

Hedge Up Alert

September 5, 2017

Key Points

- OMB has frozen the Obama-era employee pay data collection requirements that were set to take effect in March 2018.
- Employers should continue to use the prior version of the EEO-1 form and will have until March 31, 2018 to submit 2017 data.
- Employers should consider reviewing their compensation practices, with the guidance of counsel, to ensure compliance with all applicable laws.



OMB Freezes EEOC Pay Data Collection Rule

On August 29, 2017, the Office of Management and Budget (OMB) issued a memorandum staying implementation of Obama-era changes to the annual EEO-1 report form that would have required firms 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. The revised form had been due to be implemented in March 2018.

The Equal Employment Opportunity Commission's (EEOC) proposed pay data reporting scheme would have imposed new administrative burdens on large firms, including reporting of hours and pay data for all employees. For a more detailed discussion of what the proposed form EEO-1 would have required, please see our February 8, 2016 Hedge Up article, available [here](#). In light of the stay, firms can continue to use the pre-existing version of the EEO-1 form and will have until March 31, 2018 to submit their 2017 data.

In reaching its conclusions, OMB relied on its authority under the Paperwork Reduction Act (PRA) to determine whether collections of information meet the standards of the PRA. First, OMB noted that the EEOC failed to publish certain information (relating to data file specifications for employers to use in submitting the revised EEO-1 data) in the Federal Register, as required by the notice and comment process. OMB also challenged the EEOC's initial calculation of the burden on employers to comply with the new rule, stating that it failed to account for these data file specifications. Finally, OMB also expressed concern that "some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues." In implementing the stay, OMB also requested that the EEOC submit for OMB's review a new information collection package for the EEO-1.

Notably, OMB's review was requested by the EEOC's Acting Chairperson, Trump-appointee Victoria Lipnic. The review comes at a time when the EEOC is in flux: the agency currently is operating without a General Counsel, with two of its five Commissioner seats vacant and with two other Commissioner seats held by Obama appointees. OMB's stay order is rooted in its (sometimes controversial) role of ensuring that covered agencies' rules reflect the incumbent President's policies and priorities.

Despite OMB's stay of the revised EEO-1 form and accompanying data maintenance requirements, the underlying focus on pay equality remains very much intact. Commissioner Lipnic publicly reaffirmed a commitment to addressing pay discrimination on August 30, 2017, just after the decision by OMB. Moreover, several states, including New York and Massachusetts, have passed new laws designed to help redress pay disparities based on gender and other factors.

Firms should consider conducting (privileged) internal reviews of their existing pay structures and ensuring that any disparities can be explained by bona fide factors and circumstances. The year-end pay bonus process—which shortly will be under way at a number of firms—is a logical time to review these issues, with the involvement of counsel to help shroud any self-critical analysis in the attorney-client privilege.

OMB's August 29, 2017 memorandum is available [here](#). The current EEO-1 form can be found [here](#).

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