



Statement of Lisa Ponder, J.D., SHRM-SCP

Vice President and Global HR Director

MWH Constructors, Inc.

Broomfield, Colorado

On Behalf of the

Society for Human Resource Management

Submitted to the

U.S. House Committee on Education and the Workforce,
Subcommittee on Workforce Protections

Hearing on

The Need for More Responsible Regulatory and Enforcement
Policies at the EEOC

Tuesday, May 23, 2017

Introduction

Chairman Byrne, Ranking Member Takano, I am Lisa Ponder, Vice President and Global Human Resources Director for MWH Constructors, Inc. (MWHC). MWHC is the construction arm of Stantec, a global engineering and construction company with over 23,000 employees. MWHC has 2,100 employees with 900 in the United States working in 17 states. Thank you for the opportunity to testify before the Committee on the need for responsible regulatory and enforcement policies at the U.S. Equal Employment Opportunity Commission (EEOC) and the revision to the EEO-1 Report to collect pay data, as well as the investigative process at the EEOC.

At MWHC, I develop compensation plans for more than 2,000 employees as well as design and lead our human resource (HR) strategies that help attract and retain the best talent for our company. In my more than 20 years' experience as an employment law attorney working in the field of HR, I have developed a keen understanding of compliance and employee relations. My legal and HR career includes experience with recruiting, developing compensation and benefits plans, and employee development as well as leading payroll.

I appear before you today on behalf of the Society for Human Resource Management (SHRM), where I have been a member for 12 years and currently serve as a member of SHRM's Advocacy Team. SHRM is the world's largest HR professional society, and for nearly seven decades the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM represents 285,000 members who are affiliated with more than 575 chapters in the United States and subsidiary offices in China, India and United Arab Emirates.

The Equal Employment Opportunity Commission ("EEOC" or "Commission") plays a critical role in ensuring that employees have equal opportunity to work in environments that are free from discrimination. Just as importantly, the Commission educates employers to help ensure they take effective action to prevent discrimination and address it appropriately whenever found. SHRM strongly supports the goals of the EEOC and has a long-standing partnership with the agency in its efforts to inform and educate the employer community on these important issues.

Further, SHRM strongly supports nondiscrimination in all aspects of employment and believes compensation decisions should be based on an individual's qualifications and ability to perform a job, not on characteristics that have no bearing on job performance. To assist HR professionals, SHRM provides a variety of educational resources for its members on issues related to nondiscrimination in the workplace, including compensation. Nearly all SHRM conferences address these topics in addition to resources like articles, toolkits, and webinars available on the SHRM website.

In my testimony, I will address the limitations of the information sought by the Commission in its revised EEO-1 report and the challenges HR will face collecting and reporting the compensation data. In addition, I will discuss EEOC's investigative process and proposed reforms that would meet the needs of the 21st Century work environment.

The Role of Compensation in an Organization's Talent Management Strategy

One of the key focuses for HR overall is managing talent to create a world-class work environment. One aspect of talent management includes creating an effective total rewards strategy to recruit and retain employees that is made up of compensation, benefits, personal growth opportunities and increasingly workplace flexibility options. I'd like to spend a few minutes describing how organizations approach the development of a total rewards strategy because I think it helps provide context for understanding the role compensation plays in the workplace.

In developing a total rewards strategy, HR seeks to provide the employer with an approach for compensating employees that is compatible with the organization's mission, strategy and culture. The strategy must be appropriate for the specific workforce and it needs to be internally and externally equitable.

The degree of market competition, the level of product demand and industry characteristics all have an influence on compensation and benefits philosophy. To effectively recruit new employees and retain existing ones, an organization must have internal equity, where employees feel that performance or job differences result in corresponding differences in rewards that are fair. Organizations also must ensure external equity where an organization's compensation levels and benefits are competitive with organizations in the same labor market that compete for the same employees. An organization is likely to use a combination of strategies in approaching pay. For example, for critical jobs and competencies, the organization may decide to lead the competition in compensation, whereas in other areas, the organization may match what its competitors are paying their employees in the local market or industry.

Once an organization has defined its compensation philosophy, HR creates a pay system which consists of grouping jobs into pay grades and creating a pay range that sets the upper and lower limits of compensation in each grade based on experience, skills and competencies. The midpoint is often considered the market rate paid to an experienced employee meeting performance expectations.

A well-designed pay system not only helps attract new employees but also plays an important role in motivating and retaining current employees. Additionally, an effective compensation system will include specific pay practices to help an organization achieve its goals. For example, merit pay or pay for performance ties subsequent wage increases to performance and the degree to which job mastery is attained. Other pay practices may include productivity-based pay determined by the employee's output, such as a piece-rate system, as well as person-based pay, which ties pay to desired employee characteristics such as knowledge, including certifications and other education credentials; skills; and competencies that an individual employee may possess, such as experience directing or training others.

Of course, a variety of pay practices also affect take-home pay: cost-of-living adjustments; general pay increases based on local competitive markets; seniority increases; lump-sum and performance bonuses; as well as differential pay based on the type of work. Differential pay includes additional pay for less desirable shifts; emergency shifts; premium pay for working

holidays or extra hours; hazard pay; on-call pay; reporting pay; travel pay; and overtime pay. Geographic differential pay includes accommodating cost-of-living in different locations; attracting workers to certain locations; or foreign pay. Incentive pay for meeting organizational goals in productivity or sales is also common.

