

## EEO-1 Pay Reports: Rulemaking In The Absence Of Evidence

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On Feb. 1, 2016, the U.S. Equal Employment Opportunity Commission published its proposed revision of the EEO-1 form that must be completed by all employers with 100 or more employees.[1] Based on the required protocols for the new form, each covered employer would be required to provide annually the number of employees (as well as their hours worked), in broadly defined occupational categories,[2] whose pay falls within designated pay brackets. Because the EEOC proposes to have these pay distributions and hours submitted separately by gender, race and ethnicity, employers may find they are required to enter over 3,000 items of data for each entity that files an EEO-1 report.[3]



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The stated purpose for imposing new reporting obligations is to assist the EEOC in “improv[ing] enforcement of federal laws prohibiting pay discrimination.”[4] Yet, the pay ranges specified in the proposed EEO-1 reporting forms are broader than the pay differences the EEOC is trying to detect. The midpoint of each pay range is about 27 percent higher than the midpoint of the immediately lower pay range, and differences within the same pay range are over 20 percent.[5] As a result, pay differences that should be concerning will go unreported and unnoticed because in many instances they will fall within the same pay bracket. The EEO-1 forms therefore are the equivalent of a thermometer that reports a patient’s temperature in increments of five degrees when most illnesses elevate body temperature by two or three. Consequently the wide pay ranges proposed by the EEOC might fail to identify companies that discriminate in the pay of similarly situated employees.



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The breadth of the occupational categories is similarly problematic. There is no reason to expect nondiscriminating employers to provide equal compensation to all “professionals,” an occupational group that includes lawyers, doctors, architects and morticians; or to all “craft workers,” which includes both boilermakers and bicycle repairers.[6] The EEOC recognizes, of course, that pay differences within these extraordinarily broad occupational groups are not actionable, and intends to use these data for preliminary tests. However, the data the EEOC proposes to collect will be of use only if they point reliably to pay differences within narrower job categories, which may be probative of discrimination.

To demonstrate the potentially confounding signals that the EEOC’s new data collection will yield, we use Office of Personnel Management data that we were provided regarding more than one million employees in over 60 federal government agencies, for the fiscal year ending Sept. 30, 2012. The database includes pay, gender, date of hire, age, educational level, and a detailed occupational title for each employee, along with the federal government agency where he/she worked. To assess the efficacy of the EEOC’s new regulations, we imagined that each federal agency was a separate employer, obliged to file its own EEO-1 report. We restricted our sample to broad occupational categories in each agency that employed at least 50 people and included at least one person of each gender.

We then addressed the following hypothetical: Suppose the EEOC were to identify the five agencies (our pseudo-employers) with the most significant gender pay gap,[7] as determined by the Mann-Whitney test described by the EEOC at footnote 47 of their proposal. Would that criterion reliably steer the EEOC towards the agencies that would have been identified by more comprehensive regression models? In effect, we are asking whether the data collected by the EEOC can be used to create a reliable proxy for true pay differences. We were able to perform this test for four broad occupational groups.[8]

Based on the EEOC’s methodology, many federal agencies would be flagged for further investigation. To illustrate the magnitude of gender pay gaps, we first compared raw average differences in pay for full-time employees.[9] Among other findings, we discovered:

- The largest gender pay difference occurred among technical employees at the Department of Energy — women earn 34.5 percent less than men.
- Among administrative employees, the largest gender gap occurred within the Merit System Protection Board — the agency that hears appeals of discrimination charges within the federal government.
- In only one federal agency, the Small Business Administration, did women earn less, on average, than men in clerical positions.

Next, we performed more detailed regression analyses on these data.[10] We found that when we used our regression model to control for additional factors, the gender difference in average pay within an agency, within broad occupational groups, often changed dramatically. For example, among technical employees in the General Services Administration, the gender gap based on average pay was 29 percent, and using the regression model the gap disappeared entirely.

For each occupation group, we ranked agencies from worst to best in terms of the relative pay of women using both the EEOC’s proposed test and the results of individual pay regressions. We then considered how many of the five “worst” agencies, in terms of the EEOC’s proposed test, maintained that ranking based on our regression model. The results for professionals are presented in the following table:

<b>Agency Rank in Terms of Women’s Relative Pay for Professionals (Worst to Best)</b>	<b>Using EEOC’s Proposed Test</b>	<b>Using Regression Model and Individual Data</b>
1	Defense Nuclear Facilities Safety Board	International Boundary and Water Commission
2	Smithsonian Institution	Defense Nuclear Facilities Safety Board
3	Export-Import Bank of the United States	Export-Import Bank of the United States
4	Corporation for National and Community Service	Federal Housing Finance Agency
5	Broadcasting Board of Governors	National Credit Union Administration

Not only does the EEOC's criterion include agencies among its top five that the regression model does not, the EEOC's criterion would have failed to include the agency (the International Boundary and Water Commission) among its top-five "discriminators" that our regression model would have flagged as having the largest gender pay gap.[11] The EEOC also would have missed the fourth- and fifth-worst agencies. Instead, the EEOC's criterion included an agency ranked 14th (according to our regression) among the five worst.

