Move Over Say on Pay and Pay Ratio, Here Comes EEO – 1: Component 2: The Very Latest Pay Disclosure Regime

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History

February 2016 01 Published Revised EEO-1 Form in Federal Register: Report W-2 wage within 12 pay bands and total hours worked for all employees by sex, race/ethnicity, and job category

September 2016 02 OMB approves the form requiring 2017 data in March 2018

August 2017 03 OMB stays collection due to practicality, burden and confidentiality

November 2017 04 Pay equity advocates initiate litigation for reinstatement of collection

April 2019 05 Judge Tanya Chutkan of the U.S. District Court for DC ordered collection by September 30, 2019 for years 2017 and 2018
National Opinion Research Center (NORC) begins Component 2 Collection – July 15, 2019

Options
- Male
- Female
- Nonbinary is NOT an option, employer must designate

• Hispanic or Latino
• Non/Hispanic or Latino:

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<tr>
<th>White</th>
<th>Black/African American</th>
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<tr>
<td>Asian</td>
<td>Native Hawaiian/Pacific Islander</td>
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<td>2 or more races</td>
<td>Native American or Alaska Native</td>
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Job Categories:
- Exec, Sr. Level & Mngrs
- First/Mid Level Mngrs
- Professionals
- Sales Workers
- Craft Workers
- Laborers & Helpers
- Technicians
- Admin Support Workers
- Operatives
- Service Workers
Resources

NORC
https://eeoccomp2.norc.org/Info

Spreadsheets
https://eeoccomp2.norc.org/additional-reference

Instructions
https://eeoccomp2.norc.org/assets/documents/Comp2EEO1InstructionBook.pdf

Filer
https://eeoccomp2.norc.org/assets/documents/Comp2EEO1FactSheet.pdf
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Sample Form
Frequently Asked Questions – Component 2

• Who has to file?
  – The same companies that file Component 1 are required to file Component 2

• What time period is used for Component 2?
  – It could be same “workforce snapshot period” as Component 1 or a different one
    (That is, the pay period chosen by the employer between October 1 and
    December 31 of the reporting year)
Snapshot Period Specifics

• What if the employee wasn’t on the payroll during this selected workforce snapshot period?
  – Then don’t worry about that one

• What if the employee was not active by December 31 of that year?
  – Still report it
What About Non-Binary Employees?

• What do I do about non-binary employees?
  – You can make notes in the comments section. You can call it Additional Employee Data, then specify what that is, such as 1 non-binary gender employee working X hours in Job Category Y, Salary Pay Band Z, Race/ethnicity non-Hispanic White.
How Do I Use Employees’ W-2s?

• Compensation for the pay bands is found in Box-1: “Wages, tips, and other compensation”

• Employers should not use the gross annual earnings instead of Box-1 on the W-2

• What about annualizing if an employee only worked part of this year?
  – Do not annualize; use the Box-1 number
Hours Worked

- The hours-worked data is also recorded in this report
- For non-exempt employees under the FLSA, use actual hours worked
- For exempt employees under the FLSA, either use actual hours worked or proxy of 40 for full-time and 20 for part-time/week
  - Can an employer use a mix of actual and proxy? Yes!
- Format: Tally number of employees, then hours worked during the calendar year, for each of the 12 compensation bands in each of the 10 job categories, and reported by sex and race or ethnicity
Multi-Establishment Reporting

• When there are multiple establishments and one doesn’t meet the 100 employee-threshold, do I have to report for the small one?
  – Yes! Component 2 data is aggregated at the employer level, so all employees would count, regardless of how many or how few were at a particular establishment

• Is it okay to count the wages and hours from the multiple establishments at the headquarters?
  – No; wages and hours are counted at the employee’s physical location
Mergers and Acquisitions

• How does an acquisition affect reporting for the acquired subsidiary?
  – If the acquisition was before the snapshot period, the acquiring company bears the reporting responsibility. The same holds true if the acquisition was after the period and the acquiring company has access to the subsidiary’s data.

