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April 1, 2016

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

Re: Comments Regarding Proposed Revision of the Employer Information Report (EEO-1)

Dear Ms. Wilson:

Jackson Lewis P.C. appreciates the opportunity to submit these comments regarding the Equal Employment Opportunity Commission's (the EEOC) proposed revision of the Employer Information Report (EEO-1). As a national law firm devoted exclusively to management side employment law, Jackson Lewis regularly assists employers, large and small, in complying with their EEO-1 reporting obligations and, in fact, annually files thousands of EEO-1 reports on behalf of its clients.

In addition, Jackson Lewis has, for years, worked with employers in every industry across the country to gather pay and work hours data in order to conduct proactive pay equity statistical analyses that help ensure workers are being paid fairly under anti-discrimination laws. With the assistance of our computer programmers and statisticians, we reconcile, align and merge payroll and HRIS data, just as employers would be required to do under the proposal. Through this work, we have had the opportunity to become intimately familiar with the capabilities of HRIS and payroll software systems which gives us insights into how to most efficiently obtain and report on this type of information. Thus, we are uniquely positioned to provide practical insights to the EEOC regarding the benefits and burdens, as well as the efficiencies that may be realized, related to the pay data and work hours reporting in the proposal.

Jackson Lewis also recognizes and supports the Government's interest in identifying and eliminating discrimination in pay practices. Of course, any discussion of efforts to eliminate pay discrimination must weigh the potential benefits of the proposal against the resulting burden to employers. The EEOC has significantly underestimated these concerns as well as the employer burden associated with the proposed revision. Because of the manner in which this additional data is sought, any analysis by the EEOC (or the Office of Federal Contract Compliance Programs ("OFCCP")) will undoubtedly produce "false positives" and subject

employers to burdensome requests for information based on often inaccurate and misleading results. Moreover, the manner in which the EEOC suggests it will make the pay data available to the public very well could compromise the confidentiality of individual compensation data. Finally, as currently written, the burden to employers resulting from the proposed reporting changes will far outweigh any potential utility the Agency expects as a benefit.

Furthermore, we are skeptical that the EEOC's proposed changes will accomplish its stated objectives of identifying and eliminating pay discrimination. As the proposal stands, it will require the reporting of W-2 earnings by race and gender within broad EEO-1 categories and pay bands. Any analyses conducted on such data would compare employees doing vastly different work and ignore valid explanations for differences in compensation. Thus, there is no reason to believe it will prove any better a tool for identifying unlawful discrimination than mechanisms already in place.

In fact, the National Academy of Sciences (NAS), which was commissioned by the EEOC to identify ways to improve enforcement of federal laws prohibiting pay discrimination stated in its report that there was "no clearly articulated vision of how the data on wages could be used in the conduct of the enforcement responsibilities of the relevant agencies." *See* National Research Council. 2012. *Collecting Compensation Data From Employers.* Washington, DC: National Academies Press, 2 Available at http://www.nap.edu.openbook.php?record_id=13496. The NAS Report also recommended that a Pilot Study be conducted to provide more reliable information about the costs and benefits of the proposed collection. *Id.* While the EEOC commissioned a Pilot Study as recommended by the NAS, the Pilot Study analyzed "synthetic" databases from just two sources. We recommend the Agency undertake a more robust study of actual data collected after a reasonable period of time to determine the predictive value of the new EEO-1 Report in identifying pay discrimination.

We also urge the Government to consider that this proposal is just one in a long list of regulatory burdens that have been levied on employers, in particular the federal government contractor community, in the last few years. The multitude of recent executive actions and resulting regulations have increased greatly the time and resources employers must devote to their compliance efforts. In light of this concern, we have made several practical, straightforward recommendations designed to better balance the interests of government and the burden on employers.

