

Management Alert



Breaking News: New EEOC Pay Report Proposed For Employers in 2017

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If there was any doubt that pay equity is major risk area for employers, that doubt should now be erased. This morning, on the seventh anniversary of the signing of the Lilly Ledbetter Fair Pay Act, the EEOC made a startling announcement. The EEOC announced its intention to submit to the Office of Management and Budget (OMB) a major revision to the Employer Information Report (EEO-1) which will require that all employers with more than 100 employees submit compensation data to the EEOC beginning in 2017. At a White House ceremony, President Obama, Secretary of Labor Perez and EEOC Chair Yang announced the new initiative stating that the availability of pay data will allow the EEOC and the OFCCP to better target compensation issues and address pay disparities.

This proposal suggests that the new EEO-1 form will take the place of the Department of Labor's Office of Federal Contract Compliance Programs' (OFCCP) pending "Equal Pay Report" regulations, which would have affected only federal contractors and subcontractors. For more information, see our earlier alert on the Equal Pay Report [here](#).

Written comments to the EEOC's proposal will be due 60 days after it is published in the Federal Register, an action that is expected to occur on Monday, February 1, putting the close of the comment period in early April 2016. We expect that hundreds, if not thousands of comments will be received.

What is Currently Required?

Currently, employers with more than 100 employees, and federal contractors or subcontractors with more than 50 employees are required to collect and provide to the EEOC information about employees' race/ethnicity and sex in each of ten job categories (e.g., Executive & Senior-Level Officials and Managers, First/Mid-Level Officials & Managers, Professionals, Technicians, Sales Workers, Administrative Support Workers, Craft Workers, Operatives, Labors and Helpers, and Service Workers).

What Pay Data Would Be Required?

Beginning in September 2017, employers with more than 100 employees would also be required to report on the W-2 earnings and hours worked for all employees by race/ethnicity and gender. Federal contractors and subcontractors with between 50 and 99 employees will only be required to submit the current EEO-1 form without compensation data.

For each of the ten EEO-1 job categories, the proposed EEO-1 report will require compensation data to be categorized in twelve pay bands. The pay bands track those used by the Bureau of Labor Statistics in the Occupation Employment Statistics Survey as follows:

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

So, for example, an employer would report that it employs ten African-American men who are Craft Workers in the second pay band (\$19,240-\$24,439) or that it employs four White women in the Professional job category who are in the seventh pay band (\$62,920-\$80,079).

Unlike the OFCCP’s proposal, which required year-end W-2 compensation data, the EEOC’s proposal will require W-2 earnings for the previous twelve months from any pay period between July 1st and September 30th (same as the current EEO-1 report). As the proposal requests W-2 information, this will include salary, bonuses, commissions, tips, taxable fringe benefits, and other forms of reportable earnings. The EEOC suggests that such a requirement will not be burdensome to employers as HR data systems allow W-2 wage reporting by any specified date range. This does not necessary align with employers’ experience, however, especially when pulling commission data. The proposal estimates the new requirements will cost less than \$400 per employer the first year and a few hundred dollars per year after that, a gross underestimation of the burden on employers to collect and report this information.

To help address the concerns anticipated in response to the OFCCP’s proposal, the EEOC’s proposal requires that part-time or partial year employment be normalized by also requiring employers to publish hours worked by the employees in each job category and pay band. For example, an employer would report that the ten African-American men who are Craft Workers in the second pay band worked a total of 10,000 hours. This data is still largely meaningless to assess pay equity, however, as eligibility for overtime, commissions, bonuses are typically not the same for full-time, and partial-year or part-time employees.

Impact on Employers

It is difficult to overstate the impact that this could have on employers.

The EEOC explicitly says it will use the pay information to “discern potential pay discrimination.” It will do so by comparing variations within and across job categories. However, the pay bands do not take into effect legally accepted variables, such as seniority, level of responsibility, and education. We expect many false positive results with employers then needing to defend their compensation systems.

When the OFCCP published its proposed regulations in 2014, the Agency indicated that it would use the compensation data to create industry compensation standards which will then be used as benchmarks for both the OFCCP and the contractor community and would have been part of the methodology used to prioritize which contractors will be selected for OFCCP audits. Because the OFCCP will have access to the new reports, their agenda will likely not change.

Further, because EEO-1 information is reported by enterprise (i.e., the parent company and all subsidiaries), this will allow the EEOC to compare compensation within a location, across the organization and enterprise-wide. In addition, the EEOC said it will use the data to compare employers by industry or metropolitan area.

There are also significant unaddressed data privacy concerns for employers. The proposal acknowledges that the EEOC cannot release EEO-1 data and therefore the company supplied EEO-1 cannot be disclosed pursuant to a Freedom of Information Act or otherwise. However, EEO-1 data can be used in litigation. The OFCCP states that it will review requests for the report under Exemption 4 of the Freedom of Information Act and the Trade Secrets Act. While we have been successful opposing requests for disclosure of the EEO-1 form to the OFCCP in individual cases, the new form will undoubtedly be subject to additional scrutiny and requests for disclosure.

It's More Important than Ever to Act Proactively!

So where do we go from here? In light of this development, the OFCCP's focus on fair pay, and recent state action on pay equity (including in [California](#), [New York](#), and [Massachusetts](#)), all employers would be well-advised to conduct a proactive pay equity analysis now, to address any areas of concern before data is reported to the EEOC and/or the OFCCP.

Seyfarth Shaw's Pay Equity Cross-Practice L&E Team, coordinates the efforts of its Employment Analytics Group, Workplace Counseling and Solutions Group, and its Complex Discrimination Litigation Group. We are ready to help guide you through this process.

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