

# INSIGHT: EEOC Ordered to Explain Pay Data Collection Plan by April 3

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*The EEOC will soon start collecting pay and hours data from many employers compiled by gender, race, and ethnicity. Akin Gump attorneys note employers should expect more guidance and a timetable for compliance from the EEOC by April 3.*

On March 4, the Trump administration was ordered to restore an Obama-era pay data collection rule that the Equal Employment Opportunity Commission approved in 2017, but was later stayed and never implemented. Since then, implementation questions have remained up in the air, but a judge has now ordered the EEOC to explain its plan for pay data reporting by April 3.

The rule requires companies with 100 or more employees (and federal contractors with 50 or more) to provide data regarding pay and hours for all workers, compiled by gender, race, and ethnicity, on a revised EEO-1 data collection form (the “EEO-1”).

The addition of pay data reporting on the EEO-1 is substantially broader than prior reporting, which required employers to report only their workforce demographics for broad job categories.

The court ruling comes fewer than three months before the current May 31 deadline for employers to submit their EEO-1 data, and only two weeks before the survey opens on March 18 (the original March 31 deadline was extended due to the government shutdown).

To date, the government has not issued any guidance regarding whether employers will need to use the revised EEO-1 to submit their 2018 pay data by this year’s EEO-1 deadline or whether the pay data deadline will be extended. Nor has the government indicated whether it plans to appeal the District Court’s decision, or seek a stay of pay data collection pending the outcome of the appeal.

However, on March 18, the EEOC issued a statement on the opening of its portal for EEO-1 submissions, informing employers that they should submit their EEO-1 forms without the pay data, and that guidance would be forthcoming regarding pay data submission. Impatient with the EEOC’s silence, the judge from the court case has apparently ordered the EEOC to file a brief with the court, explaining its plan for collecting pay data by April 3.

## OMB Approves EEOC’s Proposed Pay Data Collection

In 2016, the EEOC and Department of Labor together announced its intent to impose greater obligations on larger employers by requiring the reporting of pay data. The EEOC’s initiative was aimed at identifying and addressing pay disparities between male and female employees, and among employees of different races and ethnicities, making it easier for the EEOC to pursue claims alleging systemic compensation discrimination.

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Under the EEOC's longstanding EEO-1 collection practices, businesses with 100 or more employees have been required to submit annual EEO-1 reports that include data about employees' ethnicity, race and sex by specified job categories (including, for example, "Executive/Senior Level Officials and Managers," "First/Mid-Level Officials and Managers," "Professionals," "Administrative Support Workers" and "Service Workers").

Under the revised EEO-1 form, covered employers would also need to submit information regarding employees' compensation and hours worked—in each case, as associated with employees' ethnicity, race and sex, and the current EEO-1 job categories. Critics of the new EEO-1 have maintained that the data collection requirements would be both burdensome and meaningless, as they potentially group together employee with very different duties, educational levels, and credentials.

On Sept. 29, 2016, Office of Management and Budget issued its approval of the new EEO-1. The new pay data collection obligations were set to begin in 2018.

## **OMB Stays Its Prior Approval of Pay Data Collection**

On Aug. 29, 2017, Victoria Lipnic, the Acting Chair of the EEOC, issued a statement explaining that OMB had decided to initiate a review and stay of EEOC's new collection of pay data. Notably, Lipnic, who is a Republican appointee, had voted against the pay data collection requirements in 2016, as a regional Commissioner.

OMB justified the stay by claiming that circumstances related to the collection had changed, and that burden estimates provided by the EEOC at the time of initial submission were materially in error. In particular, OMB claimed that the EEOC's pre-approval burden estimates did not account for the use of data file specifications for employers to use in submitting EEO-1 data, which were not made available during the public comment process and only disseminated after approval.

(See Akin Gump's Sept. 5, 2017 Hedge Up for more detail about the OMB's decision to stay implementation of the EEOC's revised EEO-1.)

## **D.C. Court Rejects OMB's Stay of Pay Data Collection**

Following the stay, several advocacy groups filed suit, arguing that OMB's decision to freeze implementation of the new pay data collection requirements was without basis in law. The court agreed, rejecting OMB's two key assertions: (1) that the public had been improperly denied the opportunity to comment on the EEOC's data file specifications in connection with the EEO-1, and (2) that the EEOC's initial burden estimates did not account for the use of these particular data file specifications.

Finding the OMB's actions "arbitrary and capricious," the court vacated the OMB's stay, and held that "the previous approval of the revised EEO-1 form shall be in effect."

What this means now for employers is unclear.

The government has not yet made any public statement in response to the court's decision. The data collection instructions currently available on the EEOC's website pertain entirely to the original version of the EEO-1 used during the OMB's stay, with no mention of the revised EEO-1 or pay data collection.

Given that the EEOC lacks a quorum (only two of the five Commissioner seats are filled—and were appointed by Obama and Trump, respectively), and is currently without a general counsel, it may be some time before the agency can take action on its own to revisit the EEO-1 pay data collection requirement.

However, the district court has now ordered the EEOC to explain how it will begin collecting pay data from employers by April 3, which will presumably include information regarding the timing and implementation of the current pay data collection rule.

While it is certainly possible that the EEOC will hold employers to the looming May 31 deadline for submission of pay data, it seems unlikely. The EEO-1 portal is already open for submissions and the EEOC has told employers to begin submitting their EEO-1s without the pay data. However, employers can anticipate guidance from the EEOC by April 3 and, hopefully, the EEOC will set a later deadline for submission of pay data. Employers will need to comply with this deadline, absent a court-ordered stay.

## **Author Information**

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