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SB-973 Employers: annual report: pay data. (2019-2020)

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Senate Bill No. 973

CHAPTER 363

An act to amend Section 12930 of, and to add Chapter 10 (commencing with Section 12999) to Part 2.8 of Division 3 of Title 2 of, the Government Code, relating to employment.

[Approved by Governor September 30, 2020. Filed with Secretary of State September 30, 2020.]

LEGISLATIVE COUNSEL'S DIGEST

SB 973, Jackson. Employers: annual report: pay data.

Existing law establishes the Department of Fair Employment and Housing (DFEH) within the Business, Consumer Services, and Housing Agency to enforce civil rights laws with respect to housing and employment and to protect and safeguard the right of all persons to obtain and hold employment without discrimination based on specified characteristics or status. The DFEH has specified powers, including the power to receive, investigate, conciliate, mediate, and prosecute certain complaints.

Existing law establishes within the Department of Industrial Relations the Division of Labor Standards Enforcement, which is vested with the general duty of enforcing various labor laws, including provisions prohibiting wage rates that discriminate on the basis of gender or race.

This bill would authorize the DFEH to receive, investigate, conciliate, mediate, and prosecute complaints alleging practices unlawful under those discriminatory wage rate provisions. The bill would require the DFEH, in coordination with the division, to adopt procedures to ensure that the departments coordinate activities to enforce those provisions.

Existing federal law requires specified companies to file with the federal Equal Employment Opportunity Commission an annual Employer Information Report (EEO-1) that contains specified data regarding demographics of the employer's workforce.

This bill would require, on or before March 31, 2021, and on or before March 31 each year thereafter, a private employer that has 100 or more employees, and that is required to file an annual Employer Information Report under federal law, to submit a pay data report to the DFEH that contains specified wage information. The bill would require that the information be made available in a prescribed format. The bill would require the DFEH to make the reports available to the division upon request. The bill would authorize the DFEH, if it does not receive the required report from an employer, to seek an order requiring the employer to comply, as specified. The bill would require the DFEH to maintain the pay data reports for a minimum of 10 years and would make it unlawful for any officer or employee of the DFEH or the division to make public in any manner whatever any individually identifiable information obtained from the report prior to the institution of certain investigation or enforcement proceedings, as specified. The bill would require the Employment Development Department to provide DFEH, upon its request, as specified, with the names and addresses of all businesses with 100 or more employees.

The bill would make legislative findings in support of these provisions.

The California Public Records Act requires a public agency to make public records available for inspection, unless an exemption from disclosure applies.

This bill would provide that any individually identifiable information submitted to the department pursuant to this bill be considered confidential information and not subject to disclosure pursuant to the California Public Records Act, except as specified.

Existing constitutional provisions require that a statute that limits the right of access to the meetings of public bodies or the writings of public officials and agencies be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.

This bill would make legislative findings to that effect.

Vote: majority Appropriation: no Fiscal Committee: yes Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. The Legislature finds and declares all of the following:

(a) Despite significant progress made in California in recent years to strengthen California's equal pay laws, the gender pay gap persists, resulting in billions of dollars in lost wages for women each year in California.

(b) Pay discrimination is not just a women's issue, but also harms families and the state's economy. In California, in 2016, women working full time, year round made a median 88 cents to every dollar earned by men, and for women of color, that gap is far worse.

(c) Although there are legitimate and lawful reasons for paying some employees more than others, pay discrimination continues to exist, is often "hidden from sight," and can be the result of unconscious biases or historic inequities.

(d) Recognizing that pay discrimination is difficult to detect and address, the Obama Administration announced a proposed revision to the Employer Information Report (EEO-1) to include the reporting of pay data by gender, race, and ethnicity beginning in 2018. However, in August 2017, the Trump Administration put a halt to the implementation of this new rule.

(e) It is the intent of the Legislature, in enacting this bill, to ensure that this pay data will continue to be compiled and aggregated in California.

(f) Further, it is the intent of the Legislature in enacting this bill for data collection purposes to allow for the designated state agencies to collect wage data to more efficiently identify wage patterns and allow for targeted enforcement of equal pay or discrimination laws, when appropriate. Therefore, it is the intent of the Legislature that this pay data will be kept confidential and not available for disclosure, except as necessary for administrative enforcement or through the normal rules of discovery in a civil action.

SEC. 2. Section 12930 of the Government Code is amended to read:

12930. The department shall have the following functions, duties, and powers:

(a) To establish and maintain a principal office and any other offices within the state as are necessary to carry out the purposes of this part.

(b) To meet and function at any place within the state.

