

Attys React To EEOC's Equal Pay Data Reporting Proposal

Law360, New York (January 29, 2016, 7:49 PM ET) -- The U.S. Equal Employment Opportunity Commission on Friday unveiled plans to require federal contractors and other employers with more than 100 workers to provide more pay data, which the agency says will help uncover potential pay discrimination. Here, attorneys tell Law360 why the proposal is significant.

Jessica Abrahams, Dentons

"Recently, the U.S. government through [the Office of Federal Contract Compliance Programs] and the EEOC has become quite active and continues to require the submission of more and more employee compensation and wage-related information from government contractors. Moreover, the government has stepped up enforcement of relevant legal and regulatory requirements. As a result, the burden on contractors from a compliance perspective is becoming increasingly onerous and creates additional exposure and liability for companies. Furthermore and critically, the new EEOC requirement requires the submission of pay data to be used for purposes of ferreting out instances of wage discrimination, but is unclear on the particulars of how the information will be analyzed and used. Not only does it remain unclear how this plan by the EEOC jibes with certain contractual requirements and other wage-related requirements, but the lack of specificity regarding this plan and its implementation create significant concerns for contractors from both compliance and enforcement perspectives."

Josh Alloy, Arnold & Porter LLP

"This is the latest example of the Obama administration's efforts, with or without legislation, to advance its goal of pay equality on the basis of gender, race and ethnicity. For most employers, it will undoubtedly create additional burdens, costs and risks as they will need to gather and report W-2 pay data to the EEOC. This could provide the EEOC with valuable information into potential pay disparities that could lead to increased scrutiny, investigations or enforcement proceedings. Employers must therefore act diligently to analyze and address, or be prepared to explain, any potential disparities before these reporting obligations become effective."

Tawny Alvarez, Verrill Dana LLP

"The data collected from the proposed EEO-1 revisions strengthens the EEOC's ability to affirmatively file suits without identifying plaintiffs. The proposal builds off of momentum from the EEOC's April 2015 victory in *EEOC v. Rosebud Restaurants Inc.*, where the Northern District of Illinois permitted the EEOC

to proceed in its suit without the identification of an injured party. The proposal goes steps beyond the EEOC's 2013-2016 Strategic Enforcement Plan, which lists as a priority enforcement of equal pay laws by 'targeting compensation systems and practices that discriminate based on gender' and seeks pay information based on both gender and race."

Randy Avram, Kilpatrick Townsend & Stockton LLP

"Today's proposal by the EEOC is very significant. I can see concerns for employers in several areas. First, assembling such a significant amount of data and then to sort by race and sex places a significant burden on employers just to complete the form. The second concern: If the EEOC plans to use the data in any significant way, then it will require further data analysis to comparable job groups, which would require additional work from the employer. Finally, I see some concern among some employers about having the salary data for certain positions available publicly."

Caroline J. Berdzik, Goldberg Segalla

"Today's announcement once again reflects the EEOC's increasingly proactive role in attempting to go out and find evidence of supposed discrimination, as opposed to simply adjudicating the claims that are brought before it. In addition to increasing the already high administrative burdens placed on employers by a myriad of federal, state and local employment laws and administrative agencies, this proposed reporting requirement could make employers more susceptible to EEOC investigations and class action equal pay lawsuits. The urgency for employers to conduct a privileged audit of their pay practices and address any compliance issues has never been greater."

Steve Brown, Bressler Amery & Ross PC

"This development certainly comes as no great surprise and is entirely consistent with the administration's and the EEOC's stated emphasis on identifying and eradicating alleged pay disparity and discrimination in the workplace. Once the EEOC starts gathering and analyzing this newly available pay data, we can expect to see a significant increase in both individual and class pay discrimination litigation. With that in mind, affected employers would be wise to review and self-audit their pay practices well in advance of their September 2017 EEO-1 reporting."

Brett Coburn, Alston & Bird LLP

"EEOC's proposed changes to the EEO-1 form will result in additional burdens on employers, but it is not going to provide data that EEOC or OFCCP can use in any meaningful way to identify unlawful discrimination. The data to be provided in the proposed report will not account for the variety of jobs within each EEO-1 category, nor will it account for any of the various factors that lawfully drive compensation decisions. Additionally, the proposal leaves many questions open, such as, one, what are the agencies going to do with this data — particularly given that EEOC cannot initiate an investigation under Title VII absent an underlying charge of discrimination— and, two, how will the hours portion of the report account for exempt employees for whom employers do not have hours data."

