



Fisher Phillips Offers Comments On EEOC's Proposed Pay Data Collection Rules

Insights

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Fisher Phillips recently submitted comments to the Equal Employment Opportunity Commission (EEOC) regarding the agency's proposed regulations that would require any business with 100 or more workers to provide detailed information about their pay practices to the federal government through the annual EEO-1 Report (read more [here](#)). The goal of these proposed regulations is to better track pay disparities between genders so as to increase enforcement of equal pay standards.

The firm's comments reflect an effort to ensure that the final regulations address several troubling issues, including the undue burden of the proposed report, the questionable utility of the data collection, and the serious privacy concerns that accompany the gathering and production of this information. A copy of the comments can be found [here](#) or at the attached PDF file.

Previous Pay Data Collection Efforts Failed

The firm's comments first point out that similar attempts to collect pay data were attempted by the federal government several years ago, and the efforts failed. For example, in 2000, the U.S. Department of Labor's Office of Federal Contract Compliance (OFCCP) developed an EO Survey for federal contracts to collect pay data in an effort to identify national trends in compensation. The firm's comments point out that the survey was used for several years, evaluated, and ultimately withdrawn as having failed in its purpose.

Several studies commissioned by the OFCCP found that the predictive ability of the data gathering to identify gender discrimination was "only slightly better than chance," resulting both false positives and false negatives. They found that the survey was a poor tool for eradicating discrimination because it ignored the myriad non-discriminatory factors that may impact also compensation.

The firm's comments inform the EEOC that the proposed EEO-1 pay reporting requirements are just as problematic and unproductive as these previous failed efforts, replicating many of the prior problems that led to the withdrawal of the shelved EO Survey. For this reason, the firm's comments urge the agency to withdraw the current proposal and significantly refine the proposed regulations. However, if the regulations are to be finalized, the comments offer suggestions for revision in order to address several key issues.

Proposed Regulations Would Be Unduly Burdensome

The firm's comments address the significant burden that would be placed on employers should they

be forced to comply with the proposed regulations in their current form. Notably, the comments remind the EEOC that members of its own Work Study Group organized to examine the concept of collecting pay data concluded that this proposal was “quite burdensome,” “unbelievable,” and “scary.”

Not only would the amount of time necessary to complete the proposed EEO-1 Report be onerous on employers, but the collection of the data necessary to provide responses would be next-to-impossible given the current parameters of the proposal. The firm’s comments offer suggested alternatives to alleviate some of the anticipated burden and to resolve some of the issues identified.

Data Collected Would Not Yield Any Relevant Statistical Data

The comments further point out to the EEOC that the proposed regulations would result in misplaced investigative resources as well as unwarranted investigations and lawsuits. This is because the pay data requirements do not align with or accurately reflect the agency’s own evidentiary standards when it comes to determining whether a discriminatory disparity exists, and therefore could not produce any relevant statistical data.

In their current form, the proposed regulations would create confusion by causing differentiated analysis of compensation discrimination claims, inevitably leading to misidentification of legitimate employer business practices as discriminatory acts. The firm’s comments offer suggested alternative methods for collecting and analyzing the data in order to better achieve the agency’s stated goals.

Proposal Presents Undesirable Challenges To Privacy Rights

Finally, the firm’s comments point out that the proposed regulations should be withdrawn or revised on a wholesale basis to address the valid data security concerns raised by the collection of employer pay information by the federal government. First and foremost, the data collected would be a high value target for data thieves seeking to hack the information from the government, potentially compromising individual privacy for millions of workers. The comments remind the EEOC that the federal government recently suffered a data breach resulting in the release of personal information for 21.5 million federal employees, and that such a breach could easily be replicated.

The firm’s comments also point out that even legitimate access to the pay data through public sources could lead to situations where employers face a competitive disadvantage owing to the release of information. Businesses could receive a competitive windfall by examining the information collected and released through public channels, exploiting the exposure of several key pay indicators.

Finally, the comments inform the agency that local and international privacy laws seem to be ignored in the proposed regulations. The firm’s comments provide several alternative solutions should the proposed regulations proceed forward towards finalization.

Conclusion: Laudable Goal, Poor Methods

The firm recognizes that the goal of eradicating and better identifying discriminatory pay practices is a worthy endeavor. However, the comments state that the firm is concerned that the proposed regulations, as currently written, would not accomplish anything noteworthy.

Instead, the firm's comments describe how the proposed regulations would merely set up employers for unwarranted disparate impact claims of discrimination founded on inaccurate theories using data not sufficiently valid to withstand scrutiny. The time and expense to prove otherwise would be considerable for the nation's employers, as would the burden to simply comply with the data gathering efforts. Add to that the legitimate and well-founded privacy concerns that spring from these proposals, and the comments predict a recipe for disaster.

For these reasons, the comments submitted by Fisher Phillips respectfully urge the EEOC to take action steps to address the concerns raised. The finalized regulations are expected to be published later this year, and we will summarize the contents once released.

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