

EEOC Proposes to Collect Pay Data from Employers

By Stephanie E. Lewis and Paul Patten

February 5, 2016

Proposed changes to the Equal Employment Opportunity Commission's EEO-1 report would have employers with at least 100 employees submitting all employees' W-2 earnings data and actual hours worked beginning with the 2017 EEO-1 reporting cycle.

According to the EEOC's proposal, the Commission and the Office of Federal Contract Compliance Programs (OFCCP) would have access to the data for pay discrimination enforcement purposes (including for targeted investigations).

In recent years, at the President's direction, the EEOC and OFCCP have sought to develop a robust pay reporting tool to help them target gender "pay gap" investigations. This proposal is the culmination of that effort and, if approved, would mean major changes for employers. For the first time, the EEOC and OFCCP would have nationwide, wide-ranging employee pay data, allowing the agencies to effectively target employers for systemic pay discrimination investigations.

The proposal would increase employers' data collection and reporting burdens well beyond the EEOC's stated estimates. And, while the EEOC sought to address confidentiality concerns surrounding submission of sensitive compensation data, the proposal leaves some of those concerns intact and raises new concerns regarding the Commission's proposal to *publish* employers' aggregated pay data.

Comment Period, Public Hearing

Employers and other interested parties have until April 1, 2016, to submit comments on the proposal. The EEOC will hold a hearing on the proposed changes. Parties who want to speak at the hearing must submit a written request to the Commission by February 22. No date has been set for the hearing.

Jackson Lewis will prepare and submit detailed comments to the EEOC.

What EEOC Will Do with the Data

The EEOC states that the enforcement agencies will use the employer pay data to "assess complaints of discrimination, focus investigations, and identify employers with existing pay disparities that might warrant further investigation." According to the EEOC, the agencies will develop software that allows investigators to conduct statistical analyses and compare particular employers' pay disparities with aggregated "benchmark" data by industry and geography.

EEOC Expectations of Employers

The EEOC and OFCCP encourage employers to use the data to conduct proactive pay self-analyses to identify unexplained disparities and make appropriate pay adjustments upward. As an incentive that raises employers' confidentiality concerns, from the EEO-1 pay data reporting, the EEOC states it "will compile and publish aggregate data that will help employers in conducting their own analysis of their pay practices."

What Would Employers be Required to Collect and Report?

The proposal requires employers to identify and report the number of employees who fall into each of 12 "pay bands" based on W-2 earnings within each of the 10 EEO-1 categories. For each employee, employers must identify the applicable EEO-1 category and pay band from the following:

EEO-1 Categories	Pay Bands
1.1 Executive/Senior Level Officials and Managers	\$19,239 and under
1.2 First/Mid-Level Officials and Managers	\$19,240 - \$24,439
2 Professionals	\$24,440 - \$30,679

Meet the Authors



Stephanie E. Lewis

Office Managing Principal
Greenville 864-672-8048
Email



Paul Patten

Principal
Chicago 312-803-2570
Email

Practices

Affirmative Action, OFCCP and Government Contract Compliance
Class Actions and Complex Litigation

Services

Pay Equity

EEO-1 Categories	Pay Bands
3 Technicians	\$30,680 - \$38,999
4 Sales Workers	\$39,000 - \$49,919
5 Administrative Support Workers	\$49,920 - \$62,919
6 Craft Workers	\$62,920 - \$80,079
7 Operatives	\$80,080 - \$101,919
8 Laborers and Helpers	\$101,920 - \$128,959
9 Service Workers	\$128,960 - \$163,799
	\$163,800 - \$207,999
	\$208,000 and over

Employers will categorize the W-2 earnings (which include hourly wages and salaries, bonuses, commissions, tips, and taxable fringe benefits) in the pay bands based on *actual* employee W-2 earnings for the 12-month period prior to the “snapshot” payroll period between July 1 and September 30 the employer uses for EEO-1 reporting.

For example, if an employer uses a September 1 date for its EEO-1 Reporting snapshot, the employer will report actual W-2 earnings from the prior 12 months (September 1 to August 31) and by EEO-1 category, race/ethnicity and gender, and pay band. This is important to note because employers already capture W-2 earnings on a *calendar year basis* (January 1 to December 31), but the 12-month actual W-2 earnings to be reported in EEO-1s will be a *different 12-month period*; therefore, employers cannot rely on the existing calendar year W-2 earnings data in the W-2s they already prepare. Employers must generate new W-2 earnings data for a different time period for EEO-1 reporting, creating a new burden for employers.

Further, to distinguish full-time employees from part-time employees and those who have worked less than a full year, employers also must report actual hours worked for each employee, again by EEO-1 category, race/ethnicity and gender, and pay band, for this same non-calendar 12-month period.

Practically, the complexity and burden accompanying these new requirements mean reporting by gender and the 12 pay bands alone would create *240 new categories* to slot employees. Further, when including race/ethnicity reporting, in addition to gender and pay band, there are 1,680 cells/categories into which employees can be slotted.

