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NAVIGATING THE NEW EEO-1 FORM & DOL GUIDANCE WITHDRAWALS

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DOL Withdraws Guidance on Joint Employment & Independent Contractors

Introduction

US Secretary of Labor Alexander Acosta announced in a June 7, 2017 press release that the US Department of Labor (DOL) has withdrawn two of its recent administrator's interpretations.

Introduction

One of the administrator's interpretations, issued in 2015, focused on the misclassification of employees as independent contractors under the Fair Labor Standards Act (FLSA) and indicated that the DOL would be more closely scrutinizing independent contractor classifications.

Introduction

The other administrator's interpretation, issued in 2016, examined joint employment relationships under the FLSA.

Introduction

Both interpretations were widely considered to be an attempt by the DOL to expand the coverage and enforcement of the FLSA. The withdrawal of the guidance documents likely indicates a shift in enforcement focus of the DOL under the Trump administration.

Background of Administrator's Interpretations

Administrator's Interpretation 2015-1, which was issued on July 15, 2015, provided guidance concerning the DOL's stance on the classification of workers as independent contractors instead of employees. Notably, in its 2015 interpretation, the DOL stated its opinion that "most workers are employees under the FLSA's broad definitions."



Background of Administrator's Interpretations

The document laid out an expansive definition of employee under the FLSA, which focused on the "economic realities" of the worker/employer relationship.

Background of Administrator's Interpretations

Likewise, the guidance signaled that the DOL would increase its enforcement efforts aimed at misclassified independent contractors and indicated that the DOL would closely scrutinize any worker a company classified as an independent contractor.

Background of Administrator's Interpretations

Administrator's Interpretation 2016-1 was issued on January 20, 2016, and arguably sought to broaden the definition of joint employers under the FLSA. In the guidance document, the DOL noted that a broad joint employment standard would "achieve statutory coverage, financial recovery, and future compliance [with the FLSA]."



Background of Administrator's Interpretations

Further, the DOL indicated that its enforcement efforts would likely target larger employers, stating, "Where joint employment exists, one employer may also be larger and more established, with a greater ability to implement policy or systemic changes to ensure compliance."



Background of Administrator's Interpretations

The guidance also discussed two primary types of joint employment relationships: (1) horizontal joint employment, which arises where two separate but related entities each employ the same employee; and (2) vertical joint employment, where one entity contracts with another to provide services or staff, such as temporary workers.



Takeaways for Employers

Although Secretary Acosta's press release stated that the withdrawal of the administrator's interpretations "does not change employer's legal responsibilities," the removal of the two interpretations could be a signal that the DOL will relax its enforcement efforts of independent contractor misclassification and revert back to its previous approach to joint employer liability.



Takeaways for Employers

It is not clear at this time if the DOL will implement new guidance, or if it will be simply withdrawing its previous guidance. However, the withdrawal appears to confirm prior statements that the Trump administration would roll back several employment-related changes implemented under the Obama administration.



Takeaways for Employers

Employers should monitor whether other government agencies will follow suit—such as the NLRB, which adopted its own broad joint employer standard in 2015's decision, *Browning-Ferris Industries of California, Inc.*





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New EEO-1 Form Collecting Pay Data



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TOPICS INCLUDE:

- History and context
- Who must file
- The existing EEO-1 Form
- The revised EEO-1 Form
- Legitimate concerns
- Practice tips

Introduction

The Equal Employment Opportunity Commission (“EEOC”) has announced substantive changes to its Employer Information Report (“EEO-1”).

The first revised EEO-1 Reports must be filed by March 31, 2018.

Goals

Understanding:

- What needs to be done in order to file an accurate EEO-1
- What compliance looks like
- What the EEOC looks for
- What private attorneys look for
- How to blend requirements with best practices



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- History

History

The Equal Pay Act (1963) and Title VII of the Civil Rights Act (1964) prohibit discrimination in the terms and conditions of employment that is motivated by gender, race, religion, ethnicity, and national origin.

This includes decisions impacting compensation.

The EEOC

The EEOC was established on July 2, 1965. Its mandate can be found in Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

The EEOC is charged with the responsibility of enforcing anti-discrimination statutes.



The EEO-1

The EEO-1 is a tool used by the EEOC in order to obtain information from employers.

Historically, the information was used to track employment opportunities in different industries.

The current EEO-1 was not used as a tool to combat pay disparity.

Not Enough Has Been Done

Studies show that:

- Women earn 79% of what men earn
- Men dominate 26 of 30 top earning jobs
- Median average earnings for African Americans are 75% of those for Whites

Combat Pay Disparity

The EEOC boasts that advancements have been made in combating discrimination.

However, the EEOC recognized that not enough has been done to combat pay inequity.

The EEOC reasoned that pay data and software can be utilized to identify and address inequity that violates Title VII.



