



Preparing Now for EEOC's New EEO- 1 Report: Disclosure of Pay Data

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Background Information

- 1/29/16: Proposal announced at White House commemoration of Lily Ledbetter Fair Pay Act
- 2/1/2016: Proposed revisions published in federal register
- 3/16/2016: EEOC holds public hearing
- 4/1/2016: Seyfarth Shaw and interested parties submit comments
- 7/14/2016: EEOC submits to OMB (makes minor revisions to proposal)
- 9/29/2016: OMB approves EEOC's proposal, despite strong opposition



Revised EEO-1 Report – Two Components

Component 1

- Current EEO-1
- Counts of employees by race/ethnicity and sex in each of ten job categories

Component 2

- Aggregate compensation data and hours
- Organized by 10 EEO-1 categories
- 12 specified pay bands

EEO-1 Coverage Issues

Components 1 and 2

- Employers with 100 + employees

Component 1

- Federal contractors with 50 to 99 employees

No EEO-1 Report Required

- Private employers (excluding federal contractors) with less than 100 employees
- Federal contractors with less than 50 employees

Timing

Pick a payroll period between 10/1-12/31 (i.e., “Snapshot period”).
EEO-1 report will be based on all full-time and part-time workers
employed during snapshot period

For all employees in snapshot period, report employee counts
(Component 1), W-2 Box 1 earnings and hours through the last pay
period of the year (Component 2)

First report is due March 31, 2018



Special Note for Federal Contractors

- VETS-4212 Report implications
 - EEO-1 Snapshot Period – moved from 7/1-9/30 to 10/1-12/31
 - VETS-4212 Report – 7/1-8/31 snapshot period
 - FN 49 of Federal Register attempts to reconcile snapshot period for filing reports – if you use December 31 as the ending date for the EEO-1 report, you may use that as the snapshot period for VETS-4212 filing
 - Unclear if the payroll period must end on 12/31
- We may receive additional guidance from Veterans' Employment and Training Service on snapshot period for VETS-4212 Report



Pay Data: W-2 Wages

- For each employee on snapshot payroll period, report W-2 “Box 1” year-end earnings:
<https://www.irs.gov/instructions/iw2w3/ch01.html#d0e2347>)
- Wages, tips, overtime, bonuses, certain fringe benefits, employer contributions to health savings account and other compensation
- Does not include elective deferrals (such as employee contributions to a section 401(k) or 403(b) plan)



Pay Data: Hours

- Non-Exempt employees: hours worked as recorded for FLSA purposes during the reporting year; includes OT
- Exempt employees: Proxy Hours or Actual Hours
 - FT workers -- 40 hours X weeks worked in the year
 - PT workers -- 20 hours X weeks worked in the year

OR

 - If the employer already maintains accurate records of hours for exempt employees, use actual hours
- Hours data will be reported in the aggregate for all employees in the pay band and job category by race/ethnicity



Pay Data: Hours, cont'd

- Hours should correspond to the wages received in the year
 - “Weeks” for exempt workers = number of weeks paid for the year
- Consider data collection implications for employees who work partial years
 - Hires, terms, unpaid extended LOAs – particularly for exempt employees
 - Gather DOH, term dates, LOA periods, including intermittent leaves if unpaid



Reported by EEO-1 Category

- All data will be categories by EEO-1 Job Category – no changes:
 - Executive/Senior Level Officials and Managers
 - First/Mid Level Officials and managers
 - Professionals
 - Technicians
 - Sales Workers
 - Administrative Support Workers
 - Craft Workers
 - Operatives
 - Laborers and Helpers
 - Service Workers

Pay Data: Organized by Pay Bands

- For each of the ten EEO-1 job categories, report compensation data in twelve pay bands. i.e.,
Professionals:

Pay Band 1	<19,239
Pay Band 2	\$19,240-\$24,439
Pay Band 3	\$24,240-\$30,679
Pay Band 4	\$30,680-\$38,999
Pay Band 5	\$39,000-\$49,919
Pay Band 6	\$49,920-\$62,919
Pay Band 7	\$62,920-\$80,079
Pay Band 8	\$80,080-\$101,919
Pay Band 9	\$101,920-\$128,959
Pay Band 10	\$128,960-\$163,799
Pay Band 11	\$163,800-\$207,999 and
Pay Band 12	\$208,000 and over

