

Equal Employment Opportunity Biden/Harris Transition White Paper

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This transition memo begins with a review of the social science literature on EEO progress, followed by what we know about the efficacy of regulatory efforts at OFCCP, EEOC, and in the courts. This review demonstrates the stalled progress and limited efficacy of current practices and suggests that new approaches must be undertaken if we are to move the needle on equal opportunity in employment. The last three sections of the report make recommendations as to what those new approaches might be. ¹



¹ The Center for Employment Equity (CEE) is committed to documenting progress, and when necessary regress, toward our shared national goals of equitable diverse workplaces. We provide scientifically careful analyses and curated data to the community of citizens, employers, and policy makers concerned with promoting equitable workplaces. This white paper was written by the CEE leadership team, Fidan Kuturlus, M.V. Lee Badgett and Donald Tomaskovic-Devey. Input on this white paper was received from CEE affiliates Michael Ash, Amanda Baumle, Stephen Boutcher, Rodrigo Dominguez-Villegas, Eric Hoyt, Jasmine Kerrissey, Carly McCann, Joya Misra, Laurel Smith-Doerr, and J.D. Swerzenski. Additional input from scholars with deep knowledge of the enforcement process and EEOC data quality came from Suzanne Bruyere (Cornell), Reggie Byron (Southwestern University), Will Evans (Reveal), Elizabeth Hirsh (University of British Columbia), Pauline Kim (Washington University School of Law), Julie Kmec (Washington University), Vincent Roscigno (Ohio State University), and Sara von Schrader (Cornell University). Much of the analyses in this transition memo builds on the collective work of [EEODataNet](#), a cooperative venture between the EEOC and academic scholars working with EEOC employment and charge data that functioned between 2012 and 2016. Special thanks to the staff at the Yang-Tan Institute on Employment and Disability, Cornell University.

Executive Summary: What we already know

1. National progress toward equal opportunity and closing wage gaps has been stalled for twenty years or more. Available evidence supports the conclusion that firm and job employment segregation and direct employment discrimination are widespread on the basis of race, sex, age, and disability. We lack good data to explore these processes at the workplace or firm level.
2. There is evidence that current regulatory practice at the EEOC and OFCCP fail to reduce employment segregation or lessen pay or other forms of discrimination. Exceptions to this conclusion involve systemic case selection and innovations in regulatory practices that motivate employer managerial, rather than legal defense, responses. Regulators are more effective when they provide normative leadership, empower EEO stakeholders within firms, and set benchmarks to steer firm behavior.
3. There is also good evidence that when firms set goals and hold managers accountable, EEO progress follows. This is where the opportunities for regulatory targeting of managerial innovations in human resource practices are most promising.

Labor Policy Recommendations

1. Raise the minimum wage to at least \$15/hour and peg future changes to inflation.
2. Enforce existing wage and hour regulations to prevent wage theft.
3. Expand subsidized childcare.
4. Insure paid family/health leave benefits.

Regulatory Policy Recommendations

1. Shift EEOC legal enforcement efforts from individual legal case processing to systemic investigations.
2. Expand normative leadership on best practices by the EEOC and OFCCP.
3. Expand data analytics to support EEOC and OFCCP enforcement efforts.
4. Press EEOC and OFCCP to provide benchmark data to employers so they can monitor their own progress relative to appropriate comparators.
5. Press OFCCP to require yearly submission of federal contractor's affirmative action plans push the EEOC and OFCCP to collect firm data on EEO targeted practices.

Administrative Initiatives

1. Approve the EEOC's application to OMB to be certified as a federal data center
2. Expand EEOC and OFCCP internal analytic capacity.
3. Expand external data transparency, including increased release of firm and agency specific data where legally possible.
4. Accelerate the modernization of all aspects EEOC data collection
5. Collect pay data from private sector firms.
6. Expand scientific analyses and input into EEO enforcement activity.

Stalled progress

Progress toward equal opportunity in employment for African Americans stalled in 1980, and in many ways has grown worse since that time. Progress for women relative to men continued into the 1990s, but has since stalled as well. Routine regulatory efforts to promote equal opportunity are clearly not working to promote a more equal employment system. Fundamental shifts in regulatory approaches are necessary if employment fairness is to advance in the United States.

