

March 21, 2019

EEOC Pay Data Rule

Federal Court Overturns OMB's Stay of EEOC Pay Data Collection Rule as "Arbitrary and Capricious"; EEOC Not Yet Requesting Pay Data.

SUMMARY

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.¹ Judge Chutkan held that the OMB's decision was "arbitrary and capricious" and, thus, violated the Administrative Procedures Act.² The court's decision means that the revised EEO-1 form is technically now in effect. On March 18, however, the EEOC opened its portal for employers to submit their annual EEO-1 forms, omitting any request for pay data. In addition, the EEOC issued a statement stating that it is "working diligently on next steps in the wake of" Judge Chutkan's order and that it will "provide further information as soon as possible." The next day, Judge Chutkan chastised government lawyers for failing to quickly implement her order and gave the government until April 3 to explain how and when it plans to implement her March 4 order.

BACKGROUND

The EEO-1 form is a form gathering 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 2016, 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 12 pay bands listed for each EEO-1 job category (executive

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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.

Many employer groups objected to the burden entailed in collecting and reporting the pay data, and also pointed out that the data required would be virtually meaningless as reported—as one example, because employees are sorted by 10 job categories, that may group together very disparate functions and employees with different educational and professional credentials.

On August 29, 2017, 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

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

As to the availability of data file specifications, the court rejected the OMB's argument that data file specifications were not available during the public comment process, stating that the EEOC had, during the comment process, “described in detail the information it proposed to collect,” and the data file specifications—which consisted of “a sample spreadsheet and formatting specifications which explained how to format a spreadsheet”—did not “change the content of the information collect.”⁴ In addition, the public notices directed employers to sample spreadsheets providing “an illustration of the data to be collected,” which “match[ed] in all material respects” the data file specifications ultimately adopted, such that employers “knew what the specifications would look like, putting the employers in a good position to comment if they desired.”⁵ The court further noted that the notice of rulemaking stated that data file

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specifications would be released upon the OMB's approval of the revised EEO-1 form, a practice which OMB had previously permitted, such that OMB and employers knew to expect "some file specifications."⁶

With respect to the EEOC's burden estimates' alleged failure to consider the particular data file specifications, the court observed that the EEOC's previous descriptions of the data to be collected were consistent with the data file specifications and that the OMB did not "actually find" that the data file specifications would change the EEOC's initial burden estimates, but only that the estimates "may change."⁷ Thus, the court found that the release of data file specifications was not a "changed circumstance" in any meaningful sense," the "EEOC proceeded exactly as planned and as OMB had approved," and the OMB "fail[ed] to support its speculation with any analysis."⁸

THE EEOC'S RESPONSE TO THE DECISION

The court's decision means that the revised EEO-1 form is technically now in effect. The ordinary deadline for filing an EEO-1 report is March 31 of any calendar year, which has been 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 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."⁹

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.¹⁰ A government attorney informed the court that the EEOC is 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.¹¹ The court directed the government to file a brief by April 3 that explains how and when the EEOC will comply with the court's March 4 decision, and gave the plaintiffs in the litigation until April 8 to respond to that submission.

IMPLICATIONS

Judge Chutkan's decision reinstating the EEOC's revised EEO-1 form and the EEOC's subsequent failure to request pay data information creates substantial uncertainty for employers, who must submit their EEO-1 forms by May 31, 2019. Adding to the uncertainty is the possibility that the OMB and/or the EEOC may appeal and seek a stay of Judge Chutkan's ruling, which would temporarily reinstate the OMB's stay of the revised EEO-1 form.

Further complicating matters, however, is that the EEOC lacks a quorum. Only two of the five commissioners are seated: Victoria A. Lipnic, the Acting Chair, appointed by President Trump, and

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Charlotte A. Burrows, appointed by President Obama. A third Commissioner, Chai Feldblum, had been re-nominated by President Trump in December 2017, but her nomination never left committee and thus expired at the end of the 115th Congress. Under 42 U.S. Code § 2000e-4(c), at least three commissioners are required to constitute a quorum of the Commission. The EEOC also currently lacks a general counsel.

Employers may opt to collect the pay data information required by the expanded EEO-1 form, in the event that no stay of the ruling is entered and the EEOC decides to seek pay data for 2018.

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ENDNOTES

¹ *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, – F. Supp. 3d –, 2019 WL 1025867 (D.D.C. Mar. 4, 2019).

² *Id.* at *17; see also 82 Fed. Reg. 43362 (Stay the Effectiveness of the EEO-1 Pay Data Collection).

³ *Nat'l Women's Law Ctr.*, 2019 WL 1025867, at *15–16.

⁴ *Id.* at *15.

⁵ *Id.*

⁶ *Id.* (emphasis in original).

⁷ *Id.* at *16.

⁸ *Id.*

⁹ *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).

¹⁰ 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).

¹¹ *Id.*

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