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The Impending Death of the Uniform Guidelines on Employee Selection Procedures

The Uniform Guidelines on Employee Selection Procedures (UGESP) purported to require employers of 15+ employees to track the impact of tests and other selection procedures used in employment decisionmaking by race and sex. (See more here). UGESP surprisingly was not targeted in the Trump Administration's bevy of Executive Orders and agency directives against affirmative action and disparate impact launched in the first half of 2025. That reprieve, it appears, has come to an end.

Along with proposing to eliminate EEO-1, EEO-2, EEO-3, EEO-4, and EEO-5 reporting requirements, the EEOC has announced the rescission of UGESP and its associated recordkeeping requirements. The rescission of the Guidelines themselves have been designated as a Final Rule, with a targeted final implementation date of January 2027. (See RIN 3046-AB43). The rescission of the recordkeeping obligation has been designated as a Proposed Rule, though without a designated comment period. (See RIN 3046-AB45).

The Office of Personnel Management has posted an interim Final Rule to the same effect concerning the selection of federal employees. The comment period for that is open until September 29, 2026.

What does this mean for employers? Once the EEO-1 reporting requirements and UGESP are off the books, there will no longer be a broad federal mandate for employers to collect race and sex demographic data from applicants and employees. However, employers in some locales and businesses will continue to be required to collect such data under state/local law. For instance, some states and municipalities require affirmative action-style demographic data collection and analysis for their contractors. Some state legislatures are also debating imposing the burden of proving non-discrimination on employers using artificial intelligence.

The elimination of these federal mandates does not mean that the collection or analysis of applicant and employee demographic data is forbidden. Some employers will want to continue (or begin) collecting this data, and there are many justifications for doing so: (i) to proactively review employment decisionmaking for unexplained discriminatory results on a regular basis (most often a compensation analysis); (ii) to review employment decisionmaking for unexplained discriminatory results in a business crisis (typically a reduction in force or reorganization); (iii) to make it easier to defend a disparate impact Title VII suit (though the DOJ feels the theory lacks validity, it is expressly included in the statute, which would require congressional action to completely eliminate); (iv) to make it easier to defend a disparate treatment suit where the plaintiff is advancing statistical and me-too evidence; (v) to maintain a uniform practice of proper data collection and storage for a multi-location employer operating in at least one market where the collection of demographic data is required; (vi) to prepare for the potential reversal of federal regulation/guidance, enactment of AI legislation, or entry into a market where this data collection is already required.

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Employers that collect employee or applicant demographic data should be careful to store it as confidential demographic data (*i.e.*, self-identification forms should not be loose in employee or applicant files). Whether spurred by regulation, a particular accusation, or as a general business practice, employers should delegate analysis of this data to attorneys to apply appropriate statistical methods and to ensure the protections of privilege and confidentiality apply to that work and discussions of methodology and results.

If you have any questions or would like additional information, please contact Whitney Brown at 205-323-9274 or wbrown@lmvtlaw.com.

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