

## EEOC Proposes Pay Data Reporting by Employers

On February 1, the EEOC proposed revising the Employer Information Report EEO-1 that employers file annually with the agency. The proposal would impose additional reporting obligations by requiring employers with 100 or more employees to disclose data on their employees' pay and hours worked starting with the 2017 filing. Employers will want to review their current pay practices and systems capabilities to identify any concerns over the proposed changes in the reporting requirements.

### Background

The U.S. Equal Employment Opportunity Commission (EEOC) enforces the federal laws prohibiting employment discrimination, including the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964, both of which prohibit discrimination based on pay. The DOL's Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order 11246 that generally prohibits employment discrimination against employees and applicants by covered federal contractors and subcontractors. With certain exceptions, private employers with 100 or more employees and federal contractors with 50 or more employees and a government contract worth \$50,000 or more are required to file a compliance survey — the Employer Information Report EEO-1 ([EEO-1 report](#)) — annually.

The EEO-1 report provides corporate-wide employment data and separate workforce profiles for each covered establishment in the U.S. In their filings, employers are required to provide information about employees' race/ethnicity and sex in each of 10 job categories. Single-establishment companies file one all-inclusive report while multi-establishment companies must file three separate types of reports — a consolidated report that includes all employees of the company, a headquarters report that includes all employees working at or reporting to the company's main office (even if fewer than 50 employees work there), and an establishment report for each location with 50 or more employees or an establishment list for sites with fewer than 50 employees.



Since 1966, both the EEOC and OFCCP have used EEO-1 data. The EEOC uses the workplace demographics data to analyze employment patterns within companies, industries and/or regions and for enforcement purposes. The OFCCP uses the data submitted by federal contractors in selecting facilities for compliance reviews.

## Pay Data Reporting

In 2014, the OFCCP [proposed](#) amendments to regulations that set forth reporting obligations of federal contractors and subcontractors under Executive Order 11246. The proposal would have required certain federal contractors and subcontractors to supplement their EEO-1 reports by submitting additional information in a new “Equal Pay Report.” The report would have included contractor summary data on employee compensation by:

- Sex, race, and ethnicity
- Job categories
- Other data points (such as hours worked, and the number of employees)

### New Reporting Obligation Announced

In conjunction with the White House [commemoration](#) of the seventh anniversary of the Lilly Ledbetter Fair Pay Act, President Obama announced a new initiative aimed at narrowing the gender pay gap. On February 1, the EEOC in partnership with the DOL [proposed](#) new EEO-1 reporting requirements. The revised EEO-1 report would include pay and hours worked data from employers — including federal contractors — with 100 or more employees. Starting with the 2017 reporting cycle, compensation and hours worked data by gender, race and ethnicity would be required in addition to the employment information companies are already required to submit annually. The EEOC’s proposal expands and replaces the OFCCP’s earlier proposal to require federal contractors and subcontractors to submit an Equal Pay Report.

#### Lilly Ledbetter Fair Pay Act

On January 29, 2009, President Obama signed into law the first piece of legislation passed by Congress under his administration, the Lilly Ledbetter Fair Pay Act of 2009. The law significantly expanded the time to file wage discrimination claims under most federal anti-discrimination laws. (See our [February 5, 2009 For Your Information](#).)

#### States Too Are Targeting Pay Equality

New York, for example, recently expanded statutory protections against gender-based pay disparity. (See our [December 18, 2015 For Your Information](#).) Last month, California’s [Fair Pay Act](#) took effect, broadening its law against gender pay inequality.

The Massachusetts attorney general’s office recently issued broad requests to employers for pay data, targeting compliance with the [Massachusetts Equal Pay Act](#). Just before the EEOC proposed its new pay reporting regulations, the Massachusetts Senate voted unanimously to strengthen that law against gender-based pay discrimination.

#### EEOC’s Rationale

The EEOC [press release](#) announcing the proposed changes said “this new data will assist the agency in identifying possible pay discrimination and assist employers in promoting equal pay in their workplaces.” It added that the new pay data would provide both the EEOC and OFCCP “with insight into pay disparities across industries and occupations and strengthen federal efforts to combat discrimination.” The agencies would use the data collected to evaluate pay discrimination claims, focus investigations, and identify pay disparities that may warrant further scrutiny. According to the EEOC, its compilation and publication of aggregated data on pay ranges and hours would also “help employers in conducting their own analysis of their pay practices to facilitate voluntary compliance.”