Snapshot of Report

Job Categories	Annual Salary in Thousands	Number of Employees (Report employees in only one category)														Total Col A-N
		Race/Ethnicity														
		Hispanic or Latino		Non/Hispanic or Latino												
				Male						Female						
		Male	Female	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races	
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O		
Executive/Senior Level Officials and Managers 1.1	\$19,239 and under															
	\$19,240 - \$24,439															
	\$24,440 - \$30,679															
	\$30,680 - \$38,999															
	\$39,000 - \$49,919															
	\$49,920 - \$62,919															
	\$62,920 - \$80,079															
	\$80,080 - \$101,919															
	\$101,920 - \$128,959															
	\$128,960 - \$163,799															
	\$163,800 - \$207,999															
\$208,000 and over																



Submission of Data

- **Single-establishment employers:** employers doing business at only one establishment in one location – file one report
- **Multi-establishment employers:** employers doing business at more than one establishment: (1) headquarters report; (2) a separate report for **each** establishment with more than 50 employees; and (3) a separate report for each establishment with fewer than 50 employees, OR an Establishment List report.
- Follows current guidelines - submitted via:
 - 1) *EEO-1 Online Filing System*, or
 - 2) Electronically transmitted data file



How Will EEOC Use the New Pay Report?

- Assist in “early assessment” of charges of discrimination
 - Announced two statistical tests to be used
- Using aggregate EEO-1 data, the EEOC expects to periodically publish reports on pay disparities by race, sex, industry, occupational groupings, and Metropolitan Statistical Area (MSA)
- Supplement training for EEOC statisticians, investigators, and attorneys about how EEO-1 pay data and the updated EEO-1 analytics tool improve the agency's enforcement activity
 - “Issue spot” potential pay discrimination and ask appropriate questions to collect evidence of possible discrimination and information about employer policies and practices
- Increase in EEOC Directed Investigations?



Key Risks and Challenges

- Data is inherently unable to discern *anything* about pay discrimination
- Large job category groupings lump together too many levels for meaningful analysis
- Large data groupings cannot serve as the basis of a Title VII or Equal Pay Act complaint
- Hours data is meaningless
 - Mixes exempt with non-exempt workers
 - Proxy hours does not reflect actual hours worked
- Will only support a request for additional information



Key Risks and Challenges, cont'd

- Mixes apples and oranges:
 - Hours have no bearing on commissions, tips, severance pay
 - Shift differentials
 - Impact of overtime
- Issues with using Box-1 W-2 wages
 - If male and female earn same salary but female contributes more heavily to her 401k, it will appear as though male earns more
- Tracking hours of exempt employees is challenging despite use “proxy” hours
 - Leaves of absence, number of weeks worked



Data Privacy – Protections

- EEOC and OFCCP:
 - Coordinate collection of EEO-1 reports through Joint Reporting Committee
 - Must hold data in confidence “to the maximum extent permitted by law”
 - Disclosure is subject to the Trade Secrets Act and the Freedom of Information Act (FOIA)
- Title VII prohibits EEOC and its employees from disclosing any information, including EEO-1 data, before a Title VII proceeding is instituted
 - Criminal penalties apply
 - EEOC imposes this requirement on all contractors



Data Privacy – OFCCP Issues

- EEOC provides summary pay data for federal contractors and subcontractors to OFCCP
- Under new OFCCP scheduling letter, OFCCP is requesting EEO-1 for last three years
- Under OFCCP regulations, contractor will be notified of FOIA request for AAP and supporting documents and will have 10 days to challenge. OFCCP will not disclose if *OFCCP* determines that contractor's objection is valid
- FOIA Exemptions 3 and 4 apply



Data Privacy – Other Risks

- EEOC releases charge files (including EEO-1s submitted with position statements) to charging parties
- EEOC releases charge files to state agencies that agree to keep the data confidential
- Charging parties and their lawyers can disclose EEO-1 reports during litigation
- In civil litigation, plaintiff's lawyer can request EEO-1 reports during discovery and can use them



What Can Employers Do Now?

