
Will Expanded EEO-1 Data Collection Yield New Insights?

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Proposed changes to the U.S. Equal Employment Opportunity Commission employer information report (EEO-1) stand to substantially increase the risk of wage discrimination class actions being brought against a wide swath of employers. In this article, we summarize the proposed changes to the EEO-1 reporting requirements and assess whether the additional information can produce economically meaningful statistical evidence of wage discrimination.

We then evaluate whether the expanded EEO-1 data collection has the potential to provide evidence of discrimination for the purposes of class action litigation in light of recent U.S. Supreme Court decisions. Finally, we provide recommendations on how employers and their counsel can leverage economic and statistical expertise to minimize the risks associated with these increased reporting requirements.

EEO-1 Changes and Implications for Detecting Wage Discrimination

The EEOC recently announced plans to revise the EEO-1 for all employers with 100 or more employees¹. Although larger employers and federal contractors already report data on the race, ethnicity and sex of employees within 10 job categories, beginning in 2018 employers must also submit information on employee earnings and hours worked in the EEO-1. The EEOC indicates that the additional data on pay and hours worked will be used to “assess

complaints of discrimination, focus agency investigations, and identify any existing pay disparities that may warrant further examination².”

The EEOC intends to apply a set of statistical tests to employer compensation data to determine whether there are significant differences in pay among the relevant groups within the firm or relative to other employers in the same labor market³. In the recently published final request for comments, the EEOC indicated that comparisons yielding statistically significant results will be used to flag cases for further examination⁴.

The rule change is far-reaching and has the potential to expose companies to significant litigation risks as a result of the EEOC’s findings. However, the proposed data collection is likely to be of limited use as a tool for detecting discrimination in practice. To understand why, consider the standard approach used by economists to measure wage discrimination. Labor economists define wage discrimination as the difference in wages between two groups, such as men and women, with the same productive capability in a job. In a simple world in which two workers employed in the same job are equally productive, they should receive the same wage. Therefore, if two otherwise identical groups of men and women are in the same job but paid different wages, the difference in wages would be interpreted as a measure of discrimination.

However, the difficulty in constructing an accurate measure of discrimination lies in adequately accounting for the factors that determine the productive capability of workers. Differences in education and experience, for example, can influence a worker’s productive capability. Suppose males within a particular occupation have higher wages than women, while also having greater labor market experience. If the difference in experience levels across men and women is not accounted for in a study of wage discrimination, all of the difference in wages across men and women will be attributed to discrimination, when in fact some (or all) of the wage difference may simply be due to disparate levels of experience.

Despite the increased reporting requirements in the proposed EEO-1, information on certain important factors in determining wages will not be included in the data. Labor market experience, work interruptions and other important determinants of wages that often differ across gender and ethnicity in systematic ways are omitted from the EEO-1. As a result, it will not be possible to accurately disentangle differences in wages across groups due to discrimination or other factors that determine work productivity. In contrast to the extensive literature on the measurement of wage discrimination, the EEOC aims to evaluate pay disparities — at least initially — by focusing on the average salary within a given pay band and job category combination. Aggregating total hours worked for all employees of a given sex and ethnicity for each combination of salary band and job category further complicates any measurement of discrimination.

If the EEO-1 report for a particular firm indicates significant pay disparities within a firm, can this information reasonably be used as the basis for a class action claim?

Despite the weaknesses inherent in the EEO-1 data collection discussed above, observers expect that the EEO-1 reports will likely “be used by employees as ‘exhibit A’ in future equal pay lawsuits⁵.” Even though EEO-1 data may prompt an investigation, recent Supreme Court rulings indicate that EEO-1 data collections are unlikely to be

useful as the foundation for future employment or wage discrimination class actions for several reasons.

First, the expanded EEO-1 data collection is not a panacea: it does not provide a theory of harm or evidence of a policy or agreement within the firm to depress the wages of any particular group of employees. Plaintiff classes will still need to demonstrate that there was a company-wide policy that caused actual or imminent injury. Even if the plaintiffs can show differences in pay levels and access to management-level jobs, they may not be able to demonstrate common injury. In *Walmart v. Dukes*, the class was not certified, in part because the plaintiffs could not point to a discriminatory policy that affected all members of the proposed class. As many firms have anti-discrimination policies in place, identifying the mechanism of harm may be challenging.