Current research is much more thorough on issues of gender segregation and pay inequity and racial disparities in hiring. Because of the absence of firm level pay data, there are no published contemporary high-quality firm level studies on U.S. gender and racial pay disparities. To understand the mechanisms producing segregation and pay discrimination the EEOC and research community need workplace or firm level pay data.

Racial Discrimination and Disparity

Hiring. There is consistent high quality evidence of employer discrimination in hiring based on race as well as past unemployment and incarceration, both of which are correlated with race.¹ Most alarmingly, there is no evidence of any decline in hiring discrimination against African Americans, although there appears to be some decline in discrimination against Latinos.² A recent high quality estimate suggests that in the U.S. today African American men with a continuous work history and no criminal record would still have to apply to twice as many jobs as a comparable white man to find a job.³ In addition, in order to secure a job, African Americans apply for a broader array of occupations than whites, a process which is associated with lower eventual wage offers.⁴ All of these patterns are worse for Black men than for Black women and for African Americans than for Hispanics. Further, there have been no declines in Black perceptions of racial discrimination in the workplace.⁵

Segregation. Within workplace racial employment firm and job segregation declined strongly in the 1960s and 1970s, particularly among federal contractors and in jobs with clear educational credential requirements, but has since stalled for all racial groups.⁶ By contrast, Racial segregation between workplaces has been rising since 1980, propelled by the death of these more integrated workplaces and the birth of less integrated ones.⁷

Earnings. Black-white earnings converged through 1980 and were then stagnant through the 1990s.⁸ Black-white pay gaps have more recently been rising. In 2019 the Black-White wage gap (adjusted for education, sex, age, and region) was 14.9%, up from 10.2% in 2010.⁹ The unexplained portion of the Black-white wage gap, often attributed to discrimination was estimated at 11% for men and 5% for women, even net of occupational segregation.¹⁰ Black-white wage gaps tend to grow during recessions with higher rates of Black job loss and fewer available work hours. This pattern is stronger in states with higher levels of racial bias.¹¹

The adjusted Hispanic-white wage gap in 2019 was 10.8%, down from 12.3% in 2000.¹² Occupational and industrial segregation and hours worked appear to be the major drivers of Black-white earnings inequalities.¹³ About half of the Hispanic-white and Black-white adjusted wage gaps remains after adjustment for both industry and occupational segregation.¹⁴

There are no published papers using firm level data to estimate the relative contributions of segregation and within job pay disparities to racial wage gaps.

Gender Discrimination and Disparity

Hiring. Evidence of hiring discrimination associated with gender is more complex. Gender differences in unemployment rates tend to be small. Audit studies suggest substantial hiring discrimination against mothers, gay men, lesbians, and transgender people. Women applying for typically male jobs as well as men applying for typically female jobs also face hiring discrimination.¹⁵

Segregation. Although the 1964 Civil Rights Act prohibited segregation on the basis of sex, there were no declines in workplace gender segregation until the 1970s. Progress slowed down in the 1990s and had stalled by 2000. Segregation declines tended to be in jobs that required educational credentials and in lower wage industries.¹⁶

Earnings. In 2018, the Census reported an average gender earnings gap of 19.4%, down from 43.4% in 1973. Most of the closing of the gap happened prior to 2000.¹⁷ The most recent and comprehensive academic study of this issue finds an unadjusted gender gap in annual earnings of 20.7%, once adjusted for race, education and labor force experience of 17.9%, and a final estimate adjusted for occupation, industry and union membership of 8.4%.¹⁸ These estimates suggests that only 14% of the national gender pay gap is a function of both gender differences in hours worked and the lower total experience associated with mothers leaving the labor force. Segregation between occupations and industries is much more important, producing 46% of the national gender gap, leaving a large 41% of the gap that may be being produced by within job discrimination. Bias against mothers is a stubborn component of the gender pay gap, even after adjustments for labor force experience and hours worked.¹⁹

There are no firm or organizational analyses of gender pay gaps in the published literature. Recent unpublished work at the Center for Employment Equity uses linked employer-employee data from the IRS to suggest that about half of the gender pay gap in the U.S. is associated with firm and job segregation and the remaining half, 8.5% on average. This analyses, however, looks only within jobs.²⁰

