

May 9, 2019

EEOC Officially Reinstates Pay Data Rule

Employers Required To Submit 2017 and 2018 Pay Data by September 30, 2019; EEOC Appeal of Decision Reinstating Pay Data Rule Will Not Affect Deadline.

SUMMARY

As we have previously discussed, on March 4, the Honorable Tanya S. Chutkan of the U.S. District Court for the District of Columbia vacated an August 29, 2017 decision by the Office of Management and Budget (the “OMB”) to stay the Equal Employment Opportunity Commission’s (the “EEOC”) requirement that employers use a revised EEO-1 form to report pay data information by employee job position, gender, race and ethnicity (so-called “Component 2 Data”).¹ Judge Chutkan held that the OMB’s decision was “arbitrary and capricious” and, thus, violated the Administrative Procedures Act.² On March 18, however, the EEOC opened its portal for employers to submit their annual EEO-1 forms, omitting any request for the Component 2 Data. Judge Chutkan thereafter chastised government lawyers for failing to quickly implement her order, but ultimately accepted the government’s proposal that the EEOC collect Category 2 data for 2018 by September 30, 2019. The Court also ordered the EEOC to collect the Category 2 data for a second year, giving the EEOC the choice between collecting that data for 2017 or 2019. Following that ruling, the EEOC officially reinstated the pay data rule—stating that employers must submit the usual EEO-1 demographic data (“Component 1 Data”) by the previously announced May 31 deadline, and the Component 2 Data for calendar years 2017 and 2018 by September 30, 2019. Although the EEOC has filed a notice of appeal in the litigation, it has told employers that the appeal does not affect the requirement to submit Component-2 Data by September 30.

BACKGROUND

The EEO-1 form gathers information on employee populations in certain broad bands of positions by race, gender and ethnicity, and is required of employers with 100 or more employees. In September

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2016, during the Obama administration, the EEOC finalized a controversial rule expanding the data to be reported by employers 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 twelve 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 rationale for the collection of this information was to eliminate wage disparities by drawing attention to the actual pay data. Many employer groups objected to, among other things, the cost and burden entailed in collecting and reporting the pay data. Employers also pointed out that the data required would be virtually meaningless as reported—as one example, the newly required data may group together very disparate functions and employees with different educational and professional credentials given employees are sorted by ten broad job categories.

On August 29, 2017, under the Trump administration, the OMB announced the immediate stay of the rule, citing the Paperwork Reduction Act (“PRA”). The OMB's memorandum stated that it had determined that it was authorized under the PRA to review the previously approved EEOC collection of information because circumstances related to the collection had changed and the burden estimates provided by EEOC at the time of initial submission were materially in error. Specifically, the OMB pointed to the fact that, since approving the revised EEO-1 form on September 29, 2016, the EEOC released data file specifications for employers to use in submitting EEO-1 data, 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 the lawsuit brought by the National Women's Law Center and the Labor Council for Latin American Advancement against the EEOC and the OMB that resulted in Judge Chutkan's decision.

THE DISTRICT COURT'S DECISION AND SUBSEQUENT PROCEEDINGS

On March 4, 2019, Judge Chutkan held that the OMB's stay decision was arbitrary and capricious because: (1) its “assertion that the data file specifications were not contained in the Federal Register, thereby depriving the public of an opportunity to comment on them, is misdirected, inaccurate, and ultimately unpersuasive”; and (2) its assertion that the EEOC's burden estimates did not account for the use of the particular data file specifications, which may have changed the initial burden estimate, “was unsupported by any analysis.”³ Judge Chutkan's decision is discussed in further detail [here](#).

Although the EEOC is appealing the ruling, the court's decision meant that the revised EEO-1 is now technically in effect. The ordinary deadline for filing an EEO-1 report is March 31 of any calendar year, which was extended to May 31. On March 18, the EEOC opened its portal for employers to submit their EEO-1 report. The portal did not include a request for employers to include the expanded EEO-1 form

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with pay data. The EEOC issued a statement stating that the agency “is working diligently on next steps in the wake of the court’s order in *National Women’s Law Center, et al., v. Office of Management and Budget, et al.* . . . which vacated the OMB stay on collection of . . . EEO-1 pay data. The EEOC will provide further information as soon as possible.”⁴

The next day, on March 19, Judge Chutkan convened a court conference at which she questioned government attorneys as to why the EEOC did not request the expanded form with pay data in employers’ 2018 EEO-1 reports. A government attorney informed the court that the EEOC was preparing its systems to ensure it could properly collect and process pay information, and indicated that the EEOC may not require employers to submit data by the May 31 deadline to file EEO-1 forms. The court directed the government to file a brief by April 3 to explain how and when the EEOC intended to comply with the court’s March 4 decision, and gave the plaintiffs in the litigation until April 8 to respond to that submission.⁵

