



## Podcast Transcript

# EEO-1 Reporting and Implications Under the Biden Administration: Is Your Data in Order?

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**Guest:** Mitch Robinson, Shareef Farag **Host:** Randall Rubenking

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**For questions and comments contact:**



### **Mitchell Robinson**

Associate  
Atlanta

T: 404.256.8418 | [marobinson@bakerlaw.com](mailto:marobinson@bakerlaw.com)



### **Shareef Farag**

Partner  
Los Angeles

T: 310.979.8472 | [sfarag@bakerlaw.com](mailto:sfarag@bakerlaw.com)

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Rubenking: Federal law requires employers with 100 or more employees and covered federal contractors with 50 or more employees to file an EEO-1 Report in. Why do employers need to file these reports? What is the data used for? And what changes should employers anticipate with the Biden administration? In this episode, Atlanta associate Mitch Robinson and partner Shareef Farag, co-leader of BakerHostetler's Wage and Hour practice team, discuss EEO-1 reporting and assess what future federal investigations will entail in light of recent case law. Both Mitch and Shareef have extensive experience in this area and are members of BakerHostetler's Labor and Employment group. Welcome to the show, Shareef and Mitch.

Farag: Thank you.

Robinson: Thank you so much.

Rubenking: Shareef, maybe you can start us off. Can you give us some background on what EEO-1 reporting is and why it has been important?

Farag: Absolutely. So, EEO stands for equal employment opportunity, and the government has required reporting for some time, particularly from government contractors, but now from all large employers as to two components. One is component one data. That data reflects essentially the demographics of your workforce, so the various ages, races, ethnicities, genders of people that work in the workforce, and the EEOC has announced that in April, component one data will begin being collected. What has not been collected and, or at least has not yet been indicated that the EEOC will collect, is component two data, and that is wage and hour data. In other words, reflecting the particular wages and the amount of work provided to employees who fit into that, those particular demographic tranches. What we'll be talking about a little bit in a little bit more detail down the road though, is what we anticipate will happen with that EEO-1 component two data and how that can be used.

Rubenking: Okay, now Mitch, prior to the Biden administration, how was this information utilized?

Robinson: Yeah, Shareef brought up some really good points there. He mentioned specifically that as it stands right now, the EEOC has indicated that they will just be collecting component one data dealing with demographics. Prior to really the Trump administration, during the Obama administration information was collected both on demographics and then also on what we oftentimes refer to as component two data, which deals with hours worked, pay data, things within the wage and hour context. That was important and it was an intentional effort on the behalf of the Obama administration to push forward policy initiatives that they thought would help support equity within the workplace. During the Trump administration, there was a decision on several occasions to stay the collection of EEO-1 data as it pertains to component two.

Again, that's hours worked and pay data, and during the end of the Trump administration, a decision was made, which Shareef alluded to, to discontinue the collection of component two data. With that said, every indication that we are getting from the Biden administration, in fact from his first executive order, is that change is on the way with regard to EEO-1 reporting, and in fact in many regards maybe we'll be back to the future. He recently appointed the OS CCP chair, a new director, Jenny Yang, who was formerly the chair of the EEOC under the Obama administration, a huge component for EEO-1 data. There are other appointments, which I know Shareef will talk to and allude to very soon here, that we expect will also be pushing for this type of information.

Rubenking: Well that sounds like potentially a very big difference in administrations. Shareef, what are the expectations of the use of this information during the Biden administration? I mean, how might plaintiffs' attorneys use this information?

Farag: Well to Mitch's point, I think the Biden Administration is going to pick up the ball where the Obama administration had left it and run with it. So it is truly back to

the future. We know the administration is going to be focused on pay equity issues and is going to be looking to address systemic pay equity issues. We know that the DOL in particular is going to be stepping up enforcement actions, and I think we can expect the same of the EEOC. We could see class-based filings for alleged wage disparities between protected categories, things in that nature. So I expect that enforcement will be stepped up, both from the government, but also frankly on the plaintiffs' bar side as well, and I think that a prudent employer will do what they can do now to see what their data reflects and what they can do to address it.

Rubenking: With this stepped up enforcement, what can employers do in preparing their EEO-1 responses as they look toward upcoming changes?

Farag: So first, you know I'll tackle part of that and then Mitch can jump in here. We know that while the component two data is not going to be collected this year, I think that we can look to the future and know that it's going to be most likely collected in the future, and you need to look closely at what that data shows. In California, starting March 31, large employers, that is employers with at least 100 employees nationwide, and just one employee in the state of California have to report all of this information to the state.