Annualized Base Compensation Is a More Useful, Practical, and Less Burdensome Unit of Pay to Collect and Report On

The EEOC's proposed rule requires employers to report W-2 earnings to employees for a time period that spans two calendar years. However, allowing employers to report annualized base compensation in lieu of W-2 earnings will provide for more meaningful analyses and drastically reduce the burden on employers. Notably, the NAS Report, which was commissioned by the EEOC, specifically recommends that the EEOC collect data on rates of

pay, not actual earnings. See National Research Council. 2012. *Collecting Compensation Data From Employers* at 4.

First, W-2 earnings are so varied and over inclusive that it will make it nearly impossible for the EEOC to make accurate comparisons. The EEOC states that the pay data will be "used to assess complaints of discrimination, focus investigations, and identify employers with existing pay disparities that might warrant further examination." By comparing W-2 earnings, the EEOC will be including in their analyses items such as overtime, payments for unused sick time, signing bonuses, and other forms of compensation that will vary greatly from employee to employee. This will make it more difficult for the EEOC to accurately determine whether certain individuals are being negatively impacted.

Second, reporting on annualized base compensation is considerably less burdensome than reporting W-2 earnings. The EEOC asserts that generating point in time W-2 reports should "not be complicated" for employers with automated payroll systems and the W-2 data can be imported into a HRIS system. The EEOC also posits that employers could utilize quarterly payroll reports or write a one-time customized program to import data from their payroll systems into their HRIS systems. By all accounts, this is an oversimplification and employers will need to invest significant time and resources into reporting W-2 earnings off-cycle and in a different format. The EEOC's statements assume that employers have, at a minimum, advanced payroll systems capable of integration with HRIS systems and that the technology to create these customized reports is available and affordable. For example, smaller employers frequently do not have any HRIS system and/or rely on third-party vendors to assist with payroll. Yet, even professional payroll services agree that it will take significant effort to modify their systems to enable the reporting of this data and the expense of such changes will undoubtedly be passed on to their customers. By comparison, employers with HRIS systems[1] can easily generate annualized base compensation from their HRIS systems.

Finally, if employers report annualized base pay, it will eliminate the need to report hours worked. Annualizing base pay will essentially "level the playing field" and provide the full time equivalent salary for part-time employees. In essence, it will allow the EEOC to compare "apples to apples" when analyzing compensation, which is one of the Agency's goals. Not only will this approach greatly reduce the burden associated with the new reporting, but it will also resolve the problems with trying to report the hours worked of exempt employees.

If the EEOC Continues with Its Plans to Collect W-2 Earnings, Then the Agency Should Change the Filing Deadline for the EEO-1 Report to March 31

In the alternative, if the EEOC declines to permit employers to report annualized base compensation, we urge the Agency to change the filing deadline for the EEO-1 Report to March 31, using a calendar year reporting period. This approach will better reflect how W-2 earnings are calculated and reported for tax purposes and will ease the burden on employers

[1] Even those companies without HRIS or payroll systems should have an easier time producing an annualized pay rate than off-cycle W-2 earnings.

associated with reporting W-2 earnings from two different calendar years, for which the EEOC has not properly accounted.

Employers report calendar year W-2 earnings to employees and the Internal Revenue Service for tax purposes. Employers typically produce the W-2 Forms in January of the year following the calendar year for which earnings are reported. Nevertheless, the proposal maintains the current reporting deadline (by September 30) and requires the inclusion of W-2 earnings for the 12-month period immediately preceding the reporting date. We recognize the Agency considered and attempted to ease employer burden when it proposed using an objective and already calculated measure of compensation (W-2 earnings) and continuing with the same reporting cycle as the previous EEO-1 Report. Nevertheless, we believe the EEOC drastically underestimates the burden associated with creating a whole new reporting cycle for W-2 earnings.

As discussed in greater detail above, reporting W-2 earnings for a time period that spans two calendar years will require significant time and resources. It will also require employers to integrate data from their HRIS software and payroll systems which is not an easy task. Finally, this new reporting cycle for W-2 earnings does not eliminate the need for the traditional reporting of W-2 earnings for tax purposes, effectively doubling the burden associated with reporting W-2 earnings.

