



December 16, 2014

Submitted through the Federal eRulemaking portal at
www.regulations.gov

Debra A. Carr, Director
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

**Re: RIN No. 1250-AA06
Coalition Comments in Support of Prohibitions Against Pay Secrecy
Policies and Actions**

Dear Ms. Carr:

On behalf of the undersigned organizations, we write to express our strong support for the Office of Federal Contract Compliance Programs' (OFCCP) proposed rule implementing Executive Order 13665, prohibiting government contractors from discharging, penalizing, or otherwise discriminating against any employee or applicant for discussing, disclosing, or inquiring about their compensation or that of another employee or applicant.¹ This rule will protect members of our federal contracting workforce who wish to inquire about wages without fear of reprisal, and will help employees and employers alike to identify and correct pay disparities.

Introduction

President Obama's signing of Executive Order 13665 on April 8, 2014, protecting individuals employed by federal contractors from retaliation for wage disclosure, has moved our nation a step closer to fulfilling the commitment the President set out in his second inaugural address that "our wives, our mothers and daughters can earn a living equal to their efforts." This proposed rule, like the Paycheck Fairness Act currently pending in Congress, seeks to level the playing field by increasing transparency and

¹ Non-Retaliation for Disclosure of Compensation Information, Exec. Order No. 13665 (April 8, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/04/08/executive-order-non-retaliation-disclosure-compensation-information>.

giving workers a much needed tool to help fight pay discrimination.² We stand with the President and Department of Labor as they work to implement new tools to address our nation's ongoing and pernicious wage gap.

I. The Rule Will Help Facilitate Access to Information that Can Address Ongoing Gender-Based and Race-Based Pay Disparities in Federal Contracting.

Over fifty years after the passage of the Equal Pay Act of 1963, glaring pay disparities still exist between men and women. Women working full time, year round in 2013 were paid only 78 cents for every dollar paid to their male counterparts. African American women and Latinas suffered from wage gaps even more severe. African American women earn just 64 cents for every dollar earned by white, non-Hispanic men; Latinas' earnings stood at 56 cents for every dollar earned by white men.³ In 1963, when the Equal Pay Act became law, women were making 59 cents for every dollar earned by men.⁴ Thus, in the span of over fifty years, we have erased almost half of the disparity between men's and women's wages, but what exists is still unacceptable.

Race and ethnicity-based wage inequality is similarly entrenched in the American workplace. In 2013, African Americans employed full-time were paid a median weekly total of \$629, and Latino workers received a median salary of only \$578 compared to \$802 for white workers.⁵

Renewed efforts to address stagnant pay disparities have never been more important than they are today, as the country emerges from difficult economic conditions. The implementation of this rule will go a long way to address these disparities for the 28 million employees of federal contractors, as we continue to push for permanent change for all employees through the passage of the Paycheck Fairness Act.⁶

According to the Institute for Women's Policy Research, nearly half of all workers are either forbidden or strongly discouraged from discussing their pay with colleagues.⁷ If workers do not know what they are being paid, it is very difficult to do anything about possible wage disparities. Removing these restrictions will help facilitate conversations with employees and between coworkers and supervisors, as well as provide opportunities

² Fact Sheet, Office of Federal Contract Compliance Programs, Notice of Proposed Rulemaking Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions (Sept. 2014), available at <http://www.dol.gov/ofccp/PayTransparencyFactSheet.html>.

³ U.S. Census Bureau. (2014). *Current Population Survey, Annual Social and Economic (ASEC) Supplement: Table PINC-05: Work Experience in 2013 – People 15 Years Old and Over by Total Money Earnings in 2013, Age, Race, Hispanic Origin, and Sex*. Retrieved 18 September 2014, from http://www.census.gov/hhes/www/cpstables/032014/perinc/pinc05_000.htm (unpublished calculation based on the median earnings of all men and women who work full-time, year-round in 2013).

⁴ E.g., National Committee on Pay Equity, *The Wage Gap Over Time* (September 2011), available at <http://www.pay-equity.org/info-time.html>.

⁵ U.S. Department of Labor, Bureau of Labor Statistics, *Median weekly earnings of full-time wage and salary workers by selected characteristics*, Current Population Survey, Table 37 (February 26, 2014), available at <http://www.bls.gov/cps/cpsaat37.htm>.

⁶ Paycheck Fairness Act, S.84/H.R. 377, 113th Cong. (2013).

⁷ FACT SHEET, INST. FOR WOMEN'S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION (June 2011) available at <http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination>.

for employers to self-correct when disparities are identified. No company or employer is required to disclose wage information under this rule, but employees would have the ability to voluntarily share information or ask without fear.

