



Will the EEOC Start Collecting Pay Data Again? 5 Pointers for Employers as You Track This Development

Insights

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The federal government wants you to share employee pay data again, along with the demographic data you already submit on employee job titles, sex, and race/ethnicity. According to its July 5 regulatory agenda, the Equal Employment Opportunity Commission (EEOC) is seeking to revive Component 2 pay data collection as part of your annual EEO-1 submission. Covered employers had to briefly submit this compensation information a few years ago after a contentious legal battle on the issue, but the Trump administration dropped the requirement to report pay data. We're not surprised to see the Biden administration pick this up again, as the EEOC signaled it would revisit this filing requirement. Notably, however, the proposal (which is expected to be released in January) faces significant obstacles before it could ultimately be finalized. Still, it's a good idea for employers to track this development, as it could lead to burdensome changes down the road. Here's what you need to know, and five pointers to keep in mind as you stay tuned for updates.

How Did We Get Here?

- **Longtime Practice:** Private employers with at least 100 employees and federal contractors or first-tier subcontractors with at least 50 employees need to organize employee demographic data by employee job category, as well as gender and race/ethnicity, and submit that data to the EEOC on an annual basis. They do so by filing an EEO-1 report. The EEOC uses this workforce demographic data for a variety of purposes including enforcement, analytics and research, and evaluation of industry trends. This requirement has been around for nearly six decades and is known as Component 1 of the EEO-1 report.
- **New Requirement Introduced:** In 2016, during the Obama administration, the EEOC proposed changes to the EEO-1 report that would require employers to include pay data and the number of hours worked for their workforces. The proposed reporting expansion was intended to identify pay gaps, which the agency could then use to target specific employers and investigate pay discrimination practices.
- **Concerns About Burden on Employers:** In 2017, during the Trump administration, the White House scrapped the revised EEO-1 report before Component 2 pay data was ever collected. The Office of Management and Budget (OMB) announced that it had significant concerns with the revised reporting requirements, among them that "some aspects of the revised collection of

information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues.”

- **Surprising Court Ruling:** In 2019, a federal judge shocked the employer community by ordering the EEOC to collect Component 2 pay data for both 2017 and 2018. The agency complied and collected this information from covered employers.
- **Practice Abandoned:** Later in 2019, the EEOC announced that it would halt further collection of pay data during future EEO-1 reporting cycles due to the high burden on employers and the unproven usefulness of the program. The agency has not collected Component 2 data since then.
- **Revival Expected:** There have been lots of rumors about a revived EEO-1 Component 2 requirement since President Biden first took office – but the [recent regulatory agenda announcement](#) is the first official step we’ve seen. The EEOC said it expects to issue a proposed rule in January 2025.

What Happens Next?

- **Look for a Proposal in 2025:** Specifically, the EEOC said it plans to propose a rule regarding its “authority to collect pay data or related information as reasonable, necessary, or appropriate for the enforcement of Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963.” The agency will rely on a study it commissioned from the National Academy of Science (NAS) that examined the quality of the 2017 and 2018 pay data collection and provided recommendations for future data collections.
- **Anticipate Revisions to the Prior Pay Data Collection Process:** The NAS report, which was issued in 2022, found that the pay data collection in 2017 and 2018 did help the EEOC address race and sex discrimination in the workplace. However, it also found some issues with the way data was collected. “Some of the issues identified could be addressed through modest changes to the existing data-collection instruments and processes. Other issues would require substantial revision to instruments and processes to better serve the full scope of EEOC’s mission,” according to the report.
- **Expect Business Groups to Push Back:** Employer advocates still have genuine concerns about cost, administrative burdens, and privacy – and they will likely cite to EEOC findings during the Trump administration to highlight the heavy burden on employers to collect pay data. At the time, the EEOC said it “concludes that the burden estimate associated with the EEO-1 is higher than ... previously estimated” and previous efforts “insufficiently calculated” the burden on employers. Moreover, [a recent SCOTUS ruling](#) gives employers new tools to challenge federal agencies’ regulatory power by enabling courts to strike down agency rules much more easily. This development may increase the likelihood that a legal challenge will be successful.
- **Note Election Year Uncertainty:** Given that we’re in a presidential election year, we could see the pendulum swing again if the Republican party takes the reins in 2025. Even if the current administration issues a proposal in January before a potential switch, the EEOC must follow a

long process before it can issue a final rule. So, the initiative could simply be dropped by a new administration in the White House.

What Should You Do For Now?

1. **Assess Your Reporting Capabilities:** Although the specifics may change, you should consider reviewing the requirements for the 2017 and 2018 pay data collection and assess your ability to comply with future reporting requirements. While you don't have to pull this data yet, it's a good idea to determine how your W-2 pay data can be split into potential pay bands and EEO-1 categories. You'll also want to think about how to report hours worked, which can be a significant undertaking, since the data is likely tracked separately from the pay data W-2 information.
2. **Conduct an Audit of Your Pay Practices:** You should also make it a priority to review current pay systems and identify and address any areas of pay disparity. Taking proactive steps now can minimize increased scrutiny later. Ideally, you would work with counsel to conduct this initial review under the protection of the attorney-client privilege while you are assessing your workforce. By conducting your own audit of pay practices, you will be able to determine whether any pay gaps exist that might catch the eye of the federal government if or when you are forced to turn over this information.
3. **Be Prepared to Take Action:** Determine whether any disparities that may exist can be justified by legitimate and non-discriminatory explanations, or whether you will need to take corrective action to address troublesome pay gaps. Due to the increased complications caused by varying state legislative developments, we strongly encourage you to get your attorney involved in this analysis early in the process.
4. **Watch for Legal Challenges:** As mentioned above, we expect the employer community to fight back on pay data reporting requirements, arguing that the process will create heavy burdens that outweigh the usefulness of collecting the data.
5. **Stay Informed on State Law Developments.** While the federal government is just starting a long rulemaking process that will involve a notice and comment period and potential litigation, many states are considering pay data reporting laws of their own. Already, California employers with at least 100 employees must comply with pay data reporting requirements that were enacted in 2020 and amended for 2023. Illinois also has a pay data reporting requirement, and more states may soon follow suit.

Conclusion

Fisher Phillips will continue to monitor any further developments in this area as they occur, so you should ensure you are subscribed to [Fisher Phillips' Insight System](#) to gather the most up-to-date information. If you have any questions about filing EEO-1 reports or state pay data reports, please consult your Fisher Phillips attorney, the authors of this Insight, or a member of Fisher Phillips' [Affirmative Action and Federal Contract Compliance Practice Group](#) or [Pay Equity Practice Group](#).

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