ERIC The ERISA Industry Committee
The Only National Association Advocating Solely for the Employee Benefit and Compensation Interests of America's Largest Employers
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Will Hansen, Senior Vice President of Retirement Policy

April 1, 2015

Ms. Bernadette Wilson
Acting Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
131 M Street NE
Washington, D.C. 20507

RE: Revision of the Employer Information Report (EEO-1) and Comment Request

Dear Ms. Wilson:

On behalf of the ERISA Industry Committee (ERIC) and its members, we hereby submit the following comments to the U.S. Equal Employment Opportunity Commission's (EEOC's) proposed revisions to the EEO-1 Report seeking to collect information on W-2 income broken out by the ten EEO-1 broad job categories and twelve broad pay bands used by the EEOC. ERIC is the only national trade association advocating solely for the employee benefit and compensation interests of the country's largest employers. ERIC supports the ability of its large employer members to tailor health, retirement and compensation benefits for millions of employees, retirees and their families. ERIC and its members fully support equal pay for equal work and efforts to ensure that employees are treated fairly and equitably in compensation. Respectfully, however, ERIC does not believe the new proposed revised EEO-1 data will further the EEOC's laudable goal of ensuring that there is no pay discrimination. In summary, ERIC, on behalf of its members, submits the following comments:

1. The EEOC lacks a legitimate basis for requesting the type and form of income data sought by the proposed revised EEO-1 report, because the requested information will in no way allow the EEOC to identify the existence of a pay discrimination or identify organizations to investigate for potential evidence of pay discrimination;
2. Requiring employers to provide W-2 taxable income will only lead to misleading and inaccurate conclusions by the EEOC if it analyzes that data, because W-2 data includes many forms of income which are not connected to actual pay decisions affecting employees performing similar work. Requiring employers to provide W-2 taxable income based on an artificial time period that spans two different taxable and work years will also lead to misleading and inaccurate conclusions by the EEOC;
3. The EEOC's assessment of the burden associated with collecting and compiling such information is lacking a sound factual basis. In fact, the EEOC is seeking to require employers to compile substantially new information that no employer maintains in the form requested by the EEOC; and
4. The EEOC's proposal threatens the confidentiality of employers' sensitive wage data.

COMMENTS

A. The Requested W-2 Income Data And The Proposed Revised EEO-1 Report Will Not Be Useful To Furthering Any Investigation Or Identifying An Organization For Potential Pay Discrimination.

EEOC seeks W-2 income data in the proposed revised EEO-1 Report purportedly to assist the agency in its investigations of pay violations or to assess complaints of discrimination or to identify employers with pay discrepancies that may warrant further investigation.[1] Both the EEOC and the Office of Federal Contractor Compliance Programs ("OFCCP") plan to use the submitted information and to analyze it "statistically" to further the above purposes. The EEOC (along with OFCCP) plans to somehow analyze the data it receives in the revised EEO-1 Report to identify those organizations where an investigation may be warranted. The EEOC also contends that submission of this data will encourage employers to engage in self-audits and correct pay discrepancies that are identified.[2] To justify the revised EEO-1 Report, the EEOC cites to its statutory authority under Section 709(c) of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-8c, to seek information from employers that is relevant to evaluating whether unlawful employment practices are occurring. This rationale for seeking the specific information in the proposed revised EEO-1 Report, however, is fundamentally flawed because the information cannot and will not identify whether there is evidence of pay discrimination.

