

## Don't Let Your California Wage Report Turn into Your Next Discrimination Litigation: California's New Compensation Reporting Requirement

Main takeaway points from new California regulations:

1. **New Regulation** – By March 31, 2021, California employers must file California's SB-973
  - Equivalent to EEO-1 Component 2 data
2. **New Risk** – Your filing may indicate wage discrimination
  - Leading to regulatory review and/or litigation
3. **Your Response** – Test your SB-973 data for discrimination before March 31, 2021 filing
  - Use the same tests regulators suggest
4. **Simple, Fast Task Plan** – Test, Correct, Adjust, and **THEN** file
  - Improve equity and reduce your risk of California "EEOC" review

The filing deadline is around the corner. Test your data for discrimination now before filing.

### I. The New Regulation

Based on the California Senate Bill SB-973, the California Department of Fair Employment and Housing (DFEH) requires private employers in California with over 99 employees nationwide to file wage data, similar to the EEO-1 Component 2, by March 31, 2021. The report requires employers to report aggregate information on the number of employees and hours worked, by twelve pay bands for each of ten job-groups. The stated purpose of the data collection is to test for and enforce equal pay and pay discrimination laws.

#### Overview and Origins of California DFEH Requirement in the EEO-1 Component 2 Requirements

The California DFEH SB-973 has its origins in the Federal EEO-1 Component 2 Requirements and has similar requirements, with some exceptions. In 2016, the Obama Administration

established the EEO-1 Component 2 data collection, expanding the scope of the EEO-1 data collection to include wage data. The collection of the EEO-1 Component 2 data was halted in 2017, before any data were collected, under the Trump Administration by order of the Office of Management and Budget.<sup>1</sup> However, in 2019 the U.S. District Court for the District of Columbia Judge ordered the collection of the EEO-1 Component 2 data for the years 2017 and 2018 by September 2019.<sup>2</sup> The EEO-1 Component 2 data were collected for 2017/2018, but further collection was halted in 2020.<sup>3</sup>

The new EEO-1 Component 2 data gathered additional information that Component 1 did not. Component 1 collected counts of employees, by establishment, for each of 10 EEO-1 Job Groupings for 14 gender and race/ethnicity combinations, requiring employers to report up to 140 “cells” of data for each Establishment within the company. Component 2 collected all the information in Component 1, but also required employee counts in each of 12 wage bands, potentially requiring 1,680 cells of information for each Establishment within a company. Component 2 further required employers to report hours worked in each of those same 12 pay bands, EEO-1 Job Grouping and gender/race combination, requiring an additional 1,680 cells of information to be reported for each establishment. These new regulations required employers to turn over substantially more pay data to the government.

The EEOC indicated that it would conduct a series of statistical tests on the EEO-1 Component 2 pay data:

“Statistical tests will be used as an initial check of the W-2 data to be collected on the EEO-1, specifically, statistical significance tests that do not rely on an assumption of a normal distribution.”<sup>4</sup>

In particular, the EEOC indicated that it would implement the Kruskal-Wallis Test and the Mann-Whitney Test, two well-known statistical tests that can be used to determine whether there are differences in the distribution of pay between demographic groups. Using the data collected by the EEOC, these tests could determine whether men tend to be more concentrated than

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<sup>1</sup> <https://www.eeoc.gov/employers/questions-and-answers-2017-eeo-1-report>

<sup>2</sup> [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2017cv2458-45](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2017cv2458-45)

<sup>3</sup> <https://www.theemployerhandbook.com/files/2020/02/download.pdf>

<sup>4</sup> <https://www.federalregister.gov/documents/2016/02/01/2016-01544/agency-information-collection-activities-revision-of-the-employer-information-report-eeo-1-and>

women in the higher pay groups, or *vice versa*. The EEOC also indicated that interval regressions could determine whether counts of men and women, by pay group, were similar, after accounting for hours worked.

## **SB-973 in California**

Reporting Form and Requirements: The California DFEH implements data reporting similar to the EEO-1 Component 2 data reporting requirements:

“To ease reporting by employers, DFEH is endeavoring to create a system that closely resembles the EEOC’s system to the extent permitted by state statute.”<sup>5</sup>

Employers have to submit data on March 31 annually for the previous reporting year (January 1 through December 31) providing a snapshot of their employees. The snapshot is gathered by capturing the workforce on a week between October 1 and December 31 of the reporting year. Data must be reported for employers with at least 100 employees, some of whom can reside or work outside of California.<sup>6</sup>

The specific data that California employers must collect are also similar to the data collected for the EEOC, including pay data by gender, race, and ethnicity. In fact, California accepts the EEO-1 Report as meeting their requirements:

“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.”<sup>7</sup>

However, there are some important differences, related to how hours, and holidays and gender are handled.

