



July 25, 2017

Honorable Neomi Rao  
Administrator, Office of Information and Regulatory Affairs  
Office of Management and Budget  
725 17th Street NW  
Washington, DC 20503

Dear Administrator Rao:

On behalf of the Society for Human Resource Management (SHRM), I request that the Office of Management and Budget (OMB) exercise its authority under Section 3517 of the Paperwork Reduction Act (PRA) and its implementing regulations to review the Equal Employment Opportunity Commission's (EEOC) revisions to the EEO-1 Form approved by OMB's Office of Information and Regulatory Affairs (OIRA) on October 18, 2016 (ICR Reference No: 201610-3046-001). SHRM believes OMB should reject the EEOC's revisions to the EEO-1 Form because the EEOC has not met the requirements of the PRA to maximize the data collection's benefit, minimize its burden, and ensure it is consistent with laws that protect privacy and confidentiality.

The need for OMB swift action has taken on greater importance as organizations have started making substantial investments in software and Human Resource Information System (HRIS) changes to collect data for submission to the agency by the deadline of March 2018.

The SHRM is the world's largest HR professional society, representing 290,000 members in more than 165 countries. For nearly seven decades, the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates. As such, SHRM represents thousands of employers who are subject to the EEO-1 and have begun making changes to their information systems, software, internal data collection processes and staffing to comply with the revised rule.

SHRM has worked, throughout its history, to end workplace discrimination based on gender. We vigorously support equal pay for equal work and believe that any misconduct against an employee should be promptly and fully rectified. However, SHRM believes the EEOC's focus on collecting pay data is misplaced. We strongly urge OMB to rescind its prior approval of the EEOC's changes to the EEO-1 Form because the revised form:

- Provides no practical utility to address pay discrimination;
- Imposes burdens on employers that far exceed EEOC estimates; and
- Raises serious privacy and confidentiality issues.

### **Lack of Practical Utility**

The EEOC failed to identify or explain how the collection of compensation data at the level of EEO-1 job category would help the agency identify whether an employer's pay practices are discriminatory. In fact, SHRM does not believe it possible to identify how the collection could identify pay discrimination because each EEO-1 job category includes a wide range of job titles, for which vastly different rates of pay are provided based on a variety of legitimate, nondiscriminatory factors. For example, the Professionals EEO-1 job category may include entry-level marketing professionals as well as medical providers with advanced degrees in specialty practices and IT professionals with sought-after skills. In order to secure those specialty or sought-after skills, employers need to provide an attractive compensation package which they would not need to offer for an entry-level position. For this reason, the pay for each of these positions, even though they are within the same broad EEO-1 job category, will vary significantly.

Similarly, the agency's proposed collection of W-2 gross income information is misplaced. W-2 gross income includes payments to employees that may be driven by factors such as employee choice and other issues that have no bearing on the employer's decision as to how much an employee earns. The W-2 gross income statement may include non-discriminatory variables that may impact pay such as shift differentials, bonuses, commissions, and overtime compensation.

For example, two production workers could have different W-2 gross wages if one was excused from working overtime hours as a reasonable accommodation under the Americans with Disabilities Act ("ADA"), while another not only worked continuously throughout the year but also worked all overtime hours offered to her. Providing hours worked by both employees does not adequately account for the differences in pay because there is no way to account for the fact that some of the hours of one employee were paid at a premium rate, while the other employee asked to be excused from all overtime hours for a legitimate, nondiscriminatory reason.

Likewise, two employees in the same job title may report different W-2 gross wage information in a calendar year if one of the employees receives a \$25,000 signing or retention bonus that year, and the other did not. This is the case even if the other employee received the same \$25,000 signing or retention bonus when he or she began employment in a different EEO-1 reporting year. If the two employees are of different races or genders, aggregating the W-2 wage information of these two employees will make it appear as if there is a potential pay discrimination issue. Thus, collecting W-2 data will not allow the EEOC to evaluate comparable compensation data points.

Asking employers to collect and report data on W-2 wages and hours worked for all their employees grouped in broad EEO-1 job categories, subdivided into 12 different pay bands without a definitive plan for how the data would be used does not satisfy the standards under the PRA.

### **Burdens Exceed EEOC Estimates**

The EEOC failed meet the requirements of the PRA by inadequately assessing the burden placed on employers who must file the EEO-1 report. Underlying this data collection proposal is the flawed assumption that accurate and fully verified EEO-1 reports can be automatically generated using technology. This is simply not the case currently and certainly will not be under the proposed changes which will require two different systems – HRIS and Payroll – to talk to one another. This is particularly

troublesome for smaller employers that may lack the funds to change their data management systems or to hire an outside consultant.

In fact, the vast majority of SHRM members do not use an outside vendor to help file the reports and a third either do not have an HRIS system at all or use different vendors for their HRIS and payroll systems. This means they will face obstacles automating any aspect of their data collection. Moreover, the EEOC's requirements file and HRIS reporting systems are not always consistent, leading to an additional round of manual edits before an EEO-1 report can be filed. Despite the agency's reliance on technology, they did not include in their estimates, the cost of upgrading an organization's human resource data systems leading to a material error in the agency's burden estimate. The actual burden on employers of collecting, verifying and reporting the information will be far greater than what the agency has estimated.

### **Privacy and Confidentiality Concerns**

The EEOC's proposal would gather very specific compensation information by specific establishments, including very small establishments, using a web-based format. Compensation data of the nature the EEOC intends to collect is especially sensitive and confidential – to both employees and employers.

For many small employers, and even larger employers, reporting data in this manner will result in the reporting of individual, employee-level data. Our concerns are not just focused on protecting our companies, but also on protecting our employees, many of whom would not be happy if their personal pay information was widely disclosed due to these data reporting requirements. In addition, release of an individual's compensation information – through the Freedom of Information Act ("FOIA"), by intentional misappropriation such as a data breach of the EEO-1 reporting system, or through a database of aggregate compensation information – poses serious concerns to the members SHRM represents. Yet, EEOC did not propose any data security safeguard to ensure protection of employees' pay data.

### **Conclusion**

In closing, given the complex reality of how pay decisions are made, the proposed data collection requirement lacks any practical utility under the PRA. This lack of utility, combined with concerns about the burden on employers, and security and confidentiality of the data, SHRM urges OMB to review and rescind its prior approval of the EEOC's revisions to the EEO-1 Form as soon as possible.

Sincerely,



Michael P. Aitken  
Vice President  
Government Affairs  
Society for Human Resource Management