

Publications

Labor and Employment Alert: EEOC Wants to Collect Employee Pay Data from Employers (UPDATE)

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Update: EEOC's Revised EEO-1 Gets Tossed by the Office of Management and Budget

On August 29, 2017, the Office of Management and Budget (OMB) immediately halted the EEOC's revisions to the EEO-1 form addressed in the below alert. To learn more about the OMB's actions, [click here](#).

Original Alert:

In February 2016, the Equal Employment Opportunity Commission (EEOC) published revisions to its Employer Information Report (EEO-1) that are intended to "assist the agency in identifying possible pay discrimination and assist employers in promoting equal pay in their workplaces." To that end, the revised EEO-1 requires covered employers to provide aggregate data on pay ranges and hours worked for their employees.

Currently, covered employers (most federal contractors and employers with at least 100 employees) annually submit an EEO-1 by September 30th that sets out their employees by job category, ethnicity, race and sex. The revised EEO-1 was initially required by September 2017. After considerable pushback, the EEOC modified this deadline and employers must now submit the revised EEO-1 by March 31, 2018.

Along with the race, gender/ethnicity, and job category data previously required, employers must also include pay data within 12 specified pay bands. These pay bands track those used by the Bureau of Labor Statistics in the Occupation Employment Statistics Survey:

1. \$19,239 and under;
2. \$19,240 - \$24,439;
3. \$24,440 - \$30,679;
4. \$30,680 - \$38,999;

5. \$39,000 - \$49,919;
6. \$49,920 - \$62,919;
7. \$62,920 - \$80,079;
8. \$80,080 - \$101,919;
9. \$101,920 - \$128,959;
10. \$128,960 - \$163,799;
11. \$163,800 - \$207,999; and
12. \$208,000 and over.

According to the EEOC, “pay bands would generate reliable aggregated data to support meaningful statistical analysis” that would show within-job-category variation, across-job-category variation, and overall variation – which may (or may not) point to potential pay discrimination.

Employers must identify their employees' total W-2 earnings for a 12-month period looking back from a pay period between July 1st and September 30th. To account for part-time employees, employees working less than a full 12 months, and employees working for multiple employers, employers also must report the number of hours worked by the employees counted in the pay bands. For exempt employees, employers may report actual hours worked or designated proxy hours of 40 hours (full-time) or 20 hours (part-time) per week.

The EEOC's avowed purpose in collecting this pay data is to gain “insight into pay disparities across industries and occupations” in order to “improve enforcement of federal pay discrimination laws and support employers' voluntary compliance with those laws.” To do so, the EEOC intends to share the pay data with the Office of Federal Contract Compliance Programs (OFCCP), which oversees the affirmative action and equal employment opportunity obligations of federal contractors. Then, “EEOC and OFCCP will use this data to more effectively focus agency investigations, assess complaints of discrimination, and identify existing pay disparities that may warrant further examination.”

The EEOC has tried to anticipate questions about confidentiality by stating that the EEO-1 data is held “confidential as required by law.” Moreover, the EEOC does not publish individual EEO-1 reports, only aggregated data in a manner that does not reveal any particular employer's or employee's information (the EEOC intends to publish the aggregate pay data it acquires from employers by industry and geographic location). Given that hackers previously breached the federal government's computer networks and stole the social security numbers and other personal information of 21 million people, these pronouncements may do little to assuage employer concerns that the security of their pay data.

It is unknown whether the revised EEO-1 form will ultimately survive in the current administration. Should the composition of the EEOC swing from Democrat to Republican, it is possible that the revised EEO-1 will be repealed. Further, on July 13, 2017, the House Committee on Appropriations adopted an amendment prohibiting funds from being used for the “collection of information...from employers relating to employees' earnings and hours worked” – precisely the information sought by the revised EEO-1. We will report on any developments. In the interim, contact your Vorys lawyer if you have questions about the EEO-1 or potential pay disparity or discrimination.