

National Equal Pay Enforcement Task Force

Background

In 1963, when women were paid 59 cents for every dollar paid to men, President Kennedy signed the Equal Pay Act, making it illegal for employers to pay lower wages to women doing substantially the same work as their male counterparts. The next year, Title VII of the Civil Rights Act of 1964 was enacted, making it illegal to discriminate, including in compensation, on the basis of sex, race, color, religion, and national origin. Today, almost 50 years after the Equal Pay Act became law, women are paid an average of 77 cents for every dollar paid to men. Studies have demonstrated that a significant portion of this gap cannot be explained by nondiscriminatory factors and that the promise of equal pay remains unfulfilled.

By signing the Lilly Ledbetter Fair Pay Act of 2009, President Obama fulfilled a campaign promise and confirmed his commitment to equal pay for women. The Lilly Ledbetter Act restored the interpretation of the law that a pay discrimination claim accrues when a discriminatory pay decision or practice is adopted, whenever an employee is subjected to a discriminatory pay decision or practice, and each time a discriminatory pay decision or practice affects an employee, including each time the employee receives a discriminatory paycheck.

The Lilly Ledbetter Act was a significant step in the Administration's pursuit of equal pay. In addition, the Administration has supported effective enforcement of equal pay and other key civil rights laws through its budgets for civil rights enforcement agencies. The Fiscal Year 2011 President's Budget provides an 11% increase for the Department of Justice's Civil Rights Division, on top of an 18% increase in the Division's budget last year. Funding for the Department of Labor's Office of Federal Contract Compliance Programs is increased by 10% in the President's Budget, and the Equal Employment Opportunity Commission received a 5% increase in the President's Budget in addition to increases last year. With these increases, as President Obama promised in the State of the Union address, we will better enforce the equal pay laws. And President Obama continues to support the Paycheck Fairness Act, which he co-sponsored in the Senate.

The National Equal Pay Enforcement Task Force

To implement President Obama's pledge in the State of the Union address to crack down on violations of equal pay laws, the Administration has created the National Equal Pay Enforcement Task Force, bringing together the Equal Employment Opportunity Commission ("EEOC"), the Department of Justice ("DOJ"), the Department of Labor ("DOL"), and the Office of Personnel Management ("OPM").

Although a number of laws exist to address equal pay enforcement, the Task Force has identified the following five persistent challenges in this area, made recommendations to address each challenge, and developed an action plan to implement those recommendations. First, three different federal agencies have distinct responsibilities to enforce the laws prohibiting pay discrimination, and they do not consistently coordinate these responsibilities. In response, the Task Force has identified specific areas in which better coordination among these agencies will improve investigation and enforcement abilities and recommends the adoption of mechanisms to

facilitate that coordination.

Second, the government’s ability to understand the full scope of the wage gap and to identify and combat wage discrimination can be improved by access to more data than are currently available. The Task Force offers recommendations for data collection targets and practices to enhance enforcement abilities, while at the same time limiting employer burdens.

Third, employees and employers are insufficiently educated on their rights and obligations with respect to wage discrimination. The Task Force is developing plans for employer and employee education programs on the right to equal pay. The Task Force is also committed to improving the training of federal employees responsible for identifying, investigating, and prosecuting wage discrimination.

Fourth, the Government Accountability Office (“GAO”) has identified an eleven cent wage gap between men’s and women’s average salaries in the federal workforce. The Task Force has directed the EEOC and OPM to work with GAO to identify the reasons for the wage gap and ways to close it.

Fifth, existing laws do not always provide federal officials with adequate tools to fight wage discrimination. The Administration strongly supports the Paycheck Fairness Act, which would close the loopholes in the Equal Pay Act that give employers unjustified defenses to their discriminatory conduct, strengthen retaliation prohibitions, and ensure that women receive the same remedies under the Equal Pay Act as are available under some laws to those subject to wage discrimination on other bases.

Recommendations and Action Plan

1. Improve interagency coordination and enforcement efforts to maximize the effectiveness of existing authorities. The EEOC, DOJ, and DOL will establish a standing working group to coordinate interagency enforcement of wage discrimination laws and to help implement Task Force recommendations. The agencies will focus on improving coordination and communication among the agencies, coordinating investigations and litigation, identifying areas in which they can issue joint guidance to employers and employees, and conducting joint training as appropriate. The agencies will confer with one another to promote consistency in policy and litigation positions, including opportunities to file amicus briefs. The working group will focus on the following specific functions.

