



VIA ELECTRONIC SUBMISSION [Also submit to EEOC via regulations.gov]

August 12, 2016

Joseph B. Nye
Policy Analyst
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street N.W.
Washington, D.C. 20503

Re: Comments on the Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1)

Dear Mr. Nye:

Associated Builders and Contractors, Inc. (“ABC”) hereby submits the following comments to the Office of Information and Regulatory Affairs (OIRA) in response to the above-referenced notice of the Equal Employment Opportunity Commission’s (“EEOC” or “Commission”) submission for the Office of Management and Budget (OMB) review on the revision to the Employer Information Report (“EEO-1”), published in the *Federal Register* on July 14, 2016, at 81 Fed. Reg., at 45479.

About Associated Builders and Contractors, Inc.

ABC is a national construction industry trade association representing nearly 21,000 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's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. 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.

Introduction

ABC is committed to compliance with laws prohibiting discrimination with respect to compensation. However, ABC has serious concerns with the proposed revision. If adopted, the revision will impose a

significant burden on employers, yet it will fail to generate reliable information for identifying pay discrimination or safeguard confidential employer information. In its comment letter on the EEOC's original proposal published in the Federal Register on Feb. 1, 2016, ABC set forth its serious concerns with the Commission's requested changes to the EEO-1 report. The EEOC's revised proposal fails to adequately address these concerns and remains as fundamentally flawed as the original proposal. Accordingly, we urge OIRA to reject the proposed revision to the EEO-1 Form and return the proposal to the Commission.

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

The EEOC continues to fail to accurately identify the burden of collecting and reporting the additional pay data information. EEOC's response to public comments was not adequate to support a revision in the form. The revised proposal, like the original, does not generate useful or reliable information so as to justify the significant and costly burden it will impose on contractors.

Gathering W-2 pay data by the 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. The EEOC's dismissal of these concerns raised by ABC and others does not negate the fact that the revised EEO-1 will be extremely costly and burdensome to implement. The EEOC specified that employers will report on income provided in Box 1 of the W-2 form.¹ However, this box fails to include all compensation, such as a 401(k) contributions or deferral to retirement plans. Depending on the age and gender of the employee this may create a false positive when reviewing this information.

The revision 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. The Commission clarified that employers could report 40 hours per week for full-time exempt employees or provide the actual amount of hours the employee works if the company already tracks the information.² Having both sets of data submitted will make it more complicated and unreliable for the Commission to determine if discrimination exists.

Under the proposed revision, 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. The Commission has revised

¹ 81 Fed. Reg. 45485.

² 81 Fed. Reg. 45488-45489.

the cost estimate and burden from its initial proposal, in which they drastically underestimated the burden. However, what is their certainty they estimated it correctly this time?³ The fact that the Commission could so woefully underestimate their initial cost estimate is itself deeply troubling and calls into question the accuracy of their revised estimate. Moreover, the Commission still has not provided the necessary support for collecting this additional information. The proposed revision 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.”⁴ 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 EEOC states that the pay data “would be extremely useful in helping enforcement staff to investigate potential pay discrimination” and that “[b]alancing utility and burden, the EEOC has concluded that the proposed EEO-1 pay data collection would be an effective and appropriate tool for this purpose.”⁵ In its revised proposal, the EEOC has increased its annual burden estimate for completing components 1 and 2 of the EEO-1 from \$9.7 million to \$53.5 million. However, the information collection remains no more useful or reliable with what the EEOC now calculates is an approximately 450% increase in the annual cost of compliance from its initial estimate and what will, in fact, be significantly more costly than even the revised estimate reflects.

The Proposed Revision Will Fail to Generate Reliable Information for Identifying Pay Discrimination

A burden in any amount would be too high in light of the proposed revision’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 proposed revision would require contractors to spend

³ From ABC’s comments submitted to the EEOC on April 1, 2016; 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.

⁴ 81 Fed. Reg. 5113, 5114.

⁵ 81 Fed. Reg. 45479, 45483.

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. The Commission needs to take a critical look at the utility of the information it provides, as it does not justify the high burden it puts on employers.

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 proposed revision 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 proposed revision 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.

The information generated from the proposed new reporting requirement will not reliably identify employers who likely discriminate in terms of compensation. 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 EEOC's response to these concerns merely was to state that it is "confident that the risk of Type I (false positive) or Type II (false negative) errors will not undermine its statistical analysis of

Component II data.”⁶ However, the EEOC’s confidence does not alleviate the concerns about unreliability of the information and risks created by such a fundamentally flawed approach.

The Proposed Revision Fails to Adequately Safeguard the Confidentiality of the Data

Compensation data about employees is highly confidential and proprietary. The proposed revision 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. While the Commission discussed the public’s comments on the confidentiality of data, it did not alleviate the concerns of employers.

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 Proposed Revision 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 supplants 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 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 revision 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. The agency failed to justify these changes and provide an adequate response to the public’s concerns. For these

⁶ 81 Fed. Reg. 45479, 45490.

reasons, we urge OIRA to reject the revision to the EEO-1 form and return the proposal to the Commission.

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Brubeck". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Ben Brubeck
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