Sexual Orientation and Gender Identity (SOGI) Discrimination and Disparity

Discrimination against LGBT people is a form of sex discrimination that is illegal under Title VII since the Supreme Court's *Bostock* ruling. Research using audit studies finds evidence that lesbians, gay men, and transgender people experience hiring discrimination, but discrimination appears to be lower in states with SOGI nondiscrimination laws.²¹ In addition, gaps in earnings or income still appear in comparisons of gay/bisexual men with heterosexual men, of transgender people with

cisgender people, and of lesbian/bisexual women with men of any sexual orientation.²² Race and ethnicity enhance some of those disadvantages: Black and Latinx women earn less than white lesbians, and Black, Latinx, and Asian American gay men earn less than white gay men. State non-discrimination policies appear to lower the sexual orientation wage gaps.

Age/Disability Discrimination and Disparity

Discrimination against people over age 50 also seems to be widespread and mostly occurs around hiring and termination.²³ Age discrimination seems to be particularly widespread toward African Americans, particularly in professional and managerial jobs.²⁴ Disability discrimination is also widespread and appears to be more extreme among smaller employers not covered by the American with Disabilities Act and for applicants with more job experience.²⁵

The Limited Efficacy of EEO Regulatory Practice

All the research reviewed below in this section relies on data produced by the EEOC or OFCCP. Research collaboration between the EEOC, OFCCP, and academic researchers is vital for evaluating the efficacy of regulatory practices. Scholarship on the efficacy of EEO regulatory enforcement focuses on both the law in practice and firm responses to both external and internal pressures for expanded equality of employment opportunity. Internal evaluations of the effectiveness of OFCCP and EEOC regulatory practices are notably absent. In 2017 the GAO explicitly criticized the OFCCP for failing to evaluate the effectiveness of their programs.²⁶ That criticism could have been extended to the EEOC as well.

Legal Enforcement Strategies

Enforcement via the EEOC and in the courts takes a predominantly legal character, where the regulatory question before the EEOC or the courts is limited to one of legal culpability. This approach is overwhelmingly focused on individual claims of employment discrimination and fails to take on the systemic and organizational nature of employment discrimination. There are exceptions: new laws or innovative interpretations of old laws tend to produce changes in firm behavior.

Uncertainty and Empowering Internal EEO stakeholders. The combination of legal change in the 1960s and both social movement and political pressure on larger corporations produced initial declines in first race and then gender employment segregation in the 1960s and 1970s. These changes preceded the formation of the EEOC and OFCCP, but were facilitated by the legal uncertainty introduced by the initial activist orientation of both.²⁷ In the late 1960s the EEOC and OFCCP, in conjunction with these cultural and political pressures on employers, strengthened the influence of those human resource professionals within firms that shared the national equal opportunity agenda.²⁸

As EEO pressure and progress waned after 1980, activist HR professionals were converted into less influential diversity managers.²⁹ Firms have since shifted from a focus on equal opportunity and affirmative action to signaling legal compliance through symbolic compliance with EEO law and regulatory expectations. As a new group of “compliance professionals” focused on legal strategies to defend firms from lawsuits, the EEOC and the OFCCP became dominant actors in the EEO regulatory space. In effect, “compliance professionals” provide safe harbors from the law, providing at best a weak tool for promoting equal opportunity in employment.³⁰ In general, research tends to show that both EEOC and OFCCP enforcement efforts were more effective in the past than they are now.

EEOC and Legal Enforcement. Most EEO regulatory activity happens under a legal framework, in which the goal is to identify acts of discrimination under the law. The research on this legal process suggests that legal recourse is generally an ineffective tool for promoting systemic change. Given the relative weakness of the threat of litigation and the fact that the vast majority of discrimination goes unreported, the current regulatory approach at the EEOC to equal opportunity in employment will not be effective in eliminating discrimination.

