



On February 1, 2016, the U.S. Equal Employment Opportunity Commission (EEOC) published proposed revisions to the Employer Information Report (EEO-1) that would require all employers with 100 or more employees to report compensation data on the EEO-1 form for the stated purpose of uncovering potential pay discrimination. Currently employers are required to provide information only on their employees' ethnicity, race and gender by job category. The changes are expected to be an additional administrative burden on employers and increase litigation and agency actions from the EEOC and U.S. Department of Labor.

Although these changes are only a proposal, it is expected that the proposal will be enacted in its entirety. Employers are therefore advised to review their pay practices prior to the changes going into effect to determine whether they may be open to any claims of discriminatory pay practices. This will allow employers to make changes to their pay practices prior to the reporting requirements going into effect.

The EEOC is currently accepting comments on the proposed revisions and any person or entity can submit comments through April 1, 2016.

Should the EEOC's proposed revisions be enacted as drafted, it would have the following impact:

Employers Required To Comply

All employers with 100 or more employees would have to comply beginning with the 2017 EEO-1 cycle.

Increased Reporting Requirements

Pursuant to the EEOC proposed revisions, beginning in 2017, employers with 100 or more employees would need to include in their EEO-1 information about their employees' W-2 earnings and hours worked in addition to ethnicity, race and gender data by job category. With regard to the newly required earnings information,

the EEOC proposes that, for each of the EEO 1 job categories, employers would need to identify the number of employees by ethnicity, race and gender whose earnings fall within the following pay bands:

\$19,239 and under
\$19,240-\$24,439
\$24,440-\$30,679
\$30,680-\$38,999
\$39,000-\$49,919
\$49,920-\$62,919
\$62,920-\$80,079
\$80,080-\$101,919
\$101,920-\$128,959
\$128,960-\$163,799
\$163,800-\$207,999
\$208,000 and over

For purposes of including the employee in the proper pay band, the EEOC proposed that employers use the employees' total W-2 earnings for a 12-month period between July 1 and September 30. As an example, the employer would aggregate an employee's W-2 data for the 12-month period preceding its first pay period in August. The EEOC is also requesting all hours worked by employees in each band. Per the EEOC, the purpose of the hours reporting is to take into account employees who work part time or who have been with the employer for less than 12 months. However, the EEOC has not addressed how to report hours worked for salaried employees and has specifically requested feedback on that issue.

The EEOC estimates that this will burden employers by causing them to incur only an additional 3.4 hours of labor to prepare the revised EEO-1. However, this does not take into account the varying size of businesses that will be subject to the new requirements or the differing accounting systems and compensation systems that employers have in place, some of which may prove far more difficult to extract the necessary data from to satisfy the proposed new requirements.

The submission of this information to the EEOC poses concern to employers beyond the increased burden they will face in completing their EEO-1s as the EEOC intends to utilize the compensation information in order to “more effectively focus agency investigations, assess complaints of discrimination and identify existing pay disparities that may warrant further examination.” Although the data will remain confidential absent a relevant Title VII action being instituted, the EEOC also intends to work “closely with the Department of Labor and the Department of Justice to coordinate an interagency approach on the use of pay data in enforcement efforts.” EEOC Chair Jenny R. Yang noted that “collecting pay data is a significant step forward in addressing discriminatory

pay practices.” Similarly, Secretary of Labor Thomas E. Perez stated that the information gathered could be used by government agencies as a “powerful tool to do its enforcement work.”

These stated intentions and the comments from EEOC Chair Yang and Secretary Perez will likely result in employers being subject to a greater risk of investigations and lawsuits by the government over pay practices — even in cases where there are legitimate reasons for the disparities in pay.

Employers should review their pay practices now — prior to the EEO-1 changes going into effect — to uncover any data that could leave them vulnerable to claims of discriminatory pay practices. Fox Rothschild can assist in this process and in preparing for complying with the new reporting requirements.

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