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# Understanding the Revised EEO-1 Report

Disclosure of Pay Data  
August 14, 2017

# Speakers

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# Today's Agenda

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- 01** Background and Current Status of the Revised EEO-1
- 02** What is “new” in the Revised EEO-1 Report?
- 03** What do I need to do to complete my 2017 EEO-1 submission?
- 04** What is the EEOC going to do with our data?
- 05** Confidentiality Concerns: How do we protect our data?
- 06** Employer Takeaways

# Background Information

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## **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 to EEOC

## **7/14/2016:**

EEOC submits to OMB (makes minor revisions to proposal)

## **8/2016:**

Seyfarth Shaw and interested parties submit comments and offer information to OMB

## **9/29/2016:**

OMB approves EEOC's proposal, despite strong opposition



***Wasn't the Revised EEO-1  
Going Away?***



# Current Status

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Chamber of Commerce submits request for reconsideration to OMB

- Supported by other employer associations and individual employers

House Action

- Prohibition on EEOC expending funds to implement revised EEO-1
- Not included in final House appropriation bill

Acting Chair Vicki Lipnic comments at NILG

- Sent letter to OIRA requesting final decision no later than end of August

Some indication that Office of Information and Regulatory Affairs (OIRA) may delay implementation to review burden analysis

- Obtain further input
- No action as of today



***What is “new” in the  
Revised EEO-1 report?***







# What is “new” in the Revised EEO-1 Report?

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## **Reporting Deadline and Reporting Period**

- New Deadline: March 31
- New Reporting Period: October 1 – December 31

## **Reporting of Compensation in 12 Pay Bands**

- Based on W-2 Wages
- By EEO-1 Category

## **Reporting “Hours Worked”**

- Based on the FLSA Definition
- By EEO-1 Category



# Revised EEO-1 Report – Two Components

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## 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

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## Component 1

- Federal contractors with 50 to 99 employees

## Components 1 and 2

- Employers with 100 + 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 W-2  
Box 1 earnings and FLSA “hours worked” through the last pay period  
of the year

First report is due March 31, 2018



# Special Note for Federal Contractors

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## VETS-4212 Report implications

- 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

2017 – Contractors must file by 9/30/17 to be in compliance with Vets-4212

2018 and beyond – Contractors must file by 9/30/2018, but may use 12/31/2017 snapshot period for filing reports

- Changing the filing date requires DOL to exercise rulemaking authority



## Pay Data: W-2 Wages

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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: FLSA “Hours Worked”

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**Non-Exempt employees:** “Hours Worked” as recorded for FLSA purposes

**Exempt employees:** Proxy Hours or FLSA Actual Hours

- If the employer already maintains accurate records of hours for exempt employees, use actual hours

*OR*

- FT workers -- 40 hours X weeks “worked” in the year
- PT workers -- 20 hours X weeks “worked” in the year

**Note:** “weeks” worked will not necessarily equate to 52 weeks

Hours data will be reported in the aggregate for all employees in the pay band and job category by race/ ethnicity



# “Hours Worked” Doesn’t mean Hours Paid

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## FLSA Definition of “Hours Worked”

### Hours on the job vs. Hours on a pay stub

- Time worked vs. Time paid
- “Hours Worked” excludes sick time, vacation, holidays, LOAs, jury duty and other compensable time
- Pay code level programming required

### Consider data implications for employees on snapshot who work partial years

- Hires, terminations





# Revised EEO-1 report – Employee Counts

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		
Technicians 3	37. \$19,239 and under															
	38. \$19,240 - \$24,439															
	39. \$24,440 - \$30,679															
	40. \$30,680 - \$38,999															
	41. \$39,000 - \$49,919								1	2					3	
	42. \$49,920 - \$62,919															
	43. \$62,920 - \$80,079	1	2	1											4	
	44. \$80,080 - \$101,919															
	45. \$101,920 - \$128,959															
	46. \$128,960 - \$163,799															
	47. \$163,800 - \$207,999															
48. \$208,000 and over																



