

# Management Alert



## Statisticians Caution EEOC on the Challenges of Collecting and Measuring Pay Equity Data

On August 15, 2012, the National Academy of Sciences released a prepublication copy of its report entitled “Collecting Compensation Data from Employers.” The report was funded by the Equal Employment Opportunity Commission (the “EEOC”). In it, some of the nation’s top statisticians reach the same conclusion many employers have: the government must first consider a number of issues relating to the collection of this data before enacting further regulations requiring employers to collect and measure pay information. The EEOC and other federal agencies would like to gather this information to enhance enforcement of equal pay laws. The statisticians concluded that the federal government is nowhere near prepared for the “significant undertaking” of implementing a tool to collect compensation data by race, gender, and national origin, not to mention the burdens and costs associated with such a collection tool.

According to these experts, the EEOC, the Office of Federal Contract Compliance Programs (the “OFCCP”) and Department of Justice (the “DOJ”) must plan how they will use pay data, have a pilot study to test any initial plans for data collection and use, and have greater capacity to deal with the data and its analysis once collected. The report also raises significant concerns about the confidentiality of the gathered data and questions what is the most appropriate measure of actual earnings.

### Background

On the heels of President Obama’s pledge in his 2010 State of the Union Address to increase enforcement of equal pay laws, the White House established the National Equal Pay Enforcement Task Force (“Task Force”), which brought together representatives of the EEOC, the DOJ, the Department of Labor, and the Office of Personnel Management. The Task Force subsequently identified several challenges to their enforcement of equal pay laws and made recommendations regarding the challenges.

At the suggestion of the Task Force, and in light of its ongoing interest in increasing equal pay enforcement, the EEOC asked the National Research Council, through its Committee on National Statistics (“CNSTAT”), to convene a panel to review methods for measuring and collecting pay information by gender, race, and national origin from U.S. employers for the purpose of administering Section 709 of the Civil Rights Act of 1964, as amended. The panel consisted of private sector and academic professionals with expertise in a variety of disciplines relevant to the collection of pay equity data and included many of the country’s foremost statisticians.

### The Panel’s Findings and Recommendations

The Panel’s 180-page report, available [here](#), exhaustively details its consideration of current and potential data sources available to federal agencies (e.g., EEO reports), methodological requirements, and appropriate statistical techniques for the measurement and collection of employer pay data. The Panel also considered the importance of protecting confidential employer data.

In the report, the Panel makes several findings and provides six recommendations to the EEOC in connection with its findings. Significantly, the Panel’s findings and recommendations corroborate the view of many employers, including federal contractors and subcontractors, that the federal government is woefully unprepared to implement any new compensation data collection tools at this time.

Key among the Panel’s findings are:

- At present, there is no clearly articulated vision of how the data on wages would be used in the conduct of the enforcement responsibilities of the relevant agencies;

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- Neither the EEOC nor the OFCCP have identified any specific mechanisms or a clearly articulated plan for how collected earnings data would be assembled, assessed, compared, and used to identify employers for investigation regarding compliance with antidiscrimination laws
- Existing studies on the cost-effectiveness of an instrument for collecting wage data and the resulting burden are inadequate to assess any new program;
- Unless the agencies have a comprehensive plan that includes the form of the data collection, it will not be possible to reliably determine the actual burden on employers and the costs and benefits of the collection;
- It is important to clearly understand the requirement and potential uses of the data as a first step in determining the quality of the data; until EEOC and its cooperating agencies gain experience with collecting, processing, and using earnings data in field investigations and in litigation, it will not be known if the data are of sufficient reliability to support enforcement.

From these findings, the Panel then identified six recommendations to address the Panel's findings:

1. In conjunction with the OFCCP and the Civil Rights Division of the DOJ, the EEOC should prepare a comprehensive plan for use of earnings data before initiating any data collection.
2. After the EEOC, the OFCCP and the DOJ complete the comprehensive plan for earnings data, the agencies should initiate a pilot study to test the collection instrument and the plan for the use of the data. The pilot study should be conducted by an independent provider charged with measuring the resulting data quality, fitness for use in the comprehensive plan, cost, and respondent burden.
3. The EEOC should enhance its capacity to summarize, analyze, and protect the confidentiality of earnings data.
4. The EEOC should collect data on rates of pay, not actual earnings or pay bands, in a manner that permits the calculation of measures of both central tendency and dispersion.
5. In anticipation of increased user demand for microdata on pay information by demographic detail for research and analytical purposes if such data are collected by the EEOC, the Panel recommends the EEOC consider implementing appropriate data protection techniques, such as data perturbation -- a data security technique that adds "noise" to databases -- and the generation of synthetic data -- a process of anonymizing the data -- to preserve confidentiality. The Panel further recommends the EEOC consider supporting research for the development of these applications.
6. The EEOC should seek legislation that would increase the ability of the agency to protect confidential data. The legislation should specifically authorize data-sharing agreements with other agencies with legislative authority to enforce antidiscrimination laws and should extend Title VII penalties to nonagency employees.

## What This Means for Employers

The Panel's findings and recommendations support the position of the employer community that the federal government must first engage in additional work including preparation, planning, and research on the intended uses, benefits, costs, and burdens of any proposed compensation data collection tool before implementation of any such tool. This Report gives employers (especially federal contractors battling the OFCCP over compensation issues and private employers in protracted litigation with the EEOC or DOJ over pay equity issues) a strong rebuttal to the Government's current approach. We will keep you updated on subsequent developments.

If you have questions about this Management Alert, please contact the Seyfarth attorney with whom you work or any attorney on our [OFCCP & Affirmative Action Compliance Team](#).



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