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EEOC and State Legislatures Focus on Pay Equity and Transparency

Introduction

If there is one issue that has remained a hot topic in employment news throughout 2016, it is pay equity and transparency. These topics have not only garnered attention at the federal level but at the state level as well.

The EEOC proposed significant changes to the EEO-1 report, a mandated compliance survey containing employment data, where it will begin collecting pay data based on certain demographic criteria in 2017. Additionally, many states, including Maryland, are taking their own steps to ensure pay equity in the workplace. These laws will likely trigger significant enforcement efforts by federal agencies and the states; thus, employers should be prepared to respond to investigations into their pay practices. However, employers can take several steps to help limit potential liability over the next year.

New EEO-1 Report Requirements

In February 2016, the EEOC announced a major revision to the Employer Information Report (EEO-1) requiring all employers with more than 100 employees and federal contractors with more than 50 employees to submit compensation data based on certain demographic information to the EEOC beginning in 2017.

The proposed rule was highly contested by employers. In March 2016, the EEOC held a public hearing regarding the proposed changes to the EEO-1 report. Employers expressed a number of concerns about proposed changes to the EEO-1 reporting rule including the increased time and money that private employers will bear to complete the new report, confidentiality issues, the range of false positives that will result from the submission of pay data, and the enforcement actions that will inevitably arise from these false positives. The EEOC issued a "revised" proposed rule on July 14, 2016 and ultimately promulgated a Final Rule on September 29, 2016. Unfortunately, the revised rule changed very little from the original. Importantly, however, it did move the due date for submission to March 31, 2018.

Under the new reporting requirements, employers must report pay data into one of ten EEO-1 job categories by sex, ethnicity, and race. Employers must use information from W-2s to allocate wages paid to employees in one of ten EEO-1 job categories into twelve pre-defined pay bands. These pay bands are based on calendar year W-2 income, which includes base salary as well as overtime pay, bonuses and commissions.

Specifically, employers need to identify employees' total W-2 earnings for a 12-month period, and the number of employees that fall within each pay band, broken out by race, ethnicity, and sex. The new EEO-1 also requires employers to report the total number of hours worked by the employees included in each pay band.

Because employers have to report the total number of hours worked by the all employees in each pay band, including exempt employees, employers have to decide whether to monitor exempt employees' work hours. This poses several problems for employers. For instance, it will be challenging to monitor exempt employee work hours, particularly because many employers do not have a system in place for this purpose as its not legally required.

Additionally, the EEOC's alternative will provide inaccurate pay data information, and could lead to more inquiries about an employer's pay practices. In response to concerns about how "hours worked" should be reported for exempt employees, the EEOC's final proposed rule gives employers the option to use: 1) proxy hours of 40 hours per week for full-time exempt employees and 20 hours per week for part-time exempt employees; or 2) provide actual hours if the employer tracks hours worked for exempt employees. The problem with using a 40- or 20-hour proxy number is evident. Because many exempt employees will work well over 40 hours a week, or alternatively, much less than 20 hours per week, the data will be significantly skewed.

Despite this plain issue with the new reporting requirements and two comment periods in which it was extensively discussed, the EEOC has not addressed the issues implicated by crediting any analysis that takes into account only proxy hours instead of actual hours worked by exempt employees. Nonetheless, without explanation, it remains steadfast in its belief that collecting hours worked, even if inaccurate, is of central importance to assess part-time and partial- year work in evaluating potential pay disparities.

Recommendations for Employers

Employers should begin to prepare to submit the new EEO-1 Report now even though the first reporting deadline is still 18 months away on March 31, 2018. In addition to determining how they should monitor and report the work hours for exempt employees, there are a number of steps employers can take to make the transition to the new reporting requirements a bit smoother:

1. Evaluate existing your HR information system ("HRIS") and payroll system to ensure that they can generate the necessary pay data to prepare the EEO-1 Report.
2. If your EEO-1 report is prepared by an outside vendor, it would be best to ensure that they are prepared to generate the reports and that they have the systems to do so. Once you ensure that your HRIS and payroll system, or vendor, is capable of maintaining the information and preparing the report, the technical compliance piece is satisfied.
3. Ensure that your employee handbook policies clearly explain how employees earn overtime, bonuses, commissions, and other components of W-2 Box 1 wages. It is important to have clearly defined pay practices if the EEOC ever investigates your pay practices based on the submission of the pay data.
4. Identify job titles in each of the 10 EEO-1 job categories and internally analyze job descriptions to ensure they are accurate and support pay decisions that reflect different job responsibilities.
5. Employers should do what they can over the next year to ensure that they are paying employees equitably.

