American Payroll Association

Government Relations • Washington, DC

April 1, 2016

Ms. Bernadette Wilson
Acting Executive Officer, Executive Secretariat
Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507
www.regulations.gov

Re: Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and Comment Request; 81 *Fed. Reg.* 5113 (February 1, 2016)

Dear Ms. Wilson:

Thank you for the opportunity to comment on the Equal Employment Opportunity Commission's (EEOC) proposed revision to the Employer Information Report (EEO-1). The American Payroll Association (APA) attended the public hearing on March 16 and listened to the positions of the commissioners and panelists who spoke concerning pay inequities, and we agree that efforts to end discrimination are essential and require meaningful data. We commend the EEOC for the agency's initial efforts to consider how to reduce the burden on employers and, yet, still collect the data required to address discrimination. The proposed electronic reporting requirement is extremely helpful. We also appreciate the cooperation among interested agencies.

While APA members prefer an approach with no burden on employers, we recognize that some information necessary to fully implement Title VII of the Civil Rights Act of 1964 (CRA) is housed with employers. Therefore, APA's comments focus on how payroll processes operate relative to the data the EEOC proposes to collect and potential limitations on what the data may indicate.

ABOUT THE AMERICAN PAYROLL ASSOCIATION

The APA is a nonprofit professional association serving the interests of more than 20,000 payroll professionals in the United States. The APA's primary mission is to educate members

and the payroll industry about the best practices associated with paying America's workers while complying with all applicable federal, state, and local laws. The APA's Government Relations Task Force works with legislative and executive branches of government to assist employers with understanding their legal obligations with significant emphasis on minimizing the administrative burden on government, employers, and individual workers.

PAYROLL OPERATIONS

In the proposed EEO-1 revision, the EEOC asserts:

> [B]ecause payroll records are cumulative, generating reports at any given point in time should not be complicated for employers with automated payroll systems. The W-2 data can be imported into a HRIS, and a data field can be established to accumulate W-2 data for the EEO-1. . . . Employers that do payroll in-house will be able to report this data utilizing most major payroll software systems or by using off-the-shelf payroll software that is preprogrammed to compile data for generating W-2s. For employers that outsource their payroll, there would be a one-time burden of writing custom programs to import the data from their payroll companies into their HRIS systems. 81 *Fed. Reg*. 5113, at p. 5117, 1st col.

The APA disagrees with the EEOC that the process to collect EEO-1 pay data will not be complicated because of the reasons that follow.

Limited resources

Forcing companies to use their limited resources on yet another government required report instead of spending those resources on building their businesses, is difficult for employers to accept. APA members are experiencing this now while collecting information to meet Affordable Care Act reporting requirements. A significant number of federal and state agencies want information and demand that employers provide the information to them.

Security

While the EEOC discussed the privacy protections considered in its proposed revisions, security was not mentioned. Anytime an employer makes changes to its processes to collect more data, doors are opened for potential data theft. Processes and procedures to protect data are not a "one-time burden," but a daily, ongoing effort.

Human resources and payroll

Perhaps more importantly, human resource and payroll operations are not connected in the manner the EEOC implies. This is significant because company decisions on human resource personnel, procedures, and software are different than those that apply to payroll departments. Payroll and human resource systems are not always designed to interface. Integrating the two systems might require cooperation from two different software companies or duplicate processes if the company decides to upgrade one of the two systems.

The EEOC is correct that payroll records are cumulative. The complication, however, is associated with how the software is configured and stored in the system. To import W-2 data into an HRIS system depends on whether the fields are already in that system and if the system is designed with the capability to import data from an external program. This is not a simple, inexpensive project.

In addition, most payroll software is designed to calculate and report W-2 data in accordance with the schedule established by the Internal Revenue Service. To comply with the EEOC's schedule, two different reporting configurations are required with new employee procedures established and implemented. These new procedures include monitoring employee data going forward, not just a one-time adjustment.

Another complication is data collection by large, decentralized employers with many divisions or subsidiaries. Payroll and human resource functions may not be integrated at the parent level to easily provide the EEOC with aggregate pay data.

Pilot study

According to the EEOC, "The Pilot Study also estimated employer burden-hour costs and the processing costs associated with the recommended method of collection" (81 *Fed. Reg*. 5113, at p. 5114, 3rd col.). This pilot study does not provide a complete picture of employers. The pilot study did not use actual data, but data generated by the researchers, Sage Computing. The *Federal Register* notice did not mention the data collected by Abt Associates on behalf of the Office of Federal Contract Compliance Programs (OFCCP): *An Evaluation of OFCCP's Equal Opportunity Survey*. That study found that pay data, collected from thousands of employers, failed to provide a meaningful foundation for identifying employers likely to engage in pay discrimination. The Abt study was almost identical to the EEOC's revised EEO-1 proposal and used actual data.

Federal contractors

The EEOC bases its data collection proposal, in part, on information gathered from studying federal contractors. Federal procedures require that federal government contractors prepare specific information for the bidding and contracting process that includes information on workers' backgrounds. Other employers do not ordinarily collect this information.

