



March 22, 2011

Jacqueline A. Berrien
Chair
Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20002
Via email to Public.Comments.RegulatoryReview@eoc.gov

Re: The EEOC's plan for retrospective analysis of significant regulations
pursuant to Executive Order 13563

Dear Chair Berrien,

The Employment Task Force of The Leadership Conference on Civil and Human Rights appreciates the opportunity to respond to the Equal Employment Opportunity Commission's request for public comment as it develops a plan to review its significant regulations. The Leadership Conference on Civil and Human Rights is a coalition charged by its diverse membership of more than 200 national organizations to promote and protect the rights of all persons in the United States.

The EEOC has undertaken this review pursuant to Executive Order 13563, "Improving Regulation and Regulatory Review." 76 Fed. Reg. 3821 (Jan. 21, 2011). Executive Order 13563 directs each federal agency to develop "a preliminary plan, consistent with law and its resources and regulatory priorities, under which the agency will periodically review its existing significant regulations to determine whether such regulations should be modified, streamlined, expanded, or repealed so as to make the agency's regulatory program more effective or less burdensome in achieving the regulatory objectives." Specifically, the EEOC "is soliciting public comment to assist in the development of its plan to periodically review existing significant regulations, including input on factors the Commission should consider, the process it should use, and the specific regulations that should be reviewed in the next two years."

The Employment Task Force supports the administration's effort to enable the EEOC to achieve its regulatory objectives more effectively. In reviewing its regulations, the EEOC should ensure that all regulations provide clarity and support vigorous enforcement of the civil rights laws. Strong and specific regulations provide important guidance to employers and employees about the meaning of civil rights laws, which can promote voluntary compliance. Regulations requiring reporting and data collection should be robust to enable the EEOC to identify and challenge unlawful discrimination.

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To that end, we urge the EEOC to finalize a number of proposed rules and to issue new or revised regulations in a number of areas. We would also like to take this opportunity to urge the EEOC to consider additional guidance in key areas.

The EEOC should issue the final rule under the ADA Amendments Act of 2008. The ADA Amendments Act revises the definition of “disability” to restore broad coverage to encompass impairments that substantially limit a major life activity. The Act also states that mitigating measures have no bearing in determining whether a disability qualifies under the law and clarifies coverage of impairments that are episodic or in remission and that, when active, substantially limit a major life activity. We urge the EEOC to issue guidance to provide further clarity.

The EEOC should finalize its proposed rule interpreting the disparate impact burden of proof and the “reasonable factors other than age” defense under the Age Discrimination in Employment Act. The new regulation will interpret the “reasonable factors other than age” defense, in light of the Supreme Court’s decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005). This regulation should also specify that the employer bears the burden of proof on this defense, consistent with the Supreme Court’s decision in *Meacham v. Knolls Atomic Laboratory*, 554 U.S. 84 (2008).

The EEOC should update its regulations to prohibit requests for age or date of birth on job applications. Many employers request date of birth information from job applicants. Such requests are included in both paper and electronic job applications. The EEOC should issue guidance to curtail this practice, which can contribute to unlawful age discrimination in violation of the ADEA.

The EEOC should issue new regulations to collect compensation data from employers. Just as the EEOC currently collects non-wage, demographic data about employers’ workforces in EEO Reports, the EEOC should collect wage data to improve efforts to combat wage discrimination.

The EEOC should issue new regulations to revise the EEO-1 form to collect more refined race data as well as disability data. In 2005, the EEO-1 form was revised in a manner that compromised the enforcement of anti-discrimination policies. The EEO-1 form no longer collects race data for those who identify as Hispanic or Latino. Additionally, a “two or more races” category was created, which diluted the number of racial minorities for purposes of analysis and hindered enforcement efforts. The EEO-1 form should collect race data for those who identify as Hispanic or Latino, and should collect more refined race data for those who would otherwise be reported in a meaningless “two or more races” category. Additionally, the EEO-1 form should collect disability information.

The EEOC should issue updated guidance on employers’ use of arrest and conviction records. Employer-conducted background checks tend to adversely impact persons of color.

Despite the disparate impact of such practices, many employers use arrest and conviction background checks as an overbroad hiring screen without proper business justification. In the wake of the Third Circuit decision in *El v. Septa*, 479 F.3d 232 (3d Cir. 2007), which called into question the EEOC's outdated guidance, the EEOC convened a meeting on this topic. However, the guidance has yet to be updated.

The EEOC should issue guidance on employers' use of credit checks. Employment decisions based on credit information tend to adversely impact persons of color, persons with disabilities, and women. Further, credit checks have not been demonstrated to be job-related and consistent with business necessity. The EEOC has made credit checks the subject of at least two meetings, but has yet to issue guidance for employers.

The EEOC should issue guidance on the potential legal implications of excluding the unemployed from consideration for job opportunities. The EEOC recently convened a meeting to examine the practice of excluding currently unemployed persons from applicant pools, including in job announcements. The EEOC heard testimony about the disparate impact of this practice on older workers, workers of color, women, and people with disabilities. The EEOC should issue guidance regarding the potential legal implications of reliance on such considerations.

We appreciate this opportunity to submit comments as the EEOC undertakes this review. If you have any questions, please contact Sarah Crawford, Director of Workplace Fairness at the National Partnership for Women & Families, at scrawford@nationalpartnership.org or 202-238-4852, or Lisa Bornstein, Senior Counsel at The Leadership Conference on Civil and Human Rights, at Bornstein@civilrights.org or 202-263-2856.

Sincerely,

The Employment Task Force of The Leadership Conference on Civil and Human Rights