

Employers Must Prep for New EEOC Data Reporting Rule

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Employers who thought that they had received a respite from the U.S. Equal Employment Opportunity Commission's proposed requirement to report information about employees' pay and hours worked when submitting their annual EEO-1 forms received a surprise on March 4, 2019, when the U.S. District Court for the District of Columbia resuscitated the revamped EEO-1 reporting obligation.

The additional data reporting requirement — which was first proposed by the EEOC in 2016 — had been stayed since Aug. 29, 2017, after the Office of Management and Budget vacated its prior approval of the new EEO-1 form. U.S. District Judge Tanya Chutkan vacated that stay and reinstated the reporting obligation. Although the EEOC filing portal has not yet opened for the current filing period, this ruling may leave employers scrambling to meet the upcoming May 31, 2019, EEO-1 submission deadline.

EEO-1 Pay and Hours Worked Data Collection: On and Off Again

Title VII of the Civil Rights Act of 1964 requires employers to keep and preserve records relevant to a determination of the occurrence of unlawful employment practices and authorizes the EEOC to mandate that employers produce reports of such records. Since 1966, the EEOC has required that employers with 100 or more employees file an EEO-1 form on an annual basis reporting the number of employees by job category, race, sex and ethnicity.

Certain government contractors and first-tier subcontractors with 50 or more employees and a contract in excess of \$50,000 are also subject to this requirement. Employers subject to the EEO-1 requirement who do business at one single establishment are required to submit a single EEO-1 report, while multi-establishment employers must submit separate reports for the headquarters and each establishment and a consolidated report including all employees.

In 2016, as part of an interagency initiative to combat pay discrimination, the EEOC announced that it would add a second “component” to the EEO-1, pursuant to which employers would be required to report the total number of full- and part-time employees by demographic category in each of 12 pay bands for each EEO-1 job category and also the aggregate hours worked by all of the employees in

each pay band.

The OMB approved the new EEO-1 data collection, as required by the Paperwork Reduction Act, or PRA, just over a month before the 2016 presidential election and one day after the EEOC submitted it to the OMB for review. In doing so, the OMB disregarded a groundswell of comments from employers contending that the cost of assembling and reporting this information would be burdensome and the utility of the information for its stated purpose of investigating potential pay discrimination would be limited.

Under the PRA, the OMB can revisit and stay prior approvals of agency data reporting requirements under certain circumstances. On Aug. 29, 2017, the OMB initiated a review of the new EEO-1 reporting requirement and stayed its prior approval. The OMB justified its change of course by noting the EEOC's post-approval publication of data file specifications for employers to use when submitting the EEO-1 data and also asserted that the data collection would be "unnecessarily burdensome" and "lack practical utility." Two public interest groups that advocate for pay equity, the National Women's Law Center, or NWLC, and Labor Council for Latin American Advancement, or LCLAA, subsequently filed suit in the U.S. District Court for the District of Columbia challenging the OMB's action.

Legal Challenge to the Stay: Revised EEO-1 On Again?

The NWLC and LCLAA, filed suit against the OMB, EEOC and other federal defendants asserting that the OMB's 2017 decision to stay the new EEO-1 reporting requirement was arbitrary and capricious and should, therefore, be overturned. Judge Chutkan agreed.

After finding that the NWLC and LCLAA had standing and that the 2017 stay was a final agency action subject to judicial review, the court analyzed whether the OMB's decision comported with its PRA regulations. The court found that the data file specification published by the EEOC after the new EEO-1 form's approval did not meaningfully affect the nature or burden of the data collection and had in fact been expressly contemplated by the EEOC's notices and prior submissions to the OMB.

Accordingly, the court dismissed this justification as a mere "technicality." Similarly, the court found that the OMB's second justification for its revocation of its approval of the EEO-1 form — that the initial burden estimate had been incorrect — was speculative and not supported by any reasoned analysis. The court further criticized the OMB for departing from the reasoning behind its prior, 2016 approval of the new EEO-1 form without providing any factual or legal analysis to explain its change in position. For these reasons, the court found the OMB's decision to be arbitrary and capricious.

The court then turned to the question of the proper remedy its decision required. Rather than remanding the issue to the OMB to repair the identified deficiencies in its analysis, the court vacated the stay issued on Aug. 29, 2017, effectively reinstating the OMB's prior approval of the revised EEO-1 form.

What Happens Next?

So where does this leave employers? Originally, the additional EEO-1 requirements had been slated to commence in March 2018, but prior to the court's decision, the requirements had been indefinitely stayed from going into effect. On Feb. 1, 2019, the EEOC extended the deadline for submission of 2019 EEO-1 data until May 31, 2019, due to the recent government shutdown. According to the EEOC's website, the 2018 EEO-1 survey will open for submission on March 18, 2019, but as of

March 14, 2019, the EEOC had not provided any guidance regarding the effect of the court's decision or what information employers will be required to submit by May 31, 2019.

Because the EEO-1 salary and hours reporting requirements never went into effect prior to the OMB's 2017 stay, many if not most employers have not been preparing to collect this data for submission in the 2018 EEO-1 report. As commentators noted during the EEOC's and OMB's 2016 approval of the new EEO-1 form, many employers do not maintain the types of demographic data traditionally collected by the EEO-1 and the newly required wage and hour data in the same systems.

If employers must comply with the new EEO-1 reporting requirements by May 31, 2019, there will be a scramble to collect and collate data from disparate human resources and payroll databases. Employers would be well advised to begin this process immediately, in light of the challenges of identifying, collecting and preparing wage and hour data for production to the government.

Aside from the practical burden of compiling this data and preparing the required report, employers now also face renewed risk that the data reported on an EEO-1 form will be used in support of discrimination claims. While this risk has always been at least notionally present, as EEO-1 reports are always requested and reviewed by the Office of Federal Contract Compliance Programs in its compliance reviews and can be requested in discovery by employees, the inclusion of compensation data increases the threat that these reports can pose in the hands of an adversarial government agency or plaintiff.

The district court's decision may not be the final word in this matter, however. The government could appeal the decision and seek a stay of the decision while the case is before the U.S. Court of Appeals for the D.C. Circuit. Given that the EEO-1 filing period opens in mere days and the deadline is only a few months away, any delay by the government in seeking or obtaining a stay would heighten the present uncertainty. Another possibility is that the EEOC could delay the onset of the requirement for employers to provide the additional information in recognition of employers' reliance on the OMB's 2017 stay and the fact that the EEOC itself may be unprepared to begin accepting this information.

With no guidance to date, however, it is uncertain whether the EEOC will postpone the deadline for both components of the EEO-1, only the new reporting requirement, or would allow the new requirement to remain in place as scheduled. Notably, the EEOC only has two of its five commissioners in place and lacks a quorum to take certain actions.

The court's decision is surely a shock to the system for employers who are subject to the EEO-1 reporting requirement. Regardless of what happens next, such employers would be wise to begin collecting the required EEO-1 pay and hours data immediately and preparing for the new requirements to remain in place beyond the 2018 reporting period.

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