It is well accepted that there are a myriad of legitimate nondiscriminatory factors that can influence what individuals earn. Employers do not make pay decisions based on the EEOC's broad based EEO job categories or the artificial twelve wage bands being used by the EEOC. In fact, most employers use some form of market based approach to determining the appropriate compensation for specific jobs in their organizations. This approach relies upon market survey data based on the skills and responsibilities of particular jobs—the skills and responsibilities employers actually use to develop pay grades or pay bands or market ranges for each of its jobs. It is equally true that an employer will pay people differently based on legitimate, nondiscriminatory factors such as prior work experience, education level, time in a particular role or with the company, particular expertise, etc. Failure to account for legitimate nondiscriminatory variables that can explain differences in pay will render an analysis of compensation differences invalid. Numerous courts around the country have found that in order for an expert to conduct a valid statistical analysis of an employment practice (e.g., compensation), the analysis must account for the key variables that influence or explain the decision. *See e.g., Anderson v. Westinghouse Savannah River Co.,* 406 F.3d 248, 263 (4th Cir. 2005) (affirming exclusion of regression analysis in discrimination matter where expert failed to control for "actual job title or the job duties"); *Pottenger v. Potlatch Corp.,* 329 F.3d 740, 748 (9th Cir. 2003) (discounting statistics where expert failed to control for employees' performance history, even though job performance may have been the variable most likely to explain the disparity) ; *Hemmings v. Tidyman's Inc.,* 285 F.3d 1174, 1182 (9th Cir. 2002) (if a party has "credible evidence that curing the alleged flaws would also cure the statistical disparity," opinion should be excluded); *Bickerstaff v. Vassar Coll.,* 196 F.3d 435, 449 (2d Cir. 1999) (affirming district court's rejection of expert's regression analysis because the analysis omitted major variables); *Sheehan v. Daily Racing Form, Inc.,* 104 F.3d 940, 942 (7th Cir. 1997) (failure to make any adjustment for variables bearing on the decision other than the protected characteristic is equating a simple statistical correlation to a causal relation, which is inconsistent with the degree of care that a statistician would use in the scientific work.).

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[1] 81 Fed. 5113, 5115.

[2] *Id.*

Whether under the Equal Pay Act or Title VII, the core issue for the EEOC when conducting an investigation is whether an employer is paying similarly situated employees differently for doing the same or substantially similar work. Studying the data requested by the EEOC in the proposed revised EEO-1 report will in no way answer that key question or even provide any basis for the EEOC to explore that key question. The EEOC's broad EEO-1 job categories clearly encompass many different types of jobs, and any comparison by EEO-1 job category would necessarily include comparing individuals who are performing different jobs. Similarly without accounting for the actual grades, pay bands, or market ranges that an employer uses when making its pay decisions, the EEOC will not be able to identify whether protected employees are being paid differently than non-protected employees performing the same or substantially similar work. Just as with the broad EEO-1 job categories, it will certainly be the case that the broad wage bands will encompass many different jobs. It is also likely that employees performing the same job could be in two different wage bands for legitimate, nondiscriminatory reasons. Thus, merely providing counts of employees by broad EEO job categories and 12 broad and artificial wage bands (that are in no way connected to an employer's actual pay structure), will neither provide the EEOC with a basis to identify evidence of potential pay discrimination, nor allow the EEOC to identify companies to investigate. In short, the information is meaningless and does not further any legitimate EEOC purpose.

The EEOC's own Pilot Study, upon which the agency relies to justify the request for the new wage data, acknowledges that in "well-functioning economic systems, market forces determine one's level of pay, and variation in pay is both necessary and inevitable." [3]Anti-discrimination laws do NOT prohibit variation in pay or differences in pay; rather, such laws prohibit pay differences that are caused by discrimination based on a protected characteristic. When courts analyze evidence of alleged pay discrimination, particularly in putative class actions, they often rely on multiple regression statistical analysis submitted by labor economists or statisticians. As the EEOC's Pilot Study and many courts have noted, statistical analysis of pay (i.e., multiple regression) will be flawed if, among other things, (1) it relies upon inaccurate or incomplete data, (2) essential variables are omitted from the analysis that could explain pay, or (3) distinct groups are wrongly aggregated in a single regression.[4]

The EEOC appears to recognize that it cannot perform a proper regression analysis of pay differences with the information it is requesting because the information clearly suffers from the flaws identified with faulty analysis. As already noted, the way the EEOC seeks to group employees into broad job categories and wage bands without regard to actual jobs or grades or market ranges will lead to inaccurate results. In addition, any such analysis will certainly be lacking essential variables that explain pay and pay differences (time at company, experience etc.). Lastly, as discussed in more detail below, relying on W-2 taxable income without any real measure to compare similarly situated employees (e.g., those who worked a full year, those with comparable work effort) will lead to using incomplete or inaccurate data.[5]

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[3] EEOC Pilot Study, September 2015, at 16.

