

Date of Hearing: June 22, 2022

ASSEMBLY COMMITTEE ON LABOR AND EMPLOYMENT

Ash Kalra, Chair

SB 1162 (Limón) – As Amended June 14, 2022

SENATE VOTE: 27-9

SUBJECT: Employment: Salaries and Wages

SUMMARY: Expands state pay data reporting requirements to cover contracted employees, specifies that the Department of Fair Employment and Housing (DFEH) shall publish employer pay data reports, and requires employers to make pay scale information for positions available to employees and included in job postings. Specifically, **this bill:**

Pay Data Reporting Requirements

- 1) Requires a private employer of 100 or more employees to submit an annual pay data report to the DFEH regardless of whether the employer is required to file an annual Employer Information Report (EEO-1) pursuant to federal law.
- 2) Requires a private employer that has 100 or more employees hired through labor contractors to submit a separate pay data report to DFEH covering the employees hired through labor contractors for the prior calendar year. The employer shall also report the ownership names of all the labor contractors used to supply employees.
- 3) Adds to the information required in the annual pay data report the median and mean hourly rate for each job category of employees broken down by race, ethnicity, and sex.
- 4) Authorizes a court, upon request by the DFEH, to impose a civil penalty, as specified, for an employer's failure to file the required report, payable to the Fair Employment and Housing Enforcement and Litigation Fund.
- 5) Requires the DFEH to phase-in publishing each private employer's pay data report on an internet website available to the public, as follows:
 - a) The pay data report for calendar year 2025 for private employers with 1,000 or more employees.
 - b) The pay data report for calendar year 2026 for private employers with 500 or more employees.
 - c) The pay data report for calendar year 2027, and each subsequent year, for private employers with 250 or more employees.
- 6) Prohibits the DFEH from publishing any individually identifiable information that is associated with a specific person.
- 7) States that a complaint filed in a civil action alleging that an employer violated the Equal Pay Act or the anti-discrimination provisions of the Fair Employment and Housing Act that is

based solely on a pay data report does not state facts sufficient to constitute a cause of action, as specified.

Salary Transparency Provisions

- 1) Requires an employer, upon request, to provide an employee the pay scale for the position in which the employee is currently employed.
- 2) Requires an employer to maintain records of a job title and wage rate history for each employee for the duration of their employment plus three years after their employment in order for the Labor Commissioner (LC) to determine if there is a pattern of wage discrepancy.
- 3) Requires an employer with 15 or more employees to:
 - a) Include the pay scale for a position in any job posting.
 - b) Provide the pay scale to a third party that announces, posts, or publishes a job posting on its behalf so that the third party can include it in the job posting.
- 4) Authorizes a person aggrieved by a violation of this section to do any of the following:
 - a) File a written complaint, as specified, with the LC within one year after the date the person learned of the violation.
 - b) Bring a civil action for injunctive relief and any other relief that the court deems appropriate.
- 5) Authorizes the LC, upon finding that an employer has violated this section, to order the employer to pay a civil penalty of no less than one hundred (\$100) and no more than ten thousand dollars (\$10,000) per violation, based on the totality of the circumstances, including whether this is a repeat violation.
- 6) Provides that 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.
- 7) States that 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:
 - a) The action shall commence only after the employee has complied with specified notice requirements and the employer has been given an opportunity to cure.
 - b) The following shall constitute "cure" for purposes of correcting a violation of (1)-(3) above, relating to pay transparency:
 - i) 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.

EXISTING STATE LAW:

- 1) Establishes the LC within the Department of Industrial Relations to administer and enforce provisions of the Labor Code governing wages, hours, and working conditions.
- 2) Establishes the DFEH to, among other things, receive and investigate complaints of illegal employment discrimination.
- 3) Provides that it is an unlawful employment practice, for an employer, because of 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, discharge, or discriminate against the person in compensation or in terms, conditions, or privileges of employment.
- 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.
- 5) 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.
- 6) Requires employers with more than 100 employees to annually 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.
- 7) 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.

EXISTING FEDERAL LAW:

- 1) Establishes the Equal Employment Opportunity Commission (EEOC) to enforce the anti-discrimination in employment provision, known as Title VII, of the Civil Rights Act of 1964.

- 2) Requires every employer with 100 or more employees that is covered by Title VII, to file annually with the EEOC, demographic information about its employees in the Standard Form 100, as revised (known as the EEO-1 Report).

FISCAL EFFECT: According to the Senate Appropriations Committee:

The Department of Fair Employment and Housing would incur first-year costs of \$572,000, and \$494,000 annually thereafter, to implement its provisions of the bill (General Fund).