# Revised EEO-1 report – Hours Worked

Job Categories	Annual Salary in Thousands	For each cell provide the <u>TOTAL</u> Number of Hours worked in last year														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		
Technicians 3	37. \$19,239 and under															
	38. \$19,240 - \$24,439															
	39. \$24,440 - \$30,679															
	40. \$30,680 - \$38,999															
	41. \$39,000 - \$49,919								2080	4160					6240	
	42. \$49,920 - \$62,919															
	43. \$62,920 - \$80,079	2080	4160	2080											8320	
	44. \$80,080 - \$101,919															
	45. \$101,920 - \$128,959															
	46. \$128,960 - \$163,799															
	47. \$163,800 - \$207,999															
48. \$208,000 and over																



***What do I need to do to complete my EEO-1 filing?***





# What Data Do You Need?

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## At Least:

- Name, Job Title, EEO-1 Category, Race, Sex, Location, Date of Hire (Employees hired in the reporting year)
- 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)



# Overview of Process





# Overview of Process

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Who at your organization needs to be involved?

- IT, HR, Payroll, Legal

Is there a managed solution from your HRIS or Payroll vendor?

If not, your IT professionals need to understand the specific data needs

- Can all the data be easily combined
- Can you extract only the data you need or will you have to significantly refine the data (e.g., limit W-2 data for only employees on snapshot)
- Can you write a query to only return FLSA “hours worked”
  - Understand impact of pay codes
  - Understand exempt employee reporting

# Don't forget about all of the “regular” validation issues in EEO-1 reporting



- Pulling the data is just the first step
  - Employees who declined to self-identify
  - Assigning EEO-1 Codes to new job titles
    - **When is the last time you reviewed your EEO-1 codes?**
- Then you'll need to add EEO-1 specific fields:
  - EEO-1 Location Code
  - NAICS Codes



***What is the EEOC going to do with my data?***





# What is the EEOC going to do with my data?

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## We still don't know for sure...

- EEOC will use “statistical tests” to identify significant disparities early in investigations
  - Once it expands its software
- Periodically publish aggregate reports on pay disparities by race, sex, industry, occupational groupings, and Metropolitan Statistical Area (MSA)

