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Employers, Get Ready (For Now): EEO-1 Pay Data Reporting Still a Go

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The revised Employer Information Report (EEO-1), which was announced on September 29, 2016, for the first time, requires employers to disclose pay data information in the form of summary pay and aggregate hours worked data based on sex, race and ethnicity. Shortly after releasing the revised EEO-1, in October 2016, the EEOC released its updated Strategic Enforcement Plan (SEP). Only the second of its kind, the plan demonstrates the commission's compliance focus for fiscal years 2017 – 2021. More specifically, the commission's revised SEP identifies the EEOC's increased focus on activities "likely to have strategic impact . . . [meaning] a significant effect on the development of the law or on promoting compliance across a large organization, community, or industry." Gender-based pay discrimination is one of the substantive area priorities highlighted in the revised SEP.

Although pay discrimination based on sex was a substantive priority in the first SEP, the revised SEP expands the focus of pay discrimination to include not only sex but also other protected groups. In short, the EEOC extended its equal pay priority to explicitly reach all workers. This means that while the EEOC will continue its focus on compensation systems and practices that discriminate on the basis of sex under the Equal Pay Act and Title VII, the EEOC will heighten its efforts to identify pay discrimination based on race, ethnicity, age, disability and other protected traits.

One tool the EEOC will undoubtedly use to accomplish this goal is the revised EEO-1. The revised EEO-1 requires employers to disclose summary pay and hours-worked data for 12 pay bands listed for each EEO-1 job category. Covered employers must report the total number of full and part-time employees for 12 categories, as well as tally and report the number of hours worked during the year by all employees for each pay band. Covered employers include private employers and federal contractors with at least 100 employees on payroll. Employers count their employees during the "workforce snapshot period," which is October 1 to December 31, 2017, and select any pay period during this three-month snapshot period to count its employees for the EEO-1 and disclose the pay data information. (Keep in mind that union and nonunion employees should be counted. Additionally, even if an employee is no longer employed as of December 31, 2017, the employee should still be counted as if he or she was employed the entire relevant pay period.) Employers must enter the pay data in the appropriate columns of the EEO-1 based on the sex, ethnicity or race of the employees. An example provided by the EEOC is that a financial services firm may report that it has ten professionals in pay band 6, which is \$49,920 – \$62,919, who are men and black; and that it also has 35 professionals in pay band 6 who are men and white. The revised EEO-1 is due on March 31, 2018.

The Office of Management and Budget (OMB) approved the revised form, but some believe that it should rescind the approval. Earlier this year, the U.S. Chamber of Commerce asked the OMB to exercise its authority to rescind its approval of the revised EEO-1. At least two republican senators (Lamar Alexander and Pat Roberts) sent the OMB a similar request. In addition to privacy concerns, Alexander and Roberts highlighted the Chamber's survey results concerning the cost to employers to comply with the new pay data requirements. The EEOC estimated it would cost \$53.5 million while the Chamber has argued it would cost around \$400.8 million and require 8,056,045 hours. Despite the administration change and efforts by others, the EEOC's priorities with regard to the pay data reporting has not shifted.

On August 3, 2017, during the ILG National Conference, the EEOC's acting Chair Victoria Lipnic expressed her personal opposition to the pay data reporting, but explained that the EEOC "is a voting body, and it takes votes to undo things and it takes votes to change things." She also explained that she sent a letter to the new head of the White House's Office of Information and Regulatory Affairs (OIRA), Neomi Rao, stressing that an answer on the status of the new EEO-1 requirement should be issued this month as "time is of the essence." For now, however, the revised EEO-1 has not been rescinded.

What does this mean? This means that while some employers may choose to wait-and-see whether the pay data reporting requirements will stand, such employers risk having an incomplete and untimely report. Consequently, employers should begin some efforts, which may include system changes or developing a plan of how to gather the information, to comply with the revised EEO-1 now in order to meet the March 31, 2018 deadline. Contact your counsel or one of the Firm's Labor & Employment attorneys to assist you, at a minimum, with understanding the scope of the revised EEO-1 requirements, ensuring employees are appropriately classified, evaluating pay scales and pay discrepancies, identifying and considering potential pay gap narratives, and developing an overall plan to address the new pay data requirements. The pay data requirements also present an opportunity for employers to conduct pertinent pay audits to assess the risk of potential equal pay violations in light of the SEP's targeted focus of equal violations for all protected groups.