

EEOC Announces Revised Proposal for U.S. Employers To Report Pay And Hours Data

On July 14, 2016, the U.S. Equal Employment Opportunity Commission ("EEOC") unveiled its amended proposal to collect summary pay data from U.S. employers with 100 or more employees. Under the proposed amendments, employers who already file an Employer Information Report (EEO-1) will be required to also report pay by gender, race, and ethnicity, across 12 pay bands, by March 31, 2018. Covered employers should start considering now how to adjust their pay, collection, and reporting processes.

Background

In January 2016, the EEOC announced a proposed revision to the EEO-1, which would require employers with 100 or more employees to begin reporting pay data across 10 job categories by sex, race, and ethnicity. The January proposal added 12 new pay bands for each of the existing 10 EEO-1 job categories, requiring employers to tabulate and report the number of employees by race, gender, and ethnicity whose W-2 earnings for the prior 12-month period fell within each pay band by job category. The January proposal would have required employers to report hours-worked data on the EEO-1 form as well.

In response to feedback received during the comment period, the EEOC published its amended proposal on July 14th, 2016. The public has 30 days until August 15, 2016, to submit comments to the amended regulations.

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The Revised Regulations

- **Which Employers Are Covered.** The EEOC considered comments urging for smaller employers to be exempt from the pay reporting requirements but did not adopt them. The proposed regulations continue to apply to all employers with at least 100 employees.
- **Timing Requirements.** The revisions propose to change the EEO-1 filing deadline from September 30th to March 31st of every year to better coordinate with the date range covered by existing W-2 reports. The revisions change the reported workforce snapshot to a pay period between October 1st and December 31st of the reporting year, rather than the current July through September time period.

The proposed changes would take effect for EEO-1 filings covering the 2017 reporting year, with covered employers required to file the new pay data component, along with the existing EEO-1 report, by March 31, 2018. The reporting period and requirements for 2016 remains unchanged, and EEO-1 reports for this year are due by September 30, 2016. Thus, no EEO-1 reports would be filed in 2017 and employers will have approximately 18 months to comply with the new requirements.

- **Reported Pay and Hours Data.** In addition to reporting employee information by gender, race, and ethnicity, the revisions continue to propose that employers report the compensation listed for these categories using Box 1 of the Form W-2 as the “measure of pay” for the 12 new pay bands.

The revisions also continue to propose that employers report “hours worked” as a component of the revised EEO-1 form, stating “collecting hours worked is of central importance” to assessing pay disparities. The EEOC proposes to adopt the Fair Labor Standards Act’s definition of “hours worked” for non-exempt employees. There will be two options for employers to report hours worked for exempt employees:

- A proxy of 40 hours a week for full-time exempt employees or 20 hours for part-time exempt employees; or
- Actual hours worked if the employer already maintains accurate records of this information.

In the revisions, the EEOC acknowledged the burden of bridging data normally maintained by a payroll system (W-2 earnings and hours worked) with data maintained in a HRIS system (gender, race, ethnicity), but explained that employers can adjust their systems to make the information collection process easier.

- **Data Confidentiality.** The revisions also continue the long-standing rule of the EEOC not to require any personally identifiable information to be reported, noting the EEO-1 pay and hours-worked data to be reported by employers is anonymous and aggregated. The revisions detail how the EEOC, in turn, cannot disclose any of the received EEO-1 data to the public, except in an aggregated format that protects the confidentiality of each individual employer's report. The only exception is when a Title VII employment discrimination claim is filed that involves that information.

The revisions do note, however, that federal contractors' EEO-1 reports will be forwarded to the Office of Federal Contract Compliance Programs (“OFCCP”) through the Joint Reporting Committee. Unlike the EEOC, the OFCCP is not covered by the same confidentiality rules and the OFCCP can respond to requests for contractor reports under the Freedom of Information Act (“FOIA”). The proposed revisions point to the OFCCP’s use of the FOIA process to notify contractors regarding any requests for their EEO-1 pay data, and contractor's ability to provide valid objections. The revisions state, “[i]f a contractor objects to disclosure, OFCCP will not disclose the data if OFCCP determines that the contractor's objection is valid. FOIA Exemptions 3 and 4 recognize the value of this data and provide, in combination with the Trade Secrets Act, the necessary tools to appropriately protect it from public disclosure.”

- **Comment Period.** The revisions provide for an additional 30-day public comment period. Any comments to the EEOC must be submitted on or before August 15, 2016.

These revisions represent the latest attempt by the EEOC and OFCCP to collect data to identify pay disparities across gender, race, and ethnicity. The EEOC plans to use the pay data to “assess complaints of discrimination, focus agency investigations, and identify existing pay disparities that may warrant further examination.”

What U.S. Employers Should Do Now

Covered employers should use the next 18 months to prepare for the final reporting rule in the following ways:

- Inventory jobs by the 12 new pay bands for each of the existing 10 EEO-1 job categories;
- Evaluate, and adjust if necessary, internal systems to permit a simpler and more straight-forward collection process for pay and hours data, reported by gender, race, and ethnicity;
- Conduct privileged audits to determine if pay disparities exist, and prospectively determine justifications for wage disparities;
- Properly train managers who make compensation decisions about the impact of different initial salary offers, raises and bonuses; and
- Consider submitting comments to the EEOC regarding the EEO-1 revisions before August 15, 2016.

The Global View for Multinational Employers

Generally speaking, the U.S. lags behind much of the globe in implementing pay equity legislation. Many countries already have significant pay data survey and reporting requirements, though with various themes and variations which are important for a multi-national employer to identify. For instance, since 2007, Denmark has required companies to conduct a gender audit to compare salaries based on gender and to publish annual statistics. Since 2009, Sweden has required employers to carry out, but not publish, a pay survey every three years in order to detect, remedy and prevent unjustifiable gender pay differences. Our neighbors to the north in Canada have a long history of pay equity laws that generally require female and male employees to be paid the same for work of equal value in the same establishment. These laws apply to federally-regulated employers, private sector employers in Ontario and Quebec, and public sector employers in certain provinces. The UK is expected to implement regulations requiring employers to publish annual gender pay information beginning April 2018. Accordingly, multinational employers should be aware of and ensure compliance with pay equity-related obligations in all jurisdictions in which they have employees.

How We Can Help

Our Employment Counseling & Litigation attorneys understand the complexities of today's local and global workforces. We work with employers to understand their ultimate business goals, protect their reputation and guide them through the modern day challenges that global businesses face by providing practical advice. Our attorneys help companies navigate these complexities by:

- Routinely providing practical advice to U.S. multinational corporations regarding their reporting and recordkeeping obligations in the U.S. and beyond;
- Conducting privileged audits to determine if pay disparities exist, and help identify and analyze justifications for any statistical wage disparities;
- Evaluating pay equity and reporting obligations and compliance on a global basis, and providing solutions across multiple jurisdictions and cultures using our global footprint; and
- Regularly defending companies against individual employee, class, or "pattern and practice" charges brought by the EEOC. Our track record is both extensive and unrivalled – we have experience in dealing with every possible HR and employment challenge U.S. and multinational employers can face.

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