



The Women's Legal Defense and Education Fund

November 12, 2019

Carol A. Baldwin Moody, *President and CEO*

BOARD OF DIRECTORS

Chair: G. Elaine Wood
Duff & Phelps, LLC

First Vice Chair: Meena Elliott
Extreme Networks, Inc.

Vice Chair: Robert M. Kaufman
Proskauer Rose LLP

Vice Chair: Amy Dorn Kopelan
Bedlam Productions, Inc.

Vice Chair: Deborah L. Rhode
Stanford Law School

Vice Chair: Jay W. Waks
American Kennel Club

Vice Chair: Laura A. Wilkinson
PayPal Inc.

General Counsel: Beth L. Kaufman+
Schoeman Updike Kaufman & Gerber LLP

Secretary: Eileen Simon
Mastercard

Treasurer: Susan B. Lindenauer
The Legal Aid Society (retired)

Esha Bandyopadhyay
Fish & Richardson PC

Dede Thompson Bartlett
*Woodrow Wilson Visiting Fellow
Davenport University*

Glynnna Christian
Ornick, Herrington & Sutcliffe, LLP

Ethan Cohen-Cole, PhD, MPA, MA
Vega Economics

Kim Gandy
*National Network to End Domestic Violence
(Past President & CEO)*

Vilia B. Hayes
Hughes Hubbard & Reed LLP

Matthew S. Kahn
Gibson, Dunn & Crutcher LLP

Amy S. Leder
Holland & Knight LLP

Lori B. Leskin
Arnold Porter Kaye Scholer LLP

Stephanie A. Sheridan
Steptoe & Johnson LLP

Karen E. Silverman
Latham & Watkins LLP

Loria B. Yeadon
YMCA of Greater Seattle

HONORARY DIRECTORS

Muriel Fox, Chair

Barbara M. Cox

Etta Frolo
Women's Wear Daily (retired)

Stephanie George
Fairchild Fashion Media Inc.

Ralph I. Knowles, Jr. (deceased)
*Doffenmyre Shields Canfield
& Knowles LLC*

Michele Coleman Mayes
New York Public Library

Lisa Specht
Manatt, Phelps & Phillips, LLP

+Non-voting Board Officer

*Organizational affiliations for
purposes of identification only.

Bernadette B. Wilson, Executive Officer
Executive Secretariat
Equal Opportunity Commission,
131 M Street NE
Washington, DC 20507

Re: Docket No. 2019-19767 - Comments in Response to the EEOC's Decision to Request Renewal of Component 1 but not Component 2 of the Employer Information report (EEO-1)

Submitted via the Federal Rulemaking Portal: www.regulations.gov/

Legal Momentum welcomes the opportunity to comment on the Equal Employment Opportunity Commission's (EEOC) decision to request renewal from the Office of Management and Budget (OMB) of Component 1 but not Component 2 of the employer information Report (EEO-1) for 2019, 2020, and 2021. Based on our comments below, Legal Momentum strongly urges the EEOC to revise its request to include renewal of the vital Component 2 data collection.

Advocating for gender equality for over 40 years, Legal Momentum remains committed to achieving economic and personal security for all women and girls by eliminating barriers to equal treatment and advancing access to equal opportunity. Toward this end, Legal Momentum leads targeted initiatives to advance gender equity in the workplace and to attain equal pay for women.

In its Notice of Information Collection, the EEOC expressed its intention to refrain from seeking renewal of Component 2 because "the unproven utility to its enforcement program of the pay data as defined in the 2016 Component 2 is far outweighed by the burden imposed on employers that must comply with the reporting obligation."¹

Legal Momentum respectfully objects to the EEOC's decision not to renew Component 2. The reason the utility of the Component 2 data collection remains unproven is because the EEOC prematurely suspended the data collection before utility could be legitimately assessed. Moreover, contrary to the EEOC's conclusory and premature assertion that the data collection has unproven utility, it is well recognized, including by employers themselves, that pay-data collection plays a central role in unearthing and correcting



longstanding yet buried gender-based pay disparities.² While any new data collection is likely to impose some additional burden, the Component 2 data collection, which simply expands upon an existing process, imposes a minimal burden when compared with the considerable utility gained by enhancing the EEOC's capacity to detect compensation discrepancies and better address persistent compensation discrimination.