The EEOC asserts that most employers will accomplish the additional reporting simply by writing software or programs for existing Human Resource Information System (HRIS) and payroll systems that can produce the data in the required formats on a fully automated basis. The Commission seriously underestimated the burden.

Confidentiality Concerns

In response to earlier concerns about the confidentiality of submitting actual pay data to the government, the EEOC proposes that employers identify the number of employees in each pay band range (by gender, race/ethnicity, and EEO-1 category) rather than provide actual W-2 earnings. This proposal raises confidentiality concerns.

For example, the EEOC states it will *publish* aggregated employee pay data by geographic area and industry. Significantly, this may permit identification of pay data by *employer* and by *employee*. To the extent an employer is the only or one of a few companies in a particular industry or geographic area, the *employer* may be identified by its pay data. Likewise, if only a few employees are in a particular EEO-1 category by race/ethnicity or gender, the *employee* can be identified by published pay data. Despite acknowledging that publishing can reveal confidential pay data, the EEOC has not described how to avoid the problem.

Burden Estimates Do Not Account for Complex Reality of Data Reporting

The EEOC decisions in the proposal will markedly increase the burden on employers:

- The decision to demand W-2 earnings — instead of the far simpler-to-produce hourly wage/base compensation — will complicate the reporting requirement. Most employers do not house W-2 earnings and actual work hours in the same computer systems as race/ethnicity, gender, and EEO-1 category of employees. To comply, employers will need to generate differing sets of data from multiple systems and then reconcile, align, and merge the data.

- While the Obama Administration maintained the proposal is designed mainly to address the gender “pay gap,” the proposal would require W-2 earnings and work hours not only by gender, but also broken out by race/ethnicity (into seven separate race/ethnicity categories), adding complexity and additional burden to the reporting. This is clear from the proposed pay and hours additions to the existing EEO-1 report.

In a novel approach to estimating burden, the EEOC asserts it will take each employer — regardless of the employer’s number of establishments, number of employees, and separate EEO-1 reports the employer must file — just *six hours to gather, input, and file all of its EEO-1 reports*. EEOC estimates this six-hour burden translates into *only \$160 in total cost* to the employer to file each year, again, regardless of the number of establishments, employees, or reports to be filed. To get to this “one-size-fits-all” six-hour estimate, the EEOC changed the rules it traditionally used to estimate EEO-1 burden, basing its “departure” on increased use of technology.

In the past, burden estimates in similar proposals were based on the number of total cells and reports to be completed or the total number of key strokes an employer had to input. Yet, even as the proposed pay data and hours additions would require reporting data *over 20 times greater than the current EEO-1 reporting requirements*, the EEOC has rejected the traditional methodology and assumed that employers have access to enhanced technology. However, even with technological efficiencies, EEOC has underestimated the employer burden.

What Should Employers Do

Employers should closely monitor this proposal in light of the significant additional data collection and reporting burdens, and the potential for legal and monetary exposure from defending agencies’ targeted investigations of pay practices.

In addition, here are actions employers can consider now:

- **Submit Comments.** As an individual employer or as part of an industry association or advocacy group, employers can correct the EEOC’s substantial underestimates of the time and cost the proposal imposes and underscore the significant, unresolved confidentiality concerns.
- **Conduct a Proactive EEO Pay Self-Analysis to Assess Risk.** Employers can use the proposed reporting tool or other methods to identify areas of exposure that could emerge in systemic investigations by EEOC or OFCCP. There is a good opportunity now, before the expected new obligations become effective in 2017, to identify and address areas of unexplained pay disparities.
- **Ensure Self-Analysis is Conducted under Attorney-Client Privilege.** Statistical analyses prepared as part of a self-assessment should *not* be done internally by the employer’s compensation department or externally by non-attorney consultants without having an attorney directing the project to provide legal advice regarding legal compliance.
- **Speak with IT Function and Outside HRIS and Payroll System Vendors.** As proposed, the new obligations would require new programs or updates to systems and software to minimize the data collection and reconciliation burdens. Assess the costs associated with such changes and consider budgeting for it. These possible costs could be part of submitted comments.
- **Is Your Organization required to Report?** Larger employers are well aware of EEO-1 reporting obligations. Employers who have not previously filed, but have reached the 100 employee threshold, are required to file EEO-1 reports. EEOC has sued employers solely for the failure to file EEO-1 reports in the past and may use the failure to file an EEO-1 reports to support a substantive discrimination claim.

Jackson Lewis will continue to monitor and report on developments. Please feel free to contact a Jackson Lewis attorney if you have any questions.

©2016 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on labor and employment law since 1958, Jackson Lewis P.C.’s 950+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged, stable and diverse, and share our clients’ goals to emphasize inclusivity and respect for the contribution of every employee. For more information, visit <https://www.jacksonlewis.com>.