

EEOC Issues Revised Proposal to Amend EEO-1 Report

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On July 13, 2016, the U.S. Equal Employment Opportunity Commission (“EEOC”) announced the publication of a [revised proposal](#) (“Revised Proposal”) that would amend the Equal Employer Information Report (“EEO-1 report”) to require, beginning in 2017, federal contractors and private employers with at least 100 employees to include pay and hours worked data by sex and race/ethnicity, grouped by job category. Public comments to the Revised Proposal are due by August 15, 2016.

The Initial Proposal

Since 1966, federal contractors and private employers with at least 100 employees have submitted yearly data to the EEOC listing each employee’s sex and race/ethnicity, grouped by job category. Spurred by a desire to address what it views as persistent pay gaps associated with sex and race/ethnicity and strengthen federal efforts to combat discrimination, on February 1, 2016, the EEOC published proposed rules (“Initial Proposal”) that would expand the EEO-1 report by requiring government contractors and employers with at least 100 employees to report pay and hours worked data for each employee, in addition to the categories already included within the EEO-1 report.

In sum, the Initial Proposal included the following points:

- The annual EEO-1 report will be expanded to include information on pay (referred to as “Component 2”).
- Component 2 will require employers to aggregate W-2 data in 12 newly defined pay bands¹ for the 10 current EEO-1 job categories.

¹ The pay bands are as follows: (1) \$19,239 and under; (2) \$19,240 to \$24,439; (3) \$24,440 to \$30,679; (4) \$30,680 to \$38,999; (5) \$39,000 to \$49,419; (6) \$49,920 to \$62,919; (7) \$62,920 to \$80,079; (8) \$80,080 to \$101,919; (9) \$101,920 to \$128,959; (10) \$128,960 to \$163,799; (11) \$163,800 to \$207,999; and (12) \$208,000 and over.

- Employers will identify the employees to be included in that year's EEO-1 report during the selected "workforce snapshot" pay period (discussed below).
- Component 2 will also require employers to track hours worked by employees identified in the workforce snapshot.
- All private employers that complete EEO-1 reports (those employing 100 or more employees) will be required to include Component 2, commencing with the 2017 EEO-1 report.

The Revised Proposal

After an initial review and comment period, the EEOC published the [Revised Proposal](#), addressing the comments concerning the Initial Proposal and including only a few changes of significance, as detailed below.

New Filing Deadline of March 31

According to the Revised Proposal, beginning with the 2017 EEO-1 report, instead of the normal September 30 filing deadline, EEO-1 reports would have to be filed by March 31 of the following year. This change results from criticisms about the Initial Proposal's failure to allow employers to gather sufficient compensation data from employees' Internal Revenue Service ("IRS") Forms W-2. The change is meant to align EEO-1 reporting with employers' new obligations to calculate W-2 earnings as of December 31. Note, however, that this change would not impact the 2016 EEO-1 report, which remains due by September 30, 2016. If the EEOC's proposal becomes final, the first EEO-1 report covered by the new requirements will be due on March 31, 2018.

New "Workforce Snapshot" Period of October 1 Through December 31

The "workforce snapshot" is the single pay period chosen by the employer to identify the employees to be included in that year's EEO-1 report. Currently, employers must choose a pay period during the three-month window between July 1 and September 31. The Revised Proposal would change the "workforce snapshot" period to the period between October 1 and December 31, again, to better align the representative workforce with the final W-2 pay data for the then-current year.

Clarification of Pay Data to Report

In the Initial Proposal, the EEOC suggested using each employee's IRS Form W-2 to record wage data without specifying which box on the form employers would use to compile this number.²

² It should be noted that, aside from concerns about which box to use, several comments from the public criticized the use of W-2 information at all, claiming, among other things, that the pay reflected on a Form W-2 may be skewed, as it reflects certain

The Revised Proposal clarifies that employers would be required to use the number provided in “Box 1” of Forms W-2 when reporting employees’ wages.

New Options for Calculating Exempt Employees’ Hours Worked

The EEOC addressed numerous comments about the Initial Proposal’s requirement to use the Fair Labor Standards Act’s definition of “hours worked” for calculating hours worked by exempt employees. As such, the Revised Proposal would permit employers to either report a proxy of 40 hours per week for each full-time exempt employee (and 20 hours per week for each part-time exempt employee) or provide the data for actual hours worked for each exempt employee.

What Employers Should Do Now

The Revised Proposal does not affect the 2016 EEO-1 report or current reporting requirements. Therefore, employers must submit employee gender and race/ethnicity information organized by job category by the current filing deadline of September 30, 2016.

Additionally, in anticipation of the updated EEO-1 reporting requirements, employers should do the following:

- Review your HRIS systems to determine whether they will enable your organization to comply with the proposed requirements, and make any changes necessary in anticipation of a March 31, 2018, due date for the 2017 EEO-1 report.
- Assess your pay practices, and consider conducting pay audits in a privileged and confidential manner to proactively identify and address pay disparities.
- Consider commenting on the Revised Proposal. The comment period is now open, and closes on August 15, 2016. You can submit comments by:
 - **Website.** Comments can be submitted to the EEOC through the Federal eRulemaking Portal at <http://www.regulations.gov>.
 - **Email.** Comments can be emailed to oir_submission@omb.eop.gov.

choices that employees make about their compensation, such as whether to work overtime, or whether to work a shift that would provide them with a shift differential, whereas simply using base pay amounts would not. Commenters also raised concerns that gathering this information would cause employers an undue burden because W-2 information is not generally maintained in HRIS systems and would be difficult to collect and report. These concerns were not taken into consideration in the Revised Proposal.

- **Mail.** Comments can be mailed to:
Joseph B. Nye
Policy Analyst, Office of Information and Regulatory Affairs,
Office of Management and Budget
725 17th Street, NW, Washington, DC 20503

or

Bernadette Wilson
Acting Executive Officer
Equal Employment Opportunity Commission
131 M Street, NE, Washington, DC 20507

- **Fax.** Comments totaling six or fewer pages can be faxed to the Bernadette Wilson, Executive Secretariat, at 202-663-4114.

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