Based on Legal Momentum's longstanding experience in the field of employment discrimination and the factors outlined above and discussed in detail below, we respectfully request that the EEOC reconsider this decision and request renewal of Component 2 for 2019, 2020, and 2021.

The Component 2 EEO-1 Data Collection Establishes an Invaluable Tool to Advance Pay Parity and Gender Equality in the Workplace

Gender Discrimination and Lack of Pay Transparency Contribute to the Persistent Pay Gap

The persistence of gender inequality in the workplace cannot be understated. Today, women at all education levels and in nearly all occupations are still impacted by the wage gap from the moment they enter the work force. Over 50 years since the passage of the Equal Pay Act of 1963, women on average continue to earn approximately 20 percent less than men despite the fact that women on average have higher levels of education than men and are more likely to hold an advanced degree.³ These disparities are amplified for minority women.⁴ Black women typically make only 63 cents, Native American women only 57 cents, and Latinas only 54 cents for every dollar paid to white, non-Hispanic men for full-time, year-round work.⁵

Women are paid less over time, expected to care for children and family members, and financially penalized for taking on this role. The cumulative impact means that the gap

² Employers are increasingly releasing pay data or reporting disparities based on internal audits. A number of banks, including Citigroup, JP Morgan, Bank of America, and Wells Fargo, responded to activist investment firm Arjuna Capital's call to disclose such data. Valerie Bolden-Barrett, *Arjuna Capital Asks 11 Banks and Tech Companies to Disclose Pay Gaps*, HR DRIVE (Feb. 14, 2019), <https://www.hrdrive.com/news/arjuna-capital-asks-11-banks-and-tech-companies-to-disclose-pay-gaps/548443/>. Citigroup was one of the first banks to voluntarily report gender pay gap data and recently disclosed unflattering figures noting the need to correct existing disparities. Julie Horowitz, *Citi Just Revealed Unflattering Pay Data. Will Other Banks Follow Suit*, CNN BUSINESS (Feb. 7, 2019), <https://www.cnn.com/2019/02/07/business/citi-banks-gender-pay-gap-data/index.html>, Megan Cerullo, *Women at Citigroup have made Strides, but not to Top Ranks*, CBS NEWS, (Jan. 16, 2019, 5:08 PM), <https://www.cbsnews.com/news/citigroup-reveals-female-employees-earn-29-less-than-male-counterparts-in-unprecedented-disclosure/>. Intel Corp recently reported that it will be publicly releasing pay data. Jeff Green, *Intel to Share Gender, Racial Pay Data Most Companies Conceal*, BLOOMBERG NEWS (Oct. 17, 2019), <https://news.bloomberglaw.com/daily-labor-report/intel-to-share-gender-racial-pay-data-most-companies-conceal>. EY and Deloitte also lead consulting firms in gender pay gap reporting. Emma Smith, *EY and Deloitte Lead Big Four in Gender Pay Gap Reporting*, ACCOUNTANCY AGE, (Mar. 8, 2018), <https://www.accountancyage.com/2018/03/08/ey-deloitte-lead-big-four-gender-pay-gap-reporting/>. Verve, a U.K. firm, advocates for firm transparency, took the plunge themselves, and have seen positive results for closing the gender pay gap. Kim Elssesser, *Pay Transparency is the Solution to the Pay Gap: Here's One Company's Success Story*, FORBES, (Sept. 5, 2018, 12:47 PM), <https://www.forbes.com/sites/kimelssesser/2018/09/05/pay-transparency-is-the-solution-to-the-pay-gap-heres-one-companys-success-story/#3a8e69bc5010>.

³ See U.S. Census Bureau, *Income and Poverty in the United States*, 10 (2015), available at <https://www.census.gov/content/dam/Census/library/publications/2016/demo/p60-256.pdf> [Census Report on Income and Poverty]; Blau, F.D. & Kahn, L. M., *The Gender Wage Gap: Extents, Trends, and Explanations*, INST. FOR THE STUDY OF LABOR, 3 (Jan. 2016).