[4] EEOC Pilot Study, September 2015, at 16-17.

[5] The EEOC purports to solve for the flaw of comparing employees who have exhibited different levels of effort, by requiring employers to create and provide "hours worked" for exempt employees. The EEOC asserts that by capturing "hours worked" it will not be comparing part time with full time employees. The EEOC also states that it is not seeking to require employers to produce new data if they do not otherwise capture hours worked for exempt employees. 81 Fed. 5113, 5117-18. At the same time, the EEOC suggests that to avoid burden, an employer can simply assume that all full time active employees work a standard 40 hours a week. *Id.* The EEOC's suggestions in no way solve for the clear flaw of comparing earnings of employees without accounting for differences in effort. It certainly is not the case that all exempt level employees (particularly more senior employees) all simply work a

Despite the obvious flaws in properly analyzing the requested data to assess evidence of pay discrimination, the EEOC simply claims that it can apply other statistical techniques to achieve its purpose. However, the "alternative" techniques articulated in the EEOC's Pilot Study cannot identify instances of pay discrimination or companies that require further investigation. As was detailed at the hearing on this proposal on March 16, 2016 and in the submissions in support thereof, the statistical approach that the EEOC proposes in its Pilot Study will not address the problems with analyzing the data the EEOC requests and the lack of utility in analyzing the existence of any pay discrimination. As labor economist Dr. Michael DuMond detailed in a declaration in support of the Chamber of Commerce's written submission on the EEOC's proposal, the EEOC's suggested approach to analyzing the requested data will not identify evidence of pay discrimination.[6] As Dr. DuMond observed, the EEOC is proposing to use statistical techniques that simply test the distribution of protected and non-protected groups by the various EEO job categories and artificial wage bands. Without any regard to the specific jobs, grades, pay bands, or market ranges that could explain different distributions, the EEOC's approach will lead to both false positive and false negative results.[7] As Dr. DuMond concluded, the EEOC proposal "will result in misleading comparisons, will not take into account known and accepted factors that influence pay, and will not lead to any useful determination as to whether employees are truly being paid the same for equal work or otherwise being subjected to pay practices which violate Title VII."[8]

This is not the first time the OFCCP or EEOC have sought to collect pay data of the type sought here. The OFCCP proposed an Equal Pay Report in 2014 that was nearly identical to the prior EO Survey sought in 2006. *Compare* 79 Fed. Reg. at 20751 (directing the Secretary of Labor to develop collection of summary pay data to "[m]aximize the efficiency and effectiveness of the agency's enforcement and its ability to focus on more likely violators [and] use the data collected to encourage greater voluntary compliance . . .") with 71 Fed. Reg. at 53033 ("The specific objectives of the EO Survey were . . . [t]o improve deployment of scarce federal government resources toward contractors most likely to be out of compliance [and] [t]o increase compliance with equal opportunity requirements by improving contractor self-awareness and encourage self-evaluations.").In rescinding the EO Survey in 2006, the OFCCP commissioned an extensive study by Abt Associates, an expert statistics firm. Abt Associates designed a comprehensive study of the EO Survey and the OFCCP conducted nearly 2,000 audits of employers in support of the Abt study. The Abt study concluded that the data collected in the EO Survey were not capable of targeting OFCCP audits to workplaces more likely to be engaged in unlawful discrimination. Given that the OFCCP will also receive the revised EEO-1 data along with the EEOC, federal contractors will especially be potentially subject to audits and investigations based on this data even though there was a recognition that the data cannot help the agencies identify those situations where an investigation may be warranted.

The EEOC also sponsored a study by the National Academy of Sciences ("NAS") of pay data collection for federal EEO enforcement purposes. A panel of experts on statistical analysis of pay data conducted the study. High-level officials of the OFCCP and Office of the Solicitor of Labor participated and provided input into the study. The NAS panel concluded that there is "no clearly

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standard 40 hours a week and to make such an assumption would lead to a false conclusion that differences in pay cannot be explained by differences in effort or actual hours worked.

[6] Decl. Dr. Michael DuMond, 3-16-16, Ex. 1 to Written Statement of Camille Olsen, Esq.

