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The Trouble with "BIG DATA"

On the 2016 anniversary of the Lilly Ledbetter Fair Pay Act, the Equal Employment Opportunity Commission announced **proposed changes to its EEO-1 report**, requiring employers to submit data on employees' W-2 earnings and hours worked. The February 1, 2016, EEOC announcement focused mainly on the gender "pay gap" as the basis for the new requirements; however, the proposed changes will mandate submission of pay data broken down by race and ethnicity, in addition to gender. This proposal is the culmination of efforts over the past few years by the EEOC and the Office of Federal Contract Compliance Programs to develop a reporting tool that would require employers to submit pay data on employees nationwide *so the agencies can target investigations to address pay discrimination.*

Around the same time as the EEOC announcement, the **Federal Trade Commission issued a report discussing "big data,"** its uses and risks in the employment setting, among others. The report highlights concerns about the potential for harm as a result of employers' use of "big data" in the human resources context when making decisions about selection and management of applicants and employees. As stated by an EEOC legal counsel at a 2014 workshop on the subject held by the FTC, workplace concerns arise from the possible ways that using "big data" tools can violate existing employment laws, such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Americans with Disabilities Act, and the Genetic Information Nondiscrimination Act.

As the workplace turns to data collection, compilation and analysis, and use, employers run a growing risk of inadvertent noncompliance and potential liability for the role that data plays in their employment policies, practices, and decisions. At the same time, employers are being asked to provide more and more data to the government.

Confluence of Factors

In its report, the FTC attributes the emergence of "big data" to a confluence of factors: the ubiquitous collection of consumer data from a variety of sources, the decreasing cost of data storage, and powerful new capabilities to analyze data, draw connections, and make inferences and predictions.

Continued

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Given the risks of disparate treatment and disparate impact when using "big data," employers need to proceed cautiously.

"Big data" has many useful applications for human resources, such as helping companies to better select and manage applicants and employees. The report cites examples that may benefit employers, such as a study showing "people who fill out online job applications using browsers that did not come with the computer … but had to be deliberately installed (like Firefox or Google's Chrome) perform better and change jobs less often." Applying such a correlation in the hiring process, however, could result in the rejection of candidates based on their use of a particular browser, not factors that are job-related and likely to produce the best hires for the employer.

The report also briefly discusses "disparate treatment" or "disparate impact" theories of discriminatory conduct. According to the report, facially neutral policies or practices that have a disproportionate adverse effect or impact on a protected class create a disparate impact, unless those practices or policies further a legitimate business need that cannot reasonably be achieved by means that are less disparate in their impact. Consider the job application example above. Use of a particular browser seems to be facially neutral, but some might argue that selection results based on that correlation can have a disparate impact on certain protected classes. Of course, a fact-specific analysis would be necessary to determine whether a "big data"- driven practice causes a disparate impact that violates anti-discrimination laws.

Two other concerns discussed in the FTC's report have workplace implications:

- ***Hidden biases in the data.*** Biases in the data could creep in during any of the stages of collection, compilation, and analysis. If hidden biases exist in these stages, "then some statistical relationships revealed by that data could perpetuate those biases," the report stated. For example, if a company's "big data" algorithm for making hiring decisions considers only applicants from "top tier" colleges, that company may be incorporating previous biases in college admission decisions. Thus, it is critical for employers to be aware of the potential for existing biases in the data being collected, analyzed, and used, so that the usefulness of the end results are not undermined.

- ***Unexpectedly learning sensitive information.*** Employers using "big data" can come into possession of sensitive personal information inadvertently. For example, the FTC report describes a study that combined data on Facebook "likes" with other survey information accurately to predict a user's sexual orientation, ethnic origin, and religious preference. An employer's exposure to this data correlation could suggest that hiring or other employment decisions were based on potentially discriminatory, rather than legitimate, factors.

The FTC report suggests companies can maximize the benefits and minimize the risks of "big data" by asking:

1) *how representative is the data set;*
2) *does the data model account for biases;*
3) *how accurate are the predictions based on big data; and*
4) *does reliance on big data raise ethical or fairness concerns?*

* * *

As "big data" applications become more widespread and cost-efficient, employers may feel the need to use them to remain competitive. Given the risks of disparate treatment and disparate impact when using "big data," employers need to proceed cautiously, understanding the technology and the data being collected and whether the correlations being shown are job-related and non-discriminatory.

