

September 12, 2019

EEOC Pay Data Reporting Requirement Changes

EEOC Plans Not To Collect Further Pay Data After Receipt of 2017 and 2018 Data Required by Court Order

SUMMARY

On September 12, 2019, the Equal Employment Opportunity Commission (the “EEOC”) announced its intention to suspend the collection of pay data information on employers’ annual EEO-1 forms for years 2019, 2020 and 2021. In a notice published in the Federal Register, the EEOC explained that it intends to review the burden on employers of collecting and reporting pay data compared to the utility of the data to the EEOC’s enforcement programs, in light of revised estimates of the burden on employers of collecting this data as well as its review of the 2017 and 2018 pay data information that is currently being collected. The notice does not affect employers’ current obligation to submit 2017 and 2018 pay data information by September 30, 2019, as described in our [memorandum of May 9, 2019](#).

BACKGROUND

The EEO-1 form is required to be submitted by all employers of 100 or more employees. In its original form, it required reporting on the numbers of employees in certain defined bands of positions, grouped by race, gender and ethnicity (the “Component 1 Data”). In September 2016, the EEOC finalized a controversial rule expanding the requirement of data submission on the EEO-1 forms to include: (i) summary pay data based on W-2 wages, reporting the total number of full- and part-time employees by race and gender in each of 12 pay bands listed for each EEO-1 job category (executive level, professionals, sales workers, etc.), for each of the employer’s physical locations; and (ii) the number of hours worked by employees in each pay band (the “Component 2 Data”).

SULLIVAN & CROMWELL LLP

Many employer groups objected, asserting that the burden entailed in collecting and reporting the pay data was disproportionate, particularly because in their view the data required would be virtually meaningless as reported. As one example, the 10 job categories in which pay is to be reported may group together very disparate job functions and employees with different educational and professional credentials.

On August 29, 2017, the Office of Management and Budget (the “OMB”) announced an immediate stay of the rule, citing the Paperwork Reduction Act (“PRA”). The OMB pointed to the fact that, after approving the revised EEO-1 form including the pay data requirement, the EEOC released data file specifications, but those specifications were not made available during the public comment process and, thus, the EEOC’s burden estimates did not account for the use of these particular data file specifications, which may have changed the initial burden estimate. The OMB asked the EEOC to submit a new proposal for the information to be collected for the EEO-1 form.

The stay prompted a lawsuit brought by the National Women’s Law Center and the Labor Council for Latin American Advancement against the EEOC and the OMB. On March 4, 2019, and as discussed in our memorandum [here](#), the Honorable Tanya S. Chutkan of the U.S. District Court for the District of Columbia vacated the OMB’s decision to stay collection of the Component-2 Data, holding that the OMB’s decision was “arbitrary and capricious” and, thus, violated the Administrative Procedures Act.¹ The EEOC is currently appealing Judge Chutkan’s ruling. Judge Chutkan’s ruling was not stayed pending appeal.

On May 2, 2019, the EEOC announced on its website that in light of the court’s order, employers would be required to submit 2017 and 2018 Component 2 Data by September 30, 2019. 2018 Component 1 Data was required to be filed by May 31, 2019.

THE EEOC’S NOTICE

On September 12, 2019, the EEOC announced its intention to request that the OMB permit it to collect Component 1, and not Component 2, Data on 2019, 2020 and 2021 EEO-1 forms.² In the EEOC’s notice announcing the proposal, the agency explained that it had created a new Office of Enterprise Data and Analytics (the “OEDA”) in May 2018 “with the goal of creating a 21st century data and analytics organization at the agency.”³ The OEDA reviewed the methodology used in 2016 to estimate the burden on employers of collecting and submitting Component 2 Data and found that the 2016 estimate had “insufficiently calculated what the burden would be to submit that data.”⁴

Specifically, the 2016 estimate was based on the number of employers that would be required to submit Component 2 Data, without considering “the different number and types of EEO-1 reports that different employers file.”⁵ For example, the EEO-1 form requires employers with only one location to file one EEO-1 report, while employers with multiple locations are required to submit a corresponding number of EEO-1 “establishment” reports, a headquarters report and a consolidated report.⁶ The 2016 estimate considered the burden on these employers to be the same on the assumption “that the bulk of the tasks performed in

SULLIVAN & CROMWELL LLP

completing the EEO-1 report will be completed at the firm level due to the centrality of automation.”⁷ Using this methodology, the EEOC estimated in 2016 that the total cost for employers to collect and submit Components 1 and 2 Data for 2017 and 2018 would be approximately \$53 million.⁸

The EEOC explained that it had developed a revised, “more accurate methodology” that estimated the burden on employers based on “report type and filer type,” which “account for the different amounts of time required for different types of EEO-1 reports, and are based on EEOC experience during the data submission process.”⁹ Using the revised methodology, the EEOC now estimates that the burden on employers for collecting and submitting Components 1 and 2 Data was approximately \$614 million in 2017 and \$622 million in 2018.¹⁰

Because the PRA requires the EEOC to “balance the utility of the [Component 2] data to its enforcement programs against the burden the data collection as structured imposes on the employers who must submit it,” the EEOC concluded that it should “consider information from the ongoing Collection 2 data collection before deciding whether” to continue collecting Component 2 Data in the future.¹¹ Accordingly, the EEOC requested that the OMB permit it to collect only Component 1 Data for 2019, 2020 and 2021 while it considered the 2017 and 2018 Component 2 Data that will be collected by September 30.

Comments on the EEOC’s proposal are due on November 12, 2019.¹²

IMPLICATIONS

Although the EEOC does not currently intend to collect Component 2 Data going forward, employers who have already implemented systems to collect pay data may decide to keep those systems in place or have contingencies in place to collect pay data in the event the OMB rejects the EEOC’s proposal or the EEOC reinstates Component 2 Data collection in the future.

* * *

Copyright © Sullivan & Cromwell LLP 2019

ENDNOTES

- 1 *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, 358 F. Supp. 3d 66, 88–89 (D.D.C. 2019).
- 2 Agency Information Collection Activities: Existing Collection, 84 Fed. Reg. 48,138, 48,138 (Sept. 12, 2019).
- 3 *Id.* at 48,139.
- 4 *Id.* at 48,139–48,140.
- 5 *Id.* at 48,140.
- 6 *Id.*
- 7 *Id.*
- 8 *Id.*
- 9 *Id.*
- 10 *Id.* at 48,140–48,141.
- 11 *Id.* at 48,141.
- 12 *Id.* at 48,138.

SULLIVAN & CROMWELL LLP

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future publications by sending an e-mail to SCPublications@sullcrom.com.

CONTACTS

New York

Heather L. Coleman	+1-212-558-4600	colemanh@sullcrom.com
Tracy Richelle High	+1-212-558-4728	hight@sullcrom.com
Ann-Elizabeth Ostrager	+1-212-558-7357	ostragerae@sullcrom.com
Theodore O. Rogers Jr.	+1-212-558-3467	rogersto@sullcrom.com
Marc Treviño	+1-212-558-4239	trevinom@sullcrom.com

Washington, D.C.

Julia M. Jordan	+1-202-956-7535	jordanjm@sullcrom.com
-----------------	-----------------	--
