CLIENT ALERTS & INSIGHTS

California's New Requirements for Submission of Annual Data and Reporting Relating to COVID-19

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On March 31, 2021, and by March 31 of each subsequent year, California employers that employ 100 or more employees and are required to file an annual Employer Information Report (EEO-1) with the Equal Employment Opportunity Commission (EEOC) will be required to make an analogous filing with the California Department of Fair Employment and Housing (DFEH).

The legislation, SB-973, is intended to address pay discrimination, noting that this new requirement stems from the fact that pay discrimination "harms families and the state's economy," and that women working full time in California made a median 88 cents to every dollar earned by men in 2016. The legislation notes that the Obama Administration announced proposed revisions to the EEO-1 to include the reporting of pay data by gender, race, and ethnicity beginning in 2018, but that the Trump Administration halted implementation of the rule in August 2017.

Filing Requirements

The newly-required annual filing requires employers to report a significant breadth of information about its employees' demographics, including: (1) a breakdown of the number of employees by race, ethnicity, and sex in each of ten different job categories; (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 (May 2019); (3) 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"; (4) a calculation of total earnings for each employee contained in the "snapshot," for the entire "Reporting Year," regardless of whether or not an employee worked for the full calendar year, and a corresponding tabulation of the number of employees whose W-2 earnings during the "Reporting Year" fell within each pay band; and (5) a calculation of the total number of hours worked by each employee in each pay band.

Additionally, employers with multiple establishments must submit a report for each establishment as well as a consolidated report that includes all employees. The report must include a section for employers to provide "clarifying remarks," but employers are not required to provide remarks. Finally, pursuant to the legislation, these DFEH reports must be submitted in a searchable format. The DFEH is obligated to maintain these reports for no fewer than ten years.

Importantly, to the benefit of employers, if an employer submits to the DFEH a copy of the EEO-1 Report "containing the same or substantially similar pay data required" in the new submission, the employer's submission is considered compliant with the new law.

Information Confidentiality

To ensure confidentiality, the new law expressly notes that any information submitted to the DFEH in these reports constitutes confidential information, and is not subject to disclosure pursuant to the California Public Records Act or otherwise "except as necessary for administrative enforcement or through the normal rules of discovery in a civil action." The statute makes it unlawful for any DFEH employee 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 (DLSE) "and only to the extent necessary for purposes of the enforcement proceeding." The law defines individually identifiable information as "data submitted pursuant to this section that is associated with a specific person or business."

Bottom Line: the Cost to Employers

There are likely few employers who will be required to make this new annual filing with the DFEH who are not already required to make a corresponding EEO-1 filing with the EEOC. However, the new DFEH filing requires inclusion of significantly more demographic-based information than is contained in an EEO-1 filing, the accumulation and indexing of which may impose a significant initial human resource cost on employers-particularly large employers. Employers should be wary about simply submitting their EEO-1 filing to the DFEH in place of a separately-constructed DFEH filing, as most employers' EEO-1 filings are likely insufficient to serve as a stand-in for a separately-drafted DFEH filing. If an employer fails to submit a satisfactory DFEH filing, the new law authorizes the DFEH to seek an order forcing compliance, and entitles the DFEH to recover the costs associated with seeking the order.

In Other News: Employers Face Heightened Requirements to Provide Employees Notice Regarding COVID-19 Cases

In another move to protect employees, Governor Gavin Newsom signed AB-685, a law imposing heightened obligations for employers to report COVID-19 cases in the workplace. Effective January 1, 2021, the new law requires employers to provide employees, employers of subcontracted employees, and employee representatives written notice within one business day of a "potential exposure" based on a positive confirmed case of COVID-19 in the workplace. The notice must include information regarding COVID-19 benefits the employee(s) may receive, including workers' compensation benefits, COVID-19 leave, paid sick leave, and the employer's anti-discrimination, anti-harassment, and anti-retaliation policies. Additionally, the law requires employers to provide notice to employees regarding the employer's disinfection protocols and safety plan to eliminate any further exposure. Finally, the law requires employers that have three or more cases within a 14-day period to report information to the local public health agency within 48 hours. Employers also must report any COVID-19-related fatalities. Notably, AB-685 also expands authority under Cal/OSHA to issue Stop Work Orders.

Likewise, on September 17, 2020, the Cal/OSHA Occupational Safety and Health Standards Board (Board) directed the drafting of a proposal for "an emergency regulation to protect all workers … from COVID-19 exposure in the workplace" for consideration at the Board's November 19, 2020 meeting. The emergency regulation is to address (1) "[t]he prevailing guidance for worker protections from COVID-19 exposure"; (2) "[n]otification for affected employers and workers"; (3) "[c]urrent

industry best practices and guidelines"; and (4) "[c]onsideration for the most vulnerable/impacted industries and professions." While the regulation has not yet been presented, any resulting regulation is expected to require employers to develop workplace COVID-19 action plans. Employers should be prepared to promptly review Cal/OSHA's impending regulation and implement workplace action plans accordingly.

For more information, contact a member of Benesch's Labor & Employment Practice Group.

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