

CLIENT ALERT

Revised EEO-1 Report Moves One Step Closer to Implementation

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The Equal Employment Opportunity Commission (EEOC) has submitted a final proposal for the revised EEO-1 report to the Office of Management and Budget (OMB) for approval (the "30-Day Notice"), potentially moving the revised report one step closer to implementation. The EEOC published its initial proposal for changes to the EEO-1 Report in February 2016 (the "60-Day Notice"), followed by a 60-day public comment period. In response to the public comments on the 60-Day Notice, the EEOC's 30-Day Notice incorporates just two changes: (1) it revises the EEO-1 submission date from September 30th to March 31st of each year to allow employers to use calendar-year W-2 data, and (2) it increases the EEOC's burden estimate from 6.6 to 17.1 hours. Unfortunately, the 30-Day Notice does little else to address employers' other concerns about this data collection. Written comments on the 30-Day Notice are due to OMB by August 15, 2016.

Since 1966, private employers with 100 or more employees and government contractors with 50 or more employees have been required to file annual EEO-1 Reports, identifying, by race and gender, the number of employees in each of ten defined "EEO-1 Categories." The EEOC's 60-Day Notice proposed to superimpose upon each of these EEO-1 categories 12 different pay bands, and require employers to identify the W-2 compensation paid to, and hours worked by, employees in those pay bands, by race and gender. These fundamental requirements set forth in the 60-Day Notice remain unchanged in the 30-Day Notice.

What Has Changed in the 30-Day Notice

The EEOC's 60-Day Notice would have required employers to submit employees' W-2 wages for a twelve-month period preceding the current September 30th annual filing deadline – a time period different from the calendar year for which employers already calculate W-2 wages for income tax reporting purposes. Numerous commenters highlighted the burden associated with gathering the data based on two different time periods. In response, the EEOC now proposes that, "beginning with the 2017 report, the reporting deadline for all EEO-1 filers will be March 31st of the year following the EEO-1 report year," and that the submission will be based on "a pay period between October 1st and December 31st of the reporting year," thus allowing employers to use calendar-year W-2 wages. Employers would not be required to file their 2017 EEO-1 reports until March 31, 2018.

The EEOC also revised its estimate of the number of hours, and the associated cost, required to complete the revised EEO-1 Report. The 60-Day Notice estimated an average time and cost to generate the data and complete the revised EEO-1 Report at 6.6 hours. This estimate was based on the number of employers who are required to submit the Report (rather than the number of establishments reported), with the EEOC assuming that virtually all filers would use an automated process to submit the data all at once rather than use the manual-entry process, currently used by many. The EEOC also based its initial burden cost estimate on an assumption that administrative support staff would perform all the work necessary for filing.

Commenters roundly criticized the estimate as grossly underestimating the time expended and personnel involved in completing the EEO-1 submission. In response, the EEOC has revised its estimate to reflect labor costs for various types of staff (such as IT

support, HR managers, legal counsel and executives) and to account for some additional time per establishment associated with manual filing. The EEOC's revised burden estimate is 17.1 hours for both firm and establishment-based functions. While an improvement over the EEOC's prior estimate, this number still underestimates the burden that would be associated with compiling, reviewing and submitting all the information required by the revised EEO-1 Report.

What Remains Unchanged

While the adjusted reporting year is a welcome revision, the 30-Day Notice fails to adequately address employers' other concerns. First, numerous commenters expressed concerns that W-2 wage data aggregated by EEO-1 categories would likely tell the EEOC nothing – or next to nothing – about potential discrimination in pay. As was made clear in [submissions](#) that included expert opinions from respected labor economists, the EEO-1 categories encompass a broad range of jobs with dissimilar market values, and W-2 earnings can encompass a range of different types of pay, such as overtime, shift differentials, or incentive compensation. With those elements of pay undifferentiated in the data reported, the EEOC will simply not be able to assess potential discrimination in pay among the employees grouped in any of the 12 pay bands.

In the 30-Day Notice, the EEOC reaffirmed its intention to use the 12 pay bands, stating that "the EEOC is not convinced that using twelve pay bands in conjunction with the EEO-1 job categories will undermine the utility of W-2 income and hours-worked data." The EEOC sought to mollify employers by stating that the Agency "does not intend or expect that this data will identify specific, similarly situated comparators or that it will establish pay discrimination as a legal matter. Therefore it is not critical that each EEO-1 pay band include only the same or similar occupations." This statement, of course, provides no comfort to employers who may find themselves subjected to expensive and time-consuming EEOC investigations or OFCCP compliance reviews triggered by the "false positives" the overly broad, aggregated data will generate if the Agency's proposed revised Report goes into effect.

The EEOC also rejected employers' suggestion to use "base pay" rather than W-2 wages, stating that other forms of compensation may "reflect an employer's discriminatory assignment of more lucrative sales opportunities to employees based on race, ethnicity and/or sex" or may "result from an employer's gender biased assumptions that lead to more overtime opportunities being offered to men than to women." As such, the EEOC concluded that "supplemental pay is a critical component of compensation and it can be influenced by discrimination, so any measure of income for purposes of enforcing the pay discrimination laws should include supplemental pay."

Second, despite expressly seeking comment on how employers should report hours worked for FLSA-exempt, salaried employees, the EEOC gave short shrift to employers' concerns about the difficulty and inaccuracy of reporting average hours-worked for employees who are not required to record their time. Full-time exempt employees often work many more than forty hours per week, and hours for part-time exempt employees vary substantially. As such, hours data based upon a formula applied to all exempt employees would be inaccurate and of limited use. Nonetheless, the 30-Day Notice requires that employers either "report a proxy of 40 hours per week for full-time exempt employees and 20 hours per week for part-time exempt employees" or "provide actual hours of work by exempt employees" – an extremely costly proposition for most employers who do not currently track such hours.

With submission of the 30-Day Notice, the EEOC moves closer to its intended September 2016 implementation date. While the proposed changes may be challenged in litigation, and the revised filing deadline of March 31, 2018 gives employers more time

to prepare, employers should begin to budget for the potential systems changes and additional resources that will be needed in order to gather, review and submit the required information. Employers should also keep in mind that the new EEO-1 Report is just the latest of the numerous "pay equity" initiatives coming out of Washington and elsewhere, and should focus their attention on understanding their compensation structure and addressing any vulnerabilities.

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