

December 16, 2014

Debra A. Carr, Director
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Ave. NW, Room C-3325
Washington, DC 20210

Via online submission

RE: RIN 1250-AA06 – Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions

Dear Ms. Carr:

Thank you very much for the opportunity to provide comments on the proposed rule implementing Executive Order 13665, which requires that certain federal contractors allow employees and applicants to inquire about, discuss, and disclose compensation information without fear of retribution or penalty.¹ The National Women's Law Center has worked for over 40 years to remove discriminatory barriers for women at work, including by ending pay discrimination against women. Throughout all of our work, we give special attention to the concerns of low-income women.

We strongly support the Office of Federal Contract Compliance Program's (OFCCP) proposed rule, and our comments provide recommendations to ensure its effectiveness. We note that although our comments are primarily focused on how the proposed rule will impact women overall and women of color specifically, the proposed rule is an important step toward narrowing the wage gap for women, workers of color, and all workers.

In 2013, women working full time, year round typically made only 78 percent of the wages made by men working full-time, year-round.² This pay gap has barely budged in a decade.³ And the gap in wages is far worse for women of color – African American women and Hispanic women typically made only 64 percent and 56 percent, respectively, of the wages made by white, non-Hispanic men for full-time, year-round work in 2013.⁴

If women were paid the same as men of the same age, with similar working hours and educational backgrounds, nearly sixty percent of women would earn more income,⁵ their annual family income would rise by about \$4,000,⁶ and the poverty rate for working women could be cut in half.⁷ And study

¹ Non Retaliation for Disclosure of Compensation Information, Exec. Order No. 13665 (April 8, 2014), available at <http://www.whitehouse.gov/the-press-office/2014/04/08/executive-order-non-retaliation-disclosure-compensation-information>.

² NAT'L WOMEN'S LAW CTR., THE WAGE GAP IS STAGNANT IN THE LAST DECADE (2014), available at http://www.nwlc.org/sites/default/files/pdfs/fact_sheet_wage_gap_is_stagnant_2013.pdf.

³ *Id.*

⁴ *Id.*

⁵ Heidi Hartman, Ph.D., et al., Briefing Paper, *How Equal Pay for Working Women Would Reduce Poverty and Grow the American Economy*, INSTITUTE FOR WOMEN'S POLICY RESEARCH (Jan. 2014), available at <http://www.iwpr.org/publications/pubs/how-equal-pay-for-working-women-would-reduce-poverty-and-grow-the-american-economy>.

⁶ NAT'L WOMEN'S LAW CTR., CONGRESS MUST ACT TO CLOSE THE WAGE GAP FOR WOMEN: FACTS ON WOMEN'S WAGES AND PENDING LEGISLATION 3 (Jan. 2010), available at <http://www.nwlc.org/sites/default/files/pdfs/PayEquityFactSheetFinal.pdf>.

after study shows that this pernicious pay gap cannot simply be explained away as the result of legitimate considerations that might influence compensation.⁸ Rather, pay discrimination remains a widespread problem and pay secrecy policies and practices continue to give cover to this persistent form of discrimination.⁹

Pay secrecy policies and practices perpetuate pay discrimination by making it difficult for individuals to learn about unlawful pay disparities. In fact, the majority of private sector employers have policies prohibiting employees from discussing their compensation or discouraging employees from doing so. According to a survey by the Institute for Women's Policy Research, more than sixty percent of private sector workers reported that their employer either prohibits or discourages employees from discussing their wages.¹⁰ Today, many of the women who uncover evidence of a discriminatory paycheck do so by accident.¹¹ And when employees have actively sought out compensation information, some have been fired as a result.¹²

This proposed rule would help prevent and remedy pay discrimination among a huge swath of the American workforce. Federal contractors employ about 28 million people – more than 20 percent of the American workforce.¹³ Through effective implementation of this proposed rule, OFCCP can help ensure that companies that have the privilege of doing business with the federal government also abide by its laws.

