

Management Alert



Breaking News: EEOC Revised EEO-1 Report Finalized - Employers With More Than 100 Employees Will Be Required to Submit Pay Data to EEOC

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Seyfarth Synopsis: On September 29, 2016, the OMB approved the EEOC's revisions to the EEO-1 report. Beginning in 2018, employers with 100+ employees will be required to annually report pay and hours data to the EEOC for its workforce. The OMB approved the EEO-1 revisions despite the significant problems with the pay data collection tool and significant questions remain regarding the usefulness of the data in identifying discriminatory pay disparities.

It's official: Beginning in 2018, employers will have to report compensation data and hours to the EEOC. Today, the Office of Management and Budget (OMB) approved the EEOC's changes to the Employer Information Report (EEO-1). As a result, every employer in the U.S. with more than 100 employees will be required to report total W-2 compensation information and hours worked for all of its employees on an annual basis. The EEOC contends that adoption of the new EEO-1 form will enable the EEOC (and, for federal contractors and subcontractors, the OFCCP) to target compensation issues and address pay disparities. There are, however, significant unanswered questions about the utility and use of this report.

The changes will take place for 2017 EEO-1 filings, which will have a new reporting deadline of March 31 of each year. For instance, the EEO-1 report for the 2017 year will be due on March 31, 2018.

How Did We Get Here?

As previously reported, the EEOC [issued revisions to the EEO-1 report](#) on February 1, 2016 followed by a 60-day comment period. On March 16, 2016, the EEOC held a public hearing regarding the EEO-1 report during which Seyfarth Shaw's Camille Olson, [testified on behalf of the U.S. Chamber of Commerce](#). [Seyfarth Shaw submitted comments](#) on behalf of itself and participated in the comments filed by the U.S. Chamber of Commerce. In response, the EEOC made minor revisions to the [proposed EEO-1 report](#) on July 14, 2016 and submitted its final revisions for OMB review and approval ("Final Revisions"). A further comment period before OMB ran through August 15, 2016, during which Seyfarth Shaw again [submitted comments](#) on its own behalf and participated in drafting comments on behalf of the U.S. Chamber of Commerce. Nearly 1,000 comments were submitted to OMB. The OMB approved the EEOC's Final Revisions today, September 29, 2016.

What Does the EEO-1 Report Currently Require?

The EEO-1 Report is a survey document that has been mandated for more than 50 years. 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, Laborers and Helpers, and Service Workers). The current EEO-1 report is available [here](#).

There are no changes to the EEO-1 report for 2016, which remains due September 30, 2016.

What Will the New EEO-1 Report Require?

Beginning in March 2018, covered employers will still be required to provide the demographic information currently required. However, in addition, employers with more than 100 employees will be required to submit a "Component 2" report which discloses previous year W-2 earnings and hours worked for all employees. Federal contractors and subcontractors with between 50 and 99 employees will only be required to submit the current EEO-1 form without the compensation and hours worked data required in the Component 2 report. The format of the new report is available [here](#).

Employers will submit information based on an employee workforce snapshot taken from the end of any pay period between October 1st and December 31st. Employers are required to account for and include all employees who were active as of that snapshot pay period. So, for example, if the employer chose December 15th as the snapshot pay period, it would include the year-end income and hours worked for every employee who was active during that pay period. In this example, if an employee was hired on December 1st, the employer would only report on the hours and income that the employee worked and earned between December 1st and December 15th. However, if another employee was terminated on November 15th of the reporting year, that employee's income and earnings would not be reported on the EEO-1 report because the employee was not employed during the December 15th snapshot pay period. As another example, if the employer chose October 1st as the snapshot pay period, the employee who was hired in December would not be included but the employee who was terminated on November 15th would be included. For the employee who was terminated as of November 15th, the employer would report the entire calendar-year hours and earnings (i.e., all hours and W-2 earnings between January 1st and the termination date of November 15th). The employer will report year-end income and hours worked for employees captured on the snapshot pay period, regardless of the date of the snapshot pay period.

The filing deadline for each year will be March 31st of the following year. So, for example, the 2017 EEO-1 reports must be submitted by March 31, 2018.

The EEOC will require that covered employers submit compensation and hours worked data as follows:

- **COMPENSATION DATA** - For each of the ten EEO-1 job categories, the new EEO-1 report requires that employers report W-2 "Box 1" income calculated on a calendar-year basis, ending December 31st. "Box 1" of the W-2 includes wages, tips, overtime, bonuses and other earnings, but does not include pre-tax retirement and benefit deductions.

