

LABOR AND EMPLOYMENT

EEOC PROPOSES TO REQUIRE EMPLOYERS TO REPORT PAY DATA FOR EMPLOYEES

by Timothy H. Howlett

For several years, the U.S. Equal Employment Opportunity Commission (EEOC) and others have raised concerns about unequal pay for women and minorities. These concerns led to the Lilly Ledbetter Fair Pay Act and are still being raised in current political campaigns.

The EEOC is now proposing to address the issue by revising the Employer Information Report (EEO 1) form to collect pay data from employers – including federal contractors – with more than 100 employees. The revision is designed to give the EEOC information about pay discrepancies across industries and occupations, and to strengthen federal efforts to combat discrimination.

This proposal is a significant change. EEO 1 data provides the federal government with workforce profiles from private sector employers by race, ethnicity, sex and job category. The new proposal would add aggregate data on pay ranges and hours worked beginning with the September 2017 report. Employers would be required to use W 2 wage data and report it by one of 12 pay bands for each EEO 1 job category. The proposed EEO 1 would report the number of employees whose total W 2 pay for the 12 months prior to the employer's EEO 1 pay period fell into each band, and then categorize the information by race, ethnicity and gender. Individual wage information would not be reported. EEOC Chair Jenny Yang stated that the new information will allow the EEOC to "more effectively focus investigations, assess complaints of discrimination and identify existing pay disparities that may warrant further examination." The EEOC would have the ability to initiate directed investigations focusing on equal pay without a discrimination charge. The proposed changes are available for inspection on the federal register website. Members of the public have until April 1, 2016 to submit comments.

A significant concern for employers is that the EEOC could initiate investigations without having complete information. The pay data would not distinguish among positions within the general job categories, nor would it include information that is typically used to determine compensation such as seniority, experience within a job classification, performance, education, or career experience. As a result, an employer could face significant expense responding to an EEOC investigation for which it has a valid explanation for any differences in pay.

Employers should now begin to analyze their pay data within job classifications to determine if there are discrepancies that need to be evaluated. The employer can then determine if there is a valid explanation for any discrepancies or make pay adjustments, if appropriate. Employers may want to discuss these issues with counsel in order to assess risk and to develop a strategy.

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