We believe the EEOC can alleviate much of this burden by changing the reporting period to a calendar year and making the EEO-1 Report due by March 31st each year. By mirroring the tax filing reporting period, employers can leverage the reports they already must run to prepare the earnings data component of the revised EEO-1 Report. Moreover, this approach is consistent with that originally espoused by the Office of Federal Contract Compliance Programs when it proposed the Equal Pay Report. See 79 FR 46562 at 46570 (August 8, 2014).

At Minimum, The EEOC Should Eliminate the Requirement to Report Number of Hours Worked for Exempt Employees

The EEOC's proposed rule requires employers to report the number of hours worked for exempt and non-exempt employees. However, recognizing some of the challenges in doing so, the Agency specifically seeks comments on the reporting of hours worked for exempt employees. While we also question the utility of reporting the hours worked for non-exempt employees,[2] we specifically have responded to the EEOC's request by recommending against the reporting of hours for exempt employees. We believe that reporting on the number of hours worked for exempt employees is a paperwork exercise and unnecessary to accomplish the EEOC's analytical objectives.

[2] To the extent a job category contains both exempt and non-exempt employees, employers would face the same challenges reporting the hours worked for exempt employees as described below.

By definition, exempt employees work as much or as little as necessary to satisfy their duties and responsibilities. Accordingly, exempt employees do not work "regular" hours. Moreover, employers are not required to track the number of hours worked for exempt employees, and most employers do not do so. If the EEOC requires the reporting of hours for exempt employees, employers will either need to start tracking hours, adding a tremendous administrative burden, or simply report the same number of hours for all such employees. Both alternatives are unsatisfactory.

The Agency does not gain significant analytical value in collecting the number of hours worked for exempt employees. The proposed rule states that the data will "allow analysis of pay differences while considering variations in hours" and will account for "periods when the employees were not employed, thus reflecting part-time work." Since the EEOC plans to use the sought after data to benchmark differences in compensation by industry and geographic region, there is no compelling reason to obtain information at such a level of specificity. Since there is no reason to believe some exempt workforce populations would have a significantly greater percentage working part-time than others, the Agency can satisfactorily perform its analyses by assuming all employees work full-time, thus normalizing the comparative data. The same reasoning also applies to the percentage of employees who may take leave during a given year. While the resulting analyses may not be 100% accurate, it is simply not possible to have completely accurate information, unless employers are required to track the actual number of hours worked for exempt employees, which the Agency has justifiably not proposed.

Alternatively, if the EEOC determines it necessary for employers to report the hours worked for exempt employees, we urge the Agency to make the reporting of that data as simple as possible. Thus, the EEOC should adopt the approach they offer in the proposal and permit employers to report all full-time exempt employees as working 2080 hours per year. For employees working less than full-time, employers should be able to report a percentage of those hours that equates to the percentage of a full-time equivalent any part-time employees work. For example, if an exempt employee works 90% of an equivalent full-time employee, the employer would report 1872 hours.

<u>For Multiple Establishment Employers, the EEOC Should Require Only the Reporting of Earnings and Hours Worked for Type 3 (Headquarters) and Type 4 (Establishment) Reports</u>

The EEOC's proposed revision does not address the issues associated with reporting earnings and hours worked for multiple establishment employers. Because of the burdens associated with reporting this information on multiple reports or on reports that only require listing the total number of employees, we recommend multiple establishment employers only report earnings and hours worked on the Type 3 (Headquarters) and Type 4 (Establishment) reports.

Employers with multiple establishments are required to follow a strict, and often complicated, EEO-1 reporting structure. For instance, a company with a headquarters location, two locations with at least 50 employees, and six additional locations that house less than 50 employees must file multiple reports: a Type 2 (Consolidated) Report consisting of all company

employees, a Type 3 (Headquarters) Report for the headquarters location, two Type 4 (Establishment) Reports, and one Type 6 (Establishment Listing) Report or six Type 8 (Establishment) Reports for the remaining locations.

