

Get Ready to Comply: All Signs Point to Enforcement of Enhanced EEO-1 Form and Reporting Obligations

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For approximately fifty years, the ***Equal Employment Opportunity Commission (“EEOC”)*** has collected workforce data about race, gender, ethnicity and job category from all businesses with 100 or more employees, using the ***EEO-1 report***. In an effort to combat pay discrimination, last year the EEOC announced that it finalized regulations expanding the information collected in the annual EEO-1 report to include pay data.

The revised EEO-1 form requires employers to collect aggregate W-2 earnings and report the number of employees in each of the twelve pay bands (spanning from \$19,239 and under to \$208,000 and over) for the ten EEO-1 job categories (Executive/Senior Level Officials and Managers; First/Mid Level Officials and Managers; Professionals; Technicians; Sales Workers; Administrative Support Workers; Craft Workers; Operatives; Laborers and Helpers; Service Workers) and classified by race, sex and ethnicity. The revised EEO-1 form has been largely criticized by employers claiming that the collection of W-2 earnings, without any context to explain legitimate non-discriminatory reasons for pay disparities (e.g., education, training, experience, tenure, merit, etc.) will unnecessarily open the door to increased scrutiny and investigations. To make matters worse, the EEOC has not been very forthcoming about how the information would be analyzed and used, other than as a “screening tool” to identify pay discrimination.

With the post-election transfer of power completed, many practitioners were unsure whether the EEOC would move forward with collecting summary pay data under the new administration. Indeed, one of President Trump’s first actions was to issue a government-wide regulatory freeze halting any new and pending regulations from taking effect. Moreover, the newly appointed acting chair of the EEOC, Victoria Lipnic, confirmed that the revised EEO-1 forms are precisely the intended regulations targeted by Trump’s directive to halt and re-evaluate new and pending rules. That stance coupled with the President’s executive order requiring that for every new federal regulation implemented, two must be rescinded, left many within the employment law community predicting that the new EEO-1 form would fall victim to the new administration’s chopping block.

However, with the passage of time, it appears that the revised EEO-1 form is likely here to stay. Unlike some other agencies, the EEOC operates by majority vote. Acting Chair Lipnic voted against

the new pay data reporting requirements, but she was outnumbered 3 to 1. Therefore, any changes to the new EEO-1 report would require a majority vote from the commission. Trump will have an opportunity to nominate two more Republican commissioners later this year, which, if the nominees are confirmed by the Senate, could tip the balance in favor of rolling back the revised EEO-1 form. However, that type of ideological shift among the EEOC commissioners would not occur until at least the Fall of 2017. Although Lipnic indicated that the enhanced pay data collection requirements may be re-evaluated in the future, she has also stressed that equal pay remains a priority for the EEOC. Given the timing of any new appointments and the upcoming filing deadline (March 31, 2018), it's more likely that we will see a proposal to modify the revised EEO-1 form, rather than a complete repeal of the collection of pay data.

Thus, employers with more than 100 employees would be wise to gear up for compliance. The EEOC recently issued guidance to assist companies with the new reporting obligations by answering questions from the agency's employer webinars about the revised EEO-1 report. The EEOC's guidance instructs employers to reference an employee's wages as reported in his or her W-2, Box 1 for the calendar year, which includes wages, tips and other compensation, to identify the correct pay band. The EEOC clarified that employers cannot reference gross annual earnings instead of W-2, Box 1, earnings. Employers should then count and report the total number of employees in each pay band for the job category on the new EEO-1 form.

The revised EEO-1 form also requires employers to report the total hours worked during the year, which will help explain partial year or part-time employment. The new EEO-1 form follows the Fair Labor Standards Act (FLSA) definition of hours worked. Therefore, employers are not required to include paid leave, such as sick leave, vacation leave, or paid holidays as hours worked. For non-exempt employees, employers should use the number of hours worked under the FLSA during the reporting year. For exempt employees, employers can choose to either report the designated proxy hours of 40 per week for full-time employees or 20 hours per week for part-time employees multiplied by the number of weeks worked that year, or, alternatively, report actual hours worked, as defined by FLSA, if the employer already maintains such records. Employers are not required to create or retain any new records of hours worked for exempt employees.

Other noteworthy changes in the new EEO-1 report include the new workforce snapshot period, which was previously a pay period in between July 1 and September 30, but is now a pay period between October 1 and December 31, and the new filing deadline every March 31, beginning March 31, 2018 and continuing thereafter. Employers are reminded to report pay and hours worked for the *entire year* for employees who are on the payroll during the workforce snapshot period. The job categories and demographic data remain the same.

"Ensuring equal pay protections for all workers" remains a substantive priority for fiscal years 2017-2021, as set forth in the EEOC's Strategic Enforcement Plan. Therefore, it is important that employers are fully ready to comply with the new reporting obligations. Prior to compiling and reporting its 2017 EEO-1 data, we recommend that companies conduct an internal audit to identify any pay disparities and then consult with legal counsel to analyze the bona fide business reasons for any discrepancies.

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