SEYFARTH SHAW

Management Alert

Breaking News: EEOC Holds Public Hearing on EEO-1 Pay Report: Seyfarth to Testify on Behalf of U.S. Chamber of Commerce

By Annette Tyman, Samuel Sverdlov, and Christine Hendrickson

Tomorrow afternoon Seyfarth Shaw's Camille Olson will testify on behalf of the U.S. Chamber of Commerce before the EEOC in public hearings on the EEOC's proposal to expand the EEO-1 report to require employers to provide pay and hours worked data for all employees. For more information on the EEOC's proposal to collect pay data, see our earlier alert here.

The impact of the new EEO-1 report is substantial; both in the millions of hours that private employers would be required to spend completing the new report and in the false positive and false negative results that the Chamber's testimony confirms are generated from the Proposed EEO-1 Report. The EEOC's Proposal, allegedly borne out of a laudable desire to ensure compliance with Title VII and the Equal Pay Act, will do no such thing. Instead, in practice, it would impose enormous burdens on employers to provide aggregated data of employees who perform dissimilar work, without regard to myriad legitimate factors that differentiate pay amongst those employees.

A full copy of the 67-page testimony, which is based, in part, on the declarations of prominent economists Dr. J. Michael DuMond (Economics, Inc.) and Dr. Ronald Edward Bird (U.S. Chamber of Commerce), is available here.

Below is a summary of the testimony that will be delivered tomorrow:

> On February 1, 2016, without any prior notice to the regulated community, the EEOC published a proposed revision to the EEO-1, Employer Information Report. This data request, to which every employer with 100 or more employees and every government contractor with 50 or more employees must respond annually, has been in existence for 50 years. However, for the first time, the EEOC is proposing that employers with 100 or more employees submit data showing the W-2 wages and hours worked of all of their employees divided into 12 arbitrary pay bands, in addition to the demographic makeup of their employment rosters. To get a sense of the magnitude of the proposed revision, the existing EEO-1 report requires 128 data points. Pursuant to the changes proposed by the EEOC, covered employers will have to submit forms for each establishment, and each establishment report would consist of 3,360 data points.
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> The framework within which the EEOC's Proposal is analyzed is Title VII and the Paperwork Reduction Act (PRA or Act).[1] The PRA requires that any request for data by a government agency meet three basic criteria: (1) the request minimizes the burden on responders to reply; (2) the request results in data which is meaningful to the government for policy and enforcement purposes; and (3) the data request is designed to ensure that the data is securely and confidentially obtained and retained. The OMB is charged with reviewing the data request to ensure that the requesting agency complies with the PRA.

1 For underlying authority to require employers to submit the EEO-1 form, EEOC relies on the recordkeeping provisions of 42 U.S.C. § 2000-e8(c) and 29 CFR 1602.7. *See* 81 Fed. Reg. 5113.

Although the EEOC admits that it began working on this project four years ago (and perhaps even longer ago), it permitted employers only five weeks to prepare these comments for submission at a public hearing in which employer representatives are permitted five minutes each to testify about the proposal. The Chamber nevertheless retained noted labor economists and statisticians to review the EEOC's proposal and two law firms to further analyze the legal compliance of the EEOC with the PRA and the new requirements it is proposing to impose on employers. The conclusions of these reviewing experts and law firms are stunning:

The EEOC has cavalierly refused to comply with its responsibilities under the Paperwork Reduction Act in the following ways:

The EEOC has produced an "analysis" of the burden its proposal will impose which is completely lacking in any substance and has no basis in fact.

- The EEOC suggests that a "revised form" with almost 26 times the number of data points to complete will impose *no* additional burden and cost 50% *less* than the previous form which was approved in 2015.
- The EEOC and its consultant admit that there was no testing of the form or the time that would take to complete it, but rather that it used "synthetic data" compiled from fictitious companies to produce an estimate of the time required to complete the new forms.
- The EEOC refers to proposals by other agencies which have never been completed and which have never been published to sustain its estimate of burden.
- The EEOC, through sleight of hand, arbitrarily eliminated from its analysis of the burden the time and effort required to submit data relating to more than 250,000 employer establishments. Under the EEOC's proposal, employers will still be required to submit data for the 250,000 establishments that have been omitted from the Agency's burden analysis. The EEOC simply ignores this fact.

The EEOC offers no argument that the mass of data to be submitted will be useful for any law enforcement or policy enhancement.

- The laws that the EEOC enforces do not permit the consideration of broad aggregates of data from dissimilar jobs combined into artificial groupings. There can be no legal or enforcement use of this data. Indeed, the EEOC's own compliance manual and its consultant recognize that these broad aggregations of data are essentially useless. Myriad federal courts have reached the same conclusion.
- The EEOC is requiring the combining of completely dissimilar jobs to determine if there is pay discrimination. For instance, the proposed revised forms will require a reporting hospital to combine lawyers, doctors, nurses and dieticians - all grouped as "professionals" - to somehow determine whether there are pay disparities based on gender, race or ethnicity. No law permits comparisons of such diverse workers to prove discrimination.
- In order to meet its own bureaucratic timetable, the EEOC will require employers to combine two distinct years of W-2 data to create a fictitious W-2 amount for employees. This combination of W-2 data over a two year period will yield completely useless information. It does not take into account job changes, promotions, annual pay adjustments, different working conditions or locations or the many other factors that go into compensation.
- The EEOC will require employers to collect and report the hours worked for all employees. While the EEOC suggests that it will not require collection of new information from employers, they have not addressed the critical fact that employers do not currently collect hours information for exempt employees. The EEOC suggests that employers may use a "default" number of 40 hours for each exempt employee. In the private sector, exempt employees regularly work more than 40 hours, thus the hours information would be

inaccurate, and therefore, of limited use. A legitimate study before this proposal was published would have revealed that fact.

The EEOC offers absolutely no discussion of the threats to confidentiality or privacy of the information it is requiring employers to submit.

- The PRA requires that the requesting agency and the OMB ensure that data collected will be treated with complete confidentiality. The EEOC did not even attempt to take this responsibility seriously. When the OPM cannot even protect the personnel data of 21 million federal employees or applicants, the EEOC should at least be cognizant that confidentiality of the pay data of more than 70,000 employers--encompassing millions of employees--deserves some consideration. It offers none.
- This data, which is shared with the Department of Labor, is subject to demand for production under the Freedom of Information Act. The EEOC states that the data will be protected to the extent permitted by law. Of course, employers will have to expend significant resources to assert their right under law to protect this data. And for some of the smaller employers, the identity and the compensation of employees will be easily ascertained; the same is true for larger employers with small establishments. The EEOC devotes only two paragraphs to discuss these privacy and confidentiality issues.

In short, the EEOC has sprung upon employers a proposal that would (1) impose significant new, costly administrative burdens; (2) yield data of no utility; and (3) fail to protect confidential information. For these reasons, the Chamber submits that EEOC should withdraw this proposed data collection and, if it refuses to do so, the OMB should exercise its authority and refuse to approve the revised form.

Next Steps

Written comments to the Office of Management and Budget (OMB) on the EEOC's proposal are due April 1, 2016. Seyfarth Shaw will be submitting comments to the OMB. We are thrilled with the outpouring of client comments on these proposed regulations. We strongly encourage you to considering adding your voice. To join the Seyfarth Pay Equity Group's comments, with or without attribution, please submit comments by next Wednesday, March 23rd to PayEquity@seyfarth.com.

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