Second, to the extent that plaintiffs are able to satisfy the standing requirements for injury and advance pay discrimination lawsuits, class actions will still need to demonstrate common impact using a common method that is directly linked to the plaintiffs' theory of harm⁶. At first glance, the Supreme Court's ruling in *Tyson v. Bouaphakeo* seems supportive of simple average measures collected from statistical evidence when determining harm to a class of plaintiffs. The EEO-1 data collections provide just this — an average measure of wage differences from statistical evidence.

However, it is unlikely that future employment class actions alleging wage discrimination will be able to rely exclusively on the EEO-1 report. In *Tyson*, the employer did not maintain records on the amount of time that employees took to “doff and don” personal protective equipment. The Supreme Court found the plaintiffs' experts could rely upon statistical evidence from a stopwatch study to provide direct estimates of donning and doffing time since evidence was not available in the employer's records. Wage discrimination, in contrast, cannot typically be measured directly in such a fashion. Discrimination, as measured by economists, is a “residual” — the difference in pay across groups after controlling for all other characteristics that determine productivity in an occupation. Although the revised EEO-1 data collection may provide some indication of wage differences, they do not contain measures of other relevant determinants of compensation.

How Should Employers Prepare?

Faced with the proposed EEOC rule change, employers may want to consider conducting an internal evaluation of their compensation data. Although the EEOC will not begin collecting data until 2018, employers should use this time to thoroughly evaluate current and historical data to determine whether the EEOC is likely to identify pay disparities using their statistical screening methods. Further, since the EEOC will also compare company pay practices to industry and/or regional peers, employers may also want to consider comparing their internal data to a subsample of the Current Population Survey, used by the U.S. Census Bureau to collect labor force statistics. Survey-based methods can also be used to identify additional information about an employer's labor force that may help explain job-related pay disparities.

Importantly, compensation analyses conducted by economics, statistics and survey experts can help employers minimize risks related to the new EEOC reporting requirements. If an analysis of the data using the EEOC's proposed methodology does yield red flags, a deeper review of the data, augmented with information on other relevant determinants of wages for individual workers, may uncover the sources of wage disparity across groups. If discrepancies in compensation can be explained by factors unrelated to discrimination, such as experience levels, such analyses can provide the foundation for an affirmative defense. Alternatively, if wage disparities remain after accounting for determinants of wages other than discrimination, employers will have the opportunity to undertake remedial actions well in advance of the 2018 reporting date.

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Endnotes

- 1 <http://www.eeoc.gov/eeoc/newsroom/release/1-29-16/cfm>; and <https://www.federalregister.gov/articles/2016/07/14/2016-16692/agency-information-collection-activities-notice-of-submission-for-omb-review-final-comment-request#citation-92>
- 2 <https://www.federalregister.gov/articles/2016/07/14/2016-16692/agency-information-collection-activities-notice-of-submission-for-omb-review-final-comment-request#citation-92>
- 3 <https://www.federalregister.gov/articles/2016/07/14/2016-16692/agency-information-collection-activities-notice-of-submission-for-omb-review-final-comment-request#citation-92>
- 4 "As explained in the 60-day notice, Component 2 data would support EEOC data analysis at the early stages of an investigation, using statistical tests to identify significant disparities in reported pay. EEOC enforcement staff who conduct these analyses would use them, in the larger context of other available economic data and information, to evaluate whether and how to investigate the allegations of discrimination in more depth." <https://www.federalregister.gov/articles/2016/07/14/2016-16692/agency-information-collection-activities-notice-of-submission-for-omb-review-final-comment-request>
- 5 <http://www.law360.com/articles/752863/attys-react-to-eeoc-s-equal-pay-data-reporting-proposal>
- 6 As the U.S. Supreme Court opined in *Comcast*, a proposed damages methodology "must measure only those damages attributable" to the plaintiffs' theory of impact. See ABA Section of Antitrust Law, *Proving Antitrust Damages: Legal and Economic Issues* 57, 62 (2d ed. 2010) cited in 569 U.S. (2013) [*Comcast* Supreme Court decision], p. 7.

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