

CLIENT ALERT

DFEH Provides More Answers to Questions About California's New Annual Pay Data Reporting Requirements, Including Which Employers Are Required to Submit Pay Data Reports

December 1, 2020

As we reported in a prior [client alert](#), California Governor Newsom recently 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. The bill takes effect January 1, 2021, with the first report due March 31, 2021.

The DFEH is gradually updating its [Frequently Asked Questions](#) on SB 973, with its first round of answers on November 2 (for which we provided another [client alert](#)). On November 23, the DFEH provided a second round of answers providing guidance on which employers are required to submit an Annual Pay Data Report, and which employees an employer is required to provide data for:

- An employer must count employees located inside and outside of California when determining whether it has more than 100 employees and is thus required to submit a Pay Data Report. For example, an employer with 50 employees inside California and 50 employees outside of California during the Reporting Year is required to submit a Pay Data Report to DFEH.
- An employer that has establishments inside and outside of California **must** report to DFEH on all of its employees assigned to its California establishments whether or not the employees live in California. An employer also **must** report on all of its employees living in California and reporting to an establishment outside of California. Thus, an employer must report on employees who live in California and telework to an establishment located outside California, and on employees who live outside of California and telework to an establishment located inside California.
- An employer **may** report to DFEH on its establishments located outside of California and on employees not located in California or not assigned to an establishment in California. DFEH is providing this option in case it is less burdensome for employers in light of federal EEO-1 reporting.

The DFEH is currently developing a sample report form and a submission portal that will further specify the information required in the Annual Pay Data Report. Employers should be aware that California officially recognizes three genders – female, male, and nonbinary – and employers should therefore report employees' sex according to these three categories. Employee self-identification is the preferred method of identifying sex information.

The DFEH has identified topics for which it intends to provide future guidance on Annual Pay Data Report requirements, including "Pay," "Hours Worked," "Multi-Establishment Employers," "Acquisitions and Mergers," and "Spinoffs." The DFEH has yet to confirm that employers should calculate hours for full- or part-time exempt employees in the same manner provided under the Federal EEO-1 component two reporting that was previously required and has now been "cancelled." In response to a

question about this topic, the DFEH replied to us by email, stating that it expects to address this topic in a subsequent round of FAQs that it will post in December.

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

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

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