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SB-1162 Employment: Salaries and Wages. (2021-2022)

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Senate Bill No. 1162

CHAPTER 559

An act to amend Section 12999 of the Government Code, and to amend Section 432.3 of the Labor Code, relating to employment.

[Approved by Governor September 27, 2022. Filed with Secretary of State September 27, 2022.]

LEGISLATIVE COUNSEL'S DIGEST

SB 1162, Limón. Employment: Salaries and Wages.

Existing law establishes the Civil Rights Department 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.

Existing law requires a private employer that has 100 or more employees and is required to file an annual Employer Information Report (EEO-1) pursuant to federal law to submit a pay data report to the department that contains specified employee information on or before March 31, 2021, and on or before March 31 each year thereafter. Existing law prescribes the information that must be included in the pay data report, including the number of employees by race, ethnicity, and sex in specified job categories. Existing law requires employers with multiple establishments to submit a report for each establishment and a consolidated report that includes all employees. Existing law permits the department to develop, publish on an annual basis, and publicize aggregate reports, provided that the aggregate reports are reasonably calculated to prevent the association of any data with any individual business or person.

Existing law provides that an employer is in compliance with the requirement that it submit a pay data report if it submits an EEO-1 to the department containing the same or substantially similar pay data information. Existing law permits the department to seek an order requiring an employer to comply with these provisions and permits it to recover the costs associated with seeking the order for compliance.

This bill would, instead, require a private employer that has 100 or more employees to submit a pay data report to the department. This bill would revise the timeframe in which a private employer is required to submit this information to require that it be provided on or before the second Wednesday of May 2023, and for each year thereafter on or before the second Wednesday of May. This bill would also require a private employer that has 100 or more employees hired through labor contractors, as defined, to also submit a separate pay data report to the department for those employees in accordance with the above timeframe, as specified.

This bill would require the pay data reports to include the median and mean hourly rate for each combination of race, ethnicity, and sex within each job category. This bill would delete a provision requiring employers with multiple establishments to submit a consolidated report. This bill would delete the provision authorizing an employer to submit an EEO-1 in lieu of a pay data report. This bill would permit a court to impose a civil penalty not to exceed one hundred dollars (\$100) per employee upon any employer

who fails to file the required report and not to exceed two hundred dollars (\$200) per employee upon any employer for a subsequent failure to file the required report. The bill would require those penalties to be deposited in the Civil Rights Enforcement and Litigation Fund.

Existing law creates the Division of Labor Standards Enforcement, under the direction of the Labor Commissioner, within the Department of Industrial Relations to enforce labor laws. Existing law requires an employer, upon reasonable request, to provide the pay scale for a position to an applicant applying for employment. Existing law defines pay scale for these purposes to mean salary or hourly wage range.

This bill would also require an employer, upon request, to provide to an employee the pay scale for the position in which the employee is currently employed. The bill would require an employer with 15 or more employees to include the pay scale for a position in any job posting. The bill would require an employer to maintain records of a job title and wage rate history for each employee for a specified timeframe, to be open to inspection by the Labor Commissioner. The bill would create a rebuttable presumption in favor of an employee's claim if an employer fails to keep records in violation of these provisions. The bill would require an employer with 15 or more employees that engages a third party to announce, post, publish, or otherwise make known a job posting to provide the pay scale to the third party and would require the third party to include the pay scale in the job posting. The bill would require the Labor Commissioner to investigate complaints alleging violations of these requirements and would authorize the commissioner to order an employer to pay a civil penalty upon finding an employer has violated these provisions. The bill would also authorize a person aggrieved by a violation of these provisions to bring a civil action for injunctive and any other appropriate relief.

This bill would require deposit of the civil penalties collected pursuant to these provisions into the Labor Enforcement and Compliance Fund, and would authorize these funds to be used, upon appropriation by the Legislature, for administration and enforcement of these provisions.

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

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

SECTION 1. Section 12999 of the Government Code, as amended by Section 178 of Chapter 615 of the Statutes of 2021, is amended to read:

12999. (a) (1) On or before the second Wednesday of May 2023, and on or before the second Wednesday of May of each year thereafter, a private employer that has 100 or more employees 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."

(2) On or before the second Wednesday of May 2023, and on or before the second Wednesday of May of each year thereafter, a private employer that has 100 or more employees hired through labor contractors within the prior calendar year shall submit a separate pay data report to the department covering the employees hired through labor contractors in the prior calendar year. The private employer shall also disclose on the pay data report the ownership names of all labor contractors used to supply employees. A labor contractor shall supply all necessary pay data to the private employer.

(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) Within each job category, for each combination of race, ethnicity, and sex, the median and mean hourly rate.

(4) 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."

(5) For purposes of establishing the numbers to be reported under paragraphs (2) and (3), 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.

(6) 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."

(7) The report shall include the employer's North American Industry Classification System (NAICS) code.

