

March 22, 2011

*Submitted Via E-mail to Public.Comments.RegulatoryReview@eoc.gov.*

Jacqueline A. Berrien  
Chair  
Equal Employment Opportunity Commission  
131 M Street, NE  
Washington, DC 20507

Re: Comments on *Plan for Retrospective Analysis of Significant Regulations*

Dear Chair Berrien:

The National Women's Law Center (the Center) appreciates the opportunity to comment on the Equal Employment Opportunity Commission's (EEOC) Plan for Retrospective Analysis of Significant Regulations. The Center is a nonprofit organization that has worked since 1972 to expand the possibilities for women and girls in the areas of education and employment, family economic security, and health. The Center has long worked to remove barriers to women's participation in the workplace, and it is a strong advocate for the strengthening and enforcement of our nation's employment civil rights laws.

The Center offers the following comments for the EEOC's consideration:

**I. THE PLAN FOR RETROSPECTIVE ANALYSIS OF SIGNIFICANT REGULATIONS SHOULD NOT UNNECESSARILY BURDEN AGENCY RESOURCES OR HINDER NEW RULEMAKING EFFORTS.**

The EEOC solicited comments regarding how to design its plan for retrospective review of significant regulations. As the agency recognized in its request for comments, Executive Order 13,563 directs agencies to design their preliminary plans "consistent with . . . resources and regulatory priorities."<sup>1</sup>

The Center strongly urges the EEOC to incorporate into any plan for retrospective regulatory review significant discretion as to when and whether to revisit existing regulations. Executive Order 13,563 suggests that retrospective analyses of existing regulations be

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<sup>1</sup> Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3822 (Jan. 21, 2011); *see also* Equal Employment Opportunity Commission, Request for Public Comment on Plan for Retrospective Analysis of Significant Regulations, [http://www.eoc.gov/laws/regulations/comment\\_retrospective.cfm](http://www.eoc.gov/laws/regulations/comment_retrospective.cfm) (last visited Mar. 18, 2011) ("[The review plan] also will be tailored to reflect our resources and rulemaking priorities.").

prepared for public release with supporting data,<sup>2</sup> and subsequent guidance from the Office of Information and Regulatory Affairs encourages agencies to “engage in a retrospective analysis of the costs and benefits” of the regulations chosen for review.<sup>3</sup> Of course the EEOC already assessed costs and benefits before adopting its regulations and has taken care to ensure that its regulations meet the needs of employers and employees with the goal of enhancing compliance with Title VII, the Equal Pay Act, and other civil rights laws. Thus, especially in light of the EEOC’s limited resources, the Center encourages the agency to be selective in its retrospective review.

The Center also encourages the agency to consider, when assessing which existing regulations and how many to review, the impact such review will have on the agency’s ability to engage in new rulemakings, rather than revisions to or repeal of old rules. The EEOC’s agenda is critically important right now: Private sector discrimination charges with the agency have reached an all-time high.<sup>4</sup> Women in the workplace continue to experience blatant pregnancy discrimination, and pregnancy discrimination charges filed with the EEOC have skyrocketed since 1997.<sup>5</sup> Moreover, new selection devices for job candidates, such as increased reliance on credit checks and the exclusion of the unemployed from applicant pools, call for EEOC scrutiny and clarification that such practices are prohibited where they have a disparate impact on protected groups.<sup>6</sup> And evolving judicial interpretations of existing civil rights laws beg the question whether the EEOC should issue new regulations to keep pace with such interpretations.<sup>7</sup> In short, given these pressing concerns, review of the “stock of

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<sup>2</sup> Exec. Order No. 13,563, 76 Fed. Reg. at 3822 (stating that retrospective analyses should be “released online whenever possible” and accompanied by “supporting data”).

<sup>3</sup> Memorandum from Cass R. Sunstein, Administrator, Office of Information and Regulatory Affairs, to Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, at 4 (Feb. 2, 2011), *available at* <http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-10.pdf>.

