Equal Pay: New Reporting Rules, Potential Impact on Collective Actions

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“And ye shall know the truth, and the truth shall make you free.”

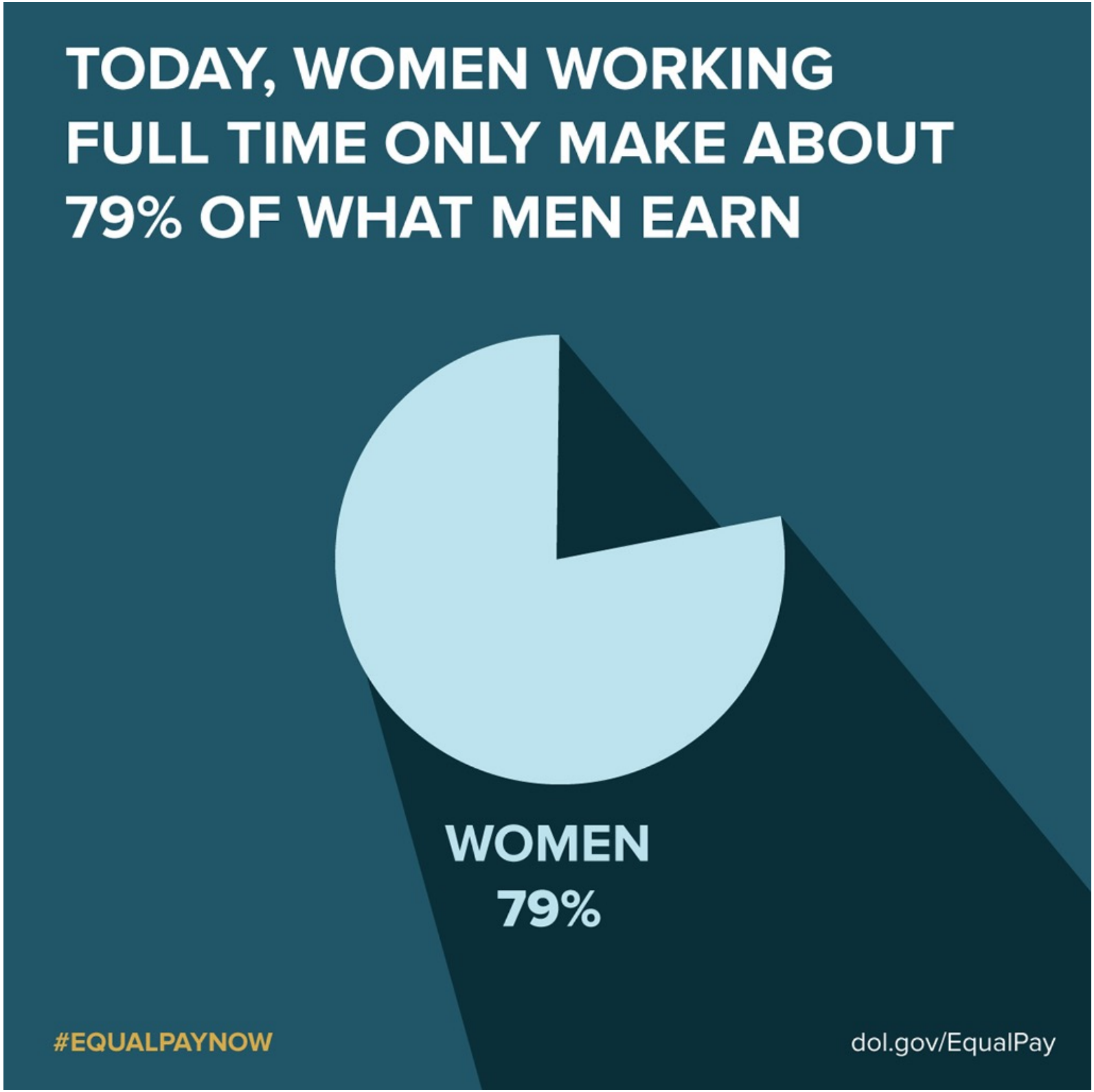
–John 8:32

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in **other concerted activities** for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities."

