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EEOC Publishes Revised Proposal to Collect Data on Employees' Compensation and Hours Worked

On July 14, 2016, the Equal Employment Opportunity Commission (EEOC) published a [revised proposal](#) to collect data on employees' compensation and hours worked through the EEO-1 reports that larger employers are required to submit annually. Notwithstanding numerous public comments stressing the burdens that this reporting requirement would impose on employers and the limited statistical utility that the information may offer, the EEOC is pressing forward with only modest revisions to its original proposal.

The revised rule will apply to employers subject to Title VII of the Civil Rights Act with 100 or more employees. The EEOC rejected comments urging a higher workforce threshold, stating, "exempting employers with fewer than 500 employees, or even fewer than 250...would result in losing data for a large number of employers who employ millions of workers, and thus would significantly reduce the utility of the pay data collection."

Covered employers will have to file the revised EEO-1 report by March 31 of each year, beginning March 31, 2018, and provide pay and hours worked data for the prior calendar year. The EEOC rejected comments urging a lesser burden of reporting every other year on grounds that "if collected only in alternate years, the utility of EEO-1 data would be diminished because it would become stale before the new data became available."

Employers will be required to perform a "workforce snapshot" count during any pay period between Oct. 1 and Dec. 31 of the reporting year. However, "while employers will count their employees during a pay period between October 1 and December 31, they will report W-2 income and hours-worked data for these employees for the entire year ending December 31."

The EEOC will require employers to report income provided in Box 1 of the employee's W-2 across 12 pay bands. The EEOC adopted the FLSA's definition for determining "hours worked," which includes, "all time an employee must be on

duty or on the employer’s premises or at any other prescribed place of work, from the beginning of the first principal activity of the workday to the end of the last principal activity of the workday.” For exempt employees whose hours are not generally tracked, “the EEO-1 Instructions will give employers the option to: (1) Report a proxy of 40 hours per week for full-time exempt employees, and 20 hours per week for part-time exempt employees, ... or (2) provide actual hours of work by exempt employees during the EEO-1 reporting year if the employer already maintains accurate records of this information.”

The EEOC asserted that it “does not intend or expect that this data will identify specific, similarly situated comparators or that it will establish pay discrimination as a legal matter.” Nonetheless, the EEOC claims the data “will be useful for identifying patterns or correlations that can inform the early stages of the investigative process.” Additionally, “using aggregated EEO-1 data, Census data, and potentially other data sources, the EEOC expects to periodically publish reports on pay disparities by race, sex, industry, occupational groupings, and Metropolitan Statistical Area (MSA).”

While the EEOC is accepting further public comment through Aug. 15, it is likely that the rule will be adopted as currently proposed. Employers should therefore begin preparing now for this new reporting requirement. In particular, employers should consult with counsel to determine what changes to their existing EEO-1 reporting practices and systems may be required to track and collate the new pay data.

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