

The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2019

PHILADELPHIA, MONDAY, JULY 29, 2019

VOL 260 • NO. 19

An **ALM** Publication

W A G E A N D H O U R

New EEO-1 Pay Data Reporting Requirements: What Employers Need to Know

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Special to the Legal

As many employers may know, the Equal Employment Opportunity Commission (EEOC), following the U.S. District Court for the District of Columbia's March 4, decision in *National Women's Law Center v. Office of Management and Budget (OMB)*, 358 F. Supp. 3d 66 (D.D.C. 2019), has announced that covered employers must submit employees' W-2 pay and hours worked data (which the EEOC has referred to as a Component 2 EEO-1) for years 2017 and 2018 by Sept. 30.

WHAT IS THE EEO-1 REPORT AND WHO MUST FILE?

The EEOC historically has collected information from covered employers regarding an employer's number of employees by job category, race, ethnicity and sex (Component 1 data) using the EEO-1 report. The EEO-1 report (Standard Form 100) is collected annually under the authority of Title VII of the Civil Rights Act of 1964 (Title VII). The Standard Form 100 was jointly developed by the EEOC and the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), as a single form that meets the statistical needs of both the OFCCP and the EEOC.

The filing of Standard Form 100 is required by law. All private employers



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employing 100 or more employees and subject to Title VII must submit an EEO-1 report annually. Most federal contractors and subcontractors that employ 50 or more employees also are required annually to submit an EEO-1 report (however, only those federal contractors that employ 100 or more employees are required to submit Component 2 data). If an employer fails to submit its EEO-1 report, under Section 709(c) of Title VII, the EEOC may compel an employer to file its EEO-1 report by obtaining an order from the U.S. district court. Under Section 209(a) of Executive Order 11246,

the penalties for failure of a federal contractor or subcontractor to comply may include termination of the federal government contract and debarment from future federal contracts.

HOW DID WE GET HERE?

The EEOC has collected Component 1 EEO-1 data since 1966. In 2010, during the Obama administration, the EEOC joined other federal agencies to identify ways to improve enforcement of federal laws prohibiting pay discrimination. The EEOC then began conducting a study that led to the National Academy of Sciences creating a panel to determine how to measure and collect information from U.S. employers by gender, race and national origin.

In 2012, the EEOC held a two-day meeting with employer representatives, statisticians, human resources information systems experts and information technology specialists. During this meeting, the idea of collecting pay data, as well as multiple-race category data, on the EEO-1 was discussed.

On Feb. 1, 2016, the EEOC published a Federal Register notice announcing its intention to seek a three-year approval from OMB of a revised EEO-1 report. The EEOC's notice explained that the revised data collection would have two components: Component 1, which would collect the same data that it historically has gathered, and Component 2, which would

collect data on employees' W-2 earnings and hours worked. The EEOC proposed collecting aggregate W-2 pay data in 12 pay bands for the 10 EEO-1 job categories that have been used for many years.

On July 14, 2016, the EEOC published a second Federal Register notice seeking approval from OMB for its addition of Component 2 data to the EEO-1 report. This notice provided the explanation that the EEOC had to revise the EEO-1 "for the enforcement of equal pay laws." On Sept. 28, 2016, the EEOC provided its final supporting statement for the new EEO-1 report to OMB for review. The next day, OMB approved the proposed collection and issued an OMB control number for the revised EEO-1 report.

After a change of administrations in Washington, on Aug. 29, 2017, the OMB stayed the implementation of the Component 2 data collection. In November 2017, the National Women's Law Center and the Labor Council for Latin American Advancement (two nonprofits advocating for equal pay) sued the OMB, challenging the OMB's stay in the U.S. District Court for the District of Columbia.

On March 4, the district court ordered that the Component 2 obligation be reinstated, and that employers provide employee wage records for two consecutive years: 2018 and either 2017 or 2019. The choice between 2017 and 2019 was left to the EEOC, which ultimately decided to collect 2017 and 2018 data. The EEOC also imposed a Sept. 30, deadline for covered employers to submit the Component 2 data to the EEOC. On July 15, the EEOC opened its electronic filing system for EEO-1 Component 2 data.

While the U.S. Department of Justice, which represents the EEOC in the EEO-1 litigation, filed a notice of appeal of the district court's March 4 decision, the EEOC stated in its notice that the filing of the appeal "does not stay the district court orders or alter EEO-1 filers' obligations to submit Component 2 data." Accordingly, covered employers should

be preparing to submit Component 2 data by Sept. 30.

WHAT MUST EMPLOYERS DO NOW?

By Sept. 30, covered employers must report wage information from Box 1 of employee W-2 forms and total hours worked for all employees broken down by race, ethnicity and sex within 12 pay bands, as follows:

- <19,239.
- \$19,240-\$24,439.
- \$24,240-\$30,679.
- \$30,680-\$38,999.
- \$39,000-\$49,919.
- \$49,920-\$62,919.
- \$62,920-\$80,079.
- \$80,080-\$101,919.
- \$101,920-\$128,959.
- \$128,960-\$163,799.
- \$163,800-\$207,999.
- \$208,000 and over.

Employers should not calculate and then report the annualized earnings for employees who did not work a full year. Rather, employers should use the information found in Box 1 on their employees' W-2 to assign the employees to the relevant Component 2 compensation bands. This reporting structure may skew the results of an employer's report because if, for example, an employer hires an employee July 1 to work for an annualized salary of \$100,000, but the employee only earns \$50,000 for that year, the employer is only permitted to report that employee into the pay band that corresponds with \$50,000, and not \$100,000.

Employers must also report hours worked for all employees in their respective job category and pay band. Hours worked are reported as a total number for each job category and pay band, representing all hours worked that year by all employees reported in that job category and pay band. This includes the actual hours worked by FLSA-exempt employees if the employer maintains such records. If an employer does not maintain such records, the EEOC has instructed that employers should report an estimated

40 hours per week for full-time exempt employees and 20 hours per week for part-time exempt employees.

Employers can report this data through the Component 2 EEO-1 online filing system or by creating a data file and inputting their data in the appropriate fields in accordance with the EEOC's data file specifications. The EEOC has explained, however, that when submitting a data file, the file layout must exactly match the EEOC's data file specifications.

There obviously are concerns about whether the Component 2 data could be made public, say, for instance, during a pay equity lawsuit. Under Title VII, the EEOC is

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not permitted to make EEO-1 pay data public, and the EEOC's pay data collection site states that exemptions 3 and 4 to the Freedom of Information Act (FOIA) may protect disclosure of data collected in the process.

While September may feel like a world away during the dog days of summer, Sept. 30 will be here before employers know it. Employers that are required to submit Component 2 data should be actively working toward meeting this impending deadline. •