For example, in the private sector, when a building owner hires a plumbing company to fix its faucets, the building owner does not ask for race, ethnicity, and gender information about each plumbing company worker nor ask for aggregate pay data. Instead, the plumbing company will identify how many workers it thinks are needed, the building owner will conduct a background check on the plumbing company, and a price will be negotiated.

LIMITATIONS ON DATA COLLECTION

APA is offering information on the limitations of W-2 data because that data may lead to false positives in identifying discrimination either by a specific employer or in the aggregate in determining that discrimination exists. The structure of an organization's compensation package can skew the true value of employees' pay. In addition, variables exist in the workplace that W-2 data does not fully capture.

Benefits

Some benefits may appear in total W-2 earnings and some may not. Wages for an employer offering health benefits to employees may not appear as total W-2 earnings. Other benefits that may not appear on a Form W-2 include employer 401(k) or other retirement plan contributions, profit-sharing contributions, and stock options. Some examples of how these may result in false-positive data include the following:

- An employer determines appropriate salary ranges based on the benefits it offers. In other words, an administrative support worker is paid $38,000 including $8,000 in pre-tax salary deferral for health coverage. This will result in a Form W-2 Box 1 amount of $30,000. The equivalent position at another company is paid $36,000 with $3,000 in pre-tax deferral for health coverage, showing $33,000 in Form W-2 Box 1. The first employer considered a benefit of $8,000 in healthcare coverage and paid a lower salary as a result. The W-2 data will only show the $30,000 and $33,000 amounts and not recognize that the employee receiving $30,000 is receiving a greater total compensation package than the employee paid $33,000.

- An employer offers healthcare coverage and pays a cash amount to employees that do not use the employer's healthcare benefits, i.e., an employee who obtains healthcare coverage through a spouse's plan at another employer. The total W-2 earnings for the cash employee will be higher than the benefits employee because the cash will appear in Box 1 of the Form W-2 and healthcare benefits are not taxable.

- In the past few years, the approach to executive compensation packages to attract talent has changed considerably. Deferred compensation packages are coming back into play. These packages are not always reflected in W-2 data. For example, an employer offers stock options to its senior managers. In this example, the value of these options will not appear on the Form W-2 because they are not "wages, tips, and other compensation" as defined by the Internal Revenue Service until realized. Suppose that a CEO of one company is paid $1 with $2 million in stock options. An equivalent CEO at another company is paid $1 million without stock options. The Forms W-2 for these employees will show $1 and $1 million.

The EEOC may recognize that other factors contribute to compensation. However, W-2 information does not identify those factors. A meaningful determination of discrimination will not result.

Pay audits and use of the data

The APA questions the capability of the EEOC and OFCCP to conduct pay audits for all of the other employers that are included in the revised data collection. Recently, the OFCCP conducted 4,000 pay audits of federal contractors. Unless Congress allocates significant funding for 2018, APA does not see how the new data will lead to additional pay audits, especially with the limitations on the EEO-1 data for targeting companies.

The CRA's Title VII may require employer engagement, but the EEOC must provide "the date, place and circumstances of the alleged unlawful employment practice," which the EEO-1 pay data will not show. The Sage study did not find a significant correlation between the analytical approach and the likelihood of systematic discrimination. This is important because the Equal Pay Act of 1963 requires that comparisons only be made for jobs that are "substantially equal."

RECOMMENDATIONS

Time to collect the data

Ideally, APA requests that this data collection be placed on hold until a comprehensive and accurate study is conducted. If the EEOC will move forward with pay data collection, APA asks

for sufficient time to make the necessary changes to employer processes and procedures. The 2017 timeline in the proposal is too soon.

Hours worked

The EEOC did not determine whether Section D of the EEO-1 Report will ask for hours worked or hours paid. APA recommends the definition of hours used by the U.S. Department of Labor (DOL) for employee responses to the Bureau of Labor Statistics information in the Current Employment Statistics (CES) program.

As best stated on the DOL's Website, "Each month the CES program surveys approximately 146,000 businesses and government agencies, representing approximately 623,000 individual worksites, in order to provide detailed industry data on employment, hours, and earnings of workers on nonfarm payrolls." The data includes the number of employees working for a certain entity broken down into supervisor/nonsupervisor and male/female categories.

The definition of hours in the CES survey is the "total number of hours for which employees received pay during the entire pay period that includes the 12th of the month." This data shows hours paid, not just hours worked, including paid time off, vacation, family leave, and so forth. The definition includes overtime, but does not convert overtime and other premium hours to straight time equivalent hours. This prevents skewed data.

The method of data collection used in the CES survey is consistent with the EEOC's approach in the proposed EEO-1 revision because it borrows from another federal agency's existing requirements. In addition, employers are already familiar with these definitions and data collection.

Thank you again for opening this proposal for public comment. If you have questions about these comments or wish to learn more about payroll and payroll professionals, please contact me at 202-248-3901 or ajacobsohn@americanpayroll.org.

Sincerely,

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