The EEOC's proposed test fared no better among technicians. It identified two agencies that are among the five worst discriminators, but also included the 11th and 19th ranked agencies according to the regression. The EEOC's test fared worst among administrative employees. Although it identified two of the bottom five agencies (according to the regression), the EEOC's proposed test also would have identified agencies that ranked 21st, 43rd and 56th as three of the worst five "discriminators." With scarce resources, targeting the 56th least likely discriminator for further investigation cannot be efficient.

Women as a group fared best in clerical positions. However, the second worst-ranking agency probably would have escaped further scrutiny because according to the EEOC's proposed criterion, that agency favored women, although the regression indicated women are paid less than men. The Mann-Whitney test also erred in the other direction — it identified the 15th ranked agency as one of the five worst discriminators.

In summary, if the criterion used to assess the EEOC's proposed data gathering is its ability to identify gender pay differences that are most likely to be actionable, our results suggest it is too crude to convey meaningful information. Whether the employers it identifies would have escaped detection if the EEOC relied primarily on charge-filing to root out discrimination is an important question, but one we cannot answer. In addition, the proposed rule should be evaluated in terms of false positives, i.e., the frequency with which it will mistakenly target nondiscriminators for investigations. In our limited experiment we have seen instances in which agencies that superficially seem to pay women significantly less are found, upon closer scrutiny, to be among those with the smallest gender pay gap.

Our results may seem surprising in light of the 143-page pilot study commissioned by the EEOC to determine "how compensation earning data could be collected from employers on the EEOC's survey collection systems." [12] That study did not investigate the efficacy of the new regulations but merely explained how the data could be collected. For example, the study did not examine the rate of false positives that would likely result from gender (or race), differences in age, tenure, detailed occupation or other legitimate factors that influence pay.

While the goal of more accurately determining instances of potential pay discrimination from EEO-1 reports is sensible, our analysis illustrates that the EEOC's proposed new data collection system is unlikely to accomplish this goal. The employer's reporting burden is substantially increased without a commensurate increase in analytical precision. In spite of its efforts, the EEOC's proposal is unlikely to aid enforcement of federal discrimination laws because the statistical methodology will often direct the EEOC to investigate companies with average gender/race pay differences that might instead be explained by legitimate factors.

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[1] Agency Information Collection Activities: Revision of the Employer Information Report (EEO-1) and

Comment Request, Federal Register / Vol. 81, No. 20 / Monday, February 1, 2016 / Notices (“EEOC Comment Request”).

[2] The occupation groups are: 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, and Service Workers.

[3] The proposed EEO-1 form includes 12 pay ranges for 14 demographic groups (e.g. White Non-Hispanic Women) for the 10 occupation groups in footnote 1; the number of employees in each cell and average hours worked must be recorded. Previously, the EEOC required only employee counts by occupation and demographic group (140 items).

[4] EEOC Comment Request, p. 5114.

[5] The proposed EEO-1 pay ranges are: under \$19,240; \$19,240 to \$24,439; \$24,440 to \$30,679; \$30,680 to \$38,999; \$39,000 to \$49,919; \$49,920 to \$62,919; \$62,920 to \$80,079; \$80,080 to \$101,919; \$101,920 to \$128,959; \$128,960 to \$163,799; \$163,800 to \$207,999; and \$208,000 and over.

[6] A guide to EEO-1 jobs is available at <https://www.eeoc.gov/employers/eeo1survey/jobclassguide.cfm>. Many companies employ a more narrow range of professionals, but this may not eliminate the problem. For example, surgeons and registered nurses are “professionals” although surgeons earn more than three times as much as registered nurses, on average (BLS OES survey).

[7] We consider gender pay differentials because the OPM data we received did not include race or ethnicity.

[8] These groups are Professional, Clerical, Administrative, and Technical. While these groups are not identical to the EEOC’s, we believe that they are sufficiently similar for illustrative purposes.

[9] We were able to calculate gender differences in average pay by agency in the OPM data, but note that average pay will not be included in EEO-1 reports.

[10] Multiple regression is a statistical technique that controls for the simultaneous influence of several factors that jointly affect a dependent variable, such as pay. Our regressions control for age (and age squared), federal government tenure (and tenure squared), education, and occupation indicator variables. Our regressions are limited by the employee and job characteristics we were able to obtain and omit important factors that influence pay, such as measures of job performance and location. In addition, we examine only year-end pay and could not analyze pay decisions. For these and other reasons our regressions are not conclusive regarding allegations of pay discrimination but are merely an alternative tool indicating where further EEOC investigation might be warranted.

[11] While our pay regression is an imperfect tool for identifying actionable discrimination, it compares the pay of men and women in the same detailed job while controlling for differences in education,

government tenure, and potential labor market experience (age). The Mann-Whitney test compares the number of men and women in broad pay categories within a broad occupation group and therefore is almost surely a less reliable indicator of actionable discrimination.

[12] Sage Computing, September 2015. Final Report: To Conduct a Pilot Study for How Compensation Earning Data Could Be Collected From Employers on EEOC's Survey Collection Systems (EEO-1, EEO-4, and EEO-5 Survey Reports) and Develop Burden Cost Estimates for Both EEOC and Respondents for Each of EEOC's Surveys (EEO-1, EEO-4, and EEO-5).

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