SEYFARTH SHAW

Management Alert

Seyfarth Submits Comments to EEOC Regarding Proposed Pay Data Collection under EEO-1 Report

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Seyfarth Synopsis in a Second: Seyfarth Shaw submitted comments on behalf of the U.S. Chamber of Commerce and standalone comments on behalf of the Firm and its clients responding to the EEOC's proposal to mandate that employers with more than 100 employees annually submit W-2 compensation data and hours worked to the EEOC and OFCCP.

On April 1st, Seyfarth Shaw submitted comments responding to the EEOC's proposal to revise the current EEO-1 report. The proposed change would mandate that employers with more than 100 employees submit W-2 compensation data and hours worked for its employees, grouped in broad job categories and subdivided into 12 pay bands, along with gender and race/ethnicity data. Seyfarth submitted comments on behalf of the U.S. Chamber of Commerce and also submitted standalone comments on behalf of the Firm and its clients. The April 1st submission supports the testimony Camille Olson presented on behalf of the U.S. Chamber of Commerce in public hearings before the EEOC on March 16th.

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 is generated from the Proposed EEO-1 Report. For more information on the EEOC's proposal to collect pay data, see our earlier alert here. 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 for employees who perform dissimilar work, without regard to the myriad legitimate factors that differentiate pay amongst those employees.

A full copy of the U.S. Chamber of Commerce's 162-page comments, which are based, in part, on the declarations of prominent economists Dr. Ronald Edward Bird (U.S. Chamber of Commerce), Dr. J. Michael DuMond (Economics, Inc.), and Dr. Robert Speakman (Welch Consulting) is available here. Seyfarth's comments are available here. These comments also reflect an outpouring of client input and feedback on the proposed revisions.

Below are highlights from the comments:

> 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. The authorization for the EEOC to require this report is found in Title VII at 42 USC § 2000e-8(c)(3) where such reports are authorized only if they are "reasonable, necessary, or appropriate..." However, for the first time, the EEOC is proposing that all employers with more than 100 employees submit data showing the W-2 wages and hours worked of all of their employees grouped by broad job categories and subdivided into 12 arbitrary pay bands, in addition to the demographic makeup of their employment rosters. The magnitude of the proposed revision cannot be overstated. The existing EEO-1 report requires 140 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 3,660 data points.

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Ironically, EEOC advances this brand new and burdensome data request pursuant to the Paperwork Reduction Act. As previously noted, 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

Although the EEOC notes that it began working on this project at least four years ago, it permitted employers only five weeks to prepare comments for submission at a public hearing in which selected employer representatives were permitted five minutes each to testify about the proposal, and only 60 days to submit these written comments. The Chamber nevertheless retained noted labor economists to review the EEOC's Proposed Revisions. The conclusions of these reviewing economic experts and law firms are stunning:

The EEOC has cavalierly refused to comply with its obligations under Title VII and 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, has no basis in fact, and is contrary to the attached economic analyses of three economists and the results of the Chamber's survey of a significant sampling of its members.

- 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. While the EEOC admits it did nothing to quantify the burdens attendant to its new data requests, and certainly did nothing to minimize the burden, the Chamber, in the eight short weeks allotted to responding entities to comment on the EEOC's Proposed Revisions, conducted a survey of 35 of its members, received in excess of twenty replies to its questionnaire and in fact determined that the burdens imposed by the new requirement were excessive, costly and, in some instances, not feasible.
- The EEOC, apparently in an effort to show a non-existent burden reduction, arbitrarily eliminated from its analysis the burden of 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 Commission's burden analysis. The EEOC simply ignores this fact. The PRA did not intend that its requirement to reduce reporting burdens be addressed by an agency simply ignoring or airbrushing reporting requirements to make its burden numbers look better. This failure alone requires that the agency rescind its proposal and undertake the necessary burden analysis the statute commands and meet the Title VII command that the required report be reasonable, necessary and appropriate.
- As shown in the analysis of the Chamber Survey performed by Dr. Bird, employers who employ almost 4.5% of the employees who would be included in the revised EEO-1 report will experience a vast increase in the cost of implementing and completing the revised form and will encounter severe operational difficulties in even formulating their HR systems to meet the new obligations.

The EEOC offers no rationale to support its claim that the mass collection of data will be useful for any law enforcement or policy enhancement.

- The laws that the EEOC enforces do not permit aggregating dissimilar jobs into artificial groupings for purpose of analyzing pay. There can be no legal or enforcement-related use for 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 into arbitrary pay bands 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 or even to provide enough evidence to commence an investigation.
- In order to meet its own bureaucratic timetable, the EEOC will require employers to combine two distinct years of

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W-2 data to create a fictitious W-2 amount for employees. This combined W-2 amount over a two year period will yield 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. And the components of W-2 income are so diverse that there can be no viable analysis of the reported W-2 income to ascertain disparities of treatment.

The EEOC will also 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, it has 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, but no such study was done.

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 Office of Personnel Management (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 significant consideration. It offers none.
- These data, once shared with the Department of Labor, are 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 individual 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. The EEOC has proposed these revolutionary revisions without meeting any of its obligations under the PRA. 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

The EEOC will now analyze and consider the comments it received on the proposed revisions. The EEOC will then provide a written assessment of the comments and submit its final recommended revisions to the EEO-1 report to the Office of Management and Budget ("OMB"). OMB in turn, will have 60 days to consider the proposal to revise the EEO-1 report. During that 60-day period, OMB will accept additional comments from the public. As we continue to monitor these changes, we welcome any additional comments at PayEquity@seyfarth.com.

For further information, you can also contact Annette Tyman at atyman@seyfarth.com, or Christine Hendrickson at chendrickson@seyfarth.com.

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