

CLIENT ALERT

DFEH Provides Additional Guidance on California Equal Pay Reporting Requirements

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As we reported in a prior [client alert](#), in 2020, California Governor Newsom signed [SB 973](#), which authorizes the California Department of Fair Employment and Housing (DFEH) to collect an “Annual Pay Data Report,” but the new legislation left a number of critical questions unanswered. SB 973 affects private employers that employ 100 or more employees and that are already required to file an annual Employer Information Report (EEO-1) pursuant to federal law. Employers with multiple establishments in California must submit a report for each “establishment” and a consolidated report that includes all employees assigned to their California establishments and all employees living in California even if they report to an establishment outside California. The bill took effect January 1, 2021, with the first report due March 31, 2021.

The DFEH has been gradually updating its [Frequently Asked Questions](#) on SB 973, with its first round of answers on November 2 (see [client alert](#)), and its second round of answers on November 23 (see [client alert](#)). On January 7, the DFEH provided a third round of answers providing guidance on the measure of pay that employers should use to assign employees to the appropriate pay band, how to calculate employees’ total hours worked, and the assignment of employees to “establishments.”

- **Measure of Pay:** To determine the appropriate pay band for each employee, employers must calculate an employee’s total earnings, as shown on the IRS Service Form W-2, for the entire Reporting Year. Unlike the federal EEO-1 Component 2 collection from 2017 and 2018, in which the EEOC required employers to use W-2 Box 1, **DFEH is requiring W-2 Box 5 – Medicare wages and tips.** Employers must use the W-2 Box 5 regardless of whether the employee worked the full calendar year.
- **Calculation of Hours:** Unlike the federal Component 2 collection in which the EEOC required employers to exclude time on paid leave when calculating hours worked, DFEH requires employers to *include* time during which an employee was on any form of paid time off for which an employee was paid by the employer, such as vacation, sick, or holiday time.
 - For **non-exempt** employees, employers should utilize timesheets or other records to calculate the actual hours worked by an employee *plus* the hours that the employee was on any form of paid time off.
 - For **exempt** employees where records of the hours worked are not maintained, employers should calculate an employee’s total hours worked by multiplying the total number of days actually worked during the Reporting Period *plus* the total number of days of any form of paid time off, multiplied by the average number of hours worked per day by that employee. If the employer records some exempt employees’ hours worked but does not record other exempt employees’ hours worked, the employer may report the actual hours worked for the tracked employees and may use a proxy for those whose hours are not tracked. The DFEH does not provide guidance on how to calculate a proxy, but does provide an example of calculating an employee’s hours: “if a full-time exempt employee (who does not maintain records of her hours) worked on average 8 hours per day, worked for 98 days, and took 2 days of paid sick leave during the Reporting Year, the employer would calculate and report the employee’s hours by multiplying 8 by 100 (800 hours).”
- **Assignment of Employees to “Establishments”:** Employers with multiple establishments in California must submit a report for each establishment and a consolidated report that includes all employees assigned to its California

establishments and all employees living in California even if they report to an establishment outside California. The DFEH has clarified that employers should utilize the same establishments that they use for their EEO-1 reports, and assign an employee to the establishment where the employer reports that employee for federal EEO-1 purposes. Employers should assign employees to the establishment that an employee formally reports to during the Snapshot Period, which is a single pay period between October 1 and December 31 of the Reporting Year. Where an employee reports to more than one establishment during a Snapshot Period, employers should assign that employee to the establishment that the employee reports to for the majority of their work.

The DFEH still intends to provide guidance on “Acquisitions and Mergers” and “Spinoffs.” The DFEH is also still developing a sample report form and a submission portal that will further specify the information required in the Annual Pay Data Report.

We will continue to update our clients on any new significant guidance from the DFEH. We also anticipate that Federal EEO-1 Component 2 reporting may be resuscitated by the incoming Biden Administration and we will update our clients on this topic, as well, if that occurs.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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