• What if the acquiring company does not have access to the Component 2 data?
  – Then that needs to be noted in the comments box on the certification page in the online filing system.

• Does it work the same way for mergers regarding the newly created company?
  – Yes, the new company would be responsible for the reporting.
Professional Employer Organizations (PEO)

• If a PEO loses a client this year, does the PEO or the client file for 2017 and 2018?
  – The former client is responsible – a PEO is not responsible for filing Component 2 data of former clients at the time of filing

• What if the PEO does not cover the client’s whole workforce?
  – When the client keeps part of the workforce, then the client is responsible for the filing
PEOs

• If a PEO client has fewer than the required employee number for reporting, who does the filing?
  – Neither! Employee count for a client occurs at the client level, and on its own, the client company would not be required to file. The PEO relationship does not affect the client.

• What does a PEO do if its client did not file its 2018 EEO-1 report before it became a client?
  – The PEO is only responsible if that client met the reporting requirements and was a PEO client during the 2018 snapshot period
Nontraditional Workforce Issues Present Various EEO-1 Coverage & Reporting Challenges

- What employer(s) covered
- Which business is employer responsible for reporting data
- Data collection and record retention
- Penalty liability
- More
EEO-1 Report Requirement

On or before September 30 of each year, every [covered employer] shall file with the commission or its delegate executed copies of Standard Form 100, as revised (otherwise known as “Employer Information Report EEO–1”) in conformity with the directions set forth in the form and accompanying instructions.

– 29 C.F.R. § 1602.7
EEO-1 Report Requirement

• Covered Employer with ≥ 100 employees required to report Component 2 EEO-1 compensation data for 2017 and 2018 by September 30, 2019
• Covered Employers with multiple establishments complete the EEO-1 Report Form for the employer in total, the headquarters, and each establishment with ≥ 50 employees
• Employers with establishments with ≤ 50 employees may choose to report compensation data in this detailed form, or report establishments with < 50 employees in list format

Component 2 EEO-1 Online Filing System Sample Form at:
https://eeoccomp2.norc.org/assets/documents/Comp2EEO1OnlineFilingSampleForm.pdf
Covered Employer

- Federal Prime or Tier 1 Subcontractor with 100 or more employees if:
  - “Prime Contractor”: Employer with government contract or any federally assisted construction contract, or employer serving as a depository of federal government funds; or
  - “Subcontractor”: Employer having a contract with a Prime Contractor or another Subcontractor calling for supplies or services required for the performance of a government contract or federally assisted construction contract; and
  - Either:
    - Have contract, subcontract, or purchase order > $50,000;
    - Serve as depositories of government funds; or
    - Financial institution that is issuing and paying agent for U.S. savings bonds/savings notes; AND

- Note: Covered Prime Contractors have duty to inform subcontractors of responsibility to submit annual EEO-1
Covered Employers

• Any other private employer if:
  – “Subject to Title VII of the Civil Rights Act of 1964” and
  – ≥ 100 employees other than state and local governments, public primary and secondary school systems, institutions of higher education, American Indian or Alaska native tribes, and tax-exempt private membership clubs other than labor organizations
  – ≤ 100 employees if:
    • Company either (1) owned or affiliated with another company, or (2) centralized ownership, control or management of personnel policies and labor relations) so that the group legally constitutes a single enterprise, and
    • Entire enterprise employs a total of 100 or more employees
Covered Employers:
Employers Covered by the Civil Rights Act of 1964, Title VII

- Private or state or local government employer with \( \geq 15 \) employees who worked \( \geq 20 \) calendar weeks in current or previous year
- Labor organizations that either operate a hiring hall or have at least 15 members
- Joint labor-management committee controlling apprenticeship or other training or retraining programs, including an on-the-job training program
- All federal agencies
Covered Employers:
Employers Covered by the Civil Rights Act of 1964, Title VII

