

## Blog Post

# Employers Must Report Pay Data and Hours Worked

May 7, 2019

Employers with 100 or more employees must report pay data and hours worked by race, sex, and ethnicity for employees in each of 10 job categories as a result of a recent court ruling. The data for 2017 and 2018 payrolls must be reported by September 30, 2019 as part of the revived Component 2 of the annual EEO-1 Report. The requirement to include that data resulted from a federal judge's recent ruling in *National Women's Law Center v. Office of Management and Budget*. This decision has a significant impact on employers. On top of this, employers now face heightened investigatory and enforcement activity due to the EEOC's access to detailed pay data.

## Background

For more than half a century, the EEO-1 Report required employers to disclose the same basic workforce information: the number of individuals employed by the employer organized by job category, race, ethnicity, and sex. This information is referred to as "Component 1" data.

In February 2016, the Equal Employment Opportunity Commission ("EEOC") announced that it would be mandating significantly more data from employers in future EEO-1 Reports. The new information, called "Component 2" data, includes employee W-2 earnings as well as hours worked in

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12 pay bands. As we previously reported in our blog, the business community opposed the new requirements for a myriad of reasons. For one, the overly broad “pay bands” that employees must be grouped into for the EEO-1 Report were an area of concern. For example, a hospital employer might have to count its surgeon, attorney, and accountant employees together in the “Professionals” category – positions that have obvious dissimilarities. There was also a concern with the burden these expanded requirements would place on employers to compile Component 2 data. Additionally, employers complained about the likelihood of increased scrutiny of pay practices and enforcement activity by the EEOC and lack of usefulness of the data to be collected. The EEOC advised that it planned to run “statistical tests” on the Component 2 data as a means “to evaluate whether and how to investigate . . . allegations of discrimination.” However, the EEOC itself acknowledged that “it does not intend or expect that this data will identify specific similarly situated comparators or that it will establish pay discrimination as a legal matter.”

Despite significant employer concerns, the Office of Management and Budget (“OMB”) under President Obama approved the EEOC’s proposed changes on September 29, 2016 and these were scheduled to go into effect in March 2018. Before implementation, however, in August 2017 the Trump Administration placed a stay on the addition of the Component 2 data to the EEO-1 Report. Many employers assumed that this meant the end of the expanded EEO-1 Report, and that is where the matter stood for more than 18 months.

## **Recent Decision**

In response to the stay, two organizations – the National Women’s Law Center (“NWLC”) and Labor Council for Latin American Advancement (“LCLAA”) – filed suit in federal court seeking to overturn the stay and on March 4, 2019 Judge Tanya S. Chutkan granted their request in *National Women’s Law*

*Center, et al. v. Office of Management and Budget, et al.* Judge Chutkan’s order vacated the stay and effectively reinstated the OMB’s prior approval of the expanded EEO-1 Report, including the Component 2 data. The order declared that the revised EEO-1 Report “shall be in effect.” However, the effect of this order remained unclear.

The EEO-1 reporting deadline that followed this order was May 31, 2019. Given the short time frame, it seemed unlikely that employers could realistically be able to submit the Component 2 pay data by that deadline. Alternatively, there were concerns that the EEOC would not be able to receive and process this data. The EEOC, therefore, advised the court that it sought to require employers “to collect retroactively 2018 Component 2 pay data and submit the relevant data to the EEOC by September 30, 2019.” The NWLC and LCLAA opposed the EEOC’s proposed September 30, 2019 deadline. The organizations argued that the EEOC should be ordered to develop a plan to open the collection of Component 2 pay data in advance of the May 31, 2019 deadline, and to develop a plan for retroactive collection of 2017 pay data – data that would have been collected last year, but for the OMB’s stay.

After taking this into consideration, on April 25, 2019, Judge Chutkan ordered that employers must submit the expanded EEO-1 Reports containing the Component 2 data by September 30, 2019. Judge Chutkan also ordered the EEOC to retroactively collect 2017 pay data by the same deadline. The EEOC is expected to begin this collection on July 15, 2019 and will likely issue guidance and training for employers sometime in advance of that date.

### **Next Steps – EEO-1 Reporting Requirements**

Employers who are required to file EEO-1 Reports annually with the EEOC include the following:

- Businesses with at least 100 employees;

- Businesses with fewer than 100 employees if the company is owned or affiliated with another company and the entire enterprise employs 100 or more people; and
- Federal contractors with at least 50 employees and a federal contract, subcontract, or purchase order of at least \$50,000.

This year, the deadline to file the EEO-1 Reports with Component 1 data is May 31, 2019. This deadline is later than usual due to the government shutdown that occurred from December 2018 to January 2019.

To comply with the Component 2 requirements, employers must choose a payroll period between October 1 and December 31, and include data for all employees (full-time and part-time) during that payroll period in the Component 2 report. For each employee in that payroll period, the employer must report earnings and hours data in the aggregate, based on the EEO-1 job categories of the employees.

For pay data, the employer should list the number of employees falling within each pay band by sex, race, and ethnicity. To identify the right pay band for each employee, employers are to use the earnings identified in Box 1 on the employees' Form W-2 for both 2017 and 2018.

For hours data, the employer should report the aggregate hours data for all employees in each pay band by sex, race, and ethnicity. For non-exempt employees, employers should report the hours worked, just as they would under the Fair Labor Standards Act. For exempt employees, employers should multiply 40 hours by the number of weeks worked by the employee in that year.

The Component 2 data for 2017 and 2018 must be reported to the EEOC by September 30, 2019. The EEO-1 Report can be completed online here: <https://egov.eeoc.gov/eeo1/login>.

If you need assistance complying with the new EEO-1 requirements, please contact your Akerman attorney.

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