⁴81 Fed. Reg. at 45482.

⁵ Nat'l Women's Law Ctr., *Workplace Justice: FAQs About the Wage Gap* (Sept. 2017), <https://nwlc.org/wpcontent/uploads/2017/09/FAQ-About-the-Wage-Gap-2017.pdf>.

persists throughout a woman's career, ultimately leaving more women with less retirement income⁶ and leaving more women in poverty.⁷

While there are a host of systemic underlying trends driving the wage gap between men and women, research demonstrates that after accounting for factors such as experience, industry, and occupation, the remaining 35.4 percent of the gap can be attributed to discrimination.⁸ It is therefore unsurprising that the EEOC concluded that federal data amply demonstrates a persistent pay gap correlated with discrimination based on sex, race, and ethnicity.⁹ In fact, a 2015 study concluded that women can be three times more likely than men to be passed over on an assignment, promotion, or wage increase as a result of their gender.¹⁰ Not only are women passed over or pushed into lower paying work, research has also shown that the entry of a large number of women into a male-dominated field has the effect of depressing wages in that field.¹¹ Compensation decisions are often guided by unconscious bias, which can be difficult to bring to the surface and results in women, particularly minority women, being paid less.¹²

Federal protections have fallen short of providing a realistic avenue for recourse. Unrealistic and insufficient legal and administrative filing deadlines mean that women often miss an opportunity to file a complaint or forgo meaningful damages by the time they become aware of a pay differential or recognize that the discrepancy was unjust. The stringent "equal pay for equal work" standard has meant that many claims are thrown out because many jobs vary in some respect, even if the difference is trivial. And the liberal set of defenses that employers can call upon to justify a pay differential, some which are based on longstanding discriminatory practices, make it almost impossible for women to prevail in court.

While the data amply demonstrate the persistence of stagnant and prevalent pay inequity based on gender,¹³ decision-making around compensation in the private sector remains largely veiled. In fact, employers have historically used female applicants' depressed salaries to pay them less and capitalized on the lack of pay transparency, often prohibiting employees from discussing salary, to perpetuate unfair pay practices. Too many women are unaware of the fact that they are being paid less than their male colleagues. Even in jurisdictions that impose specific anti-retaliation provisions or make it illegal for employers to prohibit employees from discussing salary, workers are generally still not comfortable

⁶ Nat'l Women's Law Center, *The Wage Gap: The Who, How, Why, and What to Do 2* (2017), <https://nwlc.org/wp-content/uploads/2016/09/The-Wage-Gap-The-Who-How-Why-and-What-to-Do-2017.pdf>.

⁷ Meika Berlan & Morgan Harwood, Nat'l Women's Law Ctr., *National Snapshot: Poverty Among Women and Families, 2018* (Sept. 2018), <https://nwlc-ci49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/09/National-Snapshot.pdf>.

⁸ Francine D. Blau & Lawrence M. Khan, *The Gender Wage Gap: Extent, Trends, and Explanations*, The Institute for the Study of Labor 73 (Jan. 2016).

⁹ 81 Fed. Reg. at 45481.

¹⁰ Lean In & McKinsey & Company, *Women in the Workplace 2015* 13 (2015), <https://womenintheworkplace.com/2015>.

¹¹ Asaf Levanon, Paula England & Paul Allison, *Occupational Feminization and Pay: Assessing Casual Dynamics Using 1950-2000 U.S. Census Data*, SOCIAL FORCES 88(2) (Dec. 2009).

¹² Int. Labour Organization, *ACT/EMP Research Note – Breaking Barriers: Unconscious Gender Bias in the Workplace* (Aug. 2017), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---act_emp/documents/publication/wcms_601276.pdf; Kim Elsesser, *Unequal Pay, Unconscious Bias, and What to do about it*, FORBES, (Apr. 10, 2018, 9:57 AM), <https://www.forbes.com/sites/kimelsesser/2018/04/10/unequal-pay-unconscious-bias-and-what-to-do-about-it/#6b19409b600e>.

