

UPDATE: Impending September 30 Deadline for EEO-1 Pay Data Collection

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By no later than September 30, 2019, employers with 100 or more employees must file EEO-1 Component 2 to report pay data for their workforces in 2017 and 2018. As the deadline approaches, a reminder of the history and requirements of this controversial data collection are in order.

History: Legal Challenges

During the Obama administration, the Equal Employment Opportunity Commission (EEOC) proposed revising Form EEO-1 to add the collection of pay data to the demographic data that the form already included. The U.S. Office of Management and Budget (OMB) stayed the requirement to collect the pay data, and that stay was challenged in litigation.

Earlier this year, a federal court determined the stay was improper. In that case, *National Women's Law Center v. Office of Management and Budget*, Civ A. No. 17-cv-2458 (D.D.C.), the court ruled that the revised EEO-1 must take effect in 2019 and that the EEOC must collect the required pay data. It ordered the EEOC to collect pay data for 2018 no later than September 30, 2019. The EEOC has gone a step further and is requiring covered employers to submit pay data from both 2017 and 2018 by that deadline. After significant challenges, the EEOC opened an electronic portal on July 15, 2019, for employers to begin submitting their 2017 and 2018 pay data.

OMB has appealed the district court's decision. Some employers delayed submitting their data because of the portal's current structure and the uncertainty surrounding the appeal. However, the appellate briefing schedule will not be complete until October 9, 2019 – after the deadline to submit data has passed.

Requirements

The pay data requirements have given rise to new terminology. EEO-1 Component 1 refers to the demographic information that was required before the new pay data mandates. Employers with 100 or more employees and federal contractors with 50 or more employees must submit Component 1, which describes ethnicity/race and gender information about their workforce broken down into ten job categories.

The new pay data requirements are EEO-1 Component 2. Employers and federal contractors with 100 or more employees must submit Component 2, which is comprised of pay and hours worked, broken down into 12 pay bands across the same ten job categories by the same racial, ethnic, and gender groups used for Component 1. The pay bands range from a low of less than \$19,239 to a high of \$208,000 and over.

Any pay period between October 1 and December 31 can be used to determine if an employer has the requisite number of employees. The selected pay period is the Snapshot Period and need not be consistent year to year. Only employees who were on the payroll during the Snapshot Period must be reported, so employers who have workforces fluctuating around 100 employees can choose to count in a pay period that falls under the required number. Employees who were employed during the Snapshot Period must be counted even if they were terminated before the end of the year.

Potential Wrinkles

Employee self-identification remains the preferred method of collecting the race/ethnicity and gender information used for both components. But, the EEOC and Office of Federal Contract Compliance Programs have allowed employers to use existing employment records or observation when employees fail to self-identify.

As more employees self-identify on official government forms (including state drivers' licenses and birth certificates) as non-binary or "other" rather than male or female, reporting has been confusing for employers. The EEOC recently released a new Frequently Asked Questions answer on EEO-1 Component 2 that indicated employers may now report the number (if any) of employees who identify as non-binary or other in the comment box on the report. Along with the gender information, employers should provide all other required information (pay band, job category, race, ethnicity) with respect to those employees in the box. The FAQ does not require employers to collect information as to whether an employee identifies as non-binary or other, but merely provides instructions on how to report those who do.

Compliance Steps

Covered employers who have not already submitted Component 2 must work through these steps no later than September 30, 2019:

- *Choose the Snapshot Period. (Choosing any pay period between October 1 and December 31 in which an employer has fewer than 100 employees means the employer need not submit Component 2).*

- *Confirm that each employee has been assigned to one of the 10 job categories provided by the EEOC.*

- *Identify the number of employees (based on race/ethnicity and gender) who fall into each of the EEOC's 12 compensation bands. The reported compensation must come from Box 1 of the employees' W-2s.*

- *Determine the total number of hours and weeks worked during the reporting period by those employed in the Snapshot Period (based on race/ethnicity and gender) within each compensation band. (Employers may make assumptions about hours worked by exempt employees whose hours are not tracked).*

- *Report Component 2 via the EEOC's online filing system.*

Employers can manually enter their pay information using the Computer Assisted Web Interview data collection instrument on the EEOC's website. The CAWI instrument is likely to be inefficient for employers submitting multiple entries. An alternative option to submit independently created data files opened August 15, 2019. Employers should plan ahead in case they experience delays or challenges using the portal.

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