Employers Get A Pay Data Reporting Reprieve – But For How Long?

Insights
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Despite a recent court ruling, resurrecting the requirement that employers turn over compensation information along with standard demographic figures, the EEOC this morning unveiled its 2019 EEO-1 reporting system that fails to include any request for such pay data. It appears as though employers will not have to provide information about their employees' 2018 compensation for the time being – although you should still be prepared for this to change at a moment's notice, and should begin preparing for such pay disclosures in the near future.

Brief Background
As most employers know, those businesses with 100 or more employees, and federal contractors with 50 or more employees, have long 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. In 2016, the EEOC announced changes to require employers to include pay data and the number of hours worked for their workforces in their EEO-1 reports in the hopes of identifying pay gaps and investigating pay discrimination practices.

But before the first disclosures were to be submitted in March 2018, the White House scrapped the revised EEO-1 report, as the Office of Management and Budget (OMB) announced that it had significant concerns with the revised reporting requirements. Specifically, it identified that "some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues."

Court Decision Resurrects Pay Data Reporting But Raises Significant Questions
Several advocacy organizations, including the National Women's Law Center and the Labor Council for Latin American Advancement, took the White House to court to force the beefed-up EEO-1 report back into service. On March 4, a federal court judge in Washington, D.C. agreed with their challenge and reinstated the pay data requirement.

Judge Tanya S. Chutkan 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. 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.

But Judge Chutkan's decision raised a significant number of questions and concerns for employers. After all, the window of time for employers to submit their EEO-1 reports (between March 18 and May 31, 2019) was quickly approaching, and many employers were well on their way to having the data for their FY2018 reports completed. To turn around and require employers to collect and organize the necessary pay data (and hours worked) on such short notice would create logistical nightmares. Would the EEOC once again delay the reporting period as it had done several times previously? If not, would employers get a ramp-up period granting them some additional grace when it comes to collecting and reporting the pay data? Or would they need to operate as if this requirement had been in effect the entire time, as the federal court judge had essentially mandated?

Today's Development Answers Some – But Not All – Questions

In the hopes that these questions would be answered, employers were intensely curious about what the opening of the EEO-1 reporting period would look like once the curtain was raised on Monday morning. The good news is that the agency's first response to the court ruling provides some much-needed breathing room for employers, with no indication that pay data collection is in any way imminent. When accessing the portal for submitting the EEO-1 report today, there is no method by which employers could provide compensation information even if they wanted to.

The bad news is that questions still remain, and the agency hasn't yet addressed many of them with today's development. Its statement, released on its website this morning, simply states: "The EEOC is working diligently on next steps in the wake of the court's order…which vacated the OMB stay on collection of Component 2 EEO-1 pay data. The EEOC will provide further information as soon as possible." Left unanswered: Will the EEOC or OMB appeal the judge's ruling to the D.C. Circuit Court of Appeals? Will the judge's ruling be put on hold during the pendency of any such appeal? What if the judge responds to today's EEOC notice with a reprimand to the EEOC requiring it to begin collecting pay data immediately? How could the agency comply if it does not have its own system in place to collect and process the new data? When will employers need to begin providing pay data, if at all?

[Ed. Note: During a March 19 hearing, Judge Chutkan informed the EEOC that it must inform employers about the status of the pay data disclosures by Wednesday, April 3, providing information about how the data will be collected, by what deadline, and how employers should prepare the data.]

What's Next?

We fully expect the EEOC or OMB to appeal the judge's decision and seek a delay of the revised EEO-1's implementation while the appeal is pending. However, you should operate under the assumption that you will soon have to comply with the revised EEO-1 reporting rules – whether because the judge forces the EEOC's hand immediately in response to today's development, or because the appeals court does not agree that the rule should be suspended while the appeal unfolds. While we

cannot predict whether either of these events will actually occur, it is best to operate under a worst-case-scenario mindset and prepare accordingly.

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. 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, 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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Related People

Cheryl L. Behymer
Senior Counsel
803.255.0000
Email

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