COMMENTS: This bill seeks to address workplace pay disparities and occupational segregation based on race, ethnicity, and sex. The measure builds upon SB 973 (Jackson) of 2020, which required employers that submit an EEO-1 as required by federal law to also submit an annual pay data report to the DFEH. DFEH was then authorized to develop and publicize aggregate reports based on employers' pay data. In March of 2022, DFEH released its first pay data report, which found, among other things, that women and Hispanic/Latino and Black/African American workers are overrepresented in the lowest pay bands.

Because SB 973 only applied the pay data reporting requirements to employers that annually file a federal EEO-1 report, it did not cover temporary staffing agencies. Yet, a recent Bureau of Labor Statistics study found that temporary employment has grown 75% since the Great Recession compared to just 19% for total private employment. A 2022 report by Temp Worker Justice found that across industries, temp and contracted workers fill the same jobs as direct hires, for a fraction of the pay and with fewer worker protections.¹ In addition, a comprehensive study of temp workers in one U.S. state found race to be a contributing factor in a worker's experience in temporary staffing: "from the advertising of temporary assignments, to the hiring by temp agencies, to the quality of job placements, to the consistency of work, to treatment at the workplace by supervisors, to the division of people within workplaces, to the conversions from temp worker to permanent employee."²

The author states, "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 ongoing employment. We must increase pay transparency in order to narrow the gender and race wage gap, which prevents many women, particularly women of color, from achieving economic security."

¹ See www.nelp.org/publication/temp-workers-demand-good-jobs.

² "Race, to the Bottom: The Demographics of Blue-Collar Temporary Staffing," *Temp Worker Justice*, Dave DeSario and Janelle White, December 2020, page 14.

Committee Comments

A major contention of opposition to this bill is that the pay data reporting provisions will lead to increased litigation. The employer coalition argues that once employer pay data reports are made public, a plaintiff's attorney will take any data supporting a pay disparity in the workplace and use it as a basis for filing a lawsuit. This seems to oversimplify the basis for a complaint of pay discrimination based on race, ethnicity, or sex. The pay data reports to be published by the DFEH under this bill may show differences in *pay bands* or *median* hourly rates based on protected characteristics for certain job categories. Pay data, especially de-individualized data, is unlikely by itself, however, to support a prima facie case of pay discrimination under the Equal Pay Act or the Fair Employment and Housing Act. Even under a disparate impact theory of discrimination, a plaintiff would have to identify a facially neutral employer practice or policy that has the effect of causing the pay disparity. Furthermore, if an employer's pay data report shows patterns of unexplained pay disparities based on protected categories, it should encourage that employer to review their pay practices and make necessary corrections. One can easily argue that it is good public policy to give employers another tool to audit and adjust pay disparities if such exist.

Arguments in Support

The 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, cosponsors of the bill, state, "In California, if all working women and working single mothers earned the same as comparable men, the state's poverty rate would be reduced by about 40% and the estimated average earnings increase if all working women earned the same as comparable men would be 15.8% (an additional \$68.45 billion or 2.2% to the state's economy). 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 and pay 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."

The California Labor Federation is in support and argues that pay transparency is especially needed for staffing agencies. They write, "Unfortunately, the staffing industry, which employs millions of contract workers at companies across California, used their profits to lobby for an exemption to the disclosure requirements the Legislature approved in 2020. With recent reporting that some of the state's most profitable companies hire more contract workers than direct-employees, continuing to grant special privileges to \$122B a year industry would mean

keeping too many of the state's most vulnerable workers in the shadows and denying all of us a holistic picture of what is really happening in the workforce. Contract work is a necessary component of how we perform work and conduct business, but that is no excuse for poor job quality or disparate compensation.”

Arguments in Opposition

A coalition of employer organizations, including the Chamber of Commerce, are opposed and state, “By making public the reports required under SB 973 (Jackson), SB 1162 will similarly open businesses up to litigation. Once the data is made public, a plaintiff’s attorney would simply have to review the companies with perceived pay disparities, use the report to advertise to find one plaintiff, and send a settlement demand or threaten litigation.”

The coalition goes on to state, “After only one year of this reporting requirement, SB 1162 seeks to publicize all of this data identifiable by individual companies and add average wages for each job category by race and gender under the pretense that it would reveal gender and race-based pay 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.

Even if it did show such comparisons, as Labor Code Section 1197.5 recognizes, there are numerous, lawful, bona fide factors as to why wage disparities may exist between employees performing substantially similar work, such as: (1) different educational or training backgrounds amongst employees; (2) different career experience; (3) varying levels of seniority or longevity with the employer; (4) objective, merit-based system of the employer; (5) a compensation system that measures earning by quantity or quality of production; (6) geographical differences that impact the cost of living and job market; and, (7) shift differentials. The California Chamber of Commerce and other members of the business community supported SB 358 (Jackson) (2015), which strengthened the Equal Pay Act and created a balanced approach that benefited both workers and employers. By publishing broad categories of data based on job classifications and titles, SB 1162 seeks to set up employers for public criticism with incomplete, uncontextualized reports and create a false impression of wage discrimination where none may exist.”

