



Late Night Shocker: EEO-1 Once Again Poised To Gather Pay Data Information

Insights

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A federal judge in Washington D.C. sent shockwaves through the employment law community late last night by reinstating a revised version of the EEO-1 report, which is now once again set to gather compensation information from employers across the country. The resurrection of the controversial revisions, which had been cast aside by the White House shortly after President Trump took over, will almost certainly be challenged by an appeal and could also lead to further agency maneuverings. While we have not yet seen the final chapter of this controversy written, employers need to prepare for the possibility that their pay practices will soon be placed under a federal microscope like never before.

Rollercoaster History Of Heightened Pay Data Requirements

Historically, employers with 100 or more employees, and federal contractors with 50 or more employees, have been required to submit Employer Information Reports (EEO-1 reports) disclosing the number of employees in their employ by job category, race, sex, and ethnicity on an annual basis. But, over the past few years, there has been an ongoing battle at the federal level to determine whether the EEO-1 would also be used as pay data reporting tool.

The pendulum began to swing in 2016 when [the EEOC proposed changes](#) to the EEO-1 report which would require employers to include pay data and the number of hours worked for their workforces. The proposed reporting expansion was intended to identify pay gaps, which the agency could then use to target specific employers and investigate pay discrimination practices. The revised form, [revealed in October 2016](#), was to be submitted by employers by March 31, 2018, using a “workforce snapshot” of any pay period between October 1, 2017 and December 31, 2017.

But the pendulum swung back in employers’ favor in August 2017 when the White House scrapped the revised EEO-1 report. The Office of Management and Budget (OMB) announced that it had significant concerns with the revised reporting requirements, among them that “some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues.”

This action did not meet the approval of several advocacy organizations, and the National Women’s Law Center and the Labor Council for Latin American Advancement sued both the EEOC and the OMB in November 2017 in order to revive the beefed-up EEO-1 report. Last night’s decision was a culmination of this legal action.

Federal Court Judge Breathes New Life Into Revised EEO-1 Report

Judge Tanya S. Chutkan of the U.S. District Court for the District of Columbia issued a 42-page opinion in *National Women's Law Center v. OMB* reviving the revised EEO-1 report late in the evening on March 4. She determined that the OMB did not have good cause to change course because it could not demonstrate that any relevant circumstances warranting the action had occurred between the time the proposed rule was finalized and the time the revisions were cast aside. And although the OMB indicated that it did not believe the public had ample opportunity to review the proposals and offer meaningful comment, Judge Chutkan rejected this argument as “misdirected, inaccurate, and ultimately unpersuasive.”

To the extent that the OMB justified its decision to scrap the revised EEO-1 by stating that the data collection would be of limited utility, prove to be overburdensome, and raise privacy and confidentiality concerns, Judge Chutkan noted that these rationales all directly contradicted the findings by the EEOC when the agency initially issued the revisions in 2016. “OMB failed to explain these inconsistencies,” the judge said, which fell afoul of the legal standard requiring an agency to explain “why it chose to do what it did.”

The judge noted that federal agencies are free to change their existing policies, but to do so they must “provide a reasoned explanation for the change.” Instead, in this case, she ruled that the OMB’s action in staying the EEOC’s collection of pay data was “arbitrary and capricious” because it “totally lacked the reasoned explanation” required by federal law. She concluded by saying that the OMB provided “inadequate reasoning” to support its decision to stay the data collection, and that courts “do not defer to an agency’s conclusory or unsupported suppositions.”

What’s Next?

Judge Chutkan ordered the collection of pay data to go back into effect, noting that employers had over a year to prepare for the revised reports back in 2016-2017 and should have expected the possibility that the amplified EEO-1 could be resurrected. This means that most private employers with 100 or more employees will once again have to gather and submit compensation information broken down by race, sex, and ethnicity to the EEOC in the very near future.

We expect that we will soon hear information from the agency about whether the 2018 EEO-1 reports—due to be submitted by May 31—will need to include this compensation information or whether employers will receive some sort of reprieve. Whether this could come in the form of a delayed reporting timeframe or a delay in the revised report until next year is uncertain.

Meanwhile, we expect the OMB to appeal the decision to the D.C. Circuit Court of Appeals and seek a delay of the revised EEO-1’s implementation while the appeal is pending. That would put the revised EEO-1 back on ice once more and provide employers with some immediate breathing room. And it would not be surprising if the agency went back to work to once again attempt to revise the regulations in a way that would potentially satisfy further judicial scrutiny.

Setting aside predictions on what might happen, you should operate under the assumption that you will soon have to comply with the revised EEO-1 reporting rules. This means that you should make it a priority to review current pay systems and identify and address any areas of pay disparity. It is critical to take steps now to minimize increased scrutiny that could soon come your way.

By conducting your own audit of pay practices, you will be able to determine whether any pay gaps exist that might catch the eye of the federal government if you are forced to turn over this information. You may have time to determine whether any disparities that may exist can be justified by legitimate and non-discriminatory explanations, or whether you will need to take corrective action to address troublesome pay gaps.

Accordingly, we also recommend you conduct a pay audit to gain an understanding of your pay practices. Due to the increased complications caused by varying state legislative developments, we strongly encourage you to get your attorney involved in this analysis early in the process.

As the future of the revised EEO-1 is resolved in the coming months, we will continue to assess the situation and provide necessary updates, so you should ensure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our [Pay Equity Practice Group](#) or our [Affirmative Action and Federal Contract Compliance Practice Group](#).

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