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By J. Edward Moreno  
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Labor Department Reluctant to Reveal Contractor Diversity Data

By J. Edward Moreno 2022-10-20T05:30:51000-04:00

1. Federal contractors required to report diversity stats to government
2. But public not able to see contractor hiring information

The Labor Department branch charged with enforcing affirmative action rules for federal contractors is working to keep those same companies' demographic data out of the public eye.

The government argues that the information could potentially hurt the contractors competitively, and that it has a legal requirement to give each of the approximately 15,000 companies a chance to object to an exhaustive Freedom of Information Act request from the Center for Investigative Reporting asking that they turn over the information.

Thousands of contractors collecting over \$630 billion in taxpayer dollars each year keep everything from office cafeterias to the military running for the American people, but with virtually no public transparency about how they are faring at hiring and promoting women and minorities.

The government requires any federal contractor with 50 or more workers to fill out an annual EEO-1 report, which includes information on the race, ethnicity, and gender of employees. But that information is typically under seal.

After losing a court skirmish over disclosure, the Labor Department's Office of Contract Compliance Programs (OFCCP) said it is willing to release demographic workforce data for the thousands of companies that do business with the government. But not without giving each of them an opportunity to argue against the disclosure of their information by Oct. 19.

The agency told contractors it “has reason to believe” they may be covered by Exemption 4, a FOIA carve-out for trade secrets and other commercial information. But the nonprofit news organization argues that a court already decided the information they’re seeking isn’t commercial.

“It’s extremely unique in the number of iterations it’s taken and the complete agency and industry pushback and claw back to ensure that this information isn’t disclosed,” Victoria Baranetsky, general counsel for the CIR, told Bloomberg Law.

Once the Labor Department has decided whether it agrees with the objections it invited the companies to file through a Federal Register notice, it will inevitably face more litigation from companies, the CIR, or both.

“They’re in a bind at that point, because they either disclose it and face litigation against those agencies or are concerned that we will file a lawsuit,” Baranetsky said.

#### Exemption 4

Companies that do business with the government are held to higher nondiscrimination standards than just Title VII of the Civil Rights Act of 1964, which applies to all employers, and are required to conduct affirmative action plans, which are subject to audit by the OFCCP.

The CIR first requested the EEO-1s of large tech companies in January 2018, seeking the information through a series of FOIAs filed with the Labor Department. But most of the companies—including Oracle and Palantir—objected to the release of their records under Exemption 4, and the DOL backed them.

CIR sued the Labor Department but the suit was voluntarily dismissed after the agency chose to comply with the request. But when CIR requested updated records, in 2019, the DOL declined because it was waiting for the U.S. Supreme Court to rule in *Food Marketing Inst. v. Argus Leader Media*.

The high court ruled in June 2019 that records are only confidential under Exemption 4 if they are both treated as private by the companies and provided to the government under an assurance of privacy. The ruling also established a test for determining if records fit that standard.

The CIR sued over those records, and in December 2019 a judge in the Northern District of California applied *Argus* and ordered the DOL to release the records, ruling that “the Government has failed to make a showing that the demographic information contained in the EEO-1 reports is commercial,” which is required to qualify for Exemption 4.

That was the only ruling to address the commerciality of EEO-1 forms, and the DOL didn’t appeal. At the time, the contractor community saw the ruling as a threat to the confidentiality of their diversity records.

“It’s interesting when you apply this rationale here: I don’t think a reasonable person could argue that diversity data is on par with trade secrets or secret formulas,” said Gunita Singh, a staff attorney for the Reporters Committee for Freedom of the Press.

### 'Unduly Burdensome'

In January 2019, CIR reporter Will Evans submitted the latest FOIA request seeking approximately 15,000 EEO-1 forms submitted by federal contractors from 2016 through 2020. The OFCCP initially called that request "unduly burdensome" because of the volume of records and the company-by-company consultation the agency said it believed was necessary.

The CIR argues that the DOL could just publish the records proactively, per the 2019 ruling. But the DOL said that although that ruling found that EEO-1 forms are not commercial information, it "does not have any binding effect" beyond the specific EEO-1 forms being sought through that litigation.

In a June 15 correspondence the DOL said that it has reason to believe the information could fall under Exemption 4. The agency said it would risk "substantial liability in reverse FOIA actions" if it just hands over the records.

The CIR indicated in a May correspondence that it would sue the DOL a third time if it didn't produce the records.

"It's unfortunate that the agency considers a court order to not have the force of law," Baranetsky said. "It's confounding, quite frankly."

The Equal Employment Opportunity Commission collects EEO-1 forms from all companies with more than 100 employees, then feeds the OFCCP those forms for companies that identify as federal contractors.

While they are in the EEOC's hands, the EEO-1s are protected by Title VII, which calls for criminal sanctions if records leak. But those restrictions don't apply to OFCCP.

Craig Leen, who led the OFCCP during the Trump administration, said this is a "loophole" that needs to be closed by Congress or the courts because the ultimate intent of Title VII was to make EEO-1 forms confidential.

"Congress has not passed a law saying that EEO-1 information should be released through OFCCP," said Leen, now a partner at K&L Gates. "They have passed a law saying EEO-1 data should be protected from disclosure and it's a crime for the EEOC to release it."

### ESG Investors

The Labor Department did not respond to a request for comment, including on questions about the resources being allocated to process the objections. Leen estimated the agency would have to dedicate at least three staff, including one economist and at least one lawyer.

Using the Federal Register as a forum also means that the companies' objections will be public. Lauren B. Hicks, an attorney at Ogletree Deakins helping contractors respond to the FOIA request said that the companies are weighing the optics associated with their choice to object or not.

“While they don’t want to appear to be hiding anything, they’re also concerned about putting forward data that isn’t necessarily logical or in line with their own internal systems and practices,” Hicks said.

Contractors tend to argue that the EEO-1 is an imperfect view into how the company is doing in boosting diversity. When OFCCP audits companies it also takes into account the candidate pool and location of the company, for example.

Disclosure could also benefit ESG-oriented investors who want more diversity information from the many large public companies that are also government contractors.

Dozens of investors led by Boston Walden Trust sent a letter to the Securities and Exchange Commission in November 2021 supporting an EEO-1 disclosure requirement. State Street, an asset manager handling \$3.9 trillion, announced in January that it is prepared to vote against board leaders of S&P 500 companies that don’t disclose their EEO-1 reports voluntarily.

Meredith Benton, founder of Whistle Stop Capital LLC, an ESG-focused consulting firm, pointed to a concept in finance in which a “universal owner,” like a pension fund or other institutional investors, has a fiduciary duty not to put money in places that will hurt the broader economy or society. When it comes to federal contractors, the public is the universal owner, she said.

“If the government is giving contracts to companies that are causing societal harm, even if they are providing a service, then that’s out of alignment with the broader intention of the government,” Benton said.

To contact the reporter on this story: J. Edward Moreno in Washington at [jmorenodelangel@bloombergindustry.com](mailto:jmorenodelangel@bloombergindustry.com)

To contact the editors responsible for this story: Gregory Henderson at [ghenderson@bloombergindustry.com](mailto:ghenderson@bloombergindustry.com); Rebekah Mintzer at [rmintzer@bloombergindustry.com](mailto:rmintzer@bloombergindustry.com)

## Documents

[Argus Leader ruling](#)

[CIR v. DOL ruling](#)

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