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Employment Law Outlook

Spring 2016

EEOC PROPOSES NEW EEO-1 REPORTING REQUIREMENTS FOR PAY DATA

William M. Furr

On January 29, 2016, the EEOC proposed revisions to the EEO-1 forms requiring employers with more than 100 employees to report pay data for its employees. Current regulations require employers with more than 100 employees to file EEO-1 reports listing the race, ethnicity and gender of employees. The EEOC now proposes to add employees' pay ranges and hours worked to the information collected on the EEO-1 reports. Reporting requirements under the proposed rule would take effect with the September 2017 EEO-1 filings by employers. The federal government estimates that the new rule would cover over 63 million Americans.

The EEOC and OFCCP propose to use this additional data in order to identify those employers who are not paying their employees equally. The federal agencies plan to develop algorithms to determine whether employers' pay data indicates pay disparities. According to the EEOC, the pay data collection would also allow the EEOC to compile and publish aggregated data that will help employers conduct their own analysis for voluntary compliance with the Equal Pay Act and other federal statutes.

The proposed rule requires employers to identify employees' hours worked and total W-2 earnings for a 12-month period. Employers will report W-2 pay in 12 pay bands starting with employees who earn less than $19,239 and ending with employees who make more than $208,000. The proposed rule does not require employers to report the salaries of each individual employee.

According to the EEOC, requiring employers to report aggregated data in pay bands allows the federal agencies to determine whether an employer's pay practices result in disparities among employees. Commentators have criticized the EEOC's proposed rule as being too burdensome on employers particularly because it may take significant time to collect the pay data in the form requested by the EEOC. Employers have expressed concern that the new reporting requirements will result in increased Equal Pay Act litigation against employers

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ACA – HOURS OF SERVICE AND DISABILITY PAYMENTS

Cher E. Wynkoop & Corina V. San-Marina

As mentioned in our previous article, on December 16, 2015, the IRS issued Notice 2015-87 (Notice), which provides lengthy and complex guidance on how various provisions of the Affordable Care Act (ACA) apply to employer-provided health coverage. One issue addressed by the Notice relates to hours of service earned by an employee during a period of disability and the status of the employee as a full-time employee.

To determine whether a particular employee is a full-time employee for purposes of the employer mandate, an employer must count an employee's "hours of service." An hour of service is defined as any hour for which an employee is paid or entitled to payment: 1) for work performed; or 2) for periods during which no work is performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence. One issue that has been unclear is whether this second category includes hours for which an employee receives disability benefit payments from a third party such as an insurance company or a trust, or whether it only includes hours for which an employee receives disability benefit payments directly from an employer.

The Notice clarifies that a short-term or long-term **disability payment made by or from a trust fund or insurer to which the employer contributed or paid premiums is deemed to be made by the employer, if the employee has not been terminated from employment and therefore the hours covered by the disability period should be counted as hours of service.** However, if the employee paid the premiums with after-tax contributions (so the benefits received are not taxable to the employee), this arrangement would be treated as an arrangement to which the employer did not contribute, and payments from the arrangement would not give rise to hours of service.

Additionally, the final rules provided, and the Notice confirms, that hours of service do not include: (1) hours

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NEW RULE ENDS VISA-FREE TRAVEL FOR CERTAIN VISITORS

Susan R. Blackman

The Visa Waiver Program allows citizens of 38 countries to travel to the United States without a visa, for business or pleasure, for up to 90 days. The program was created to encourage tourism and business travel from countries deemed low risk. Twenty million visitors come to the United States each year visa-free. To participate, eligible visitors complete a short online application through the Electronic System for Travel Authorizations (ESTA). The system provides proof of travel authorization within 48 hours unless the applicant is on a "no fly" list or fails to meet other criteria.

New Law Focuses on Ties to "Areas of Concern"

In response to terrorist acts at home and abroad, Congress has tightened this program. The Visa Waiver bill was attached to the U.S. budget law following the attacks in Paris and California.