- Private or state or local government employer with > 15 employees who worked > 20 calendar weeks in current or previous year
  - 20 weeks need not be consecutive
  - To determine if 20-week requirement is met, only count calendar weeks when the employer had requisite number of employees for each workday of that week
  - Employee who started or ended employment during the middle of a calendar week counts on the days when he had an employment relationship with the employer
  - Employer that meets threshold by end of calendar year when discrimination occurs/count taken covered even if did not have 15 employees before or when alleged violation occurred

Counting Employees For Coverage Determinations

- Determine who is employer and employee
- Determine the number of employees on/deemed on employer’s payroll
- Exclude individuals who are not employees, e.g., discharged/former employees or independent contractors
- Add to that figure any other individuals who have an employment relationship with the employer, such as temporary or other staffing firm workers

*EEOC Compliance Manual §§ 605:0008–605:00010*
Exempt Employers

- EEO-1 reporting N/A to establishments in Puerto Rico, the Virgin Islands, or other American Protectorates
“We’ve got 57 team managers, 36 project coordinators and 63 concept implementors—not bad for a company with only 18 employees!”
“Employer” and “Employee”

Employer means “person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of the Internal Revenue Code of 1954”

“Employer” and “Employee”

- Title VII employment status is a question for the court to resolve as a matter of law
- See, e.g., *Nethery v. Quality Care Inv’rs, L.P.*, 382 F. Supp. 3d 776 (M.D. Tenn. 2019)
Common Law Agency Test of Employment

“when Congress has used the term “employee” without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.’ …

“Payroll Test” EEO-1 Instructions

• Employee means any individual on the payroll of an employer who is an employee for purposes of the employers withholding of Social Security taxes except insurance sales agents who are considered to be employees for such purposes solely because of the provisions of 26 USC 3121 (d) (3) (B) (the Internal Revenue Code)

• Leased employees are included in this definition and refer to a permanent employee provided by an employment agency for a fee to an outside company for which the employment agency handles all personnel tasks including payroll, staffing, benefit payments, and compliance reporting
Common Law Agency Test of Employment

“The question whether a shareholder-director is an employee, however, cannot be answered by asking whether the shareholder-director appears to be the functional equivalent of a partner. Today there are partnerships that include hundreds of members, some of whom may well qualify as “employees” because control is concentrated in a small number of managing partners. Cf. *Hishon v. King & Spalding*, 467 U.S. 69, 79, n. 2, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984) (Powell, J., concurring) (“[A]n employer may not evade the strictures of Title VII simply by labeling its employees as ‘partners’”)

Common Law Agency Test of Employment

  - When former bookkeeper employed by medical clinic sued for disability discrimination under ADA, the clinic asserted it did not have 15 or more employees for the 20 weeks
  - To have 15 employees, the four physician-shareholders who owned the professional corporation and served on its board of directors must count as employees
  - Supreme Court ruled must evaluate facts and circumstances under common law test of employment to determine whether physician-shareholders counted as employees
Common Law Agency Test of Employment

  – “In ADEA cases, district courts determining whether the relationship at issue is an employer/employee relationship or an owner/independent contractor relationship use federal law tests to evaluate the nature of parties' working relationship; those tests include the common-law agency test, the Fair Labor Standards Act (FLSA) economic realities test, and a blended or hybrid approach that combines the common-law agency test with a consideration of the economic realities of the hired party's dependence on the hiring party.”
  • *Nemo v. RR Donnelley Logistics Servs.*, 367 F. Supp. 3d 1302 (N.D. Ala. 2019)
Common Law Agency Test

- **Employee vs. Owner/Independent Contractor (42 U.S.C.A. § 2000e-3)**
  - Common-law agency test for determining whether the relationship at issue is an employer/employee relationship or an owner/independent contractor relationship focuses on the level of control that the alleged employer may exercise over an individual; other factors include the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.
Common Law Agency Control Test Determines Who Is “Employer”

- Factors court considers in determining whether hired person is employee under Title VII include: (1) the hiring party’s right to control the manner and means by which the product is accomplished; (2) the skill required; (3) the source of the instrumentalities and tools; (4) the location of the work; (5) the duration of the relationship between the parties; (6) whether the hiring party has the right to assign additional projects to the hired party; (7) the extent of the hired party’s discretion over when and how long to work; (8) the method of payment; (9) the hired party's role in hiring and paying assistants; (10) whether the work is part of the regular business of the hiring party; (11) whether the hiring party is in business; (12) the provision of employee benefits; and (13) the tax treatment of the hired party. Civil Rights Act of 1964 § 701, 42 U.S.C.A. § 2000e(b).

