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PERSPECTIVE

## Answering the call for pay equity

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In 1949, California enshrined in law a fundamental concept: equal pay for equal work, regardless of sex. Since then, state and federal governments have enacted laws that prohibit discrimination in pay due to sex, race, ethnicity and many other protected characteristics. And, in 2015, California codified a new and improved fundamental concept: equal pay for *substantially similar* work, regardless of sex, race or ethnicity.

Despite the decades-long existence of such pay equity and anti-discrimination laws, research shows that significant race and gender pay disparities persist in workplaces throughout California and the country, with women of color bearing the brunt. In fact, data from the U.S. Census Bureau indicate that Black, Native American, and Latina women typically earn an average of 62, 57, and 54 cents, respectively, for every dollar earned by white, non-Hispanic men. The consequences of pay inequities harm not only underpaid workers, but also communities, workplaces, investors and our society and economy at large.

Legislators, equal pay advocates, and other stakeholders have identified unchecked biases, historic inequities, legal loopholes, and insufficient enforcement as key culprits that have allowed race and gender pay disparities to persist. Last month, the California Legislature sent to Gov. Gavin Newsom's desk a new bill — Senate Bill 973 — that seeks to address these issues through mandatory pay data reporting and more targeted enforcement.

Modeled after the now defunct EEO-1 Component 2 data reporting requirement, SB 973 would require that California employers with 100 or more employees submit annual pay data reports to the state's Department of Fair Employment and Housing. California employers' annual reports would include the following information: (A) the number of employees by

race, ethnicity and sex broken down into nine specified job categories; (B) the number of employees by race, ethnicity and sex whose annual earnings fall within specified pay bands; (C) the total number of hours worked by each employee counted in each pay band during the reporting year; (D) for employers with multiple establishments, a report for each establishment and a consolidated report that includes data on all employees; and (E) any clarifying remarks regarding the information provided, which is optional.

For purposes of calculating the number of employees by job category and determining their annual earnings, a California employer would select a single pay period between Oct. 1 and Dec. 31 of the reporting year, take a snapshot of that pay period that counts all individuals employed in each of the nine specified job categories, and report the IRS Form W-2 total earnings for each such individual employed as of the snapshot pay period (irrespective of whether such individual worked the entire year).

The authors of SB 973 proffer that such pay data reports would allow state agencies to identify wage patterns and better enforce the state's pay equity and anti-discrimination laws. Proponents of the legislation believe that it will encourage employers to analyze their own pay, recruitment, hiring, and retention practices to ensure such practices are fair and lawful. Further, proponents believe that the legislation will prompt employers to self-correct, where necessary, to ensure equitable pay and better representation of workers at all pay levels.

On the other hand, opponents of SB 973 argue that the pay data reporting requirements do not align with existing pay equity or anti-discrimination laws, and would likely show misleading pay disparities. Specifically, opponents argue that grouping employees into the nine specified job categories for analysis of pay disparities does not align with the substantially similar work standard under existing law. Opponents also worry that strictly

focusing on W-2 earnings and failing to adequately account for neutral, bona-fide factors that may explain differences in pay will show pay disparities when none actually exist. Similar concerns were shared by critics of the former EEO-1 Component 2 reporting requirements. Even the EEOC, when it declined to continue collecting and reviewing such pay data at the federal level, opined that it did not intend or expect that such pay data would identify specific, similarly situated comparators or that it would establish pay discrimination as a legal matter. Despite these ostensible shortcomings, SB-973 overwhelmingly passed in the California Senate and Assembly and awaits Gov. Newsom's signature.

The bill's express intent to allow for more efficient identification of wage patterns and targeted enforcement further underscores the need for California employers to implement or improve annual pay equity reviews in the near future. Collecting and reviewing pay data is about more than just compliance and mitigating legal risk, however.

Indeed, as organizations across California and the U.S. commit to fighting racism and advancing racial equity, annual pay equity reviews can bolster such efforts, including by building more diverse, equitable and inclusive workplaces. At its core, a proactive pay equity review allows employers to identify and remediate

differences in pay for substantially similar work that cannot be justified by a seniority system, merit system, a system that measures production, or any other bona fide factor other than sex, race or ethnicity that is job related and consistent with business necessity. More comprehensive pay equity reviews also allow organizations to, among other things, spot opportunity gaps and disparities in representation, diagnose shortcomings in the implementation of compensation philosophies, identify potentially biased compensation decision-makers, and/or identify policies, procedures, or practices that may have a disparate impact on employees based on race, ethnicity, sex or other protected characteristics. Accordingly, organizations that fully commit to comprehensive pay equity reviews can truly bolster their diversity, equity, and inclusion efforts, spot and remediate issues, and reap the numerous benefits stemming therefrom.

While studies show more employers are committing to pay equity and undertaking pay equity reviews each year, SB 973 reflects the Legislature's overarching desire to accelerate progress in terms of achieving pay equity. California employers can answer the call for pay equity now by implementing or bolstering annual pay equity reviews before an administrative action or lawsuit arises. The benefits are abundant. ■

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