<sup>4</sup> Press Release, Equal Employment Opportunity Commission, EEOC Reports Job Bias Charges Hit Record High of Nearly 100,000 in Fiscal Year 2010 (Jan. 11, 2011), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/1-11-11.cfm>.

<sup>5</sup> *See* Equal Employment Opportunity Commission, Pregnancy Discrimination Charges - EEOC & FEPAs Combined: FY 1997 - FY 2010, <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm> (reporting that the number of pregnancy discrimination charges received grew from 3,977 in 1997 to 6,119 in 2010); *see also* Sue Shellenbarger, *More Women Pursue Claims of Pregnancy Discrimination*, WALL ST. J. (Mar. 27, 2008), at D1, *available at* [http://online.wsj.com/article/SB120657740153967147.html?mod=hps\\_us\\_editors\\_picks](http://online.wsj.com/article/SB120657740153967147.html?mod=hps_us_editors_picks).

<sup>6</sup> *See, e.g.*, EEOC Meeting on the Treatment of Unemployed Job Seekers (Feb. 16, 2011) (testimony of Fatima Goss Graves, National Women’s Law Center), *available at* <http://www.eeoc.gov/eeoc/meetings/2-16-11/graves.cfm>; EEOC Meeting on Employer Use of Credit History as a Screening Tool (Oct. 20, 2010) (testimony of Sarah Crawford, Lawyers Committee for Civil Rights Under Law), *available at* <http://www.eeoc.gov/eeoc/meetings/10-20-10/crawford.cfm>.

<sup>7</sup> *See, e.g.*, 29 C.F.R. § 1604.11 App’x A (noting that the EEOC rescinded section 1604.11(c) in the wake of *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and that the EEOC issued a policy document in place of the rescinded regulatory section).

existing regulations” must not come at the expense of the “flow of new requirements,”<sup>8</sup> where the latter are sorely needed to enforce our civil rights laws.

## **II. THE PROCESS FOR CONDUCTING A RETROSPECTIVE ANALYSIS OF SIGNIFICANT REGULATIONS MUST ACCOUNT FOR VALUES SUCH AS EQUITY, HUMAN DIGNITY, FAIRNESS, AND DISTRIBUTIVE IMPACTS.**

The EEOC solicited comments regarding factors it should consider in conducting its retrospective review of significant regulations. The Center urges the EEOC, in weighing whether to revise or repeal existing regulations, to take into account, where permitted or required by law, not only traditional and quantifiable regulatory costs and benefits, but also critical values, such as “equity, human dignity, fairness, and distributive impacts.”<sup>9</sup> Executive Order 13,563 explicitly permits agencies to consider these values, which it acknowledges may be “difficult or impossible to quantify,” in their regulatory review process.<sup>10</sup> Because that executive order makes retrospective analyses part of agencies’ regulatory review processes, the Center urges the EEOC to accord these values great weight as it considers whether existing regulations should be revised, expanded, or repealed. Such an approach is both consistent with Executive Order 13,563 and fundamental to achieving the remedial purpose and motivating ideals of laws such as Title VII and the Equal Pay Act (EPA).

In addition, the Center urges the EEOC to continue to recognize the unique way in which it must conduct any cost-benefit analysis in the context of civil rights regulations. By passing employment civil rights laws, Congress concluded that particular benefits to workers and society were desirable and so required by law, regardless of cost. For example, “in passing the [Pregnancy Discrimination Act], Congress considered at length the considerable cost of providing equal treatment of pregnancy and related conditions, but made the decision to forbid special treatment of pregnancy despite the social costs associated therewith.”<sup>11</sup> Thus, an employer cannot legally refuse to hire a pregnant woman on the basis of her pregnancy, even if having such an employee on staff will lead to an increase, perhaps substantial, in the employer’s expenses.