¹³ Census Report on Income and Poverty, 10; see also NAT'L WOMEN'S LAW CTR., *THE WAGE GAP IS STAGNATING FOR NEARLY A DECADE* (2015), available at <https://nwlc.org/wp-content/uploads/2016/09/Wage-Gap-Stagnant-2016-3.pdf>.

discussing compensation with their colleagues.¹⁴ As a result, it is difficult for employees, employers, and enforcement agencies alike to proactively eradicate remaining pay inequities because of lack of access to the necessary information and data on existing gender-based pay disparities in equal or substantially similar positions.

The EEOC's Component 2 Pay Data Collection Advances Pay Equity by Increasing Access to Critical Pay Data

The long-awaited Component 2 information collection, previously approved by OMB in September 2016, was the result of a comprehensive and consultative review process initiated by the EEOC that carefully balanced utility against burden. The EEOC's argument that collection of Component 2 data lacks utility is disingenuous as the EEOC has not given the data collection a chance to succeed, prematurely proclaiming its lack of utility even before completing its initial court-ordered data collection or assessing a single year's worth of data.¹⁵ The EEOC's decision not to request renewal of Component 2 prematurely suspends the information collection, thwarting the agency's ability to adequately verify and assess the true utility of the data collection.

The Component 2 data collection requires private employers and federal contractors with 100 or more employees to supplement their existing reports to the EEOC with basic yet invaluable data on compensation and hours worked based on gender, race, and ethnicity. By facilitating greater transparency and supplementing existing data with vital demographic information regarding compensation, Component 2 data brings us one step closer toward accomplishing the long-overdue goal of securing equal pay for women and minorities in the workplace. In fact research on the impact of mandatory wage transparency demonstrates that disclosing disparities in gender pay can narrow the gender wage gap.¹⁶ Mandatory transparency can also increase the number of women being hired, indicating that the supply pool of female employees increases as gender pay transparency improves, and can increase the number of female employees being promoted from the bottom of the hierarchy to more senior positions.¹⁷ Research also shows that wage transparency not only fosters a more equitable workforce but also benefits employers economically. Transparency can help employees collaborate more productively and also work harder overall.¹⁸ Pay secrecy, in contract, leads to more disengagement and decreased performance and may do more harm than good.¹⁹

Whereas the minimal burdens to employers are likely to diminish substantially once new reporting programming and processes are in place, the benefits of pay data toward evaluating and addressing gender-based discrimination will be exponential and sustained over time. Notably, the new information collection will significantly enhance utility of existing data, supplementing long-reported demographic data with the critical yet missing compensation component. By exposing potential disparities in compensation, the revised

¹⁴ Bridget Ansel, *Pay Transparency is Good For Employees but can also Benefit Businesses*, WASHINGTON CENTER FOR EQUITABLE GROWTH, (Sept. 6, 2017), <https://equitablegrowth.org/pay-transparency-is-good-for-employees-but-can-also-benefit-businesses/>.

¹⁵ The EEOC recognizes that Component 1 EEO-1 data is valuable, however, it likewise notes that it has been collecting this data since 1966.

¹⁶ Morten Bennedsen, Elena Simintzi, Margarita Tsoutsoura & Daniel Wolfenzon, *Do Firms Respond to Gender Pay Gap Transparency?* 4-6 (Nat'l Bureau of Econ. Research, Working Paper No. 25435 Jan. 2019).

¹⁷ *Id.*

¹⁸ Bridget Ansel, *Pay Transparency is Good for Employees but can also Benefit Businesses*, WASHINGTON CENTER FOR EQUITABLE GROWTH, <https://equitablegrowth.org/pay-transparency-is-good-for-employees-but-can-also-benefit-businesses/>.

¹⁹ *Id.*

data collection would also facilitate deeper evaluations of systemic discrimination that permeates other processes such as recruitment, hiring, assignment, promotions, and allocation of other opportunities.

