the required pay equity data reporting should yield a more comprehensive picture of possible pay disparities at any given company and at the statewide level. Providing the name of the labor contractors involved would enable the DFEH and the DLSE to follow up in the event that the data submitted reveals concerning patterns in relation to the rates that any particular labor contractor pays.

In opposition to this aspect of the bill however, a coalition of employers led by the Chamber of Commerce expresses concern that the bill forces them to be reliant on data from the labor contractor over which they may not have much control.

For their part, representatives of labor contracting agencies wrote the Committee to object to this aspect of the bill on the grounds that they do not presently collect the demographic data necessary for fulfilling the bill’s reporting requirement. They argue that it would be costly and burdensome to begin to do so now. They add that since their employees are generally only part of the labor force for any given company for a relatively short period, the pay equity data corresponding to their employees may not reveal much about the private company’s pay equity over longer periods.

Finally, the Construction Employer’s Association and other employers of union employees seek assurance that union apprenticeship programs and hiring halls are not meant to be included within the bill’s definition of a labor contractor. They highlight that the pay for such employees is set by the role performed and cannot vary between individuals based on demographics.

⁶ *What Happened to Temps? Changes Since the Great Recession* (Feb. 2021) United States Bureau of Labor Statistics <https://www.bls.gov/opub/mlr/2021/article/temp-help.htm> (as of Apr. 16, 2022).

⁷ Wakabayashi. *Google’s Shadow Work Force: Temps Who Outnumber Full-Time Employees* (May 28, 2019) New York Times <https://www.nytimes.com/2019/05/28/technology/google-temp-workers.html> (as of Apr. 23, 2022).

The author and sponsor respond that inclusion of workers from these sources remains crucial to obtaining an accurate picture of any pay disparities and occupational segregation within any given large company.

b. Publication of pay equity reports by company

SB 973 included guardrails around the pay equity data reported to the DFEH so that individually identifying information about any specific employee would not be revealed publicly, except in the event of an investigation or enforcement action or as part of discovery in a civil case. SB 973 did authorize DFEH to develop and publish a report based on the pay equity data it receives from employers, but SB 973 limited the content of that report to aggregate data reflecting overall patterns. SB 973 did not authorize DFEH to publish the pay equity data for any single employer.⁸

In contrast, this bill now proposes to require DFEH to publish each private employer's pay data report on a website available to the public, though individually identifiable information that is associated with a specific person will remain protected.

The author and proponents of the bill assert that this level of transparency is critical to overcoming the pay gaps. They believe the resulting public accountability will push employers to take a hard look at the data and encourage those employers to make appropriate reforms. Job seekers could look to this data when making decisions about what company to work for. Consumer, too, might use it to choose where to take their business.

In support of this view, the author and sponsors point to the outcomes of a similar public pay equity data reporting initiative undertaken in Denmark, where a Harvard Business Review study concluded that publication of pay equity data led to a decrease in pay disparities.⁹ They also highlight that a number of private employers – including California-based giants Airbnb, Apple, Cisco, Door Dash, Dropbox, Google, Headspace Health, LinkedIn, Netflix, Nextdoor, Salesforce, Snap Inc., Twitter, and Uber – have pledged to publish aspects of their workplace demographic data publicly in order to demonstrate commitment to eliminating disparities.¹⁰

There is strong opposition to this component of the bill, however. The opponents raise three primary concerns about what they believe would happen if each private employer's pay equity data is published.

⁸ This was in contrast to at least one proposal for a pay equity data program that preceded SB 973, but was ultimately vetoed by then-Governor Brown. (See AB 1209, Gonzalez-Fletcher, 2017.)

⁹ Bennedsen et al. *Research: Gender Pay Gaps Shrink When Companies Are Required to Disclose Them* (Jan. 23, 2019) Harvard Business Review <https://hbr.org/2019/01/research-gender-pay-gaps-shrink-when-companies-are-required-to-disclose-them> (as of Apr. 16, 2022).

¹⁰ *Share DEI Data, Metrics, and Goals*. The ACT Report <https://actreport.com/recommendations/#share> (as of Apr. 16, 2022).

First and foremost, the opponents contend that publication of this data could fuel what they consider to be a false narrative about employment discrimination. While the pay equity data that employers are required to report demonstrates whether or not there are disparities in pay based on race, ethnicity, and gender, the opponents note, the data does not say anything about *why* those disparities exist. California's Equal Pay Act, like the federal law, allows for some disparity in pay so long as those disparities can be justified by a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or some other bona fide factor other than sex, such as education, training, or experience. (Lab. Code §§ 1197.5(a)(1)(A-D) and 1197.5(b)(1)(A-D).) The pay equity data in the required reports does not factor in these possible justifications. The reports show disparities but the reports do not prove that those disparities are against the law.

