

July 29, 2016

EEOC Revises Proposal to Collect Pay Data from Employers

On July 14, 2016, the Equal Employment Opportunity Commission (“EEOC”) issued a revised proposal to require employers with 100 or more employees to report data on employee pay and hours worked in their annual EEO-1 reports. The agency published its original proposal in February 2016 as part of the federal government’s efforts to combat pay inequity through a series of reporting and enforcement programs.

Currently, most employers with 100 or more employees (and certain federal contractors with 50 or more employees) must file annual EEO-1 reports that provide demographic information about their workforce with the EEOC each year by September 30. The EEOC’s proposal will further require employers with 100 or more employees to annually report their employees’ W-2 earnings and hours worked beginning in March 2018. The EEOC is receiving public comments on the revised proposal through August 15, 2016.

Employers will not be required to report each employee’s precise income, but will rather group employees – based on the annual earnings reported on their Forms W-2 – into 12 pay “bands”, with lowest band including all employees earning less than \$19,240, and the highest band including all employees earning \$208,000 or more, for each of the EEO-1 job categories and demographic groups. Employers will also report the aggregate hours worked by employees in each pay band, job category, and demographic group. Under the EEOC’s proposal, employers who do not track the work hours of employees who are exempt from the overtime pay requirements of the Fair Labor Standards Act must nonetheless report work hours for these employees, but may use estimates of 40 and 20 hours per week for full and part time employees, respectively. The proposal would apparently require employers completing the EEO-1 to place overtime-exempt employees who work other modified schedules, such as 30-hour or four-day weeks, into either the 40-hour or 20-hour category.

The EEOC’s revised proposal also adjusts the annual date by which employers must submit EEO-1 reports, and the period during which employers may select a “workforce snapshot” of employees for inclusion in their reports. EEO-1 reports for

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the 2017 calendar year will be due March 31, 2018, six months after the current deadline of September 30, 2017. The filing deadline for 2016 EEO-1 reports remains September 30, 2016. In addition, for the year 2017 and subsequent filings, employers will select a pay period between October 1 and December 31 of the reporting year to provide a tally of employees who fall into each category on the EEO-1 report, rather than continuing to use a date during the current permitted period of July 1 to September 30.

The EEOC has indicated that it plans to use the information provided by employers as a resource for creating public reports on aggregated pay data across regions and industries, and also as a tool for evaluating allegations of pay discrimination in the initial stages of an investigation; claims of discriminatory compensation can be actionable even if disparities on the basis of race or gender arose inadvertently. Further, the EEOC may share employers' EEO-1 pay data reports with state and local equal employment agencies. While it remains to be seen exactly how the EEOC will use this information, the pay and hour data tabulated on the proposed EEO-1 may be of questionable utility in demonstrating the presence or absence of discrimination. For example, an employee who receives a mid-year promotion accompanied by a substantial salary increase may appear – in the employer's year-end report – to have received substantially lower pay than his or her colleagues. Exempt employees who would be reported as working 40 hours, but whose actual hours depart significantly from the form's approved categories, may seek out or decline projects that require a more substantial investment of time and may be associated with higher incentive or performance pay. In addition, the pay bands used on the EEO-1 forms will not capture smaller discrepancies in employee income, whether or not intentional, that may in fact stem from discriminatory compensation practices.

The collection and reporting of employees' W-2 compensation and hours worked by demographic and job type will likely place a substantial administrative burden on those employers who file annual EEO-1 reports, especially in workplaces where pay is sensitive or contentious. In anticipation of the expanded EEO-1 reporting requirements, affected employers would be well served to evaluate and adjust their payroll and other tracking systems to ensure that the requisite data can be produced as efficiently as possible. In addition, in light of the EEOC's decision to focus public and agency attention on discrimination in pay, employers may wish to consider commissioning their own privileged compensation reviews to better assess their potential exposure and, if appropriate, to explore remedial measures.

If you have any questions regarding the current or proposed EEO-1 reports, please contact Nick Bauer at (212) 758-7793 or any other attorney at the firm.