

DOUBLE DUTY: YOU WILL SOON HAVE TO TURN OVER PAY DATA FROM BOTH 2017 AND 2018

Insights
May 3, 2019

The EEOC just announced that, in order to comply with a recent shocking court order, most employers will need to turn over compensation information from both 2017 and 2018 when they submit their Component 2 pay data with their EEO-1 submission on September 30, 2019. While there is still a chance that an appeals court could put the pay data/hours worked reporting requirement on hold once again, or that a newly reconstituted EEOC Commission might modify the regulations, you should start taking action immediately under the assumption that all of this information will need to be disclosed by the recently announced due date. Meanwhile, the May 31, 2019 deadline for the traditional demographic data (now called "Component 1" data) remains firmly in place.

HOW DID WE GET HERE?

Employers felt a tectonic shift in early March, when a federal court in Washington, D.C. revived the Obama-era requirement that calls for employers to turn over compensation information in the EEO-1 Report along with general demographic data. The judge's March 4 order required the pay data collection to commence immediately, but when the Equal Employment Opportunity Commission (EEOC) unveiled its 2019 reporting system on March 18, there was no method by which employers could have included such information even if they wanted.

In response, the court ordered the EEOC to begin collecting the pay data by September 30, 2019. And the judge took it

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one step further: she agreed with those advocacy organizations bringing the original lawsuit and ruled that employers should be on the hook for turning over two years' worth of pay data. After all, the original plan from the Obama-era EEOC called for this information to be collected starting several years ago, and the judge believed the agency erred by putting a halt to this collection effort. So she gave the EEOC the option of either collecting pay data from both 2017 and 2018 information by the September 30 deadline, or collecting 2019 pay data during the 2020 reporting period, and asked the agency to choose an option by Friday, May 3.

EEOC PICKS ITS POISON: DOUBLE DATA TO DISCLOSED IN 2019

In an announcement both [posted on the agency's website](#) and [released in the Federal Register](#), the EEOC announced that EEO-1 filers should begin preparing to submit their pay data for calendar year 2017, in addition to data for calendar year 2018, by the September 30, 2019 deadline. It also said that it expects to begin collecting this data by mid-July, which comports with its earlier announcement that the collection portal would be open for business and in a position to accept compensation information on July 15, 2019.

The agency also reminded employers that general demographic information for 2018 is still due by May 31, 2019, and that recent events have not impacted the existing due date for the standard EEO-1 Report.

WHAT'S NEXT?

You can expect a few things to happen in the near future. First and foremost, in order to be in a position to comply with the new requirements, the EEOC has already announced that it will offer a series of training sessions and provide detailed information to employers so you understand your obligations in advance of the September 30 due date. Be on the lookout for those in the coming weeks.

Meanwhile, you can expect employer organizations to launch independent legal challenges against the new requirements now that the dust has settled and the obligations are set in stone. No doubt that these organizations will point out that the September 30 deadline for 2017 and 2018 information will present a difficulty for

employers given that it is just a day before the 2019 data collection payroll period begins.

Finally, it would not be surprising if the federal government also filed an appeal against the judge's ruling that resurrected the pay data reporting requirement in the first place. While we would assume that the independent employer organizations and the federal government would ask for an indefinite delay in reporting while any appeal is pending, you cannot count on the fact that such a stay would be granted. Instead, you should operate under the assumption that you will soon be responsible for turning over a mountain of pay data – indeed, twice as big as you might have thought – by September 30.

[ED. NOTE: THE FEDERAL GOVERNMENT INDEED FILED AN APPEAL OF THE LOWER COURT'S DECISION ON FRIDAY AFTERNOON, MAY 3. HOWEVER, THE EEOC CONFIRMED THAT THIS NOTICE OF APPEAL DOES NOT PAUSE THE COURT'S ORDERS OR IN ANY WAY ALTER EEO-1 FILERS' OBLIGATIONS TO SUBMIT PAY DATA. "EEO-1 FILERS SHOULD BEGIN PREPARING TO SUBMIT COMPONENT 2 DATA," THE AGENCY SAID ON ITS WEBSITE.]

WHAT SHOULD YOU DO?

For EEO-1 filers (those businesses with at least 100 employees), we can't stress this enough: you should assume that you will need to turn over both 2017 and 2018 pay data and hours worked by the September 30, 2019 deadline. You should begin by determining how your W-2 pay data will be split into the 12 pay bands required for each of the 10 EEO-1 categories. And you need to determine how you will report your hours worked, which is also a significant undertaking, where the data is likely tracked separately from the pay data W-2 information.

You should also 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 may soon come your way. Ideally, you would work with counsel to conduct this initial review under the protection of the attorney-client privilege while you are assessing your workforce and the proper grouping for your employee population.

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 or when 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.

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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