NPRC
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March 31, 2016

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

Submitted via www.regulations.gov

Re: Revision of the Employer Information Report (EEO-1) and Comment Request
ID: EEOC-2016-0002-0001, Feb 1, 2016

Dear Ms. Wilson:

Members of the National Payroll Reporting Consortium (NPRC) appreciate the opportunity to comment on proposed revisions to the Employer Information Report (EEO-1). NPRC is a non-profit trade association whose member organizations provide payroll processing and related services to over 1.5 million employers nationwide, covering one-third of the private sector work force. Payroll service providers have long served an important role in our nation's tax collection system as a conduit between employers and government authorities. Payroll service providers improve the efficiency of government tax collections and improve compliance.

The NPRC is neutral as to the appropriateness or need for the 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. We make recommendations in the following areas:

- Definitions and guidance are needed concerning Hours Worked.
- More specific definition is needed concerning the "W-2 earnings" basis.
- September 2018 may be the earliest feasible effective date for the revised EEO-1 Report.

Hours Worked Definition

The proposed revisions to the EEO-1 Report would require employers to report employees' aggregate hours worked, by job category, race and gender. The notice provides that employers and Human Resource Information systems generally already collect and summarize hours worked, and notes that "*employers will report only data that they already maintain*."

It is generally true that employers are already required by the Fair Labor Standards Act (FLSA) to keep records of hours worked, in particular for employees that are covered by minimum wage and overtime pay requirements. Under the FLSA's recordkeeping regulations (29 CFR Part 516), every covered employer must keep certain records for each nonexempt employee. There is no particular form required, but records must maintain accurate information about each covered employee and

their hours worked and wages earned; specifically including hours worked each day and total hours worked each workweek.

We recommend that the EEOC explicitly adopt the relevant FLSA definitions covering hours worked, primarily because they are already well-understood by employers, and already form the basis for existing employer record-keeping systems. FLSA definitions would also make clear what might otherwise be ambiguities in EEOC hours-worked recordkeeping expectations. For example, longstanding FLSA rules address common questions in distinguishing "time worked" from "time not counted as work," such as:

- Waiting Time (e.g., engaged to wait; waiting to be engaged)
- On-Call Time
- Breaks and Meal Periods
- Pre- and Post-Work Activities
- Meetings and Training Programs
- Travel Time

However, there are several exemptions from FLSA minimum wage and/or overtime pay requirements, and in these circumstances, the regulations provide that employers do not need to maintain accurate records of hours worked. Common FLSA exemptions[1] include:

- Airline employees
- Amusement/recreational employees in national parks/forests/Wildlife Refuge System
- Buyers of agricultural products
- Commissioned sales employees
- Companions for the elderly
- Computer professionals
- Domestic employees who live-in
- Executive, administrative, professional and outside sales employees
- Firefighters and police in small municipalities
- Fishing
- Fruit & vegetable transportation employees
- Local delivery drivers
- Motion-picture theater employees
- Newspaper delivery
- Railroad employees
- Salesmen and mechanics in automobile dealerships
- Seamen
- Seasonal and recreational establishments
- Taxicab drivers

These categories collectively account for a significant proportion of U.S. employment. It is

[1] http://webapps.dol.gov/elaws/whd/flsa/screen75.asp *(last visited 3/4/2016)*

estimated that more than 25 percent of the full-time U.S. workforce falls under the executive, administrative, or professional (AKA "white-collar") exemption alone.

Because of these various exempt classes of employees, EEOC may need to issue additional guidance to outline expectations for employer tracking (or attribution) of hours worked for the EEO-1 Report. The federal government recently addressed this very issue in the context of the Affordable Care Act (ACA), and the related ACA rules may be useful to the EEOC.

Affordable Care Act Employer Shared Responsibility regulations (specifically IRC Section 4980H[2]) were necessary because the ACA required employers to track and evaluate hours worked ("hours of service"), in order to distinguish full-time employees. These rules offer guidance in circumstances in which FLSA rules do not apply, such as the exempt classes of employment mentioned above, and alternatives to facilitate attribution of hours to salaried workers.

The EEOC asked for input on how to report hours worked for salaried employees, such as using an estimate of 40 hours per week for full-time salaried workers. We agree with this approach, and note that the EEOC may be able to rely upon existing Affordable Care Act Employer Shared Responsibility regulations:

> *"For employees paid on a non-hourly basis (such as salaried employees), an employer may calculate the actual hours of service using the same method as for hourly employees, or use a days-worked equivalency crediting the employee with eight hours of service for each day for which the employee would be required to be credited with at least one hour of service, or a weeks-worked equivalency whereby an employee would be credited with 40 hours of service for each week for which the employee would be required to be credited with at least one hour of service[3]."*

Please review the referenced ACA regulations for guidance related to industries and occupations for which hours of service are currently not recorded, or are difficult to track (e.g., adjunct faculty, commissioned salespeople, airline employees, etc.)