I. The Proposed Rule is Necessary to Bring an End to Pay Secrecy Policies and Practices That Perpetuate Discrimination.

As Justice Louis Brandeis said, sunlight is the best disinfectant. If workers are able to discover unlawful wage disparities, they can take steps to address them. Further, additional transparency is more likely to

⁷ *Id.*

⁸ See, e.g., Francine D. Blau & Lawrence M. Kahn, *The Gender Pay Gap: Have Women Gone as Far as They Can?*, 21 ACAD. MGMT. PERSP. 7 (2007) (finding that 41 percent of the wage gap remains unexplained even after accounting for factors such as occupation, industry, work experience, union status, educational attainment and race); CHRISTIANNE CORBETT & CATHERINE HILL, AM. ASS'N OF UNIV. WOMEN, GRADUATING TO A PAY GAP: THE EARNINGS OF WOMEN AND MEN ONE YEAR AFTER COLLEGE GRADUATION 20-21 (2012), available at <http://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf> (finding a 7 percent pay gap between female and male college graduates one year after graduation even after controlling for numerous factors including hours worked, occupation, college major, employment sector).

⁹ See NAT'L WOMEN'S LAW CTR., 50 YEARS & COUNTING: THE UNFINISHED BUSINESS OF ACHIEVING FAIR PAY 4-9 (2013), available at http://www.nwlc.org/sites/default/files/pdfs/final_nwlc_equal_pay_report.pdf.

¹⁰ INST. FOR WOMEN'S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION (2014), available at http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination-1/at_download/file (revealing that 60 percent of male employees and 62 percent of female employees report that their employers either prohibit or discourage the discussion of wages) [hereinafter 2014 IWPR PAY SECRECY REPORT].

¹¹ See, e.g., *Morrow v. L & L Products, Inc.*, 945 F. Supp. 2d 835 (E.D. Mich. 2013) (in which female plaintiff saw male co-worker's paycheck and noticed that he was paid more, even though he had worked fewer hours); *Hodge v. PNC Bank*, No. 11-CV-10597, 2013 WL 2456002 (E.D. Mich. June, 2013) (in which female plaintiff assumed many responsibilities of her male co-worker and took over his office, only to find a file on his computer showing that he was paid more than she); *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) (in which a female area manager discovered via an anonymous tip that she was earning significantly less money than her male coworkers).

¹² See, e.g., *NLRB v. Main Street Terrace Care*, 218 F.3d 531 (6th Cir. 2000) (in which plaintiff was fired when she discussed wages with co-workers to determine whether they were being paid fairly); *NLRB case No. 14-CA-26790* (in which plaintiff was fired for sharing wage information under a company policy that explicitly prohibited such activity); see also Mary Williams Walsh, *The Biggest Company Secret: Workers Challenge Employer Policies on Pay Confidentiality*, N.Y. Times, Jul. 28, 2000, available at <http://www.nytimes.com/2000/07/28/business/biggest-company-secret-workers-challenge-employer-policies-pay-confidentiality.html> (describing a female worker who, as the only woman on her team, discovered through overhearing a conversation that she was paid less than her male coworkers and was subsequently fired when she complained).

¹³ *White House: New Federal Contractor Executive Order Coming*, HUMAN RIGHTS CAMPAIGN (June 16, 2014), <http://www.hrc.org/blog/entry/white-house-new-federal-contractor-executive-order-forthcoming>.

prompt employers to proactively identify, investigate, and remedy wage disparities within their workforces, reducing the need for costly litigation. The much narrower wage gap in the public sector – where pay secrecy rules are uncommon – is evidence of the difference that a little sunlight makes. Six in ten employees in the private sector report that discussing their wages is either prohibited or discouraged,¹⁴ compared to about fourteen percent of public sector employees who report that discussing their wages is either prohibited or discouraged.¹⁵ And while the gender-based wage gap for all full time workers, based on median earnings, is twenty-three percent,¹⁶ in the federal government, where pay rates are transparent and publicly available,¹⁷ the gender-based wage gap is less than half of that, at about eleven percent.¹⁸

