



DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

Rescission of Notice of Intention Not to Request, Accept or Use Employer Information Report (EEO-1) Component 2 Data, November 25, 2019

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Notice.

SUMMARY: The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) and the Equal Employment Opportunity Commission (EEOC) collect workforce data through the Employer Information Report (EEO-1) under their Joint Reporting Committee. OFCCP is rescinding its previously issued notice, which stated that OFCCP did not intend to request, accept, or use EEO-1 Component 2 data. The agency has determined that it was premature to issue a notice stating OFCCP did not expect to find significant utility in the data.

DATES: This action is effective immediately.

FOR FURTHER INFORMATION CONTACT: Tina T. Williams, Director, Division of Policy and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue NW, Room C-3325, Washington, DC 20210. Telephone: (202) 693-0103 (voice) or (202) 693-1337 (TTY).

SUPPLEMENTARY INFORMATION:

Background

OFCCP administers and enforces Executive Order 11246, as amended (E.O. 11246), which applies to Federal contractors and subcontractors. E.O. 11246 prohibits employment discrimination and requires affirmative action to ensure equal employment opportunity regardless of race, color, religion, sex, sexual orientation, gender identity, or national origin. It also prohibits Federal contractors and subcontractors from discriminating against applicants and

employees for inquiring about, discussing, or disclosing information about their pay or the pay of their co-workers, subject to certain limitations.

OFCCP and the EEOC have separate legal authority to collect EEO-1 data, and they coordinate collection to promote efficiency through their Joint Reporting Committee. The EEOC's legal authority to collect EEO-1 data from private employers derives from Title VII of the Civil Rights Act, and OFCCP's authority to collect data from certain Federal contractors derives from E.O. 11246 and its implementing regulations.¹ The EEO-1 data collection is a mandatory annual data collection that requires all private sector employers that are covered by Title VII and have 100 or more employees, and Federal contractors with 50 or more employees meeting certain criteria, to submit demographic workforce data, including data by sex, race, ethnicity, and job categories (Component 1) (Office of Management and Budget (OMB) Control No. 3046-0049). The EEO-1 Component 1 data has been shared between the two agencies for decades to avoid duplicative information collections and to minimize the burden on employers.

OFCCP had previously expressed interest in collecting summary compensation data for the purpose of informing its compliance and enforcement efforts. On August 8, 2014, OFCCP published a notice of proposed rulemaking in the *Federal Register* to amend the regulations that implement E.O. 11246 by adding a requirement that certain Federal contractors and subcontractors supplement their EEO-1 Report with summary information on compensation paid to employees, as contained in the Form W-2, Wage and Tax Statement, by sex, race, ethnicity, and specified job categories, as well as other relevant data points such as hours worked and the number of employees.² The purpose of the proposed collection was to enable OFCCP to more effectively focus its enforcement resources to better identify potential pay inequities for further evaluations. Public comments submitted to OFCCP on the proposal argued for, among other things, improving interagency coordination and decreasing employer burden for reporting

¹ See 42 U.S.C. § 2000e-8(c); 29 CFR 1602.7; 41 CFR 60-1.7.

² See 79 FR 46561 (Aug. 8, 2014).

compensation data by using the EEO-1 data collection, rather than conducting a new OFCCP data collection. Ultimately, OFCCP determined that it would collaborate with the EEOC to collect compensation data as part of the EEO-1 filing rather than proceed with publishing a final rule.

On July 14, 2016, the EEOC published a 30-day notice in the *Federal Register* to obtain a three-year approval from OMB for the continued collection of Component 1 demographic data, as well as a new collection of summary compensation data, referred to as “Component 2” EEO-1 data.³ The notice stated that, although the EEOC is responsible for compliance with the Paperwork Reduction Act of 1995, the EEO-1 report is a joint data collection to meet the enforcement needs of both the EEOC and OFCCP while avoiding duplication. The Component 2 collection included aggregated data on employee pay and hours worked. On September 29, 2016, OMB approved the EEO-1 Components 1 and 2 information collection for calendar years 2017 and 2018.

