

**Bradley Cave**

Partner
307.778.4210
Cheyenne
bcave@hollandhart.com

EEOC's Pay Data Reporting Goes Into Effect With 2017 EEO-1 Report

Insight — September 2016

The U.S. Equal Employment Opportunity Commission (EEOC) announced today that the revised Employer Information Report (EEO-1) requiring employers to specify how many employees, by gender and race or ethnicity, are paid within specified pay ranges will go into effect with the 2017 report. The 2016 report (due tomorrow, September 30, 2016) is not affected.

How The New EEO-1 Report Will Work

The new EEO-1 report provides columns for employers to report the summary pay data by job category. The pay data will be grouped into twelve pay bands which are based on those used by the Bureau of Labor Statistics in the Occupation Employment Statistics survey:

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

Beginning with the EEO-1 report of 2017 data, the “workforce snapshot period” will be October 1 to December 31, 2017. Each covered employer is permitted to choose any pay period during this three-month period to count its full and part-time employees for the EEO-1 report. Consequently, the first step is to choose a pay period that you will use for the data needed to complete the report.

Next, you will need to count the number of employees in each pay band for each job category. To determine which pay band an employee should be reported in, use the pay reported for income tax purposes in Box 1 of the W-2 form for that year.

Then, in the appropriate columns of the new EEO-1 report, enter the number of employees in each pay band based on sex and race/ethnicity of the employees. For example, an accounting firm may have a total of 32

Professionals in pay band 6, including 15 who are male and white, 10 who are male and black, 6 who are female and white, and 1 who is female and Hispanic. If you have no employees in a particular job category or pay band, leave that cell on the EEO-1 report blank.

Reporting Hours Worked

Perhaps the most burdensome requirement for the new EEO-1 report is the reporting of the total number of hours worked in the last year for all employees in each pay band, by gender and race or ethnicity. The EEOC and the Office of Federal Contract Compliance Programs (OFCCP) state that they are collecting the hours worked data to account for part-time and partial year employment when they analyze the pay data.

For non-exempt employees, you'll need to add up all the hours worked for all employees in each pay band and then break it out by the employees' gender and race or ethnicity. For exempt employees, you may either report the actual number of hours worked, or report 20 hours per week for each part-time exempt employee and 40 hours per week for each full-time exempt employee.

Which Employers Must Provide This Pay Data?

Starting with the 2017 report, which is due on March 31, 2018, private employers with 100 or more employees, including federal contractors and subcontractors, must submit the summary pay data. Federal contractors and subcontractors with 50-99 employees must still file an EEO-1 report providing employee sex, race, and ethnicity by job category, as is currently required, but will *not* be required to report any pay data.

Confidentiality Concerns

The pay data will be reported on an aggregate basis so that no individual employee's pay information should be discernible. Once the EEOC has the data, its staff may not make that information public until such time as a Title VII proceeding involving the information is begun.

For federal contractors and subcontractors, the EEOC will provide the summary pay data to the OFCCP. If a request for such data is made under the Freedom of Information Act (FOIA), the OFCCP will notify contractors of the FOIA request in advance to allow the contractor to object to disclosure of the information. If OFCCP determines that a contractor's objection is valid, it will not disclose the data.

Will The Pay Data Really Identify Wage Disparities?

As we have reported before, the EEOC and the OFCCP want to collect this pay data from private employers in order to identify potential pay discrimination. In essence, the data will allow these federal agencies to target specific industries and employers for investigation on whether pay discrepancies are the result of gender, race or ethnic discrimination.

In the aggregate, however, the pay data lacks any context. It does not take into account any factors that typically determine pay rates, such as

education, skill, experience, seniority or longevity with the company, alternative or flexible working arrangements, etc. It only provides the raw numbers of male versus female employees by race and ethnic background in each job category and pay band. That raw data fails to reflect the reality of how employers actually pay their workers.

Expect Challenges to Rule But Prepare For 2017 Report

Like so many of the recent employment-related rules (e.g., DOL's overtime rule, NLRB's persuader rule, etc.), business groups and associations are likely to challenge this new EEOC requirement. We will continue to monitor any developments but in the meantime, use the next year to conduct a self-audit of your pay data. Will your numbers show any pay discrepancies based on gender, race or ethnicity? Are all your female or ethnic employees paid in the lower pay bands? You have 18 months before the new EEO-1 report must be submitted so use that time to review your pay determinations, making sure to document why individual employees in similar positions are paid differently than others.

If you have any questions about this new development, please contact BCave@hollandhart.com.

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