The opponents of this bill fear that this subtlety will be lost on the public at large. They worry that if any particular company's pay equity data reveals disparities in pay based on race, ethnicity, or gender, and that data gets published, the company will face reputational repercussions despite the fact that the company might well have a valid defense under the Equal Pay Act if they were accused of unlawful discrimination in court.

Second, the opponents worry that the publication of pay equity data for each private company will, in essence, pre-package the evidence that attorneys would need to bring a lawsuit against the company for employment discrimination. The fear here is that workers' rights attorneys will comb through the pay data reports as soon as they are published, looking for pay disparities or occupational segregation that they could then seize upon to allege discrimination. The opponents of the bill highlight the public comments of at least one plaintiff's attorney confirming the utility of the pay equity data for precisely that purpose.

As the opponents themselves emphasize, however, disparities in the pay equity data alone do not prove that a violation of the Equal Pay Act has taken place, so a plaintiff would have to have some additional basis for contending that the employer was engaging in discrimination. Additionally, even with a pay equity data report in hand, an attorney could not bring claims against a company unless a client came to that attorney expressing interest in bringing such a suit. California attorneys may not solicit clients. (Cal. Rules of Prof. Conduct 1-1400.)

Finally, the opponents of this component of the bill express concern that it could lead to the use of the pay equity data for a wide range of additional purposes for which, from the opponents' point of view, it is not appropriate. They note the existence of SB 1458 (Limon, 2022), for example. SB 1458 proposes to adjust the formula for calculating workers' compensation benefits by adjusting the injured worker's average weekly wage by the percentage of disparity in earnings between genders as reported to the DFEH in the employer's annual pay equity data. While it can be argued that SB 1458 is a

remedial way of ensuring that injured workers do not suffer disparity in benefits because of their gender, the opponents do not view it that way. From their point of view, because the pay equity data does not prove that pay disparities are unlawful, the pay equity data should not be used as a remedial tool.

In response to these concerns, the author proposes to offer a series of amendments in Committee. Those amendments focus on two of the opposition's key concerns.

First, with respect to the opposition's concern over the possibility that employers could use publication of each employer's pay data report as a way to launch a barrage of lawsuits against the employers, the author proposes to insert a provision expressly stating that any cause of action brought against an employer for employment discrimination or violation of the Equal Pay Act that is based exclusively on the pay data reports may be thrown out on the basis that it fails to state a claim on which relief can be granted. A plaintiff could try again afterwards, but the plaintiff would have to produce some other evidence of the alleged discrimination or unequal pay in order to proceed. The pay data reports alone would never be enough.

Second, with respect to the opposition's concern that the pay data reports may contribute to a false impression that pay disparities at any given company are unlawful, the author proposes an amendment that would enable employers to provide additional explanatory information to accompany the publication of their pay data report. This concept is adapted from the way that pay equity is reported in the United Kingdom, an example of which can be visited on the internet at <https://gender-pay-gap.service.gov.uk/Employer/QOsIQ2Dy/2021>.

In addition, the author proposes an amendment that would phase in publication of the pay data reports for specific companies depending on their size. Initially, DFEH would not publish the pay data reports for individual employers at all. For the 2024 calendar year, DFEH would only publish the pay data reports for employers with 1000 employees or more. For the 2025 calendar year, DFEH would publish the pay data reports for employers with 500 employees or more. Beginning with the pay data reports for calendar year 2026, DFEH would publish the reports each year for all employers with 250 or more employees. That final threshold also matches with the pay equity reporting system used in the United Kingdom. Throughout, DFEH would continue to publish the aggregate pay data for all employers with 100 or more employees, just as it does now.

Arguably, this phased-in approach could have several policy advantages. If employers' pay data reports were published immediately, they would likely spend their energy and resources on explaining any existing pay gaps. With one to two years, at least, before their pay data reports are made public, employers are more likely to focus their efforts on addressing the pay gaps so that, by the time their pay gaps are published, there is less to have to explain. In other words, although the amendments delay

publication of the data, the intended remedial impact of the bill should still begin to take effect immediately. By the same token, the phased-in approach should at least partially relieve employer's concerns about being shamed for the content of their pay data reports because the employers will have more time with which to address anything that might be perceived as shameful if it became public.

3. Proposed requirement to include pay scale information in job announcements

Several studies have shown that social dynamics in negotiations over pay are at least one factor contributing to the pay gap.¹¹ These studies conclude, as a broad generalization, that female job applicants and applicants of color are less likely than their male and white counterparts to bargain for higher salaries.

The author and sponsors of this bill believe that greater transparency can help with this aspect of the pay gap problem as well. In 2017, California enacted a law requiring employers to provide the pay scale information to job applicants if the applicant requests that information after an initial interview for the job. (AB 168, Eggman, Ch. 688, Stats. 2017; Lab. Code § 432.3(c).) While that rule ensures that applicants have a path to accessing information about the pay range that the employer may be willing to offer for the position, it still requires applicants to make an affirmative request for that information, something not all applicants may be willing to do.