(c) To appoint attorneys, investigators, conciliators, mediators, and other employees as it may deem necessary, fix their compensation within the limitations provided by law, and prescribe their duties.

(d) To obtain upon request and utilize the services of all governmental departments and agencies and, in addition, with respect to housing discrimination, of conciliation councils.

(e) To adopt, promulgate, amend, and rescind suitable procedural rules and regulations to carry out the investigation, prosecution, and dispute resolution functions and duties of the department pursuant to this part.

(f) (1) To receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful pursuant to Chapter 6 (commencing with Section 12940).

(2) To receive, investigate, conciliate, mediate, and prosecute complaints alleging a violation of Section 51, 51.5, 51.7, 51.9, 54, 54.1, or 54.2 of the Civil Code. The remedies and procedures of this part shall be independent of any other remedy or procedure that might apply.

(3) To receive, investigate, conciliate, mediate, and prosecute complaints alleging, and to bring civil actions pursuant to Section 52.5 of the Civil Code for, a violation of Section 236.1 of the Penal Code. Damages awarded in any action brought by the department pursuant to Section 52.5 of the Civil Code shall be awarded to the person harmed by the violation of Section 236.1 of the Penal Code. Costs and attorney's fees awarded in any action brought by the department pursuant to Section 52.5 of the Civil Code shall be awarded to the department. The remedies and procedures of this part shall be independent of any other remedy or procedure that might apply.

(4) To receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful pursuant to Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1, except for complaints relating to educational equity brought under Chapter 2 (commencing with Section 200) of Part 1 of Division 1 of Title 1 of the Education Code and investigated pursuant to the procedures set forth in Subchapter 5.1 of Title 5 of the California Code of Regulations, and not otherwise within the jurisdiction of the department.

(5) To receive, investigate, conciliate, mediate, and prosecute complaints alleging practices made unlawful pursuant to Section 1197.5 of the Labor Code. The department shall, in coordination with the Division of Labor Standards Enforcement within the Department of Industrial Relations, adopt procedures to ensure that the departments coordinate activities to enforce Section 1197.5 of the Labor Code.

(A) Nothing in this part prevents the director or the director's authorized representative, in that person's discretion, from making, signing, and filing a complaint pursuant to Section 12960 or 12961 alleging practices made unlawful under Section 11135.

(B) Remedies available to the department in conciliating, mediating, and prosecuting complaints alleging these practices are the same as those available to the department in conciliating, mediating, and prosecuting complaints alleging violations of Article 1 (commencing with Section 12940) of Chapter 6.

(g) In connection with any matter under investigation or in question before the department pursuant to a complaint filed under Section 12960, 12961, or 12980:

(1) To issue subpoenas to require the attendance and testimony of witnesses and the production of books, records, documents, and physical materials.

(2) To administer oaths, examine witnesses under oath and take evidence, and take depositions and affidavits.

(3) To issue written interrogatories.

(4) To request the production for inspection and copying of books, records, documents, and physical materials.

(5) To petition the superior courts to compel the appearance and testimony of witnesses, the production of books, records, documents, and physical materials, and the answering of interrogatories.

(h) To bring civil actions pursuant to Section 12965 or 12981 of this code, or Title VII of the Civil Rights Act of 1964 (Public Law 88-352; 42 U.S.C. Sec. 2000 et seq.), as amended, the federal Americans with Disabilities Act of 1990 (Public Law 101-336; 42 U.S.C. 12101, et seq.), as amended, or the federal Fair Housing Act (42 U.S.C. Sec. 3601 et seq.), and to prosecute those civil actions before state and federal trial courts.

(i) To issue those publications and those results of investigations and research as in its judgment will tend to promote goodwill and minimize or eliminate discrimination in employment on the bases enumerated in this part and discrimination in housing because of race, religious creed, color, sex, gender, gender identity, gender expression, marital status, national origin, ancestry, familial status, disability, veteran or military status, genetic information, or sexual orientation.

(j) To investigate, approve, certify, decertify, monitor, and enforce nondiscrimination programs proposed by a contractor to be engaged in pursuant to Section 12990.

(k) To render annually to the Governor and to the Legislature a written report of its activities and of its recommendations.

(l) To conduct mediations at any time after a complaint is filed pursuant to Section 12960, 12961, or 12980. The department may end mediation at any time.

(m) The following shall apply with respect to any accusation pending before the former Fair Employment and Housing Commission on or after January 1, 2013:

(1) If an accusation issued under former Section 12965 includes a prayer either for damages for emotional injuries as a component of actual damages, or for administrative fines, or both, or if an accusation is amended for the purpose of adding a prayer either for damages for emotional injuries as a component of actual damages, or for administrative fines, or both, with the

consent of the party accused of engaging in unlawful practices, the department may withdraw an accusation and bring a civil action in superior court.