[7] *Id.* at ¶¶ 16-28.

[8] *Id.* at ¶ 28.

articulated vision of how the data on wages could be used in the conduct of the enforcement responsibilities of the [federal enforcement] agencies."[9] The NAS panel noted that:

The main purpose for which the wage data would be collected, as articulated . . . by [the] EEOC and OFCCP . . . is for targeting employers for investigation regarding their compliance with antidiscrimination laws. But beyond this general statement of purpose, the specific mechanisms by which the data would be assembled, assessed, compared, and used in a targeting operation are not well developed by either agency. The panel found no evidence of a clearly articulated plan for using the earnings data if they are collected.[10]

Although the EEOC thereafter commissioned its Pilot Study, as noted above, the EEOC has not adequately addressed the conclusions of the Abt study or the NAS report that the information being requested cannot effectively be used to assess the existence of pay discrimination and/or for compliance with anti-discrimination laws.

B. Reliance On W-2 Taxable Income Instead of Actual Pay Rate Data Is Fundamentally Flawed.

Beyond the fact that the type and form of data requested by the EEOC will be of no value in identifying circumstances of potential pay discrimination, relying on W-2 taxable income instead of actual pay rate data is fundamentally flawed and will only lead to misleading conclusions. Unlike actual rates of pay, W-2 data includes many different forms of "taxable income" and it is not specific to the actual pay decisions that the EEOC should be evaluating for purposes of determining whether there is any evidence of pay discrimination. For example, W-2 data will include (1) severance pay that an employee may have received in a year when the employee only worked for a small part of that year, (2) leave pay during periods when an individual is not working, (3) stock option compensation which would not appear on a W-2 unless an individual had decided to exercise a particular option, (4) reimbursements for travel costs and relocation costs, and (5) tuition reimbursements. None of these forms of income have anything to do with actual pay decisions. How and when such income gets included in W-2 income will certainly vary from employer to employer based on the types of benefits that may be available such as leave pay, sick pay, life insurance, deferred compensation, etc. W-2 data can also be misleading when evaluating pay decisions in a given year because some forms of income such as stock grants or stock options will be awarded in one year but may be taxable when an employee chooses to exercise the stock options. Another example would be forgivable loan grants or sign-on bonuses that are subject to a clawback and are taxable over a number of years even though paid in full at the beginning of an employee's employment. All of these examples demonstrate how W-2 income will not necessarily represent the actual pay decisions that should be at issue for the EEOC in a given year. This is especially true when the data is generated for an artificial time period spanning across two different taxable years. It is important to note that the NAS Report recognized the obvious flaws with W-2 data and recommended that EEOC focus on rates of pay, not W-2 taxable income. The EEOC has not followed that recommendation and the Pilot Study recommendation to use W-2 data does not address the flaws in using that data.

In addition, the so called W-2 income is being requested across two different taxable years. An employee receives a W-2 statement based on a calendar year in which he/she earned income. In contrast, the EEOC is requesting that employers compile so called W-2 income data across two different years, which will encompass pay decisions from two different work years and include income

[9] NAS Report, at 2.
[10] *Id.*

from two different taxable years. Thus, the actual W-2 number being generated will never match actual pay rates, actual pay decisions or the actual W-2 statements that individual employees receive. And again, the W-2 number will not necessarily be reflective of actual pay decisions that one might chose to study. For example, if an employee was promoted and received a 10% pay increase in June of a year, the W-2 data created for the EEOC would not necessarily reflect the significant and substantial pay increase received by that individual in that year, and therefore would not be truly reflective of how that individual was being paid in comparison to others at the time the EEOC is reviewing the information.

C. The EEOC Fails To Adequately Consider, And Therefore Underestimates, The Burden Associated With Collecting And Compiling The Requested W-2 And Hours Worked Data.

The assumption that the additional burden imposed by the proposed revised EEO-1 report has just a marginal cost is not grounded in facts. Regardless of the ability to file the EEO-1 electronically, the process for compiling the information and creating the reports is manual. As the EEOC acknowledged, only 2% of employers submitted their data by uploading a data file in 2014 compared to manually completing the forms.