This bill, instead, proposes a solution that eliminates the need for applicants to request pay scale data. The bill simply requires employers to include pay scale information for the position in the job announcement. The pay scale information would have to be included whether the employer does the hiring directly, or engages the services of a third party for that purpose. Additionally, the bill empowers a current employee to request and obtain pay scale information about that employee's present position. In these ways, the bill seeks to provide applicants and employees with the information they need to bargain more effectively for higher pay.

To enable verification of compliance in the case of disputes, the bill also obligates employers to keep copies of the job description and pay history for any position for as long as the employee occupies that position and for an additional three years afterward.

The opponents of the bill question whether this is necessary, especially given that a pay scale could be quite broad and therefore might not provide much real insight to the applicant or the job holder. Additionally, the opponents express the belief that having to post pay scales will hurt businesses' ability to respond flexibly to market condition and to lure talent. Another concern may stem from the obligation to maintain job

¹¹ See, e.g., Maria Recalde & Lise Vesterlund, Gender Differences in Negotiation and Policy for Improvement, National Bureau of Economic Research (Dec. 2020); Hannah Riley Bowles, Linda Babcock & Kathleen L. McGinn, Constraints and Triggers: Situational Mechanics of Gender in Negotiations, 89 J. PERSONALITY & SOC. PSYCH. 951, 955-56 (2005)

descriptions. Currently, there is no legal requirement for employers to create or keep job descriptions, so this bill would be creating a new mandate in that regard.

The author proposes to offer amendments in Committee that address some of the concerns raised.

4. Proposed requirement to post internal opportunities for professional advancement

Disparate access to opportunities for professional advancement also contribute to the wage gap. Here, too, the author and sponsors view increased transparency as a potential part of the solution. If everyone knows about such opportunities, their thinking goes, a broader array of candidates will apply, and the benefits of professional promotion – including greater pay – will accrue to a wider demographic spectrum, thus helping to decrease the pay gap.

With this in mind, the last component of the bill requires employers to make any upcoming internal job openings and the associated pay scale known to all current employees before filling that vacancy.

The opponents of this aspect of the bill do not necessarily object to the general concept of notifying current employees about job openings, but they express concern that doing so in absolutely every hiring scenario is impractical in light of the many different ways in which a vacancy can occur and the rapid decisions that employers sometimes have to make in response.

With these considerations in mind, the author proposes to offer amendments in Committee that would clarify the extent of the notification requirement and allow for interim or temporary appointments to be made in urgent situations.

5. Considerations regarding enforcement of the pay scale posting and job opening notification requirements

The components of this bill requiring the posting of pay scale information in job announcements and the notification of employees about any current or upcoming job openings both come with nearly identical enforcement mechanisms. In either case, an aggrieved employee or applicant could seek redress from the employer through administrative means by filing a complaint with the Labor Commission or proceeding with a civil action in court. If the aggrieved applicant or employee elects file a complaint with the Labor Commissioner, the bill directs the Labor Commissioner to investigate. If the Labor Commissioner concludes that a violation took place, the Labor Commissioner would have authority to impose civil penalties of between \$500 and \$10,000 per violation, depending on the totality of the circumstances. The civil penalties would be payable to the Labor Commissioner for use in other enforcement actions. If, instead, the aggrieved applicant or employee elects to go to court, they could seek injunctive relief and any other relief that the court deems appropriate.

The opponents express concern that these enforcement mechanisms expose them to significant new potential for liability. In particular, they worry that because these provisions of the bill are nestled within the Labor Code, they could be enforced through Private Attorney General Act (PAGA) suits in which private employees step into the shoes of the Labor Commissioner. In such legal actions, the employee bringing suit can recover penalties on behalf of themselves and other employees affected by the violation. (Lab. Code § 2699(a).) PAGA actions can therefore have something akin to a class action effect and they are, for now at least, not subject to mandatory arbitration. (*But see Viking River Cruises, Inc. v. Moriana* (2021) ___ U.S. ___ (142 S.Ct. 734).)

PAGA provides a force multiplier effect for a Labor Commissioner's office that cannot possibly keep up with enforcement of employment laws at the millions of jobsites across California. (*Arias v. Superior Court* (2009) 46 Cal.4th 969, 991.) PAGA comes under criticism from employers, however, for ostensibly enabling penalties to be stacked up for what they often view as trivial violations. As one compromise in this area, certain types of Labor Code violations have been made curable under PAGA. That is, employers can avoid liability for specified Labor Code violations if they remedy the alleged violation within 33 days of receiving a demand from the aggrieved employee. (Lab. Code § 2699.3(c).)

Given the bill's intent to ensure that applicants and employees get timely notice of pay scale and professional advancement opportunities, the author proposes to offer amendments in Committee that would specify that a violation of those requirements would be curable under PAGA.

