

AUGUST 23, 2016

EEO-1 Reports: Time for Employers to Get in Formation

BY DAVID J. GOLDSTEIN AND MIKE CHILDERS

This is the time of year when employers with 100 or more employees and federal contractors with 50 or more employees must prepare and file their annual EEO-1 reports – documents that provide the government with details regarding employee counts and demographics for every company location. In this article, we will explain why all employers should be careful to correctly answer the EEO-1 questions relating to federal contractor status, discuss how all employers should prepare for required compensation reporting beginning in 2018, and advise federal contractors how to prepare their EEO-1 reports so as to avoid future audit headaches.

Sophisticated employers take the EEO-1 filing requirement seriously knowing that it is a violation of federal law to make a willfully false statement on the report. At the same time, however, employers also generally assume that the government is unlikely to make any use of the data that will directly impact an individual filer. In other words, employers generally see little or no risk associated with EEO-1 reporting.

Such an assumption may be reasonable for non-federal contractors but, as discussed below, there is considerably more risk associated with EEO-1 reporting for federal contractors, who are subject to U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") audits. In addition, if the EEOC implements its pending proposal for collecting compensation data through the EEO-1 filing, all employers subject to the filing requirement should take the process much more seriously.

1. Identification as a Federal Contractor

Employers completing an EEO-1 report are asked to answer the following questions:¹

¹ A sample EEO-1 form is available at <https://www.eeoc.gov/employers/eeo1survey/upload/eeo1-2-2.pdf>

Section C-EMPLOYERS WHO ARE REQUIRED TO FILE

2. Is your company affiliated through common ownership and/or centralized management with other entities in an enterprise with a total employment of 100 or more?

3. Does the company or any of its establishments (a) have 50 or more employees **AND** (b) is not exempt as provided by 41 CFR 60-1.5, **AND** either (1) is a prime government contractor or first-tier subcontractor, and has a contract, subcontract, or purchase order amounting to \$50,000 or more, or (2) serves as a depository of Government funds in any amount or is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Savings Notes?

A company that answers “yes” to question 2 is required to file its EEO-1 reports as part of its parent’s filing no matter how independent the company may be from its parent. As an example of how this works in practice, consider a corporate family with a parent and three subsidiaries (“subs”). The parent will be required to file a headquarters report with employee counts for its principal place of business and a consolidated report indicating the total number of individuals employed by the parent and its 3 subs. In addition, the parent will also file separate reports for each of its own “establishments” in addition to its headquarters. Finally, the parent must file separate reports for every one of its three subsidiaries’ establishments. The EEO-1 instructions define an “establishment” as an economic unit which produces goods or services, such as a factory, office, store, or mine. In most instances, the establishment is at a single physical location and is engaged in one, or predominantly one, type of economic activity.²

It is in this context that question 3 must be answered with regard to each establishment for which a report is being filed.

The answer to question 3 is very important because answering “yes” to question 3 identifies the company as a federal contractor, information that the OFCCP will use to create its own database of entities that must meet federal affirmative action requirements and subject to audit for compliance. In other words, answering “yes” to this question substantially increases the likelihood of a company being audited by OFCCP.

The first thing to note in answering question 3, is that a company should only answer “yes” if it is a prime or *first-tier* subcontractor.³ While entities with contracts necessary to the performance of a federal contract are subject to affirmative action requirements even if they are second-tier or lower subcontractors, such entities are not required to answer “yes” to this question on the EEO-1 form.

The second thing to note in answering this question is that its application to multi-establishment companies is complicated. The convoluted wording of the question combined with the system’s default settings often lead companies to incorrectly identify themselves as federal contractors.

When one company in a corporate family is a federal contractor, affiliated companies often are subject to federal affirmative action requirements even though they have no contracts of their own. Whether non-contractor companies must comply will depend on their relationship with their contractor siblings, parents or subsidiaries, but that is beyond the scope of this article. Either way, however, question 3 is not asking employers to broadly disclose whether they are federal contractors. It is only asking employers to self-identify as prime contractors or first-tier federal subcontractors.

