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## *EEOC Proposes New Pay Data Collection Tool: All Employers to Share Pain With Federal Contractors*

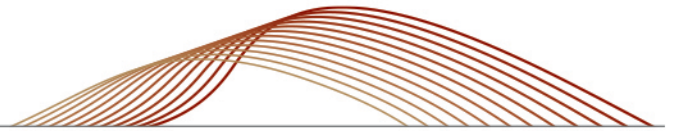
By [The Federal Contractor Compliance Practice Group](#)

For many years, federal contractors have been subjected to various analytical tools devised and used by the OFCCP to screen their compensation practices for potential discrimination. Long time practitioners will recall the Median Analysis (aka the “Dubray Analysis”), the Equal Opportunity Survey, the “3-prong test,” and the “double deuces test,” to name just a few. Each of these screening tests was ostensibly designed to enable the OFCCP to better use its limited resources by targeting contractors that more likely had systemic pay differences. None of these approaches was especially well designed to accurately identify potential discrimination, in the general view of the federal contractor community. Still, their use resulted in the expenditure of significant contractor time, effort, and expense in defending pay practices in compliance evaluations. [In August 2014, the OFCCP issued a Notice of Proposed Rulemaking \(“NPRM”\)](#) that would have required contractors to annually submit summary compensation data by gender and race/ethnicity, again ostensibly to enable the agency to better direct enforcement resources. However, employers that were not federal contractors did not face this type of scrutiny of their compensation decisions from federal regulators. As this Alert discusses, that is no longer the case.

[On January 29th, the EEOC published its own NPRM](#), stating that it intends to collect information about W-2 earnings and hours worked,<sup>1</sup> organized by EEO-1 category, sex, race, and ethnicity from employers with 100 or more employees. This data will be collected on an expanded EEO-1 form, starting in the 2017 reporting cycle, if the EEOC proposal becomes final. It will replace the OFCCP’s proposed pay data collection tool and, according to the EEOC’s NPRM,<sup>2</sup> will be used to better coordinate enforcement efforts across federal agencies. This is the most recent of the Obama Administration’s efforts to improve federal enforcement of pay equity laws while not unduly burdening the employer community or infringing employer’s legitimate rights to protect employee pay as confidential information. In this Alert, we describe what the EEOC has proposed and identify key issues of concern to the employer community.

### **Background to the NPRM**

The EEOC’s proposal results from a multi-year effort, starting with the President’s 2010 National Equal Pay Task Force. According to the EEOC, its objective is to better position federal agencies to enforce pay discrimination laws, while minimizing the burden on the employer community and respecting employer concerns about confidentiality. The EEOC had previously engaged the National Academy of



Sciences (“NAS”), which commissioned a panel to study *Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin*. The NAS Panel issued its report in 2012.<sup>3</sup> The NAS report led to a pilot study that concluded in late 2015, which applied a variety of statistical tests to two different sets of synthetic data. The pilot study made recommendations on “several central components of a data collection, including: The unit of pay to be collected; the best summary measures of central tendency and dispersion for rates of pay; appropriate statistical test(s) for analyzing pay data; and the most efficient and least costly methods for transmitting pay data from employers.”<sup>4</sup> Additionally, the EEOC obtained feedback from employer groups and other experts in 2012. Finally, the EEOC explains, comments received by the OFCCP following its 2014 NPRM concerning a pay data collection tool were also taken into consideration.

The agency considered five different potential measures of earnings, ultimately settling on W-2 earnings as the measure to be collected. W-2 earnings represent “a more comprehensive report of earnings” at the employee level and it would be the least burdensome method of collecting compensation data for employers, according to the EEOC.<sup>5</sup> Together with the OFCCP, the EEOC intends to “develop statistical tools that would be available to staff on their computers, to utilize the EEO-1 pay data” to “assess complaints of discrimination, focus investigations, and identify employers with existing pay disparities that might warrant further examination.”<sup>6</sup> Additionally, they intend to look at “W-2 pay distribution within a single firm or establishment, and by comparing the firm’s or establishment’s data to aggregate industry or metropolitan-area data. This application,” the agency explains, “would highlight statistics of interest.”<sup>7</sup> Whether and if so how the OFCCP intends to utilize the proposed EEO-1 compensation data in the Federal Contractor Selection System for identifying employers for compliance reviews is unknown. Likewise, it is unclear how the EEOC would use this information for purposes of initiating directed investigations under the Equal Pay Act or issuing commissioner charges under Title VII.