Meanwhile, Back at the EEO-1 Report

"Big data" flows in all directions, and employers long have had the obligation to report to the EEOC certain data on applicants and employees. In recent years, the EEOC and OFCCP have sought to develop a robust pay reporting tool to help them target employers

For a more detailed discussion of the **FTC "Big Data" Report**, go to **FTC's "Big Data" Report Has Suggestions for the Workplace,** and **"Big Data" in the Workplace: EEOC Attorney Urges Caution,** at **www.workplaceprivacyreport.com**. The Jackson Lewis **Privacy, e-Communication and Data Security Group**, comprised of experienced attorneys, many of whom are "Certified Information Privacy Professionals," stays on the edge of legal developments affecting clients' workplace, business, and marketing risks — and opportunities — in the digital age.

What Employers Are Required to Collect and Report

The EEOC 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.

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*. Employers cannot rely on the existing calendar year W-2 earnings data in the W-2s they already prepare and must generate new W-2 earnings data for a different time period for EEO-1 reporting.

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 the same non-calendar 12-month period.

The EEOC may have underestimated the substantial compliance burden of the new employee data reporting requirements.

for gender "pay gap" investigations. The proposal announced in the February 1, 2016, Federal Register 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 effectively to target employers for systemic pay discrimination investigations.

According to the EEOC, 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." Reportedly, 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.

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 to do so, but one that raises employer concerns about confidentiality of the 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."

Confidentiality Concerns

Employer concerns about the confidentiality of their pay data prompted the EEOC to propose a process for employers to identify the number of employees in each pay band range (by gender, race/ethnicity and EEO-1 category), rather than provide employees' actual W-2 earnings. This proposal raises additional confidentiality concerns, however, which the EEOC acknowledges but has failed to address.

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.

* * *

As a practical matter, the complexity and scope of these new requirements create a substantial compliance burden for covered employers. 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; however, the Commission may be seriously underestimating the burden.

For more information on the proposed changes to the EEO-1 reporting data, go to **"EEOC Proposes to Collect Pay Data from Employers"** at **www.jacksonlewis.com**. The Jackson Lewis **Affirmative Action and OFCCP Defense Practice Group** prepares and defends affirmative action plans and provides sophisticated legal representation in the event of discrimination allegations, back-pay demands, or pay discrimination claims for large and small employers.

In the meantime, employers should closely monitor this proposal, not only in light of the significant compliance burdens it would impose, but for the potential for targeted investigations of pay practices by the EEOC and the OFCCP. Beyond determining whether an employer has the obligation to file an EEO-1 report, additional steps employers should consider include:

- ***Submitting comments*** as an individual employer or as part of an industry association or advocacy group to challenge the agencies' estimations of the time and cost the proposal imposes and underscore the unresolved confidentiality concerns.
- ***Conducting a proactive EEO pay self-analysis*** to identify areas of exposure that could emerge in systemic investigations by EEOC or OFCCP – before the new obligations become effective in 2017 – to identify and address areas of unexplained pay disparities.
- ***Ensuring self-analysis is protected by attorney-client privilege*** by conducting the analysis under the direction of legal counsel to provide compliance advice.
- ***Consulting with IT and HRIS/payroll system vendors*** to assess the costs of required new programs or updates to systems and software to minimize the data collection and reconciliation burdens and to budget for such changes.

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 and may use the failure to file an EEO-1 report to support a substantive discrimination claim.

"Big data" is here to stay. How big a role "big data" analytics tools will play in the workplace depends on whether they can actually produce results and positively impact HR decision-making. Caution is necessary, however, due to the potential risks of violating existing employment laws. Knowledgeable employment counsel can help to assess the benefit versus risk for employers.

Developing Law of the Workplace

Regulatory Agencies Step into Vacuum of Gridlocked Washington

Employers often must keep a closer watch on actions taken or proposed by government agencies having enforcement authority over workplace matters than on new legislation or court rulings. With a divided Congress, a presidential election year, and a Supreme Court in transition, these regulatory agencies take center stage as the major source of new or changing requirements with which employers must comply.

