

Department of Labor: Releasing Employers' 2016-2020 EEO-1 Report Data Unless Each Employer Objects

By Eric J. Felsberg, Christopher T. Patrick & Taylor M. Napoli

August 23, 2022

Meet the Authors



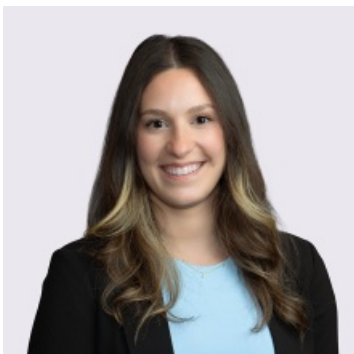
Eric J. Felsberg

Principal
631-247-4640
Eric.Felsberg@jacksonlewis.com



Christopher T. Patrick

(He/Him)
Principal
303-876-2202
Christopher.Patrick@jacksonlewis.com



The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) received a Freedom of Information Act (FOIA) request for detailed EEO-1 Report employee demographic information that thousands of U.S. employers submitted from 2016 through 2020. *Unless these employers submit objections by September 19, OFCCP plans to release their currently non-public demographic employee data in response to the request.*

While the FOIA request seeks only disclosure of EEO-1 Reports for federal contractors and first-tier subcontractors, OFCCP has not identified which specific employers it believes the request covers. As a result, employers that may not believe they are federal contractors, and do not consent to this disclosure, may consider objecting.

Background

Federal contractors with at least 50 employees, and other employers with at least 100 employees, must file annual EEO-1 Reports. Employers submit them with the expectation of privacy — and the Equal Employment Opportunity Commission's commitment to keeping them private. OFCCP's FOIA Frequently Asked Questions also recognize that some employers consider their EEO-1 Report information to be "confidential commercial or financial information" that may be protected from disclosure under FOIA Exemption 4.

When OFCCP receives FOIA requests for these EEO-1 Reports for specific federal contractors or subcontractors, it typically sends direct notice to each specific employer. The purpose of this notice is to provide the employer an opportunity to object to the disclosure and explain why the requested records are exempt from FOIA disclosure. Objections typically lead OFCCP to decline to disclose the employer's EEO-1 Reports.

This FOIA Request

The Center for Investigative Reporting has submitted a FOIA request seeking all Type 2 Consolidated Employer Information Reports, Standard Form 100 (EEO-1 Report), filed by federal contractors from 2016-2020. This is a broad request that covers all employers who identified as a federal contractor when filing their EEO-1 Reports — and perhaps employers whom OFCCP has identified as federal contractors or subcontractors through other means.

OFCCP's Response to FOIA Request

On August 18, OFCCP announced that it had received the FOIA request. It also announced that it planned to notify all employers through publication in the *Federal Register* the next day.

Taylor M. Napoli

Associate

Taylor.Napoli@jacksonlewis.com

Related Services

Affirmative Action, OFCCP and
Government Contract Compliance

This is a change to its usual practice of sending direct notice to each employer subject to the FOIA request. It also creates a gray area about which employers OFCCP believes to be federal contractors or first-tier subcontractors and which employers' reports it plans to disclose. Employers may not know whether OFCCP believes their reports are covered within the FOIA request. *As a result, OFCCP may ultimately release the EEO-1 Reports of some unsuspecting employers, unless these employers object by September 19, 2022.*

Objecting to Disclosure Under FOIA

OFCCP has requested that objections to this FOIA request include the employer's name, employer's address, and contact information for the employer (or its representative).

According to OFCCP's notice, any objection should also include answers to these questions to evaluate the application of FOIA Exemption 4:

1. What specific information from the EEO-1 Report does the employer consider to be a trade secret or commercial or financial information?
2. What facts support the employer's belief that this information is commercial or financial in nature?
3. Does the employer customarily keep the requested information private or closely-held?
4. What steps have been taken by the contractor to protect the confidentiality of the requested data, and to whom has it been disclosed?
5. Does the employer contend that the government provided an express or implied assurance of confidentiality? If no, were there express or implied indications at the time the information was submitted that the government would publicly disclose the information?
6. How would disclosure of this information harm an interest of the employer protected by Exemption 4 (such as by causing foreseeable harm to the employer's economic or business interests)?

Other potential objections also may exist.

Anticipating a large volume of objections, OFCCP has established an [online process](#) to collect and track employer objections. Employers may also submit these objections by email (OFCCPSubmitterResponse@dol.gov).

If you have any questions about this FOIA request or whether (and how) to object to disclosing your organization's EEO-1 Reports, please contact a member of Jackson Lewis' Affirmative Action, OFCCP and Government Contract Compliance Practice Group.

©2022 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.