The EEOC has posted on its website a [Small Business Fact Sheet, Questions and Answers](#) and the [proposed EEO-1 form](#) to collect compensation and hours worked data. Members of the public have until April 1, 2016, to submit comments.

### Proposed Changes

For the 2016 reporting cycle, employers that are subject to the EEO-1 reporting requirement will continue to submit the same information that is collected currently. Starting with the 2017 reporting cycle, employers — including federal contractors — that are required to report and have 100 or more employees will have to submit the revised EEO-1 with aggregate compensation and hours data for their employees. Contractors that are subject to the EEO-1 reporting requirement but have fewer than 100 employees will not have to provide pay and related hours worked information. Rather, they will continue to collect and submit the same information the current EEO-1 report requires.

**Adding Pay and Hours Worked Data to the EEO-1.** Employers are currently required to report employment data for all permanent full- and part-time employees broken down by: ten job categories; seven race/ethnicity categories; and gender. In addition to that data, employers that will be required to file the revised EEO-1 will also have to report compensation data organized by the following twelve pay bands.

Pay Bands	
Pay Band 1	≤\$19,239
Pay Band 2	\$19,240 - \$24,439
Pay Band 3	\$24,240 - \$30,679
Pay Band 4	\$30,680 - \$38,999
Pay Band 5	\$39,000 - \$49,919
Pay Band 6	\$49,920 - \$62,919
Pay Band 7	\$62,920 - \$80,079
Pay Band 8	\$80,080 - \$101,919
Pay Band 9	\$101,920 - \$128,959
Pay Band 10	\$128,960 - \$163,799
Pay Band 11	\$163,800 - \$207,999
Pay Band 12	≥\$208,000

For these purposes, the EEOC has selected total W-2 earnings for a 12-month period looking back from a pay period between July 1 and September 30 as the measure of pay to be used on the proposed EEO-1. W-2 gross income includes wages, salaries, fees, bonuses, commissions, tips, taxable fringe benefits, tuition reimbursement and other reportable earnings. It also includes overtime, severance, and shift differential pay as well as nonproduction bonuses (such as year-end bonuses, hiring and referral bonuses, and profit-sharing cash bonuses).

**Comment.** By contrast, the EEO-4 forms that public employers complete report compensation by annual salary rather than W-2 data, using eight pay bands.

The revised EEO-1 will also require employers to report total annual hours worked by the employees in each job category, separated by race/ethnicity and gender within each pay band cell. The expansion of the current reporting matrix to include this data would significantly increase the complexity of employer reporting.

The EEOC anticipates that this data will allow analysis of pay differences while considering aggregate variations in hours and accounting for part-time and partial-year employment. According to the EEOC, it has not yet developed a process to analyze and use the new data. However, the EEOC and OFCCP plan to develop a software tool that will allow their investigators to conduct an initial analysis by looking at W-2 pay distribution within a single firm or establishment, and by comparing that data to aggregate industry or metropolitan-area data. Because most exempt employees do not record actual hours worked, the EEOC has requested comments on how to handle the proposed reporting requirement.

**Comment.** Whether employers' existing payroll systems or their payroll vendors' systems would be able to gather the additional pay and hours worked data will have to be determined on a case-by-case basis. Employers should begin to examine their HRIS and payroll systems or consult with their vendors to determine whether they would be able to comply with the proposed changes if they are adopted or would have to develop "custom programs to import data" from other databases to ensure compliance.

**Due Date and Submission.** Currently, employers must collect and provide EEO-1 data from any pay period between July 1 and September 30 of the survey year, and file the EEO-1 by September 30 of that year. The same reporting period and deadlines would continue to apply to the new filing requirement. Unless they qualify for an undue hardship exemption, filers will be required to submit the proposed EEO-1 report electronically beginning in 2017.

## In Closing

The new initiative is aimed at narrowing the gender pay gap and eliminating pay discrimination through increased EEOC and OFCCP scrutiny of employer pay practices. If the expanded reporting requirements are approved, starting with the 2017 EEO-1 filings, employers — including federal contractors — with 100 or more employees would be required to provide compensation and hours worked data in addition to the information already submitted on their annual filings. Given recent pay equity initiatives at the federal and state levels, employers will want to review their current pay practices and assess what, if any, potential risks they may pose.

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