6. Proposed amendments

In order to address the issues set forth in the Comments, above, the author proposes to incorporate amendments into the bill that would, among other things:

- delay and phase in the publication of each private employer's pay data report eventually ending with publication of the data reports for employers with 250 or more employees only;
- ensure that employers have an opportunity to provide explanatory information to accompany the publication of their pay data report;
- prevent plaintiffs from pursuing lawsuits against employers based on the content of the employer's pay data report alone;
- require employers to retain records of each employee's job title, rather than a job description for each employee;
- give employers the opportunity to cure a violation of the pay scale posting requirements before they can be sued under PAGA;
- provide a mechanism for employers to address urgent personnel vacancies by allowing for temporary or interim appointments prior to notifying all current employees of an internal job opening;

- give employers the opportunity to cure a violation of the internal job opening notification requirement before they can be sued under PAGA; and
- make other minor and technical amendments.

A mock-up of the amendments in context is attached to this analysis.

7. Arguments in support of the bill

In summary, proponents of the bill assert that:

- companies will monitor and improve their pay equity data if they know it will be reported publicly;
- to be accurate, a company's pay equity data needs to reflect their contracted labor force in addition to their direct employees; and
- to have equal opportunity to bargain for pay and to advance professionally, job openings need to be made known to all employees and applicants need information about pay scales without having to ask.

According to the author:

According to a 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. The wage gap persists across industries, occupations, and education levels, and exacts a heavy toll not only on women and people of color, but also on the families they support and the economy as a whole.

Pay transparency is key to achieving pay equity. SB 1162, the Pay Transparency for Pay Equity Act, will help identify gender and race-based pay disparities by requiring pay transparency at every stage of the employment process, from hiring, to promotion, and ongoing employment.

We must increase pay transparency in order to narrow the gender and race wage gap, which prevents women, particularly women of color, from achieving economic security.

As sponsor of the bill, California Employment Lawyers Association, Equal Rights Advocates, TechEquity Collaborative, the National Employment Law Project, and the California Commission on the Status of Women and Girls jointly write:

[SB 1162] will help close the gender and race wage gap by increasing pay transparency and requiring more equitable and transparent hiring and promotion practices. [...] 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. 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. [...] Companies can't fix what they can't see. SB 1162 will help shed more light on wage disparities by expanding the scope of pay data disclosure requirements to cover all workers, including contract workers, and to make this aggregate pay data information publicly available. (Internal citations omitted.)

In support, the California Labor Federation writes:

All workers deserve to know if they are being compensated fairly. The evidence proves that pay transparency makes the promises of the Equal Pay Act a reality. That is why good employers are already doing it. SB 1162 simply codifies existing best practices to ensure a fair and equal playing field for all workers. (Internal citations omitted.)

8. Arguments in opposition to the bill

In summary, the opponents of this bill contend that:

- publication of the pay equity data by company will lead to litigation and false narratives about discrimination;
- inclusion of contracted labor in pay equity reports would be difficult and would not yield a good picture of long term pay equity and occupational segregation since contracted employees are usually only with a company for a relatively short time;
- existing law regarding disclosure of pay scales strikes a reasonable balance that this bill would disrupt;
- the bill's internal job posting requirements would disrupt ordinary and necessary personnel practices; and
- the bill creates significant new and unjustified legal liability for employers.

For example, in opposition to the bill, a coalition of 59 business and trade associations led by the Chamber of Commerce writes

SB 1162 would encourage new, burdensome litigation against employers based on the publication of broad, unreliable data collected by the state. Further, this bill undermines employers' ability to hire, imposes administrative and record keeping requirements that are impossible to implement, and subjects employers to a private right of action and penalties under the Private Attorneys General Act (PAGA). The additional burdens and costs this proposal would create will limit an employer's ability to offer higher wages and benefits to new or existing employees and discourage growth or expansion in California.

In further opposition to the bill, California Staffing Professionals writes:

Requiring staffing agencies to submit temporary employee pay rate ranges based on demographic data not only will be administratively burdensome, it will require staffing agencies to collect race, ethnicity and other demographic information that they purposefully do not currently collect so as to avoid potential bias when placing candidates on assignment. Besides the bias risk, collecting, analyzing, and categorizing such information will impose a costly burden on staffing agencies, and also the agency charged with collecting and classifying the data – all of which is why government regulators, including in California, have long excluded temporary employees from such mandates.