On April 3, the EEOC informed the court that it intended to require employers to submit Component 2 Data for 2018 by September 30, 2019, citing the need to address “the significant practical challenges for the EEOC to collect [the Component 2] data,” including the need to outsource the data collection to a contractor due to limitations in the EEOC’s data collection processes.⁶ On April 8, the plaintiffs asked the Court to require the EEOC to collect Component 2 data by the current May 31 deadline for Component 1 Data.⁷

On April 25, Judge Chutkan accepted the EEOC’s proposal to collect 2018 Component 2 Data by September 30, 2019, and also directed the EEOC to collect 2017 Component 2 Data by that date. The court gave the EEOC the option of committing to collect 2019 pay data next year in lieu of collecting 2017 pay data. Judge Chutkan directed the EEOC to notify her which year it would choose to collect in a status report to be filed by May 3. In accepting the EEOC’s proposed September 30 deadline, Judge Chutkan expressed some “doubts” about the stated burden of collecting the Component 2 Data, as articulated by the EEOC.⁸

Judge Chutkan also required the EEOC to file status reports with the court every 21 days regarding its compliance with the order to collect 2018 Component 2 Data by September 30, and gave the EEOC until April 29 to publish a statement on its website and to submit the same statement for publication in the Federal Register informing employers of this deadline.⁹

On April 29, the EEOC notified employers on its website that it will collect 2018 Component 2 Data beginning in “mid-July” with a deadline of September 30, 2019. The EEOC will notify employers of the exact date that submissions will be accepted once available.¹⁰ The EEOC further stated that 2018 Component 1 Data must still be filed by May 31, 2019. On May 2, the EEOC posted on its website that it had chosen to collect 2017 Component 2 Data pursuant to Judge Chutkan’s April 25 order. As for 2018 Component 2 Data, employers will be required to submit the 2017 Data by September 30, 2019.¹¹

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On May 3, the EEOC filed a notice of appeal of Judge Chutkan's decision holding that the OMB's stay of the rule was "arbitrary and capricious."¹² On May 6, however, the EEOC notified the court and employers that its appeal does not alter the requirement to submit 2017 and 2018 Component 2 Data by September 30.¹³

IMPLICATIONS

To the extent an employer has not already done so, it should begin collecting the 2017 and 2018 Component 2 Data as soon as practicable, to ensure it is able to meet the September 30 deadline. Moreover, employers who are considering conducting an analysis of that information to determine whether various factors (such as educational experience, tenure and location) may have affected the reported pay data should be mindful that such analyses may be the subject of discovery requests by the government and private parties, to the extent it is not conducted under legal privilege.

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ENDNOTES

- 1 *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, 358 F. Supp. 3d 66 (D.D.C. Mar. 4, 2019).
- 2 *Id.* at 90; see also 82 Fed. Reg. 43362 (Stay the Effectiveness of the EEO-1 Pay Data Collection).
- 3 *Nat'l Women's Law Ctr.*, 358 F. Supp. 3d at 87–88.
- 4 *Statement on the 2018 EEO-1 Portal Opening for Component 1 Data*, EEOC, <https://www.eeoc.gov/employers/eeo1survey/statement-2018-opening.cfm> (Mar. 18, 2019).
- 5 Mulvaney, Erin, *Judge Scolds US Lawyers Over Delay in Pay-Data Compliance*, *The National Law Journal*, <https://www.law.com/nationallawjournal/2019/03/19/judge-scolds-u-s-lawyers-over-delay-in-pay-data-compliance/> (Mar. 19, 2019).
- 6 Defendant's Submission in Response to the Court's Questions Raised During the March 19, 2019 Status Conference, *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, No. 17-cv-2458 (D.D.C. Apr. 3, 2019), ECF No. 54 at ¶ 4.
- 7 Plaintiffs' Response to Defendants' Submission re: the Court's Questions Raised During the March 19, 2019 Status Conference, *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, No. 17-cv-2458 (D.D.C. Apr. 8, 2019), ECF No. 62 at 2.
- 8 Order, *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, No. 17-cv-2458 (D.D.C. Apr. 25, 2019), ECF No. 71 at 1–2.
- 9 *Id.*
- 10 *U.S. Equal Employment Opportunity Commission*, EEOC, <https://www.eeoc.gov/> (last visited May 7, 2019); see also Reinstatement of Revised EEO–1: Pay Data Collection, 84 Fed. Reg. 18,383 (May 1, 2019).
- 11 *U.S. Equal Employment Opportunity Commission*, EEOC, <https://www.eeoc.gov/> (last visited May 7, 2019); see also EEO–1 Pay Data Collection for 2017, 84 Fed. Reg. 18,974 (May 3, 2019).
- 12 Notice of Appeal, *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, No. 17-cv-2458 (D.D.C. May 3, 2019), ECF No. 72.
- 13 Defendant EEOC's Report of Steps to Implement the EEO–1 Component 2 Data Collection: Submitted May 3, 2019, *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, No. 17-cv-2458 (D.D.C. Apr. 25, 2019), ECF No. 73–1 at 2; *U.S. Equal Employment Opportunity Commission*, EEOC, <https://www.eeoc.gov/> (last visited May 7, 2019).

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