Section 7 - NLRA (29 U.S.C. 157)(emphasis added)

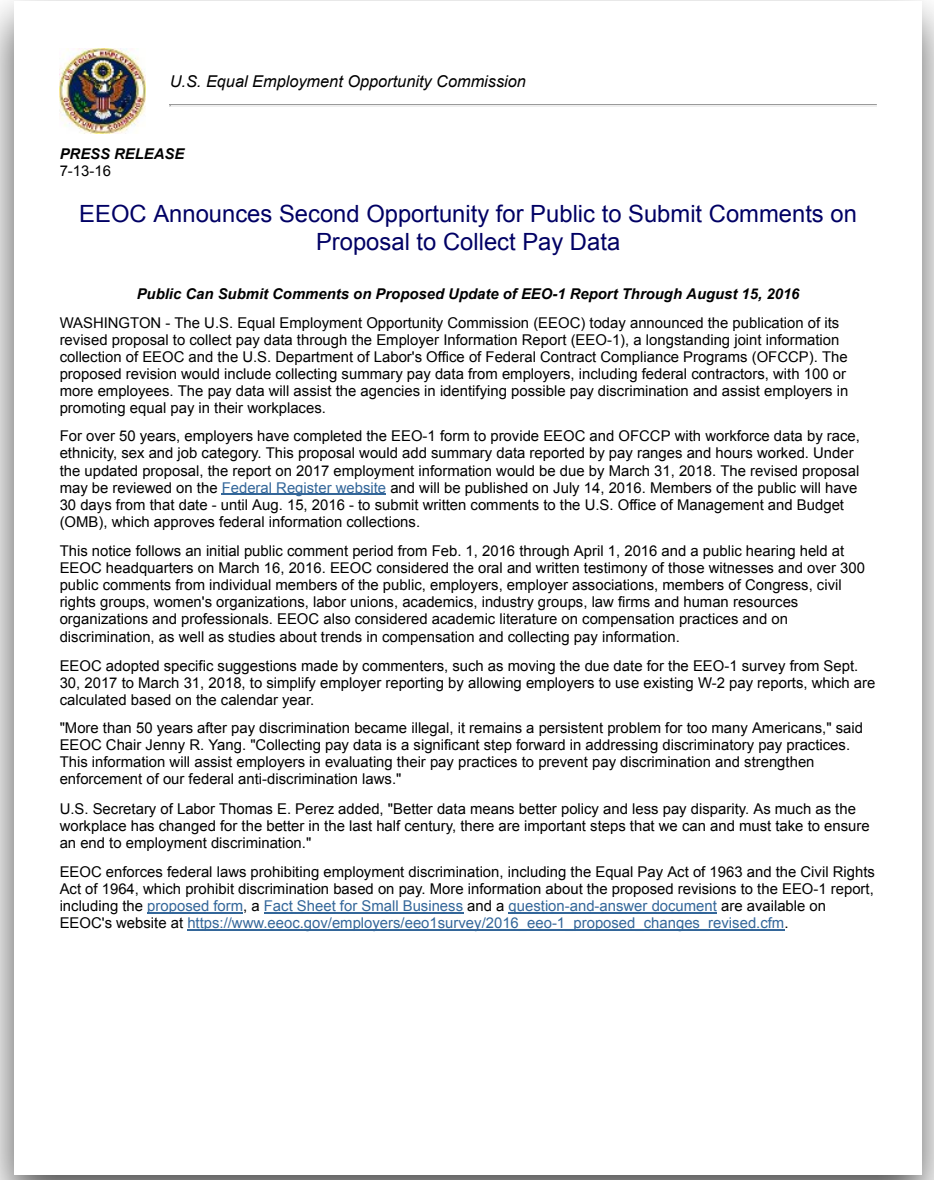
Employers Cannot Lawfully Chill Employee Discussion of Wages

Wage discussions among employees are considered to be at the core of Section 7 rights because wages, "probably the most the most critical element in employment," are "the grist on which concerted activity feeds." Jones & Carter, Inc., 2012 WL 5941221, N.L.R.B. Div. of Judges Nov. 26, 2012, adopted sub nom. Jones & Carter, Inc., 2013 WL 754064, N.L.R.B. Feb. 8, 2013; *Triana Industries, 245 NLRB 1258 (1979); and Taylor Made Transportation Services, 358 NLRB No. 53 (2012).*


TODAY, WOMEN WORKING FULL TIME ONLY MAKE ABOUT 79% OF WHAT MEN EARN
WOMEN
79%
#EQUALPAYNOW
dol.gov/EqualPay

New EEO-1 Reporting Rule

- Proposed New EEO-1 Reporting Rule
- Public Comment Period ended August 15, 2016
- Employers subject to EEO-1 Reporting will have to provide **pay data and hours worked data**
- New Form EEO-1 reports would be due March 31, 2018



U.S. Equal Employment Opportunity Commission

PRESS RELEASE
7-13-16

EEOC Announces Second Opportunity for Public to Submit Comments on Proposal to Collect Pay Data

Public Can Submit Comments on Proposed Update of EEO-1 Report Through August 15, 2016

WASHINGTON - The U.S. Equal Employment Opportunity Commission (EEOC) today announced the publication of its revised proposal to collect pay data through the Employer Information Report (EEO-1), a longstanding joint information collection of EEOC and the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). The proposed revision would include collecting summary pay data from employers, including federal contractors, with 100 or more employees. The pay data will assist the agencies in identifying possible pay discrimination and assist employers in promoting equal pay in their workplaces.