Rachel Cowen, DLA Piper

"The EEOC's announcement is part of larger movement in this country to dramatically change equal pay law and create greater transparency in employee compensation. For 50 years, the paradigm has been 'equal' pay for 'equal' work, and if an employer could point to any factor other than sex causing the disparity, no claim could lie. The game is changing. Seven states have now passed laws providing that it is now equal pay for 'similar' or 'comparable' work, and factors other than sex must be 'bona fide' or 'job related.' The OFCCP also announced last year its intention to start collecting payroll data, and hold government contractors to a higher standard, stating that 'contractors may not implement compensation practices, including performance review systems, that have an adverse impact on the basis of sex and are not shown to be job related and consistent with business necessity.' The combination of these state statutes and federal regulations is going force employers to look more carefully at their pay practices and determine if there are disparities before becoming subject to these mandatory disclosures. Remedies may be difficult because it's not permissible for employers to simply lower pay of the favored or only move women's pay upwards. Rather, employers who have disparities will need to create parity for all similarly situated employees. The 'job related' requirement imposed in these statutes and regulations may also bring an end to practices such as setting pay based upon prior salary, or negotiation, which have historically favored men."

Aimee Delaney, Hinshaw & Culbertson LLP

"This could be significant for employers both in terms of the burden it will place on them and the risk of how the information will be used and analyzed. Most employers do not have systems in place to track pay data, so compliance will likely cost money. Proper assessment of equal pay issues is dependent on identifying proper comparisons, which should involve consideration of skill, effort and responsibility. The potential hazard with a blanket reporting requirement is whether the agency reviewing the data will consider these important nuances or whether employers will even have a mechanism to make such distinctions."

Kirsten Eriksson, Miles & Stockbridge PC

"The proposal will create an administrative burden on employers and increase the time and money required to defeat government claims of pay inequality, but is unlikely to reveal widespread pay discrimination. For years, the OFCCP has collected aggregate compensation data from federal contractors, and has only rarely been able to use the information to identify substantial pay discrimination. Fewer than 1 percent of all audits result in a finding of pay discrimination, despite being a focus of every OFCCP audit since 2010. The data will, however, likely be used to select companies for audit and may change the government's preferred targets over time. Employers who are unlucky enough to fall into the crosshairs of this targeting will need to be prepared for very costly, time-consuming efforts to prove the absence of pay discrimination."

Noreen Farrell, Equal Rights Advocates

"The proposed rule expands a current requirement of large employers that they report workplace composition data by race, gender and ethnicity. The White House estimates that the rule will affect more than 63 million employees, so there are 63 million reasons to celebrate this proposal. Equal Rights Advocates welcomes the pay data proposal as a tool for workers, business and enforcing agencies to

expose and address pay differentials based on unlawful criteria. Pay discrimination is a problem that desperately needs fixing. It is about fairness, and it is about time.”

Robert Fisher, Foley Hoag LLP

“This is another step by the EEOC to pursue systemic discrimination cases against employers. The EEOC has been investigating employers regarding their overall compliance with federal discrimination laws, often in the absence of individual complainants. The EEO-1 form has been one tool used by the EEOC to identify potential targets. The proposal to require employers to disclose employee wage data too would enhance that tool, and the EEOC intends to conduct statistical analyses of employer wage data in order to identify possible gender-based or race-based disparities.”

Shafeeqa Watkins Giarratani, Norton Rose Fulbright

“The EEOC’s proposed revision to the EEO-1 report increases the burdens and pitfalls for responding employers. The additional pay data component will translate to additional time and cost for data collection, synthesis and analysis, as well as heightened scrutiny and investigation by the OFCCP once that data is submitted. Now more than ever, employers must be diligent in their record keeping, training and understanding of their data. Employers should be encouraged to conduct a privileged pay analysis prior to submission to discover and resolve issues that may exist in their data.”