A. Pay secrecy policies interfere with the enforcement of our nation’s civil rights laws.

The Supreme Court has firmly established that an employee cannot prospectively waive her Title VII rights: “Title VII’s strictures are absolute and represent a congressional command that each employee be free from discriminatory practices,” and thus “waiver of these rights would defeat the paramount congressional purpose behind Title VII.”¹⁹ Pay secrecy policies operate much like a waiver by effectively blocking many potential claimants’ ability to learn that they are paid less than their male counterparts – a prerequisite to bringing a pay discrimination claim.²⁰ Unlike more visible discriminatory practices – such as a demotion, change in schedule, or termination – pay discrimination often operates in the dark and pay secrecy policies systematize and provide cover for discrimination. When an employee faces penalties or termination for merely inquiring about or discussing her pay, she lacks the opportunity to discover whether her right to be free from discrimination under Title VII – or under Executive Order 11246 if the employee is hired by a federal contractor²¹ – has been violated. By making it nearly impossible for many women to detect pay disparities, pay secrecy policies and practices operate as a fundamental roadblock to the operation of both Title VII and Executive Order 11246.

¹⁴ See 2014 IWPR PAY SECRECY REPORT, *supra* note 9. In addition to the private and public sector breakdowns, the report shows that about half of all workers across the private and public sectors—51 percent of women and 47 percent of men—report that the discussion of wage and salary information is either discouraged or prohibited. *Id.*

¹⁵ See 2014 IWPR PAY SECRECY REPORT, *supra* note 9 (showing that eleven percent of men in the public sector and eighteen percent of women in the public sector report that wage discussion is discouraged or prohibited).

¹⁶ Gowri Ramachandran, *Pay Transparency*, 116 PENN ST. L. REV. 1043, 1063 (2012).

¹⁷ *Id.*

¹⁸ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-279, WOMEN’S PAY: GENDER PAY GAP IN THE FEDERAL WORKFORCE NARROWS AS DIFFERENCES IN OCCUPATION, EDUCATION, AND EXPERIENCE DIMINISH 3 (2009), available at <http://www.gao.gov/assets/290/287375.pdf>.

¹⁹ *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974).

²⁰ The minority opinion in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, acknowledged that pay discrimination is particularly difficult to detect and therefore to enforce:

Pay disparities often occur, as they did in *Ledbetter*’s case, in small increments; cause to suspect that discrimination is at work develops only over time. Comparative pay information, moreover, is often hidden from the employee’s view. Employers may keep under wraps the pay differentials maintained among supervisors, no less the reasons for those differentials. Small initial discrepancies may not even be seen as meet for a federal case, particularly when the employee, trying to succeed in a nontraditional environment, is averse to making waves.

550 U.S. 618, 645 (2007) (Ginsburg, J., dissenting).

²¹ See U.S. DEP’T OF LABOR, GUIDE TO BASIC EEO REQUIREMENTS UNDER EXECUTIVE ORDER 11246 FOR SMALL BUSINESSES WITH FEDERAL CONTRACTS 4, available at <http://www.dol.gov/ofccp/regs/compliance/pdf/SBGuide.pdf> (“Executive Order 11246 is similar to Title VII. Executive Order 11246 prohibits Federal contractors and subcontractors from engaging in workplace employment discrimination on the basis of race, color, religion, sex, or national origin.”).

B. The National Labor Relations Act prohibits, but may not sufficiently deter, employers' discriminatory actions against employees who inquire about or discuss their compensation.

Courts have watered down existing legal protections for employees who discuss their pay, which makes this proposed rule all the more important. The NLRA bars private sector employers from “interfere[ing] with, restrain[ing], or coerc[ing]” employees who engage in protected conduct, defined as “concerted activit[y] for the purpose of collective bargaining or other mutual aid or protection.”²² And courts and the National Labor Relations Board (NLRB) have found that conversations about wages are protected concerted activity and that rules that ensure employees can never talk about their wages can be unfair labor practices because they can inhibit these protected labor practices.²³

Despite the NLRA's protections, more than one-third of private-sector employees have specific policies banning workers from discussing their pay, demonstrating that additional protections are needed.²⁴ For example, the employer defense in the NLRA permits employers to institute policies that interfere with conduct protected by the NLRA if there is a “legitimate and substantial business justification” for doing so.²⁵ This provision has been so broadly interpreted by the courts as to allow, for example, prohibitions on any discussion of wages during working time.²⁶ Additionally, and importantly, the NLRA does not protect supervisors from adverse actions for discussing their wages, a group that is defined broadly as including anyone with the authority not just to hire or fire, but to “reward,” “discipline,” “direct” others, or “effectively recommend such action.”²⁷ This means that a manager would have no means of objecting to a policy that prevented her from ever learning about gender-based pay disparities.²⁸

²² 29 U.S.C. §§ 151-169 (1970).