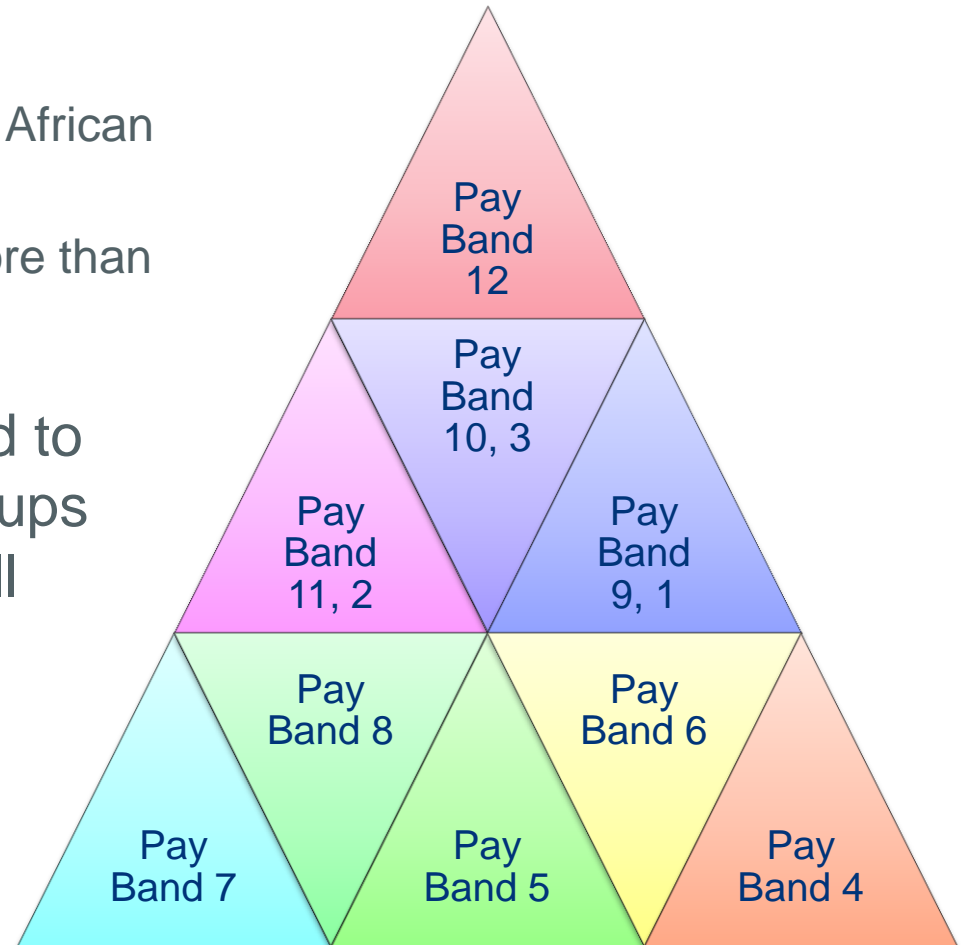


# What kinds of statistical analysis?

EEOC indicates it may use:

- Mann-Whitney (men vs women or African Americans vs Whites)
- Kruskal-Wallis test to compare more than two groups (e.g., race)

Both of these tests may be used to assess if gender and racial groups are equally distributed across all the pay levels of an employer



# What will these statistical analyses show?

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Not much...data is inherently unable to discern **anything** about pay discrimination

The data that EEOC is collecting has some serious limitations

- Large job categories combine too many varying positions
- Pay is highly correlated with experience, relative skills, and qualifications and many factors – none of which are captured
- Valid differences in working conditions that impact pay
  - Full/part-time status, shift differentials, overtime can be correlated with gender but are not indicative of discrimination



# "Sample" Corporation

## Gender / Race Employee Counts by EEO-1 Category and Pay Band

Facility: City, State

Pay Band	Gender		Percent in Pay Band		Mann-Whitney	Race					Percent in Pay Band					Kruskal-Wallis
	Male	Female	Male	Female	Standard Deviations	White	AfrAmer	Asian	Hispanic	TwoMore	White	AfrAmer	Asian	Hispanic	TwoMore	Standard Deviations
<b>1.1 - Executive/Senior Level Officials and Managers</b>					<b>0.00</b>											<b>1.55</b>
(12) \$208,000 and over	13	5	100.0%	100.0%		14	1	2	1	0	100.0%	100.0%	100.0%	100.0%	0.0%	
<b>1.2 - First/Mid Level Officials and Managers</b>					<b>-2.55</b>											<b>4.27</b>
(8) \$80,080 - \$101,919	3	2	9.1%	7.7%		1	3	0	1	0	2.2%	27.3%	0.0%	100.0%	0.0%	
(9) \$101,920 - \$128,959	0	3	0.0%	11.5%		1	1	0	0	1	2.2%	9.1%	0.0%	0.0%	100.0%	
(10) \$128,960 - \$163,799	8	9	24.2%	34.6%		12	5	0	0	0	26.7%	45.5%	0.0%	0.0%	0.0%	
(11) \$163,800 - \$207,999	19	12	57.6%	46.2%		28	2	1	0	0	62.2%	18.2%	100.0%	0.0%	0.0%	
(12) \$208,000 and over	3	0	9.1%	0.0%		3	0	0	0	0	6.7%	0.0%	0.0%	0.0%	0.0%	
<b>2 - Professionals</b>					<b>-7.55</b>											<b>8.21</b>
(5) \$39,000 - \$49,919	2	0	0.6%	0.0%		1	1	0	0	0	0.2%	2.1%	0.0%	0.0%	0.0%	
(6) \$49,920 - \$62,919	13	15	4.1%	7.1%		17	3	4	2	2	4.0%	6.3%	9.8%	20.0%	22.2%	
(7) \$62,920 - \$80,079	14	28	4.4%	13.2%		25	9	4	1	3	5.9%	18.8%	9.8%	10.0%	33.3%	
(8) \$80,080 - \$101,919	22	36	6.9%	17.0%		34	12	9	1	2	8.1%	25.0%	22.0%	10.0%	22.2%	
(9) \$101,920 - \$128,959	76	77	24.0%	36.3%		118	13	16	4	2	28.0%	27.1%	39.0%	40.0%	22.2%	
(10) \$128,960 - \$163,799	104	38	32.8%	17.9%		126	7	8	1	0	29.9%	14.6%	19.5%	10.0%	0.0%	
(11) \$163,800 - \$207,999	84	17	26.5%	8.0%		97	3	0	1	0	23.0%	6.3%	0.0%	10.0%	0.0%	
(12) \$208,000 and over	2	1	0.6%	0.5%		3	0	0	0	0	0.7%	0.0%	0.0%	0.0%	0.0%	

