CARLTON FIELDS

EEO-1 Pay Data Collection Stay Held "Arbitrary and Capricious"

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On March 4, 2019, District of Columbia District Court Judge Tanya Chutkan ruled that the government did not properly stay the implementation of the Equal Employment Opportunity Commission's (EEOC's) revised Employer Information Report (EEO-1) for the collection of aggregate workforce pay data. *National Women's Law Center et al. v. Office of Management and Budget, et al.*, 2019 WL 1025867. The decision creates uncertainty regarding employer reporting obligations in the near term.

As we previously reported, in 2016 the EEOC proposed revisions to the EEO-1 report form, which the EEOC requires private employers with 100 or more employees, or government contractors with 50 or more employees, to submit annually. Proposed during the waning days of the Obama Administration, the EEOC's revised collection criteria required employers to tabulate and report the number of employees in each category whose W-2 wage earnings for the prior year fell within each of 12 pay bands, in addition to providing race, sex and ethnicity data in 10 standard EEO-1 job categories. The EEOC's stated purpose for the proposed EEO-1 change was to use the new information to "identify discriminatory pay practices where they exist in order to ensure that fair pay practices are put in place." *See Questions and Answers, Notice of Proposed Changes to the EEO-1 to Collect Pay Data from Certain Employers.*

The White House Office of Management and Budget (OMB) initially approved the proposed data collection, issuing an OMB control number required under the Paperwork Reduction Act in September 2016. Although slated for implementation in September 2017, the pay data reporting deadline was eventually pushed back to March 2018 to allow employers more time to comply.

Following President Trump's election in November 2016, the OMB changed course without much explanation, and apparently bowing to pressure from business groups who opposed the pay data collection. In August 2017, the OMB issued a memorandum to the EEOC indicating that it was initiating a review and immediate stay of the revised data collection regulation in accordance with its

authority under the Paperwork Reduction Act. The OMB ordered the EEOC to publish a notice in the Federal Register announcing the stay. *See* 82 Fed. Reg. 43362 (Sept. 15, 2017). The EEOC therefore suspended all efforts to collect pay data, directing employers to submit the prior approved EEO-1 report form by March 2018 for the 2017 reporting period.

In November 2017, the National Women's Law Center and the Labor Council for Latin American Advancement sued the OMB, the EEOC and designated officers in the District of Columbia district court, challenging the OMB's reversal. On March 4, the court granted the plaintiffs' summary judgment motion, finding that the OMB's decision to stay enforcement of the revised EEO-1 reports was "arbitrary and capricious" and exceeded its administrative authority. The court issued an order reinstating the data collection rule (now one year past its initial data collection date) and approving the revised EEO-1 form proposed by the EEOC in the original regulations.

The opinion does not explain when or how employers are supposed to respond, and as of this writing, neither the EEOC nor OMB have issued any statements or direction concerning compliance. The EEOC had already pushed back its March 2019 deadline for employer 2018 EEO-1 reports (under non-pay data collection rules) to May 31, 2019, due to the government shutdown earlier in the year. With the 2018 reporting portal not yet opened, it is unknown whether the ruling will impact the current reporting period or what the EEOC and OMB will do in light of this ruling in the short term. We will continue to monitor for developments.

What is clear is that the EEOC's attempt to find ways to identify and rectify prohibited pay discrimination just got a green light from a federal district court. It remains to be seen whether the information to be provided in the revised EEO-1 report will accomplish that goal. Certainly, though, the potential collection and analysis of aggregate employer data may embolden the agency to pursue more pay equity claims in the future.

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