The EEOC and OMB have been acting on the recommendations of the U.S. Chamber of Commerce, which has taken the extreme position that the rule has “no accompanying benefit.”²⁰ This insincere perspective does a disservice to the business community by disregarding the complex dynamics of gender discrimination in employment and the role that pay opacity plays in perpetuating it. In reality, the collection of aggregate data serves several important functions. First, the data can help identify and uncover pay disparities that prompt much needed investigation. Identification of a disparity is just a starting point for investigation and disclosure of pay data may equally reveal the absence of discrepancies.

By enhancing transparency and streamlining reporting on compensation, the revised data collection can also serve to encourage employers to proactively assess, monitor, and review their pay practices and empower them to highlight their gender-neutral practices or preemptively address problematic disparities early on to avoid costly arbitration and litigation.²¹

Pay data reporting also reflects the future trajectory of employment pay practice. Many employers already report such data to comply with pre-existing obligations, including foreign compliance obligations, and many other employers are increasingly collecting and reporting pay data and demographic data voluntarily, recognizing its inherent utility as a tool to proactively achieve pay equity and eliminate problematic disparities.

In 2018, The UK enacted a law that requires companies with at least 250 employees to publicly disclose gender wage gap information.²² Many other countries, such as Denmark, Australia and Germany, have passed similar laws with the goal of increasing transparency and addressing the gender wage gap head on. To comply with these foreign laws and regulations, many U.S. companies who operate in the UK are therefore already reporting more pay data than what is required under Component 2.²³ The UK law, for example, requires a full breakdown of each employee’s salary and an explanation.²⁴

Recently a number of banks, including Citigroup, JP Morgan, Bank of America, and Wells Fargo responded to activist investment firm Arjuna Capital’s call to voluntarily disclose pay data.²⁵ After completing its EE0-1 reporting, Intel Corp recently reported that it will be

²⁰ Letter from Randel K. Johnson, Senior Vice President of Labor, Immigration, and Employee Benefits, U.S. Chamber of Commerce, James Plunket, Dir. of Labor Law Policy, U.S. Chamber of Commerce, to John M. Mulvaney, Dir., Office of Mgmt. and Budget, Re: Request for Review; EEOC’s Revision of the Employer Information Report, 2 (Feb. 27, 2017), available at https://www.uschamber.com/sites/default/files/2-27-17_comment_letter_-_us_chamber_eeo-1_request_for_review.pdf.

²¹ Studies have also shown that closing the gender wage gap would positively impact the economy by reducing poverty, increasing consumer spending, and increasing the gross domestic product. See Hartmann, H., Hayes, J. & Clark, J. *How Equal Pay for Working Women Would Reduce Poverty and Grow the American Economy* 1, INST. FOR WOMEN’S POLICY RESEARCH (2014).

²² Press Release, UK Department for Business, Energy & Industrial Strategy (Jan. 1 2019), <https://www.gov.uk/government/news/new-executive-pay-transparency-measures-come-into-force>.

²³ See *supra* note 2.

²⁴ Gender Pay Gap Regulations 2017, No. 172, art 2, <http://www.legislation.gov.uk/ukxi/2017/172/made>.

²⁵ Valerie Bolden-Barrett, *Arjuna Capital Asks 11 Banks and Tech Companies to Disclose Pay Gaps*, HR DRIVE (Feb. 14, 2019), <https://www.hrdrive.com/news/arjuna-capital-asks-11-banks-and-tech-companies-to-disclose-pay-gaps/548443/>.

publicly releasing its pay data.²⁶ Intel's vice president of human resources and director of compensation and benefits acknowledged the need for companies to put themselves out there even in the face of criticism in order to achieve legitimate progress.²⁷ Starbucks reports that it is now sharing pay equity data with its employees and discloses salary ranges with candidates who request it.²⁸ Verve, a U.K.-based tech firm, recently engaged in full pay transparency initiatives. Since the move to transparency, Verve bases pay on solely objective measures, has increased workforce diversity, and improved worker productivity.²⁹