This W-2 income data will be reported by tallying the number of employees in each of the ten EEO-1 job categories and categorizing their pay 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

For instance, 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).

- **HOURS WORKED** - The report will also require employers to submit 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.

For non-exempt workers, employers will report actual hours worked (including overtime hours). But what about exempt employees who often do not track their hours? The EEOC's answer was non-satisfactory and will result in skewed data. Employers have the option to use: 1) proxy hours of 40 hours per week for full-time exempt employees and 20 hours per week for part-time exempt employees; or 2) provide actual hours if the employer tracks hours worked for exempt employees.

Impact on Employers

This report will have a clear impact on employers. Not only does this add significantly to the reporting obligations already borne by employers, but the EEOC was clear that this report would be used to "investigate potential pay discrimination" by the EEOC and the OFCCP.

As set forth in our written comments, we have significant concerns with the new EEO-1 report in combating pay discrimination. Despite the comments submitted from the employer community, the EEOC refused to address the key issues implicated by the collection of compensation information in the new EEO-1 report.

- The EEOC failed to address the concerns raised by many commenters, including Seyfarth Shaw and well-respected labor economists, that the EEOC's proposal would do nothing to ferret out pay discrimination given the broad aggregation of dissimilar jobs into artificial pay groupings. For instance, the revisions to the EEO-1 report will require a reporting hospital to combine lawyers, doctors, accountants, nurses and dieticians - all grouped as "professionals" - to somehow determine whether there are pay disparities based on gender, race or ethnicity. No existing law permits comparisons of such diverse workers to prove discrimination. The EEOC acknowledges as much when it concedes in its Final Revisions that it "does not intend or expect that this data will identify specific, similarly situated comparators or that it will establish pay discrimination as a legal matter."
- The statistical tests the EEOC has suggested it will utilize to analyze employer data will likely result in rampant Type I (false positive) or Type II (false negative) errors. This will only lead to additional requests for information based on inaccurate results.

- The use of “Box 1” of the W-2 data increases the possibility of misleading results when investigating pay discrimination. For instance, if a male and a female earn the exact same salary for the job, but one of them contributes more heavily to their 401(k), then according to the EEO-1 report, there will be an appearance of pay disparities since the male and the female employee will have varying wages in Box 1 of their W-2 form.
- This is further compounded by how the EEOC will track hours data. The final proposal to counting hours worked will not address the concerns raised by the employer community. Eligibility for overtime, commissions, and bonuses are typically not the same for full-time, and partial-year or part-time employees yet the report requires this kind of apples/oranges comparison. Further, as most employers will report proxy hours instead of actual hours worked by exempt employees, the hours data is of limited relevance. The EEOC believes that collecting hours worked is of “central importance” to assess part-time and partial-year work in assessing “potential pay disparities.” And yet, the only option given to employers for ensuring that their exempt pay information is analyzed using accurate information is to track actual hours worked for exempt employees, which would be extremely burdensome, if not unworkable, for many employers.

In addition to the concerns with the report itself, there remain significant outstanding data privacy concerns for employers. The Final Revisions acknowledge that the EEOC cannot release EEO-1 data and therefore the company supplied EEO-1 report 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. Federal contractors will need to stay vigilant to ensure that they are promptly responding to FOIA requests for their EEO-1 report.

Employers Need to Be Proactive with Pay Equity Issues

So, what is next? First, we caution against the thinking that because the reporting deadline is not until 2018, there is plenty of time. The new EEO-1 report will be based on 2017 pay data, which begins in less than four months.

Employers will need to begin the process of determining how to adjust their systems and practices to ensure that the new required data is available in the format mandated by the EEOC. Thus, it is important to begin discussions with your HR, HRIS and IT teams now. The number of fields in the new EEO-1 report has ballooned to 3,360 data points per establishment report. As a result, it will take time to develop and implement the right mechanisms to submit the new EEO-1 reports to the EEOC.

In light of the newly adopted EEO-1 report, the OFCCP’s focus on fair pay, and recent state action on pay equity (including California, New York, Massachusetts, Maryland, and Nebraska), all employers would be well-advised to conduct a proactive pay equity analysis now, to address any areas of concern before data is reported and analyzed by the EEOC and/or the OFCCP.

[Seyfarth Shaw’s Pay Equity Group](#) leads the legal industry in thought leadership, privileged fair pay analyses, and employer advocacy on issues relating to pay equity. Given our extensive involvement in responding to the EEOC’s revisions to the EEO-1 report, we are ready to help guide you through this process. [Click here](#) to sign up for Seyfarth’s Pay Equity communications.

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Seyfarth Shaw LLP Management Alert | September 29, 2016

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