- Glaser v. Upright Citizens Brigade, LLC, 377 F. Supp. 3d 387 (S.D.N.Y. 2019)(for purposes of determining whether a Title VII plaintiff qualifies as an “employee,” a plaintiff “must establish that she received remuneration in some form for her work” and the Court must determine whether a hired person is an employee under a thirteen-factor agency rubric articulated by the Supreme Court in Community for Creative Non-Violence v. Reid, 490 U.S. 730, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989), which considers factors such as an alleged employer's level of control over the alleged employee.
Common Law Agency Control Test Determines Who Is “Employer”

• Whether business is employer determined by economic realities of the relationship and the degree of control the employer exercises over the alleged employee considering:
  1. the extent of the employer’s control and supervision over the worker, including directions on scheduling and performance of work;
  2. the kind of occupation and nature of skill required, including whether skills are obtained in the workplace;
  3. responsibility for the costs of operation, such as equipment, supplies, fees, licenses, workplace, and maintenance of operations;
  4. method and form of payment and benefits; and
  5. length of job commitment and/or expectations.
    • Id. at 378–39. “[T]he employer’s right to control is the most important” of these factors. Id. at 378.

• *Levitin v. Nw. Cmty. Hosp.*, 923 F.3d 499, 501 (7th Cir. 2019)(holding physician who had privileges to perform surgeries at hospital was not hospital's employee, thus precluding her Title VII sex, religion, and ethnicity discrimination claim against hospital arising from its termination of her practice privileges, where physician owned her own medical practice, billed her patients directly, and filed taxes as a self-employed physician, hospital did not provide her with employment benefits or pay her professional-licensing dues, and moreover, she set her own hours, was able to obtain practice privileges at other hospitals, use her own staff in surgeries, and made her own treatment decisions for her patients.); See also, *Henry v. Adventist Health Castle Medical Center*, 363 F.Supp.3d 1128 (D. Haw. 2019), reconsideration denied, No. CV 18-00046 JAO-KJM, 2019 WL 1840843 (D. Haw. Apr. 24, 2019)
Economic Realities Test

- **Employee vs. Owner/Independent Contractor**
  - The economic realities test, for determining whether the relationship at issue is an employer/employee relationship or an owner/independent contractor relationship, analyzes the extent to which the individual is dependent on the alleged employer.
  - *Nemo v. RR Donnelley Logistics Servs.*, 367 F. Supp. 3d 1302 (N.D. Ala. 2019)(holding genuine issues of material fact regarding relationship between delivery route driver and logistics delivery service, including degree of control exercised over his work, precluded summary judgment for delivery service on driver's Title VII and ADEA claims on basis that driver was independent contractor rather than employee.)
Combination of Economic Realities Test and Common Law Control Test

• Whether business is employer determined by economic realities of the relationship and the degree of control the employer exercises over the alleged where the employer’s right to control is the most important” of these factors
  – *Levitin v. Nw. Cmty. Hosp.*, 923 F.3d 499, 501 (7th Cir. 2019)(holding physician who had privileges to perform surgeries at hospital was not hospital's employee, thus precluding her Title VII sex, religion, and ethnicity discrimination claim against hospital arising from its termination of her practice privileges, where physician owned her own medical practice, billed her patients directly, and filed taxes as a self-employed physician, hospital did not provide her with employment benefits or pay her professional-licensing dues, and moreover, she set her own hours, was able to obtain practice privileges at other hospitals, use her own staff in surgeries, and made her own treatment decisions for her patients.)
Multiple Entities Deemed Single Employer

• Integrated Enterprise Test
• Joint Employer Test
Integrated Employer Deemed Single Employer

• An Integrated Enterprise is one in which the operations of two or more employers are considered so intertwined that they can be considered the single employer of the charging party. The separate entities that form an integrated enterprise are treated as a single employer for purposes of both coverage and liability. If a charge is filed against one of the entities, relief can be obtained from any of the entities that form part of the integrated enterprise.

