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Re: RIN No. 1250-AA06
ACLU Comments in Support of Prohibitions Against Pay Secrecy
Policies and Actions

LAURA W. MURPHY
DIRECTOR

Dear Ms. Carr:

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For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, gender identity, sexual orientation, disability, or national origin.

We write to express our strong support for the Office of Federal Contract Compliance Programs' (OFCCP) proposed rule¹ implementing Executive Order 13665,² prohibiting government contractors from discharging, penalizing, or otherwise discriminating against any employee or applicant for discussing, disclosing, or inquiring about their compensation or that of another employee or applicant. This rule will protect members of our federal contracting workforce who wish to inquire about wages without fear of reprisal, will help employees and employers alike to identify and correct pay disparities, will contribute to effective federal enforcement of non-

¹ Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 79 Fed. Reg. 55,712 (Sept. 17, 2014) (Notice of Proposed Rulemaking).

² 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>.

discrimination provisions, and will promote more efficiency in federal contracting.

Introduction

On April 4, 2014, President Obama signed Executive Order 13665 protecting individuals employed by federal contractors from retaliation for wage disclosure. In doing so, the President moved our nation a step closer to fulfilling his commitment set out in his second inaugural address that “our wives, our mothers and daughters can earn a living equal to their efforts.”³ The ACLU has long advocated for this Executive Order,⁴ including as co-chair of the Paycheck Fairness Act coalition, and we were deeply honored to be invited to stand with the President at this historic signing.⁵

This proposed rule, like the Paycheck Fairness Act currently pending in Congress, seeks to level the playing field by increasing transparency and giving workers a much needed tool to help fight pay discrimination.⁶ We stand with the President and Department of Labor as they work to implement new tools to address our nation’s ongoing and pernicious wage gap.

I. The Rule Will Help Facilitate Access to Information that Can Address Ongoing Gender-Based and Race-Based Pay Disparities in Federal Contracting.

Over fifty years after the passage of the Equal Pay Act of 1963, glaring pay disparities still exist between men and women. Women working full time, year round in 2013 were paid only 78 cents for every dollar paid to their male counterparts. African American women and Latinas suffered from wage gaps even more severe. African American women earned just 64 cents for every dollar earned by white, non-Hispanic men; Latinas’ earnings stood at 56 cents for every dollar earned by white men.⁷ In 1963, when the Equal Pay Act became law, women were making 59 cents for every dollar earned by men.⁸ Thus, in the span of over fifty years, we have erased almost half of the disparity between men’s and women’s wages, but what exists is still unacceptable.

³ Barack Obama, President of the United States, Inaugural Address (Jan. 21, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/01/21/inaugural-address-president-barack-obama>.

⁴ Letter from the ACLU to Barack Obama, President of the United States (Apr. 17, 2012), *available at* https://www.aclu.org/files/assets/aclu_letter_to_president_obama_on_retaliation_executive_order_4_17_12_0.pdf.

⁵ Letter from ACLU to Barack Obama, President of the United States (May 5, 2014), *available at* <https://www.aclu.org/womens-rights/aclu-thank-you-letter-president-obama-executive-action-pay-equity>.

⁶ Fact Sheet, Office of Federal Contract Compliance Programs, Notice of Proposed Rulemaking Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions (Sept. 2014), *available at* <http://www.dol.gov/ofccp/PayTransparencyFactSheet.html>.

⁷ U.S. Census Bureau. (2014). *Current Population Survey, Annual Social and Economic (ASEC) Supplement: Table PINC-05: Work Experience in 2013 – People 15 Years Old and Over by Total Money Earnings in 2013, Age, Race, Hispanic Origin, and Sex*. Retrieved 18 September 2014, from http://www.census.gov/hhes/www/cpstables/032014/perinc/pinc05_000.htm (unpublished calculation based on the median earnings of all men and women who work full-time, year-round in 2013).