²³ *NLRB v. Main St. Terrace Care*, 218 F.3d 531, 538 (6th Cir. 2000); *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1510-11 (8th Cir. 1993); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66-67 (2d Cir. 1992); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 918 (3d Cir. 1976); *Campbell Electric Co. & Local Union 153*, 340 N.L.R.B. 825, 2003 WL 22295365, at **18 (2003); *Lafayette Park Hotel*, 326 N.L.R.B. 824, 825 (1998).

²⁴ Tom Dreisbach, ‘Pay Secrecy’ Policies at Work: Often Illegal, and Misunderstood, NPR.ORG (Apr. 13, 2014, 3:12 PM), <http://www.npr.org/2014/04/13/301989789/pay-secrecy-policies-at-work-often-illegal-and-misunderstood>.

²⁵ *See NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967); *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263, 269 (1965).

²⁶ *See Vanguard Tours, Inc.*, 981 F.2d at 67 (2d Cir. 1992) (finding a ban on wage discussions permissible as applied to working hours); *Jeannette Corp.*, 532 F.2d at 919 (“An employer might adopt and enforce a rule prohibiting employee wage discussions during working time, in the absence of evidence that it was adopted for discriminatory purposes.”). *See also* NAT’L WOMEN’S LAW CTR., COMBATING PAY SECRECY POLICIES 2 (2012), available at <http://www.nwlc.org/sites/default/files/pdfs/paysecrecyfactsheet.pdf>.

²⁷ 42 U.S.C. § 152 (Defining “supervisor” as “any individual having authority, the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action . . . [if the foregoing] requires the use of independent judgment”). Some courts have also held that university faculty (*NLRB v. Yeshiva University*, 444 U.S. 672 (1994)), nurses (*NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 577-78 (1994)), bus line dispatchers (*Eastern Greyhound Lines v. NLRB*, 337 F.2d 84 (6th Cir. 1964)), supervisors who work only seasonally (*NLRB v. Fla. Agric. Supply Co., Div. of Plymouth Cardage Co.*, 328 F.2d 989 (5th Cir. 1964)), sports editors (*NLRB v. Medina Cty Publ’ns, Inc.*, 735 F.2d 1999 (6th Cir. 1984)), and a wide range of other employees are supervisors.

²⁸ For example, Lilly Ledbetter, one of the few female supervisors at the Goodyear plant in Gadsden, Alabama, discovered after working there for nearly two decades that she was being paid less than all her male colleagues through an anonymous tip. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, (2007), overturned due to legislative action (Jan. 29, 2009). As a “supervisor,” the NLRA would not have prevented Goodyear from firing or disciplining Ms. Ledbetter if she had asked her coworkers about their salaries. NAT’L WOMEN’S LAW CTR., COMBATING PAY SECRECY POLICIES at 2.

II. The Proposed Rule Is Good for Employers' Bottom Lines.

Pay secrecy policies are bad for business, not only because they give cover to discrimination but also because they lead to poorer performance,²⁹ employee dissatisfaction and lower motivation,³⁰ mistrust of management,³¹ and an inefficient market.³² On the other hand, studies have shown that increased transparency in pay foster communication and create work environments where employees are more likely to believe they are paid fairly.³³ For example, a world-wide study conducted by Kenexa, a human capital management consulting service, concluded that fair pay results in employees who are less likely to quit, more engaged in their work, and less stressed at work.³⁴ It also concluded that fair pay led to physically and psychologically healthier employees, who reported more satisfaction in their personal life.³⁵ The same study found that there are three determinants of whether an employee perceives her pay as fair: (1) whether there is transparency in how pay is determined; (2) knowledge of how to maximize pay; and (3) a belief that pay is related to performance.³⁶ Moreover, with pay transparency, “employers can show employees that merit really is rewarded, and supervisors can be better encouraged to reward true merit,” therefore encouraging employee productivity.³⁷

The proposed rule prohibiting federal contractors from adopting pay secrecy policies will also help federal contractors avoid discrimination by equipping employees with the ability to gather information about their pay. Because pay discrimination is not isolated to one employer or one industry, equally qualified women and men often have very different salary histories. The proposed rule will give employers the right incentives to investigate and promptly remedy unequal pay. And allowing workers to discuss their pay without fear will motivate employers not to perpetuate past discrimination in their salary practices.

