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What To Expect From New EEOC Pay Data Demands

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Jeff Heller, of counsel in the Vorys Houston office and a member of the labor and employment group, authored an article for *Employment Law360* titled "What To Expect From New EEOC Pay Data Demands." The full text of the article is included below with permission from *Law360*.

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What To Expect From New EEOC Pay Data Demands

On April 25, Judge Tanya Chutkan of the U.S. District Court for the District of Columbia issued an order requiring the [U.S. Equal Employment Opportunity Commission](#) to collect pay data from employers required to file EEO-1 forms for the year 2018 by Sept. 30, 2019. This ruling was a victory for several advocacy groups that challenged the Trump administration's action that initiated a recent review and stay of the pay data collection efforts.

The judge left little doubt throughout the proceedings that she believed the administration's efforts were unjustified. She criticized the EEOC several times for its failure to immediately implement pay collection efforts after her initial ruling on March 4.

The whirlwind proceedings caught many employers (and likely the EEOC) off guard. All employers with more than 100 employees and all federal contractors employing 50 or more employees are obligated to submit this data to the EEOC. The court also ordered the EEOC to publish a statement about this requirement on its website by April 29.

Finally, the court also ordered the EEOC to collect a "second" year of data. The EEOC is to select whether data will be submitted for 2017 or for 2019 by May 3. Most commentators believe the EEOC will order data collection going forward for the 2019 year in an effort to spare employers from the burden of reporting on old data. Recently, the EEOC announced that it would begin accepting employer-reported data in July so that it would comply with the court's deadline.

The Contorted Path to Employer Pay Data Reporting

In 2016 the Obama administration's EEOC first published guidelines revising EEO-1 employer reporting requirements to include extensive collection of wage and salary data in 2018. Challenges were raised immediately from employer groups, citing the enormous cost (estimates of \$50 to \$400-plus million) and burden for employer compliance.

There is no doubt that the new administration responded to the employer criticisms when it stayed the EEOC's action. The district court in D.C. acted quickly, however, to reverse the administration's efforts.

Despite Judge Chutkan's questioning why data could not be collected almost immediately, employers and human resources departments know that the reporting burden is significant. There will likely be errors and inconsistencies across the board as companies make their interpretation of the requirements in the context of their workforce demographics. And notwithstanding a Sept. 30 deadline, HR departments will be stretched to manage what will be an uncertain process over the next few months.

What Are the Reasons for Collecting Pay Data?

Congress unsuccessfully sought to legislate collection of wage and salary data when the House passed the Paycheck Fairness Act in 2010. This act died in the Senate along a party line-vote in 2014. The Obama administration then resorted to rulemaking, with the EEOC issuing rules in 2016 requiring data collection.

The basic rationale for data collection is the desire to eliminate gender-based wage disparities by shining a light on actual pay data. (Some refer to this as "naming and shaming.") Access to pay data by workers and their advocates, along with publicity and advocacy of reported wage disparities, are tools for eliminating the pay gap between the sexes.

Indeed, some European countries have implemented similar requirements in the past few years, and it is fair to say that the publicity from company reports has had an impact on public opinion. Nevertheless, in the U.K., reported pay gaps have increased in many companies since the implementation of pay reporting requirements. The ability of "naming and shaming" approaches to eliminate pay gaps assumes incorrectly that companies can simply turn on or turn off the pay spigot and achieve quick results.

Another development in the U.K. following enactment of its pay reporting law is that collective legal actions addressing alleged pay gaps have increased substantially in number and scope over the past several years. There is little doubt that another beneficiary of EEOC sponsored data-gathering will be advocacy groups and plaintiffs lawyers seeking to use the courts for similar legal actions in the US.

Litigation Seeking to Address Discriminatory Pay Gaps

While Title VII and the federal Equal Pay Act have been on the books for 50-plus years, and some states now prohibit wage discrimination in general, the reported wage gap between the sexes remains. More legal cases have been filed recently with great fanfare but success has been elusive in some of these instances.