The "Terrorist Travel Prevention and Visa Waiver Program Reform" bill imposes restrictions on visitors who have traveled to Iraq, Iran, Syria, or Sudan (not including South Sudan) since March 1, 2011. Individuals who hold dual citizenship with a Visa Waiver country and one of the four listed countries are also prohibited from entering the U.S. without a visa, even if they acquired dual citizenship by operation of law and never traveled to that country (e.g., they were born in France to an Iraqi father). The Secretary of Homeland Security can designate additional countries as "areas of concern." Yemen, Somalia and Libya have been added by the Secretary.

ESTA approval is usually valid for two years, but U.S. Customs and Border Protection (CBP) has already notified some affected dual citizens that their ESTA approval is no longer valid. Persons with revoked ESTA authorization will not be allowed to board an airplane to the United States. All visitors affected by the restrictions must apply for a visitor visa at a U.S. Consulate in order to travel here, unless a waiver applies. Visa application involves forms, fees, fingerprints, and interviews conducted under oath. Applicants who traveled to one of the seven restricted countries will have to demonstrate legitimate purposes. Waivers to the restrictions may be available for: persons who traveled for international organizations or humanitarian NGOs; journalists; or those who went to Iraq for legitimate business purposes. The Secretary will consider whether a requested waiver meets national security interests on a case-by-case basis.

Must Have Compliant E-Passport for ESTA

Effective April 1, 2016, the law now requires ESTA visitors to present fraud-resistant passports that have electronic e-chips containing biometric data in order to enter the United States visa-free. To verify whether you possess a qualifying passport, look for the international e-passport symbol on the cover. See the CBP website for an example: http://www.cbp.gov/travel/international-visitors/esta. Participating governments must also certify by October 1, 2016, that they require fraud-resistant passports for travelers to enter their countries.

Notify Affected Associates

We recommend that you spread word of these changes to any colleagues, business associates, customers, conference attendees, or personal visitors who travel here pursuant to ESTA authorization. If they are directly affected by the new restrictions, they will need to plan to apply for a visitor visa (often issued as a combination B-1/B-2 visa, which can be used for business or tourism purposes).

Tips for Visa Applicants

Plan for potential delays in other visa application cases. The increase in visitor visa applications that will be filed by travelers previously eligible for ESTA may cause delays at U.S. Embassies and Consulate offices for other visa applications, including applications for work visas. The Department of State indicated that it will add staff members at U.S. Consulate offices if application volumes significantly increase, and it will develop ways to expedite interview appointments for former ESTA travelers with imminent needs for visas. Nonetheless, travelers planning to apply for U.S. visas should be prepared in case it takes more time than usual to obtain an interview appointment or more time for the Consulate to process the application after the interview. During post-interview processing, the applicant's passport remains at the Consulate office.

Travelers Who Are Not Affected by this Change

Canadian citizen visitors are visa-exempt pursuant to other agreements and are not affected by these restrictions. The new requirements also do not affect individuals who already have valid U.S. work visas or other types of visas.

Visitors with current ESTA approval may check the CBP website to see if the approval is still valid: https://esta.cbp.dhs.gov. We will continue to monitor future developments, such as the revised ESTA application form that CBP is expected to launch in the coming months.■

FOURTH CIRCUIT CLARIFIES JOINT EMPLOYMENT TEST IN TITLE VII CASES

Jerrauld C. C. Jones

Employers often assume they may have little or no liability for legal claims if they hire workers through a temporary employment agency. But when claims do arise, employees often sue both the staffing agency and the employer, arguing that both entities are liable under a "joint employer" theory.

Until recently, guidance on the test for joint liability has been fuzzy. Courts utilized multiple tests resulting in varying outcomes, and creating consternation for employers. However, the Fourth Circuit recently clarified its framework to determine joint employment for claims brought under Title VII of the Civil Rights Act of 1964 (Title VII).

The Fourth Circuit clarified its interpretation of joint employment in *Butler v. Drive Automotive Industries of America, Inc.*, 793 F.3d 404 (4th Cir. 2015), and put all employers on notice going forward that they cannot hide behind another entity to avoid liability.

In *Butler,* the plaintiff (Butler) was hired by Drive Automotive Industries (Drive) through a temporary employment agency, ResourceMFG (Resource). Butler alleged that her supervisor, a Drive employee, sexually harassed her on the job. Butler complained to Resource, which took no action. Later, Drive requested that Resource terminate Butler; Resource complied with the request and fired Butler. Butler sued both Drive and Resource for retaliation under Title VII and relied on a theory of joint employer liability.

