



VIA ELECTRONIC SUBMISSION

April 1, 2016

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

Re: DOCKET ID EEOC-2016-0002, Comments on the EEOC's Proposed Revision of the Employer Information Report (EEO-1)

Dear Ms. Wilson:

Associated Builders and Contractors, Inc. ("ABC") hereby submits the following comments to the Equal Employment Opportunity Commission ("EEOC" or "Commission") in response to the above-referenced proposed revision to the Employer Information Report ("EEO-1"), published in the *Federal Register* on February 1, 2016, at 81 Fed. Reg., at 5113 ("Proposal"),¹ that would require employers with 100 or more employees to provide data on W-2 pay and hours worked, beginning in 2017.

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing nearly 21,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

¹ On April 1, 2016, ABC filed comments to this docket along with numerous other organizations, including but not limited to, the American Benefits Council, American Gaming Association and American Institute of CPAs. ABC shares the concerns and recommendations provided in these comments and incorporates them into this letter by reference.

Introduction

ABC is committed to compliance with laws prohibiting discrimination with respect to compensation. However, ABC has serious concerns with the Proposal. If adopted, the Proposal will impose a significant burden on employers, yet it will fail to generate reliable information for identifying pay discrimination or safeguard confidential employer information. Accordingly, we urge the Commission to withdraw the Proposal.

The Proposal Will Impose a Significant and Costly Burden on Contractors, Which the EEOC Seriously Underestimates

The EEOC fails to accurately identify the burden of collecting and reporting the additional pay data information. Gathering W-2 pay data by EEO-1 establishment would be extremely burdensome to contractors, because many of the systems that contain W-2 data do not also contain demographic data. Therefore, contractors would be required to re-configure their systems in order to marry pay data with their demographic data. This burden would hit contractors with many small EEO-1 locations particularly hard. Moreover, the Proposal would require employers to collect W-2 data in a manner not currently required. Because the EEO-1 reporting period is not on a calendar-year basis, employers would have to collect and report W-2 information over a two-year span, a fact that the EEOC apparently ignores in its estimate. Integrating data from two years' worth of W-2 data is no insignificant task.

The Proposal also calls upon employers to submit data on the numbers of hours worked by employees. Again, the EEOC estimate fails to accurately capture the fact that employers generally do not track the hours worked of exempt employees under the Fair Labor Standards Act. Having to do so would add significant time and cost to the EEO-1 reporting requirement.

Under the Proposal, the EEO-1 report will grow from 180 cells to 3600 and mandate the collection of information not currently tracked and in a different format. However, the EEOC estimates an hours burden of just 6.6 hours per filer to submit the revised EEO-1. One of our members noted that, currently, it takes one staffer about a full day to collect the data and submit the EEO-1 form. Under the new proposal, the staffer will need to determine how best to manipulate the software to get the needed information. It will take significantly more time for just one staffer to collect the data and complete the EEO-1 form, far beyond the EEOC's estimate. The Proposal also presents an indirect, but no less profound, cost to employers. The time and resources required for staffers to collect and report the new data pulls employees away from doing other meaningful work. The EEOC fails to take into account the indirect cost on an employer of not being able to maximize staff value.

The EEOC cites the pilot study it commissioned ("Pilot Study") as its fulfillment of the National Academy of Sciences' ("NAS") recommendation to conduct an independent study "to identify the

most efficient means to collect pay data.”² However, the Pilot Study did not include a quantitative estimate of the burden of collecting and reporting the data. Such an unreliable and incomplete study cannot possibly serve as a basis for satisfying the NAS recommendation or the obligation under the Paperwork Reduction Act (“PRA”) to ensure that the information collection, among other things, minimizes the burden on employers.

The Proposal Will Fail to Generate Reliable Information for Identifying Pay Discrimination

A burden in any amount would be too high in light of the Proposal’s failure to generate useful information. The data collected by the EEOC would be so flawed that it would not enable the Commission or the Office of Federal Contract Compliance Programs (OFCCP) to effectively target contractors engaging in pay discrimination. The Proposal would require contractors to spend time and money reconfiguring their systems and compiling data for the EEO-1 report, but neither the EEOC, nor the OFCCP nor the contractors would be able to use the results to accurately determine where pay discrimination exists.

W-2 information is not an accurate reflection of employee compensation. It does not take into account all the various factors that impact individual compensation decisions. The Proposal completely overlooks the Equal Pay Act provisions under which a pay differential is not deemed discriminatory if it is based on factors such as seniority, qualifications and performance. Another fundamental flaw of the Proposal is that it aggregates W-2 information into overly broad salary bands and job categories.