• The primary focus on centralized control of labor relations

• Issue often arises where there is a parent-subsidiary relationship, a parent-subsidiary relationship is not required for two companies to be considered an Integrated Enterprise

EEOC Compliance Manual §§ 605:0008–605:00
Integrated Employer Deemed Single Employer

- Factors determine degree of interrelation between the operations to determine degree of control of one entity over other
  - Sharing of management services such as check writing, preparation of mutual policy manuals, contract negotiations, and completion of business licenses
  - Sharing of payroll and insurance programs
  - Sharing of services of managers and personnel
  - Sharing use of office space, equipment, and storage
  - Operating the entities as a single unit
  - The degree to which the entities share common management
  - Whether the same individuals manage or supervise the different entities
  - Whether the entities have common officers and boards of directors
  - Centralized control of labor relations
  - Whether there is a centralized source of authority for development of personnel policy
  - Whether one entity maintains personnel records and screens and tests applicants for employment
  - Whether the entities share a personnel (human resources) department and whether inter-company transfers and promotions of personnel are common
  - Whether the same persons make the employment decisions for both entities
  - The degree of common ownership or financial control over the entities
  - Whether the same person or persons own or control the different entities
  - Whether the same persons serve as officers and/or directors of the different entities
  - Whether one company owns the majority or all of the shares of the other company

_EEOC Compliance Manual_ §§ 605:0008–605:00
Integrated Employer Deemed Single Employer

- Whether two separate entities are a “single employer,” courts examine facts and circumstances for the absence of an “arm's length relationship found among the integrated companies” or organizations considering:
  1. Interrelation of operations,
  2. Common management,
  3. Centralized control of labor relations and personnel, and
  4. Common ownership and financial control

“Joint Employers” Deemed Single Employer

• “Joint employer” refers to two or more employers that are unrelated or that are not sufficiently related to qualify as an integrated enterprise, but that each exercise sufficient control of an individual to qualify as his/her employer (EEOC Compliance Manual §§ 605:0008–605:00)

• Commission's Enforcement Guidance on Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, Questions 1-2, N:3319-21 (BNA) (1997) (available at www.eeoc.gov) (discussing factors considered in determining whether an entity has sufficient control to qualify as an individual's employer)
“Joint Employers” Deemed Single Employer

- The law recognizes that two entities may simultaneously share control over the terms and conditions of employment, such that both should be liable for discrimination relating to those terms and conditions. The two entities in such circumstances are deemed to be joint employers of the employees in question. 
  

- One entity is the joint employer of another entity's formal employees … if the two ‘share or co-determine those matters governing essential terms and conditions of employment.’ The joint employer analysis “is simply that one employer while contracting in good faith with an otherwise independent company, has retained for itself sufficient control of the terms and conditions of employment of [an] employee[ ] who [is] employed by the other employer.”
  
  *Nethery v. Quality Care Inv'rs, L.P.*, 382 F. Supp. 3d 776, 780 (M.D. Tenn. 2019)
“Joint Employers” Deemed Single Employer

• Example rulings
  – *Frey v. Coleman*, 903 F.3d 671, 676 (7th Cir. 2018)
  – *Nethery v. Quality Care Inv'rs, L.P.*, 382 F. Supp. 3d 776, 780 (M.D. Tenn. 2019)
Agents