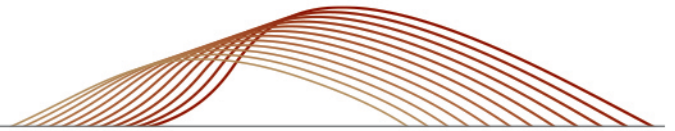
Notably, the EEOC states that “they also anticipate developing software tools and guidance for stakeholders to support analysis of aggregated EEO-1 data.” Presumably, this will enable an employer to determine whether the EEOC and the OFCCP is likely to consider its compensation data to be suspect, and if so, in what respect. How useful such tools turn out to be, however, remains to be seen.

## **What would be collected and when?**

Starting with the 2017 EEO-1 filings, employers would be required to provide summary W-2 compensation and hours worked data for all employees by gender and race/ethnicity. More specifically, in one chart organized by the ten EEO-1 job categories, employers will report the number of employees whose W-2 compensation falls within each of 12 defined pay ranges that mirror the Bureau of Labor Statistics OES survey. The lowest of the pay ranges proposed is \$19,239 and under, and the highest proposed pay range is \$208,000 and over. In a separate, similarly organized chart, employers will report the “total number of hours worked” by those employees in the prior year. A link to the proposed form can be found [here](#). EEO-1 data is currently collected by employers from any pay period between July and September of the filing year. This will be true as well for the compensation and hours worked data. The W-2 earnings will be for the preceding 12-month period so employers essentially will be required to prepare a second W-2 report for all employees in the EEO-1 snapshot.

## **Issues of Concern for Employers**

As most of our readers know, EEO pay analysis is a complicated exercise, if done properly and done well; it requires the development of similarly situated employee groupings for comparison, as well as a



comprehensive understanding of an employer's pay practices and the many non-discriminatory organizational, individual, and market factors that influence pay decisions. It requires detailed information concerning the job and type of work performed by the employee, as well as certain detailed information concerning her or his background. Meanwhile, much of this information is carefully guarded by employers for legitimate business reasons.

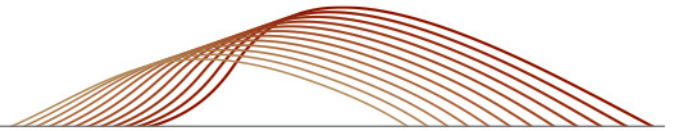
There is good reason to question the value of the data that would be collected in the proposed EEO-1 because of the absence of other key data elements, as well as the aggregation of the data into groups of questionable relevance. Additionally, there is an inherent tension between regulators' desire to collect information that they view as useful to the enforcement of federal anti-discrimination laws and employers' desire to minimize the disruption of their business and maximize their competitive positioning in the labor market. As a result, there are three chief concerns about the proposed pay data collection tool.

### ***Data will lead to false indicators***

The collection of aggregate W-2 compensation data by EEO-1 job groups will not enable federal agencies to reliably and validly examine pay across similarly situated employees; much less fairly consider the myriad of legitimate factors that typically explain differences in pay. EEO-1 categories do not distinguish between different jobs or the type or level of work performed by employees, even among those in the same EEO-1 category. Job and type of work generally are key explanations for pay differences between, for example, professionals who are performing jobs that are core to the employer's business and those who perform ancillary support functions. Similarly, EEO-1 categories do not reflect differences in relevant job experience (either with the current employer or with prior employers), which often explains differences in pay among employees who otherwise appear similar. Likewise, W-2 compensation data includes severance pay and signing bonuses, which depending upon timing may unfairly distort the picture presented by the proposed EEO-1 compensation data. Therefore, as with the historic screening tests used by OFCCP, the assessment that can be done by enforcement agencies with the EEOC's proposed data set is extraordinarily limited in its usefulness. Indeed, just as with the prior tests, the EEOC and the OFCCP are likely to identify false positives—employers with what may appear to be suspect pay distribution that have perfectly legitimate non-discriminatory explanations for the detected variations. Likewise, aggregation of the data at this level may also produce false negatives—it may disguise circumstances where truly suspect compensation differences would otherwise be found.