Discrimination lawsuits against employers must first be preceded by a formal charge to the EEOC or state Fair Employment Practice Commissions. The EEOC processes between 70,000 and 100,000 discrimination charges per year. This is a very heavy caseload for the EEOC given its limited funding and staffing levels. Although at intake about 80% of cases appear to have some credible evidence of discrimination, the EEOC investigates only those cases with the strongest evidence. Most cases receive a right to sue letter and are referred to the private bar, while others go through an administrative process at the EEOC with further investigation followed by conciliation or formal mediation processes, and in rare cases, litigation.

It appears that less than 1% of employees who experience discrimination file formal charges with the EEOC or state FEPCs.³¹ This low level of reporting is not surprising as the evidence for employer retaliation against people who make discrimination charges is overwhelming.³² Looking specifically at sexual harassment charges, 68% report retaliation and 64% job loss, while only 27% receive any benefit, with a median monetary pay out of only \$10,000. Other bases have similar outcomes. Increased charge filing seems to follow from workplace legal rights training.³³

EEOC charges of employment discrimination and even EEOC litigation does not appear to produce change in workplace composition.³⁴ Monetary payouts (even costly ones) have no or even negative effects on workplace composition.³⁵ Even the most high profile cases filed by the EEOC have ambiguous outcomes. Settlements that include high monetary penalties, diversity training, and increased legal rights awareness among employees have either no or negative effects on future employment diversity in those firms. EEOC charges of employment discrimination and even EEOC litigation *only* appear to produce change in workplace composition *under specific remedial conditions*. Only mandates that proscribe specific hiring goals and managerial accountability lead firms to further diversify their workforces.³⁶ It appears that most

EEOC-required relief in litigated cases mandate human resource practices that demonstrate regulatory compliance, rather than directly target or monitor shifts in employment diversity, discrimination, or retaliation.³⁷

There is variation in charge outcome associated with both the basis of the charge and its location. 27% percent of pregnancy discrimination claims to the EEOC receive some benefit, while only 16% of race and sexual orientation do.³⁸ Some states generate consistently higher discrimination charge rates than others regardless of the type (e.g. sex, race, disability, age, retaliation) of charge. It is also the case that states vary greatly in the degree to which the EEOC process yields benefits to the charging party, a pattern that is also independent of the type of discrimination.³⁹

The evidence on the legal route for the cases that go to the private bar is at least as discouraging. Although the EEOC issues right to sue letters to most charging parties, private bar lawyers accept an estimated 10% of cases brought to them, and less than 1% of potential law suits are ever filed. Of this 1% of cases, most are settled with small monetary payouts, with most plaintiffs losing their jobs, receiving no admission of guilt by the employer, having to sign confidentiality agreements to protect the reputation of the firm charged with discrimination.⁴⁰ Moving into the court system is particularly difficult for plaintiffs who make intersectional claims. Charges based on multiple protected bases are only half as likely to win their cases as plaintiffs who allege a single basis of discrimination.⁴¹

Part of the weakness of the legal route, whether pursued via the EEOCs administrative procedures or via the courts, is that most discrimination is treated as an individual problem rather than a systemic one. In general plaintiffs fare better in terms of monetary benefits in both EEOC and private bar proceedings when the cases are prosecuted on a systemic or class basis; however even here actual employment gains tend to be fleeting.⁴² Systemic enforcement strategies are more likely to produce the uncertainties and normative pressures that prior research shows to be most effective.

OFCCP Enforcement

Federal contractors are held to higher equal opportunity standards than other firms, including the requirement to create and follow affirmative action plans. The Office of Federal Contract Compliance Programs (OFCCP) is the branch of the US Department of Labor in charge of antidiscrimination and affirmative action enforcement.

The Federal Affirmative Action Program. Research estimating the impacts of affirmative action in federal contracting shows positive effects on increasing the employment shares of minorities and women at workplaces, particularly for Black women and men. Findings also reveal that these benefits have been sensitive to presidential administrations' support and funding of an equal opportunity regulatory agenda. Most notably, the positive impacts of the 1960s and 1970s were weakened during the 1980s resulting in reduced oversight and enforcement.⁴³ This suggests that during periods when there is greater top-down leadership and commitment to these agencies and programs, enforcement had more leverage and employers were more

responsive. Other research shows that the power of internal EEO stakeholders within firms is magnified among federal contractors.⁴⁴ Further evidence shows that US states showed sharp declines in Black and Hispanic female and male employment shares in state and local government public employment in the aftermath of affirmative action bans. In the case of black women, these declines grew in magnitude over time.⁴⁵ Affirmative action works, but only when enforced.