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- Who Must File

Who Must File

According to the EEOC, Companies:

Subject to Title VII with 100 or more employees excluding state and local governments, primary and secondary school systems, institutions of higher education, Indian tribes and tax-exempt private membership clubs other than labor organizations;

Or ... (continued)

Who Must File (continued)

According to the EEOC, Companies:

Subject to Title VII who have fewer than 100 employees if the company is owned or affiliated with another company, or there is centralized ownership, control or management (such as central control of personnel policies and labor relations) so that the group legally constitutes a single enterprise and the entire enterprise employs a total of 100 or more employees.



Who Must File (continued)

Government contractors with 50 or more employees must also file.

The Count

The count of employees is based on the number of employees working during a pay period that falls between October 1 and December 31, 2017. All employees identified in the pay period are included, even employees who no longer work for the company at the end of the year.

The employer picks the pay period.





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- The Existing EEO-1

The Existing EEO-1

- Review of the existing EEO-1
- Purpose
- Available resources
- Filing deadlines
- Steps that can and should be taken by employers using this form

The Existing EEO-1

Section B—COMPANY IDENTIFICATION <i>(To be answered by all employers)</i>			OFFICE USE ONLY
1. Parent Company			
a. Name of parent company (owns or controls establishment in Item 2) omit if same as label			a.
Address (Number and street)			b.
City or town	State	ZIP code	c.

The Existing EEO-1

2. Establishment for which this report is filed. (Omit if same as label)					.
a. Name of establishment					d.
Address (Number and street)	City or Town	County	State	ZIP code	e.
b. Employer Identification No. (IRS 9-DIGIT TAX NUMBER)					f.
c. Was an EEO-1 report filed for this establishment last year? <input type="checkbox"/> Yes <input type="checkbox"/> No					



The Existing EEO-1

Section C—EMPLOYERS WHO ARE REQUIRED TO FILE *(To be answered by all employers)*

<input type="checkbox"/> Yes	<input type="checkbox"/> No	1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?
<input type="checkbox"/> Yes	<input type="checkbox"/> No	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?
<input type="checkbox"/> Yes	<input type="checkbox"/> No	3. Does the company or any of its establishments (a) have 50 or more employees <u>AND</u> (b) is not exempt as provided by 41 CFR 60-1.5, <u>AND</u> 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? If the response to question C-3 is yes, please enter your Dun and Bradstreet identification number (if you have one): <input type="text"/>

NOTE: If the answer is yes to questions 1, 2, or 3, complete the entire form, otherwise skip to Section G.



The Existing EEO-1

Section D-EMPLOYMENT DATA

OF 100 -

Employment at this establishment - Report all permanent full- and part-time employees including apprentices and on-the-job trainees unless specifically excluded as set forth in the instructions. Enter the appropriate figures on all lines and in all columns. Blank spaces will be considered as zeros.

Job Categories	Number of Employees (Report employees in only one category)														
	Race/Ethnicity														
	Hispanic or Latino		Not-Hispanic or Latino												Total Col A - N
			Male						Female						
	Male	Female	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	White	Black or African American	Native Hawaiian or Other Pacific Islander	Asian	American Indian or Alaska Native	Two or more races	
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	



The Existing EEO-1

Executive/Senior Level Officials and Managers	1.1
First/Mid-Level Officials and Managers	1.2
Professionals	2
Technicians	3
Sales Workers	4
Administrative Support Workers	5
Craft Workers	6
Operatives	7
Laborers and Helpers	8
Service Workers	9
TOTAL	10
PREVIOUS YEAR TOTAL	11

The Existing EEO-1

Section E - ESTABLISHMENT INFORMATION (Omit on the Consolidated Report.)

1. What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.)
-



The Existing EEO-1

Section F - REMARKS

Use this item to give any identification data appearing on the last EEO-1 report which differs from that given above, explain major changes in composition of reporting units and other pertinent information.





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- Proposed EEO-1

Proposed EEO-1

On January 29, 2016, the EEOC publicized proposed revisions to the EEO-1, including collections of:

- Pay data from employers
- Hours worked
- Broken down by protected classes and job classifications

The EEOC will use this data to bring systemic disparate pay claims.

Review Period

The EEOC went through a review and comment period.

The EEOC recently announced that it will proceed with the proposed EEO-1 Form beginning with March 2018.

It is important to compare the two forms to appreciate the profound differences.

Proposed EEO-1

Proposed parts A-C very similar:

SECTION A - TYPE OF REPORT

1. Indicate by marking in the appropriate box the type of reporting unit for which this copy of the form is submitted (MARK ONLY ONE BOX).