# "Sample" Corporation

## Gender / Race Employee Counts by EEO-1 Category and Pay Band

Pay Band	Gender		Percent in Pay Band		Mann-Whitney									
	Male	Female	Male	Female	Standard Deviations									
<b>1.1 - Executive/Senior</b> (12) \$208,000 and over	<b>2 - Professionals</b>				<b>-7.55</b>	1.55								
<b>1.2 - First/Mid Level</b> (5) \$39,000 - \$49,919	2	0	0.6%	0.0%	}	4.27								
(6) \$49,920 - \$62,919	13	15	4.1%	7.1%										
(7) \$62,920 - \$80,079	14	28	4.4%	13.2%										
(8) \$80,080 - \$101,919	22	36	6.9%	17.0%										
(9) \$101,920 - \$128,959	76	77	24.0%	36.3%										
<b>2 - Professionals</b> (10) \$128,960 - \$163,799	104	38	32.8%	17.9%	}	8.21								
(11) \$163,800 - \$207,999	84	17	26.5%	8.0%										
(12) \$208,000 and over	2	1	0.6%	0.5%										
(8) \$80,080 - \$101,919	22	36	6.9%	17.0%			34	12	9	1	2	8.1%	25.0%	22.0%
(9) \$101,920 - \$128,959	76	77	24.0%	36.3%	118	13	16	4	2	28.0%	27.1%	39.0%	40.0%	22.2%
(10) \$128,960 - \$163,799	104	38	32.8%	17.9%	126	7	8	1	0	29.9%	14.6%	19.5%	10.0%	0.0%
(11) \$163,800 - \$207,999	84	17	26.5%	8.0%	97	3	0	1	0	23.0%	6.3%	0.0%	10.0%	0.0%
(12) \$208,000 and over	2	1	0.6%	0.5%	3	0	0	0	0	0.7%	0.0%	0.0%	0.0%	0.0%

# What will these statistical analyses show?

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To pass a Mann-Whitney or Kruskal-Wallis analysis, employers need to show that men and women and employees of all races are equally proportioned across the organization

That is very unlikely to happen within the EEO-1 framework:

- jobs with different pay scales can make it appear that one group is paid less within the same EEO-1 category
- partial year jobs intermixing with full year jobs can make it appear that one group is paid less within an EEO-1 category (even if they have they exact same pay but are in different bands because of hours)

Hours data is not used in either analysis



# Decision Point – Should We Run the EEOC’s Identified Statistical Tests on our Data?

## Pros

vs.