²⁹ See Peter Bamberger and Elena Belagolovsky, *The Impact of Pay Secrecy on Individual Task Performance*, 63 PERSONNEL PSYCHOLOGY 965, 988-90 (2010) (finding that pay secrecy is associated with “weaker individual task performance” because, in the absence of information about how they are paid relative to their peers, some employees are more predisposed to guess and are more likely to assume there are unjustified pay disparities, leading to poorer task performance).

³⁰ See Adrienne Colella, et. al, *Exposing Pay Secrecy*, 32 ACAD. OF MGMT. REVIEW 55, 56 (2007) (finding that the available research shows that “pay secrecy leads to employee dissatisfaction and low motivation”). See also Edward Lawler III, *Pay Secrecy: Why Bother?* FORBES (Sept. 12, 2002, 1:00 PM), <http://www.forbes.com/sites/edwardlawler/2012/09/12/pay-secrecy-why-bother/> (finding that pay secrecy causes workers to be dissatisfied because they overestimate what coworkers are paid and managers are allowed to make poor pay decisions without having to justify them).

³¹ See Gundars Kaupins, *Keeping Pay a Secret May Cause Problems for Companies*, IDAHO STATESMAN BUS. INSIDER (May 30, 2012), available at <http://cobe.boisestate.edu/blog/2012/06/11/keeping-pay-a-secret-might-cause-problems-for-companies-by-gundy-kaupins/> (writing that “[p]ay secrecy can lead to reduced motivation for employees, because they are not certain how their pay can be increased relative to others in the organization. The organizational rewards may be desirable, but the relative performance expectations might not be known.”).

³² See Colella, *supra* note 29, at 60 (finding that from an economics perspective, pay secrecy may cause a less efficient market because employees will not move to their highest value. The authors specify that “[p]ay secrecy, by hindering information to employees, generates information asymmetry between workers and organizations, thus preventing workers from moving to better fitting jobs. In other words, if a top-quality engineer is not aware of a higher-paying job that he or she could perform in his or her current company or in another company with a pay secrecy policy, then that engineer may stay in the “wrong” job and be underemployed. Employers cannot “lure” or “pull” good employees away from other employers if they maintain pay secrecy, because they cannot advertise current wage or salary levels. Thus, pay secrecy is one factor that prevents labor markets from clearing in an efficient manner.”).

³³ Rena Rasch and Mark Szytko, *Perception is Reality: The Importance of Pay Fairness to Employees and Organizations*, 2013 WORLDATWORK J., 65, 71-72.

³⁴ *Id.* at 66.

³⁵ *Id.*

³⁶ *Id.* at 67.

³⁷ Ramachandran, *supra* note 15, at 1070.

III. The Defenses in the Proposed Rule Appropriately Take Business Needs into Account, But Should Be Narrowly Construed to Ensure that the Rule is Effectively Implemented and Enforced.

The central aim of the proposed rule is to ensure that frank conversations about wages can occur in the workplace without fear of retaliation. It therefore is critical that any employer defenses in the rule be narrowly interpreted consistent with that goal.

A. The “essential functions” defense should be narrowly interpreted, consistent with the Americans with Disabilities Act.

The first proposed exception to the rule, which also acts as an affirmative defense, does not protect employees who disclose compensation information that they had access to as a part of their “essential job functions,” where others lacked such access. As the NPRM states,

This defense acknowledges that an employee who has access to sensitive compensation information of others within an organization as part of her or her essential job functions has a duty to protect such information from disclosure.³⁸

In defining “essential job functions,” OFCCP proposes factors established by the Americans with Disabilities Act (ADA). We support this exception, as well as OFCCP’s use of the ADA in interpreting “essential job functions.” However, “essential job functions” must be narrowly defined, as exceptions generally are, and any factors considered must be limited and given a narrow interpretation. The ADA makes clear that “essential job functions” are limited to those functions that are critical to performing the position in question and that an employer’s judgment must not to be given conclusive weight on the question of what constitutes an “essential job function.” Otherwise, as many courts have explained, employers could “escape . . . liability simply by defining job duties in a manner that excludes” the group of employees in question,³⁹ and, in fact, that “it is especially important to look beyond the employer’s judgment.”⁴⁰ Courts have likewise emphasized the importance of looking beyond a written job

³⁸ Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 79 Fed. Reg. 55712, 55721 (proposed Sept. 17, 2014) (to be codified at 41 C.F.R. pt. 60-1).

