Construction Industry Round Table

March 31, 2016

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The Honorable Bernadette Wilson
Acting Executive Officer, Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

ATTN: Docket No. 2016-01544; Agency No. 3046-0007
RE: *Proposed Revision of the Employer Information Report (EEO-1)*
[81 Fed. Reg. 5113 (February 1, 2016)]

Dear Commission:

On behalf of the Construction Industry Round Table (CIRT)[1], we wish to have our *opposition* included in the official record of comments regarding the above captioned proposed U.S. Equal Employment Opportunity Commission (hereinafter "EEOC") rule to require all employers with 100 or more workers submit pay data from W-2 forms along with the already mandated EEO-1 diversity reports (hereinafter "proposed rule" or "diversity pay rule".)

The member firms represented by CIRT have traditionally provided design and construction services to both private and *public* sector clients. Consequently, they must abide by the various jurisdictional rules, regulations, and laws, as well as the federal mandates and requirements. Over the years, the design/construction community has thus become very familiar with FEDERAL (and state/local) procurement policy and procedures as specified in the statutes controlling or pertinent to these contracting activities. The generic rules related to pay rates, etc. are more complex and complicated with respect to construction service providers since they fall within specialized regulations such as Davis-Bacon prevailing-wage schedules and possible Project Labor Agreements (PLAs).

[1] The Construction Industry Round Table (CIRT) strives to create one voice to meet the interest and needs of the design *and* construction community. CIRT supports its members by actively representing the industry on public policy issues, by improving the image and presence of its leading members, and by providing a forum for enhancing and/or developing strong management approaches in an ever changing environment through networking and peer interaction.

The Round Table is composed of approximately 115 CEOs from the leading architectural, engineering, and construction firms in the United States. Together these firms deliver on billions of dollars of public and private sector infrastructure projects that enhance the quality of life of all Americans while directly employing half-million workers.

While business organizations and associations, such as CIRT, understand the value and need for regulations/rules that require fair unbiased treatment of all employees . . . we do not believe mega-data collection and simplistic "disparity analysis" truly reflect the complex nature of a diverse work environment and/or sufficiently serve as the basis for claims.

Discussion

Even taken alone (or as only a small incremental step), the burdensome nature of this "big-data" collection rule would raise serious and substantial questions both as to privacy/data confidentiality (potential Constitutionality questions) and with requirements under the Paperwork Reduction Act (PRA).

Notwithstanding these legal concerns, suffice to say it is yet another example of the federal government heaping on private sector job creators *unprecedented cumulative burdens* not really known or fully appreciated. Moreover, this is a **rulemaking in search of a problem** . . . a fishing expedition, paid for by the lost hours, dollars, and attention of the private sector entrepreneurs that must compete in a global market-place while bearing the costs and inefficiencies of the federal leviathan.

(1) Privacy/Confidentiality Legal Concerns
The EEOC has not addressed or sufficiently weighed the risks and legitimate concerns for employee privacy and data confidentiality. Given the current state of cyber-crime, and breaches both within and without the federal government personnel as well as sensitive data records[2] – this is no small shortcoming to the rulemaking.

Specifically, in May 2015 the United States Court of Appeals for the Second Circuit held that Section 215 of the so-called Patriot Act cannot be legitimately interpreted to allow the bulk collection of domestic calling records.[3] Essentially, the Court ruled, in part, the data gathering violated the Fourth and First Amendments to the U.S. Constitution. There are stark analogous comparisons to this case with the goals and methodology of the EEOC's diversity pay rule, which seeks "big data" pay information mining to be gathered on a mass basis (mega or bulk collection by any other name) . . with no specific case or violation under investigation and/or alleged.

(2) Burdensome Regulatory Inefficiency Concerns
Per the rulemaking, the EEOC seeks a three-year Paperwork Reduction Act (PRA) approval from the Office of Management and Budget (OMB); essentially claiming the mass bulk data gathering expedition is not burdensome or pernicious. Of course, no federal government agency or commission has ever gotten this far in proposing a rule, without concluding it is NOT burdensome. . .

[2] Massive cybersecurity breaches of some 5.6 million at the Office of Personnel Management have been widely reported. The total number of those believed to be caught up in the breaches, including the theft of the Social Security numbers and addresses is more than 21 million former and current government employees.

[3] See, *ACLU v. James Clapper*, 785 F.3d 787, 2d Cir. (May 2015).

