

August 15, 2016

Mr. Joseph B. Nye
Policy Analyst
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Agency No. 3046-0007, Agency Information Collection Activities; Notice of Submission for Office of Management and Budget (OMB) Review, Final Comment Request: Revision of the Employer Information Report (EEO-1)

On behalf of the more than 6,000 members of the American Road and Transportation Builders Association (ARTBA), we respectfully offer comments on the July 14 *Federal Register* notice of information collection regarding the proposed revision of the EEO-1 by the Equal Employment Opportunity Commission (EEOC). ARTBA has also submitted comments on this issue directly to the EEOC on April 1.

ARTBA's membership includes private and public sector members that are integral to the planning, designing, construction and maintenance of the nation's roadways, waterways, bridges, ports, airports, rail and transit systems. Our industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs. ARTBA members – especially transportation construction contracting firms – must comply with EEOC regulations. Therefore, any proposed revisions to the EEO-1 would directly impact them.

The EEO-1 form requires information on employees' ethnicity, race and gender by job category. The EEOC has proposed expanding it for firms with 100 or more employees to require that the form include salary data as well. The pay data, EEOC has stated, will "be used to assess complaints of discrimination, focus investigations, and identify employers with existing pay disparities that might warrant further examination."

The EEOC has already provided one opportunity to comment on the proposed changes to the EEO-1 earlier this year. Unfortunately, after hearing concerns from a number of regulated entities, including ARTBA, the EEOC has not seen fit to alter its proposal in any significant way. ARTBA hopes OMB will also examine the concerns which have been raised and direct the EEOC to either revisit or abandon its proposed changes to the EEO-1.

ARTBA's members work diligently to build and maintain transportation improvement projects in as safe and efficient a manner as possible, while minimizing costs for the taxpayers and complying with a myriad of federal and state regulations.



ARTBA looks at all proposed new federal mandates through this context. Generally speaking, the proposed EEO-1 revisions would unnecessarily increase the amount of data collected and the administrative burden on affected employers, while not yielding accurate, useful information for its stated purpose. The proposal also carries security and legal risks for the firms submitting the information. For all these reasons, ARTBA categorically opposes the EEOC's proposed new mandate.

Data Out of Context

The transportation construction industry is very unique. Nonetheless, the EEOC proposes to obtain salary information from industry employers through a very generic source, the data found on the federal W-2 tax forms. As stated in the July 14 Federal Register notice, the EEOC justifies the use of W-2 data “because it is already calculated by employers, therefor limiting burden, and because it is a comprehensive measure of pay that would be more likely to capture the effect of employment discrimination on different kinds of pay compensation.”

As ARTBA pointed out in our comments to the EEOC, this approach is problematic in that it would show an employee's salary, but provide absolutely no context as to how that salary is determined. In fact, transportation construction firms utilize a number of completely-permissible factors to make these determinations, including:

- shift time (i.e. day-time vs. night-time work hours),
- location of the job site (which can vary widely, because the work sites are generally transportation construction projects),
- specialized training of the employee,
- seniority,
- education, and
- job performance, among others.

W-2 forms do not include any of this information, nor would it be included on the revised EEO-1. It would be a travesty for regulators to conduct fishing expeditions predicated on such limited employer information. In an analysis using this information from the W-2, the EEOC could simply see one employee at pay level “X” and another at pay level “Y,” to draw conclusions out of context, and launch an investigation when, in actuality, no discriminatory practice exists at all. An excellent example of this is pay based on location, which is actually a practice also used by the federal government. An employee based in a rural area may earn less than an employee in an urban area simply because of cost-of-living differences. This would not be reflected on a W-2. Further, a W-2 does not take into account perhaps the most important factor in determining pay level—performance. Obviously, there is no room for this type of information in the EEOC proposal.

Moreover, it is easy to state that employers who do not discriminate will simply be exonerated at the conclusion of any such investigation. In reality, though, these employers would have to commit significant time and resources to defend themselves against scurrilous accusations based on incomplete information.

It should also be noted that many ARTBA members already conduct self-audits to guard against race- or gender-based pay disparities. This shows that ARTBA members are committed to the concept of equal work for equal pay, while opposing any form of employment discrimination.

Data Security and Related Issues

ARTBA also has serious concerns about the confidentiality of salary data once it is collected. The EEOC proposes to collect the data electronically, which introduces the possibility of a security breach through which sensitive, proprietary information could be publicly disclosed when the data is submitted or being maintained by the EEOC. Although the EEOC tried to offer reassurance at its March 16 public hearing by noting it had not experienced a data breach and consistently monitors its on-line security systems, this is of course not a guarantee that one could not occur in the future. There have been many high-level, damaging cyber-attacks on federal government servers, including those of the Internal Revenue Service and Office of Personnel Management, resulting in repercussions to innocent parties that will persist for many years. Since ARTBA submitted comments to the EEOC, one of the two major political parties in this country has also suffered a very significant and well-publicized data breach. Up until now, the EEOC has only collected data on ethnicity and gender, but the addition of salary data may make the agency a more attractive target for cyber-criminals.

The consequences of such a data breach would be very serious for any company. For example, any publication of salary data could have serious implications for employee morale. Also, in a competitive marketplace, firms could use leaked salary information to “poach” employees from their rivals. Finally, current or former employees and other parties could use this information to initiate civil litigation based solely on perceived discrepancies in pay, efforts that would be as equally misguided as the government investigations described above.

Added Costs

The EEOC’s proposed rule would add significant administrative costs to affected employers. Many employers manually enter their EEO-1 data as a common practice. According to some ARTBA members, adding W-2 information as a requirement could result in 25 or more additional hours of data entry and preparation for each report. Further, companies may have to invest in new software systems to comply with the EEOC’s revisions. Unfortunately, these added costs for transportation construction companies will simply result in more expensive transportation improvement projects at a time when transportation funding is constrained at all levels of government. As noted above, transportation construction firms take pride in maximizing efficiency in building these projects. However, cost increases from federal mandates, such as that proposed by the EEOC, would be unavoidable. It should also be noted that delays resulting from the additional EEOC requirements would run counter to recent efforts on the federal level to improve the project delivery process for transportation improvements.

Finally, ARTBA had requested time for a representative to speak during the EEOC’s public hearing held on March 16. The EEOC ultimately denied our request, but did not give any reason as to why. While ARTBA can appreciate the realities of time and space constraints at any public forum, there was no discussion by the EEOC as to why some organizations were allotted time for representatives to speak and others were not. As in these comments, ARTBA needs to give

voice to a very unique and critical industry on which the EEO-1 proposal would have a heavy impact. We therefore believe the OMB should instruct the EEOC to disclose how it decides on witnesses at its public forums. Further, the proposed EEO-1 revisions should be sent back to the EEOC with instructions for the EEOC to hold a public hearing where all interested parties are given the opportunity to speak.

ARTBA and its members are committed to full compliance with employment laws, including those related to pay equity. However, the current revisions to the EEO-1 form will do little to achieve this goal, while opening the door to unfounded litigation, data security breaches and costs increases in transportation projects. As such, ARTBA urges OMB to instruct the EEOC not to proceed with the proposed revisions to the EEO-1.

ARTBA and its members are always available to meet with the OMB and provide firsthand information on how the agency's proposals – currently or in the future – will affect the membership.

Thank you for considering these views.

Sincerely,

A handwritten signature in black ink that reads "T. Peter Ruane". The signature is written in a cursive, flowing style.

T. Peter Ruane
President & C.E.O.