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Should Employers Keep Collecting Workforce Demographic Data?

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On July 21, 2026, the U.S. Equal Employment Opportunity Commission voted 2-1 to publish a proposed rule that would rescind the EEO-1 report and related demographic data surveys—a reporting regime that has been in place since 1966. EEOC Chair Andrea Lucas and Commissioner Brittany Panuccio voted in favor; Commissioner Kalpana Kotagal, the agency's sole Democratic appointee, voted against. A 63-page draft notice of proposed rulemaking will appear in the Federal Register for a 30-day public comment period, after which the Commission may finalize the rescission.

The EEO-1 currently requires private employers with 100 or more employees and federal contractors with 50 or more workers to submit annual workforce demographic data broken down by job category, sex, and race or ethnicity. The EEO-3, EEO-4, and EEO-5 surveys, which collect similar information from unions, state and local governments, and public schools, are also targeted for elimination.

The proposal is not yet final, and the comment period means the rescission is still months away at minimum. But the vote has already prompted a wave of questions from employers about what to do in the interim, and what role workforce demographic data should play in their compliance programs going forward.

The short answer: most employers should continue collecting and maintaining workforce demographic data. The reasons why, and the framework for doing so lawfully and with appropriate privilege protections, are addressed below.

1. Are Employers Still Collecting Workforce Demographic Data?

The broad consensus among employment counsel is "yes." And employers have strong independent reasons to continue, regardless of whether the EEO-1 requirement is ultimately rescinded.

First, Title VII's underlying recordkeeping obligation remains in place. The statute requires every covered employer to make and keep records relevant to the determination of whether unlawful employment practices have been or are being committed. That obligation does not depend on the EEO-1 reporting requirement and will survive its elimination. The EEOC has also made clear it will continue to request specific personnel records in connection with active charge investigations.

Second, private discrimination litigation has not changed. The private plaintiffs' bar continues to bring disparate impact and disparate treatment claims, and courts continue to apply Title VII as written. Demographic data is far cheaper to collect proactively than to reconstruct after a lawsuit or charge has been filed.

Third, state-level reporting obligations remain in force and are expanding. Colorado recently enacted its own EEO-1-equivalent reporting requirement, and other states may follow. Employers with multi-state workforces cannot treat the federal proposal as eliminating all of their potential data collection obligations.

Fourth, internal compliance programs continue to require demographic data. Pay equity analyses, adverse impact studies, AI governance frameworks, and validation studies for selection criteria all depend on workforce demographic information. An employer that dismantles its data infrastructure now will be at a significant disadvantage if it later needs to defend its employment practices, or if a future administration reinstates the EEO-1 requirement, as Commissioner Kotagal predicted on the record is likely.

What has changed is posture, not practice. A growing number of companies are pulling back on public disclosure of EEO-1 data and internal DE&I metrics while continuing to collect that information internally. That distinction (*i.e.*, collect but limit disclosure) reflects the current enforcement environment without sacrificing the data infrastructure employers need.

2. How Are Employers Assessing the Data, and What Baselines Are They Using?

The analytical framework for workforce demographic analysis has not changed fundamentally, but the purpose driving that analysis has shifted—from reporting-driven to litigation-risk-driven. That reframing matters both for how employers structure their analyses and for how they protect them.

Workforce composition analysis remains standard practice. Employers continue to benchmark workforce demographics against available external data sources (census data, EEOC industry aggregates, and relevant labor market data for specific job categories) and against their own historical snapshots. The goal is to identify statistically meaningful disparities before they surface in a charge or lawsuit.

Adverse impact analysis continues as well. Selection rate analyses using the four-fifths rule and standard deviation tests remain the standard methodology for assessing hiring, promotion, and reduction-in-force decisions. Even with the Trump administration's de-prioritization of disparate impact enforcement at the agency level, Title VII's disparate impact provision is codified in the statute and has not been repealed. Courts will continue to apply it. And following the Supreme Court's elimination of *Chevron* deference in *Loper Bright Enterprises v. Raimondo*, the Department of Justice's June 2026 Office of Legal Counsel memorandum declaring disparate impact guidance "unconstitutional" will not bind federal courts. Private disparate impact claims are not going away.

The key analytical shift is that employers are increasingly ensuring that their demographic analyses are tied to specific legal risk management purposes rather than general DE&I program improvement objectives. That framing matters both for privilege preservation (addressed below) and for navigating the current EEOC enforcement posture, which has made clear it will scrutinize analyses used to motivate employment decisions based on protected characteristics.

3. How Can Employers Lawfully Use Workforce Demographic Data They Collect?

This is where the current enforcement environment creates real tension. EEOC Chair Lucas has stated explicitly that demographic data may not be used to motivate employment decisions based on race, sex, or other protected characteristics, and that there is "no diversity exception to Title VII." That has always been the law. What has changed is the degree of scrutiny now applied to programs that blur the line between using data to identify and correct unlawful barriers and using data to achieve demographic outcomes.