OFCCP Reviews. By statute, the OFCCP schedules limited evaluations of federal contractor establishments for compliance with U.S. equal employment laws and federal contractor affirmative action requirements. Additionally, OFCCP is required to conduct in-depth reviews, or “focus and quality reviews”, which include on-site reviews of a randomly selected subset of federal contractor establishments. New research looking at the contemporary impact of these randomized in-depth OFCCP reviews finds that they do not result in statistically discernible change in workplace minority and female composition, even for establishments with low levels of minority and female employment. This suggests that the this program does not provide sufficient bite for firms to be responsive in terms of their diversity composition.⁴⁶

Disability Reporting. Updated 2014 OFCCP regulations required federal contractors to offer applicants and employees the opportunity to self-identify as a person with a disability and encouraged them to use these data to understand their progress toward a 7% utilization goal for the employment of individuals with disabilities.⁴⁷ A survey of federal contractors shows mixed responses, but at least some employers changed their human resource practices as a result of the new rules and increased disability hiring.⁴⁸ Further analyses of the initial effect of the 503 regulations using OFCCP audits of federal contractors reveals a reduction in the probability of the OFCCP identifying an EEO violation on the basis of disability along with sustained lower probabilities in the years following the policy change.⁴⁹ This example points to the potential power of increased reporting requirements and the encouragement of firms to set employment goals as strategies to reduce employment discrimination.

So What Works?

Looking back to the initial successes for the EEO regulatory regime of the 1960s and 1970s, it is clear that when legal shifts in the context of public and legislative pressure produce uncertainty for managers and empower internal EEO advocates that change in employment outcomes can occur. During this early period, and more recently around LGBTQ employment diversity, when the EEOC has broadened the scope of legal protections, firms have tended to follow their interpretations while the courts or legislature have endorsed EEOC leadership.⁵⁰ Contemporary research on both EEOC and OFCCP enforcement finds that, while direct enforcement efforts tend to be ineffective and can even generate backlash at the firm level, enforcement efforts can have an indirect positive effect on hiring diversity for other firms in the same labor market.⁵¹ On the enforcement side, it is normative leadership and uncertainty as to the rules which seem to consistently lead to changes in managerial EEO practices.⁵²

In the end, it is shifts in industry and corporate cultures, not regulatory interventions, that produce firm level diversity progress.⁵³ Thus regulatory action needs to target systemic inequalities associated with firms, industries, and perhaps labor markets with particularly low levels of diversity and high levels of discrimination. This is not to say that corporate diversity programs always work. In fact, the evidence is clear that most diversity initiatives, including widespread diversity training, internal grievance procedures, and public corporate equal opportunity commitments, are ineffective in changing workplace hiring practices.⁵⁴ The practices that appear to be most consistently effective are firms setting hiring, promotion, and pay equity goals and holding their managers accountable for reaching them.⁵⁵ This is best accomplished by enlisting managers as problem solvers rather than in a adversies in the regulatory environment.⁵⁶ Legal enforcement tends to divert discrimination problems into legal defense strategies instead of making them routine managerial responsibilities.⁵⁷

What is to be Done?

Something needs to change. Current legalistic and administrative enforcement practices have failed to move the needle on employment equity for decades. The evidence is that much enforcement and firm legal compliance is symbolic and that legal remedies are weak and largely ineffective. Yet efforts to produce uncertainty, empower organizational EEO stakeholders, goals and accountability, as well as data transparency can all work. We outline the implications of what we know for what can be done.

Federal Labor Law

Much gender and racial inequality, whether rooted in discrimination or not, can be addressed by changing the basic structure of inequality and social services. These initiatives do not target discrimination, but rather the consequences of discrimination and inequalities more generally.