Kate S. Gold, Drinker Biddle & Reath LLP

"The EEOC’s proposed revisions to its EEO-1 form will require all employers with 100 or more employees who currently submit the EEO-1 to submit additional summary data on wages paid to their employees, including by gender, race and ethnicity. As currently proposed, this information would be reported across 10 job categories and by 12 pay bands, but will not require the reporting of specific salaries of each individual employee. This proposal is broader than one previously published by the Department of Labor, which would have applied only to federal contractors. Under the current proposal, employers would first submit pay data as of the Sept. 30, 2017, EEO-1 filing deadline. However, the proposed revision must first follow the normal procedures and public comment process before it can be implemented. The takeaway for employers is that the spotlight on pay equity is not going away. In fact, the White House fact sheet makes it clear that the revised EEO-1 form is just one of several ongoing steps designed to focus employers on fair pay practices and closing the gender-based wage gap. States such as New York and California passed equal pay laws last year and a number of states will introduce legislation this year. The possibility of a revised EEO-1 form is one more wake-up call to employers to audit their employee compensation and pay practices and evaluate whether disparities can be explained and whether adjustments should be made."

Dione Greene, Armstrong Teasdale LLP

“The significance is that while pay will become much more transparent, federal contractors and other employers will be subject to much more litigation. It would be wise for employers subject to these changes to ensure that similarly situated employees are paid the same.”

Clayton R. Hearn, Roberts Markel Weinberg Butler Hailey PC

“Today, the Equal Employment Opportunity Commission announced its plans to require more pay data in EEO-1 reports to uncover potential pay discrimination. If this proposal becomes effective, it is likely that compliance for larger employers will create increased administrative costs, especially if several of their employees do not return EEO-1 questionnaires. To be sure, ensuring equal pay for men and women doing the same work is a noble and moral objective. But it remains to be seen whether this objective will be furthered by these additional reporting requirements.”

Elizabeth Pryor Johnson, Fowler White Burnett PA

"With the announcement today by the EEOC of its proposal to require all employers — not just federal contractors, as had been originally contemplated — to include pay data in their EEO-1 reports, the EEOC has added a powerful tool to address the systemic gender equal pay concerns included in its 2013-2016 Strategic Enforcement Plan. The proposal of course is also yet another example of the Obama administration's use of regulatory initiatives to advance its agenda in the face of the rebuffs by congressional Republicans, notably in the defeat of the Paycheck Fairness Act. One of the many problems posed by this initiative is the fact that the raw data is a blunt enforcement instrument that will fail to take into account the myriad of facts that may factor into compensation decisions. It will, no doubt, be used by employees as 'exhibit A,' in future equal pay lawsuits, and it will be left to the employers to painstakingly explain any disparities. The secretary of labor's expressed hope that this initiative will prompt a self-critical analysis of employers' pay practices is valid — every employer should be vetting thoroughly its compensation practices before answering to the government as to why its statistics may appear skewed."

Julia Judish, Pillsbury Winthrop Shaw Pittman LLP

"The collection of compensation data by EEO-1 job category and 'pay band' is unlikely to unearth discrimination. To establish discrimination, one must rule out legitimate job-related factors as explanations for compensation differences. EEO-1 job categories group together employees with different job types, responsibilities, qualifications, years of experience and performance levels. For example, a hospital may employ physicians, audiologists, graphic designers, registered nurses, lawyers, medivac helicopter pilots, translators and chaplains. All of these jobs fall under the EEO-1 'Professionals' category, without having comparable salaries. Reporting combined total W-2 earnings for these varied jobs has little practical utility."

Jennifer A. Kearns, Duane Morris LLP

"As part of its increasing focus on wage equality issues, the EEOC is proposing that EEO-1 employers be required to provide wage data about their employees, in addition to reporting race and gender information. While gathering such data may spur employers to correct disparities that appear correlated with race or gender, there may be bona fide business reasons for disparities. For example, a highly qualified candidate who has other offers may negotiate a higher salary. Employers should carefully evaluate and validate the bases for wage differentials that may be susceptible to criticism, regardless of whether the EEOC proposal is approved."

Christy E. Kiely, Hunton & Williams LLP

"Today's announcement is the latest in a long and troubling chain of government actions that unnecessarily burden federal contractors. The EEOC and the OFCCP both claim that collecting high-level, aggregated pay data will somehow identify 'pay discrimination' by contractors. And yet, they do not control for valid pay factors like experience, tenure and education. In reality, such generalized data cannot yield any meaningful analysis. The contractor community should be concerned about this action and the trend it represents. This supposedly benign collection tool will, in actuality, be used to unjustifiably target companies — particularly large ones — for government audits and investigations."

