

EEOC REVISES PROPOSED EQUAL PAY DATA RULE

As previously discussed [here](#), the EEOC recently proposed collecting salary information and hours worked data as part of the Employer Information Report (“EEO-1”). Following a comment period, the EEOC issued on July 14, 2016 an amended Equal Pay Data Rule proposal. The EEOC specified the W-2 box to be used for reporting, changed the snapshot period and adjusted the timetable for collection of data.

THE BASICS

Currently, private employers subject to Title VII that have 100 or more employees file an EEO-1. Federal contractors with 50 or more employees also file an EEO-1. The current EEO-1 form collects data about employees ethnicity, race and sex by job category (Component 1). A second component is being added to the EEO-1 (Component 2) and will include pay and hours worked data. The hours will be reported as cumulative totals of employees in each pay band subdivided by job category and by ethnicity, race and gender. Actual hours will need to be reported for non-exempt employees. For exempt employees, employers may report the actual hours worked or use a proxy of 40 hours per week for full time and 20 hours per week for part time multiplied by the number of weeks worked.

THE CHANGES

Box 1

The previous proposal did not specify which box on the W-2 would be reported, but now the EEOC has decided to use Box 1 of Form W-2 to report pay, which includes all income received between January 1 and December 31 including overtime and bonuses. The income will be divided into the same bands suggested in the original proposal.

Snapshot

Previously, a workforce snapshot was taken in the third quarter of the year and used to populate the EEO-1. The workforce snapshot will now be taken in the fourth quarter of the year, and employers will report W-2 income and hours worked data over the entire year for those employees present during the snapshot.

New Deadlines

Previously, the proposed deadline for submitting income and hours data was September 30 to correspond with the EEO-1 filing deadline. The EEOC has adjusted the proposed filing deadline for all EEO-1 data to March 31 to correspond with employers’ W-2 deadline. This year only, the EEO-1 will be due by September 30, 2016 without Component 2. Then EEO-1 reports will not have to be filed again until March 31, 2018 and will include both components.

EEOC RESPONSE TO COMMENTS

The EEOC responded to comments that raised issues identified in our previous blog.

- *Burdensome.* The reporting deadline was changed to March 31 so that employers would not need to calculate W-2 data mid-year. In addition, the EEOC has inserted an 18-month period between the next two EEO-1 submission dates for employers to prepare their record keeping systems. Some comments suggested reporting data bi-annually, but the EEOC dismissed this, asserting that old data would become stale before new data became available.
- *Apples and Oranges.* In response to concerns that 12 pay bands created segments that are overly broad and provide information that is useless or misleading, the EEOC stressed the data will be used for identifying patterns or correlations to investigate and not to establish pay discrimination as a legal matter.
- *Confidentiality.* The EEOC noted that they have been confidentially collecting EEO-1 data for over 50 years and EEO-1 information is only released to contractors and local governments on condition that it not be made available to the public.
- *Relevance.* The EEOC acknowledges pay data from W-2 Box 1 may be influenced by employees’ discretion (for example, whether to work overtime) and does not necessarily reflect employer practices. The EEOC responded that discriminatory practices such as

assigning overtime to men because they take care of the family or giving white employees more lucrative sales routes would be reflected in Box 1 pay data. Whether discrimination actually occurred can be resolved through investigation.

- *Reliability.* The EEOC asserts it will be using an “advanced analytic tool” to evaluate data, for example, comparing pay distribution of men and women across similar jobs. The EEOC claims that the program has been tested and will help to identify legitimate concerns and determine which claims to pursue.

If employers have input or are unsatisfied with the newest proposal, the EEOC is collecting comments until August 15, 2016. The EEOC has issued a revised fact sheet for small employers and a revised question and answer document addressing the proposed changes. The proposed EEO-1 is available [here](#).

While all the details may not be settled, it seems clear employers will be submitting pay and hours worked data to EEOC in the near future.

If you have any questions, please contact Mark Sabey at marksabey@hallrender.com or your regular Hall Render attorney.