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## *DFEH Issues FAQs on New Pay Data Reporting Requirements*

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On the heels of California's new pay reporting statute, SB 973 (codified as California Government Code section 12999), the California Department of Fair Employment and Housing ("DFEH") has issued FAQs to answer many common questions about compliance with the new law.

To recap, on September 30, 2020, California Governor Gavin Newsom signed SB 973, which requires private employers with 100 or more employees to submit an annual pay data report to DFEH. The first annual report will be due on or before March 31, 2021, and subsequent annual reports will be due on or before March 31 each year thereafter. See our prior alert [here](#) for more information.

But SB 973 did not address a number of critical issues, such as which employees count towards the 100-employee threshold; whether employers are required to submit data on employees working outside of California; or how employers should submit their reports to DFEH. As a result, employers faced a number of uncertainties just a few months before the first compliance deadline. DFEH promised to issue FAQs to clarify these and other questions, which are now available [here](#). Below are some of the highlights:

- The FAQs confirm that **employers must count employees located both inside and outside of California** when determining whether they meet the requisite 100-employee threshold (and thus are required to submit a report). Of note, however, employers with **no** employees in California during the reporting year are not required to file a report. Thus, as the FAQs summarize, "an employer is required to file a pay data report with DFEH if the employer has 100 or more employees (inside and outside of California), is required to file an EEO-1 report, and has at least one employee in California."
- Furthermore, employers with fewer than 100 employees during their chosen snapshot period may still be required to file a report if they "regularly employed 100 or more employees during the Reporting Year." The FAQs explain that "[r]egularly employed 100 or more employees during the Reporting Year" means that an employer "employed 100 or more individuals on a regular basis during the Reporting Year." In turn, "regular basis" refers to the nature of a business that is recurring, rather than constant.
  - To illustrate, the FAQs provide the following example: in an industry that typically has a three-month season during a calendar year, an employer that employed 100 or more employees during that season regularly employed the requisite number of employees.

Thus, that employer “would be required to file a pay data report to DFEH, if the employer is also required to file an EEO-1 Report.”

- In addition, employers must count part-time employees the same as full-time employees towards the 100-employee threshold, just as they must also count employees who are on paid or unpaid leave, disciplinary suspension, or any other employer-approved leave of absence.
- As to which employees must be included in an employer’s annual report, the FAQs confirm that employers **must** include their employees assigned to California establishments and/or working within California, but **may** include other employees as well.
  - Employees who telework from a residence outside of California, but are assigned to an establishment in California, should be included on the report.
  - Employees who telework from a residence in California, but are assigned to an establishment outside of California, should be included on the report. In such case, DFEH provides employers with two options: they can include the employees on an establishment report that covers (1) only those employees teleworking from California and who are assigned to a single establishment outside of California; **or** (2) all employees assigned to that establishment outside of California.
  - For any employees who both reside outside of California and are assigned to an establishment outside of California, employers **may** include those employees on their reports, but they are not required to do so.
- In sum, per the FAQs, DFEH expects that “a single-establishment employer in California will include on its pay data report all employees (including any employees outside of California) whether or not teleworking.” Likewise, DFEH expects that “a multiple-establishment employer with establishments only in California will include across its establishment reports and in its consolidated report all employees (including any employees outside of California) whether or not teleworking.”
- With regard to the actual submission of the annual reports to DFEH, the FAQs note that employers will be able to make their submissions through a “secure online reporting system” that is not yet operational. DFEH anticipates rolling out that system, which will “closely resemble[] the EEOC’s system to the extent permitted by state statute,” in advance of the 2021 filing deadline. In addition, DFEH intends to issue standard forms for employers to submit their reports.
- The FAQs also address retention and potential publication of submitted data. For example, the FAQs state that DFEH may publish reports based on aggregated data from multiple employers, provided that the aggregate reports are “reasonably calculated to prevent the association of any data with any individual business or person.” In addition, the FAQs confirm that DFEH “shall maintain pay data reports for not less than 10 years,” pursuant to Section 12999(l) of the law.

DFEH will be “regularly updating” the FAQs with guidance on the above topics and others, including pay, hours worked, multi-establishment employers, acquisitions and mergers, and spinoffs. Employers may also submit questions to DFEH via the following email address: [paydata.reporting@dfeh.ca.gov](mailto:paydata.reporting@dfeh.ca.gov).

In the meantime, employers should work with their counsel to understand their obligations under SB 973 and, as applicable, prepare to submit their first report on or before March 31, 2021. If you have questions about SB 973 or pay equity generally, please contact any member of our Pay Equity Practice Group.



*If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings Los Angeles lawyers:*

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