- Agent = individual or entity having the authority to act on behalf of, or at the direction of, covered entity
- Covered entity liable for the actions of its agents as it would be for actions taken by itself
- Liability of agents
  - Entity agent of covered entity liable for the discriminatory actions taken on behalf of covered entity
  - Most Federal Appeals Courts hold supervisors not individually liable for discrimination because they do not meet the definition of the term "employer"
  - Sole proprietor who employs at least 15 or 20 employees (depending upon the applicable statute) liable as a covered "employer"

_EEOC Compliance Manual_ §§ 605:0008–605:00
Non-Traditional Labor Relationships Can Create EEO-1 Counting and Reporting Issues

• “Hours Worked” means the annual sum of hours
  – A nonexempt employee worked within the meaning of the Fair Labor Standards Act (FLSA) during the EEO-1 reporting year; or
  – An exempt employee worked during the EEO-1 reporting year based on either:
    • A proxy of 40 hours per week for a full-time exempt employee, and 20 hours per week for a part-time exempt employee, multiplied by the number of weeks the individual was employed during the EEO-1 reporting year; or
    • Actual hours worked by an exempt employee if the employer already maintains accurate records of this information.

Component 2 Instruction Handbook at 14
Non-Traditional Labor Relationships Can Create EEO-1 Counting and Reporting Issues

• “Compensation” or "Pay" means an employee's W2 earnings, specifically those reported in Box 1 of the W2 form - wages, tips, other compensation. IRS directions for that entry are "Show the total taxable wages, tips, and other compensation that you paid to your employee during the year. However, do not include elective deferrals (such as employee contributions to a section 401(k) or 403(b) plan) except section 501(c)(18) contributions."

• Employers are expected to use payroll reports for the previous four quarters to generate the necessary data. Please refer to the IRS website for specific examples (https://www.irs.gov/pub/irs-pdf/iw2w3.pdf)

Component 2 Instruction Handbook at 14
Non-Traditional Labor Relationships Can Create EEO-1 Data Collection and Recordkeeping Requirements

- Employers may acquire the information necessary for completion of items 5 and 6 of Report EEO-1 either by visual surveys of the workforce, or at their option, by the maintenance of post-employment records as to the identity of employees where the same is permitted by State law. In the latter case, however, the Commission recommends the maintenance of a permanent record as to the racial or ethnic identity of an individual for purpose of completing the report form only where the employer keeps such records separately from the employee's basic personnel form or other records available to those responsible for personnel decisions, e.g., as part of an automatic data processing system in the payroll department.

29 C.F.R §1602.13.
Non-Traditional Labor Relationships Worker Reclassification Risks and Challenges

- Worker classification challenges common
- EEO reclassification risk elevated because reliance on FLSA/NLRA or common law definitions of employment
- Reclassification creates recordkeeping, counting, other challenges
- Depending on nature of contractual, other relationships, often experience challenges getting data and records from other entities
Attorney-Client Privilege, Work Product, and Other Evidentiary Rules
Evidentiary and Other Risk Issues of Outsourced and Other Non-Traditional Relationships

“It’s true, I did jump over the moon. I had waaaaay too much coffee that day!”
Risk Management Tips

- Classifications and activities implications are broader than EEO-1 Report
- Recognize and manage risks of unprivileged discussions among parties
- Don’t be an ostrich: realistically classify relationships and operate accordingly
- Know and apply proper tests for worker classification
- Affirmatively evaluate worker’s classification on integrated basis
- Try to classify worker consistently for all purposes; when you don’t, know and document legal and factual justification
- Collect, retain, and audit records and documentation needed as you go
- Build safeguards into agreements and structure nontraditional arrangements to minimize reclassification risks, capture and retain evidence and documentation, promote defensibility
- Have a disaster recovery plan
- Insurance, indemnity
- Consider implications of relationships and data on other exposures, business objectives, and qualifications
EEOC Update

- EEOC published in the Federal Register 6570-01P 9/12/2019: Intention to renew three years of Component 1 data collection
- Not renew collection of Component 2 data
  - Note estimated burden to employer $297 million and 9,167,393 hours of labor
QUESTIONS?