⁸ E.g., National Committee on Pay Equity, *The Wage Gap Over Time* (September 2011), *available at* <http://www.pay-equity.org/info-time.html>.

Race and ethnicity-based wage inequality is similarly entrenched in the American workplace. In 2013, African Americans employed full-time were paid a median weekly total of \$629, and Latino workers received a median salary of only \$578 compared to \$802 for white workers.⁹

Renewed efforts to address stagnant pay disparities have never been more important than they are today, as the country emerges from difficult economic conditions. The implementation of this rule will go a long way to address these disparities for the 28 million employees of federal contractors, as we continue to push for permanent change for all employees through the passage of the Paycheck Fairness Act.¹⁰

According to the Institute for Women's Policy Research, nearly half of all workers are either forbidden or strongly discouraged from discussing their pay with colleagues.¹¹ If workers do not know what they are being paid, it is very difficult to do anything about possible wage disparities. Pay secrecy is one of the most prevalent employer practices that has made discrimination hard to detect and remedy.

Removing these restrictions will help facilitate conversations between employees and between coworkers and supervisors, as well as provide opportunities for employers to self-correct when disparities are identified. No company or employer is required to disclose wage information under this rule, but employees would have the ability to voluntarily share information or ask without fear.

The case of Lilly Ledbetter illustrates the importance of this rule. Ms. Ledbetter was an employee of Goodyear Tire – a federal contractor – for nearly twenty years. Goodyear prohibited employees from discussing or sharing their wages, so Ms. Ledbetter did not know of the discrimination against her until someone slipped her an anonymous note, years after the discrimination began. Had anti-retaliation protections applied to her or her coworkers, Ms. Ledbetter might have discovered the wage discrimination earlier and sought a remedy without fear of punishment.

In addition to facilitating employee discussions, this rule would assist federal enforcement of discrimination laws. Pay secrecy remains one of the persistent challenges to equal pay enforcement. If fear of punishment prevents contractor employees from sharing or asking about wage information, they may not be able to assert their rights under Executive Order 11246, under which OFCCP enforces compensation discrimination. Moreover, such pay secrecy policies hamper OFCCP's ability to conduct interviews and investigations for wage discrimination, if employees feel unable to speak openly. Finally, this proposed rule is designed to ensure that the most qualified and productive workers receive fair wages and not paid less than their similarly-situated counterparts due to discriminatory decision-

⁹ U.S. Department of Labor, Bureau of Labor Statistics, *Median weekly earnings of full-time wage and salary workers by selected characteristics*, Current Population Survey, Table 37 (February 26, 2014), available at <http://www.bls.gov/cps/cpsaat37.htm>.

¹⁰ Paycheck Fairness Act, S.84/H.R. 377, 113th Cong. (2013).

¹¹ FACT SHEET, INST. FOR WOMEN'S POLICY RESEARCH, PAY SECRECY AND WAGE DISCRIMINATION (June 2011) available at <http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination>.

making. In sum, this NPRM promotes the federal government's interest in efficiency in federal contracting and economy in the use of taxpayer funds.

For these reasons, the ACLU strongly supports this rule. In addition, we provide the following recommendations, based on the NPRM's request for comments, to help improve the ability of employees to discuss their wages without fear of retaliation and to avoid a cramped interpretation of the rule.

II. Affirmative Defenses and Exceptions to the Rule's Protections Need to Be Narrowly Tailored with Limited Subjective Factors.

OFCCP rightly views this new proposed rule in terms of non-discrimination, and therefore, we agree that the Title VII standards and framework for determining the existence of discrimination should also apply here. We concur that the "motivating factor" causation standard in assessing liability for violations of the new prohibition is appropriate.

a. The Definition of "Essential Job Functions"

In carrying out the Executive Order, the NPRM provides an exception for its protection when an employee with access to compensation information of other employees or job applicants, as part of such employee's "essential job functions," discloses it to individuals who would not otherwise have that information (other than in response to a formal charge or investigation). The NPRM proposes factors to consider in defining "essential job functions" in order to determine which employees would be exempt from the proposed rule's protections against retaliation for wage disclosure.