SUPPORT

California Commission on the Status of Women and Girls (sponsor)

California Employment Lawyers Association (sponsor)

Equal Rights Advocates (sponsor)

National Employment Law Project (sponsor)

TechEquity Collaborative (sponsor)

9 to 5

Alameda Labor Council

Alliance of Californians for Community Empowerment

Alphabet Workers Union

American Association of University Women - California

Asian Law Alliance

BlueGreen Alliance

California Asset Building Coalition

California Child Care Resources and Referral Network

California Conference Board of the Amalgamated Transit Union
California Conference of Machinists
California Domestic Workers Coalition
California Healthy Nail Salon Collaborative
California Labor Federation, AFL-CIO
California Latinas for Reproductive Justice
California Partnership
California State Association of Electrical Workers
California State Pipe Trades Council
California Teamsters Public Affairs Council
California Women Lawyers
California Women's Law Center
California Work & Family Coalition
Career Ladders Project
Child Care Law Center
Clergy and Laity United for Economic Justice
Communications Workers of America District 9
Consumer Attorneys of California
Contra Costa Labor Council
Courage California
Disability Rights California
Earthseed
Economic Policy Institute
Employee Rights Center
End Hunger Now!
Engineers and Scientists of California, IFPTE Local 20, AFL-CIO
Equality California
Friends Committee on Legislation of California
The Greenlining Institute
Human Impact Partners
Legal Aid at Work
Los Angeles Alliance for a New Economy
Mujeres Unidas y Activas
NARAL Pro-Choice California
National Association of Social Workers
National Council of Jewish Women - California
National Union of Healthcare Workers
National Women's Law Center
National Women's Political Caucus of California
Opportunity Institute
Orange County Labor Federation
Parent Voices
Raising California Together
San Francisco Women's Political Committee

San Mateo Labor Council
Santa Barbara Women's Political Committee
Santa Clara County Wage Theft Coalition
Service Employees International Union, California
Stronger California
Temp Worker Justice
Tradeswomen, Inc.
The Workers Lab
Trusaic
UNITE HERE International Union, AFL-CIO
United Food and Commercial Workers, Western States Council
Utility Workers Union of America
Voices for Progress
Western Center on Law & Poverty
Western States Council Sheet Metal, Air, Rail and Transportation
Women's Foundation California
The Workers Lab
Worksafe

OPPOSITION

Acclamation Insurance Management Services
Allied Managed Care
American Staffing Association
Antelope Valley Chambers of Commerce
Associated General Contractors
Association of Independent California Colleges and Universities
BlueGreen Alliance
California Association for Health Services at Home
California Beer and Beverage Distributors
California Building Industry Association
California Business Properties Association
California Business Roundtable
California Chamber of Commerce
California Credit Union League
California Employment Law Council
California Farm Bureau
California Forestry Association
California Hospital Association
California Landscape Contractors Association
California League of Food Producers
California Legislative Conference of Plumbing, Heating & Piping Industry
California Manufactures & Technology Association
California Railroads

California Restaurant Association
California Retailers Association
California State Council of the Society for Human Resource Management
California Staffing Professionals
California Taxpayers Association
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
Flasher Barricade Association
Fresno Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
Housing Contractors of California
Imperial Valley Regional Chamber of Commerce
Job Creators for Workplace Fairness
La Cañada 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, California Chapters
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
Southwest California Legislative Council
True Blue
United Contractors
Valley Industry & Commerce Association
Visalia Chamber of Commerce
Wall and Ceiling Alliance
West Ventura County Business Alliance
Western Electrical Contractors Association
Western Growers Association
Western Wall and Ceiling Contractors Association

Wine Institute

RELATED LEGISLATION

Pending Legislation: SB 1458 (Limon, 2022) adjusts the formula for calculating workers compensation benefits by increasing the average weekly wage by the percentage of disparity in earnings between genders as reported to the DFEH in the employer's annual pay equity data if the applicant's average weekly wage is less than the average weekly wage of the opposite gender in that data. SB 1458 is currently pending consideration before the Senate Labor, Public Employment and Retirement Committee.

Prior Legislation:

AB 1192 (Kalra, 2021) would have required the report and publication of a series of metrics for large California employers about the nature of their workforce, pay, benefits, and conditions including, among others, disparities in pay based on race and gender. AB 1192 died on the Assembly inactive file.

SB 973 (Jackson, Ch. 363, Stats. 2020) required California employers with 100 or more employees to compile and submit pay equity data to the DFEH annually and directed DFEH to publish a yearly report on statewide pay equity based on this data in the aggregate.

SB 171 (Jackson, 2019) was substantially similar to SB 973. SB 171 died in the Assembly Appropriations Committee.

SB 1284 (Jackson, 2018) was substantially similar to SB 973. SB 1284 died in the Assembly Appropriations Committee.

AB 2282 (Eggman, Ch. 127, Stats. 2018) clarified that, while prior salary information cannot justify disparities in compensation, an employer may make a compensation decision based on an applicant's current salary as long as any wage differential resulting from that compensation decision is justified by: (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; or (d) a bona fide factor other than sex, such as education, training, or experience.

AB 46 (Cooper, Ch. 776, Stats. 2017) clarified that the California Equal Pay Act applies to public as well as private sector employers.