GINA and Employee Wellness Programs

In 2015, the U.S. Equal Employment Opportunity Commission issued a proposed rule clarifying that the Genetic Information Nondiscrimination Act does not prohibit employers from offering limited incentives

Employers soon may be able to offer incentives to employees to obtain a spouse's health risk assessment.

to employees when their covered spouses provide information about their current and past health status in a health risk assessment (HRA). The HRA must be offered as part of a voluntary wellness program under a group health plan. The proposal reflects a change from the agency's position that such incentives could violate GINA's broad definition of "genetic information." That definition includes information about a family member's (including a spouse's) current or past health status.

Under the proposed rule, an employer may offer limited incentives to employees when their covered spouses complete an HRA as part of a voluntary wellness program. Incentives may be financial or in-kind and structured as rewards or penalties. Examples include reductions in employees' health insurance premiums, increased employer contributions to health savings accounts, and cash or non-cash prizes. HRAs may include

a medical questionnaire about current and past health status, a medical examination (such as high blood pressure or cholesterol screenings), or both.

A wellness program must be reasonably designed to promote health and prevent disease in the participants. To satisfy that standard, the EEOC would impose requirements similar to those proposed in 2015 for wellness programs under the American with Disabilities Act. The program must not be overly burdensome, a subterfuge for violating GINA or other employment discrimination laws, or highly suspect in the method chosen to promote health or prevent disease. Programs that would *not* be reasonably designed to promote health or prevent disease include those that impose an overly burdensome amount of time for participation as a condition to obtaining a reward, require intrusive procedures, or place significant costs on the employee.

For more information, go to EEOC Proposed Genetic Information Nondiscrimination Act Rule Permits Incentives in Wellness Programs for Spouse Health Information.

Revision of Salary Basis under FLSA Exemptions

In July 2015, the Department of Labor published a notice of proposed rulemaking to update regulations governing which executive, administrative, and professional employees (white collar workers) are exempt from the Fair Labor Standards Act's minimum wage and overtime pay provisions. The regulations on these "white collar exemptions" were last updated in 2004, when the current salary threshold for exemption was set at $455 per week. The DOL says its purpose in issuing the current proposal is to "ensure that the FLSA's intended overtime protections are fully implemented, and to simplify the identification of nonexempt employees, thus making the executive, administrative and professional employee exemption easier for employers and workers to understand and apply."

The DOL's proposed rule on white collar exemptions would more than double the salary basis necessary for an employee to qualify.

The Notice of Proposed Rulemaking:

1) *sets the standard salary level at the 40th percentile of weekly earnings for full-time salaried workers ($921 per week, or $47,892 annually);*
2) *increases the total annual compensation requirement needed to exempt highly compensated employees (HCEs) to the annualized value of the 90th percentile of weekly earnings of full-time salaried workers ($122,148 annually); and*
3) *establishes a mechanism for automatically updating the salary and compensation levels going forward to ensure that they will continue to provide a useful and effective test for exemption.*

According to the DOL, the proposal "minimizes the risk that employees legally entitled to overtime will be subject to misclassification based solely on the salaries they receive, without excluding from exemption an unacceptably high number of employees who meet the duties test." The Department also is proposing to automatically update the standard salary and HCE total annual compensation requirements to ensure that they remain meaningful tests for distinguishing between bona fide executive, administrative, and professional workers who are not entitled to overtime and overtime-protected white collar workers.

Since the DOL's announcement to more than double the salary basis necessary to qualify for the "white collar" exemptions from overtime, the business community has swung into action. Employers and associations have been lobbying for a more modest increase to the minimum required salary, while preparing to comply with the new rule should it take effect in its current form. A key element of that preparation is anticipating the budgeting adjustments that will be necessary when the new rule goes into effect.

DOL officials have indicated the final rule likely will be released during the second half of 2016. Pressure through lobbying or litigation could affect not only the substance of the final rule, but the timing of announcements and the effective date itself. The upcoming Presidential election also may affect the release date of the final rule.

