



Weston Hurd Employment and Labor Alert February 2016

Employers May Pay for Pay Inequality: The New EEOC Pay Data Rule

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The U.S. Equal Employment Opportunity Commission (EEOC) and the Obama Administration unveiled a new proposed rule on January 29, 2016, that would require employers with a 100 or more employees to disclose hours worked and compensation for employees by gender, race and ethnicity. Employers would be required to report this information on revised employer information reports, also known as EEO-1 reports. This rule would cover more than 60 million employees.

The EEOC published the proposed "Pay Data Rule" on February 1, 2016, along with the proposed revised EEO-1 report form. On the current EEO-1 report form, an employer is required to identify the number of its employees (by gender, race and ethnicity) in each of the ten EEOC-defined job categories.

See the current form at: <http://www.eeoc.gov/employers/eeo1survey/upload/eeo1-2.pdf>

The Pay Data Rule would require all employers with a 100 or more employees to also identify the number of its employees (by gender, race and ethnicity) that fall into 12 pay ranges for *each* of the ten identified job categories (calculated based on the employees' total W-2 earnings). The 12 pay ranges (or bands) are as follows:

Proposed EEO-1 Pay Bands

\$19,239 and under
\$19,240-\$24,439
\$24,440-\$30,679
\$30,680-\$38,999
\$39,000-\$49,919
\$49,920-\$62,919
\$62,920-\$80,079
\$80,080-\$101,919
\$101,920-\$128,959
\$128,960-\$163,799
\$163,800-\$207,999
\$208,000 and over



Although the EEOC claims that this methodology will limit employer burden because HRIS software developers already have programs that report similar information for public employers, a quick glance at the proposed form makes clear the additional reporting burden which the Pay Data Rule would place upon employers, requiring both new technology and additional personnel resources to cull the information.

Click the attached link for a look at the new form:

www.eeoc.gov/employers/eeo1survey/2016_new_survey.cfm.

The Pay Data Rule was announced on the seventh anniversary of the Lilly Ledbetter Fair Pay Act. As the White House stated in its press release touting the new rule, the purpose of the rule is to help the EEOC uncover potential pay discrimination across industries and occupations. EEOC Chair Jenny R. Yang likewise stated that the new rule will "prevent discrimination and strengthen enforcement of our federal anti-discrimination laws." Thus, it is likely that the EEOC will use the pay data reported to investigate employers for perceived discrimination.

The obvious problem for employers is that the EEOC will be getting an employer's raw pay data without context that could explain a pay discrepancy. Not only are the EEOC's ten job categories overbroad, but there are also numerous nondiscriminatory factors that result in differences in pay among employees within the same category (for example, differences in education, seniority, and performance). Thus, the Pay Data Rule not only imposes additional administrative burdens on employers, it also subjects employers to the potential for the even greater expense of responding to an EEOC investigation or lawsuit based upon an incomplete and potentially distorted picture of their actual compensation practices.

The EEOC plans to implement its Pay Data Rule beginning in 2017. Employers and their representatives have until April 1, 2016 to submit comments to the EEOC regarding this proposed rule. Online comments can be submitted at <http://www.regulations.gov>.

Please contact your Weston Hurd lawyer with questions, comments, or concerns regarding the new EEOC Pay Data Rule. Weston Hurd LLP can assist in forecasting how the new rule may affect your business and help prepare for the rule's implementation so that your business is in compliance.



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