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EEOC continues to fight wage inequality

by Emily Burkhardt Vicente

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Businesses are bracing for a new rule from the Obama Administration that would require companies to report employee pay data broken down by gender and race. The Equal Employment Opportunity Commission recently announced the proposal at a White House equal pay event commemorating the seventh anniversary of the Lilly Ledbetter Fair Pay Act, which made it easier for women to challenge discriminatory pay in court. The proposed revision to the Employer Information Report (EEO-1), which does not need legislative approval, would obligate businesses with 100 or more employees to report W-2 information by slotting employees by gender, race, and ethnicity into a pay band across 10 different job categories. Employers also would be required to report the total number of hours worked by employees in each pay band. The public has until April 1 to submit comments on the proposed regulations, and the EEOC has said the revisions will be finalized by September, with the first reports requiring the inclusion of pay data due in fall 2017.

Not surprisingly, business groups like the Retail Industry Leaders Association and the U.S. Chamber of Commerce have decried the government's plan. If the regulations are implemented in their current form, they will likely create numerous challenges for companies, not the least of which is added administrative burden. The EEOC estimates it will take the average employer about 6.6 hours to compile the data and complete the new EEO-1 form, at a cost of $160, plus a one-time cost of $378 to develop information systems tracking this data. Many employers and business groups, however, have called the EEOC's estimates out of touch with the realities of how this data actually is stored and managed.

In addition, the EEO-1 report would be due annually on Sept. 30, and would seek aggregate W-2 data for a 12-month period looking back from a pay period between July 1 and Sept. 30 of the reporting year. As employers typically generate W-2 data at the end of the calendar year, the EEOC's proposal assumes that employers can make simple changes to their payroll reporting processes to generate "off-cycle" wage reports and that doing so will be a small and inexpensive proposition. While these assumptions may be true for some employers, many will have to add more manpower or new technology to meet the requirements.

The EEOC's proposal also does not recognize the significant shortcomings of the data to be collected. Under the current draft regulations, employers would have to fit specific jobs such as "marketing manager," "accounting supervisor," and "IT supervisor" into very broad job categories like "first/mid-level officials and managers." Not surprisingly, those jobs are likely to have very different salaries for reasons that have nothing to do with race or gender. There are many factors that go into compensation decisions, such as education level, years of experience, seniority, geographic location, and prior work experience; yet, there is no mechanism to give that context to the data. The EEOC has not explained how it will

account for these factors, causing significant concern that the data will lead to a large number of false positives for wage discrimination.

In fact, it seems inevitable that these new data collection efforts will lead to more government investigatory inquiries. The EEOC has said it intends to use the collected data to "focus wage discrimination investigations, identify existing pay disparities, and help employers evaluate their own practices." The Office of Federal Contract Compliance Programs has similarly indicated it will use the data as an element of its audit selection criteria. It also seems likely the data will be used to bolster individual EEOC charge investigations and advance the EEOC's goal of targeting so-called systemic discrimination cases, which the EEOC defines as cases involving discriminatory patterns, practices, and policies having a broad impact on a company or industry. In recent years, the EEOC has looked for opportunities to pursue such cases, and these new regulations will present additional avenues to advance that agenda.

The draft regulations also raise privacy and confidentiality concerns. Although the information produced can be marked "confidential" by the employer to try to protect it from a request under the Freedom of Information Act, the agency does not have to honor that request and, even if it does, that position can be challenged by those seeking to discover the information. In an age where data breaches have become all too common, there also is legitimate concern about the security of the data if the agencies' systems are breached. For companies that would be at a competitive disadvantage if a rival were able to obtain their pay information, these confidentiality concerns are especially acute.

For California employers, the EEOC's announcement carries additional potential problems. The regulation comes on the heels of California's enactment of one of the toughest pay equity laws in the nation. Under the Fair Pay Act, California employers are prohibited from paying female employees less than male employees for "substantially similar work," even if there are different job titles or work sites. The new federal reporting requirements could help California (and, in turn, private plaintiffs under the Private Attorneys' General Act) bring more lawsuits, using data that tells only a part of the story.

In the end, employers could find themselves spending significant time and money explaining the nondiscriminatory bases for employee pay rates. The additional burdens created by these new requirements are not only the work involved in compiling the information and completing the form, but also in potentially dealing with increased regulatory and litigation activity. Given this, employers should consider conducting privileged pay audits to assess whether the data generated under the new rules is likely to draw government scrutiny and, if so, to make any necessary changes now before the new rules take effect.

Workforce discrimination undeniably still exists, and those who engage in it should be held accountable. But, the EEOC's latest proposal is likely to do more to create headaches for employers than it is to put a dent in remedying gender-based pay disparities.

Emily Burkhardt Vicente is a partner at Hunton & Williams LLP. Her practice focuses on the representation of employers in complex employment litigation, with particular emphasis on California and FLSA wage and hour class and collective actions, employment discrimination class actions, complex whistleblower litigation and unfair competition and employee raiding litigation. She may be reached at (213) 532-2153 or ebvicente@hunton.com.