Raise the Minimum Wage. Racial and gender wage gaps are produced in large part by the segregation of groups between low and high wage jobs. More than 40% of U.S. jobs pay less than \$15/hour.⁵⁸ We estimate that raising the federal minimum wage to \$15 an hour would reduce the white female-white male wage gap by a quarter, and that of Hispanic and Black men and women with white men by a third.⁵⁹ A higher minimum wage must be pegged to inflation to have enduring effects. Sub-minimum wages for agricultural, tipped, and other workers must be eliminated. The best research suggests that there is no net employment loss with higher minimum wages and that some positive wage gains for jobs near the minimum wage.⁶⁰

Fight Wage Theft. Wage theft by employers is common among low wage workers, and is particularly concentrated among racial minorities, immigrants, and women. ⁶¹ Raising the minimum wage will encourage increased employer wage theft. If raising the minimum wage is to have its full benefit for workers in general and reducing gender and race/ethnic wage inequality specifically, the Department of Labor must expand its efforts to fight wage theft..

Expand Subsidized Child Care and Paid Family/Medical Leave. The gender pay gap is partially produced by stubborn motherhood pay penalties, some of which are produced by discrimination tied to caregiving responsibilities. Expansion of parents' access to childcare and increased ability to care for families when sick will reduce the cost of care giving in the short run and may reduce stereotype discrimination in the long run. Low income households, which are disproportionately minority and female headed, are particularly sensitive to the cost of family care.

Regulatory Retargeting

The research is clear that simply intensifying individual oriented legal approaches to EEO regulation is unlikely to reduce discriminatory segregation and pay practices. At the same time the science is increasingly clear as to what works at the organization level in order to move the needle toward equal employment opportunities: normative pressure on firms, accountability and goal setting, and enlisting middle managers in diversity efforts.

The EEOC and OFCCP should

1. Shift resources from legal/process evaluations to outcome-based assessments of firm EEO performance.
2. Adopt strategies to empower firm's internal EEO stakeholders, not their legal defense teams
 - a. with transparent useful data analytics
 - b. with clear transmission of evidence based best practices
 - c. with firm specific EEOC data on diversity and discrimination claims benchmarked to local labor markets and same industry firms
3. Provide leadership on best practices, goal setting and accountability.
 - a. Develop a best practice pay equity analysis that broadens comparison jobs to similarly skilled occupational groups.
 - b. The EEOC could develop best practice guidelines that flag practices that are particularly problematic in their own discrimination charge data (e.g. for LGBTQ discrimination these include sexual harassment, misgendering of employees, access to bathrooms and locker rooms, benefits related to transitioning).
 - c. Encourage firm setting of transparent diversity goals and targets.
 - d. Encourage firm transparent internal and external benchmarking.
 - e. Require firm reports on internal EEO practices to the EEOC and OFCCP.
 - f. Require federal contractors to deposit their Affirmative Action Plans with the OFCCP.

- g. Provide firm specific targeted feedback to employers in the form of benchmarking using EEOC diversity and pay data surveys.
- 4. Strengthen the efficacy of current regulatory practices
 - a. Increase regulatory focus on hiring and promotion-based firm and job segregation.
 - b. Expand post-regulatory firm accountability, require employers to draw up goals and timetables, and report progress. EEOC institutes automated monitoring of its own survey responses and future discrimination complaints for closed discrimination complaints.
 - c. Increased transparency with federal data on the regulatory process and outcomes.
 - d. Within the limits of confidentiality reporting, increase transparency on firm specific diversity and discrimination trajectories.
 - e. Increase coordination of EEO efforts among federal agencies (EEOC, OFCCP, DOJ, but also all other agencies with EEO employment responsibilities such as DOL and OSHA).
 - f. Evaluate EEO efforts within the federal government.
 - g. Move from complaint driven to systemic enforcement targeting use data analytics to identify problematic firms, industries, and places.
- 5. Develop a data driven infrastructure for enforcement activities.
 - a. Extend and deepen the strong support Trump-era EEOC Commission Chairs Lipnik and Dhillon have provided for data analytic modernization.

Date Transparency, Quality, and Utility

The EEOC and OFCCP need to move from routinized process-oriented administration toward data-driven outcome-based regulatory activities. This is impossible without good quality data, presented transparently to stakeholders and the internal and external capacity to make the most potential of these data efforts. The recommendations below focus on reaching those goals, but also reflect the deep knowledge of data quality and lacunae at the Center for Employment Equity and in the EEODataNet community more generally.