Mark A. Konkol, Kelley Drye & Warren LLP

"The new requirement for employers to turn over pay data is not only burdensome; it's not the EEOC's proper role. Generally policing the American workplace is not the EEOC's mandate, and empowering it to do that is a misuse of executive authority. The EEOC has been successfully challenged in the past few years for leveraging small issues like individual employment discrimination charges into broad, invasive, indiscriminate investigations of workplace practices generally. The new rule enables exactly that: fishing expeditions to police employers without 'probable cause' for the search. That's not something the EEOC is empowered or mandated to do."

Esther Lander, Akin Gump Strauss Hauer & Feld LLP

"The proposed new EEO-1 reporting form has 12 annual salary bands that are supposed to be completed based on W-2 annual earnings, with the lowest band being approximately \$19,000 and under, and the highest being approximately \$200,000 and over. The pay bands become progressively larger, with a \$4,000 difference within a band on the low end, and as high as a \$40,000 difference within a band at the top. As with the current EEO-1, the job categories are very broad and generic, such as 'Senior Level Managers,' 'Midlevel Managers,' 'Professionals,' 'Administrative,' 'Technicians,' 'Service Workers,' 'Sales Workers,' etc. The agency proposes to also collect 'hours worked' data for the employees and, as with the salary bands, the 'hours worked' would need to be broken down and aggregated by gender and EEO-1 race/ethnicity category within each band. The 'hours worked' data would attempt to account for part-time workers and those who did not work an entire year. There is no proposal for how to account for the hours worked by salaried employees and the EEOC welcomes input on this. My initial impression is that the aggregate data won't tell us much about pay discrimination and is going to place a significant collection and reporting burden on employers. Employers could also be unfairly targeted based upon this data because of extremely overbroad job categories, inaccurate data on hours worked for salaried employees, and zero controls for important key nondiscriminatory variables that could explain perceived differences in pay between groups."

Mark Lerner, Kasowitz Benson Torres & Friedman LLP

"Compliance with the enhanced EEO-1 initiative may be cumbersome and expensive for larger employers, and especially noncentralized employers. But even more costly could be evidence of pay disparities which employers are not prepared to explain and defend effectively. Employers who have not reviewed their own pay information with fair pay and other EEO-related standards in mind should consider this a warning to do so now."

Bill Martucci, Shook Hardy & Bacon LLP

"The EEOC's plan to require federal contractors and other employers with more than 100 workers to provide more pay data is a dramatic step in the ever-focused approach by the EEOC to find potential pay discrimination. Employers should review their pay practices and policies under the guidance of counsel and make appropriate changes if necessary. This continuing focus on pay equity is a major issue today and tomorrow for American corporations. EEOC Chairman Jenny Yang is committed to equality and parity in pay. Under her leadership, these efforts will be significant. The time to act is now."

Kristin E. Michaels, McDermott Will & Emery LLP

"The significance of this proposal remains to be seen. The EEOC has stated what pay data employers will be required to provide, but it does not explain how the data will be assessed, evaluated, compared, or how it will be used to identify employers for compliance with equal pay and discrimination laws. The National Academy of Sciences, in an earlier report funded by the EEOC, recommended, among other things, that the pay data gathered not be actual earnings or pay bands, but rather rates of pay, because actual earnings may be over- or underinclusive. The EEOC nevertheless has decided to request that employers report W-2 earnings and hours worked. Determination of hours worked for salaried employees where hours are not tracked will require an additional administrative burden. At this point, the proposal is vague at best and there is the potential for false positives which employers may have to spend the time disproving."

Camille Olson, Seyfarth Shaw LLP

"Because EEO-1 information is reported by enterprise, i.e., the parent company and all subsidiaries, the EEOC will be able to compare compensation within a location, across the organization and enterprisewide. The EEOC also said it will use the data to compare employers to aggregate industry or metropolitan-area data. It is not clear how all of this requested information could possibly be relevant to the EEOC's analysis of whether an individual employer discriminates between individuals based on a protected category in pay.

With respect to the EEOC's possession of this new category of information, the EEOC has affirmed that it will publish aggregate compensation data by industry and geographic location. However, whether an individual company pays a different rate to an employee than what another company pays in the same industry or geographic location is irrelevant to the EEOC's mandate under Title VII."

