

Following the Money: The EEOC Requires Big Employers to Track Pay Data

The U.S. Equal Employment Opportunity Commission (“EEOC”) announced last week that, starting in March 2018, it will collect summary pay data from private employers (including federal contractors and subcontractors) with 100 or more employees. The pay data will be added to the annual Employer Information Report EEO-1, which already collects aggregate data about employees’ gender, race or ethnicity, and job category. The EEOC first proposed collecting compensation data in January of this year as part of its efforts to root out pay discrimination. Following a public hearing and comment period, the EEOC largely followed through on its proposal, in what the Secretary of Labor called “a critical step in delivering on the promise of equal pay.”¹

Who is affected?

Private employers (including federal contractors and subcontractors) with 100 or more employees must now include pay data in their annual EEO-1 reports. Consistent with current practice, private employers that are not federal contractors or subcontractors, and that have fewer than 100 employees, need not file EEO-1s.²

Federal contractors and subcontractors with 50 to 99 employees need not report pay data, but must continue to file EEO-1s that tally employees by gender, race or ethnicity, and job category. Federal contractors and subcontractors with fewer than 50 employees need not file EEO-1s.³

What has changed?

The new rule changes the scope of data that must be reported, the timing of data collection, and the reporting deadline.

Pay and Hours Data. In addition to providing information about employees by gender, race or ethnicity, and job category, the revised EEO-1 requires employers to report the number of employees in each of twelve pay bands (from \$19,239 and under to \$208,000 and over) based on earnings figures in those employees’ W-2s.⁴ Notably, that pay data is itself categorized by gender and race or ethnicity – meaning that for each pay band, employers must specify how many men and women of each race or ethnicity fall into that band.⁵

Employers must also report the aggregate number of hours worked by employees in each pay band. For exempt employees under the Fair Labor Standards Act (“FLSA”), employers may report 40 hours per week for full-time employees and 20 hours per week for part-time employees, or report actual hours worked. For non-exempt employees, hours reported on EEO-1s should match records maintained for wage and hour compliance purposes.⁶

Data Collection. The “workforce snapshot period” during which employers must count employees is now October 1 to December 31 (it had been July 1 to September 30 in 2016 and prior years). Employers may choose any pay period during that three-month window to count employees for EEO-1 reporting purposes.⁷ The EEOC hopes that moving the

1 Press Release, EEOC, EEOC to Collect Summary Pay Data (September 29, 2016), available at <https://www.eeoc.gov/eeoc/newsroom/release/9-29-16.cfm>.

2 EEOC, Small Business Fact Sheet: The Revised EEO-1 and Summary Pay Data, available at <https://www.eeoc.gov/employers/eeo1survey/2017survey-fact-sheet.cfm> (last visited Oct. 5, 2016).

3 *Id.*

4 *Id.*

5 EEOC, Proposed EEO-1 Form, available at https://www.eeoc.gov/employers/eeo1survey/2016_new_survey_2.cfm (last visited Oct. 5, 2016).

6 See EEOC, Questions and Answers: The Revised EEO-1 and Summary Pay Data, available at <https://www.eeoc.gov/employers/eeo1survey/2017survey-qanda.cfm> (last visited Oct. 5, 2016).

7 *Id.*

"snapshot" period to the end of the year, instead of the previous Q3 period, will capture sameyear promotions that move employees into different pay bands.⁸

Filing Deadline. These changes take effect for the 2017 reporting period, but no EEO-1 is due during calendar year 2017. Instead, the filing deadline is March 31, 2018 for the 2017 reporting period (and will remain March 31 going forward).⁹ This is a change from the previous deadline of September 30 of the reporting year, and better aligns the EEO-1 with W-2 calculation and reporting periods.¹⁰

What will the EEOC do with this information?

As it currently does when receiving allegations of employment discrimination under Title VII or the Equal Pay Act, the EEOC will perform a statistical analysis of the employer's EEO-1 data early in its investigation. The EEOC asserts that this information "helps with a first assessment of the allegations made in a charge of discrimination and, as appropriate, with planning an investigation."¹¹ With the addition of pay data by gender and race or ethnicity, employers can likely expect increased scrutiny from the EEOC when allegations of unequal pay are made. The EEOC also intends to publish aggregated EEO-1 data and industry reports based on this data.¹²

What should employers do?

The first EEO-1s with pay data are not due until March 31, 2018. But there are steps employers can take now to smooth the transition and prepare to defend potential allegations of pay discrimination. These steps include:

- Determining whether existing systems can generate the newly required data regarding employees' gender, race or ethnicity, and W-2 earnings;
- Planning for a "workforce snapshot" in late 2017; and
- Reviewing new EEO-1s with counsel to identify any apparent pay disparities potentially correlated with gender or race or ethnicity, and gathering documentation on any relevant pay determinations.

The EEOC's [website](#) provides a number of resources, including a [Small Business Fact Sheet](#), [Questions and Answers](#), [EEO-1 filing instructions](#), and the [new EEO-1 form](#). In addition, the EEOC will offer free webinars on October 20 and October 26, 2016.¹³

8 Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1), 81 Fed. Reg. 45484-85 (proposed July 14, 2016).

9 EEOC, Small Business Fact Sheet, *supra* note 2.

10 Revision of the Employer Information Report (EEO-1), *supra* note 8.

11 EEOC, Small Business Fact Sheet, *supra* note 2.

12 *Id.*

13 EEOC, Press Release, *supra* note 1.

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Lisa E. Cleary

212-336-2159

lecleary@pbwt.com

Catherine A. Williams

212-336-2207

cawilliams@pbwt.com

Adam E. Pinto

212-336-2156

apinto@pbwt.com

Helen P. O'Reilly

212-336-2739

horeilly@pbwt.com

Eric LaPre

212-336-2858

elapre@pbwt.com

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