The EEOC also does not explain the basis for its estimate that employers spend only 2.9 hours collecting, verifying, validating, and reporting their current EEO-1 data. The EEOC also bases its cost estimate on a faulty assumption that the additional EEO-1 data will be developed and compiled by administrative personnel only, at a low cost. This faulty assumption is not consistent with reality. Employers rely upon IT personnel, HR personnel and legal counsel when compiling EEO-1 data and the addition of the requested compensation data will add additional departments and personnel to the team that currently compiles the EEO-1 Report. Without accounting for the cost of more senior level personnel and outside support, the EEOC's cost estimate is not reliable or accurate.

In addition, the EEOC's estimate of the one-time burden required to satisfy the new data request lacks a factual basis and underestimates the true burden employers would face to compile the requested information. The EEOC asserts that employers readily have W-2 and hours worked data available and, accordingly, it will only require about eight hours to adjust existing HRIS systems to compile the requested information. This assertion, however, simply has no factual basis. First, employers do not maintain hours for exempt employees and the requirement that such data be provided will require significant work to even capture the information.[11] Proposals to rely on estimates of hours worked are similarly flawed. Any analysis based on a fictitious estimate will be meaningless. Second, the W-2 income information will not be easily compiled. In contrast to an annual W-2 statement generated for a single tax year, the EEOC is requiring employers to compile and essentially create a new W-2 statement from across two different years. The EEOC simply ignores the burden associated with compiling the W-2 information for an artificial time period. Third, since employers do not maintain their compensation data based on the proposed wage bands, there will be a substantial burden this year and thereafter for employers to determine to which wage band an employee belongs. Fourth, the cost estimate for the one-time burden also appears to be based on a faulty assumption that a relatively low cost professional will do the work at minimal cost to an employer. The EEOC's assumption fails to recognize the cost of the other resources (internal and external) that employers will

[11] To comply with what the EEOC's request for hours worked also could have the unintended consequence of requiring employers to engage in conduct inconsistent with the Fair Labor Standards Act ("FLSA").. Many employers will be required to construct new time tracking and accounting systems that they do not currently have for their executive, managerial, administrative, professional and other employees who are exempt under the FLSA. Tracking such information could be viewed as inconsistent with treating exempt employees as salaried employees under the FLSA.

certainly rely upon to comply with the new requirements (e.g., senior HR, IT and legal personnel, and outside consultants and counsel).

The EEOC also fails to take into account the significant burden imposed on employers that would be investigated or audited based on the data being sought. As discussed above, because the data in the proposed revised EEO-1 will not assist either the EEOC or the OFCCP to properly identify entities where discrimination may be present, employers (and especially federal contractors) will likely be subjected to unnecessary investigations and audits. The burden associated with defending an EEOC investigation and/or an OFCCP audit is significant and there has been no consideration of that unnecessary burden.

D. The EEOC's Proposal Threatens the Confidentiality of Employers' Sensitive Wage Data.

The EEOC's proposal requires employers to submit sensitive compensation data without adequately addressing confidentiality concerns, particularly for federal contractor employers. Although the EEOC is subject to criminal penalties if it releases company-specific EEO-1 data, no similar penalties apply to the OFCCP, which will also have access to the revised EEO-1 report for federal contractor employers. Only traditional Freedom of Information Action ("FOIA") protections (e.g., protection for trade secrets) apply to EEO-1 data in the OFCCP's possession. The OFCCP will release publicly requested EEO-1 data unless an employer timely objects to the request and the OFCCP agrees with the employer's asserted objections (i.e., that the information is commercially protected and confidential). This process poses a significant risk to employers, for example, if they inadvertently fail to submit timely objections or if the OFCCP disagrees with the objections. In addition, employers will expend significant resources objecting to the inevitable FOIA requests for the new wage data. To adequately protect their sensitive information, employers will be required to object to each and every FOIA request they receive, imposing a significant and unreasonable cost and burden on employers.

Thank you for your consideration of these comments. If you have any questions, or if ERIC can be of further assistance, please contact us at (202) 789-1400.

Respectfully,

Will Hansen

Will Hansen
Senior Vice President, Retirement Policy