The EEOC should also consider whether using a simple estimate of 40 hours per week for full-time salaried workers may have a negative effect on the desired statistical results; i.e., by inflating the apparent rate of pay for salaried workers if actual hours worked generally exceed 40 hours per week on average.

Another question is whether the proposed EEO-1 Report revision should reflect hours worked, or hours paid; e.g., vacation, holiday, sick pay, disability, leave of absence, etc. The proposal does not directly specify, but implies that only hours actually worked should be included. Exclusion of paid time off could present an additional programming burden for employers that maintain their own payroll and/or Human Resources Information systems; i.e., an additional step may be necessary to exclude paid time off. As a point of context, Affordable Care Act definitions include hours paid:

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[2] *26 CFR 54.4980H, Final regulations, Shared Responsibility for Employers Regarding Health Coverage, February 12, 2014*

[3] *Ibid*

> *The term hour of service means each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer, and each hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence…*

In terms of minimizing burden to employers, the EEOC may also want to consider that Human Resource Information systems have been substantially modified in recent years to comply with ACA definitions and requirements to record and analyze hours of service. EEOC rules that vary from FLSA and ACA definitions could necessitate substantial new programming.

W-2 Earnings Definition

It is helpful that the EEOC selected an earnings definition which is already well understood by employers. However, the definition as described in the proposal should be clarified to avoid ambiguity and diverse input. Employers might interpret "W–2 gross income" to mean W-2 "Box 1—Wages, tips, other compensation", which reflects earnings subject to Federal Income tax, or they could reasonably use "Box 3—Social Security wages," or "Box 5—Medicare wages and tips".

Given the discussion in the proposal, it would appear that the EEOC intends for the definition to be as inclusive as possible. EEOC may wish to review the IRS definitions associated with Form W-2 boxes 1, 3 and 5, and clarify which should apply for EEO-1 reporting purposes. Generally, Social Security wages and Medicare wages and tips are more inclusive than Box 1 wages subject to Federal Income tax. They include tax-preferred elements such as 401(k) and similar retirement plan contributions, pre-tax health coverage amounts under a Section 125 Cafeteria plan, and other elements that are excluded from Box 1. However, Social Security wages are subject to a taxable wage limitation (currently $118,500). Medicare wages shares the Social Security wage definitions, but is not subject to a taxable wage limit.

The calculation of "W-2 earnings for a 12-month period looking back from a pay period between July 1st and September 30th" may be complex. Employers generally summarize such earnings on a calendar year basis. Payroll systems generally clear annual earnings accumulators for January 1, and may not have ready access to earnings for particular pay periods in the prior year. The requirement to summarize W-2 earnings for a 12-month period crossing calendar years could require separate storage of each employee's W-2 earnings, for each pay period, through the prior July.

September 2017 May Not be Feasible for All Employers

Another concern is whether the September 2017 date for the first revised report would be feasible. Normally a minimum of six months is necessary for an orderly software development process. A project of the magnitude described would more appropriately be afforded 12 months.

The EEOC Revision of the Employer Information Report (EEO–1) and Comment Request was not sufficiently detailed to be actionable. Employers will need specific rules and definitions, as discussed above, to enable modifications to the affected information systems.

The proposal also provides that employers can select a one-year period beginning with any pay period in July through September for inclusion of earnings and hours in the report. Even if the EEOC is able to publish final and sufficiently detailed rules within a few weeks, in order to meet the September 2017 filing deadline, employers will need to begin storing related data (e.g., Medicare wages per employee for each pay period) by July 2016. Although the new reporting obligation is generally based on data that employers already collect, it will be necessary to conduct formal software development to store the intended data (potentially with definitions that vary from what employers already collect); to perform the analysis and produce the EEO-1 Report; to format it for electronic filing and so on.

Further complicating such development is that programming to support the existing EEO-1 Report generally resides within Human Resource Information Systems. The addition of hours worked and W-2 earnings will require HR systems to collect the data from payroll systems, which are often entirely separate. It is also not unusual for employers to use an HRIS system from a different vendor than their payroll system, which adds further to the time and complexity of development.

Again, a project of the magnitude described would *normally require at least 12 months for systems development, after final regulations and specifications have been published*, before any related data should be expected to be stored for subsequent reporting. *September 2018 may be the earliest realistic deadline for the first revised EEO-1 Report*.

In closing, we appreciate the opportunity to comment on the proposed EEO-1 Report revisions. The most important recommendations from our perspective include:

- Adopt definitions that are already well-understood by employers.
- Requirements to aggregate hours worked should be consistent with similar requirements
    - Consider adopting relevant rules from the Fair Labor Standards Act
    - Consider adopting relevant Affordable Care Act rules in addition, to address classes of employment exempted from certain provisions of the FLSA
- Clarify the W-2 earnings definition
- September 2018 may be the earliest possible effective date for the first report

We would be glad to discuss this further if it would be helpful. Please call me if we can be of service. Thank you.

Sincerely,

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