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Employer Action Recommended to Navigate New Pay Data Reporting to EEOC

Most employers have heard the news that the once-paused EEO-1 pay data reporting requirements are now live, and the deadline to respond is set for September 30, 2019. Many employers will rush to collect the necessary data in an attempt to prepare for swift compliance with the requirements. But a significant note of caution is in order. Employers are now tasked with preparing pay data in a format never previously required and the specifics of which to date remain unclear. Of particular note, employers are now required to report data related to total number of employees and total number of hours worked for 12 different pay bands by gender, race and ethnicity, and each of the 10 EEO-1 job categories.

Given the potential legal landmines associated with collecting and reporting data in this format to the EEOC, employers are strongly advised to involve legal counsel, whether in-house or outside, to determine an appropriate process for the internal collection of such sensitive information. Employers are urged to consider undertaking a comprehensive analysis of the pay data that will be produced to assure that the implications of the production are well-known in advance of the production to the EEOC, and that if any remediation is indicated it can be assessed as well.

EEO-1 Reporting Requirements

Many employers are required to file EEO-1 reports annually with the EEOC. This filing requirement applies to

- businesses with at least 100 employees,
- businesses with fewer than 100 employees if the company is owned or affiliated with another company and the entire enterprise employees 100 or more people, and
- federal contractors with at least 50 employees and a federal contract, subcontract or purchase order of at least \$50,000.

Most employers are very familiar with this requirement. This year, the deadline to file the EEO-1 forms with 2018 employer data is May 31, 2019 (later than usual, due to the government shutdown that occurred in December 2018–January 2019).

Legal Challenges to EEO-1 Data Collection and New Deadline in Place

Under the Obama administration, the EEO-1 form was revised to require employers to report employee's salary information by race, ethnicity and sex. This new requirement, however, was suspended by the Trump administration in September 2017. The Trump administration's decision was challenged, and on March 4, 2019, the U.S. District Court for the District of Columbia held that the White House Office of Budget and Management "failed to demonstrate good cause for the stay." *Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget*, 358 F. Supp. 3d 66, 89 (D.D.C. 2019). This decision effectively revived the Obama administration's EEO-1 reporting requirements with little time to prepare such information.

After the decision was made, the EEOC proposed a September 30, 2019, deadline "in order to accommodate the significant practical challenges for the EEOC...in response to the Court's order." EEOC also announced its plan to use a data and analytics contractor to perform the collection of this sensitive pay data. And last week, in a ruling from the bench, Judge Tanya S. Chutkan of the U.S. District Court for the District of Columbia, sided with the EEOC and ordered the September 30, 2019, deadline for 2018 pay data.

The EEOC may require submission of 2017 pay data as well by September 30, 2019, or may opt to collect 2019 pay data instead, due sometime in the spring of 2020. The EEOC will make this determination by May 3, 2019. The EEOC allows employers to request a one-time 30-day extension, as needed.

Key Takeaway for Employers

Collecting and providing pay data to the EEOC has never been required before, so caution is due. Now that the deadline is in place, employers should immediately begin to formulate a process for collection of the required pay data and should consider undertaking a competent and, to the extent possible, confidential statistical analysis of their compensation outcomes to determine any potential impacts on protected classes.

It is essential that this project not be conducted haphazardly. Furthermore, it is crucial to recognize that employers' efforts to protect the confidentiality of any analysis performed to determine the implications of their data will depend heavily on involving inside or outside counsel *from the outset* and not later in the process.

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