

EEOC Proposes Rule Requiring Employers to Report Wage Data on EEO-1 Form

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February 5, 2016

Late last week, the Equal Employment Opportunity Commission (EEOC) proposed a rule that would require employers with 100 or more employees to report data concerning employee pay on an annual basis. The rule, designed to strengthen the EEOC's ability to enforce federal laws prohibiting pay discrimination, represents the Obama administration's latest effort to combat pay discrimination in the workplace.

Under the proposed rule, wage data would be collected through the submission of the Employer Information Report (EEO-1), a report many employers are currently required to file annually. In its current form, the EEO-1 requires employers to report the number of individuals they employ by job category and by race, ethnicity and sex. Starting in 2017, employers subject to the EEO-1 reporting requirement who have 100 or more employees would also be required to report employees' total W-2 earnings on a revised EEO-1. In selecting W-2 earnings as the measure of pay to be reported, the EEOC will be looking not only at employees' base wages or salary, but other elements of compensation such as overtime pay, severance pay, shift differentials and bonuses. Employers would identify employees' total W-2 earnings for a 12-month period looking back from a pay period between July 1 and September 30.

The new EEO-1 would have 12 pay bands for each of the job categories listed on the current EEO-1 and the employer would be required to report the number of employees whose W-2 earnings for the prior 12 months fell within each pay band, broken out by race, ethnicity and sex. The new EEO-1 would also require employers to report the total number of hours worked by the employees included in each pay band. The new rule retains the current September 30 deadline for submitting the EEO-1, but covered employers would be required to submit the new EEO-1 report electronically.

The EEOC anticipates that the data will give it the information it needs to root out possible pay discrimination. Once it collects the data, the EEOC will run statistical tests to identify discriminatory pay practices. The EEOC plans to develop a software tool that would allow its investigators to analyze the pay distribution within a single employer and compare that data to aggregate industry or metropolitan area data.

The new rule is part of the EEOC's continued focus on so-called "systemic discrimination" cases, which the EEOC defines as cases involving discriminatory patterns, practices and policies having a broad impact on a company or industry. In recent years, the EEOC has looked for opportunities to pursue such cases, even in the absence of an employee complaint concerning the alleged discrimination. While courts have imposed limits on the EEOC's recent enforcement tactics (see previous client alert), the EEOC's stated plan to enforce federal anti-discrimination laws based on its own analysis of wage data suggests that it will not relent in these efforts. Accordingly, employers who are subject to EEO-1 reporting requirements should review their pay practices to identify and, if necessary, address any issues that may draw the EEOC's attention.

The proposed rule is subject to a notice-and-comment period, which ends on April 1, 2016. Employers concerned about the impact of the new rule should voice their concerns to the EEOC before that time. However, in its announcement of the proposed rule, the EEOC has stated that it believes that the new reporting requirement will impose minimal administrative burden on employers and that existing rules and procedures will adequately protect the confidentiality of employers' pay data.

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