³⁹ *Kammueler v. Loomis, Fargo & Co.*, 383 F.3d 779, 787 (8th Cir. 2004). See also *E.E.O.C. v. Dollar Gen. Corp.*, 252 F. Supp. 2d 277, 286 (M.D.N.C. 2003) (citing 29 C.F.R. § 1630, App. at 1630.2(n) (“Greater weight will not be granted to the types of evidence included on the list than to the types of evidence not listed.”)).

⁴⁰ *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 287 (4th Cir. 2004) (stating that “although the statute requires consideration of “the employer’s judgment” . . . courts are entitled to consider other evidence as well. It is especially important to look beyond the employer’s judgment . . . where the employer’s requirements are arguably over inclusive with respect to the functions of the job that are truly essential”) (internal cites omitted); See also *Samson v. Fed. Exp. Corp.*, 746 F.3d 1196, 1201 (11th Cir. 2014) (emphasizing that whether a particular job function is “essential” must be decided on a case-by-case basis, and that while the employer’s judgment is “among the relevant factors . . . this factor alone is not conclusive”); *Rorrer v. City of Stow*, 743 F.3d 1025, 1039 (6th Cir. 2014) (noting that the employer’s judgment is one of six other factors to be considered in determining whether a job function is “essential”); *Miller v. Illinois Dept. of Transp.*, 643 F.3d 190, 198 (7th Cir. 2011) (stating that under the categories of evidence laid out by the ADA for determining whether a job function is essential, “the employer’s judgment is an important factor, but it is not controlling”); *Holly v. Clairson Industries, L.L.C.*, 492 F.3d 1247, 1258 (11th Cir. 2007) (deciding that weight may be given to the employer’s view of the essential functions even if it is outside of a formal job description, but such judgment is not conclusive); *Turner v. Hershey Chocolate U.S.*, 440 F.3d 604, 613 n.6 (3d Cir. 2006) (noting that the “employer judgment” factor in determining whether a job function is essential “is but one piece of evidence to be considered by the trier of fact”); *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1191 (10th Cir. 2003) (deciding that an employer’s opinions are considered, but not controlling); *Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11, 25 (1st Cir. 2002) (stating that an “employer’s good-faith view of what a job entails, though important, is not dispositive”); *Feldman v. Olin Corp.*, 692 F.3d 748, 755 (7th Cir. 2012) (“We generally defer to an employer’s determination . . . [b]ut this does not mean that we completely abdicate independent review.”); *Carpenter v. Ohio Health Corp.*, 44 Nat’l Disability Law Rep. P 33, 2011 WL 4572009, at *15 (S.D. Ohio 2011) (not deferring to supervisor’s determination that a task was essential because supervisor’s testimony relied on others rather than on an actual review, there were gaps in her knowledge, and she failed to consider

description to determine whether an employee responsibility meets the test of an “essential job function.”⁴¹ This is critical because otherwise employees with only peripheral access to pay information could be barred from learning about pay discrimination. Narrowly defining the essential functions of a job reduces the risk that this defense will create a gaping hole in the protection provided by the proposed rule.

The two limitations that OFCCP explicitly proposed to the “essential job functions” exception should also be maintained. First, OFCCP proposes that the exception not apply to individuals in human resources who inquire about their own pay or raise concerns to a manager about others’ compensations. Sixty-nine percent of human resources professionals in the United States are women.⁴² And, as of 2009, women make up seventy-percent of human resources professionals in the federal government.⁴³ Without this limitation allowing human resources professionals to inquire about their own pay, hundreds of thousands of women would be barred from discovering gender-based pay discrimination, undermining the goal of the proposed rule. Similarly, the second limitation protects employees who have “essential job function” access to compensation information, but who reveal pay information that they learned through means other than their “essential job functions” access, such as through a casual conversation with employees.

