



*National Payroll Reporting Consortium*

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March 29, 2019

Ms. Victoria A. Lipnic  
Acting Chair  
Equal Employment Opportunity Commission  
131 M Street NE  
Washington, DC 20507

Mr. Jody H. Hunt  
Assistant Attorney General  
U.S. Department of Justice  
Civil Division  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Mr. Paul J. Ray  
Acting Administrator  
The Office of Management and Budget  
Office of Information and Regulatory Affairs  
725 17th Street, NW  
Washington, DC 20503

Re: Potential Collection of Component 2 EEO-1 pay data for 2018

Dear Madam Chair Lipnic, Assistant Attorney General Hunt, and Acting Administrator Ray:

We understand that the EEOC is considering options in light of the recent court order removing the stay with respect to the 2016 Proposed Revised EEO-1 Form, and specifically collection of Component 2 EEO-1 pay data.

The National Payroll Reporting Consortium (NPRC) provided input in 2016 on the proposed rulemaking concerning revisions to the Employer Information Report (EEO-1) to add component 2 pay data; generally hours worked and W-2 earnings. NPRC is a non-profit trade association whose member organizations provide payroll processing and related services to nearly two million U.S. employers, representing over 36% of the private sector workforce. Payroll service providers have long served an important role in our nation as a conduit between employers and government authorities. Payroll service providers improve the efficiency of government reporting through electronic filing, and improve employer compliance.

As noted in our comment letters, NPRC is strictly neutral as to the appropriateness or need for proposed changes to the EEO-1 annual report. However, we serve in part to offer constructive technical assistance to government policymakers concerning proposals that affect employment-related reporting. Employers would likely rely heavily on external service providers, including members of the NPRC, to assist them in complying with any new or revised EEO-1 reporting



obligations. As such, our members have performed critical analysis as to the feasibility of complying with the Component 2 EEO-1 pay data report, as we understand it, for 2018.

As you might imagine, there is substantial concern, in particular because of the possibility that such reports may be due by the end of May 2019. Normally changes of this magnitude require a minimum of six months to a year for design, development, testing, release and related training and communications. Aside from the critical issue of appropriate time allowed for systems development to enable formatting and submission in electronic form, there would be technical challenges in retroactive gathering of input, and related data analysis and processing tasks.

### ***Retroactive Collection of Data May Not Be Possible***

There is a substantial added complication because the Component 2 pay data report would require retroactive gathering of input. Because of the OMB stay on the revision, employers and service providers generally did not develop the data collection mechanisms and did not collect and store the necessary data, as explained in more detail below, to comply with such a report for 2018.

Although the revised EEO-1 W-2 earnings data for 2018 should generally be available, hours worked data is a concern. Obviously, hours worked are generally collected and stored with respect to FLSA non-exempt (i.e., hourly) employees, assuming the EEOC adopts FLSA definitions. However, such hours data do not exist for most exempt (i.e., salaried) employees, and employers will have significant difficulties at this point in re-creating hours of service records for 2018.

We recognize that EEOC's revised EEO-1 report permits the use of a proxy 20 hours or 40 hours for exempt employees, which is very helpful, but employers would still need to do a significant amount of retroactive data-gathering to establish the dates of active employment, translate them into the number of weeks worked and translate that information into hours. For instance, FLSA hours worked is a defined term that does not include all hours that were "paid" to an employee and excludes time for leave of absence(s), vacation, jury duty and other hours that were paid but not worked. Beyond salaried workers, there are also many other forms of employment and industries in which workers are paid on some basis other than hours worked. Given the stay issued by OMB, member organizations discontinued their implementation efforts pending further direction. As a result, the new data file specifications that are needed to prepare the revised report are not finalized.

