What CHROs Need to Know About EEOC’s Proposed Pay Data Report

Proposed Data Collection Will Misdirect and Waste Agency and Employer Resources, Will Not Help the EEOC Assess Discrimination Complaints

On July 14, 2016, the Equal Employment Opportunity Commission (EEOC) published its latest proposed revision to the annual EEO-1 report that would require large employers to report the total number of employees and total number of hours worked for 12 different pay bands by gender and race for each of the 10 EEO-1 job categories. Employers’ first reports will be due by March 31, 2018, for calendar year 2017 pay data.

Proposed Pay Data Report Although employers will not have to submit pay data for each individual employee, the report will require employers with more than 100 employees to tabulate and report the number of employees who fall within any one of 12 pay bands (pay ranges) for 10 different EEO-1 job categories and 14 different gender and race/ethnicity groups. Which pay band an employee would be assigned to would be determined by an employee’s W-2 earnings data accumulated over the four previous quarters ending on December 31. Covered employers would also be required to report the total number of hours worked in the last year by the employees that fall within each of the 12 prescribed pay bands for each of the 10 EEO-1 job categories, by race, ethnicity, and gender.

For salaried employees who are exempt under the Fair Labor Standards Act, employers can either assume 40 hours per week for full-time exempt employees and 20 hours per week for part-time exempt employees, multiplied by the number of weeks the individuals were employed during the EEO–1 reporting year; or provide actual hours worked by exempt employees if the employer maintains accurate records of the information.

Under the latest EEOC proposal, employers will count their employees during a new “snapshot” pay period between October 1 and December 31 and will use the W-2 income and total hours worked for these employees for the entire calendar year when filing the new report.

Like the current EEO-1 report, employers will have to submit a separate report for the headquarters location and each establishment that has more than 50 employees, as well as a consolidated report for the entire company. The final rule sets the implementation date for the new reporting requirement March 31, 2018. The new data will also be shared with the Office of Federal Contract Compliance Programs (OFCCP) for employers who are federal contractors.

According to the EEOC, the revised information collection will be used:

• By agency personnel who conduct complaint intakes to “issue spot” potential pay discrimination;

• To support the agency’s ability to discern significant pay disparities in the early stages of its investigations and to make more efficient decisions about how to plan the investigations going forward using statistical tests; and

• To publish periodic reports on pay disparities by race, sex, industry, occupational groupings, and Metropolitan Statistical Area (MSA).
**Will Misdirect and Waste Agency and Employer Resources**
The pay data collection in the proposed EEO-1 is likely to generate significant numbers of “false positives” that will waste both EEOC and OFCCP resources and inappropriately target non-discriminating employers, who will then need to spend significant time, money, and resources defending themselves against meritless allegations. The proposed EEO-1 is likely to generate significant numbers of “false negatives” where true discriminators would be identified as non-discriminators and the EEOC and OFCCP thus would fail to target them for investigation.

Moreover, the EEO-1 job categories are too broad to evaluate compensation data for similarly-situated employees as they may lump aerospace engineers and lawyers with teachers and human resource specialists, and salaried employees who are exempt from the Fair Labor Standards Act with those employees who are not. The pay band approach does not account for legitimate variables that affect employee pay (i.e., differing responsibilities, education, skill level, length of service, experience, and performance). Further, W-2 earnings data varies significantly from employer to employer based on benefits and bonuses.

The proposed pay data collection is completely unnecessary for the vast majority of employers that do not have an EEOC charge of pay discrimination and at best, the ability of OFCCP to use the pay data in the proposed EEO-1 to target federal contractor establishments for compensation discrimination audits is likely to be no better than selecting establishments by chance. A more likely outcome will be a high false positive rate that will target establishments where no compensation discrimination exists.

**Serious Confidentiality Concerns**
Although, Title VII forbids the EEOC or any EEOC officer or employee from making public any information, including EEO–1 data, before a Title VII proceeding is instituted that involves that information. EEOC staff who violate this prohibition are guilty of a criminal misdemeanor and can be imprisoned. However, Title VII permits disclosure of the pay data after suit is filed on the issues that were investigated at the administrative level, which means the pay data could be eventually released by the party who files a Title VII charge.

Moreover, the new pay data will be shared with the OFCCP for employers who are federal contractors. Although OFCCP will notify contractors of any Freedom of Information Act (FOIA) requests for their EEO–1 pay data and if a contractor objects to disclosure, OFCCP will not disclose the data *if OFCCP determines that the contractor’s objection is valid.* While OFCCP says it will protect the confidentiality of EEO–1 pay data *to the maximum extent possible consistent with FOIA,* the agency provides no guarantee the data will not be released. In fact, under FOIA and the Department of Labor’s disclosure policy and procedures at 29 C.F.R. Part 70 it is highly likely that sensitive compensation data can be disclosed.