

MEMORANDUM

To: ES&A Clients & Friends
From: Anna Elento-Sneed, Esq.
Janelle Yee, HR Services Manager
Date: 7/22/2016
Subject: EEOC Revises Proposed Rule on Collecting Pay Data

On July 14, 2016, the Equal Employment Opportunity Commission (“EEOC” or the “Commission”) revised its proposed rule on collecting specific pay data from certain employers who file Employment Information Reports or “EEO-1 Reports.” The newly revised proposed rule modifies the period in which employers would need to file their EEO-1 Report. It also clarifies the definition of “hours worked” for both non-exempt employees as well as exempt employees.

The EEOC first published its initial proposed revision to its EEO-1 Report on February 1, 2016, in the Federal Register. In this initial notice, the EEOC discussed which employers would likely be affected by the new rule, the data that will be required to be reported, the due date, how the data will be analyzed, and the confidentiality of the data collected and the analysis conducted.

Proposed New Deadline to Filing EEO-1 Reports

Based on comments received from the February 1, 2016 proposed rule, the EEOC amended its proposed rules on July 14, 2016 by altering the EEO-1 filing deadline from September 30 of each year to March 31 of each year, beginning in 2018 (instead of 2017).

The Notice also changed the “workforce snapshot” (which is defined as the pay period when an employer tallies the number of individuals employed for that year’s EEO-1 Report) from any pay period between July and September to any pay period between October 1st and December 31st of the reporting year.

The Commission amended the deadline to file the EEO-1 Report in 2016 due to comments made by employers that there is insufficient time to budget, develop and implement processes or systems to capture the data. In addition, many employers recommended changing the EEO reporting period to the calendar year, which is the same as the W-2 reporting period.

Employers who have either (1) 100 or more employees; or (2) a federal contract and at least 50 employees will still continue to file their 2016 EEO-1 Report by September 30, 2016, using the existing form. Under the proposed rule, affected employers will not be required to file their EEO-1 Report in 2017 but will be required to file their Report on March 31, 2018.

Use of Pay Bands

The Commission is proposing employers who have one hundred (100) or more employees to disclose employees’ income on their W-2s using the 12 pay bands which are used by the Department of Labor’s Bureau of Labor Statistics’ Occupational Employment Statistics. The 12 pay bands are:

Pay Bands	Pay Bands Label
1	\$19, 239 and under
2	\$19,240-\$24,439
3	\$24,440-\$30,679
4	\$30,680-\$38,999
5	\$39,000-\$49,919
6	\$49,920-\$62,919
7	\$62,920-\$80,079
8	\$80,080-\$101,919
9	\$101,920-\$128,959
10	\$128,960-\$163,799
11	\$163,800-\$207,999
12	\$208,000 and over

The 12 pay bands will be used in conjunction with the total number of employees in each pay band, the ethnicity/race, gender, total hours worked for all employees for the entire calendar year by each EEO-1 category. The July 14, 2016 Notice contained an example of four African American women who were classified as administrative support workers in the sixth pay band who worked a total of 8,160 hours in the calendar year.

Definition of Hours Worked

Under the proposed rules, the Commission wants to collect “hours worked” so the agency can account for part-time employees and employees who worked only part of the reporting year. In addition, the EEOC can assess potential pay disparities and use the information to investigate discrimination charges of pay disparities.

The EEOC has adopted the Fair Labor Standards Act’s definition of the term “hours worked” which is defined as “all time an employee must be on duty, or on the employer's premises or at any other prescribed place of work, from the beginning of the first principal activity of the workday to the end of the last principal activity of the workday”.

Under the revised proposed rule, “hours worked” for non-exempt employees would be recorded the same way the hours are recorded for FLSA purposes. The proposed revised EEO-1 Report will include the following two options to report hours worked for exempt employees: (1) “Report a proxy of 40 hours per week for full-time exempt employees, and 20 hours per week for part-time exempt employees,” and then multiply the number of weeks the individuals were employed during the reporting year; or (2) Report the actual hours of work by exempt employees if the employer maintains accurate records of the time worked for each exempt employee during the reporting year.

Bottom Line

Prior to the issuance of the final rules, employers who are potentially subjected to the new rules should begin to: (1) Review their job positions and their respective EEO-1 categories; (2) Review the companies’ pay practices to ensure they are non-discriminatory and in compliance with applicable federal laws; and (3) Ensure there is documentation of legitimate non-discriminatory reasons for any pay disparities.