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<sup>8</sup> *The Views of the Administration on Regulatory Reform: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce* (Jan. 26, 2011) (testimony of Cass R. Sunstein, Administrator, Office of Information & Regulatory Affairs) (internal quotation marks omitted), available at [http://energycommerce.house.gov/media/file/hearings/oversight/012611\\_OIRA/012611sunstein.pdf](http://energycommerce.house.gov/media/file/hearings/oversight/012611_OIRA/012611sunstein.pdf) (describing Executive Order 13,563 as “aimed at the ‘stock’ of existing regulations as well as the ‘flow’ of new requirements”).

<sup>9</sup> Exec. Order No. 13,563, 76 Fed. Reg. at 3821.

<sup>10</sup> *Id.*; see also Memorandum from Cass R. Sunstein, *supra* n.3, at 4, (noting that “[d]uring the process of retrospective analysis, the principles set forth in Section 1 through 5 [of Executive Order 13,563] remain fully applicable, and should help to orient agency thinking”).

<sup>11</sup> *Int’l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 210 (1991) (internal quotation marks omitted).

### **III. ANY RETROSPECTIVE ANALYSIS MUST ACCOUNT FOR THE FACT THAT CLEAR AND COMPREHENSIVE REGULATIONS INTERPRETING CIVIL RIGHTS LAWS REDUCE BUSINESS COSTS AND HELP EMPLOYERS MORE ACCURATELY MEASURE RISK.**

The success of our nation's employment civil rights laws, including Title VII and the Equal Pay Act, depends largely on employer self-regulation. These laws were designed "to serve as a 'spur or catalyst' to cause employers 'to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges' of discrimination."<sup>12</sup>

The vast majority of employers want to comply with our nation's employment civil rights laws and engage in the kind of self-examination envisioned by Congress when it passed these worker protections. However, our employment civil rights statutes do not necessarily make clear—with their comparatively broad strokes—how they apply to the myriad facets of the modern workplace, including innovative benefits programs, complicated pay structures, and various employee selection devices.

Clear and comprehensive substantive regulations serve to fill those interstices, and do so to the benefit of law-abiding employers. They signal how the EEOC intends to enforce laws with which it is charged and the behaviors that run afoul of these laws, even as workplace practices change over time.<sup>13</sup> Employers can, therefore, more easily comply with and accurately gauge their risk of liability under civil rights laws when clear rules are available. Clear and comprehensive regulations are also likely to discourage meritless litigation, as employees and their counsel can more easily conclude—without filing a lawsuit—whether employer practices violate civil rights laws.

In addition, clear and comprehensive regulations deter employers weighing whether to discriminate. Employers who consider employing discriminatory practices must consider factors such as the likelihood of detection and the probability of legal liability. Clear and comprehensive regulations, including rules requiring the collection of workplace data from a variety of employers,<sup>14</sup> increase the likelihood that the EEOC will identify workplace disparities and investigate discriminatory practices. Law-abiding employers also benefit from this deterrence because they can avoid competition with competitors who are reducing their expenses by engaging in, for example, unlawful pay discrimination. The EEOC must consider these benefits, even though they are difficult to quantify.

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<sup>12</sup> *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352, 358, (1995) (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)) (noting deterrence value in the context of Title VII and the Age Discrimination in Employment Act); see also *Wallace v. Dunn Constr. Co., Inc.*, 62 F.3d 374, 378 (11th Cir. 1995) (noting that "Title VII and the Equal Pay Act . . . serve to deter discriminatory conduct in the workplace").

<sup>13</sup> See, e.g., 29 C.F.R. § 1604.2 (describing detailed scenarios under which an employer's use of sex in employment decisions clearly would not constitute a bona fide occupational qualification under Title VII).

<sup>14</sup> See, e.g., 29 C.F.R. 1602.7.

#### IV. THE CENTER URGES THE EEOC, CONSISTENT WITH ITS STATUTORY AND REGULATORY POWERS, TO BEGIN COLLECTING PAY-RELATED INFORMATION FROM PRIVATE EMPLOYERS.