Pamela M. Floor, Quarles & Brady LLP

"The proposal will allow EEOC and OFCCP to create industry-specific and geographically specific compensation information to target outlier companies for investigation and/or audit. Because the EEO-1 report will list employee information by establishment, the report raises confidentiality concerns. An employee's pay may be figured out based on his or her pay band if he or she is the only employee in a pay band at the location or is otherwise identifiable by race or sex. The proposal adds to the regulatory burden on employers and raises questions about what OFCCP will do, if anything, on its proposed compensation report."

Farrah N.W. Rifelj, Michael Best & Friedrich LLP

“The EEOC’s proposal follows the OFCCP’s recent concentration on pay data, so in that sense, it is not surprising. However, the information the EEOC gathers will be of little value. Comparing pay data across EEOC job groups is not an apples-to-apples comparison. It says nothing about whether persons in specific jobs with equal experience are paid equally for equal work. The EEOC cannot combat pay disparity with bad data. In addition, many employers will have significant concerns regarding the security of this data.”

Michael A. Shaunessy, McGinnis Lochridge

"This is a clear sign that the EEOC is getting more aggressive in pursuing what it sees as employers who illegally discriminate in pay. The EEOC data collection is a continuation of the agency’s express strategy of identifying and prioritizing cases involving systemic discrimination. The EEOC will look for evidence of discrimination in the data provided. Employers, including federal contractors, need to make certain they can explain any EEOC 'perceived' evidence of illegal discrimination in pay. Further, employers should anticipate the EEOC acting 'sua sponte' to conduct investigations and prepare for these investigations."

Mickey Silberman, Jackson Lewis PC

"Make no mistake — this is big. The Obama administration made eliminating the gender 'pay gap' a top enforcement priority. This proposal for the first time would give EEOC wide-ranging pay data — to be shared with OFCCP — allowing the enforcement agencies to effectively target employers for systemic pay investigations. The decision by EEOC to demand W-2 earnings — instead of the far simpler-to-produce base comp — will greatly complicate this reporting requirement. EEOC vastly understates the burden this will impose on employers. Employers do not house W-2 earnings and, separately, employee race and gender data, in the same computer system. Therefore, to comply, employers will need to generate differing sets of data from multiple systems and then reconcile, align and merge the data. For anyone who has done that — apparently that doesn’t include the EEOC — we know how difficult it is. Importantly, while the EEOC’s pronouncements accompanying the proposed rule focus only on the gender 'pay gap' as the basis for the new requirements, the proposed changes will mandate submission of pay data broken down by race/ethnicity, in addition to gender. Once again, this choice by EEOC will make it a far more burdensome endeavor for employers."

Gunjan Talati, Thompson Hine LLP

“The government isn’t playing hide the ball with what they intend this proposal to do — they really address it in the press release. The significance is twofold: First, they want to spur companies to identify and root out pay discrimination voluntarily; and second, for companies that lag behind, they want data that will help them enforce fair pay laws. Coupled with the administration's recent Fair Pay and Safe Workplaces Executive Order efforts, it reinforces the attention contractors have to pay to rooting out discrimination.”

Julie A. Vogelzang, Duane Morris LLP

"The EEOC's actions are consistent with trends that are building across the states to ensure pay equity between the sexes. California recently adopted what might be the most aggressive fair pay law in the

country, and I suspect we will see more states doing so. The EEOC's proposed addition to the reporting requirements will open up a new avenues for investigations that will analyze employer pay issues. Employers should consider analyzing their practices and conducting internal reviews to identify potential disparity in jobs that are similar, even when those jobs are in different locations."

Philip Voluck, Kaufman Dolowich & Voluck LLP

"I attended a conference today where Commissioner Lipnic announced that the EEOC was releasing this today. I got the distinct impression it was issued amongst strong opposition. This is another example of the EEOC's aggressive agenda to eradicate what it terms, 'systemic discrimination.' Companies fear voluntary disclosure because it may make them appear like discriminators when they actually are not. The filing of EEO-1 reports is required; it is not voluntary. Now the EEOC has a built-in data collection system with which it can identify pay disparities. Nothing is final until the public comment period expires sometime this spring."

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