<input type="checkbox"/> Single-establishment Employer Report	<input type="checkbox"/> Multi-establishment Employer: <input type="checkbox"/> Consolidated Report (Required) <input type="checkbox"/> Headquarters Unit Report (Required) <input type="checkbox"/> Individual Establishment Report (submit one for each establishment with 50 or more employees) <input type="checkbox"/> Special Report
---------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

2. Total number of reports being filed by this Company (Answer on Consolidated Report only):

SECTION B - COMPANY IDENTIFICATION

1. Name of parent company that owns or controls establishment in Item 2 (omit if same as above).

a. Parent Company:

Address (Number and Street):

City or Town: State: ZIP code:

2. Establishment for which this report is filed (omit if same as above)

a. Name of Establishment:

Address (Number and Street):

City or Town: County: State: ZIP code:

b. Employer Identification No. (IRS 9-DIGIT TAX NUMBER):

c. Was an EEO-1 report filed for this establishment last year?
 Yes No

SECTION C - EMPLOYERS WHO ARE REQUIRED TO FILE

1. Does the entire company have at least 100 employees in the payroll period for which you are reporting?
 Yes No

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?
 Yes No

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 60-1.3, AND either (1) is a prime government contractor or federal subcontractor, and has a contract, subaward, 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?
 Yes No

4. If the response to the above question (C - 3) is Yes, please enter your Dun and Bradstreet identification number (if you have one):

NOTE: If an answer to questions 1, 2 or 3 of Section C is "Yes", complete the entire form, otherwise skip to Section D.

Proposed EEO-1

Titles

- Executive / Senior Level Officials and Managers
- First / Mid-level Officials and Managers
- Professionals
- Technicians
- Sales Workers
- Administrative Support Workers
- Craft Workers
- Operatives
- Laborers and Helpers
- Service Workers



Proposed EEO-1

Executive Senior Level Officials and Managers Salary Set

\$19,239 and under
\$19,240 - \$24,439
\$24,440 - \$30,679
\$30,680 - \$38,999
\$39,000 - \$49,919
\$49,920 - \$62,919
\$62,920 - \$80,079
\$80,080 - \$101,919
\$101,920 - \$128,959
\$128,960 - \$163,799
\$163,800 - \$207,999
\$208,000 and over



Proposed EEO-1

Categories

For each cell provide the <u>TOTAL Number of Hours</u> worked in last year														
Race/Ethnicity														Total Col A- N
Hispanic or Latino		Non/Hispanic or Latino												
		Male						Female						
Male	Female	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races	
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O



Proposed EEO-1

SECTION E – ESTABLISHMENT INFORMATION *(Omit on the Consolidated Report)*

What is the major activity of this establishment? (Be specific, i.e., manufacturing steel castings, retail grocer, wholesale plumbing supplies, title insurance, etc. Include the specific type of product or type of service provided, as well as the principal business or industrial activity.)

Proposed EEO-1

SECTION F – REMARKS

Use this item to give any identification data appearing on the last EEO-1 report which differs from that given above, explain major changes in composition of reporting units and other pertinent information.

Proposed EEO-1

Section G

SECTION G - CERTIFICATION

Check One: <input type="checkbox"/> 1. All reports are accurate and were prepared in accordance with the instructions. (Check on Consolidated Report Only) <input type="checkbox"/> 2. This report is accurate and was prepared in accordance with the instructions.			
Name of Certifying Official	Title	Signature	Date
Name of Person to contact regarding this report	Title	Address (Number and Street)	
City and State	Zip Code	Email Address	Telephone No. (including Area code and Extension)

All reports and information obtained from individual reports will be kept confidential as required by Section 708(e) of Title VII.
WILLFULLY FALSE STATEMENTS ON THIS REPORT ARE PUNISHABLE BY LAW, U.S. CODE, TITLE 18, SECTION 1001





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- Overriding Concerns

Overriding Concerns

The revised EEO-1 Form includes information that would increase the amount of data collected from 140 data points to 3,360 (gender, race, ethnic, occupational categories, and pay bands).

This, coupled with the new software, creates tools for prosecution of improper pay cases.



Continuing Concerns

With a click of a button the EEOC will be able to determine if there is a difference in pay based upon employees in any protected class.

The information can also be accessed by private attorneys.

Employers Need Time

If pay disparities exist:

- 2017 disparities cannot be corrected in 2018
- Unequal pay
- Overall diversity
- Senior level positions
- Developing talent pools





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- Practice Tips

Practice Tips

- Plan ahead to ensure that reporting can be done in a timely manner and be accurate
- Develop processes to capture all required data now
- Coordinate HR, HRIS, payroll and departments
- Secure vendors early
- Tests



Carrots

There are bona fide defenses:

- Seniority system
- Merit system
- Education and training
- Geography
- Travel

Kick the Tires

If there is a bona fide defense, review it from the perspective of:

- The employer
- The employee
- The plaintiff's lawyer
- The court

Kick the Tires

- Analyze the same type of data that the EEOC will review once the revised EEO-1 is filed
- Act early in 2017
- The EEOC hopes employers will use pay data to self-correct
- Create a mock EEO-1

Tips

1. Recruitment
2. Hiring
3. Promotion
4. Management training
5. Job descriptions

Tips

6. Career development
7. X Corp. University
8. Impact of mergers, acquisition, growth, downsizing
9. Structured compensation
10. Documentation

Questions?

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