1. The EEOC and OFCCP treat EEOC surveys as confidential information. This follows from a requirement targeted at the private sector in the 1964 Civil Rights Act. Other federal agencies founded only a few years later report firm specific data. For example OSHA reports [establishment specific injury data](#).
 - a. The 1972 amendment to the Civil Rights Act extended EEOC data collection to state and local governments, but was silent as to whether that data should be treated as confidential. The EEOC currently treats state and local survey data as confidential. This interpretation should be reconsidered and the EEOC should consider publicly releasing state and local diversity and pay data.
 - b. Compel the OFCCP to disclose federal contractor EEO-1 surveys through FOIA without going through the notification/objection process, following

the case law in *Ctr. for Investigative Reporting v. U.S. Dep't of Labor*, 424 F. Supp. 3d 771, 780 (N.D. Cal. 2019).

- c. When the OFCCP gives notice of a FOIA request to companies, it should maintain its own decision making authority, employing the *Argus Leader* standard that information be "customarily and actually confidential." The notion that either a firm's occupational or race/gender composition are customarily confidential is at this point simply not true. Information on both is available for nominal fees from vendors such as LinkedIn, Glassdoor, and multiple marketing platforms (e.g. *Google*, Facebook).
- d. Encourage voluntary disclosure of EEO1 reports by private sector firms.
2. Develop transparent sophisticated EEOC reporting to public stakeholders to replace the static tables the EEOC has been releasing without modification since 1966.
 - a. The newly released [EEOC Explore](#) is a useful prototype for such reporting, including both a searchable interface and confidentiality protecting downloadable source data.
 - b. [EEOC Explore](#) should be expanded to include other EEOC surveys and data on discrimination charges.
 - c. The EEOC is unique among federal agencies in reporting employment and discrimination charge counts that are not population adjusted. [EEOC Explore](#) should report, in addition to counts, rates in order for publics to understand disparities in employment and discrimination charges relative to appropriate at-risk populations.
 - d. Examples of such reporting using EEOC survey and discrimination charge data already exist at [Diversity Analytics](#), a product of the Center for Employment Equity.
3. Strengthen internal data analytic capacity at the EEOC and OFCCP.
 - a. Fast track OMB approval of the EEOC's Federal Data Center application
 - b. The EEOC should create internal capacity to track firm progress and regress on diversity and discrimination charges.
 - c. Institute automated diversity and discrimination charge monitoring after charge resolution to track firm performance.
 - i. Use AI and automated data tools to streamline process and reduce costs .
 - d. Allocate Resources to support and expand initial efforts to determine the efficacy of Artificial Intelligence/Machine Learning approaches to complement the mission of EEOC.
 - e. Develop and use external scientific capacity to support EEOC and OFCCP efforts. Consider the 2012-2016 [EEODataNet](#) model.
4. Accelerate the current EEOC Data Collection Modernization plan.
 - a. Develop and implement a valid, reliable, and fit-for-use collection of compensation data which aligns with the recommendations of the forthcoming National Academies Consensus Panel Report.

- i. Work with the state of California, which has recently mandated pay data collection, to develop coordinated use of pay data for enforcement and reporting activity.
 - b. Improve data quality and completeness by continuing support of modernization efforts of EEO-1,3,4,5 data collections.
 - i. Use the IRS Business Master File to identify new firms and agencies that should be responding to EEOC surveys.
 - ii. Develop establishment and firm reporting protocols for protected classes beyond race and gender.
 1. The EEOC should address the implications of the Bostock decision for data collection on sexual orientation and gender identity on the EEO surveys.
 2. Develop data items for firm disability and age diversity profiles.
 - iii. Collect consistent yearly data on establishment EEO practices.
 - iv. Create collaborations among stakeholders including researchers, employers, and government partners to support the development of enhanced data collection processes that are minimally burdensome and maximally useful.
 - v. Gaps in EEO1 survey response reporting are common.
 1. Develop better tracking of EEOC survey non-compliance.
 2. Implement automated alerts when an establishment that reported in the prior year fails to report.
 - vi. There are instances in which establishments report widely different or implausible employment numbers one year to the next. Some of these are likely data errors. Implement automated alerts to both the EEOC and submitting employer when there is unusually large/small employment growth and recheck with reporting establishment.
 - vii. Pay bands in the EEO-4 survey have not been updated in decades. Update these pay bands to reflect contemporary pay levels.
 - viii. The EEO-4 currently collects data on “Other than full-time including temporary employees.” This should be clarified to “Other than full-time, including part-time, temporary, and contract employees.” Consider implementing the same requirement for the EEO-1 survey.
 - c. Ensure that 21st century data quality control techniques and quality assurance practices are designed into the IMS system replacement for the recording of discrimination charge data. Better data quality is needed in order to increase the utility of discrimination charge data for internal EEOC evaluation of the effectiveness and efficiency of its practices, as well as facilitate research on the effectiveness of the charge administration process.
 - i. Include a statement from the charging party as to what occurred that led to a discrimination claim.
 - ii. Collect occupation and wage/salary information from the charging party.

