

PUBLICATION

The Spotlight on Pay Equity is Here to Stay

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On January 29, 2016, the Equal Employment Opportunity Commission (EEOC) announced proposed rules that would require all employers with 100 or more employees – not just federal contractors as had been anticipated – to add W-2 earnings and hours worked to the information included in their employer information reports (EEO-1s). Employers with 100 or more employees already provide the federal government with data on gender, race and ethnicity in their EEO-1 reports. Employers with less than 100 employees are not required to file EEO-1 reports. These new proposed reporting requirements would begin with the September 2017 EEO-1 report.

President Obama's administration has made it no secret that pay discrimination is a priority. And, the Secretary of Labor noted that these proposed rules are intended to gather data to root out gender-based and race-based pay discrimination, while also encouraging employers to evaluate their own pay practices.

What pay information must be reported?

Under the proposed rules, employers will not be required to provide wage information for each individual employee. Instead, employers will be required to provide aggregate W-2 earnings in 12 annual pay bands for the ten existing EEO-1 job categories. Within each pay band, wages would need to be broken down and aggregated by gender and the EEO-1 race/ethnicity category within each band. The hours of work data required would also need to be broken down and aggregated for gender and race/ethnicity in the same manner. The EEOC, however, has not proposed how to collect hours worked by exempt employees.

What does this mean for employers?

- Higher administrative burden: Under the proposed rules, employers would have to develop a system to gather, reconcile and merge wage and hours worked data for reporting in the EEO-1. This system will likely require more manpower and will be costly. Employers that already track wage and hours worked data will be ahead of the curve.
- Increased liability exposure: The EEOC could use the wage and hours worked data collected to target employers for audits and investigations for improper pay practices or discrimination. Employers will likely also be exposed to a greater chance of class action equal pay suits. This data also could be a powerful resource for the EEOC in existing investigations or pending litigation.
- Concerns regarding confidentiality: An employer can mark the information provided in the EEO-1 as confidential, but the EEOC may not honor this request. A competitor, therefore, might be able to access the data to get a competitive market advantage in the recruitment and retention of talent.
- Unreliable data: The wage and hours worked data gathered on the EEO-1 without context is unreliable as many factors determine an employee's wage besides hour(s) worked, such as education, performance and seniority.

What can Employers do?

- Employers should conduct a privileged audit of pay practices to ascertain compliance with the proposed rules.
- After this privileged audit, employers should address any identified wage disparities that are due to gender and/or race/ethnicity.
- Employers must ensure that similarly situated employees are treated the same.
- Employers should be prepared to provide documentation and data to support any pay disparities.

Supporters of the proposed rules note that transparency is key to reaching pay equity between the genders and other minority groups. It remains to be seen, however, if the proposed rules will lead to the gathering of reliable data from which the EEOC can assess and identify true wage disparity.

The public comment period on the proposed rules is open until April 1, 2016. Comments may be submitted through <http://www.regulations.gov>.