The proposal makes no mention of which types of reports would require compensation data and hours worked. Nevertheless, for administrative ease, we propose that employers should only report compensation data and hours worked on the Type 3 (Headquarters) and Type 4 (Establishment) reports. Requiring reporting on the Type 2 (Consolidated) Report would be redundant as some or all of that information will appear on the Type 3 and Type 4 reports.[3] Moreover, since a Consolidated Report contains employers from multiple locations, we question the analytical value to the EEOC. In addition, requiring the reporting on the Type 6 Report completely undermines the reason for allowing employers to summarize the number of employees at such locations – namely, administrative ease – and adds no utility as it would contain data aggregated across multiple locations in numerous geographies. While employers could conceivably report the compensation and hours data on a Type 8 Report, that could add significant burden and contribute little analytical value to the EEOC as those locations tend to be very small.[4]

The EEOC Has Not Adequately Addressed Concerns of Confidentiality Associated with the Storage, Employer Transmittal, and the EEOC's Publishing of Sensitive Pay Information

The pay information that the EEOC proposes to collect is highly sensitive. Disclosure of such sensitive information would be detrimental to both employers and employees alike. Any sort of data breach, external or internal, would also harm the Government. This issue is magnified when we consider that many employers who batch upload their EEO-1 reports are required to do so via e-mail. Certainly, e-mail is not the most secure way to transfer such sensitive information. Therefore, we strongly urge the EEOC to consult with data security experts and develop more secure electronic data transfer mechanisms and take all necessary precautions to prevent breaches once this highly sensitive data is in the Government's possession before the effective date of a final rule.

Furthermore, we have concerns regarding the confidentiality of an individual employee's pay when such data will be reported by race, gender and EEO-1 category within each pay band. For example, the EEOC states that it will publish aggregated employee pay data by geographic area and industry. Significantly, under certain circumstances, this may permit identification of pay data by employer and by employee. To the extent an employer is the only one or one of a few companies in a particular industry or geographic area, the employer may be

[3] In its Equal Pay Report proposal, the OFCCP agreed that reporting pay data on the Consolidated Report was unnecessary. See 79 FR 46562 at 46569 (August 8, 2014).

[4] If the EEOC has an overriding interest in collecting this information on the typically small percentage of an employer's workforce associated with the Type 6 or Type 8 Reports, while redundant and of questionable analytical value, the Agency could require the reporting of compensation and hours worked data on the Type 2 (Consolidated) Report.

identified by its pay data. Likewise, if only a few employees are in a particular EEO-1 category by race or gender, the employee can be identified by the published pay data.

We appreciate that the EEOC addressed this issue in a footnote in the proposed rule by stating the Agency "intends to re-examine the rules for testing statistical confidentiality for publishing aggregate data to make certain that tables with small cell-counts are not made public." See 81 FR 5113 at 5115 (February 1, 2016). However, before finalizing any rule we strongly encourage the Agency to establish protocols to ensure that it will never make available to the public data that will permit the identification of a specific employer or employee because of small sample sizes.

* * *

Once again, Jackson Lewis supports the goal of eliminating the gender wage gap and appreciates the EEOC's objectives in proposing this rule. Nevertheless, we believe that the EEOC has not considered fully some of the complications associated with the proposed revision or the scope of the impact on employers. In light of this, we have offered practical, straightforward modifications to the revised EEO-1 Report designed to alleviate some of the burden on employers while still maintaining the Report's utility to the EEOC. However, if the EEOC cannot find ways, either by adopting these or similar recommendations, to substantially alleviate the burden to employers and ensure confidentiality, we cannot support the Agency's promulgation of a final rule collecting pay data on the EEO-1 Report.

Very Truly Yours,

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