A. Increase coordinated efforts between EEOC and DOJ in investigations and litigation to improve employers’ compliance with wage discrimination laws.

The EEOC has enforcement authority for the Equal Pay Act (“EPA”), which requires that men and women in the same workplace be given equal pay for work requiring equal skill, effort, and responsibility. Individuals may bring suspected violations to the EEOC for investigation or file lawsuits directly, and the EEOC can bring lawsuits against both private and state and local employers. The EEOC may also conduct “Directed Investigations” into suspected EPA violations without an individual charge.

Title VII of the Civil Rights Act of 1964 also prohibits compensation discrimination and is enforced jointly by the EEOC and DOJ. The EEOC may investigate and attempt to resolve Title

VII cases and may bring individual or pattern or practice Title VII lawsuits against private sector employers based on charges of discrimination. These charges may be filed by individuals or by members of the Commission (“Commissioner Charges”). DOJ can bring individual claims against state or local government employers on referral from the EEOC and can bring pattern-or-practice claims against government employers based on EEOC referrals or on its own investigation.

The EEOC and DOJ have begun an intensive pilot program to coordinate the investigation and litigation of charges against state and local government employers in several EEOC district offices. This effort is intended to enable the two agencies to focus on strategic priorities and to leverage their resources to ensure the most effective investigations possible. The agencies will evaluate this pilot program and determine whether best practices for cooperation on investigations of state and local government employers should be replicated and applied in other districts.

B. Evaluate and reinvigorate the EEOC-DOL Memoranda of Understanding.

The EEOC and DOL entered into two Memoranda of Understanding in 1999 to promote better enforcement of federal laws prohibiting unlawful compensation practices, with a particular emphasis on wage discrimination.

The first MOU provides for cross-training of staff members of the EEOC and DOL’s Wage and Hour Division on how to identify compensation discrimination in the course of their investigations. This memorandum also facilitates referrals and allows for the sharing of information on pay discrimination cases between the agencies.

The second MOU updates an earlier agreement regarding cooperation between the EEOC and Office of Federal Contract Compliance Programs (“OFCCP”). This MOU provides OFCCP the ability to seek monetary damages in its conciliation of cases arising from complaints involving federal contractors, makes OFCCP an agent of the EEOC for the purposes of accepting and investigating charges, and provides for data sharing and the referral of individual discrimination charges from OFCCP to the EEOC.

The EEOC and DOL will evaluate the practices of field offices that have used their MOU referral authority to identify successful practices that, among other things, facilitate greater communication about enforcement priorities and increase referrals between the agencies. The EEOC, DOJ, and OFCCP will also develop and implement protocols for ensuring that the EEOC and DOJ may have access to compliance audit files where appropriate to advance the investigatory process. The EEOC and OFCCP will develop a pilot program that requires their field offices in specific regions to work together to identify sectors where increased enforcement activity is necessary. DOJ will provide support to this pilot program as necessary.

C. Improve coordination and cooperation between OFCCP and DOJ under Executive Order 11246.

DOL and DOJ have significant coordination and enforcement authorities that have been underused in recent years. Under Executive Order 11246, which prohibits discrimination in federal contractors’ employment decisions, OFCCP, with the DOL Office of the Solicitor, has primary enforcement authority. OFCCP is authorized to refer class cases to DOJ for

investigation and judicial enforcement. Although this referral authority has been successfully used in the past, it has not been used in recent years. With the Solicitor of Labor, OFCCP and DOJ will work collaboratively to improve enforcement efforts and to develop criteria to determine when interagency referrals and/or enforcement partnerships are appropriate in cases involving compensation discrimination.

On the recommendation of the Director of the Office of Federal Contract Compliance, DOJ is authorized to initiate independent investigations of and sue contractors it believes are in violation of the Executive Order. DOL and DOJ will evaluate whether this authority can be applied to improve enforcement efforts.

D. Strengthen wage discrimination focus in the EEOC systemic enforcement and litigation program.

The EEOC will strengthen its wage discrimination emphasis into its systemic enforcement and litigation program to address patterns of wage discrimination in particular industries, occupations, or geographic areas. Using all tools available to the EEOC, including Directed Investigations and Commissioner Charges, the EEOC will focus on patterns and practices that tend to perpetuate the wage gap through discriminatory pay, as well as on individual instances of wage discrimination with strong litigation or educational potential.