The case of Lilly Ledbetter illustrates the importance of this rule. Ms. Ledbetter was an employee of Goodyear Tire – a federal contractor – for nearly twenty years. Goodyear prohibited employees from discussing or sharing their wages, so Ms. Ledbetter did not know of the discrimination against her until someone slipped her an anonymous note, years after the discrimination began. Had anti-retaliation protections applied to her or her coworkers, Ms. Ledbetter might have discovered the wage discrimination earlier and sought a remedy without fear of punishment.

For these reasons, the undersigned organizations strongly support this rule. In addition, we provide the following recommendations, based on the NPRM’s request for comments, to help improve the ability of employees to discuss their wages without fear of retaliation and to avoid a cramped interpretation of the rule.

II. Affirmative Defenses and Exceptions to the Rule’s Protections Need to Be Narrowly Tailored with Limited Subjective Factors.

a. The Definition of “Essential Job Functions”

In carrying out the Executive Order, the NPRM provides an exception for its protection when an employee with access to compensation information of other employees or job applicants, as part of such employee’s “essential job functions,” discloses it to individuals who would not otherwise have that information (other than in response to a formal charge or investigation). The NPRM proposes factors to consider in defining “essential job functions” in order to determine what employees would be exempt from the proposed rule’s protections against retaliation for wage disclosure.

We support OFCCP’s use of the ADA in interpreting “essential job function.” However, OFCCP should make clear that “essential job function” must be narrowly defined, as exceptions generally are, and that any factors considered be limited and given a narrow interpretation. Essential job function must be critical to performing the position in question and an employer’s judgment is not to be given conclusive weight on the question of what constitutes an essential job function. Narrowly defining the essential functions of a job reduces the risk that loopholes will be exploited rendering the rule ineffective. This is necessary in order to ensure that frank conversations about wages between employees, and between employees and supervisors, can occur without fear of retaliation. It is important to note, however, that this rule would not require supervisors to disclose pay information, but would make sure that conversations about pay are not prohibited. If given a broad interpretation, in contrast, this exception would defeat the Executive Order’s goal of helping to root out discrimination and would have the potential of swallowing the rule.

b. Essential Job Functions as an Affirmative Defense

In general, in order to ensure that the protections in the Executive Order apply to the broadest number of employees as possible, any affirmative defenses available to employers

must also be narrowly tailored. The NPRM proposes two possible employer affirmative defenses when a claim of retaliation is made by an employee.

First, the NPRM proposes that “essential job functions” serve as an employer affirmative defense, as well as an exception to the rule. This definition would also apply to the employers’ defense that his adverse employment action was taken against an employee whose duty it was to maintain and protect the privacy of employee personnel records and wage information as part of an essential job function.⁸

All of the same previously-discussed concerns and recommendations would apply here. As discussed above, the employer’s ability to assert “essential job functions” as an affirmative defense must be limited to only a very narrow subset of employees whose job it is to maintain and protect the privacy of employee personnel records in order to ensure that the rule can be robust in scope. For example, the mere fact that a supervisor, or even a human resources professional, just has *access* to pay information, is not sufficient to exclude them from protections in the first instance and is also insufficient to constitute a defense when adverse action is taken. If employees with mere access to information on pay are excluded from these protections, it could mean large groups of employees – those, for example, who are in the best positions to remedy problems (such as supervisors), and those in fields that are predominately women (such as human resources), will not be able to engage in frank discussions with those seeking their assistance, or worse still, would not be protected themselves as noted in the discussion section of this NPRM.

c. Violation of Workplace Rules as an Affirmative Defense

Second, the NPRM also proposes an affirmative defense for violations based on legitimate workplace rules. While employers should be able to take appropriate and necessary actions for serious workplace violations, as it is currently proposed, this defense runs the risk of being so broad as to allow pre-textual reasons for adverse actions. Such a broad and undefined proposal, that allows excessive employer subjectivity, could serve as a proxy for an employer wanting to fire an employee for discussing or disclosing wages. In fact, the example that is proposed to illustrate this affirmative defense – an employee being “disruptive” – opens the door to this exact problem. Such a subjective example is unclear, too broad, and could allow an employer to define any type of discussion of pay as “disruptive.” OFCCP providing more narrowly tailored definitions and examples of the types of legitimate workplace rules that are permitted as an affirmative defense will reduce the chance that these defenses are abused.