Foreign pay data reporting requirements as well as voluntary reporting have already proven useful, revealing concerning gaps worthy of further investigation. Citigroup was one of the first of the banks to voluntarily report gender pay data, venturing to disclose unflattering figures in order to get ahead of the problem.³⁰ Though their UK reporting, Goldman Sachs, Stifel Nicolaus and Williamson-Dickie have revealed concerning gender pay gaps in the UK that should be examined and raise alarms regarding their pay practices in the U.S. These three companies reported at least a 53% gap in pay for male and female employees.³¹ Google UK reported that female employees in the UK make an average 17 percent less than male employees and 16 percent less at the median.³² Its report also showed that women make up half of its lowest-paid employees and less than a quarter of the highest-paid ones and that women's bonuses are, on average, 43 percent lower than men's bonuses.³³

Collection of Component 2 data fills a critical gap and serves several important functions, increasing transparency, which in turn increases the capacity of employees, employers, and the EEOC to identify, assess, and address problematic pay disparities based on gender, race, and ethnicity. The utility of such reporting is increasingly well established and the EEOC's attempts to impede such reporting only serves to thwart and delay an inevitable and invaluable pay equity practice.

The Revised EEO-1 Report Sufficiently Minimizes Burden on Employers

According to the EEOC, its newly created Office of Enterprise Data and Analytics (OEDA) conducted a revised burden analysis using data scientists who were not at the EEOC in 2016 when the EEO-1 Component 2 was approved.³⁴ However, OEDA's higher burden estimate and new methodology based on the number of forms and reports different employers would

²⁶ Jeff Green, *Intel to Share Gender, Racial Pay Data Most Companies Conceal*, BLOOMBERG NEWS (Oct. 17, 2019), <https://news.bloomberglaw.com/daily-labor-report/intel-to-share-gender-racial-pay-data-most-companies-conceal>.

²⁷ *Id.*

²⁸ Samantha McLaren, *Why These 3 Companies Are Sharing How Much Their Employees Make*, LinkedIn Talent Blog (Feb. 14, 2019), <https://business.linkedin.com/talent-solutions/blog/trends-and-research/2019/why-these-3-companies-are-sharing-how-much-their-employees-make>.

²⁹ Kim Elsesser, *Pay Transparency is the Solution to the Pay Gap: Here's One Company's Success Story*, FORBES, (Sept. 5, 2018, 12:47 PM), <https://www.forbes.com/sites/kimelsesser/2018/09/05/pay-transparency-is-the-solution-to-the-pay-gap-heres-one-companys-success-story/#3a8e69bc5010>.

³⁰ Julie Horowitz, *Citi Just Revealed Unflattering Pay Data. Will Other Banks Follow Suit*, CNN BUSINESS (Feb. 7, 2019), <https://www.cnn.com/2019/02/07/business/citi-banks-gender-pay-gap-data/index.html>, Megan Cerullo, *Women at Citigroup have made Strides, but not to Top Ranks*, CBS NEWS, (Jan. 16, 2019, 5:08 PM), <https://www.cbsnews.com/news/citigroup-reveals-female-employees-earn-29-less-than-male-counterparts-in-unprecedented-disclosure/>.

³¹ Christopher Brennan, *American Companies such as Goldman Sachs among UK's Worst Gender Pay Gap Offenders*, DAILY NEWS (Apr. 2018), <https://www.nydailynews.com/news/world/u-s-companies-worst-gender-pay-gap-offenders-uk-data-article-1.3918082>

³² Gender Pay Gap Service, *Gender Pay Gap Report*, (Apr. 5, 2017), <https://gender-pay-gap.service.gov.uk/Employer/dFbkAijd/2017>.

³³ U.K. GENDER PAY GAP REPORT, <https://gender-pay-gap.service.gov.uk/Employer/dFbkAijd/2017>.

³⁴ 84 Fed. Reg. at 48138, 48139.

have to file³⁵ does not establish that the burden is excessive or outweighs the immense utility of Component 2 data reporting.

To obtain OMB approval for an information collection, which involves new recordkeeping and reporting requirements,³⁶ an agency is not tasked with eliminating any and all burden. Rather, it must demonstrate that the information collection “is the least burdensome necessary for the proper performance of the agency’s functions to comply with legal requirements and achieve program objectives....”³⁷ The EEOC’s 2016 request more than sufficiently complied with this requirement.