Demographic data remains lawfully usable for the following purposes:

Identifying and correcting disparities in facially neutral systems. If an employer's analysis reveals that a selection criterion, testing protocol, or promotion process produces adverse impact against a protected group, the employer can use that finding to examine and, if warranted, modify the facially neutral practice. The goal is to eliminate unlawful barriers, not to make employment decisions based on protected characteristics.

Responding to EEOC charges and civil litigation. Workforce demographic data is essential both to rebut pattern-or-practice allegations and to demonstrate that an employer's selection processes are non-discriminatory. Employers that have not maintained this data will be at a significant disadvantage when defending against government investigations or private suits.

Informing outreach and recruiting pipelines. Demographic data can inform decisions about where to recruit and how to broaden the applicant pool. For example, identifying institutions, professional organizations, or geographic markets that may be underrepresented in the current applicant flow. The key distinction is that this use affects who sees a job opportunity, not who gets hired. Selection decisions must remain based on job-related criteria.

State compliance and required investor reporting. Where state law imposes demographic reporting obligations, or where securities law disclosure obligations or contractual commitments require demographic information, that data must be maintained and reported.

As we've previously indicated, employers are moving away from using demographic data to set numeric diversity targets, track progress toward workforce composition goals, or justify employment decisions as remedial. Those uses carry elevated risk under the current enforcement framework, which treats such practices as evidence of intentional race- or sex-based decision-making.

4. Preserving Privilege Around DE&I Data and Analysis

The most consistent recommendation across sophisticated employment law practices right now is that all DE&I-related data collection and analysis should be structured within a formally documented attorney-client privileged review. The EEOC's current enforcement posture, which actively solicits whistleblower complaints about employer DE&I practices, makes this more important than ever.

The following practices are essential to preserving privilege:

Document the legal engagement at the outset. The analysis should be formally commissioned by legal counsel (in-house or outside) for the explicit purpose of providing legal advice on EEO compliance risk. An engagement letter or written directive from counsel should document this purpose before the analysis begins.

Separate legal work product from business reporting. If an analysis serves both legal risk assessment and business reporting purposes, privilege is difficult to maintain over the combined product. Employers should maintain a clean separation between the privileged legal analysis and any business-facing dashboards, executive reports, or public disclosures.

Implement data handling protocols. Workforce demographic data used for legal compliance analysis should be maintained separately from selection and employment decision records. Access should be limited to those with a need to know for legal compliance purposes, and the data should not be commingled with operational HR systems in ways that make it difficult to maintain as a discrete privileged work product.

Structure third-party vendor engagements through counsel. Where outside consultants or data analytics vendors are used for workforce demographic analysis, the engagement should flow through legal counsel, and the vendor should be retained as a legal support consultant rather than a business consultant. Retainer agreements should reflect this structure, and communications with the vendor should be directed by counsel.

What Employers Should Do Now

The EEOC's proposal to rescind EEO-1 reporting does not reduce employers' underlying legal exposure; instead, it reduces one external reporting obligation while leaving the underlying legal obligations and litigation risks intact. Against that backdrop, we recommend the following:

Continue collecting and maintaining workforce demographic data. The Title VII recordkeeping obligation, state-level requirements, and litigation risk all support continued collection. Do not dismantle data infrastructure that may be difficult to rebuild.

Reframe the purpose of your demographic analyses. Analyses that were previously framed around DE&I program goals should be reoriented toward legal risk management and EEO compliance. This reframing affects both the privilege analysis and the litigation risk.

Review public disclosures. If your organization has publicly disclosed EEO-1 data or internal DE&I metrics in prior years, carefully evaluate whether continued public disclosure remains appropriate in the current enforcement environment.

Structure analyses within a privileged review. Work with counsel to ensure that demographic analyses are formally commissioned as legal work products, separated from business reporting functions, and protected by appropriate data handling protocols.

Monitor for finalization and state law developments. The proposal is not yet final. Employers should monitor both the finalization of the federal rule and developments in state law, where reporting obligations may continue to expand regardless of what happens at the federal level.

Notably, employers that are government contractors should exercise heightened caution when determining which demographic analyses to continue conducting. Recent executive orders and newly incorporated federal contract provisions require contractors to certify that they do not engage in racially discriminatory diversity, equity, and inclusion (DE&I) practices. Noncompliance with these requirements can result in significant consequences, including contract termination, suspension or debarment, and potential liability under the False Claims Act, which may expose contractors to treble damages and other penalties. Given these elevated risks, government contractors should carefully evaluate their demographic analysis practices and consult legal counsel to ensure continued compliance with evolving federal requirements.

We will continue to track these developments and will provide additional updates as the rulemaking process unfolds.

Contact Us

If you have questions about how to structure your organization's approach to workforce demographic data in light of the EEOC's proposal, please contact Erik Eisenmann, Sarah Vincent, Catarina Colón, Nora Evans, or your Husch Blackwell attorney.

Related Insights

For additional context on this development, please see our previous alerts:

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Back to the top