AB 168 (Eggman, Ch. 688, Stats. 2017) prohibited an employer from seeking or relying on the salary history information of an applicant as a factor in determining whether to offer an applicant employment or what salary to offer an applicant. The bill also required an employer, upon reasonable request, to provide the pay scale for a position to an applicant.

AB 1209 (Gonzalez-Fletcher, 2017) would have required employers with 500 or more employees in California to provide the Secretary of State with specific information regarding gender wage differentials for exempt employees and board members every two years as part of their corporate filings. In his message vetoing AB 1209, then Governor Brown wrote that “ambiguous” language in the bill “could be exploited to encourage more litigation than pay equity.” In addition, he wrote: “[w]hile transparency is often the first step to addressing an identified problem, it is unclear that the bill... will provide data that will meaningfully contribute to efforts to close the gender wage gap.”

SB 1063 (Hall, Ch. 866, Stats. 2016) expanded the prohibitions in the California Equal Pay Act regarding gender to include discrimination based on race or ethnicity.

AB 1676 (Campos, Ch. 856, Stats. 2016) required that prior salary shall not, by itself, justify any disparity in compensation.

SB 358 (Jackson, Ch. 546, Stats. 2015) amended the Equal Pay Act to require employers to justify any gender pay differential with a legitimate non-sex-based factor. The bill also prohibited retaliation against employees for disclosing or discussing their wages with co-workers.

AB 160 (Grunsky, Ch. 804, Stats. 1949) enacted California’s original Equal Pay Act.

PRIOR VOTES:

Senate Labor, Public Employment and Retirement Committee (Ayes 4, Noes 1)

Amended Mock-up for 2021-2022 SB-1162 (Limón (S))

Mock-up based on Version Number 99 - Introduced 2/17/22

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 12999 of the Government Code, as amended by Section 178 of Chapter 615 of the Statutes of 2021, is amended to read:

12999. (a) (1) On or before the second Wednesday of May 2023, and on or before the second Wednesday of May of each year thereafter, a private employer that has 100 or more employees shall submit a pay data report to the department covering the prior calendar year, which, for purposes of this section, shall be referred to as the “Reporting Year.”

(2) On or before the second Wednesday of May 2023, and on or before the second Wednesday of May of each year thereafter, a private employer that has 100 or more employees hired through labor contractors within the prior calendar year shall submit a separate pay data report to the department covering the employees hired through labor contractors in the prior calendar year. The private employer shall also disclose on the pay data report the ownership names of all labor contractors used to supply employees.

(b) The pay data report shall include the following information:

(1) 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.

(2) The number of employees by race, ethnicity, and sex, whose annual earnings fall within each of the pay bands used by the United States Bureau of Labor Statistics in the Occupational Employment Statistics survey.

(3) Within each job category, for each combination of race, ethnicity, and sex, the median and mean hourly rate.

(4) For purposes of establishing the numbers required to be reported under paragraph (1), an employer shall create a "snapshot" that counts all of the individuals in each job category by race, ethnicity, and sex, employed during a single pay period of the employer's choice between October 1 and December 31 of the "Reporting Year."

(5) For purposes of establishing the numbers to be reported under paragraphs (2) and (3), the employer shall calculate the total earnings, as shown on the Internal Revenue Service Form W-2, for each employee in the "snapshot," for the entire "Reporting Year," regardless of whether or not an employee worked for the full calendar year. The employer shall tabulate and report the number of employees whose W-2 earnings during the "Reporting Year" fell within each pay band.

(c) The employer shall include in the report the total number of hours worked by each employee counted in each pay band during the "Reporting Year."

(d) For employers with multiple establishments, the employer shall submit a report covering each establishment.

(e) The report shall include the employer's North American Industry Classification System (NAICS) code.

(f) The report shall include a section for employers to provide clarifying remarks regarding any of the information provided. An employer is not required to provide clarifying remarks.

(g) The information required by this section shall be made available in a format that allows the department to search and sort the information using readily available software.

(h) If the department does not receive the required report from an employer, the department may seek an order requiring the employer to comply with these requirements and shall be entitled to recover the costs associated with seeking the order for compliance. Upon request by the department, a court may impose a civil penalty not to exceed one hundred dollars (\$100) per employee upon any employer who fails to file the required report and not to exceed two hundred dollars (\$200) per employee upon any employer for a subsequent failure to file the required report. Any penalty under this section shall be payable to the Fair Employment and Housing Enforcement and Litigation Fund established under Section 12907.

(i) Except as required by subdivision (k), it shall be unlawful for any officer or employee of the department or the Division of Labor Standards Enforcement to make public in any manner whatever any individually identifiable information obtained pursuant to their authority under this section prior to the institution of an investigation or enforcement proceeding by the Division of Labor Standards Enforcement or the department under Section 1197.5 of the Labor Code or Section 12940 involving that information, and only to the extent necessary for purposes of the enforcement proceeding. For the purposes of this section, "individually identifiable information" means data submitted pursuant to this section that is associated with a specific person or business.

