



# Updated Equal Pay Data Rule Fails To Address Employer Concerns

EMPLOYERS NOW FACE MARCH 2018 DEADLINE FOR FIRST PAY REPORT

Insights

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The Equal Employment Opportunity Commission (EEOC) announced revisions to its planned pay data rule yesterday, but unfortunately the revisions do not address the majority of concerns employers had about the original controversial version. While the updated rule makes minor concessions to employers and provides much-needed clarity on two issues, the revisions do not sufficiently address the undue burdens that employers will face in completing required reports, and all but ignore concerns about confidentiality and the underlying utility of the rule.

Although the revised rule will still need to go through another public comment process, there appears to be sufficient momentum at the agency to push the rule forward as revised. Therefore, employers can expect to be subject to a heightened pay transparency standard for their 2017 compensation practices, with an initial reporting deadline of March 31, 2018.

This Alert answers the most commonly asked questions about this developing story.

## What Was Originally Proposed?

On January 29, 2016, the Obama Administration proposed executive action through the EEOC to require certain businesses to provide detailed information about how much each of their employees is earning. Under the proposed law, affected employers would need to break down pay information by gender, as well as race and ethnicity, in order to make it very easy to identify pay gaps.

It would require any business with 100 or more workers to provide detailed information about their pay practices to the federal government through the annual EEO-1 Report. The goal of these proposed regulations is to better track pay disparities between genders so as to increase enforcement of equal pay standards. Read our full Alert [here](#).

## What Concerns Were Identified?

Many observers identified serious flaws with the EEOC's proposed rule. Specifically, the proposed rule would cause undue burden on employers, while the utility of the data collection was deemed questionable at best. Moreover, employers had serious privacy concerns accompanying the gathering and production of this information.

On April 1, 2016, Fisher Phillips submitted comments to the EEOC regarding the proposed regulations (read more [here](#)). The firm recognized that the goal of eradicating and better identifying discriminatory pay practices was a worthy endeavor. However, the comments stated that the firm was concerned that the proposed regulations, as initially written, would not accomplish anything noteworthy.

Instead, the firm's comments described how the proposed regulations would merely set employers up for unwarranted disparate impact claims of discrimination founded on inaccurate theories using data not sufficiently valid to withstand scrutiny. The time and expense to prove otherwise would be considerable for the nation's employers, as would the burden to simply comply with the data-gathering efforts. Add to that the legitimate and well-founded privacy concerns that spring from these proposals, and the comments predicted a recipe for disaster.

For these reasons, the comments submitted by Fisher Phillips respectfully urged the EEOC to take action steps to address the concerns raised.

### **What Did The EEOC Announce In Response?**

Employers were encouraged when EEOC Chair Jenny Yang announced on June 22, 2016, that the agency would soon issue a revised version of its proposed pay data collection rules in an effort to "think about how we minimize the burden on employers." It appeared that the agency was acknowledging that the initial proposal was unduly burdensome, and we were hopeful that some of the concerns identified above would be addressed (read more [here](#)).

Unfortunately, the revised rule announced yesterday does little to assuage employer concerns. In fact, the revised rule only makes two substantive changes to the original rule.

### **What Change Has Been Proposed Regarding Reportable Pay Data?**

Currently, all employers with 100 or more workers already complete the EEO-1 form on an annual basis, providing demographic information to the government about race, gender, and ethnicity. The original proposal will require employers to complete a revised EEO-1 form that will also require salary and pay information be included. However, the original proposal was silent on how employers were to determine the correct amount to be listed.

The revised rule clarifies that employers should use Box 1 on the employee's W-2 form as a measure of reportable compensation on the upcoming EEO-1 Reports. Although the EEOC acknowledged that many employers argued for a "base pay" standard rather than W-2 income, the agency stated that it believes that W-2 income is a suitable measure for pay data collection. It also stated that supplemental pay (including shift differentials and overtime pay) is a critical component of compensation that should be included in the reporting because it can be influenced by discrimination.

### **What Change Has Been Proposed Regarding The Timing Of The Reports?**

The original proposed rule included the same reporting year as the current EEO-1 Report, which

The original proposed rule included the same reporting year as the current EEO-1 Report, which means that employers would have had to produce the pay data information before September 30 of each year, starting in 2017. However, employers vigorously objected to this reporting period, as it would have required them to construct a separate compensation report spanning October 1 through September 30 for each employee.

The EEOC's revised rule states that, beginning with the 2017 EEO-1 Report, the reporting deadline for all EEO-1 filers will be March 31 of the year following the report year. Thus, the first EEO-1 report that will need to include pay data – the 2017 EEO-1 Report – will be due by March 31, 2018. This will allow employers to use W-2 data from the preceding calendar year in order to compile their reports several months after the close of the year.

For those already required to complete the EEO-1 Report, you will still need to produce a 2016 Report by September 30, 2016. However, you will then have an 18-month period before your next report is due, this time to include pay data (March 31, 2018).

### **What Should Employers Do Now?**

In light of these developments, affected companies should make it a priority to review current pay systems and identify and address any areas of pay disparity. It is critical to take steps now to minimize increased scrutiny once the data begins to be reported next year.

By conducting your own gender-specific audit of pay practices, you will be able to determine whether any pay gaps exist that might catch the eye of the federal government when you turn over this information beginning in 2018. You should have time to determine whether any disparities that may exist can be justified by legitimate and non-discriminatory explanations, or whether you will need to take corrective action to address troublesome pay gaps.

If you have any questions about this proposal, or how it may affect your business, please contact your Fisher Phillips attorney.

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*This Legal Alert provides an overview of a proposed new federal regulation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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