This superficial regard to the (PRA) is precisely how the U.S. economy has become weighed down with the unprecedented cumulative drag or expenses from a "*regulatory complex*" that some estimates put at nearly $2.0 Trillion dollars annual.[4] Every individual rule is justified, as if imposed in a vacuum.

However, it is clear that the private sector will need to adjust its activities, add to its costs, take on new data gathering burdens, and most importantly be prepared to upgrade, heighten, and otherwise bolster its security, privacy, and confidentially protocols and procedures . . . in response to this single rulemaking.

Beyond these general costs, efforts, and concerns, the construction community is faced with a unique set of additional challenges with respect to payroll. The federal government's Davis-Bacon Act prevailing wage calculations, applied on federal projects add an entire layer of various pay rates and amounts that muddy or otherwise complicate the data for individual employees. . . even like-situated employees . . .except as to whether or not Davis-Bacon Act applies to the project they are assigned. Add to this, the Project Labor Agreement (PLAs) that might be negotiated by the parties, and yet another potential disparity is embedded into the data. . . for the agency to "*find!"*

(3) Rulemaking in Search of a Problem

The very scope and nature of this rulemaking – bulk, big-data, record collection (alia NSA), by its very application is proof it is a fishing-expedition in search of a problem or a claim. What actions the EEOC chooses not to pursue, will have eager plaintiff lawyers stepping-in with armfuls of supposed data collected ahead of time, without a shred of evidence of wrong doing or likely cause – to warrant such burdensome legal challenge to the private sector firms.

Even the U.S. Department of Labor, after undertaking an analysis of 26 million employee pay files concluded that the effort has now revealed that occupation selection accounts for the pay gap, **and not** differential pay to similarly situated employees.[5]

Moreover, the federal government also recognizes the impact different regions and locales have on pay scales and standards of living – it is irresponsible for this rulemaking, which proposes to dramatically invade the privacy/confidentiality of personnel records in mega-data collection, to simply ignore such vitally critical differences.[6]

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[4] NAM contends the total cost of federal regulations in 2012 was $2.028 trillion (in 2014 dollars); and the annual burden for an average U.S. firm at $233,182, or 21 percent of average payroll. The CEI, asserts federal regulation/ intervention cost U.S. consumers/businesses an estimated $1.88 trillion in 2014, or roughly $15,000 per household,

[5] As reported in an ENR article entitled: "*Industry Girds for Feds' Big-Data Diversity Pay Gap Rule*" Debra K. Rubin (March 2, 2016).

[6] The federal government has available to it regional data on average salaries. In fact, the federal government's own General Schedule ("GS") pay tables for federal employees include locality adjustments that recognize that certain metropolitan areas have higher costs of living requiring an increase in pay.

Conclusion

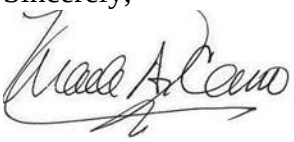
In a recent, and timely, contribution to the whole notion of "diversity" and the apparent, real or imagined biases that the concept has launched in the legal realm (which this proposed rulemaking is most assuredly a part), the Harvard Journal of Law & Public Policy – raised serious and meaningful questions.

As part of the Harvard Journal article's conclusion it quoted favorably Kingsley R. Browne's observation: "*at a time when we are constantly told of the virtues of 'diversity' – i.e., that persons of different groups have different perspectives and attitudes – one would think that it would be similarly recognized that they may have different interests and abilities as well*."[7]

The most critical and important evidence to date that payroll differences and even gaps, may simply be the benign outcome of "different interests and abilities" if not circumstances (e.g., Davis-Bacon Act when it comes to design/construction industry), is the U.S. Department of Labor study and the OPM's (GS) pay differential scales for geographical location.

Rather than creating questionable rules and regulatory schemes that raise serious privacy and confidentiality questions (akin to the mega bulk data gathering of NSA), the EEOC should allow the marketplace to pay wages that permit U.S. companies to win in a global economy. Reliable, well compensated jobs will be the result.

Sincerely,



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President

[7] *Measuring Diversity: Law Faculties in 1997 and 2013,*" 39 HAR. J.L. & PUB POL'Y 89 (Winter 2016); Page 138, Footnote 102: *Statistical Proof of Discrimination: beyond "Damned Lies,"* 68 WASH. L. REV. 477 (1993) at page 505.