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EEOC Announces Proposed Revisions to EEO-1 Pay Data Collection Tool

By [The Pay Equity Practice Group](#)

On July 13, 2016, the EEOC announced revisions to its January 2016 proposal to collect pay data through a revised EEO-1 form. As discussed in our prior [client alert](#)—analyzing the EEOC’s original request for comments (the “Original Proposal”) regarding this initiative—the Commission intends to gather information about W-2 earnings and hours worked, organized by EEO-1 category, sex, race, and ethnicity from employers with 100 or more employees.

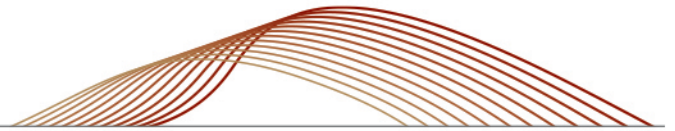
If the EEOC proposal becomes final, non-contractor employers will for the first time be required to submit summary employee compensation data for study and possible investigation by the EEOC. The data will be collected on an expanded EEO-1 form, starting in the 2017 reporting cycle. It will replace the OFCCP’s proposed pay data collection tool and, according to the EEOC’s Original Proposal, will be used to better coordinate efforts across federal agencies.¹

The July 2016 revisions purportedly consider and incorporate certain comments received following the January 2016 Original Proposal. The revised rule provides for a 30-day public comment period. Below we describe key changes in the EEOC’s revised proposal and identify ongoing issues of concern for employers.

Reporting Period, Deadline, and “Workforce Snapshot”

The most significant change from the Original Proposal is that the EEOC’s revised rule changes the reporting deadline for all EEO-1 filers to **March 31st** of the year following the EEO-1 report year. As proposed, the rule thus would require calendar year reporting and move the 2017 EEO-1 reporting due date to March 31, 2018, with wage information based on employees’ W-2 income in the prior year. The 2016 EEO-1 reporting deadline of September 30, 2016 for the currently approved EEO-1 remains unchanged. So EEO-1 filers will have an 18-month “break” after the 2016 EEO-1s are submitted.

The EEOC’s Original Proposal had retained the current September 30 EEO-1 filing deadline, but the Agency responded to concerns that this would have required employers in essence to prepare a second W-2 report each year. The new deadline aligns the EEO-1 with federal obligations to calculate and report W-2 earnings as of December 31st and will allow employers to use W-2 information gathered for tax purposes for the EEO-1.



In response to concerns about the “workforce snapshot” date during which an employer would count its employees to be reported on the EEO-1, the EEOC proposes moving the period from **October 1st to December 31st**, to minimize the possibility of unreported changes after the “snapshot.” Under the new rule, employers will report W-2 income and hours-worked data for the employees on the form for the entire year. Employers should strategically evaluate which pay period to choose; a later pay period may reflect important late-year developments (such as promotions that could alter an employee’s job category or pay band), but other year-end obligations may make it administratively easier to choose an earlier window.

W-2 Data Clarification

The revised rule clarifies that employers must provide the earnings of employees listed in Box 1 of the W-2, which includes taxable income received between January 1 and December 31 of the relevant calendar year.

Although this revision provides clear direction, it does not address initial employer concerns that W-2 income is an unsuitable measure for pay data collection by the Commission. This income reflects employee choice (*e.g.*, employees’ elective participation in overtime) and supplemental pay, such as signing bonuses, which may unfairly distort the picture presented by the data. Employers should understand and be prepared to explain any apparent discrepancies caused by such non-discriminatory factors.

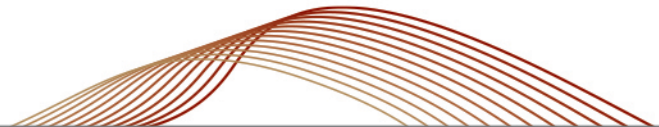
Clarification Regarding Reporting of “Hours Worked”

The revised rule retains the obligation of employers to report “hours worked” for exempt employees, notwithstanding employer comments that this is an unrealistic measure. The EEOC’s new proposed rule offers employers two options: (1) report a proxy of 40 hours per week for full-time exempt employees, and 20 hours per week for part-time exempt employees, multiplied by the number of weeks the individuals were employed during the EEO-1 reporting year; or (2) provide actual hours of work by exempt employees during the EEO-1 reporting year if the employer already maintains accurate records of that information.

Clarification Regarding Confidentiality of EEO-1 Data

In response to employer concerns, the EEOC’s revised proposed rule expands upon the Original Proposal’s discussion regarding the privacy and confidentiality protections of business and pay data. The revised rule emphasizes that Title VII forbids the EEOC or any EEOC officer or employee from making any information public, including EEO-1 data, before a Title VII proceeding is instituted that involves that information. Although such data may be shared with the OFCCP, the rule notes that the OFCCP will notify all federal contractors of any FOIA request for their EEO-1 pay and hours-worked data, and will protect that information to the maximum extent permitted under FOIA. With respect to non-federal contractors, the OFCCP will refer all FOIA requests for EEO-1 data to the EEOC for a response. In addition, the revised rule outlines the measures taken by the EEOC to protect data in its possession, including complying with certain security and privacy controls.

These clarifications fall far short of addressing employer concerns regarding the confidentiality of the proposed EEO-1 data. Employers must still be concerned that this information will be provided in response to a FOIA request, and there is no guarantee that the security and privacy measures taken by the EEOC will adequately protect the collected data. In addition, in small locations with only a few employees in any given EEO-1 category of a given race or gender, individualized data may be ascertainable if the form is made public.



Next Steps

Interested parties have until August 15, 2016 to participate in the comment period. We encourage all employers to participate with their industry groups or otherwise to ensure that whatever final rules are adopted will permit employers to operate their businesses in compliance with the law with minimal disruption from regulators.

We will continue to report on the revised rule, EEO pay analyses, and all related developments.



If you have any questions concerning these developing issues, please do not hesitate to contact any of the members of the Pay Equity Practice Group:

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¹ 81 Fed. Reg. 5113, 5115 (Jan. 30, 2015).

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