(j) Except as required by subdivision (k), any individually identifiable information submitted to the department pursuant to this section shall be considered confidential information and not subject to disclosure pursuant to the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1).

(k) (1) Notwithstanding subdivision (i), the department may develop, publish on an annual basis, and publicize aggregate reports based on the data obtained pursuant to their authority under this section, provided that the aggregate reports are reasonably calculated to prevent the association of any data with any individual business or person.

(2)(A) Notwithstanding subdivision (i) and (j) and in addition to the aggregate report described in paragraph (1), the department shall publish each private employer's pay data report as provided in paragraph (1) ~~under~~(2) of subdivision (a) on an internet website available to the public, as follows:

(1) The department shall not publish any private employer's pay data report for calendar year 2023.

(2) The department shall publish each private employer's data report for calendar year 2024 for private employers with 1000 or more employees.

(3) The department shall publish each private employer's pay data report for calendar year 2025 for private employers with 500 or more employees.

(4) The department shall publish each private employer's pay data report for calendar year 2026, and each subsequent year, for private employers with 250 or more employees.- The department shall not publish any individually identifiable information that is associated with a specific person.

(B) The department shall also provide a mechanism, accessible from the internet website on which each private employer's pay data report may be accessed, for visitors to that internet website to view any additional information that the employer chooses to provide regarding its pay data. The mechanism shall be either a space for text under the heading "What this employer says about their pay equity data," a hyperlink from that heading, or both. An employer is not required to submit additional information pursuant to this subparagraph.

(C) The department shall not publish any individually identifiable information that is associated with a specific person.

(l) The department shall maintain pay data reports for not less than 10 years.

(m) For purposes of this section, both of the following definitions shall apply:

(1) "Employee" means an individual on an employer's payroll, including a part-time individual, and for whom the employer is required to withhold federal social security taxes from that individual's wages.

(2) "Labor contractor" means 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.

(3) "Establishment" means an economic unit producing goods or services.

(n) Upon request by the department, no later than 60 days from the date of the request, the Employment Development Department shall provide the department with the names and addresses of all businesses with 100 or more employees in order to ensure compliance with this section.

(o) A complaint filed in a civil action alleging that an employer violated Section 1197.5 of the Labor Code or Section 12940 of the Government Code that is based solely on information in a pay data report does not state facts sufficient to constitute a cause of action for purposes of Section 425.10 of the Code of Civil Procedure, and the defendant may demur based on the fact that the complaint does not state facts sufficient to constitute a cause of action against the defendant pursuant to Section 430.10 of the Code of Civil Procedure.

SEC. 2. Section 432.3 of the Labor Code, as amended by Section 320 of Chapter 615 of the Statutes of 2021, is amended to read:

432.3. (a) An employer shall not rely on the salary history information of an applicant for employment as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant.

(b) An employer shall not, orally or in writing, personally or through an agent, seek salary history information, including compensation and benefits, about an applicant for employment.

(c) An employer shall ~~include~~provide the pay scale for a position ~~to an applicant applying for employment by including it in~~ any the job posting. An employer, upon request, shall provide the pay scale for the position a person is currently employed in. The following shall apply to this subdivision:

(1) An employer shall maintain records of a job ~~title~~~~description~~ 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.

(2) 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 ~~provide~~~~include~~ the pay scale ~~into applicants that view~~ the job posting.

(d) (1) A person who claims to be aggrieved by a violation of this section may file a written complaint with the Labor Commissioner within one year after the date the person learned of the violation. The complaint shall state the name and address of the employer and shall provide a detailed account of the alleged violation, as may be required by the Labor Commissioner.

(2) A person who claims to be aggrieved by a violation of this section may also bring a civil action for injunctive relief and any other relief that the court deems appropriate.

(3) The Labor Commissioner shall promptly investigate complaints alleging violation of this section.

(4) Upon finding that an employer has violated this section, the Labor Commissioner may order the employer to pay a civil penalty of no less than ~~five~~~~one~~ hundred dollars (\$~~1~~~~5~~00) 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.

(5) If an employer fails to keep records in violation of this section, there shall be a rebuttable presumption in favor of the employee's claim.

(6) Both of the following shall apply to any action brought to enforce this section pursuant to the Labor Code Private Attorneys General Act of 2004 (Part 13 commencing with Section 2698) of Division 2):

(A) The action shall commence only after the requirements specified in subdivision (c) of Section 2699.3 have been met.

(B) The following shall constitute cure for purposes of subdivision (c) of Section 2699.3:

(i) For an alleged violation of subdivision (a), demonstrating that the employer revised an applicant's salary by excluding salary history as a factor in determining what salary to offer the applicant or demonstrating that the employer reevaluated an applicant for employment by excluding salary history as a factor in determining whether to offer employment to the applicant.