We also know, alluding to what Mitch was mentioning earlier, that Julie Sue, the former head of the Labor and Workforce Development Agency here in California, is up for the number two role at the EEOC. And the LWDA under Julie Sue was particularly interested in gender disparity issues and wage disparity issues. So I think we can look for an increase in enforcement, and employers really have to get their arms around what their data shows. I don't know what your thoughts are, Mitch?

Robinson: No, I think that's absolutely right, Shareef. I mean, I view this as an opportunity that cannot be taken lightly by employers. I think all employers really need to look at data, which is at their fingertips, with a discerning eye, and I might say further consider hiring a law firm or someone who is a professional as assessing this data to get an understanding of what are the implications from an equity perspective in the workplace.

One of the things that I know is even if there was a decision by the Biden administration to not use the EEO-1 reporting system to force pay equity, what we do know is that OFCCP, under its guidance already, requires federal contractors, some 25% of our workforce here in the United States, to evaluate the compensation systems to determine whether there are gender, race, or ethnicity disparities. And I'm reading that straight from the reg, and so it is fair to say, based on everything we've seen, that there is going to be further scrutiny for employers, period, and so I can't sort of echo Shareef's sentiments enough that we really need to push forward as any employer in making sure that we are scrutinizing the data and really pushing forward from a policy and legal perspective to limit exposure.

Rubenking: Given the importance of these, the increased importance of these EEO-1 reports, are there any recent decisions that inform strategies employers can use as they defend themselves against litigation arising out of their EEO-1 responses or similar mandates asking for component two type data?

Farag: Sure. You know, the most notable decision, Randall, that you know I think should be instructive here is the Oracle decision, and that decision, where the OFCCP sought regulations on what they viewed as a pay equity issue and pay discrimination issues within the workplace, the administrative law judge determined that there was not a pattern in practice of discrimination. Now why is that important? Well, in part, the OFCCP relied upon EEO-1 data. What that suggests to us is that moving forward, taking that lesson, both the OFCCP and other federal enforcement arms, are going to have a deeper and more thorough investigation.

In the Oracle case, what was determined was that just from the data alone, you could not suggest that there was discrimination, and part of the reliance that the administrative law judge put their hat on is the fact that there was no indication that there wasn't another reason, whether a pay equity issue such as tenure or experience. And so it is fully within reason to expect all enforcement agencies within the federal government, particularly the OFCCP, which have some purview over pay equity issues, to scrutinize employers even more so because they understand that in order to find pay discrimination, there's a standard that needs to be met that wasn't met in the Oracle case.

Rubenking: Are there any final thoughts you'd like to leave us with? Mitch?

Robinson: Sure. I think the number one thing that I would tell all employers is that they need to, right now, be mindful of what's to come. This is the time to make sure that you have an assessment and an appropriate audit of your workforce to limit the exposure you might be facing in the future. Whether you seek a law firm or some other consultation, I would encourage you to have someone look at the workforce. Look at any issues that might arise now, because I think that anyone that is following both the guidance and the executive orders of the Biden administration and also some of the campaign promises that were made by President Biden and Vice President Harris will see that they have a strong priority on enforcement as it pertains to pay equity. So now is the time. Do not delay. Be persistent and very discerning in how you evaluate the data of your workforce.

Farag: And you know Randall, from my part I often equate this in speaking with clients to risk management. You have a risk management budget. You engage in risk management to see what's coming and mitigate against it. So I strongly echo everything that Mitch said. The data is all available to you. It is in your HRIS system and your payroll system. You can figure this out. I also think it's important when managing risk to analyze the value that an attorney could add to that and the protections that can attach to attorney work product and attorney client privilege communications when you're trying to look at potential areas of risk with a clear eye and an understanding of what that data may reflect.

Rubenking: This sounds like a very complex situation and increasingly important with the Biden administration. I want to thank you gentlemen for joining us today.

Farag: Thank you very much.

Robinson: Thank you so much, Randall.

Rubenking: If you have any questions for them, their contact information is in the show notes. Also, check out our Employment Law Spotlight blog where Shareef and Mitch are regular contributors. As always, thanks for listening to BakerHosts. Comments heard on BakerHosts are for informational purposes and should not be construed as legal advice regarding any specific facts or circumstances. Listeners should not act upon the information provided on BakerHosts without first consulting with a lawyer directly. The opinions expressed on BakerHosts are those of the participants appearing on the program and do not necessarily reflect those of the firm. For more information about our practices and experience, please visit [bakerlaw.com](http://bakerlaw.com)