Therefore, the correct response to question 3 should be determined on an establishment by establishment basis as follows. For each establishment, determine if the company whose employees are being reported for

² <https://www.eeoc.gov/employers/eeo1survey/2007instructions.cfm>

³ A “yes” answer is also required, of course, if the company serves as a depository of Government funds in any amount or is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Savings Notes. Because these bases for an affirmative response are of limited applicability, we will not reference them again in this article.

the establishment is a prime or first tier covered government contractor. If so, answer “yes” to question 3; answer “no” otherwise.

Note, too, though, that if a company answers “yes” to question 3 for any establishment in the family, the EEO-1 system will default to a “yes” answer for every other establishment. This means that establishments that are not subject to the OFCCP’s rules may be inadvertently identified as a covered federal contractor subject to audit.

In order to avoid erroneously indicating government contractor status, employers with a covered government contract must indicate “yes” on the report for every establishment that is subject to a federal contract but then go back through the reports and make sure that “no” is indicated for all establishments not subject to a covered federal contract. It is important to follow this process because answering “no” to question 3 for any one establishment will not automatically populate “no” responses for other establishments.

2. Aligning AAP and EEO-1 Establishments

Federal contractors are required to prepare and maintain annual affirmative action plans (AAPs). In general, every location (or “establishment”) with 50 or more employees must have a plan and every employee in the contractor’s workforce must be included in a plan.

Unfortunately, however, the definition of an establishment for AAP purposes is not quite the same as the definition of an establishment for EEO-1 purposes. Accordingly, an employer’s EEO-1 establishments may not precisely map to a contractor’s AAP establishments. This disconnect can result in the OFCCP selecting a location for an audit based on EEO-1 filings that should not be subject to a compliance review. Even more frequently, this disconnect can lead to disputes with the OFCCP over the proper scope of an audit. For example, if the OFCCP chooses a location for an audit based on an EEO-1 report that shows 500 individuals employed at that location but then finds that the AAP for the location only includes 150 employees, the contractor is likely to be closely questioned about the disconnect.

Accordingly, it is important for federal contractors to conduct a review of their EEO-1 and AAP establishment structures to ensure the greatest possible alignment. Again, because of the differences in the rules for identifying EEO-1 and AAP establishments, a perfect correlation is generally unlikely. However, a high degree of consistency is desirable and definitely possible.

Although such consistency has always been important, once the OFCCP begins using EEO-1 reporting as a tool for collecting compensation data, alignment will become essential.

3. New Compensation Collection Requirements

On February 1, 2016, the EEOC published a notice of its intention to begin collecting compensation information as part of annual EEO-1 reporting.⁴ The proposed rule, as later revised,⁵ will require every employer subject to EEO-1 filing obligations to submit both W-2 wages and hours worked in 12 pay bands within the 10 current EEO job categories.

The proposed final rule also changes the EEO-1 filing deadline from September 30 to March 31. Employers will not be required to file EEO-1 reports at all in 2017, but will then have to file the new report, including compensation data, by March 31, 2018.

This new obligation creates two major challenges for covered employers—aside from the problems that may arise from the EEOC or OFCCP’s efforts to use the data for enforcement purposes.

4 <https://www.gpo.gov/fdsys/pkg/FR-2016-02-01/pdf/2016-01544.pdf>

5 <https://www.gpo.gov/fdsys/pkg/FR-2016-07-14/pdf/2016-16692.pdf>

First, employers will need to have a way of tracking the average hours each non-exempt employee is working during the year.⁶ Second, employers will want to have some means of integrating payroll and HR information systems in order to generate the reports necessary to file the new EEO-1 reports.

In order to prepare for this new filing system, we recommend that employers review and update their software, systems, and data as follows.

First, employers should verify that they will be able to track cumulative taxable wages (i.e., W-2 wages)⁷ and not just gross pay in their payroll or a related system.

Second, employers should also verify that will be able to track cumulative hours worked for non-exempt employees in their payroll system or a related system.

Third, employers should review their mapping of job titles to the ten EEO-1 job categories. In the past, misidentifying an employee's EEO-1 job category had minimal or no consequences. That will no longer be the case, however, if the EEOC and OFCCP carry through with their plans to use EEO-1 compensation data to identify employers for audit or investigation. Improperly combining employees into a group could then increase the appearance of disparities in pay between men and women or minorities and non-minorities attracting agency scrutiny.