Prior Legislation

SB 973 (Jackson) Chapter 363, Statutes of 2020 required employers with 100 or more employees to provide the DFEH with specified EEO-1 data.

AB 2282 (Eggman) Chapter 127, Statutes of 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) Chapter 776, Statutes of 2017 clarified that the California Equal Pay Act applies to public as well as private sector employers.

AB 168 (Eggman) Chapter 688, Statutes of 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) of 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. The measure was vetoed by Governor Brown.

SB 1063 (Hall) Chapter 866, Statutes of 2016 expanded the prohibitions on pay discrimination to include discrimination based on race or ethnicity.

AB 1676 (Campos) Chapter 856, Statutes of 2016 provided that prior salary shall not, by itself, justify any disparity in compensation.

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

REGISTERED SUPPORT / OPPOSITION:

Support

California Commission on The Status of Women and Girls (Co-Sponsor)

California Employment Lawyers Association (Co-Sponsor)

Equal Rights Advocates (Co-Sponsor)

National Employment Law Project (Co-Sponsor)

TechEquity Collaborative (Co-Sponsor)

9to5

ACCE Action

ACLU

Alameda Labor Council

Alphabet Workers Union

American Association of University Women - California

American Federation of Labor and Congress of Industrial Unions

Asian Law Alliance

Bluegreen Alliance

California Asset Building Coalition

California Child Care Resource 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

California Latinas for Reproductive Justice

California Legislative Women's Caucus

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
Chinese Progressive Association
Clergy and Laity United for Economic Justice
Communication 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
Equality California
Friends Committee on Legislation of California
Fund Her
Greenlining Institute
Human Impact Partners
Kim Center for Social Balance
LAANE
Legal Aid At Work
Mujeres Unidas Y Activas
Naral Pro-Choice California
National Association of Social Workers, California Chapter
National Council of Jewish Women-California
National Union of Healthcare Workers
National Women's Law Center
National Women's Political Caucus of California
Nextgen California
Opportunity Institute
Orange County Labor Federation
Parent Voices
Raising CA Together
San Francisco Women's Political Committee
San Mateo Labor Council
Santa Barbara Women Lawyers
Santa Barbara Women's Political Committee
Santa Clara County Wage Theft Coalition
Service Employees International Union
Stronger California
Techequity Collaborative
Temp Worker Justice
The Greenlining Institute
The Workers Lab

Trusaic
Unite Here International Union
United Food and Commercial Workers Union, Western States Council
Utility Workers of America
Voices for Progress
Western Center on Law & Poverty
Western States Council Sheet Metal, Air, Rail and Transportation
Women's Foundation California
Worksafe

Oppose

Allied Managed Care
American Property Casualty Insurance Association
Antelope Valley Chambers of Commerce
Associated General Contractors
California Association for Health Services At Home
California Bankers Association
California Beer and Beverage Distributors
California Building Industry Association
California Business and Industrial Alliance
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 Grocers Association
California Hospital Association
California Hotel & Lodging Association
California Landscape Contractors Association
California League of Food Producers
California Manufactures & Technology Association
California New Car Dealers Association
California Railroads
California Restaurant Association
California Retailers Association
California State Council of The Society for Human Resource Management
California Taxpayers Association
California Travel Association
Carlsbad Chamber of Commerce
Citrus Heights 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
Family Business Association of California

Family Winemakers of California
Flasher Barricade Association
Fresno Chamber of Commerce
Glendora 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 Canada Flintridge Chamber of Commerce
Lake Elsinore Valley Chamber of Commerce
Lodi Chamber of Commerce
Long Beach Area Chamber of Commerce
Los Angeles Area Chamber of Commerce
Los Angeles Latino Chamber of Commerce
Murrieta Wildomar Chamber of Commerce
National Federation of Independent Business
Oceanside Chamber of Commerce
Orange County Business Council
Orange County Hispanic Chamber of Commerce
Paso Robles Chamber of Commerce
Santa Ana Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Santee Chamber of Commerce
Simi Valley Chamber of Commerce
Southwest California Legislative Council
Technet
Tri County Chamber Alliance
True Blue
Valley Industry & Commerce Association
Visalia Chamber of Commerce
West Ventura County Business Alliance
Western Electrical Contractors Association
Western Growers Association
Wine Institute

Oppose Unless Amended

California Association of Christian Colleges and Universities

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