For over 50 years, employers have completed the EEO-1 form to provide EEOC and OFCCP with workforce data by race, ethnicity, sex and job category. This proposal would add summary data reported by pay ranges and hours worked. Under the updated proposal, the report on 2017 employment information would be due by March 31, 2018. The revised proposal may be reviewed on the Federal Register website and will be published on July 14, 2016. Members of the public will have 30 days from that date - until Aug. 15, 2016 - to submit written comments to the U.S. Office of Management and Budget (OMB), which approves federal information collections.

This notice follows an initial public comment period from Feb. 1, 2016 through April 1, 2016 and a public hearing held at EEOC headquarters on March 16, 2016. EEOC considered the oral and written testimony of those witnesses and over 300 public comments from individual members of the public, employers, employer associations, members of Congress, civil rights groups, women's organizations, labor unions, academics, industry groups, law firms and human resources organizations and professionals. EEOC also considered academic literature on compensation practices and on discrimination, as well as studies about trends in compensation and collecting pay information.

EEOC adopted specific suggestions made by commenters, such as moving the due date for the EEO-1 survey from Sept. 30, 2017 to March 31, 2018, to simplify employer reporting by allowing employers to use existing W-2 pay reports, which are calculated based on the calendar year.

"More than 50 years after pay discrimination became illegal, it remains a persistent problem for too many Americans," said EEOC Chair Jenny R. Yang. "Collecting pay data is a significant step forward in addressing discriminatory pay practices. This information will assist employers in evaluating their pay practices to prevent pay discrimination and strengthen enforcement of our federal anti-discrimination laws."

U.S. Secretary of Labor Thomas E. Perez added, "Better data means better policy and less pay disparity. As much as the workplace has changed for the better in the last half century, there are important steps that we can and must take to ensure an end to employment discrimination."

EEOC enforces federal laws prohibiting employment discrimination, including the Equal Pay Act of 1963 and the Civil Rights Act of 1964, which prohibit discrimination based on pay. More information about the proposed revisions to the EEO-1 report, including the proposed form, a Fact Sheet for Small Business and a question-and-answer document are available on EEOC's website at https://www.eeoc.gov/employers/eeo1survey/2016_eeo-1_proposed_changes_revised.cfm.

- W-2 pay would be reported in 12 “pay bands”
- Employers will tally the number of employees in 12 pay bands for each EEO-1 job category
- The pay bands track those used by the Bureau of Labor Statistics

- But…

- Employers would report **summary** pay data. Employers would not report individual pay or salaries.

- Employers would also report non-exempt employees' "hours worked" data as already maintained for purposes of the FLSA

- Employers would also report exempt employees "hours worked" data by either:

  - assuming 40 hours per week for for full-time employment or 20 hours per week for part-time employment; or

  - reporting actual hours worked if the employer already maintains accurate records of these hours

- But….

- Title VII forbids the EEOC or any EEOC officer or employee from making public any information, including EEO-1 data, before a Title VII proceeding is started that involves the information.

- A FOIA request for such information must include a file stamped copy of the lawsuit

Equal Pay Collective Actions

- Equal Pay Act
  - Follows FLSA Standards for Opt-In Collective Actions
- Title VII
  - Follows Rule 23 Standards for Opt-Out Class Actions
- Texas Labor Code Chapter 21
  - Mirrors Title VII

Amendment to Include Class Claims?

Notable Recent Cases

Less Work By Comparator: “The fact that a female employee performed additional duties beyond a male comparator does not defeat the employee’s prima facie case under the EPA.” *Riser v. QEP Energy*, 776 F.3d 119 (10th Cir. 2015)

Job descriptions alone are not dispositive… Even when comparator allegedly is the "supervisor" of the complaining party, fact dispute regarding level of supervision (if any) precluded motion to dismiss. *Gums v. Delaware Dep't of Labor*, 2015 WL 5458275 (D. Del. Sept. 2015)

Significant Additional Duties: In unpublished decision, two female shuttle bus drivers were held to not be substantially similar to male two road bus drivers, three garbage workers, two police department shuttle bus drivers, and a supervisor because the work of the comparators allegedly required mechanical skills, out of town, overnight, and weekend work, law enforcement skills, and the supervision of other employees. *Fields v. Stephen F. Austin State Univ.*, 611 Fed. Apps. 830 (5th Cir. 2015).