OMB’s 2016 approval of Component 2 information collection was the result of a carefully researched, comprehensive, and consultative review that carefully balanced utility against burden and sought to advance the EEOC’s mission to prevent, address and eliminate discrimination in the workplace. Based on its comprehensive review and revisions, the EEOC rightly concluded in 2016 that despite imposing some additional costs, the solicitation of the new data points imposed the minimum burden necessary for the EEOC to significantly enhance its investigatory function. As noted above, the EEOC already solicited and considered comments on the issue of cost and burden and conducted a thorough evaluation of the burdens imposed, revising its proposal to address concerns.

The EEOC well documented how the information collection was carefully crafted to minimize burden in numerous ways. First, the EEOC minimized burden and enhanced efficiency by building upon an existing process and requesting new data through the EEO-1 report, which covered employers already submit with the relevant demographic data. Using a familiar form strikes the right balance by collecting data that can be useful for enforcement purposes while not overburdening employers.

Second, most employers already maintain payroll systems with information regarding compensation and hours worked and are required to collect and report W-2 wage data under federal law. By strategically choosing to use W-2 income, which reflects a comprehensive measure of pay, and shifting the reporting deadline to March, the data collection allows employers to utilize their W-2 data for their EEO-1 report and to align their EEO-1 and W-2 obligations, further minimizing the burden. The burden of reporting hours worked is similarly minimized since employers are required under federal law to maintain records of hours worked for non-exempt employees,³⁸ and the EEOC has provided options for reporting with respect to exempt employees.³⁹ To further minimize burden, the EEOC also chose to utilize the existing narrow set of pay bands.⁴⁰

Accordingly, the EEOC correctly noted that most employers would not be required to collect much additional data, if any. Based on the EEOC’s pilot study, it further found that convenient software solutions exist with the capacity to collect and link the requested data regarding earnings, hours, and compensation, and that most major payroll software systems are already equipped to compile this data.⁴¹ The agency’s original estimates demonstrate that although initial implementation may pose temporary inconveniences, once systems are re-programmed to generate and link the new EEO-1 data, there will be minimal additional

³⁵ *Id.*

³⁶ 5 C.F.R. § 1320.3(c).

³⁷ 5 C.F.R. § 1320.5(d).

³⁸ 29 C.F.R. § 516.2.

³⁹ 81 Fed. Reg. at 45488.

⁴⁰ *Id.* at 45490.

⁴¹ *Id.* at 45487.

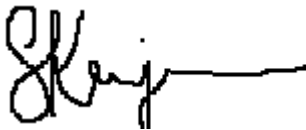
burden going forward. These factors apply even if you take into account OEDA's revised estimates.

In fact, the business driven campaign to stay the approved data collection and to prematurely suspend the court-ordered 2-year data collection imposes an even worse burden. By imposing last minute suspensions and delays, OMB has created confusion and lack of clarity for employers, making it impossible for them to timely decipher their compliance obligations. As a result many employers seeking to comply back in March 2018 already invested in systems to collect and report Component 2 data, and by now, all covered employers should have systems in place in order to comply with their September 2019 Component 2 reporting obligations.

Employers have also expressed concerns about the burden of unfounded inferences of discrimination based on disparities that can be explained by non-discriminatory factors. Here, it is worth noting that while the new reporting requirements would enhance data-collection, they would not change the EEOC's obligation to carry out thorough investigations and to evaluate the implications of the data. The collection of data is just a first step in the analysis and disparities may prove harmless or identify problematic underlying trends. Conversely, the new data can equally support employers' claims regarding the absence of discrimination. The availability of more data will only augment the EEOC's analysis, assisting it to target its investigations, and will in no way undermine the ability of an employer to provide information to explain its practices and present non-discriminatory grounds for discrepancies.

These factors demonstrate that while the new report does impose minor additional burdens, the information collection nonetheless strikes an effective balance between collecting information necessary for the EEOC to fulfill its mission while safeguarding against unnecessary and unjustified costs.

Sincerely,

A handwritten signature in black ink, appearing to read 'SK' followed by a stylized name and a long horizontal flourish.

Seher Khawaja
Senior Attorney, Economic Empowerment
Legal Momentum