

### A (Temporary?) Reprieve: Employers No Longer Required to Submit Pay Data to the EEOC

On Tuesday, August 29, 2017, the U.S. Equal Employment Opportunity Commission (EEOC) announced that the Office of Management and Budget (OMB) would stay the new EEO-1 pay reporting requirements that had been scheduled to take effect in March 2018.

As previously reported, in September 2016, the EEOC amended its Form EEO-1 to require that employers with 100 or more employees report detailed pay data on their workforce, broken down by the employees' gender, race and ethnicity. The revised form, which was due to the EEOC on March 31, 2018, required that employers submit W-2 compensation and hours data, divided into 12 separate pay bands. These employers – and federal contractors with 50-99 employees – were already required to provide data on employees' gender, race and ethnicity by job category on the existing EEO-1 form.

This new EEOC rule had been subject to vigorous challenge among employer groups. In February 2017, the U.S. Chamber of Commerce and 27 trade associations asked the OMB to reconsider its 2016 approval of the revised EEO-1 form pursuant to Section 3517 of the Paperwork Reduction Act (PRA). The PRA and its implementing regulations require that any federal agency seeking to collect information from the public (1) minimize the burden on complying with requests; (2) maximize the utility of the information sought; and (3) ensure that the information provided is subject to appropriate confidentiality and privacy protections. The Chamber of Commerce argued that the revised EEO-1 form violated the PRA, as it was both overly burdensome and would do nothing to ensure equal pay for equal work.<sup>1</sup>

On Tuesday, August 29, 2017, the OMB sided with the Chamber of Commerce. It issued a memorandum indicating that it would immediately stay the implementation of the new EEO-1 form. It outlined three main justifications for this decision:

- 1. Lack of public comment on data collection:** The OMB pointed out that the EEOC failed to release information about how it would collect pay data until *after* the rule had been approved. Thus, the OMB concluded that the public "did not receive an opportunity to provide comment on the method of data submission to EEOC."
- 2. Burden:** Second, the OMB concluded that this lack of information on data collection may have caused the burden of compliance to be underestimated since the "EEOC's burden estimates did not account for the use of these particular data file specifications."
- 3. Ineffectiveness and Privacy Concerns:** Lastly, the OMB indicated that it had broad concerns that the new EEO-1 form "lack[ed] practical utility," was "unnecessarily burdensome" and did not "adequately address privacy and confidentiality issues."

#### What's Next

For now, covered employers have a reprieve from their new EEOC pay data collection obligations. If the EEOC seeks to

<sup>1</sup> See Letter to John M. Mulvaney, *Request for Review; EEOC's Revision of the Employer Information Report* (Feb. 27, 2017), available at <https://www.uschamber.com/letter/letter-omb-requesting-review-the-eeocs-revisions-the-eeo-1-form> (last visited August 30, 2017).

salvage its effort to collect pay data from employers, it must submit a new information collection package for the EEO-1 form to OMB for review.

### **Take-Away for Employers**

Employers need not collect and report pay and hours-worked data on the EEO-1 form next year. However, according to the EEOC, “[t]he previously approved EEO-1 form which collects data on race, ethnicity and gender by occupational category will remain in effect.” The EEOC has confirmed that the deadline for this filing will remain March 31, 2018.

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