(ii) For an alleged violation of subdivision (b), demonstrating that the employer has revised any hiring or recruitment practices that seek salary history information.

(iii) For an alleged violation of subdivision (c), demonstrating that the employer has revised all job postings to include a pay scale or if the alleged violation is that a person was not provided the pay scale for the position a person is currently employed in, by demonstrating that the employer has provided that person with the pay scale as required under this section.

(e) Section 433 does not apply to this section.

(f) This section does not apply to salary history information disclosable to the public pursuant to federal or state law, including the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1 of the Government Code) or the federal Freedom of Information Act (Section 552 of Title 5 of the United States Code).

(g) This section applies to all employers, including state and local government employers and the Legislature.

(h) Nothing in this section shall prohibit an applicant from voluntarily and without prompting disclosing salary history information to a prospective employer.

(i) If an applicant voluntarily and without prompting discloses salary history information to a prospective employer, nothing in this section shall prohibit that employer from considering or relying on that voluntarily disclosed salary history information in determining the salary for that applicant.

(j) Nothing in this section shall prohibit an employer from asking an applicant about the applicant's salary expectation for the position being applied for.

(k) Consistent with Section 1197.5, nothing in this section shall be construed to allow prior salary to justify any disparity in compensation.

(l) All civil penalties collected pursuant to this section shall be deposited into the Labor Enforcement and Compliance Fund for distribution to the Division of Labor Standards Enforcement. Upon appropriation by the Legislature, these funds may be expended by the division to cover reasonable ongoing costs of administering and enforcing this section.

(m) For purposes of this section, all of the following shall apply:

(1) "Pay scale" means athe salary or hourly wage range that the employer reasonably expects to pay for the position.

(2) "Applicant" or "applicant for employment" means an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position.

SEC. 3. Section 432.4 is added to the Labor Code, to read:

432.4. (a) (1) ~~(A) An employer shall notify all current employees of any internal job openings and the pay scale for the position at least five business days before filling the position. 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 calendar day and prior to making a promotion decision.~~

~~(B) A notice posted at the workplace in both English and the language understood by the majority of the employees or an electronic dissemination of the notice to employees shall be sufficient for purposes of the notice requirement in paragraph (1).~~

~~(2) An employer that engages a third party to announce, post, publish, or otherwise make known any opportunity for promotion shall provide the pay scale to the third party. The third party shall provide the pay scale to any person that views the posting.~~

~~(2) Notwithstanding paragraph (1), an employer may fill an internal job opening on a temporary or interim basis for up to 30 days without satisfying the requirements of paragraph (1) if the employer did not anticipate having to fill the position.~~

(b) (1) A person who claims to be aggrieved by a violation of this section may file a written complaint with the Labor Commissioner within one year after the date that the person learned of the violation. The complaint shall state the name and address of the employer and shall provide a detailed account of the alleged violation, as may be required by the commissioner.

(2) A person who claims to be aggrieved by a violation of this section may also bring a civil action for injunctive relief and any other relief that the court deems appropriate.

(c) The Labor Commissioner shall promptly investigate any complaint alleging a violation of this section.

(d) Upon finding that an employer has violated this section, the Labor Commissioner may order the employer to pay a civil penalty of no less than ~~five~~one hundred dollars (\$~~1500~~) 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.

(e) Section 433 does not apply to this section.

(f) This section applies to all employers, including state and local government employers and the Legislature.

(g) All civil penalties collected pursuant to this section shall be deposited into the Labor Enforcement and Compliance Fund for distribution to the Division of Labor Standards Enforcement. Upon appropriation by the Legislature, these funds may be expended by

the division to cover reasonable ongoing costs of administering and enforcing this section.

(h) The Labor Commissioner shall adopt rules and regulations as necessary to carry out the provisions of this section and Section 432.3.

(i) For purposes of this section, ~~both of the following shall apply:~~

~~(1) "Opportunity for promotion" means an actual or anticipated vacancy in any existing or new position.~~

~~(2) "Pay scale" has the same meaning as set forth in subdivision (m) of Section 432.3.~~

(j) Both of the following shall apply to any action brought to enforce this section pursuant to the Labor Code Private Attorneys General Act of 2004 (Part 13 (commencing with Section 2698) of Division 2):

(1) The action shall commence only after the requirements specified in subdivision (c) of Section 2699.3 have been met.

(2) An employer shall be deemed to have cured a violation of this section for purposes of subdivision (c) of Section 2699.3 if both of the following are true

(A) The employer demonstrates that it has notified all eligible employees of any other internal job openings and the pay scale for the positions.

(B) The employer demonstrates that it has established or revised its policies regarding internal job openings to ensure notification to all current employees of any internal job openings and the pay scale for the position at least five business days before filling the position as required under this Section.