Although not directly relevant to the proposed EEO-1 report, our recent experience with Affordable Care Act (ACA) employer reporting of health coverage is conceptually similar, and may offer insights as to the time required to modify software. The ACA was enacted in 2010, and included new employer reporting of health coverage beginning in 2014, which was based in part on employee hours of service. As the EEOC has done, Treasury and the IRS determined that it would be helpful to use existing definitions of hours of service with which employers were already familiar. Employers were provided with proposed regulations in mid-2012 (IRS Notice 2012-58). In February 2014, final regulations were published that were generally based on the



definition of hours of service<sup>1</sup> related to qualified retirement plans (29 CFR 2530.200b-2(a)). Even with the conceptually simple adoption of an existing hours of service definition, the related systems development was extremely complex and ultimately the filing requirement for 2014 was suspended.<sup>2</sup> Thus, despite use of a well-established definition of hours and thorough advance rulemaking, the complexity of the underlying data made it very difficult to complete the necessary programming, which required more than two full years.

The present question is even further complicated by the potential need to obtain data from past periods; i.e., 2018. In fact, it may be extraordinarily difficult for many employers to capture or re-create such data even retroactive to January 2019, for any 2019 reports due in 2020.

### **Formatting and Submission in Electronic Form**

EEOC electronic filing specifications for Component 2, which are the new data elements related to hours and W-2 earnings, have not been finalized. Employers and software developers generally need a minimum of six months to one year to develop, program and test significant changes, beginning with the date that final specifications are published. Consequently, it is unlikely that many employers would be able to comply with the electronic filing requirement for the EEO-1 report, and it is unclear whether the EEOC would have the technical ability to accept electronic filings even if an employer was prepared to do so in 2019.

This raises the question of whether the EEOC might permit paper submissions for 2018, and whether there would be any practical value in doing so. A paper submission would not substantially reduce the burden on employers to collect and summarize hours and wage data, and would make it effectively impossible for the EEOC to capture, analyze and use the reported information.

Systems development is also not a straightforward task of merely formatting data (assuming such data is available) into an EEOC-defined file specification. Such projects require specific procedural or systemic handling of complex fact patterns, which may require rulemaking or other guidance from EEOC. A few examples include handling of:

1. Employees with job classification code changes during the snapshot period, or the full year
2. Reclassification of a job category during the year
3. Employees that appeared in the snapshot period but were terminated, deceased or retired by the end of the snapshot period
4. Employee changes of status (e.g., temporary to regular; part-time to full-time; non-exempt to exempt) during the snapshot period or year
5. Changes in work location/establishment, or work location/establishment, that become inactive during the period
6. Employees with more than one job classification concurrently or during the snapshot period

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<sup>1</sup> Treasury Final regulation TD 9655, Shared Responsibility for Employers Regarding Health Coverage, 8544 Federal Register Vol. 79, No. 29, February 12, 2014

<sup>2</sup> IRS Notice 2013-45: Transition Relief for 2014 Under §§ 6055 (§ 6055 Information Reporting), 6056 (§ 6056 Information Reporting) and 4980H (Employer Shared Responsibility Provisions) NOT-129718-13



To ensure data accuracy of the reports, it will be important to understand the EEOC's position on these and other issues. Generally, any new employer reporting is more effectively addressed prospectively, after all specifications and related guidance are released; in this case so that employers can record actual hours for salaried employees in accordance with such rules.

As a result, we believe that any requirement that employers comply with Component 2 EEO-1 pay data reporting for 2018 would be prohibitively costly and difficult to execute for both employers and the EEOC. The revisions embodied in Component 2 reporting are very substantial and will require an appropriate amount of time for orderly systems development and testing.

We urge the EEOC to consider the significant implications to the employer community in establishing the timelines of reporting of Component 2 EEO-1 pay data elements to begin no sooner than 2020 (i.e., reports due in 2021 for 2020). We would recommend and propose a meeting with the Commission and other stakeholders on this important question within the next few weeks, in order to thoroughly assess the readiness of both employers and the EEOC to execute the Component 2 reporting.

Sincerely,

A handwritten signature in blue ink, appearing to read "Pete Isberg", is positioned to the right of the word "Sincerely,".

Pete Isberg  
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