- Evaluate how the data will be gathered, put into the right format and submitted to the EEOC
 - Online filing system
 - Electronically transmitted data file (technical)
- New EEO-1 report has 3,360 data points per establishment (current report has up to 180)
 - Very tedious if you are doing through “online filing system”
- Consider whether budgets need to be increased
- Consider doing a test run using the new EEO-1 format



Adjusting Systems and Practices

- While employers may already collect required data in different forms, systems likely do not “talk” to each other
- Consider as a first step talking to HRIS Vendors regarding data collection and report functionality
- Employers need to work with HR, HRIS, and IT teams now to determine how to collect the required data
 - EEO data (race and gender)
 - W-2 wages
 - Hours worked
 - Number of weeks worked (LOA)



What Data Do You Need?

- At Least:
 - Name, Job Title, EEO-1 Category, Race, Sex, Location, Date of Hire (Employees hired in the reporting year)
 - Date of Termination (Employees term'd in the reporting year)
 - # of Weeks worked – consider unpaid LOA issues
 - Exempt/Non-Exempt
 - FT/PT Status
 - W-2 Box 1 Wages
 - # of Hours Worked during W-2 Period for Non-Exempt (exempt if you have them)



EEOC Resources

- <https://www.eeoc.gov/eeoc/newsroom/release/9-29-16.cfm>
- <https://www.eeoc.gov/employers/eo1survey/2017survey.cfm>.
- <https://www.eeoc.gov/employers/eo1survey/2017survey-qanda.cfm>

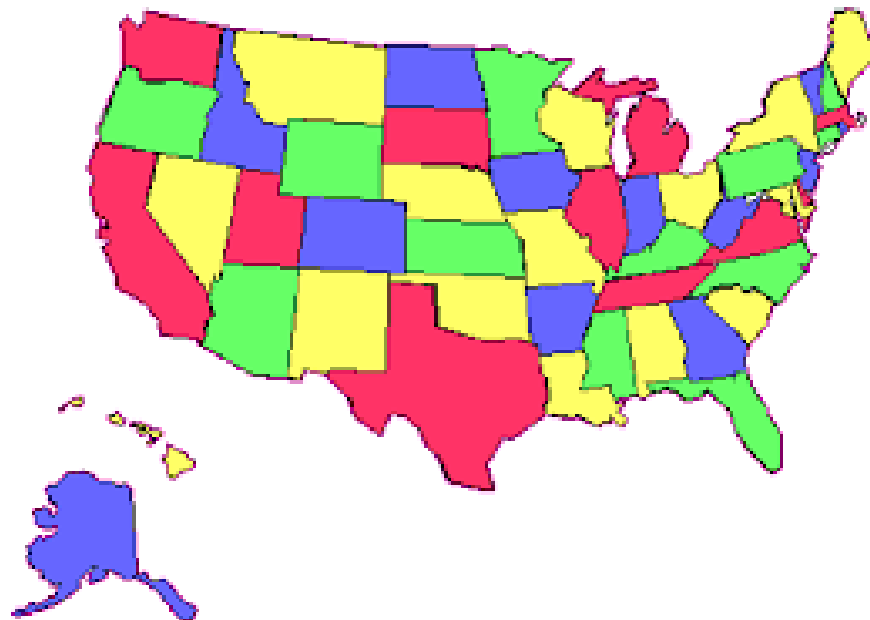


Consider a Pro-Active Pay Equity Assessments

- Consider conducting a pay equity analysis
 - *Examine your own compensation data before the government starts doing so*
 - Keep attorney-client privilege principles in mind
- Consider running EEO-1 report using statistical tests the agency has said they will use
- Employers likely need additional resources & budget to:
 - Conduct appropriate compensation analyses
 - Correct any disparities found

Seyfarth's 50-State Pay Equity Survey

- Updated regularly for registered clients, this survey covers all existing and pending state pay equity laws. To inquire about how to purchase the survey, please contact payequity@seyfarth.com.



Seyfarth's Pay Equity Guide



Coming your way soon!



Thank You

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