E. Review and revise OFCCP enforcement guidance and practices.

OFCCP will publish a Notice of Proposed Rescission to rescind the 2006 standards entitled “Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination” and related guidance. With appropriate input from the EEOC and DOJ, OFCCP will establish new standards through an accepted mechanism for establishing policy and investigation procedures, *i.e.*, an OFCCP directive or the Federal Contract Compliance Manual.

OFCCP will formally rescind Directive 285, Active Case Management, which prohibits an on-site audit of a contractor unless a desk audit identified 10 victims of discrimination.

OFCCP has lifted the limitation on the number of contractors eligible for a full audit review at any one time.

OFCCP will hire more than 200 employees, most of whom will be Compliance Officers, the front line employees responsible for detecting discriminatory practices.

2. Collect data on the private workforce to better understand the scope of the pay gap and target enforcement efforts. Private sector employers are not required to systematically report gender-identified wage data to the federal government. This lack of data makes identifying wage discrimination difficult and undercuts enforcement efforts. We must identify ways to collect wage data from employers that are useful to enforcement agencies but do not create unnecessary burdens on employers.

A. Institute a strategy to collect pay data from federal contractors, culminating in a data collection tool that will identify contractors who are likely to be out of compliance.

The OFCCP Equal Opportunity (“EO”) Survey, which was adopted at the end of the Clinton Administration and rescinded by the Bush Administration, was intended to (1) increase compliance with equal opportunity requirements by improving contractor self-awareness and encouraging self-evaluations; and (2) improve the use of federal enforcement resources and improve OFCCP efficiency by targeting contractors most likely to be out of compliance.

The EO Survey has been rescinded, and its reinstatement, or the establishment of a similar survey, must be by regulation or legislation (the Paycheck Fairness Act calls for reinstatement of the EO Survey). Through publication of an Advance Notice of Proposed Rulemaking (“ANPRM”), OFCCP will seek the input of stakeholders in evaluating whether the EO Survey should be redesigned to collect different data than previously sought and whether there are any ways to further limit the burden of data collection for employers. The implementation of a survey is expected to result in better identification of those contractors who are likely to be out of compliance, particularly with regard to compensation discrimination; a narrowing of the issues on which the resulting review will focus; and identification of contractors for corporation-wide and industry-focused reviews.

To avoid duplicative data collection efforts, OFCCP and the EEOC will work collaboratively when evaluating data collection needs, capabilities, and tools. The data collected by OFCCP will be shared with other enforcement agencies and with the public to the extent allowed by law.

B. The EEOC will evaluate its data collection needs and capabilities.

The EEOC collects non-wage workforce data using several surveys called EEO Reports. There are four versions of the EEO Report, which are filed by private sector employers with more than 100 employees and certain federal contractors, local unions, state and local government employers, and public elementary and secondary schools. The EEOC shares the data with authorized federal agencies to avoid duplicate collection of data. The data are confidential, but aggregated data are made available to the public. The EEO-4 Report, which covers state and local government employers, is the only survey that collects any wage-related data. However, the job categories and wage bands reported on the EEO-4 are so broad that they are rarely if ever used to conduct wage disparity analyses.

The EEOC has conducted an extensive review of federal data sources to determine whether there are existing data that it could use to enhance wage discrimination law enforcement efforts. It has determined that there is no federal data source that contains private sector employer-specific wage data broken down by demographic category. Additionally, the EEOC has evaluated

whether expanded versions of existing data collection efforts could provide this information.

The EEOC will commission an outside study to determine what data it should collect to most effectively its enhance wage discrimination law enforcement efforts. The EEOC already has received a prospectus from the National Academy of Sciences to conduct such a study. To avoid duplicative data collection efforts, OFCCP and the EEOC will work collaboratively when evaluating data collection needs, capabilities, and tools.

3. Undertake a public education campaign to educate employers on their obligations and employees on their rights. In addition, agencies will to work develop enhanced training programs for their employees charged with identifying, investigating, and prosecuting wage discrimination and will improve the accessibility of publicly available information.