Unequal Pay Due to Commission Structure: In a case that demonstrates the sometimes nuanced intersections between the EPA and Title VII, a district court held that there was no EPA violation when a male and female received different pay under an identical commission structure because arguably the pay differential was due to the higher production of the male employee. However, because the female plaintiff argued that her comparator's higher commissions were based upon discriminatory preferential assignments of commission bearing accounts to the male, her Title VII claim was not dismissed. *Ism v. JDA Software, Inc.*, WL 3953852 (D. Ariz. June 29, 2015)

Reverse Discrimination: In *Clark v. Czech*, 2005 WL 1117296 (D.N.J. 2015), the male plaintiff brought pay disparity claims against the state agency alleging his female comparators did the same work as him but were paid more. The state's allegedly merit based pay classification system (under which the females were paid more) presented questions of fact because such system depended on how the employer implemented the system.

“**Nearly Identical**” (correctly decided)

The “nearly identical” standard does not apply to pay disparity claims under Title VII. To establish a prima facie case of racially discriminatory compensation under Title VII, Jones must show that she was paid less than a member of a different race was paid for work requiring “substantially the same responsibility.”*Jones v. Chevron U.S.A., Inc.*, 932 F. Supp. 2d 794, 796 (S.D. Tex. 2013).

“**Nearly Identical**” (wrongly decided)…

“An individual plaintiff claiming disparate treatment in pay under Title VII must show that his circumstances are **nearly identical** to those of a better-paid employee who is not a member of the protected class.” *Minnis v. Bd. of Sup'rs of Louisiana State Univ. & Agr. & Mech. Coll.*, 620 Fed. Appx. 215, 218 (5th Cir. 2015)(unpublished)

“**Nearly Identical**” (wrongly decided)…

Taylor v. United Parcel Serv., Inc., 554 F.3d 510, 523 (5th Cir. 2008), which states in part:An individual plaintiff claiming disparate treatment in pay under Title VII must show that his circumstances are “nearly identical” to those of a better-paid employee who is not a member of the protected class. *Citing to Little v. Republic Refining Co.*, 924 F.2d 93, 97 (5th Cir.1991).

Why the "**Nearly Identical**" standard is wrong:

To support the "nearly identical" argument made in *Taylor*, the *Taylor* panel cited to *Little v. Republic Refining Co.,* 924 F.2d 93, 97 (5th Cir.1991).

Little v. Republic Refining Co is not a pay disparity – or Title VII – case. *Little v. Republic Refining* relies upon an earlier case, *Smith v. Wal-Mart Stores*, that is a discharge case (not a pay disparity case) regarding a workplace rule violation. *See* Little v. Republic Refining Co., 924 F.2d 93, 97 (5th Cir.1991) and *Smith v. Wal-Mart Stores (No. 471)*, 891 F.2d 1177, 1180 (5th Cir. 1990)(emphasis added).

Why the "**Nearly Identical**" standard is wrong, continued:

The *Taylor* panel contradicted itself by correctly citing to well established Fifth Circuit precedent found within *Uviedo v. Steves Sash & Door Co.*, 738 F.2d 1425, 1431 (5th Cir. 1984), on reh'g, 753 F.2d 369 (5th Cir. 1985).

Why the "**Nearly Identical**" standard is wrong, continued:

Uviedo holds: "To establish a *prima facie* case of discrimination respecting compensation a plaintiff must prove (1) that she is a member of a protected class, and (2) that she is paid less than a nonmember for work requiring **substantially the same responsibility.** *Pittman v. Hattiesburg Municipal Separate School District,* 644 F.2d 1071, 1074 (5th Cir.1981); *Plemer v. Parsons-Gilbane, Inc.,* 713 F.2d 1127, 1137 (5th Cir.1983). The analysis is the same even where the two employees whose salaries are being compared are employed at different times in the same position. *Pittman; see also Bourque v. Powell Electrical Manufacturing Company,* 617 F.2d 61, 64 (5th Cir.1980) (comparison of salary to plaintiff's predecessor). The issue in this case is whether Ana Uviedo and Elaine Fisher were in fact performing **substantially** the same job." Id.

Why the "**Nearly Identical**" standard is wrong, continued:

Taylor and *Minnis* cannot have changed the law in the Fifth Circuit because, "one panel of this court cannot overrule the decision of another panel; such panel decisions may be overruled only by a subsequent decision of the Supreme Court or by the Fifth Circuit sitting *en banc." Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997).

Why the "**Nearly Identical**" standard is wrong, continued:

A more recent Fifth Circuit case than *Taylor*, holds: "To establish a prima facie case of racial discrimination with respect to compensation, the plaintiff must show that he was paid less than a member of a different race was paid for work requiring **substantially** the same responsibility." *. . .* "Johnson must show that those workers to whom he compares himself were 'performing **substantially** the same job.'"

Johnson v. TCB Const. Co., Inc., 334 Fed. Appx. 666, 670 (5th Cir. 2009) citing to *Uviedo v. Steves Sash & Door Co.*, 738 F2d 1425, 1431 (5th Cir.1984).