

Client Alert

Labor & Employment Practice Group

February 11, 2016

EEOC Seeks to Expand EEO-1 Form to Include Pay Data

The Equal Employment Opportunity Commission (EEOC) has announced plans to require employers to provide information about employee pay and hours worked as part of their annual EEO-1 reports. The EEOC's proposal, which was published in the Federal Register on February 1, 2016, would apply to employers with 100 or more employees and would take effect with the 2017 reporting cycle. The EEOC contends that the additional data will help the EEOC and the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) identify possible pay discrimination issues.

Current EEO-1 Data Collection

Currently, EEOC regulations require federal contractors with 50 or more employees and private employers with 100 or more employees to file an annual EEO-1 report listing the number of individuals they employ by ten job categories and by race, ethnicity, and sex.¹ A sample of the currently approved EEO-1 report is located at:

<http://www.eeoc.gov/employers/eeo1survey/upload/eeo1-2.pdf>

Proposed Expanded EEO-1 Data Collection

The EEOC proposes expanding the EEO-1 report to include pay data. The proposed EEO-1 data collection consists of two components. Component 1 would collect the same data as the currently approved EEO-1. Component 2 (which covers data that is not currently collected) would collect data on employees' total W-2 earnings and hours worked. An illustration of the data that would be collected by both Components 1 and 2 is located at:

http://www.eeoc.gov/employers/eeo1survey/2016_new_survey.cfm

W-2 Pay Data

Rather than collecting pay data for each individual employee separately, Component 2 would collect aggregate W-2 data in 12 pay bands² for the 10 EEO-1 job categories. Employers would be required to count and report the number of employees in each pay band. The EEOC has stated that Component 2 will not require employers to collect new data but rather will require the reporting of W-2 pay data that employers already maintain in the

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normal course of business. Timing will be an issue. The EEO-1 must be filed by September 30th of each year. While it is true that federal law already requires employers to generate W-2s for each of their employees, W-2 data is often not compiled until the end of the calendar year. In order to meet the September 30th EEO-1 deadline, W-2 data will have to be compiled by employers earlier in the year, which will place an additional burden on employers.

Hours Worked Data

In addition to W-2 data, Component 2 would collect the total number of hours worked by the employees included in each EEO-1 pay band. While this data may be relatively simple to compile for hourly workers, it is unclear how this data will be compiled and reported for salaried employees. The EEOC has not proposed requiring employers to collect data on actual hours worked for salaried workers. One potential approach proposed by the EEOC would be for employers to use an estimate of 40 hours per week for full-time salaried workers. The EEOC is seeking employer input with respect to how to report hours worked for salaried employees and is encouraging employers to comment on this issue. The public comment period ends on April 1, 2016.

Timing

For the 2016 reporting cycle, all EEO-1 filers will only be required to submit Component 1 data. Beginning with the 2017 reporting cycle, employers that have 100 or more employees will be required to submit Components 1 and 2. Federal contractors that have between 50 and 99 employees will only be required to submit Component 1.

Mandatory Electronic Filing

Additionally, beginning in 2017, all employers would be required to submit the proposed EEO-1 data electronically. According to the EEOC, as of 2014, all but three of the 67,146 EEO-1 filers already submitted their EEO-1 data electronically, so according to the EEOC, this requirement should not impose an additional burden on the vast majority of employers. That does not necessarily, however, take into consideration compiling and electronically filing the required compensation information.

Analysis of Pay and Hours Worked Data

The EEOC and OFCCP plan to analyze the data regarding pay and hours worked in order to assess discrimination complaints, guide agency investigations, and identify pay disparities that may warrant a closer examination. In order to accomplish this, the agencies plan to develop software that will allow investigators to conduct an initial analysis by looking at W-2 pay distribution within a single employer and comparing the employer's data to aggregate industry and/or metropolitan-area data. It remains to be seen how well these analyses take into account the many individualized factors that affect compensation. Analyzing bare W-2 pay data without context may lead to erroneous charges of pay discrimination, as there are many factors that determine an employee's total compensation besides just the number of hours worked, such as seniority, level of education, and performance.

Confidentiality Concerns

Employer data collection necessarily raises confidentiality concerns. The EEOC is required to keep EEO-1 data confidential under Section 709(e) of Title VII, which forbids "any [EEOC] officer or employee" from making "public in any manner whatever any information obtained by the Commission ... prior to the institution of any [Title VII] proceeding ... involving such information." 42 U.S.C. 2000e-8(e). Any EEOC officer or employee who violates this prohibition is guilty of a misdemeanor. *Id.* The EEOC does publish aggregate EEO-1 data, however, in a way that does not reveal any individual employer's data. For example, the EEOC has published aggregate EEO-1 data at the national,

regional, and industry levels, and the EEOC has also published reports analyzing aggregate EEO-1 data based on industry or particular groups of people.

Should you need assistance in evaluating your company's obligations under the EEOC's proposed changes to the EEO-1 report, please contact your King & Spalding Labor & Employment attorney.

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¹ The term "federal contractor" refers to federal contractors and first-tier subcontractors that satisfy the employee and contract size coverage criteria that subject them to the EEO-1 reporting obligations. The term "private employer" refers to all other entities required to file the EEO-1 that are not included in the "federal contractor" designation.

² The 12 proposed pay bands are: (1) \$19,239 and under; (2) \$19,240-\$24,439; (3) \$24,440-\$30,679; (4) \$30,680-\$38,999; (5) \$39,000-\$49,919; (6) \$49,920-\$62,919; (7) \$62,920-\$80,079; (8) \$80,080-\$101,919; (9) \$101,920-\$128,959; (10) \$128,960-\$163,799; (11) \$163,800-\$207,999; and (12) \$208,000 and over.