(c) For employers with multiple establishments, the employer shall submit a report covering each establishment.

(d) 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.

(e) 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.

(f) 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. Upon request by the department, a court may impose a civil penalty not to exceed one hundred dollars (\$100) per employee upon any employer who fails to file the required report and not to exceed two hundred dollars (\$200) per employee upon any employer for a subsequent failure to file the required report. Any penalty under this subdivision shall be payable to the Civil Rights Enforcement and Litigation Fund established under Section 12907. If the employer is unable to submit a complete and accurate report because a labor contractor has not provided the pay data as required under paragraph (2) of subdivision (a), the court may apportion an appropriate amount of penalties to any labor contractor that has failed to provide the pay data to the employer.

(g) 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.

(h) 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 (Division 10 (commencing with Section 7920.000) of Title 1).

(i) Notwithstanding subdivision (g), 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.

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

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

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

(2) "Labor contractor" means an individual or entity that supplies, either with or without a contract, a client employer with workers to perform labor within the client employer's usual course of business.

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

(l) 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.

(m) The amendments made to this section by Senate Bill 1162 of the 2021–22 Regular Session of the Legislature shall not affect the requirement of employers to file reports in 2021 and 2022 pursuant to this section as it read on December 31, 2022, or the department's authority to pursue those employers on and after January 1, 2023.

SEC. 2. Section 432.3 of the Labor Code, as amended by Section 320 of Chapter 615 of the Statutes of 2021, is amended to read:

432.3. (a) An employer shall not rely on the salary history information of an applicant for employment as a factor in determining whether to offer employment to an applicant or what salary to offer an applicant.

(b) An employer shall not, orally or in writing, personally or through an agent, seek salary history information, including compensation and benefits, about an applicant for employment.

(c) (1) An employer, upon reasonable request, shall provide the pay scale for a position to an applicant applying for employment.

(2) An employer, upon request, shall provide an employee the pay scale for the position in which the employee is currently employed.

(3) An employer with 15 or more employees shall include the pay scale for a position in any job posting.

(4) An employer shall maintain records of a job title and wage rate history for each employee for the duration of the employment plus three years after the end of the employment in order for the Labor Commissioner to determine if there is still a pattern of wage discrepancy. These records shall be open to inspection by the Labor Commissioner.

(5) An employer with 15 or more employees that engages a third party to announce, post, publish, or otherwise make known a job posting shall provide the pay scale to the third party. The third party shall include the pay scale in the job posting.

(d) (1) A person who claims to be aggrieved by a violation of this section may file a written complaint with the Labor Commissioner within one year after the date the person learned of the violation. The complaint shall state the name and address of the employer and shall provide a detailed account of the alleged violation, as may be required by the Labor Commissioner.

(2) A person who claims to be aggrieved by a violation of this section may also bring a civil action for injunctive relief and any other relief that the court deems appropriate.

(3) The Labor Commissioner shall promptly investigate complaints alleging violation of this section.

(4) Upon finding that an employer has violated this section, the Labor Commissioner may order the employer to pay a civil penalty of no less than one hundred dollars (\$100) and no more than ten thousand dollars (\$10,000) per violation. The Labor Commissioner shall determine the amount of the penalty based on the totality of the circumstances, including, but not limited to, whether the employer has previously violated this section. For a first violation of subdivision (c), no penalty shall be assessed upon demonstration by the employer that all job postings for open positions have been updated to include the pay scale as required by this section.

(5) If an employer fails to keep records in violation of this section, there shall be a rebuttable presumption in favor of the employee's claim.

(e) Section 433 does not apply to this section.

(f) This section does not apply to salary history information disclosable to the public pursuant to federal or state law, including the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1 of the Government Code) or the federal Freedom of Information Act (Section 552 of Title 5 of the United States Code).

(g) This section applies to all employers, including state and local government employers and the Legislature.

(h) Nothing in this section shall prohibit an applicant from voluntarily and without prompting disclosing salary history information to a prospective employer.

(i) If an applicant voluntarily and without prompting discloses salary history information to a prospective employer, nothing in this section shall prohibit that employer from considering or relying on that voluntarily disclosed salary history information in determining the salary for that applicant.

(j) Nothing in this section shall prohibit an employer from asking an applicant about the applicant's salary expectation for the position being applied for.

(k) Consistent with Section 1197.5, nothing in this section shall be construed to allow prior salary to justify any disparity in compensation.

(l) All civil penalties collected pursuant to this section shall be deposited into the Labor Enforcement and Compliance Fund for distribution to the Division of Labor Standards Enforcement. Upon appropriation by the Legislature, these funds may be expended by the division to cover reasonable ongoing costs of administering and enforcing this section.

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

(1) "Pay scale" means the salary or hourly wage range that the employer reasonably expects to pay for the position.

(2) "Applicant" or "applicant for employment" means an individual who is seeking employment with the employer and is not currently employed with that employer in any capacity or position.