Each of these commonsense interpretations will ensure that the “essential job functions” defense does not defeat the entire new rule banning pay secrecy policies and practices. A key facet of human resources professionals’ job is to equalize pay disparities. While they are obligated to keep personnel information confidential, human resources professionals must be allowed to discuss information gathered through means that are unrelated to their access to private information. If they can be punished for discussing pay information they learned, for example, from a conversation by the water cooler it would create a chilling effect that would keep human resources professionals from performing a key aspect of their jobs.

B. The “legitimate workplace rule” defense should be narrowly construed to avoid swallowing the anti-retaliation rule.

The second affirmative defense, establishing a “legitimate workplace rule,” is another reasonable exception to the proposed anti-retaliation provision – nothing in the executive order would suggest that employers could no longer run their workplaces efficiently. However, it is critical that OFCCP make clear that the “legitimate workplace rule” defense will be narrowly interpreted. Courts’ overbroad interpretation of the NLRA’s “legitimate and substantial business justification” exception to the prohibition on interfering with employees’ rights to engage in protected, concerted activity demonstrates

whether others were available for the task); *Braheny v. Pennsylvania*, 2012 WL 176186, at *3 (E.D. Pa. 2012) (stating that while the employer’s judgment as to which functions are essential is an important factor, it “is but one piece of evidence to be considered by the trier of fact, and standing alone is not determinative”).

⁴¹ *See, e.g., Hall v. U.S. Postal Service*, 857 F.2d 1073, 1079-80 (6th Cir. 1988) (finding that it was an error for the court to accept job description as controlling on whether heavy lifting was essential job function under Rehabilitation Act); *Bralo v. Spirit Airlines, Inc.*, 2014 WL 1092365, at *14 (S.D. Fla. Mar. 19, 2014) (accepting the plaintiff’s claim to look beyond the written job description, stating that while the company’s judgment, “as expressed in the written job description, must be given consideration, it is not the only factor to consider,” leading the court to heed plaintiff’s claim that his actual daily work activities diverged from his written job description); *E.E.O.C. v. Dollar Gen. Corp.*, 252 F. Supp. 2d 277, 288-89 (M.D.N.C. 2003) (stating that “the essence of the inquiry [into whether a function is essential] requires a logical, case-by-case examination involving a common sense consideration of various factors, such as what an employee *actually* does and what she was hired to do”) (emphasis added).

⁴² Julie Cook Ramirez, *The Feminization of HR*, HUMAN RESOURCE EXEC. ONLINE (Mar. 1, 2012), <http://www.hreonline.com/HRE/view/story.jhtml?id=533345673>.

⁴³ U.S. MERIT SYS. PROT. BD., *WOMEN IN THE FEDERAL GOVERNMENT: AMBITIONS AND ACHIEVEMENTS* 16 (2011).

the risks of interpreting a defense so broadly that it gives cover to discrimination. Discussions of employee wages are certain to cause some employers discomfort – especially if there is a gap in wages. A narrow interpretation of the “legitimate workplace rule” defense is necessary to ensure that it cannot be used as pretext for employers to proscribe those conversations from taking place. A narrow interpretation of both defenses is needed to prevent a chilling effect for employees. Otherwise both workers talking by the water cooler—the human resources professional and the other employee— could be punished for discussing wages, whether from an overly broad interpretation of “essential job functions,” or an overly broad interpretation of “legitimate workplace rule.”

C. The proposed rule should be analyzed under the “motivating-factor” analysis.

As the NRPM suggests, the proposed rule is a nondiscrimination policy rather than an anti-retaliation policy. As previously discussed, pay secrecy policies contribute to pay discrimination because they hide and perpetuate discriminatory unequal pay and keep employees from detecting and correcting discrimination. By doing so, pay secrecy policies not only contribute to discrimination, they interfere with an individual’s Title VII protections by foreclosing her right to bring a claim of discrimination. Because the adverse action occurs before an employee even engages in protected activity – such as filing a claim or complaint of discrimination – the employer’s act of terminating or otherwise penalizing employees for discussing their pay is an act of discrimination. As noted in the NPRM, the purpose of the prohibition on pay secrecy serves a different purpose than the traditional retaliation framework – designed to protect the process by which individuals can assert their right to be free from discrimination – because it is intended “to protect workers from pay discrimination itself.”⁴⁴