- iii. Collect relationship (e.g. co-worker, direct supervisor, manager) data about individuals alleged to be the source of discriminatory behavior
 - iv. Collect data on sexual orientation and gender identity as part of the intake forms and charge narratives for all charges alleging discrimination on these bases. This is particularly relevant for African American charging parties, whose charges disproportionately lack such information in LGBT discrimination charges.
 - v. Add a data field explaining why the EEOC decided to proceed with a case versus not.
 - vi. Require that industry field be entered on intake.
 - vii. Require that both establishment and firm fields are distinct and entered on intake.
 - viii. Implement an automated look up function to match to establishment and firm identifiers.
 - ix. Require EEOC intake staff to input the EEO firm and establishment number. This would allow the EEOC and researchers to more easily and confidently link the discrimination charge data to EEO-1 and EEO-4 reports.
 - x. Improve time-stamped data entries by recording all the steps taken in the charge resolution process. This will provide a better understanding of the process charges go through to be resolved.
 - xi. Require EEOC staff compliance with data quality control and quality assurance requirements integration of EEOC charge and employment data
5. Implement consistent firm identifiers that can be linked across time, charge, and survey.
 - a. The best approach would be to use the IRS' Employer Identification Numbers (EINs) which would further allow data to be combined with other federal databases.
6. Develop a legislative proposal that amends Internal Revenue Code Section 6103(d) granting authority for IRS to share Federal Tax Information from the IRS Business Master File (e.g. Employer Identification Numbers (EINs), names and addresses) with the EEOC. In the meantime, consider using the OFCCPs access to EIN via the existing IRS code sharing with the Department of Labor.
7. Expand scientific analyses of input into EEO regulatory efforts.
 - a. Continue support and open the EEOC Data Enclave at the National Opinion Research Center.
 - i. Permit researchers no cost access in order to leverage large scale, low cost expertise to support EEOC/OFCCP regulatory efforts.
 - ii. Deposit all EEOC surveys and charge data, including qualitative components, into the data enclave.

- b. Pursue a collaboration with the Bureau of the Census's Research Data Centers in order to allow merging of EEOC and other federal data on individuals and firms for scientific analyses.
- c. Utilize non-partisan scientific expertise.
 - i. Consider reinstating yearly [EEODataNet](#) conferences at the EEOC.
- d. Consider identifying and sponsoring critical research projects, such as:
 - i. A contemporary review of progress in racial employment equity, with a specific focus on the role of segregation and discrimination mechanisms
 - ii. A series of contemporary studies of the efficacy of OFCCP and EEOC regulatory practices with a focus on post investigation or audit employment diversity and discrimination charge filings
 - iii. Contemporary case studies of leader firms with positive EEO records and trajectories
 1. For example, identify companies that already allow employees to self-identify their sexual orientation and gender identity, and develop a pilot project leading to best practice guidelines for all employers.
 - iv. Development of artificial intelligence/machine learning approaches to the analysis of linked charge administrative and EEOC survey data
 - v. The potential impact of on-line recruitment platforms and AI/machine learnings algorithms in resume screening in producing segregation and discrimination
 - vi. What are the implications of platform mediated and other sub-contractor work practices for race, gender, age and disability earnings and disparities?
 - vii. Qualitative studies of the experiences and impact of EEOC enforcement on discrimination charging parties and employers

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