

### “Show Me the Money”: EEOC Seeks Pay Data from Large Employers

On January 29, 2016, the U.S. Equal Employment Opportunity Commission (“EEOC”) announced a proposal to begin collecting pay data from private employers with 100 or more employees and federal contractors. The EEOC currently collects data about employees’ gender, race, and ethnicity by job category through the Employer Information Report EEO-1; this proposal would require covered employers to also supply information on employee earnings in those reports.<sup>1</sup> Employers should be aware that the final Rule is expected to go into effect for the September 30, 2017 employer information report filing deadline.

#### Background

The EEOC’s proposal seeks to help it in its efforts to root out pay discrimination. It follows recommendations from independent studies and the EEOC’s work with the President’s National Equal Pay Task Force, which proposed new data collection requirements to combat pay discrimination in the workplace.<sup>2</sup> According to the EEOC, the new reporting requirements are expected to fill a “critical void” in the agency’s efforts to address such discrimination.<sup>3</sup> In her remarks about the proposal, EEOC Chair Jenny R. Yang cited “[c]onsiderable research” demonstrating that “significant” pay gaps on the bases of gender, race, and ethnicity that have persisted despite EEOC enforcement efforts.<sup>4</sup> The EEOC expects that this new requirement will assist employers “in conducting their own analysis of their pay practices to facilitate voluntary compliance.”<sup>5</sup> More ominously for employers, the EEOC and the Office of Federal Contract Compliance Programs plan to use this pay data “to assess complaints of discrimination, focus agency investigations, and identify existing pay disparities that may warrant further examination.”<sup>6</sup>

#### What Does This Mean for Employers?

The pay data requirement will apply to all private employers – not just federal contractors – that have 100 or more employees and that are already subject to EEO-1 reporting standards. The EEOC currently requires these employers to submit EEO-1s that detail the gender, race, ethnicity, and job category profile of their workforce. The proposal seeks to expand these reporting requirements to W-2 earnings data, including (among other things) a worker’s wages, salary, fees, commissions, tips, table fringe benefits, elective deferrals, overtime pay, and non-production bonuses (e.g., year-end bonuses, hiring and referral bonuses, and profit-sharing cash bonuses). While the proposal contemplates collecting aggregate data—not individual salary information about specific employees—it does require employers to identify how many employees fall within each of 12 proposed pay bands, and to specify the gender, race, and ethnicity of those employees.<sup>7</sup> The proposal is expected to cover over 63 million employees.<sup>8</sup>

1 The published proposal can be found at <https://federalregister.gov/a/2016-01544>.

2 Press Release, EEOC: EEOC Announces Proposed Addition of Pay Data to Annual EEO-1 Reports, January 29, 2016, available at <http://www1.eeoc.gov/eeoc/newsroom/release/1-29-16.cfm>.

3 Jenny R. Yang, Chair, EEOC, Remarks at the White House Equal Pay Event (Jan. 29, 2016), available at <http://www1.eeoc.gov/eeoc/newsroom/release/chair-remarks-1-19-2016.cfm>.

4 Remarks, Yang, *supra* note iii.

5 Press Release, EEOC, *supra* note ii.

6 *Id.*

7 Remarks, Yang, *supra* note iii.

8 Press Release, White House Office of the Press Secretary: FACT SHEET: New Steps to Advance Equal Pay on the Seventh Anniversary of the Lilly Ledbetter Fair Pay Act, January 29, 2016, available at <https://www.whitehouse.gov/the-press-office/2016/01/29/fact-sheet-new-steps-advance-equal-pay-seventh-anniversary-lilly>.

In contrast, federal contractors with 50 to 99 employees that are already subject to the EEO-1 reporting requirements are not covered by this proposal. They will continue to submit the same information that is collected by the current EEO-1 report, and will not be required to supply W-2 data. Also exempt are "first-tier subcontractors" with 50 to 99 employees that are currently subject to EEO-1 reporting standards.

The EEOC recommends a number of approaches for employers as they comply with the new requirements:

First, because payroll records are cumulative, generating reports at any given point in time should not be complicated for employers with automated payroll systems. The W-2 data can be imported into a [human resources information system, or HRIS], and a data field can be established to accumulate W-2 data for the EEO-1. Alternatively, employers could obtain this pay information by utilizing quarterly payroll reports for the previous four quarters. Employers that do their payroll in-house will be able to report this data utilizing most major payroll software systems or by using off-the-shelf payroll software that is preprogrammed to compile data for generating W-2s. For employers that outsource their payroll, there would be a one-time burden of writing custom programs to import the data from their payroll companies into their HRIS [human resource information system] systems.<sup>9</sup>

The EEOC has invited written comments from members of the public on any aspect of the Proposed Rule, which was published in the Federal Register on February 1, 2016. The public comment period on the proposed changes will run until April 1, 2016, at which point the EEOC will schedule a public hearing on the proposal.

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<sup>9</sup> Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113, 5117 (proposed Feb. 1, 2016).

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