

FOCUS ON EEOC

EEOC Releases Revised Proposal Imposing New Pay Data Requirements

The U.S. Equal Employment Opportunity Commission (EEOC) has collected data from private sector employers on race, ethnicity, sex and job category of employees for 50 years to provide the government with workplace profiles.¹ On July 13, 2016, the EEOC announced a revised proposal to collect additional data within the Employer Information Report (EEO-1) relating to pay and hours worked. The announcement reflects the EEOC's focus on reducing pay disparities and enforcing equal pay laws, and updates a proposal from earlier this year. The initial proposal was published on February 1 and tasked employers with substantial new data collection requirements. After a 60-day comment period, the EEOC then revised the proposal to reflect certain suggestions, such as changing the timeline to allow employers to use existing W-2 reports during the first year of implementation. Though the updates in the revised version were added in response to complaints that the initial proposal was too burdensome, the two proposals are largely similar.

Federal contractors and employers with 100 or more employees are required to report W-2 wages, not just base pay, for multiple EEO-1 job classifications according to 12 different pay bands. This data includes overtime pay, bonuses and commissions, and is intended to capture overall compensation more accurately. Employers will need to report the number of employees in each pay band according to EEO-1 job classification, race and gender.

The recent revision, though not very different from the initial proposal, provides employers with more time to prepare for the changes:

- The workforce snapshot period will be moved from the current July through September period to an October through December period, during which employers will be able to pick a "snapshot" date for reporting.
- The EEO-1 filing deadline will be moved from September 30 to March 31 of each year.

This newsletter is prepared by Shook, Hardy & Bacon's National Employment Litigation and Policy Practice™.

Contributors to this issue:



Amy Cho
Northwestern University
Shook Chicago
312.704.7744
acho@shb.com



Bill Martucci
Georgetown University
Shook Washington, D.C.
202.783.8400
wmartucci@shb.com

Attorneys in the Employment and Litigation and Policy Practice represent corporate employers throughout the United States in all types of employment matters. To learn more, please visit SHB.com.

¹ Equal Employment Opportunity Commission: What You Should Know: Equal Pay and the EEOC's Proposal to Collect Pay Data (July 14, 2016), https://www.eeoc.gov/eeoc/newsroom/wysk/pay_data.cfm.

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Employers will therefore need to submit their 2016 EEO-1 reports by September 30, 2016—without the additional pay and hours data—and will have until March 31, 2018, to submit the complete pay and hours data for 2017. Comments will be accepted until August 15, 2016, and the EEOC plans to issue the final form revisions on September 30, 2016.

While the EEOC's purpose in collecting this data is to ensure that equal pay laws are enforced, many employers are concerned about the burden of implementing the new data collection standard. Additional time and paperwork are inevitable results of the revised EEO-1 report; the EEOC responds to these concerns by emphasizing the importance of eliminating pay disparities. The EEOC plans to use the data to identify companies to investigate, although some employers worry that the data may reflect misleading information.

In response to the updated law, employers should therefore take the following actions:

- Analyze current compensation data and determine whether any disparities exist relating to race, gender or ethnicity. This analysis should be done with counsel's assistance to invoke attorney-client privilege protection.
- Within this analysis, to fully determine the source of any resulting disparities, it is important to examine multiple factors that could affect pay differences in a way that is legitimate and nondiscriminatory. These factors may include experience, performance, education, location and other relevant information.

Completing a self-audit enables employers to determine whether they may be in violation of EEOC guidelines and therefore susceptible to investigation. If disparities are identified, it is important for employers to work to eliminate those that are not caused by a legitimate business purpose to avoid EEOC investigation for pay discrimination.