

EEOC Won't Budge On EEO-1 Pay Data Collection

Law360, New York (July 20, 2016, 11:41 AM ET) --

On Feb. 1, 2016, the Equal Employment Opportunity Commission, in coordination with the Office of Federal Contract Compliance Programs, published proposed guidelines that will require employers with 100 or more employees to include compensation information on EEO-1 reports.

On July 13, after considering hundreds of comments received during the comment period, the EEOC published a revised (although substantively similar) proposal for further comment and provided additional information about how it intends to use compensation data.

EEOC's Proposed Reporting Requirements

Consistent with the original proposal, the EEOC's revised proposal will require employers with 100 or more employees to include two categories of information in their EEO-1 reports. First, employers will continue to submit ethnicity, race and sex data by job category as is currently required. Second, employers will be required to submit data regarding employees' W2 earnings and hours worked. These data will be reported by job category and, within each job category, further broken down across 12 pay bands. View an example of the proposed new reporting form.

The primary differences between the EEOC's original proposal (for detail on the original proposal, read our article, "EEOC Proposes Significant Expansion of EEO-1 Reporting Requirements") and the revised proposal include the following:

- Modifying the deadline by which EEO-1 reports must be submitted from Sept. 30 of the reporting year to March 31 of the following year, beginning in 2017. This means that the 2017 EEO-1 report will be due on March 31, 2018.
- Requiring that the earnings and hours worked data be calculated as of Dec. 31 of the reporting year.



Michael S. Burkhardt



Paul C. Evans



Grace R. Speights

- Advising that the reported earnings are to be based on Box 1 W2 data. This would not only include compensation paid to employees for “hours worked,” but also bonuses, incentive compensation payouts and payments for paid time off.
- Clarifying that, for nonexempt employees, the definition of “hours worked” for EEO-1 reporting purposes will be consistent with the Fair Labor Standards Act definition. Thus, the hours worked calculation will not reflect paid time off hours even though the compensation for those hours will be reflected in the W2 data provided.
- Clarifying that, for exempt employees, employers will have the option of reporting (1) actual hours worked, if tracked, or (2) 40 hours per workweek for full-time employees and 20 hours per workweek for part-time employees. The EEOC acknowledged that the latter are rough estimates that will not reflect the actual hours worked by exempt employees.

In short, the EEOC addressed certain questions relating to when and what data are to be reported, but otherwise left their proposal largely unchanged.

EEOC’s Intended Use of Data

The EEOC’s July 2016 proposal also identifies three intended uses of the earnings and hours worked data:

1. The EEOC plans to use data for “early assessment of charges of discrimination.” Specifically, the EEOC stated that it would adapt its software tool to allow enforcement staff to examine “pay disparities based on job category, pay bands and gender, ethnicity or race” at a particular employer after receiving a charge of discrimination involving that employer. Enforcement staff may also perform statistical analyses of the data to determine whether there are any significant disparities in how employees are distributed across pay bands as well as how the employer’s data compares to its “competitors in the same labor market.” The EEOC will then assess the allegations and the statistical results to determine “how to focus the investigation and what information to request.”

While the agency stated that these analyses will control for hours worked, it makes no mention of how it intends to control for other nondiscriminatory factors that may explain pay differentials (for example, education, career and experience). Rather, it suggests that employers will have the opportunity to explain their pay practices, provide additional data and articulate nondiscriminatory reasons for pay differences as part of the request for information process.

2. The EEOC stated that it will aggregate the earnings and hours worked data across employers to publish periodic reports on “pay disparities by race, sex, industry, occupational groupings and metropolitan statistical area.”

3. The EEOC stated that the collection of data will be used to enhance training programs. This includes:

- Training EEOC staff on how to use the statistical tools available to them, “issue spot” potential pay discrimination, and “ask appropriate questions

to collect relevant anecdotal evidence of possible discrimination;”

- Providing support to employers through seminars, webinars and educational materials that will aid employers in identifying and correcting policies and practices that could lead to discrimination such as “subjective pay decision-making practices, establishing salary by relying heavily on prior salary, and setting salary based in large part on negotiations;” and
- Providing training, such as know-your-rights training, to other groups.

Confidentiality

The EEOC reiterated that, consistent with federal law, it will keep all company-specific EEO-1 data confidential, unless and until a Title VII proceeding is instituted that implicates the data. Any EEOC staff member who violates this requirement will be guilty of a misdemeanor. The EEOC also stated that it will only release information to other agencies if the agencies agree to comply with the confidentiality requirement and, for state and local agencies, the data provided will be restricted to that relating to employers within the agency’s jurisdiction.

Likewise, the OFCCP will hold any EEO-1 data that it receives confidential to the maximum extent permitted by law, in accordance with Freedom of Information Act exemptions 3 and 4 and the Trade Secrets Act. In the event the data are requested through a FOIA request, the OFCCP will notify the employer and give it an opportunity to object. If the OFCCP receives objections that it determines are valid, it will deny the FOIA request.

The EEOC also specified the steps it currently takes to ensure data protection, privacy and security.

Employer Response and Next Steps

Although the EEOC’s proposed revisions may alleviate some of the burden on employers, the core earnings and hours worked data that the EEOC proposes to collect remains the same.

Based on its proposed revisions, the EEOC seems intent on requiring employers to submit earnings and hours worked data, and employers should begin to consider the implications of submitting such data for their own businesses and take appropriate action. This could include conducting internal analyses, on a privileged basis, that assess what the data would show if the company submitted an EEO-1 report (including the proposed compensation information) now.

In addition, employers should consider conducting pay equity analyses to identify the nondiscriminatory factors that may explain pay differences, and make any desired pay adjustments. Furthermore, because some pay differences may be the result of differences in representation based on the job type or the level of the position, employers should ensure that they are tracking applicant data on interest and availability for positions.

Employers will have the opportunity to submit comments regarding the revised proposal until Aug. 15, 2016.

—By Michael S. Burkhardt, Paul C. Evans, Blair J. Robinson and Grace R. Speights, Morgan Lewis &

Bockius LLP

Michael Burkhardt and Paul Evans are partners in Morgan Lewis' Philadelphia office, Blair Robinson is a partner in Morgan Lewi's New York office, and Grace Speights is a partner in Morgan Lewis' Washington, D.C., office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2016, Portfolio Media, Inc