For more information on the white collar exemption proposed rule, go to **"U.S. Department of Labor Proposes to Restrict Scope of FLSA 'White-Collar' Overtime Exemptions."**

Electronic Reporting and Public Posting of OSHA Injury and Illness Logs

The Occupational Health and Safety Administration's proposed "Improve Tracking of

Workplace Injuries and Illnesses" rule is expected to be final in the spring of 2016. This proposed rule will add new electronic reporting obligations to existing reporting requirements.

In particular, OSHA is planning to require employers with more than 250 employees (per establishment) to submit their OSHA 300 Logs on a quarterly basis. In addition, employers with at least 20 employees at any time in the previous calendar year (per establishment) will be required to submit electronically to OSHA on a yearly basis the information provided on OSHA Form 300A ("Annual Summary"). OSHA, in turn, would post information from the OSHA 300 Logs and 300A Forms on its website and make the information publicly available to anyone who would like to review them. OSHA believes that publicly posting such information, essentially, will shame employers into implementing safer work practices and give the public and employees information on the safety of a business.

For a look at the Regulatory Agendas for the Department of Labor and the EEOC, go to "U.S. Department of Labor 2015 Statement of Regulatory Priorities" and "EEOC Regulations: New and Proposed Regulations."

Minimum Wages Increase in 14 States, Many Local Jurisdictions

Fourteen states began 2016 with higher minimum wages, and several more have increases scheduled to take effect in July. Twelve states increased their minimum wage rates through legislation passed in 2014 or 2015, while two states automatically increased their rates based on the cost of living, according to the National Conference of State Legislatures. Currently, 29 states and the District of Columbia have minimum wages above the federal minimum wage of $7.25 per hour.

For a discussion of these and other minimum wage changes, go to "State Minimum Wage Increases Effective 2016."

Beginning January 1, 2016, under Executive Order 13658, the minimum wage rate for workers on federal construction and service contracts increased to $10.15 per hour. The Executive Order minimum wage rate generally must be paid to workers performing work on or in connection with covered contracts. Additionally, beginning January 1, 2016, tipped employees performing work on or in connection with covered contracts generally must be paid a minimum cash wage of $5.85 per hour.

The new rule proposed by OSHA will add electronic reporting obligations to existing reporting requirements for employers.

For a chart of state minimum wage laws, go to www.dol.gov/whd/minwage/america.htm.

Many local jurisdictions have enacted their own minimum wage requirements exceeding those in federal or state laws. For example, San Francisco, Oakland, and Berkeley, California, all have minimum wages higher than the federal or state rate. Other local jurisdictions that have enacted higher minimum wages include Chicago, Illinois; Las Cruces, New Mexico; and Montgomery County, Maryland.

For a chart of minimum wage laws by local jurisdictions, see "State and Local Minimum Wage Increases in 2016," at www.shrm.org/hrdisciplines/compensation/articles/pages/minimum-wage-state-local-2016.aspx.

Even within one state, there can be a confusing array of minimum wage laws. In New York, for example, many employers must sort through federal, state, municipal, wage board, and other sources of minimum wage requirements. The state's most recent actions on minimum wage rates came from two labor department wage boards, one for the hospitality industry as a whole and the other for "fast food" establishments.

As a result, New York employers must be aware of an assortment of new and proposed rules governing the payment of wages, beyond the increase to $9.00 per hour for nonexempt workers and an increase in the salary basis for executive and administrative exemptions (to $675 per week, effective for all employers in 2016). All of the proposed rules, save the already-enacted increase to the New York minimum wage, remain subject to continued agency rulemaking, public comment, and political lobbying.

For detailed information on New York minimum wages, go to "Significant Changes to New York State Hospitality Industry Wage and Hour Laws Effective 12/31/15" and "The Confusing Array of Wage Hour Developments Impacting New York State Employers' Wage and Hour Compliance."

Our specialized Practice Groups share resources and critical insight to seamlessly deliver practical and effective solutions in all areas of workplace law, including Disability, Leave and Health Management, Wage and Hour, and Workplace Health and Safety. Go to www.jacksonlewis.com/practices for a complete descriptive listing of Jackson Lewis Practices with links to detailed discussions, related experience, and helpful resources.

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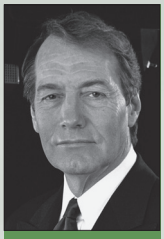

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