

FIRM NEWS

EMPLOYERS MUST ACT PROMPTLY TO MEET CONTROVERSIAL NEW EEO-1 REPORTING OBLIGATIONS BY SEPTEMBER 30, 2019

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PROFESSIONALS
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Private employers with 100 or more employees, all employers with government contracts, and government subcontractors with 50 or more employees and a contract of \$50,000 or more, will now need to annually report to the U.S. Equal Employment Opportunity Commission how much they paid workers of different sexes, races and ethnicities going back to 2018, following a decision made yesterday by the US District Court for the District of Columbia. Terry Bonnette, a partner with Detroit-based management side labor and employment law firm Nemeth Law, explained the background of the decision, the controversy behind the ruling and the immediate next steps for employers.

Background

In 2017, the Obama administration added new reporting requirements for employers who submit annual EEO-1 reports to the Equal Employment Opportunity Commission (EEOC). In an effort to identify and remedy pay discrimination, employers were required to provide W-2 wage information and total hours worked for its employees by gender, race, and ethnicity. Employers never had to do that, however, because when the Trump administration took office, it suspended the Obama reporting requirements. The DC Federal Court found in its April 25, 2019 decision that there was no legal justification to suspend the reporting requirements. Accordingly, employers now must comply with the original reporting requirements by September 30, 2019. (See *National Women's Law Center v. Office of Management and Budget*.)

Why the Controversy?

The stated purpose of the data collection is to help employers evaluate their pay practices and assist the EEOC in strengthening enforcement of federal anti-discrimination laws. Yet, the reporting requirements are controversial for several reasons. Beyond the burden placed on employers, there are questions about whether the requested data is truly meaningful. For example, it requires employers to report by job classification how many male and female employees in each EEO classification fall into certain EEOC pay bands – and Bonnette says that's where the confusion can come in.

“In looking at pay ranges for lower paying jobs, there is approximately a \$5,000 difference between the lower end and the upper end of the EEOC pay band. For higher salaried jobs, however, there can be a \$35,000-\$45,000 difference between the lower end and upper end of the same pay band,” Bonnette said. “That means a man and a woman could be in the same job with the man earning \$163,000 and the woman earning \$129,000 and the report would show no pay disparity, because both employees fall within the same pay band. On the other hand, the same report would show a pay disparity between a man earning \$128,960 and a woman earning \$128,959, because those two salaries, while only a dollar apart, fall into different pay bands under the new reporting guidelines.”

Bonnette also points out that the report does not account for seniority, experience, education level, or any of the other factors that might account for pay differences within the same job classification. He uses the example of two commissioned sales people of different races where one sells \$2,000,000 in product and earns a \$150,000 commission, and the other sells \$1,000,000 in product and earns a \$75,000 commission.

“This report would show a race-based pay disparity where none exists,” Bonnette said. “In essence, it prematurely shifts the burden from the EEOC (or an employee) having to demonstrate that a pay difference is based on current or historical discrimination to the employer having to prove a negative (i.e. that there is no pay discrimination.)

Action Needed

Moving beyond the controversy, Bonnette explained the practical impact of the decision and next steps for employers to meet the September 30 deadline.

“These regulations were in effect for nearly a year before they were suspended, so many employers were already prepared to comply,” Bonnette said. “Most employers are going to have the requested data in raw form, but will have to scramble to compile, organize, and cross reference it, because the requirements ask employers to integrate data sets that are traditionally maintained in separate systems. The issue for most employers isn’t that they don’t have the data, it’s a question of how to get all of the required data together on one system in a timely manner to generate and file the required report.”

About Nemeth Law, P.C.

Nemeth Law specializes in arbitration, mediation, workplace investigations, employment litigation, traditional labor law and management consultation/training for private and public sector employers. It is the largest woman-owned law firm in Michigan to exclusively represent management in the prevention, resolution and litigation of labor and employment disputes.