The coming year provides a good opportunity to conduct a thorough compensation audit prior to the beginning

of the new EEO-1 “snapshot” period which is any pay period between October 1st and December 31st of the reporting year (starting with the EEO-1 Report for 2017). At a minimum, you should identify any disparities that appear to be correlated with race, sex, or ethnicity for employees in the same job and employees that perform similar work. Where an apparent disparity has a valid explanation, make sure you have the documentation necessary to explain the discrepancy. Where an apparent disparity does not have a discernible valid explanation, take steps to correct the disparity and evaluate how to effectively explain the correction(s) to the affected employees prior to the snapshot period.

Changes to Maryland’s Equal Pay Law

In addition to federal efforts to combat pay inequities, legislative proposals directed at ensuring equal pay between genders have been introduced in almost half of the states as well. Many of the equal pay bills include provisions similar to those proposed in the federal Paycheck Fairness Act – held up by the Senate on several occasions – which would provide employees the right to share salary information with co-workers and require employers to prove pay disparity is related to job performance rather than gender.

For example, Maryland passed legislation expanding state equal pay laws and broadening the right of employees to discuss their wages with each other, often referred to as “wage transparency.” The Equal Pay for Equal Work Act of 2016 (“Act”), signed by Governor Hogan on May 19, 2016, took effect on October 1, 2016. The Act amended Maryland’s existing Equal Pay law, Md. Lab. & Empl. Code §3-301 *et seq.*, which applies to employers of any size, in many ways.

The Act expands the current law prohibiting wage discrimination based on sex by also prohibiting wage discrimination based on gender identity. Furthermore, employers are prohibited from providing less favorable employment opportunities or discriminating based on sex or gender identity. Providing less favorable employment opportunities is defined by the Act as:

1. assigning or directing an employee into a less favorable career track (if career tracks are offered) or position;
2. failing to provide information about promotions or advancement in the full range of career tracks offered by the employer; or
3. limiting or depriving an employee of employment opportunities that would otherwise be available to the employee but are not offered because of the employee’s sex or gender identity.

The law also establishes new provisions whereby an employer may not prohibit an employee from inquiring about, discussing, or disclosing the wages of the employee or another employee. Specifically, the Act prohibits employers from taking any adverse employment actions against an employee for:

- Inquiring about another employee’s wages;
- Disclosing the employee’s own wages;
- Discussing another employee’s wages if those wages have been disclosed voluntarily;
- Asking the employer to provide an explanation or reason for the employee’s specific wages; or
- Assisting or encouraging another employee to exercise his or her rights under this law.

Employers can still enforce workplace policies that establish reasonable workplace limitations on the time, place, and manner for inquiries relating to employee wages as long as it is consistent with the standards adopted by the

Commissioner of Labor and Industry and all other state and federal laws. For example, a limitation may include prohibiting discussion or disclosure of another employee's wages without that employee's prior permission, unless the employee has access to that information as part of his or her job functions and uses it to respond to a complaint or charge, or in furtherance of an investigation, proceeding, hearing or action under the Act.

Conclusion

Pay equity and transparency became a hot topic in 2016, and there is no shortage of states enacting laws to address equal pay. For example, California and New York have also passed aggressive equal pay laws within the last year. Going into 2017, pay equity and transparency will surely be a focus on both the federal and state level. Maryland employers should take the necessary steps to ensure that it does not get caught in the web of an EEOC investigation or wage complaint. Completing internal audits to analyze employees' pay and making sure that each pay decision is substantiated on a permissible basis will help alleviate the stress of filing the EEO-1 Report in March 2018. It will also help employers fix any current outlier issues in their pay scheme, and be useful in ensuring they make better informed decisions about pay decisions in the future.