

EEO-1 Pay Data Disclosure Requirement on Hold, Being Reconsidered by EEOC

By Shane T. Muñoz and Viktoryia Johnson,ⁱ FordHarrison LLP

Overview of EEO-1 Reporting Requirement. Section 709(c) of Title VII of the Civil Rights Act of 1964 (Title VII) requires employers to “make and keep” records relevant to the determination of whether unlawful employment practices have occurred or are occurring, and to produce those records to the U.S. Equal Employment Opportunity Commission (EEOC). Pursuant to this authority, the EEOC in 1966 issued a regulation requiring most employers subject to Title VII and having 100 or more employees annually to file with the EEOC copies of Standard Form 100, otherwise known as “Employer Information Report EEO-1” (EEO-1 Report). In 1978, pursuant to Executive Order 11246, the U.S. Department of Labor’s (DOL) Office of Federal Contract Compliance Programs (OFCCP) (the agency responsible for ensuring that federal government contractors comply with anti-discrimination laws and regulations) issued a regulation extending this obligation to certain federal contractors.

The EEO-1 Report collects summary data regarding the racial, ethnic, and gender makeup of an employer’s workforce, categorized by job category. The EEOC and OFCCP use the reports to identify disparities between the demographics of an employer’s workforce and the demographics that one would expect to see in the absence of discrimination, in each of the 10 job categories in the geographic area where the employer is located. If there are disparities that are statistically significant, that may be an indicator of discrimination, and may result in further investigation by the agency. In this manner, the agencies use EEO-1 Reports to study employment patterns and to help enforce anti-discrimination laws.

Proposed Revisions. On February 1, 2016, the EEOC proposed revisions to the EEO-1 Report data collection process. The proposed revisions resulted from a multi-year effort among the EEOC and other federal agencies (including the DOL) to identify ways for improving enforcement of federal laws prohibiting pay discrimination. The proposed revised EEO-1 Report has two components. The first component (Component 1) would collect the same data that was gathered by the current EEO-1 Report—i.e., employee race, ethnicity, and gender, separated by job category. The second component (Component 2) would collect data on employees’ W-2 earnings and hours worked. According to the EEOC, the access to this type of employee pay and hours information would improve administrative investigations of possible pay discrimination that contribute to persistent wage gaps for women and minorities in the United States labor market.

Under the proposed revisions, covered private employers and contractors would be required not only to report the number of employees employed in each of the 10 job

categories by ethnicity, race, and gender, but would also be required to report, for each job category, the number of employees falling within each of 12 pay bands. The bands range from “\$19,239 and under” to “\$208,000 and over.” Covered employers and contractors would also be required to report the aggregate hours worked by employees in each pay band for the last 12 months, sorted by ethnicity, race, and gender. This data would allow analysis of pay differences while considering aggregate variations in hours.

On September 29, 2016, the EEOC announced that, starting in March 2018, it would officially begin the W-2 data collection. The EEOC set March 31, 2018, as the deadline for filing the new 2017 EEO-1 Reports, affording companies and contractors subject to this requirement 18 months to prepare for compliance.

The Revised EEO-1 Is “Immediately Stayed.” On August 29, 2017, however, the Administrator of the Office of Information and Regulatory Affairs (OIRA), of the OMB, after a “review,” “immediately” stayed the new pay data reporting requirement implemented by the EEOC nearly a year prior. Pursuant to a memorandum from OIRA Administrator Neomi Rao to Acting Chair of the EEOC Victoria Lipnic, the EEOC was directed to continue collecting only the traditional ethnicity, race, and gender EEO-1 information. OIRA based the stay on (1) the lack of notice or opportunity for public comment regarding data file specifications released by the EEOC subsequent to implementing the revised EEO-1 Report; (2) inaccurate estimates of compliance burdens; and (3) impracticability, burdensomeness, and confidentiality issues associated with the new data collection process, given the sensitive nature of employee data subject to disclosure:

[S]ince approving the revised EEO-1 form on September 29, 2016, ... EEOC has released data file specifications for employers to use in submitting EEO-1 data. These specifications were not contained in the Federal Register notices as part of the public comment process nor were they outlined in the supporting statement for the collection of information. As a result, the public did not receive an opportunity to provide comment on the method of data submission to EEOC. In addition, EEOC’s burden estimates did not account for the use of these particular data file specifications, which may have changed the initial burden estimate.

OMB has also decided to stay immediately the effectiveness of the revised aspects of the EEO-1 form for good cause, as we believe that continued collection of this information is contrary to the standards of the [Paperwork Reduction Act]. Among other things, OMB is concerned that some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues.

In connection with the stay, the OIRA directed the EEOC: (1) to submit to the OMB a new data collection package for the EEO-1 form; and (2) to publish a public notice

“announcing the immediate stay of effectiveness of the wages and hours worked reporting requirements contained in the EEO-1 form and confirming that businesses may use the previously approved EEO-1 form in order to comply with their reporting obligations for FY 2017.” The new data collection process remains under review.

Conclusion. The implementation of the revised EEO-1 Report and its additional reporting requirements is stayed until further notice. Companies subject to the EEO-1 reporting requirement should not report aggregate data about their employees’ W-2 (Box 1) income and hours worked (i.e., the information required by Component 2 of the revised EEO-1 Report). While employers may use the version of the EEO-1 Report form implemented on September 29, 2016, they should leave the salary information portion blank. Filers should continue to submit the Component 1 data regarding employees’ ethnicity, race, and gender, separated by job category. 2017 EEO-1 Reports reflecting Component 1 only are due to the EEOC by March 31, 2018. For purposes of this report, employers should count their employees in the fourth quarter of calendar year 2017, between October 1, 2017 and December 31, 2017 (the “workforce snapshot period”).

ⁱ If you have any questions regarding this article, or your company’s obligation for EEO-1 reporting or other employment law matters, please feel free to contact the authors of this Alert, Shane Muñoz, (813) 261-7803 or smunoz@fordharrison.com, or Viktoryia Johnson, (813) 261-7814 or vjohnson@fordharrison.com, or the FordHarrison attorney with whom you usually work.