According to the NPRM, "[t]he EEOC and the OFCCP anticipate that the process of reporting pay data may encourage employers to self-monitor and comply voluntarily if they uncover pay inequities." This is a laudable objective. For the reasons just explained, however, it is unclear that the proposed compensation data collection tool will effectively reveal actual compensation problems that need to be corrected.

Diligent employers may nonetheless be inclined to conduct privileged self-critical analyses of the EEO-1 compensation data to understand how it may be viewed by regulators so that the employer is best situated to explain away any seemingly discriminatory differences and avoid a costly investigation. How to approach such an exercise, however, may be a challenge, depending upon the availability of aggregate data published by the EEOC and usefulness of whatever software the agency develops for employer use.



## ***Confidentiality***

Employers legitimately should have concerns about the confidentiality of the proposed EEO-1 compensation data. The compensation data as reported may well practically disclose an employee's level of pay where there are small numbers of employees in a given EEO-1 job group. The chief concern here is the fact that the data will be shared with the OFCCP. The EEOC is prohibited by Title VII from making "public in any manner whatever any information obtained by the Commission . . . prior to the institution of any [Title VII] proceeding . . . involving such information."<sup>8</sup> Meanwhile, the OFCCP is only restricted in this regard as to non-contractors. Federal contractors still must be concerned that this information could be discovered under the Freedom of Information Act. This should be among the many issues raised by employers and employer organizations in comments responding to the NPRM.

## ***New scrutiny for non-contractors***

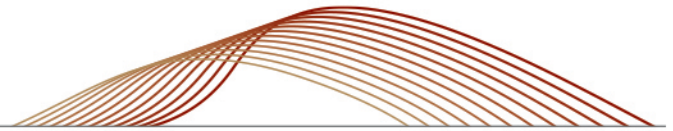
As noted at the outset, this proposed compensation collection tool increases the likelihood that employers that are not federal contractors will face greater scrutiny of their pay practices. With the EEOC's development of statistical tools for analyzing the proposed EEO-1 compensation data, investigators will try to "identify employers with existing pay disparities that might warrant further examination."<sup>9</sup> This may be in the context of the investigation of an individual EEOC charge, or otherwise. The OFCCP routinely conducts compliance evaluations of federal contractors, during which it collects employee level compensation data for analysis during the desk audit phase of the evaluation. Non-contractors may well face similar requests from the EEOC, pursuant to the agency's subpoena power, and whether those demands are made will likely be a function of how the employer's EEO-1 compensation data looks through the prism of the EEOC's software.

## **Next Steps**

Interested parties have until April 1, 2016 to participate in the comment period. We encourage all employers to participate with their industry groups or otherwise to ensure that whatever final rules are adopted will permit employers to operate their businesses in compliance with the law with minimal disruption from regulators. This proposal is yet another step towards greater, although not more accurate, scrutiny of pay equity by regulators. Together with recent changes to state equal pay laws in California and New York, this provides further incentive to employers to undertake privileged self-critical analyses of pay practices to understand what latent risks may be facing their business.

If you have questions about the NPRM or EEO pay analysis generally, please contact any member of our Federal Contractor Compliance Practice Group. We will continue to report on developments concerning the NPRM.

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<sup>1</sup> The agency specifically is seeking comments on how hours should be reported for exempt employees and notes that it does not intend to require employers to track hours for this purpose.

<sup>2</sup> 81 Fed. Reg. 5113, 5115 (Jan. 30, 2015).

<sup>3</sup> National Research Council. 2012. *Collecting Compensation Data From Employers*. Washington, DC: National Academies Press, 8. Available at [http://www.nap.edu/openbook.php?record\\_id=13496](http://www.nap.edu/openbook.php?record_id=13496).

<sup>4</sup> 81 Fed. Reg. at 5114.

<sup>5</sup> 81 Fed. Reg. at 5116-5117.

<sup>6</sup> 81 Fed. Reg. at 5115.

<sup>7</sup> 81 Fed. Reg. at 5118.

<sup>8</sup> 42 U.S.C. 2000e-8(e).

<sup>9</sup> 81 Fed. Reg. at 5115.

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