Pay discrimination is unlike most other discrimination cases. There is usually not a discrete act or acts but rather, pay discrepancies can exist with many factors to consider. There are sometimes legitimate factors

other than sex or protected status that might explain pay gaps including training, seniority and skills. While there can be some differences in how courts consider these other factors, Title VII and the Equal Pay Act recognize these and other reasons as potential defenses for employers.

Additionally, the courts must grapple with language in the Equal Pay Act that limits the comparator group of employees to those in same or similar job families and work locations. Generally speaking a claim must involve persons working in the same place doing substantially equal work for unequal pay. Title VII prohibits pay discrimination among similarly situated employees and covers additional forms of compensation; however, determining when and where jobs and individuals are similarly situated is not always easy.

Finally, in the past state laws often mirrored federal law so state court actions did not make much difference. In the last two or three years, we have seen a flurry of state equal pay laws that significantly departed from federal law. Laws already on the books include California (2016), Massachusetts (2016), Maryland (2016), Oregon (2017), Puerto Rico (2017), Washington (2018), New Jersey (2018), and Illinois (2019). These states enacted extensive statutes that for instance, do not require employees to be located in the same establishment; do not require comparing the pay between groups of employees performing “equal work,” but instead allow comparisons with “substantially similar work,” “comparable work” or “work of a comparable character”; finally, employer defenses are often more limited than under federal law.

Perhaps one of the most significant bars to wage disparity cases is the difficulty of obtaining real data that helps a plaintiff to frame an effective class action complaint. While the law allows individual claims, for many plaintiffs lawyers, a class action is desired where potentially hundreds or thousands of workers with wage disparities are at issue.

Federal Equal Pay Act class actions are opt-in classes, meaning that a lot of effort is put in up front by a plaintiff to identify victims and seek members of a class. Title VII, by contrast, allows wide-ranging class actions (all women in such and such positions, for instance), although employers have had some success preventing certification of overly broad classes.

More significantly down the road, the [U.S. Supreme Court's](#) 2011 decision in the [Walmart](#) wage-and-hour class action recognized that where employment decisions are “subjective” (which might include a salary offer or the placement of someone in a pay range), it can be difficult to maintain a class action as the class is not similarly situated.

EEOC Pay Data to the Rescue

There is no doubt that EEOC-collected wage and salary data will fuel new efforts to litigate class actions addressing alleged wage disparities. Litigants will use the EEOC data, supplied by the employer directly, to better frame an initial complaint that can withstand attacks by motion, as well as to better target companies for litigation based on significant reported pay gaps.

Employers will argue among other things that little can be determined from broadly aggregated pay in broadly designated EEOC job categories. But there is little doubt that collective actions will get a boost from Judge Chutkan's ruling.

Employers also face the prospect that the public is more interested in this topic and generally favors equal pay for equal work. Potential publicity about outlandish pay discrepancies will likely drive more interest for those promoting the equal pay agenda. Boards of directors have little choice but to request HR departments and senior leaders to explain reported pay discrepancies.

The Case for Proactive Pay Equity Analyses

Understanding what your data may show is the key to giving your organization advice on what it might need to do now. Organizations that have recently done a thorough pay equity analysis will better understand not only what they might report but can also observe if previous measures to moderate pay gaps have been successful.

A proper pay equity analysis is done under legal privilege and allows you to explore how different factors such as tenure, hire date, location, prior salary and employee ratings (as some examples) may have affected your pay data when comparing by race and sex.

Could this be used against you? There is no guarantee, as data is data and like other facts, it is always discoverable. But using counsel familiar with these efforts to help make judgments and decisions about the data is an example of privileged advice that can be protected. More importantly, privileged advice better places your organization to understand its risks and consider appropriate actions. There are many good professionals who specialize in conducting these analyses. Most can partner with lawyers working under privilege.

Finally, it is my experience that managers and workforces respond positively when it is understood that the employer is taking steps to ensure pay inequities are fairly dealt with by the employer. This is a complicated topic so get advice now and keep an eye on the EEOC's website for more details about reporting requirements.

