

One Minute Memo®



EEOC Revises EEO-1 Report Proposed Pay-Data Collection Rules

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Seyfarth Synopsis: On July 14, 2016, the EEOC released revisions to the EEO-1 proposed rule that will require many employers to annually report pay data if approved in its current form. While the EEOC clarified certain provisions and modified others, key provisions of the revised proposed rule remain largely unchanged. The changes do not address the most significant problems with the pay data collection tool and, in particular, the usefulness of the data in meaningfully identifying discriminatory pay disparities.

In February, the Equal Employment Opportunity Commission (EEOC) announced a major revision to the Employer Information Report (EEO-1) which, if approved by the Office of Management and Budget (OMB), will require that all employers with more than 100 employees submit compensation data to the EEOC beginning in 2017. For more information on the EEOC's initial proposal to collect pay data, see our earlier alerts [here](#), [here](#), and [here](#).

The EEOC solicited feedback from the public regarding the proposed rule and received 322 comments from individuals, employers, organizations (including Seyfarth Shaw) and members of Congress. On March 16, 2016, the EEOC held a public hearing regarding the EEO-1 pay report during which our very own, [Camille Olson](#), testified on behalf of the U.S. Chamber of Commerce. Employers who would be subject to the proposed rule rightfully expressed concern about numerous issues including: (1) the millions of hours that private employers would be required to spend completing the new report; (2) the false negative and false positive results that the Chamber's testimony confirms are generated from the Proposed EEO-1 Report, and (3) confidentiality issues.

On July 14, 2016, the EEOC issued its "[revised](#)" [proposal](#) for collecting pay data in the EEO-1 report for OMB review. The revised rules hold steady on the overall burdens on employers and do not cure the meaninglessness of the data reported to EEOC for investigating pay discrimination. At best, the report will require the collection of additional data from employers under review. Below, we outline some of the salient changes and clarifications to the proposed EEO-1 pay data collection rules.

- If approved, the changes would take place in 2017, with a reporting deadline of March 31. Specifically, the EEO-1 data for the 2017 year will be due on March 31, 2018. There would be no changes to the EEO-1 collection requirements for 2016 which remains due September 30, 2016.

- In response to employer concerns regarding the reporting of the pay data, the EEOC's proposed revisions move the "workforce snapshot" period from a pay period between July 1 to September 1, with a reporting deadline of September 30, to a pay period between October 1 and December 31, with a reporting deadline of March 31.
- In the originally proposed rules, the EEOC did not indicate which "box" of the W-2 is reportable as wages. Under the final proposed rule, the EEOC clarifies that employers are to report income provided in "Box 1" of the W-2 form, which includes wages, tips, and other compensation, but does not include pre-tax retirement and benefit deductions. This revision increases the opportunity for a misleading result 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 submission, 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.
- In response to concerns about how "hours worked" should be reported for exempt employees, the EEOC's final proposed rule gives employers 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. In doing so, the EEOC has still declined to address the significant issues implicated by crediting any analysis that takes into account only *proxy* hours instead of *actual* hours worked by exempt employees. The EEOC remains steadfast in its belief 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.
- Finally, the EEOC failed to address the concerns raised by many commenters, including some of the most 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.

Outlook For Employers

The final proposed rule illustrates the EEOC's unyielding approach to collecting compensation information, regardless of the burdens on employers as compared to the benefit of identifying discriminatory pay practices. This is highlighted by the EEOC's insistence on keeping the key provisions of the proposed rules unchanged, despite comments and testimony from industry experts that explained the proposed pay data will be useless in investigating pay discrimination. Thus, employers must prepare themselves for the possibility that these rules will be enacted with very burdensome requirements.

The revised rule brings a fresh 30-day comment period, with all comments due to the OMB on August 15, 2016. Seyfarth Shaw will be submitting comments to the revised rules, and 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 Friday, July 22, 2016 to PayEquity@seyfarth.com.

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Seyfarth Shaw LLP One Minute Memo® | July 18, 2016

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