We support OFCCP's use of the ADA in interpreting "essential job function." However, OFCCP should make clear that "essential job function" must be narrowly defined, as exceptions generally are, and that any factors considered be limited and given a narrow interpretation. Essential job function must be critical to performing the position in question and an employer's judgment is not to be given conclusive weight, consistent with case precedent, on the question of what constitutes an essential job function.

Case law supports the position that although an employer's view of what constitutes an "essential job function" be considered, it should not be the only or controlling factor, and other outside factors need to be considered.¹² Narrowly defining the essential functions of a

¹² See, e.g., *Kammueler v. Loomis, Fargo & Co.*, 383 F.3d 779, 787 (8th Cir. 2004); *Samson v. Fed. Exp. Corp.*, 746 F.3d 1196, 1201 (11th Cir. 2014); *Rorrer v. City of Stow*, 743 F.3d 1025, 1039 (6th Cir. 2014); *Miller v. Illinois Dept. of Transp.*, 643 F.3d 190, 198 (7th Cir. 2011); *Holly v. Clairson Industries, LLC*, 492 F.3d 1247, 1258 (11th Cir. 2007) ("...if it were considered to be conclusive, then an employer that did not wish to be *inconvenienced* by making a reasonable accommodation could, simply by asserting that the function is "essential," avoid the clear congressional mandate..."); *Turner v. Hershey Chocolate U.S.*, 440 F.3d 604, 613 n.6 (3d Cir. 2006); *Davidson v. America Online, Inc.*, 337 F.3d 1179, 1191 (10th Cir. 2003) (...the employer's opinions are considered, but not controlling); *Gillen v. Fallon Ambulance Service, Inc.*, 283 F.3d 11, 25 (1st Cir. 2002) ("employer's good-faith view of what a job entails, though important, is not dispositive"); *Hall v. U.S. Postal Service*, 857 F.2d 1073, 1079–1080 (6th Cir. 1988) (error for court to accept job description as controlling on whether heavy lifting was essential job function under Rehabilitation Act);

job reduces the risk that loopholes will be exploited rendering the rule ineffective. As illustrated in the context of employer liability, the Eight Circuit held in *Kammueler v. Loomis, Fargo & Co.*, “[w]ere we to give conclusive weight to the employer's opinion on this issue . . . any employer . . . would escape ADA and MHRA liability simply by defining job duties in a manner that excludes disabled employees.”¹³ It is similarly possible that employers could use these tactics to seek exemption from this proposed rule. We encourage OFFCCP to incorporate these holdings in its interpretation of “essential job function.”

Such an interpretation is necessary in order to ensure that frank conversations about wages between employees, and between employees and supervisors, can occur without fear of retaliation. It is important to note, however, that this rule would not require supervisors to disclose pay information, but would make sure that conversations about pay are not prohibited. If given a broad interpretation, in contrast, this exception would defeat the Executive Order’s goal of helping to root out discrimination and would have the potential of swallowing the rule.

b. Essential Job Functions as an Affirmative Defense

In general, in order to ensure that the protections in the Executive Order apply to the broadest number of employees as possible, any affirmative defenses available to employers must also be narrowly tailored. The NPRM proposes two possible employer affirmative defenses when a claim of retaliation is made by an employee.