Comparing the aggregated wages of jobs within the broad EEO-1 job categories will not yield useful information to demonstrate pay discrimination. In looking at the breadth of the EEO-1 categories themselves from the perspective of a construction company, the individual pay bands include hundreds of different trades, all of which are going to have a different base pay starting rate. ABC members are not going to find any value at all in looking at a measure of pay that aggregates different trades. Moreover, in our industry, within a trade, the great differentiator above base pay or scale pay is not how many hours a person worked; the differentiator is skill set, and nothing in our members’ payroll or HR systems, assuming they have such sophisticated systems, quantifies skill set. The W-2 does not provide a complete story of an individual’s compensation. ABC members are entitled to exercise discretion to pay a worker more if that individual has a proven reputation of doing careful, quality work, shows up to work on time, and, in some cases, will always answer his or her phone to come into work in an emergency. A significant percentage of contractors do not perform written performance evaluations of each laborer’s annual performance because they employ a transient workforce. In addition, the aggregation of wage data nationwide is inconsistent with the requirements of the Davis-Bacon Act, 40 U.S.C. 3141, in which Congress mandated that wage rates for government construction contracts be determined separately for each civil subdivision in each state, and that such rates be determined separately for different types of construction work.

² 81 Fed. Reg. 5113, 5114.

The information generated from the proposed new reporting requirement will not reliably identify employers who likely discriminate in terms of compensation. Although the EEOC is vague as to how the Commission and the OFCCP will use the information, the Proposal does state that they “plan to develop a software tool that will allow their investigators to conduct an initial analysis by looking at W-2 pay distribution within a single firm or establishment, and by comparing the firm’s or establishment’s data to aggregate industry or metropolitan-area data.”³ The prospect of the agencies using such unreliable information to target their enforcement efforts is of the greatest concern to ABC and our members. We are concerned with the “false positives” derived from the data. Such simplistic and overly broad aggregated data does not account for the myriad of factors impacting compensation, such as experience, skill set, location, degree and jobsite. Yet, employers will be faced with spending additional time and resources to defend against baseless allegations of pay discrimination.

The Proposal Fails to Adequately Safeguard the Confidentiality of the Data

The compensation data about employees is highly confidential and proprietary. The Proposal does not adequately protect such sensitive information from disclosure. The use of the pay bands will not ensure that the compensation information cannot be individually identified. For example, the pay of some executives at a company could be readily identified, as could the pay of employees for whom there were only a limited number in a particular pay band or job category. Further, ABC and our members’ security concerns are exacerbated by recent data breaches, such as the massive data breach at the Office of Personnel Management.

Of great concern to ABC and our members is the fact that information the EEOC shares with the OFCCP and the Department of Justice is potentially subject to disclosure under the Freedom of Information Act (“FOIA”). Although an agency that receives a FOIA request is supposed to contact the employer and provide an opportunity to object, the process is ripe for mistakes. It is possible that a private litigant could seek EEO-1 data in litigation discovery and that some courts could permit that broad discovery. If the EEOC releases a copy of the confidential EEO-1 report information to the party that filed a complaint, there would be no protection of that information from further release. The release of the information to third parties could have a damaging impact on an employer’s reputation and place the company at a competitive disadvantage.

The Proposal is an Attempt by the EEOC to Avoid the Requirements of the Administrative Procedure Act (“APA”)

Although the Proposal is presented as a change to an information collection request, it is, in substance, a rulemaking. As such, it is subject to the APA requirements applicable to rulemaking. The fact that the Proposal replaces the earlier OFCCP proposed rule on summary compensation data collection is indicative of its functional equivalence to rulemaking. In addition, targeting enforcement actions based on the EEO-1 would constitute agency action that fails to meet the requirements of the APA because it

³ 81 Fed. Reg. at 5118.

is arbitrary and capricious. Furthermore, the EEOC exceeds its statutory authority to make changes to the EEO-1 as the changes mandated by the Proposal are not reasonable, necessary or appropriate.

Conclusion

ABC and our members have serious concerns with the EEOC's requested changes to the EEO-1. The Proposal imposes an unjustified burden on employers, fails to generate useful and reliable information to combat pay discrimination, and fails to protect the confidentiality of the information. For these reasons, we urge the EEOC to withdraw its Proposal.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,



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