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EEOC Proposes To Add Pay Level Information To Required EEO-1 Reports

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By: [Robert S. Nichols](#), [Leslie Selig Byrd](#) and [Amber K. Dodds](#)

The Obama Administration has recently focused on eliminating pay discrimination by mandating increasing employee pay level disclosure. Building on this emphasis, the Equal Employment Opportunity Commission (EEOC), in conjunction with the Office of Federal Contract Compliance Programs (OFCCP), has proposed expanding the scope of employers' EEO-1 report to include pay level information. The EEO-1 report, which federal contractors and first-tier subcontractors with 50 or more employees and a contract of \$50,000 or more and other private sector employers with 100 or more employees are required to file annually with the EEOC, includes information concerning the makeup of the employer's workforce. This information is broken down by race, ethnicity, sex, and job category.

The EEOC's proposal would expand the EEO-1 report to require disclosure of aggregate pay data and hours worked. Specifically, employers would tabulate and report the number of employees whose W-2 earnings for the prior 12-month period fall within any one of 12 pay bands (pay ranges) and the aggregate hours worked in that band. The proposal sets the implementation date for the increased reporting requirements as beginning with the September 2017 report. See sample proposed EEO-1 Report [here](#).

The pay band approach is intended, in part, to protect the confidentiality of individual employee pay levels. In other words, employers would not report individual pay information for specific employees but rather would report aggregate information based on the 12 pay bands in each of the standard EEO-1 job categories. Presumably, this offers most employers, with the exception of those with only one or a few employees in a job category, some level of confidentiality. The EEO-1 Reports are currently confidential, except in certain circumstances, e.g., a party to a lawsuit may request the disclosure of the party-employer's EEO-1 Report through a FOIA request.

The information would be used by both the EEOC and the OFCCP to "focus agency investigations, assess complaints of discrimination, and identify existing pay disparities that may warrant further examination." EEOC Chair Jenny R. Yang, in conjunction with announcement of the proposal, emphasized that "collecting pay data is a significant step forward in addressing discriminatory pay practices." Similarly, Secretary of Labor Thomas E. Perez emphasized that the information gathered could be used both by (i) employers to evaluate their own pay practices, and (ii) regulators as a "powerful tool to do its enforcement work."

Accordingly, employers should expect that EEO-1 reports showing significant pay disparities based on a protected classification may lead to federal regulatory investigations and may be used to bolster individual charges or complaints of pay discrimination filed by employees. For example, as part of Federal Contractor Selection System, the OFCCP currently utilizes the results of the EEO-1 Report as one of the factors in the neutral electronic selection of contractors for a compliance review. Similarly, the EEOC explained in its written Q&A that the pay band approach lends not only to comparing individual employees (within-job-category variation) but also “support[s] the agencies’ ability to discern potential discrimination” in across-job-category variation and overall variation. The pay band approach, however, does not (on its face) include legitimate variables affecting employee pay—such as differing responsibilities between individuals with the same or similar job titles, education, other experience, and seniority. Accordingly, even with the pay band approach, challenged employers could find themselves spending significant time and resources explaining the non-discriminatory bases for employee pay rates.

As a result, the additional burdens that will be created for employers by these new requirements are not only the work involved in compiling the information and completing the relevant sections of the EEO-1 report but also potentially coping with increased regulatory and litigation activity based upon the results reported.

The EEOC and its proposal has provided for a 60-day period for the public, including employers and employees, to provide comments on the proposal. The timeframe for those comments closes on April 1, 2016.