

US Pay Equity Progress Hinges On Data Transparency

By **Lynne Bernabei and Kristen Sinisi**

In 2016, as part of the Obama administration's effort to enforce equal pay laws, the U.S. Equal Employment Opportunity Commission announced that it would begin collecting aggregate pay, or Component 2, data from employers. The following year, the Trump administration reversed course, and the EEOC resisted collecting the new pay data until a court mandated that it do so.

Despite the court order, the EEOC again has made clear its intention to halt the collection and abandon the 2016 regulations, in favor of returning to a narrow data collection, established over a half-century ago. This move puts the U.S. far behind other countries, which seek to alleviate long-lasting pay gaps through the collection and publication of pay data.

Background

Under Section 709(c) of Title VII of the Civil Rights Act of 1964,[1] the EEOC must collect information about the workforces of certain employers to help it gauge whether "unlawful employment practices have been or are being committed." Specifically, starting in 1966, Title 29 of Code of Federal Regulations Section 1602.7 required private employers with at least 100 employees and federal contractors with at least 50 employees to submit annual employer information reports, or EEO-1 reports, with certain demographic information about the composition of their workforces.

Historically, the EEO-1 form required employers to provide only Component 1 data, which specifies how many employees of each sex, race and ethnic category occupied each job category (executive/senior-level officials and managers, first/mid-level officials and managers, professionals, technicians, sales workers, administrative support workers, craft workers, operatives, laborers and helpers, and service workers) during a given year.

In theory, the Component 1 data provides a snapshot of an employer's workforce, which enables the EEOC to visually assess the distribution of employees by race, national origin and sex among various job categories. However, Component 1 does not directly collect or measure discrimination in compensation.

Despite federal, state and local legislation aimed at eliminating pay discrimination, the gender and racial wage gaps persist. As of 2018, the U.S. Department of Labor's Bureau of Labor Statistics found that full-time female workers earned on average 81.1% of men's earnings.[2] These figures are even more pronounced for female minorities. Indeed, the Institute for Women's Policy Research determined that African American women earned 65.3 cents for each dollar white men earned, a statistically significant decrease in African American female earnings from 2017, when they earned 67.7 cents on the dollar.[3]

Because Component 1 does not address discrimination in pay, in 2016, the EEOC announced that it would begin collecting Component 2 pay data from employers. Whereas Component 1 requires employers to tally the number of employees, by sex and race, in each job



Lynne Bernabei



Kristen Sinisi

category, Component 2 requires employers to specify the W-2 pay band of each employee. The pay bands range from \$19,239 and under to \$208,000 and over.

Under the Paperwork Reduction Act, Title 44 of U.S. Code Section 3507, the U.S. Office of Management and Budget must approve agencies' data collections every three years. The OMB renewed the EEOC's Component 1 collection, and approved its Component 2 collection, for a period spanning from September 2016 through September 2019.

EEOC's Change in Position

On Aug. 29, 2017, Neomi Rao, then-administrator of the Office of Information and Regulatory Affairs, or OIRA, a subagency of the OMB, issued a memorandum to EEOC Commissioner Victoria Lipnic, which stayed the EEOC's collection of Component 2 data, but did not impact its Component 1 collection. According to Rao, the EEOC purportedly underestimated the burden associated with Component 2 collection when it previously obtained OMB approval.[4]

Subsequently, on Nov. 15, 2017, the National Women's Law Center, or NWLC, and the Labor Council for Latin American Advancement, or LCLAA, filed suit against the EEOC, OMB and OIRA in the U.S. District Court for the District of Columbia, and argued that the OMB exceeded its authority in staying the collection of Component 2 data.

U.S. District Judge Tanya Chutkan lifted the stay because the government failed to point to any meaningful changes that affected the EEOC's prior burden estimates.[5] In a subsequent ruling, the court clarified that because the EEOC had continued to collect Component 1 data during the litigation, the OMB's approval for Component 1 would still expire on Sept. 30, 2019.

However, because the EEOC stopped collecting Component 2 data for 553 days, the court extended the OMB's approval of Component 2 to April 5, 2021. The court has ordered the EEOC to complete its Component 2 collection for calendar years 2017 and 2018 by Jan. 31, 2020.

Where Does This Leave Us?

Eighteen days before the OMB's approval of the Component 1 data collection expired, on Sept. 12, the EEOC published a notice of information collection, and stated that it sought renewed OMB approval of Component 1 but not Component 2, while expressly recognizing that under the court's order, Component 2 approval extended through April 2021. Notably, the EEOC made this decision before it completed its first Component 2 collection, which suggests that the EEOC's decision was politically motivated, rather than based on a careful consideration of the utility of the data it collected.

Despite the court's order, the EEOC has continued to hold hearings on the viability of Component 2, and has made clear that it does not intend to defer Component 2's renewal until 2021, regardless of next year's presidential election. Rather, all signs indicate that the EEOC intends to take more immediate action to stop its Component 2 collection, which may lead the NWLC and LCLAA to return to district court. Further, if a future administration reverts to the Obama-era regulations, employers' ability to demonstrate that Component 2 imposes a substantial burden may be greatly diminished, given that they have already developed the means necessary to report their 2017 and 2018 pay data.

Lack of Transparency

Section 709(e) of Title VII requires the EEOC to maintain the confidentiality of private employers' EEO-1 reports, with limited exceptions for federal government prime contractors and first-tier subcontractors. A private-sector employee may obtain the aggregated EEO-1 data for her employer only pursuant to a Freedom of Information Act request, if she has filed a Title VII lawsuit against her employer.[6]

Although Component 2 puts the U.S. on par with other countries we previously surveyed in terms of data collection, it still lags behind many with respect to transparency.[7] For example, under the United Kingdom's 2017 pay gap regulations, employers must publicly report figures about their gender pay gap each year, including: the mean and median pay gap in hourly pay; the mean and median bonus pay gap; the proportion of each gender receiving a bonus; and the proportion of each gender in each pay quartile.