On August 29, 2017, OMB stayed the EEOC’s collection of Component 2 data, and the EEOC proceeded to collect only Component 1 data. Subsequently, the EEOC issued a *Federal Register* notice on September 15, 2017, suspending the Component 2 data collection.⁴ In response to a lawsuit challenging OMB and the EEOC’s actions, on March 4, 2019, the United States District Court for the District of Columbia vacated OMB’s stay of the Component 2 data collection and ordered that the previous approval of the EEO-1 Component 2 collection was in effect.⁵ The court further ordered the EEOC to collect the Component 2 data for calendar years 2017 and 2018 by September 30, 2019. On May 3, 2019, the EEOC published a *Federal Register* notice announcing the immediate reinstatement of the collection of 2017 and 2018 Component 2 data from EEO-1 filers.⁶ A February 6, 2020 Joint Status Report to the court stated that more

³ See 81 FR 45479 (July 14, 2016).

⁴ See 82 FR 43362 (Sept. 15, 2017).

⁵ *National Women’s Law Center, et al. v. Office of Management and Budget, et al.*, 358 F. Supp. 3d 66 (D.D.C. 2019).

⁶ See 84 FR 18974 (May 3, 2019).

than 89% of all eligible employers had submitted Component 2 data, and on February 10, 2020, the United States District Court for the District of Columbia deemed the collection complete.

On September 12, 2019, the EEOC published a 60-day notice in the *Federal Register* announcing its intention not to seek renewal of the OMB approval for the collection of Component 2 data.⁷ The EEOC concluded that, it should consider information from the Component 2 data collection before deciding whether to pursue another pay data collection consistent with the Paperwork Reduction Act.

Subsequently, on November 25, 2019, OFCCP published a notice in the *Federal Register* indicating that the agency would not “request, accept, or use Component 2 data, as it does not expect to find significant utility in the data given limited resources and [the data’s] aggregated nature.”⁸ While the notice conceded that “the data could potentially inform OFCCP’s scheduling process for compliance evaluations,” OFCCP concluded that the Component 2 data was too broad and not collected at a level of detail that would enable the agency to make comparisons among similarly situated employees as required by the “Title VII standards that OFCCP applies in administering and enforcing [E.O.] 11246” without conducting additional analysis that would put an unnecessary financial burden on the agency.⁹

On March 23, 2020, the EEOC published the 30-day notice indicating that it would not seek an extension to continue Component 2 data collection.¹⁰

Accepting Aggregated Component 2 Data from the EEOC

OFCCP issued its November 2019 notice stating the agency would not request, accept, or use Component 2 data even before the United States District Court for the District of Columbia deemed the collection of 2017 and 2018 Component 2 data complete in February 2020. At that time, OFCCP had little information about the response rate of the collection, how

⁷ See 84 FR 48138 (Sept. 12, 2019).

⁸ See 84 FR 64932 (Nov. 25, 2019).

⁹ 84 FR 64993.

¹⁰ See 85 FR 16340 (March 23, 2020).

the data was submitted and assembled, or the completeness of the data. Nor did the agency have the opportunity to review and analyze the data.

Upon further consideration, OFCCP believes the position taken by the agency in the November 2019 notice was premature and counter to the agency's interests in ensuring pay equity. As detailed below, there are substantial reasons to believe that the Component 2 data could be useful to OFCCP's enforcement. Given the effort expended by employers to submit the data and resources devoted by the EEOC and OFCCP in the development of the collection, OFCCP believes it would be valuable to analyze this data to assess its utility for OFCCP's enforcement efforts.

OFCCP intends to devote further agency resources to evaluate the data's utility because the joint collection and analysis of compensation data could improve OFCCP's ability to efficiently and effectively investigate potential pay discrimination.¹¹ Also, analyzing compensation data in conjunction with other available information, such as labor market survey data, could help OFCCP identify neutral criteria to select contractors for compliance evaluations. Thus, OFCCP is rescinding its November 25, 2019 notice. OFCCP plans to analyze the Component 2 data collection to assess its utility for providing insight into pay disparities across industries and occupations and strengthen Federal efforts to combat pay discrimination.

Tina T. Williams,

Director, Division of Policy and Program Development,

Office of Federal Contract Compliance Programs.

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¹¹ As stated in the EEOC's July 14, 2016, 30-day notice, EEOC concluded that "implementing the proposed EEO-1 pay data collection will improve the EEOC's ability to efficiently and effectively structure its investigation of pay discrimination charges." See 81 FR 45479, 45483 (July 14, 2016). OFCCP, too, believes the compensation data collection may be useful for its enforcement efforts.