The district court dismissed Butler's complaint against Drive, concluding that Drive was not her employer. On appeal, the Fourth Circuit disagreed with the district court and laid out a test for determining joint employment in Title VII claims. Joining seven other federal appellate courts, the Fourth Circuit adopted the "hybrid" test to determine the level of control a company has over a particular worker. The test considers nine factors, of which three are particularly important:

- Whether the entity has authority to hire and fire the individual;
- Whether the entity exercises day-to-day supervision of the individual, including employee discipline;
- Whether the putative employer furnishes the equipment used and the place of work.

The court explained that although no one factor is determinative and each assessment is fact-specific, the degree of control is the most important consideration in determining joint employment under Title VII.

Applying the test in *Butler*, the court decided that Drive was also Butler's employer because the temporary and regular work staff worked together using the same equipment, Butler performed work that was part of Drive's core business, and Drive exhibited significant control over Butler's employment (because she was fired at Drive's request). Drive unsuccessfully argued that it was not Butler's employer because she wore a staffing agency uniform, was paid by the staffing agency, and parked in a lot used only by temporary workers.

It is important to highlight that the Fourth Circuit stated the fact that an employee who signs a form disclaiming an employment relationship will not defeat a finding of joint employment.

It is important to highlight that the Fourth Circuit stated the fact that an employee who signs a form disclaiming an employment relationship *will not* defeat a finding of joint employment. Moreover, an individual's failure to appreciate an entity as an employer will not be dispositive. The burden is on the employer to ensure that they exercise an amount of control over a temporary employee that does not bind th\em as an employer unnecessarily.

Ultimately, employers should be conscious of the potential for joint employer liability whenever employees are provided from an outside source. Whether it is a staffing agency or a subcontractor, employers should be mindful of the amount of control they exert over temporary employees, as it may create unwanted liability in a Title VII suit.■

CONTACTS

Labor & Employment Law

William M. Furr, Chair	wfurr@wilsav.com
William E. Rachels, Jr.	wrachels@wilsav.com
Gregory A. Giordano	ggiordano@wilsav.com
Samuel J. Webster	swebster@wilsav.com
Christopher A. Abel	cabel@wilsav.com
Susan R. Blackman	sblackman@wilsav.com
David A. Kushner	dkushner@wilsav.com
Phillip H. Hucles	phucles@wilsav.com
Jerrauld C. Jones	jjones@wilsav.com

Immigration

Susan R. Blackman	sblackman@wilsav.com
James B. Wood	jbwood@wilsav.com

Employee Benefits

Cher E. Wynkoop	cwynkoop@wilsav.com
David A. Snouffer	dsnouffer@wilsav.com
Corina V. San-Marina	csanmarina@wilsav.com

WILLCOX SAVAGE
440 Monticello Avenue, Suite 2200
Norfolk, Virginia 23510

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even though the pay disparities could be explained by factors such as performance, education and tenure.

Although federal anti-discrimination statutes such as Title VII of the Civil Rights Act of 1964 have restrictions on what can be publicly disclosed by the EEOC, it is not clear whether the OFCCP is bound by the same restrictions. Commentators have urged the EEOC to add anti-disclosure provisions to the Final Rule prohibiting the EEOC and OFCCP from publicly disclosing the reported data.

Employers should review their pay data to determine whether there are pay disparities between their male and female employees. If a self-audit reveals such disparities, employers should plan to address them before the new reporting requirements become effective.

Public comments to the EEOC's proposed rule were due on April 1, 2016. A public hearing concerning the proposed rule will be scheduled sometime in 2016. Stay tuned for future developments.■

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for which an employee receives payment under a plan maintained solely to comply with worker's compensation, unemployment or disability insurance laws; or (2) hours for which payment only reimburses an employee for medical or related expenses.

In conclusion, employers who provide disability benefits for which employees pay no premiums or pay premiums on a pre-tax basis and who did not credit hours for service during the period of disability, or credited a limited number of hours, should revisit this practice and begin complying with the guidance provided in the Notice.■