Therefore, we strongly support OFCCP’s proposal that the “but-for” causation standard held to apply to retaliation claims in the Supreme Court’s decision in *University of Texas Southeastern Medical Center v. Nassar*⁴⁵ does not apply to violations of the proposed rule. Violations of this rule should be analyzed under the traditional framework for Title VII discrimination claims using a “motivating factor” analysis because interpretations of Executive Order 11246 follow the same legal standards as Title VII. As the NPRM notes,

Both the Executive Order and Title VII have as one of their goals the identification and elimination of employment discrimination; therefore, Title VII standards for determining the existence of discrimination may properly be applied to discrimination cases under Executive Order 11246.⁴⁶

Under a motivating factor analysis, an individual must show that discrimination was a motivating factor for the employer’s adverse action. The burden then shifts to the employer to show a lawful reason for its action, and even if the employer articulates a lawful reason, OFCCP may determine that the employee’s discussion of pay was at least partly the cause of the employer’s adverse action. If the employer can show that it would have taken the same action regardless of the employee’s discussion of wages, the scope of remedial action will be limited, but the employer will not escape liability once discrimination has been found to be a motivating factor. The Title VII motivating factor analysis would ensure that the pay secrecy prohibition rule continue to serve as a discrimination deterrent for employers even if the proposed “essential job function” access and “legitimate workplace rule” defenses are

⁴⁴ Prohibitions Against Pay Secrecy Policies and Actions, 79 Fed. Reg. at 55719.

⁴⁵ 133 S.Ct. 978 (2013).

⁴⁶ Prohibitions Against Pay Secrecy Policies and Actions, 79 Fed. Reg. at 55720.

interpreted broadly. This is because employers would remain liable for any discrimination involved in an adverse action, while limiting the scope of their liability with reasonable defenses.

IV. The Proposed Rule Could Be Strengthened Through Technical Assistance and Training for Employers, Employees and OFCCP Investigators.

We support OFCCP's proposed requirement that contractors incorporate the rule prohibiting pay secrecy policies and practices into existing employee manuals and handbooks and to disseminate the provision to employees and job applications either electronically or by posting a copy of the provision in conspicuous places. We likewise support OFCCP's proposal to make small businesses subject to the compliance requirements of the proposed rule, given the low burdens of implementation. These requirements, along with OFCCP's offer to publish compliance assistance materials and host implementation webinars and listening sessions, will provide employees and employers with clarity about the pay secrecy prohibition and help change behavior by simply making the rule known and visible. In doing so, it makes it easier for employers to comply and eases the fear or confusion of employees seeking to discuss or inquire about their pay.

The implementation of the proposed rule could be strengthened in several ways to ensure its efficacy. First, we suggest that OFCCP offer technical assistance for current and prospective contractors who will be covered by the proposed rule, as well as for employees. OFCCP should also invest in training its investigators on how to identify and examine cases alleging adverse actions for an employee's inquiry about or discussion of compensation. We also urge OFCCP to prioritize enforcement of the pay secrecy prohibition in compliance evaluations and complaint investigations to ensure that the new prohibition is understood, taken seriously, and effective in deterring discrimination.

We urge OFCCP to adopt final regulations on the pay secrecy prohibition swiftly and without any unnecessary delay. The proposed rule, applied to federal contractors and intended to eliminate the secrecy and fear surrounding inquiring about, discussing, or disclosing compensation information, will be an effective measure to combat pay discrimination and shrink the wage gap. It gives employers the tools to self-correct and avoid discrimination, gives employees the ability to discover and address pay inequities, and improves the morale and productivity of the workplace.

Thank you for the opportunity to submit comments on this proposed rule. Please do not hesitate to contact Fatima Goss Graves (fgraves@nwlc.org) if we can provide further information.

Sincerely,



Fatima Goss Graves
Vice President for Education & Employment



Liz Watson
Senior Counsel and Director of Workplace Justice for Women



Abigail Bar-Lev
Fellow