## Cons

- You will see what the agency sees
- May be used to support an internal decision to conduct a robust pay analysis
- Opportunity to investigate data issues (i.e., EEO-1 assignments)

- Based on meaningless data – Results will be meaningless
- W-2 data and FLSA Hours worked are not used in pay analyses
- False sense that pay looks good
- Indicators of problems when none exist



# What To Do Now

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- Prepare your organization
  - How would you gather the requested data
  - Review data (i.e. EEO-1 categories, establishments, self-ID, etc.)
  - Transition key data fields into electronic sources, e.g., experience, certifications, and education
  
- And finally (and most importantly)...
  - *Under attorney-client privilege*
  - *Examine your own compensation data before the government starts doing so*







***What do I do if someone  
tries to get my EEO-1  
report?***



# What do I do if someone tries to get my EEO-1 report?

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EEO-1 Reports are protected from disclosure by EEOC employees under Title VII

- But charging parties can access the EEOC's files, including the EEO-1 report after filing suit

No similar protections over OFCCP

- EEO-1 Reports are subject to FOIA requests submitted to OFCCP
- Under OFCCP regulations, contractor will be notified of FOIA request 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



# Do I have any protections if someone issues a FOIA Request to OFCCP?

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FOIA Exemption 4 protects confidential business information (e.g. trade secrets or commercial and financial information)

- relates to a business or trade in which the submitter has a commercial interest or deals with money;
- was obtained from a person, includes individuals, corporations, state/foreign governments, but not Federal government; and
- that it is covered by the attorney-client, work product, or deliberative process privileges or if release would cause substantial harm to the competitive position of the submitter.



# How do I protect my EEO-1 from disclosure?

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There are a couple of steps that you can take to protect your information:

- Ensure that the company officials listed on your EEO-1 reports is up to date
  - **Notify** EEOC on company letterhead of change in company officials
- Ensure that the company official is **aware** that such notifications may be sent and how to respond
- If a request is received, promptly notify your legal department and/or outside counsel for assistance

Any objections should address the following:

- Specific information you consider to be protected
- How disclosure would be valuable to your competitors
- Whether the information already publicly available. If so, how does further release cause harm?
- What steps have you taken to protect the confidentiality of the information?





# *Employer Takeaways*



# Key Takeaways:

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Budgets for completing EEO-1 will likely need to increase

Develop a comprehensive plan for completion of the Revised EEO-1

- Include process for maintaining confidentiality

In light of sensitive nature of data, high level employees should be involved in EEO-1 reporting process

Understanding your pay practices will be critical

- Conduct a robust pay analysis
- Keep attorney-client privilege principles in mind
- Consider capturing key data that explain pay differences into electronic sources

# EEOC Resources

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- <https://www.eeoc.gov/employers/eo1survey/2017survey.cfm>
- <https://www.eeoc.gov/employers/eo1survey/2017survey-qanda.cfm>

# Seyfarth Shaw Resources

EEO-1 Resource Page. We will provide periodic updates, resource materials and responses to FAQs regarding Component 2 of the EEO-1 Report

<http://www.seyfarth.com/EEO1-Resource-Center>

50-State Pay Equity Survey. Updated regularly, this survey covers all existing state pay equity laws.

[http://www.seyfarth.com/dir\\_docs/publications/PE\\_01262017.pdf](http://www.seyfarth.com/dir_docs/publications/PE_01262017.pdf)

The collage features four overlapping document covers:

- EEO-1 Solutions by Seyfarth:** Includes a lightbulb icon and text about the Employer Information Report (EEO-1) and Component 2 requirements starting in 2015.
- Employer Tools:** Includes a briefcase icon and text about organizational tools.
- Seyfarth Client Alerts:** Lists recent news items such as "VETS-4212 Report: 2017 Filing Cycle Starts August 14, 2017" and "Breaking News: New EEOC Pay Report Proposed".
- 50 State Pay Equity Desktop Reference:** Features a world map with human icons containing dollar signs, and the title "50 State PAY EQUITY DESKTOP REFERENCE What Employers Need to Know About Pay Equity Laws 2017 EDITION".



# Organizational Strategy and Analytics

Empowering Employers with Data-Driven Results



Data-Driven  
Compliance

Workforce Planning &  
Proactive Assessments

Privileged  
Analytics

<http://www.seyfarth.com/OrganizationalStrategyAnalytics>



**Questions?**