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<sup>5</sup> <https://www.dfeh.ca.gov/paydatareporting/faqs>

<sup>6</sup> <https://www.dfeh.ca.gov/paydatareporting/faqs>

<sup>7</sup> [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200SB973](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB973)

## II. New Risks

California's DFEH will keep your data for years with the intent of testing for pay inequity. The data you give them later this month creates years of regulatory, pay equity exposure.

Retention and Use of Data: The DFEH will retain your data for many years.

"The bill would require the DFEH to maintain the pay data reports for a minimum of 10 years."<sup>8</sup>

and:

"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."<sup>9</sup>

California Says Data Is For Statistical Detection of Discrimination: In addition, SB-973 states the data will be collected for detection and enforcement of discrimination. The bill states that its purpose is:

"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."<sup>10</sup>

The California DFEH maintains a webpage it updates regularly to provide guidance for companies looking to understand the requirements of SB-973. The URL is:

<https://www.dfeh.ca.gov/paydatareporting/>.

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<sup>8</sup> [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200SB973](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB973)

<sup>9</sup> [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200SB973](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB973)

<sup>10</sup> [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201920200SB973](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB973)

### III. Your Response

Using the same statistical tests referenced by the EEOC will allow you to see what the DFEH might find in your data before you file it and make corrections, while you can.

#### Statistical Analyses

Given the DFEH's direct references to the EEOC data collection in discussing the form and intent of the SB-973 data collection, the statistical tests mentioned by the EEOC are appropriate and reasonable to apply to the SB-973 data to determine what the DFEH might find. The EEOC referenced statistical tests include the Mann-Whitney Tests, Kruskal-Wallis Tests and Interval Regressions, which are briefly described below.

The **Mann-Whitney** and **Kruskal-Wallis Tests** are useful for the EEOC and DFEH to evaluate whether protected class members were, on average, in lower pay bands than employees in a non-protected class.

The **Mann-Whitney Test** rank orders employees by pay band and then sums the rank ordering for a protected class of employees and for the non-protected class of employees to determine which group has a higher "overall rank order" and whether the difference in the sum of the ranks is statistically significant. For example, if there is one man and no women in the highest pay band and one woman and no men in the second highest pay band, the man in the highest pay band will have a rank of 1 and the woman will have a rank of 2. All other employees will be ranked similarly and their rankings will be summed. The **Mann-Whitney Test** then evaluates whether the protected class of employees had a statistically significant lower ranking than the non-protected class members.

The **Kruskal-Wallis Test** performs a similar calculation to the **Mann-Whitney Test** except that it can evaluate more than two groupings of people at the same time, determining whether any one or more groups is statistically significantly above or below the other groups. This test allows the regulators to determine whether pay was similar across multiple race/ethnicity groups.

Given that the DFEH also collects information on hours worked, an **Interval Regression**, another statistical methodology proposed by the EEOC, is a reasonable analysis that could evaluate disparity in pay. **Interval Regressions** evaluate whether protected class members are in lower

pay bands than non-protected class members, accounting for hours worked. Since the DFEH will collect pay bands rather than actual pay, an **Interval Regression** rather than a multiple regression analysis is referenced by the EEOC.

## IV. Simple, Fast Task Plan

Before you file your data, it is easy to test it, review the results, and correct typos, job misclassifications and other errors.

Statistical testing, such as the EEOC references, can be performed using simple software. These statistical tests will often reveal issues in your data ranging from typos to misclassified individuals, which you can easily fix before you file. While the DFEH data does not allow for any explanatory variables, if you see a problem based on that data, you can investigate why these potential pay disparities exist or at least be aware that there is potential exposure. Testing services like [EquityTest](#), a user-friendly, cloud-based service created by [EquiCalc](#), can be used for simple tests as well as more complex tests that explore the effect of explanatory variables.

**Join EquiCalc on March 23 at 2 pm EST for our Pay Equity Webinar titled “California’s New Wage Reporting Requirement: How to Prepare Now to Avoid Becoming a Litigation Target”**

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