

EEO-1 Background

For decades, the EEOC has required employers with 100 or more employees, and government contractors with 50 or more employees and a contract of more than \$50,000, to file Form EEO-1 with the EEOC (it is shared with the OFCCP). The form requires an employer to report the demographics of their workforce by race, ethnicity, and gender, using broad “job bands” (e.g, professionals, technicians, sales workers) – so an employer might report that it has 7 white male professionals, 5 black female professionals, 1 Hispanic female professional, and 3 Hispanic male professionals. This data is kept confidential by EEOC, and is only released in aggregate form (although it is also provided to OFCCP, and thus potentially available to the public via FOIA). EEOC’s statutory authority to collect this information derives from section 709 of Title VII, which gives the EEOC the power to “prescribe by regulation or order, after public hearing, [such reports] that are reasonable, necessary, or appropriate” for the enforcement of Title VII. Pursuant to the Paperwork Reduction Act (PRA), the EEOC is required to seek approval from OMB to collect this data, including OMB’s review of the forms themselves.

For twenty years, employee advocates and women’s groups on the left have been pushing for the EEOC to require the reporting of employee compensation in “pay bands” in job bands by race, ethnicity and gender. Employers have consistently opposed this effort.

In September 2016, the Obama Administration era EEOC obtained approval from OMB to collect this compensation data. Because of how the data is tabulated into “pay bands” and “job bands” it is impossible to use it in any meaningful way to root out pay discrimination. EEOC’s estimate (which was conservative to say the least) pegged the annual cost for employers to file this information is in excess of \$50 million annually. Employer trade associations have analyzed and come up with much higher costs – conceivably as high as \$400 million.

In February 2017, the U.S. Chamber of Commerce and others filed a petition with OMB asking the agency to rescind its prior approval and suspend collection of pay data indefinitely. In August 2017, OMB informed EEOC that it was rescinding its approval and staying collection of pay data pending further review.

In November 2017, the National Women’s Law Center (NWLC) and others sued EEOC and OMB in federal court, arguing that OMB’s revocation of its prior approval was arbitrary and capricious under the Administrative Procedure Act and should be voided. On March 4, 2019, Judge Tanya Chutkan of the U.S. District Court for the District of Columbia (an Obama appointee) granted summary judgment in favor of NWLC, invalidated OMB’s rescission of its clearance, and ordered that EEOC collect compensation by May 31, 2019. At a March 18 status conference, the judge appeared angry that the EEOC had not yet notified employers that they would need to file this data, and has ordered DOJ to file with the court by April 3, 2019 a report setting out how EEOC will implement these collection requirements. Plaintiffs’ response to DOJ’s filing is due on April 8, 2019.

EEO-1 Chronology

- 02/01/2016 EEOC publishes proposed EEO-1 with compensation data collection (by gender, race, and ethnicity) – “Component 2” – for 60 days notice and comment to EEOC relying on Paperwork Reduction Act clearance procedure to introduce new form
- 03/16/2016 EEOC holds day-long public hearing on proposal
- 04/01/2016 60-day comment period closes
- 07/14/2016 EEOC publishes revised proposed EEO-1 for 30 days notice and comment to OMB
- 08/15/2016 30-day comment period closes
- 09/29/2016 OMB approves EEO-1 form (Components 1 and 2) under Paperwork Reduction Act. EEOC announces that for reporting of 2016 data (due March 2017) only Component 1 needs to be filed. First filing due of Component 2 will be for 2017 data, due March 31, 2018
- 02/2017 U.S. Chamber of Commerce and EEAC (now CWC) file petitions with OMB asking OIRA to review and revoke its prior PRA approval of Component 2
- 08/29/2017 OMB informs EEOC that it has rescinded its approval and stayed the use of Component 2 pending further review; Component 1 remains in effect
- 11/15/2017 National Women’s Law Center *et al.* sue OMB and EEOC
- 01/18/2018 EEO-1 (Component-1 only) 2018 survey cycle is scheduled to open; reports due March 31, 2019
- 02/05/2019 In light of government shutdown, EEOC announces that 2018 survey will now open on March 18, 2019, with reports due May 31, 2019
- 03/04/2019 Court grants summary judgment to NWLC under Administrative Procedure Act
- 03/18/2019 EEOC posts on website that survey is open for Component 1 only; advises that guidance re: filing component 2 will be forthcoming
- 03/18/2019 NWLC files motion for status conference
- 03/19/2019 At status conference, Court orders DOJ to file a report with the court by April 3, providing an explanation of how EEOC will collect Component-2 and ‘actual dates’ for when the data collection would commence and be collected by May 31. Court expresses concern that the government was “ignoring a very real time constraint,” underscoring that the deadline for employers to submit the data is May 31
- 04/03/2019 Report due to court
- 04/08/2019 Plaintiffs reply to report due

Legal Options

Seek an Immediate Stay. In connection with filing the April 3 report, if DOJ can make a persuasive case that pay data collection is simply not possible in the time frame presented, they may be able to argue for a stay of the order until such time as compliance is possible. Alternately, if DOJ files an appeal (as discussed below), there is an argument to stay the order pending appeal.

Appeal to the Court of Appeals for the District of Columbia Circuit/Seek Stay Pending Appeal. Very few facts in the case appear to be disputed, and the question of whether OMB's rescission was lawful under the PRA appears to be a question of law that we might be able to have reviewed on a *de novo* standard of review. DOJ could move to appeal the court's order, and seek a stay pending the appeal.

An argument can be made that this is the classic case of when a stay pending appeal should be granted: in the absence of a stay, EEOC and businesses would be forced to spend millions of dollars to prepare information/filing that the Appeals Court may ultimately determine is not required to be filed. There can be no argument that plaintiffs would suffer immediate harm – EEOC has not collected this data for 50+ years, without any harm to plaintiffs. The equities favor staying the enforcement of this requirement until the Appeals Court has had a chance to review. In the event DOJ appeals, it is highly likely that business groups would want to weigh in via an amicus brief.

Intervention. Business and trade associations are evaluating the strength of a motion to intervene in the lower court case currently pending. The argument in support of intervention would be that DOJ's mission is to protect the interests of OMB and the EEOC. No party to the case presently is representing the interest of the impacted stakeholders – businesses which face millions of dollars of immediate compliance costs. In the event an attempt to intervene is made, we would ask DOJ to support (or at least not oppose) the motion. Although given the judge's disposition to date, it is unclear how willing she would be to grant the motion, denial of the motion too can form the basis of an appeal. Finally, if the strategic decision is to not intervene at this stage but rather wait until an appeal is filed, we would ask that DOJ support or not oppose a motion to intervene at that time.