A. Educate employers and employees on their respective obligations and rights regarding equal pay.

The EEOC, DOL, and DOJ will evaluate the possibility of developing guidance for employers on evaluating pay disparities in the workplace, with regard to equal pay for equal work and occupational segregation that leads to lower pay for occupations that are female-dominated. For state and local employers, guidance could also address the assessment of job classification systems to determine whether they pose equal pay problems.

The Women’s Bureau will conduct an ongoing review of state-level activities aimed at employer compliance and reporting.

The EEOC, DOJ, and DOL will assess their educational tools, materials, and publications for employers and employees. If necessary, they will develop additional educational materials to train employees on their rights under the law, including how to identify potential compensation discrimination.

DOL’s Women’s Bureau will evaluate the discontinued “Know Your Rights” program and determine whether it should be revived or replaced.

The Women’s Bureau will host a research meeting with pay equity experts from academia and national organizations to determine data gaps and best approaches to information gathering.

The EEOC and DOL’s OFCCP and Women’s Bureau will host a series of meetings with employers, contractors, and advocates to launch educational materials into the community and to highlight the available tools and resources.

Each EEOC District Office will host a “Fair Pay Day,” designed to focus the attention of the public and the media on fair pay issues. Each office will conduct outreach events related to wage discrimination on their “Fair Pay Day.” As a follow-up to their “Fair Pay Day,” offices will conduct joint outreach with other local federal agencies and local Industry Liaison Groups on wage discrimination issues.

B. Improve training for federal employees responsible for equal pay enforcement.

The EEOC will review its staff training modules to improve training for enforcement staff on how to assess and use wage data to identify and develop wage disparity cases. The EEOC will

develop enhanced training for its investigators on how to investigate wage discrimination charges, including the elements of proof required for an Equal Pay Act case and the differences in analysis between an EPA case and a Title VII wage case.

When appropriate, the EEOC, DOJ, and OFCCP will engage in joint staff training or staff cross-training.

OFCCP will hire more than 200 employees, most of whom will be Compliance Officers, front line employees who are responsible for detecting discriminatory practices. When OFCCP rescinds and replaces its Interpretive Standards and Voluntary Guidelines, it will provide new training to its employees on enforcement opportunities.

C. Improve the quantity, quality, and accessibility of publicly available wage data.

The DOL's Employment and Training Administration, with input from the Women's Bureau, will review its CareerOneStop web site, which includes the wage and salary comparison tool, to identify and highlight any additional data or training that should be made available for job seekers or employees. (See www.careeronestop.org/SalariesBenefits/SalariesBenefits.aspx for access to the tool.)

The interagency coordination working group will prepare public reports detailing enforcement actions taken by each agency consistent with all applicable legal or other restrictions on the disclosure or dissemination of such information.

4. Implement a strategy to improve the federal government's role as a model employer.

A 2009 GAO report found a wage gap between men and women in the federal workforce of eleven cents. GAO was unable to identify a cause for seven cents of this wage gap. The EEOC and OPM will request to meet with GAO to discuss this report and examine data from the two years after the GAO reporting period. The EEOC and OPM will request to work with GAO to identify the reasons for this wage gap and ways to close it. The EEOC and OPM will also request to work with GAO to determine whether it has the statistical tools necessary to analyze any job segregation in the federal workforce.

The EEOC will use the information gained from the collaboration with OPM and GAO to provide agencies with better guidance in analyzing wage gap issues.

Fewer women than men serve in the Senior Executive Service, the highest level of the civil service. Though not a strict pay disparity issue, this pattern is relevant to women in the workforce. OPM has initiated a government-wide diversity initiative that will address, among other issues, any barriers to service by women, minorities, and people with disabilities in the SES. OPM will submit recommendations for a government-wide diversity strategy to the OPM Director.

5. The Administration will work with Congress to pass the Paycheck Fairness Act.

Although the Equal Pay Act of 1963 was an important historical milestone, it has not been updated since then, despite nearly half a century of legal and economic developments. The Paycheck Fairness Act would significantly enhance the Equal Pay Act. Among other things, the new law would allow women to receive the same remedies for sex-based pay discrimination as those available under some laws to individuals subjected to race or national origin discrimination. The Act would bar retaliation against workers who disclose their wages, and would strengthen protections against wage discrimination by clarifying the scope of affirmative defenses. The Administration will continue working with lawmakers on this legislation and supporting its enactment.