Women working full-time, year-round are paid 77 cents for every dollar earned by their male counterparts.<sup>15</sup> That gap widens in certain industries: For example, women working full-time in sales and related occupations are paid 64 percent of what their male counterparts in the industry earn in median usual weekly wages.<sup>16</sup> Thus, women working in sales endure a wage gap unseen at the national aggregate level since 1981.<sup>17</sup> Strong evidence suggests that the wage gap more generally, affecting women of many classes, races, regions, and occupations, is driven at least in part by sex-based discrimination in the workplace.<sup>18</sup>

The EEOC's current data collection is insufficient to ensure that the agency detects and responds to these pressing pay disparities. Through its EEO Reports, the EEOC collects workforce data from private employers with 100 or more employees, certain federal contractors, local unions, and state and local governments.<sup>19</sup> However, only one of those forms, the EEO-4, applicable to state and local governments, requests data related to wages, and the data it collects is "so broad that they are rarely if ever used to conduct wage disparity analyses."<sup>20</sup>

The Center applauds the EEOC's commission of an external study to determine what additional data the EEOC should collect to detect pay disparities and enforce our nation's pay discrimination laws.<sup>21</sup> The Center further urges the EEOC to move forward with the collection of pay data, at a minimum from employers with 100 or more employees, and by job category, sex, race, and ethnicity.<sup>22</sup> It could do so by revising the current Employer Information Report EEO-1, which is required of private employers covered by Title VII with

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<sup>15</sup> National Women's Law Center, *36 Cents Short - Wage Gap in Sales and Related Occupations Highest of Any Sector* (Jan. 20, 2011), available at [http://www.nwlc.org/sites/default/files/pdfs/retail\\_wage\\_gap\\_fact\\_sheet\\_draft\\_1.20.11\\_1.pdf](http://www.nwlc.org/sites/default/files/pdfs/retail_wage_gap_fact_sheet_draft_1.20.11_1.pdf).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> See, e.g., AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, *BEHIND THE PAY GAP* 17, 18 (2007), available at <http://www.aauw.org/learn/research/behindPayGap.cfm>.

<sup>19</sup> NATIONAL EQUAL PAY ENFORCEMENT TASK FORCE, *RECOMMENDATIONS* 5, available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/equal\\_pay\\_task\\_force.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf); see also 42 U.S.C. § 2000e-8(c) (creating the EEOC's statutory authority for the collection of EEO reports).

<sup>20</sup> *RECOMMENDATIONS*, *supra* n. 19, at 5.

<sup>21</sup> See *id.* at 6 (noting the EEOC's decision in this regard and that it had "received a prospectus from the National Academy of Sciences to conduct such a study").

<sup>22</sup> The EEO-1 already collects information regarding the number of permanent full- and part-time employees by job category, sex, and race and ethnicity. See Equal Employment Opportunity Commission, Standard Form 100, Employer Information Report EEO-1: Instruction Booklet (Jan. 2006), available at <http://www.eeoc.gov/employers/eo1survey/2007instructions.cfm>.

100 or more employees,<sup>23</sup> or by requiring “special or supplemental reports . . . necessary to accomplish the purposes of Title VII,” as recognized by EEOC regulation.<sup>24</sup> This collection would readily meet the standards outlined in Executive Order 13,563, as the agency could review its existing regulatory powers and assess the most appropriate approach to expanding its data collection. Such review would enable the agency to make its regulatory program more effective.

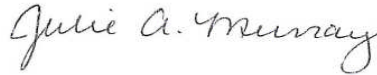
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Thank you for the opportunity to comment on the proposed plan for retrospective review of the EEOC’s significant regulations. We would be happy to discuss our comments further or answer any questions you may have. Please contact Fatima Goss Graves, Vice President for Education and Employment, at (202) 588-5180.

Sincerely,



Fatima Goss Graves  
Vice President for Education and Employment



Julie Murray  
Margaret Fund Fellow

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<sup>23</sup> See 29 C.F.R. § 1602.7.

<sup>24</sup> 29 C.F.R. § 1602.11.