Significantly, anyone can access the pay data on any reporting employer from the U.K.'s searchable database. In 2017, the U.K. had an average wage gap of 9.1%, which decreased to 8.6% in 2018, and remained relatively stagnant at 8.9% in 2019.[8]

Based on the U.S. model, employees cannot even request EEO-1 data until after they file a Title VII complaint in court, which means they must have a good faith basis completely independent of the pay data to believe that their employers subjected them to disparate treatment. However, most U.S. employees lack access to meaningful data about the compensation of similarly situated employees, which results in their inability to learn about, or challenge, illegal pay differentials.

The BBC as a Case Study

The U.K. presented an interesting peak behind the curtain when, in 2017, as part of the BBC charter renewal, the Department for Digital, Culture, Media and Sport forced the BBC to publish pay data for its publicly paid employees and freelancers who earned £150,000 or more per year, based on pay bands of £50,000. Although the BBC also released its inaugural report under the U.K.'s pay gap regulations in 2017, that report contained aggregate data, whereas its report to the department provided nonaggregate data about specific workers' pay.

The BBC's 2017 report revealed that television presenter Chris Evans, who earned a salary of between £2.2 million and £2,249,999, was its highest-paid worker. It further showed that a staggering two-thirds of its highest-paid workers, including its top seven earners, were men.

Although the list included salaries between £150,000 and £2,249,999, no nonwhite workers earned more than £300,000. The list also illustrated severe pay discrepancies between male hosts who appeared in the middle or near the top of the list and their female counterparts, many of whom did not even make the list.

The 2017 report sparked public outrage, after which the National Union of Journalists submitted an equal-pay grievance to the BBC on behalf of 121 members. As an example, journalist Sarah Montague alleged that in 2017, she earned £133,000, while the BBC paid two of her male counterparts £649,000 and £299,000.[9]

Journalist Louise Minchin earned less than £150,000 in 2017, while her male co-presenter earned between £200,000 and £249,999. Journalist Joanna Gosling earned just over

£100,000 in 2017, while her male colleagues earned £150,000 for a four-day work week. Last month, journalist Samira Ahmed filed suit against the BBC, and alleged that from 2010 to 2018, she earned £465 per episode of "Newswatch," whereas her male comparator, Jeremy Vine, earned £3,000 per episode of "Points of View," a similar program with a smaller audience.

Although the BBC initially defended its salary decisions on the basis that big stars, i.e. white males, deserve more pay because they are "talented and entertaining," it later backtracked. Ultimately, the BBC imposed downward pay adjustments on many of its male stars and provided 36 upward adjustments — primarily to females — to alleviate pay disparity.

Conclusion

History has taught us that in order to eliminate pay discrimination, meaningful data about employers' pay practices must be collected and made accessible. The collection of aggregate pay data is not a perfect solution, but it is a step in the right direction. Over the past several years, U.S. employers have developed the necessary tools to gather and report aggregate pay data, which should, sometime in the near future, pave the way for administrations to reverse course and improve the public transparency of men's and women's pay.

Lynne Bernabei and Kristen Sinisi are partners at Bernabei & Kabat PLLC.

The authors thank Jack Davis, a 2019 summer associate at the firm, for his contributions to this article.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] Title 42 of U.S. Code Section 2000e-8(c).

[2] U.S. Dep't of Labor, Bur. of Labor Statistics, "Women Had Higher Median Earnings than Men in Relatively Few Occupations in 2018," (Mar. 22, 2019), <https://www.bls.gov/opub/ted/2019/women-had-higher-median-earnings-than-men-in-relatively-few-occupations-in-2018.htm>.

[3] Inst. for Women's Pol'y Res., "The Gender Wage Gap: 2018 Earnings Differences by Race & Ethnicity" (Mar. 7, 2019), <https://iwpr.org/publications/gender-wage-gap-2018/>.

[4] Mem. from Neomi Rao, Adm'r, OIRA, to Victoria Lipnic, Acting Chair, EEOC, JA020, ECF No. 44 (Aug. 29, 2017), https://www.reginfo.gov/public/jsp/Utilities/Review_and_Stay_Memo_for_EEOC.pdf.

[5] Women's Nat'l Law Ctr. v. Office of Mgmt. & Budget, Civil Action No. 17-cv-2458 (D.D.C. Mar. 4, 2019).

[6] 29 C.F.R. § 1610.17(h).

[7] Lynne Bernabei & Kristen Sinisi, "Gender Pay Data: Impact of European Laws in the U.S.," Law 360 (May 11, 2018), <https://www.law360.com/articles/1041706>.

[8] Office for Nat'l Statistics, "Understanding the Gender Pay Gap in the UK" (Jan. 17, 2018), <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/articles/understandingthegenderpaygapintheuk/2018-01-17>; Office for Nat'l Statistics, "Gender Pay Gap in the UK: 2019" (Oct. 29, 2019), <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2019>.

[9] Anita Singh, "Three Top Female Presenters Have Tackled BBC Over Gender Pay Gap, Samira Ahmed Case Told," Telegraph (Oct. 31, 2019), <https://www.telegraph.co.uk/news/2019/10/31/three-top-female-presenters-have-tackled-bbc-gender-pay-gap/>.