



## ***EMPLOYMENT LAW ALERT***

July 20, 2016

### ***I NEED TO ASK YOU A PERSONAL QUESTION . . . HOW MUCH MONEY DO YOU MAKE? EEOC PROPOSES NEW PAY DATA REPORTING REQUIREMENTS FOR LARGE EMPLOYERS***

*Andrew M. DeLucia, Esq.*

The U.S. Equal Employment Opportunity Commission<sup>1</sup> called a full-court press to help eliminate pay disparity by large employers. In January 2016, the EEOC published proposed revisions to the requirements associated with the Employer Information Report (EEO-1) to include a requirement that large employers provide salary information. Currently, the EEO-1 requires private sector employers with 100 or more employees, and certain smaller federal contractors, to provide annual reports to the federal government on certain

employment workforce profiles, such as the ethnicity, race, gender, and job category breakdown of their employees. Under the proposed revisions, the EEOC would also require such employers, including federal contractors with 100 or more employees, to include information regarding pay and hours worked.

The release of the proposed revisions coincided with the seventh anniversary of the Lily Ledbetter Fair Pay Act (signed into law by President Obama) and furthered the EEOC's efforts to identify possible pay discrimination based on impermissible characteristics, such as gender, race, or ethnicity.

According to the EEOC, the data will "provide EEOC and the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor with insight into pay disparities across industries and occupations and strengthen federal efforts to combat discrimination. This pay data would allow EEOC to compile and publish aggregated data that will help employers in conducting their own analysis of their pay practices to facilitate voluntary compliance.

---

<sup>1</sup> The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (40 or older), disability, or genetic information. Most employers with at least 15 employees are covered by EEOC laws. Most labor unions and employment agencies are also covered. The laws apply to all types of work situations, including hiring, firing, promotions, harassment, training, wages, and benefits. The Equal Pay Act of 1963 and the Civil Rights Act of 1964, which prohibit discrimination based on pay, are among the laws enforced by the EEOC.

The agencies would use this pay data to assess complaints of discrimination, focus agency investigations, and identify existing pay disparities that may warrant further examination.”

The initial proposed revisions were subject to a public comment period from February 1, 2016 through April 1, 2016 and a public hearing on March 16, 2016. The EEOC considered oral and written testimony of witnesses at the hearing and the over 300 public comments from individual members of the public, employers, employer associations, members of Congress, civil rights groups, women’s organizations, labor unions, academics, industry groups, law firms and human resources organizations and professionals, as well as literature and studies on compensation practices, discrimination, and trends in compensation and collecting pay information.

On July 14, 2016, the EEOC issued a revised proposal based on the feedback.

The updated proposed changes would take effect on reports due on March 31, 2018 (changed from September 30, 2016), and would be due each subsequent year on March 31. Impacted employers will be required to identify employees’ total W-2 earnings for a 12-month look-back period. Employers must also implement and maintain a system by which they can both track and document data regarding the pay ranges and hours worked of their employees, as well as analyze that information to ensure compliance with the new reporting requirements. The EEOC’s proposed pay data collection form requires employers to

provide the numbers of employees of different races, ethnicities, and genders that fall into each of a series of twelve pay bands based on W-2 income (ranging from *\$19,239 and under* to *\$208,000 and over*) and the number of hours worked by those employees. For exempt employees, employers can report either (1) the actual amount of hours worked (if accurate records exist); or (2) a proxy of 40 hours per week for full-time employees, and 20 hours per week for part-time employees.

The EEOC is accepting public comments on the proposed regulations until August 15, 2016.

### **Practical Implications and Advice For Employers**

**Submit Comments-** Whether as an individual employer or as part of an industry association or advocacy group, employers can and should submit comments to the EEOC to identify its particular concerns with the proposed revisions.

**Assess Reporting Capabilities-** The proposed revisions may require new programs or applications, or updates to existing systems and software to facilitate the data collection. Estimate the potential costs associated with such updates and budget for them. Consider including an explanation of the cost burdens as part of any submitted comments.

**Cooperate with the Agency-** Of course, employers may have legitimate, non-discriminatory reasons for pay disparity (e.g., performance, experience, expertise), that will not be reflected in the information

being collected by the EEOC. The EEOC decided to use W-2 income after carefully considering feedback because supplemental pay, such as overtime, premium pay, and bonuses, is increasingly common in business today, and the EEOC cannot overlook its importance in a pay survey. According to the EEOC, supplemental pay can reflect discrimination in an employer's decisions and policies, for example, discriminatory assignments for overtime and more lucrative shifts.

Unfortunately, employers could needlessly be subject to scrutiny even though legitimate business reasons exist for any pay disparity. We recommend that employers consult with counsel and cooperate with any inquiries from the agency and provide comprehensive responses because doing so may decrease the potential of a full-blown investigation.

*Please contact Andrew M. DeLucia at 610-408-2025 or [adelucia@rubinfortunato.com](mailto:adelucia@rubinfortunato.com) for more information about the EEOC's proposal or to discuss its impact on your wage policies or practices.*

**Have Counsel Assist With a Self-Assessment**- If you haven't already, under the direction of counsel (so as to protect the attorney-client privilege), employers should immediately begin a self-assessment of its wage practices to identify any unexplained disparities. If disparities or unusual results are found, together with counsel, employers should evaluate whether legitimate business reasons exist to justify the results or to determine best options to address and fix any potential issues.