First, the NPRM proposes that “essential job functions” serve as an employer affirmative defense, as well as an exception to the rule. This definition would also apply to the employer’s defense that its adverse employment action was taken against an employee whose duty it was to maintain and protect the wage privacy of employee personnel records information as part of an essential job function.¹⁴

All of the same previously-discussed concerns and recommendations would apply here. As discussed above, the employer’s ability to assert “essential job functions” as an affirmative defense must be limited to only a very narrow subset of employees whose job it is to maintain and protect the privacy of employee personnel records in order to ensure that the rule can be robust in scope. For example, the mere fact that a supervisor, or even a human resources professional, just has *access* to pay information, is not sufficient to exclude them from protections in the first instance and is also insufficient to constitute a defense when adverse action is taken. If employees with mere access to information on pay are excluded from these protections, it could mean large groups of employees – those, for example, who

Bralo v. Spirit Airlines, Inc., 2014 WL 1092365, at *14 (S.D. Fla. Mar. 19, 2014) (“While [the employer’s] judgment, as expressed in the written job description, must be given consideration, it is not the only factor to consider.”); *E.E.O.C. v. Dollar Gen. Corp.*, 252 F. Supp. 2d 277, 288-89 (M.D.N.C. 2003) (“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.”); *Rohan v. Networks Presentations LLC*, 375 F.3d 266, 287 (4th Cir. 2004) (Shedd, J., dissenting) (“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.”).

¹³ *Kammueler*, 383 F.3d at 787.

¹⁴ Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 79 Fed. Reg. at 55,718.

are in the best positions to remedy problems (such as supervisors), and those in fields that are predominately women (such as human resources), will not be able to engage in frank discussions with those seeking their assistance, or worse still, would not be protected themselves as noted in the discussion section of this NPRM.

c. Violation of Workplace Rules as an Affirmative Defense

Second, the NPRM also proposes an affirmative defense for violations based on legitimate workplace rules. While employers should be able to take appropriate and necessary actions for serious workplace violations, as it is currently proposed, this defense runs the risk of being so broad as to allow pre-textual reasons for adverse actions. Such a broad and undefined proposal, that allows excessive employer subjectivity, could serve as a proxy for an employer wanting to fire an employee for discussing or disclosing wages. In fact, the example that is proposed to illustrate this affirmative defense – an employee being “disruptive” – opens the door to this exact problem. Such a subjective example is unclear, too broad, and could allow an employer to define any type of discussion of pay as “disruptive.” OFCCP providing more narrowly tailored definitions and examples of the types of legitimate workplace rules that are permitted as an affirmative defense will reduce the chance that these defenses are abused.

III. OFCCP Should Require Training and Best Practices for the Anti-Retaliation Rule.

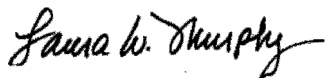
OFCCP has also requested comments on the implementation of this rule. The proposal would require federal contractors to add a specific non-discrimination provision regarding compensation disclosure to their already mandatory equal opportunity clauses. Training for managers on the new rule, including providing best practices, is important in order to ensure that managers and employees alike understand their new protections and obligations. For companies that have had longstanding policies against wage discussions, such trainings and the dissemination of this new information are critically important. Merely eliminating a basis on which to take adverse action against employees should not be a financial or significant administrative burden on employers. For example, instruction on other non-discrimination provisions and similar protections are already part of many employers’ mandatory training courses and in employee manuals or material, which can be easily amended.

Conclusion

We commend the President for signing the anti-retaliation executive order and the Department of Labor for its implementation. The EO and this subsequent rulemaking will benefit 28 million workers, representing billions of dollars in federal contract funds that will no longer be able to be used to underwrite this kind of discrimination. We urge the Administration to adopt final regulations on this proposed rule swiftly and without any unnecessary delay.

Thank you for the opportunity to submit comments on an issue that is so critical for working women. Please do not hesitate to contact Deborah J. Vagins, ACLU Senior Legislative Counsel, at dvagins@aclu.org if we can provide further information.

Sincerely,

A handwritten signature in black ink that reads "Laura W. Murphy". The script is fluid and cursive, with the first letters of each word being capitalized and prominent.

Laura W. Murphy
Director, Washington Legislative Office

A handwritten signature in black ink that reads "Deborah J. Vagins". The script is fluid and cursive, with the first letters of each word being capitalized and prominent.

Deborah J. Vagins
Senior Legislative Counsel