



Pay Equity Advocates Push for Expanded EEO-1 Data

Insights

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Two advocacy organizations, concerned that national pay equity action has been stalled, recently filed a lawsuit in federal court aiming to resurrect the beefed-up EEO-1 reporting requirements which would have forced employers to shed light on their compensation practices. Not satisfied with the tide of activity that is taking place at the state level, these organizations are hoping the courts will breathe new life into the federal effort to bolster consistent pay equity standards across the country. What do employers need to know about this latest development?

Under Obama Administration, EEOC Sought to Obtain Pay Equity Data Through EEO-1 Report

For those unfamiliar with this story, some background may be helpful. Since 1966, the United States Equal Employment Opportunities Commission (EEOC), consistent with its rulemaking authority, has required businesses with 100 or more employees (and certain others) to file an annual EEO-1 Report. While the EEO-1's requirements have been modified over the years, it generally requires covered employers to report the number of individuals it employs by job category (i.e., Executive/Senior Level Managers, First/Mid-Level Managers, Technicians, Administrative Support Workers, Laborers and Helpers, etc.) and, within each job category, identify the total number of males and females with their respective races or ethnicities.

In 2010, the EEOC joined President Obama's National Equal Pay Task Force, which sought to address the pay gap between men and women. The EEOC decided, based on a study conducted by the National Academy of Sciences, that the EEO-1 Report would be an appropriate and effective vehicle for obtaining data concerning that gap. The EEOC therefore commissioned a pilot study to determine the best and most efficient means of accomplishing its goal.

In 2016, the EEOC published notices in the Federal Register concerning its intentions regarding the EEO-1 Report; most notably, that it would require covered employers to include compensation data along with the other demographic information. Public commentary was solicited, public hearings were held, and debate ensued. Ultimately, the EEOC continued to push for the collection of such data and, on September 29, 2016, the Office of Management and Budget (OMB) approved the initiative. Everything was on track for employers to include such data for the 2017 reporting period when they next submitted their EEO-1 Report by March 31, 2018.

Under Trump Administration, OMB Stayed Collection of Pay Equity Data

About a year later, on August 29, 2017, the OMB reversed course. It suspended the pending EEO-1 revision after business groups argued against it for a number of reasons, including the undue

burden it would cause and the questionable utility of the underlying data. Instead, it cited the need for further review in light of the fact that certain “data file specifications” the EEOC would require employers to use were not contained in the Federal Register notices, nor did the EEOC’s “burden estimates” account them. As a result of the OMB’s announcement, the EEOC published notice in the Federal Register on September 15 that covered employers need not include pay data in their 2017 EEO-1 Reports.

Pay Equity Advocates File Suit

In mid-November, two advocacy groups—the National Women’s Law Center and the Labor Council for Latin American Advancement—filed suit against the OMB, the EEOC, and certain of their directors and/or administrators in their official capacities. Their November 15 complaint, which was filed in District of Columbia federal court, consists of four allegations: that (1) the OMB exceeded its authority under the Administrative Procedures Act (APA); (2) the OMB’s action violated the APA insofar as it was contrary to regulation; (3) the OMB’s action violated the APA and the Paperwork Reduction Act insofar as it was contrary to statute; and (4) the OMB’s action was arbitrary and capricious. The suit largely seeks injunctive relief; in essence, it asks the court for an order reversing the suspension of the rule and for the rule to once again be slated to take effect.

We will keep you posted on this litigation as it progresses and, in particular, with respect to any major developments and decisions. Covered employers should pay particular attention because a decision in the plaintiffs’ favor could mean expanded EEO-1 reporting requirements in the not-so-distant future.

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