

Controversial Wage Data Collection and Reporting Requirements Reinstated, but No Clear Guidance Yet for Employers

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04 / 23 / 19

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UPDATE: On April 25, 2019, the judge in *National Women's Law Center v. Office of Management and Budget* ruled that employers subject to EEO-1 reporting are required to report 2018 wage data by gender, ethnicity and race to the EEOC by September 30, 2019. Pursuant to the judge's ruling, we expect to hear from the EEOC by May 3, 2019, regarding collection of wage data for an additional calendar year (either 2017 or 2019).

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As employers consider pay equity issues and disclosures, they are closely watching a recent federal district ruling that reinstated an Obama-era rule requiring large employers to collect and annually report wage data by gender, ethnicity and race to the Equal Employment Opportunity Commission (EEOC). The March 4, 2019, decision in *National Women's Law Center v. Office of Management and Budget* creates uncertainty among employers about whether they will have to comply with the reinstated wage data requirement by the next EEOC annual reporting deadline, May 31, 2019.

In a brief submitted by the EEOC to the court on April 3, 2019, the EEOC argued that the deadline for reporting wage data should be extended to September 30, 2019, to accommodate significant practical challenges with the agency's ability to collect this data. However, even with that extension, the EEOC's chief data officer cautioned that "there is a serious risk that the expedited data collection may yield poor quality data because of the limited quality control and quality assurance measures that would be implemented due to the expedited timeline." In a response filed April 8, 2019, the plaintiffs asked the court to reject the EEOC's requested extension and maintain the current May 31, 2019, deadline.

Employers awaiting the judge's decision on the final deadline should begin the significant effort of preparing the pay data that likely will ultimately need to be submitted.

Background

The wage data reporting rule was intended to help close the persistent wage gap between men and women, as well as between racial groups, through greater pay transparency. When the EEOC first announced the rule in 2016, then-Secretary of Labor Thomas E. Perez explained, "Better data will not only help enforcement agencies do their work, but it helps employers to evaluate their own pay practices to prevent pay discrimination in their workplaces." The U.S. Chamber of Commerce and other major business associations lobbied against the rule, asserting the new reporting requirements would be overly burdensome for employers and would not yield useful information. Before the rule became effective, the Trump administration's Office of Management and Budget (OMB) indefinitely stayed the requirement.

The genesis of the rule goes back to President Barack Obama's National Equal Pay Enforcement Task Force, in which the EEOC joined other federal agencies to identify ways to improve enforcement of federal laws prohibiting pay discrimination. As a result of the task force and after various studies the task force commissioned, in February 2016, the EEOC announced its intention to revise its Employer Information Report (EEO-1) to add a second component of information to be collected and reported by employers. The federally mandated EEO-1 survey already required (i) employers with 100 or more employees and (ii) federal government contractors or first-tier subcontractors with 50 or more employees and a federal contract, subcontract or purchase order amount of \$50,000 or more, to collect and annually report their employees' gender, ethnicity and race, by job category.

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The new component was to require the same employers to also collect and annually report aggregated wage data and hours worked, categorized by employees' gender, ethnicity and race, and by job category (Wage Data). Following a comment period and public hearing, in September 2016, the OMB, under President Obama, approved the collection and reporting of Wage Data, and the changes were set to become effective in March 2018 with reporting on 2017 data.

In August 2017, under President Donald Trump's administration, the OMB changed course and issued a memorandum suspending implementation of the EEO-1's Wage Data collection and reporting requirements. The OMB cited the Paperwork Reduction Act as the reason for its review and immediate stay, and stated its general concern that the new requirements "lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues."

Court Ruling

The National Women's Law Center and the Labor Council for Latin American Advancement filed suit against the OMB and the EEOC, as well as certain administrators in those agencies, seeking both a declaration that the OMB exceeded its authority under the Paperwork Reduction Act in staying the collection and reporting of Wage Data, and reinstatement of the collection and reporting requirements. On March 4, 2019, Judge Tanya S. Chutkan of the U.S. District Court for the District of Columbia found the OMB's stated reason when issuing the stay conflicted with its prior findings that the Wage Data collection had practical utility and was designed to minimize the burden of reporting for employers, yet the OMB failed to explain these inconsistencies. Judge Chutkan held that the OMB did not show "any prior error, let alone a material one," and the OMB's stay of the Wage Data collection and reporting was "illegal." Accordingly, Judge Chutkan vacated the OMB's stay and reinstated the previous approval of the revised EEO-1 form, including Wage Data, effective immediately.

Implications

The recent ruling leaves employers with questions about whether they will have to undertake the significant task of adding 2018, and possibly 2017, Wage Data to their EEO-1 submissions with little advance notice. Based on the court ruling, employers subject to EEO-1 reporting are required to include Wage Data for 2018 in their reports. The current EEO-1 reporting site for the 2018 calendar year opened on March 18, 2019, but the EEOC

has not yet provided a means for employers to submit the Wage Data component on the EEO-1 portal. In addition, the court's ruling did not specify whether and when 2017 Wage Data would be required.

Following a request by Judge Chutkan for the EEOC to provide guidance about if, when and how it will collect Wage Data from employers, the EEOC submitted a brief on April 3, 2019, stating that it could collect the data by September 30, 2019, if it enlisted the help of an outside data analytics contractor. Yet, as discussed above, the EEOC highlighted the serious risks associated with such a proposal, including the risk of poor quality data as an end product, further noted its strong concerns about requiring employers to report 2017 data at the same time. In addition, on April 1 and 4, 2019, DirectEmployers Association, Inc. and the American Society of Employers, as well as the U.S. Chamber of Commerce and other major business associations, respectively, filed *amici* briefs, arguing their employer-members cannot simply "hit the send button" or "flip a switch" and produce "the reams of data necessary to comply with the Wage Data requirements."

DirectEmployers Association and the American Society of Employers asserted compliance should not be required until the 2020 EEO-1 reporting deadline. The Chamber of Commerce stated it will take employers at least 18 months to prepare to collect the required data prospectively — the amount of time the EEOC originally provided when the Wage Data rule was issued in September 2016, but "[g]athering the data *retroactively* for 2018 ... is simply impractical." However, in their April 8, 2019, filing, the plaintiffs asked the court to require, among other things, that the EEOC: (i) provide notice to employers by April 12, 2019, of their obligation to report Wage Data in this reporting cycle, (ii) collect the Wage Data for calendar year 2018 by the current May 31, 2019, deadline, and (iii) develop a plan to collect Wage Data from calendar year 2017. On April 16, 2019, Judge Chutkan held an evidentiary hearing on the parties' submissions. The judge has yet to rule on the final timeline and details for compliance, but we expect a decision very soon.

Regardless of the judge's decision on these details, there also is a strong likelihood that the OMB will appeal and seek a stay of the court's ruling that Wage Data must be reported at all until the issue can be decided by the appellate court. However, until further clarity is provided, employers are advised to prepare for the possibility that they will be required to submit Wage Data by as early as May 31, 2019.