

Employers May Face Significant Changes to Federal EEO-1 Reporting Requirements

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On February 1, the U.S. Equal Employment Opportunity Commission (EEOC) published proposed revisions to the Employer Information Report (EEO-1) for private employers or government contractors with 100 or more employees. *See* 81 Fed. Reg. 5113. In addition to the current requirement to provide race, sex, and ethnicity data in 10 standard EEO-1 job categories, the EEOC is proposing that employers also tabulate and report the number of employees in each category whose W-2 wage earnings for the prior year fell within each of 12 pay bands. As proposed, employers will also be required to report the total number of hours worked in aggregate by the employees identified in each category. If implemented, employers will be required to meet the new reporting obligations beginning with the September, 2017 EEO-1 report deadline. The EEOC's stated purpose for the proposed EEO-1 change is to use the new information to "identify discriminatory pay practices where they exist in order to ensure that fair pay practices are put in place." The EEOC, in conjunction with the OFCCP, is also seeking "insight into pay disparities across industries and occupations." *See [Questions and Answers, Notice of Proposed Changes to the EEO-1 to Collect Pay Data from Certain Employers](#)*. The EEOC has not, however, explained how wage and hour information reported in broad pay bands without context can accurately meet legal standards where current law recognizes that many variable

factors make up pay differentials outside of hours worked within a single job category, much less across multiple professions. For example, there are over 350 Census Job Code professions listed in the single “professionals” EEO-1 job category. These include such diverse professions as actuaries, civil engineers, zoologists, foresters, marriage and family therapists, lawyers and preschool teachers, to name just some. Yet the data required to be captured will only be the number of employees employed in the respective pay bands within the “professionals” category, an extremely broad and differentiated classification. Indeed, early studies into the viability of collecting wage data reflected a concern that beyond the general statement that wage data was needed to target employers for investigation regarding compliance with anti-discrimination laws, “the specific mechanisms by which the data would be assembled, assessed, compared and used in a targeting operation are not well developed by either [the EEOC or OFCCP].” National Academy of Sciences, *Report on President’s National Equal Pay Task Force*, 2; 86-87 (2012). Any explanation or direction on how an individual investigator will eventually use the information contained in an employer’s filed report is also noticeably lacking. The EEOC merely states in the Federal Register that the EEOC and OFCCP plan to develop software that will allow an investigator to “conduct an initial analysis” by looking at the wage distribution in a particular firm and comparing it to unspecified aggregate industry data to “highlight statistics of interest.” 81 Fed. Reg. at 5118. But given the complexity of data analytics and statistical sample size limitations, it is unclear how the government can drill down any meaningful or reliable conclusions in the abstract in an individual charge. What is clear is that the EEOC is attempting to find ways to identify and rectify prohibited pay discrimination. Whether the information to be provided in the revised EEO-1 report in its current proposed form will accomplish that goal remains to be seen. Also, while the burden on employers to collect and report on the data has been hypothetically estimated, the EEOC conceded that it lacks quantitative information regarding the possible costs of collecting the required pay information as proposed. 81 Fed. Reg. at 5120. The EEOC will accept comments on the proposed changes over the next 60 days. Comments accepted will include those concerning whether the proposed changes are even necessary to carry out the agency’s functions, and those regarding the burden on employers to provide the information if required. Given the risk of increased challenges to pay practices, whether due to revised EEO-1 reporting or the EEOC’s strategic focus, employers are well served to evaluate their compensation practices in advance of the reporting requirements to be able to defend legitimate pay disparities if challenged.

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