(2) If an accusation was issued under former Section 12981, with the consent of the aggrieved party filing the complaint, an aggrieved person on whose behalf a complaint is filed, or the party accused of engaging in unlawful practices, the department may withdraw the accusation and bring a civil action in superior court.

(3) Where removal to court is not feasible, the department shall retain the services of the Office of Administrative Hearings to adjudicate the administrative action pursuant to Sections 11370.3 and 11502.

(n) On any Section 1094.5 Code of Civil Procedure challenge to a decision of the former Fair Employment and Housing Commission pending on or after January 1, 2013, the director or the director's designee shall consult with the Attorney General regarding the defense of that writ petition.

SEC. 3. Chapter 10 (commencing with Section 12999) is added to Part 2.8 of Division 3 of Title 2 of the Government Code, to read:

CHAPTER 10. Annual Pay Data Report

12999. (a) On or before March 31, 2021, and on or before March 31 each year thereafter, a private employer that has 100 or more employees and who is required to file an annual Employer Information Report (EEO-1) pursuant to federal law shall submit a pay data report to the department covering the prior calendar year, which, for purposes of this section, shall be referred to as the "Reporting Year." The department shall make the reports available to the Division of Labor Standards Enforcement upon request.

(b) The pay data report shall include the following information:

(1) The number of employees by race, ethnicity, and sex in each of the following job categories:

(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.

(J) Service workers.

(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.

(3) For purposes of establishing the numbers required to be reported under paragraph (1), an employer shall create 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) For purposes of establishing the numbers to be reported under paragraph (2), the employer shall calculate the total earnings, as shown on the Internal Revenue Service Form W-2, for each employee in the "snapshot," for the entire "Reporting Year," regardless of whether or not an employee worked for the full calendar year. The employer shall tabulate and report the number of employees whose W-2 earnings during the "Reporting Year" fell within each pay band.

(c) The employer shall include in the report the total number of hours worked by each employee counted in each pay band during the "Reporting Year."

(d) For employers with multiple establishments, the employer shall submit a report for each establishment and a consolidated report that includes all employees. The report shall include the employer's North American Industry Classification System (NAICS) code.

(e) The report shall include a section for employers to provide clarifying remarks regarding any of the information provided. An employer is not required to provide clarifying remarks.

(f) The information required by this section shall be made available in a format that allows the department to search and sort the information using readily available software.

(g) If an employer submits to the department a copy of the employer's Employer Information Report, otherwise known as an EEO-1 Report, containing the same or substantially similar pay data information required under this section, then the employer is in compliance with this section.

(h) If the department does not receive the required report from an employer, the department may seek an order requiring the employer to comply with these requirements and shall be entitled to recover the costs associated with seeking the order for compliance.

(i) It shall be unlawful for any officer or employee of the department or the Division of Labor Standards Enforcement 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 or the department under Section 1197.5 of the Labor Code or Section 12940 involving that information, and only to the extent necessary for purposes of the enforcement proceeding. For the purposes of this section, "individually identifiable information" means data submitted pursuant to this section that is associated with a specific person or business.

(j) Any individually identifiable information submitted to the department pursuant to this section shall be considered confidential information and not subject to disclosure pursuant to the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1).

(k) Notwithstanding subdivision (i), the department may develop, publish on an annual basis, and publicize aggregate reports based on the data obtained pursuant to their authority under this section, provided that the aggregate reports are reasonably calculated to prevent the association of any data with any individual business or person.

(l) The department shall maintain pay data reports for not less than 10 years.

(m) For purposes of this section, both of the following definitions shall apply:

(1) "Employee" means an individual on an employer's payroll, including a part-time individual, whom the employer is required to include in an EEO-1 Report and for whom the employer is required to withhold federal social security taxes from that individual's wages.

(2) "Establishment" means an economic unit producing goods or services.

(n) Upon request by the department, no later than 60 days from the date of the request, the Employment Development Department shall provide the department with the names and addresses of all businesses with 100 or more employees in order to ensure compliance with this section.

SEC. 4. The Legislature finds and declares that Section 3 of this act, which adds Section 12999 to the Government Code, imposes a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision, the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:

To maintain the privacy of individuals who are the subject of sensitive information, that employers are required to report, regarding compensation and hours worked, sorted by gender, race, ethnicity, and job category in order to measure progress and further the state's goal of achieving equal pay for women and people of color.