III. OFCCP Should Require Training and Best Practices for Implementing the Rule.

OFCCP has also requested comments on the implementation of this rule. Training for managers on the new rule, including providing best practices, is important in order to

⁸ Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 79 Fed. Reg. 55,718 (Sept. 17, 2014) (Notice of Proposed Rulemaking).

ensure that managers and employees alike understand their new protections and obligations. For companies that have had longstanding policies against wage discussions, such trainings and the dissemination of this new information are critically important. Merely eliminating a basis on which to take adverse action against employees should not be a financial or significant administrative burden on employers. For example, instruction on other non-discrimination provisions and similar protections are already part of many employers' mandatory training courses and in employee manuals or material.

Conclusion

We commend the President for signing the anti-retaliation executive order and the Department of Labor for its implementation. The EO and this subsequent rulemaking will benefit 28 million workers, representing billions of dollars in federal contract funds that will no longer be able to be used to underwrite this kind of discrimination. We urge the Administration to adopt final regulations on this proposed rule swiftly and without any unnecessary delay.

Thank you for the opportunity to submit comments on an issue that is so critical for working women. Please do not hesitate to contact Deborah J. Vagins, ACLU Senior Legislative Counsel, at dvagins@aclu.org if we can provide further information.

Sincerely,

American Civil Liberties Union
9to5, National Association of Working Women
9to5 Atlanta
9to5 California
9to5 Colorado
9to5 Wisconsin
American Association of University Women (AAUW)
AAUW of Alabama
AAUW of Alaska
AAUW of Arizona
AAUW of Arkansas
AAUW of California
AAUW of Colorado
AAUW of Connecticut
AAUW of Delaware
AAUW of District of Columbia
AAUW of Florida
AAUW of Georgia
AAUW of Hawaii
AAUW of Idaho
AAUW of Illinois
AAUW of Indiana
AAUW of Iowa
AAUW of Kansas
AAUW of Kentucky

AAUW of Louisiana
AAUW of Maine
AAUW of Maryland
AAUW of Massachusetts
AAUW of Michigan
AAUW of Minnesota
AAUW of Mississippi
AAUW of Missouri
AAUW of Montana
AAUW of Nebraska
AAUW of Nevada
AAUW of New Hampshire
AAUW of New Jersey
AAUW of New Mexico
AAUW of New York
AAUW of North Carolina
AAUW of North Dakota
AAUW of Ohio
AAUW of Oklahoma
AAUW of Oregon
AAUW of Pennsylvania
AAUW of Rhode Island
AAUW of South Carolina
AAUW of South Dakota
AAUW of Tennessee
AAUW of Texas
AAUW of Utah
AAUW of Vermont
AAUW of Virginia
AAUW of Washington
AAUW of West Virginia
AAUW of Wisconsin
AAUW of Wyoming
American Association for Access, Equity and Diversity (formerly the American Association for Affirmative Action)
American Association of People with Disabilities
Bazelon Center for Mental Health Law
Beaver Valley NOW
Black Women's Roundtable
Blacks In Government
CA CLUW
Capital Area CLUW
Central Florida CLUW
Central Indiana Chapter, Coalition of Labor Union Women
Central Indiana Labor Council, AFL-CIO
Coalition of Labor Union Women
Compliance USA, Inc.
Disciples Justice Action Network

District of Columbia Metropolitan Chapter of the Coalition of Labor Union Women
Equal Pay Coalition NYC
Equal Rights Advocates
Family Values @ Work
Federally Employed Women (FEW)
Federally Employed Women's Legal & Education Fund, INC. (FEW-LEF)
Feminist Majority
Greater Fresno Area CLUW
The Institute for Science and Human Values
Kate Mullany CLUW
Labor Project for Working Families
The Lawyers' Committee for Civil Rights Under Law
The Leadership Conference on Civil and Human Rights
Legal Aid Society-Employment Law Center
Legal Momentum
Metro-Detroit CLUW
Missouri Women In Trades
MomsRising.org
National Advocacy Center of the Sisters of the Good Shepherd
National Coalition on Black Civic Participation
National Committee on Pay Equity
National Consumers League
National Council of Jewish Women
National Council of Women's Organizations (NCWO)
National Employment Law Project
National Employment Lawyers Association
National LGBTQ Task Force
National Organization for Women
National Partnership for Women & Families
National Women's Law Center
New Jersey CLUW
Northwest Ohio Coalition of Labor Union Women
NYS PowHER
Oregon Tradeswomen, Inc.
Older Women's Economic Security Task Force, NCWO
Philadelphia CLUW
Restaurant Opportunities Centers United (ROC-United)
The Solomon Project
SWPA CLUW
U.S. Women's Chamber of Commerce
UAW Local 2213 Professional Registered Nurses
UltraViolet
United Food & Commercial Workers International Labor Union
Washington State Coalition of Labor Union Women
Wider Opportunities for Women
Women Donors Network
Women Employed
Women's Law Project