Fourth, employers will likely find it convenient to incorporate the new EEO-1 pay bands into their HR information systems.

Finally, employers with separate payroll and HR information systems will want to determine how they are going to link information between the two systems in order to pull the information that has to be reported.⁸

4. Required Consolidated Establishment Reporting

Prior to 2015, companies were able to easily identify multiple entities operating at a common site. Beginning with the 2015 EEO-1 reporting cycle, however, a parent company with multiple subsidiaries operating at a single site has been required to consolidate reporting of its multiple subsidiaries' employees at that site in a single EEO-1 establishment report for the site (unless the subs have different North American Industry Classification System (NAICS) codes). This consolidation is required even if the different business units are separate, genuinely independent legal entities.

Aside from the potential tax implications of listing independent businesses as a single entity on reports to the federal government, this raises a special concern for government contractors because of the relationship between EEO-1 reports and compliance reviews. If the OFCCP chooses an EEO-1 establishment for audit, it is going to have concerns if the employer then asserts that only a subset of the employees reported on the EEO-1 form for that site are subject to audit or if the employer responds that there are multiple different AAPs associated with the site.

In addition, once the EEOC and OFCCP begin to collect compensation data through the EEO-1, this consolidation of separate entities will make the data useless (or at least misleading) for purposes of assessing compensation practices of individual entities.

6 Both the proposed rule and the revision to the propose rule have stated that employers can use 40 hours per week as a proxy for the average hours worked by exempt employees.

7 *Definition of W-2 wages.* Section 199(b)(2) and § 1199-2(e) of the regulations provides that, for purposes of § 199(b)(1), the term "W-2 wages" means, with respect to any person for any taxable year of such person, the sum of the amounts described in § 6051(a)(3) and (8) paid by such person with respect to employment of employees by such person during the calendar year ending during such taxable year. Thus, the regulations provide that the term W-2 wages includes: (i) the total amount of wages as defined in § 3401(a); (ii) the total amount of elective deferrals (within the meaning of § 402(g)(3)); (iii) the compensation deferred under § 457; and (iv) for tax years beginning after December 31, 2005, the amount of designated Roth contributions (as defined in § 402A).

8 This can be done either by building an internal bridge between the two processes or by preparing separate reports in Microsoft Access or Microsoft Excel and combining the reports in one of those programs.

For these reasons, in preparing their EEO-1 reports, employers should seek to avoid having to combine data from different companies whenever possible. Your legal counsel may be able to offer assistance in identifying ways to properly do this. In situations where there is no way to avoid having to combine data from different companies, an employer may wish to file a "Type 5" petition requesting the use of a special filing procedure. This special filing procedure requires the company to explain in detail why the standard system is incompatible with its needs and to offer a detailed alternative for completing its EEO-1 filing obligations.

Unfortunately, the Joint Reporting Committee (JRC) – which is responsible for EEO-1 administration – has not offered any details as to the circumstances under which it will permit the use of a special filing procedure or the alternate arrangements that might be authorized. Also unknown is the time it would take for the JRC to process such a request or whether the filing of a petition tolls the reporting deadline. In our experience, it has taken up to nine months to get a decision and one cannot count on getting a decision prior to expiration of the filing deadline.

Conclusion

Because EEO-1 reports are always reviewed by the OFCCP in connection with compliance reviews and may be sought in discovery by private litigants, there has always been some risk of this data being used against an employer in support of discrimination claims, but that risk has been relatively limited. Once EEO-1 reports begin to include compensation data, however, that risk increases substantially. Due to that increased risk, employers will want to pay greater attention to their EEO-1 reporting.

Recognizing that there is at least a possibility that Congress could intervene and prevent the implementation of the new EEO-1 requirements, employers may wish to wait a little longer before beginning serious implementation efforts. At the same time, because there is no evidence at this time that the proposed changes will not be implemented, and compliance will be complicated, employers should not delay their preparations much longer.

If you have any questions regarding the new EEO-1 reporting system or require assistance in filing your EEO-1 reports, please do not hesitate to contact Littler.