As you can see, employers design their pay structures to reflect the business goals the organization is trying to achieve, while addressing the need to attract qualified applicants and retain qualified employees who are motivated by the opportunity and rewards offered by that employer.

To remain effective, pay structures must be re-evaluated over time to ensure the ranges remain both internally equitable and externally competitive. In fact, an essential part of maintaining equity and fairness in the workplace is regular evaluation of the organization's total rewards strategy—including pay, benefits, performance, professional development and other career opportunities. It is also important that employers share their compensation philosophy throughout the organization and are transparent about their compensation practices.

Even with all the legal and HR expertise that goes into creating equitable pay structures, the gender pay gap between men and women persists. There have been numerous studies analyzing the pay differential, yet disagreements exist as to the size of the gap. Furthermore, a complete explanation of the reasons for the pay gap remains elusive. Some of the most recent work in determining the factors that influence pay differences between men and women point to more nuanced factors. Claudia Goldin, in her research, describes the cost of “temporal flexibility” and Anne-Marie Slaughter similarly refers to the “motherhood” or “care” penalty that leads many women to pursue jobs that prioritize flexibility over salary. One powerful way to decrease that gap, it is argued, is to increase the availability of workplace flexibility. SHRM has championed the creation of flexible workplaces to benefit all employees – men and women alike – by providing training materials to help enhance flexibility in all types of workplaces and by honoring employers that are achieving results in this area through our *When Work Works* Award.

One important factor in an employee's wage differential is that employee's own chosen career path – previous jobs, departments, experience, education, and geographic locations all affect pay. Similarly, levels of responsibility, such as the number and type of direct reports, oversight responsibilities for budgets or customer accounts, and performance history affect individual compensation.

From the HR perspective, these differences in knowledge, skill, ability, proficiency, responsibility, and geographic location, provide a legitimate basis for differences in pay among employees doing similar work. The key, however, is figuring out what is causing the wage differential and what amount of it is due to discrimination. Unfortunately, the data the EEOC wants to collect from employers does not help identify those employers with illegal and discriminatory practices.

Collecting Data by EEO-1 Category

The EEOC's revision to collect compensation data at the level of EEO-1 job category is unlikely to shed much light on whether an employer's pay practices are discriminatory. This is because each EEO-1 job category includes a wide range of jobs, for which vastly different rates of pay are paid based on a variety of legitimate, nondiscriminatory factors. In MWHC's case for example, our company reports all our project engineers in one job category on the report – "professionals." MWHC reported 1,100 employees in that category for 2016 – 307 women and 793 men. The vast majority of these professionals are some type of engineer. However, these engineers range in levels of experience from just out of college to more than 20 years of experience. Many of these engineers will grow in expertise and knowledge, and will remain individual contributors. This fact will prevent them from moving into the First/Mid-Level Officials and Managers Job Categories.

MWHC reports all its engineers in the professional category in the EEO-1 report. Our engineering group includes young people right out of college all the way up to senior engineers with over thirty years of experience. We pay our more senior engineers with 20-30 years of industry experience more than we pay our millennial engineers just out of school with 1-5 years of experience. The number of women engineers in the baby boomer generation is approximately 5 percent in our industry, so we have very few senior women engineers. However, the number of women engineers in the millennial generation is closer to 20 percent in our industry, so we have many more junior women engineers. Reporting both groups in one job category as required under the new EEO-1 Report will produce a result showing that we pay our male professionals more than our female professionals. There is no way to show that in reality we pay our senior engineers more than we pay those with much less experience. There will appear to be a pay differential based on gender when in fact the pay differential is based on years of experience.

Looking at only the data reported by the EEO-1 Report, our company will appear to be discriminating against women engineers – it will show a pay differential where none exists. There is no way to show the experience or responsibility levels that dictate an individual's compensation in the EEO-1 report. Not having the ability to counter the imbalance of the male-to-female ratio in the engineering field leads to a false narrative that could discourage women from pursuing a career in the science, technology, engineering and math fields.

As a multistate employer, the EEO-1 Report compounds this problem for our company because we are required to provide this data for all establishments that have more than 50 employees. MWHC has various offices and project sites that are divided by role – corporate or project. At our corporate offices, we have a good balance of gender diversity. Whereas at some of our construction project sites, we only have pure field construction positions that are predominately male. Therefore, our report by establishment shows a misrepresentation of our total workforce. Again, this is a false narrative portrayed by the EEO-1 Report.

Collecting Aggregated W-2 Gross Income in the Revised EEO-1 Report

In the EEO-1 Report revision, the collection of W-2 gross income information is misplaced for its stated purpose. As the agency recognizes, W-2 gross income includes other non-

discriminatory variables that may impact earnings, including shift differentials, bonuses, commissions, and overtime compensation. Thus, while this data may provide the agency a broader view of pay practices, collecting this data will not allow the EEOC to evaluate comparable compensation data points.

For example, two engineers at MWHC could have different W-2 gross wages if one was excused from working overtime hours as a reasonable accommodation under the Americans with Disabilities Act (ADA), while the other not only worked continuously throughout the year but also worked all overtime hours offered to her. Providing hours worked by both employees does not adequately account for the differences in pay because there is no way to account for the fact that some of the hours of one employee were paid at a premium rate, while the other employee asked to be excused from all overtime hours for a legitimate, nondiscriminatory reason.

Likewise, two employees with the same job title may have different W-2 gross wage information in a calendar year if one of the employees receives a \$25,000 signing bonus that year and the other does not. This is the case even if the other employee received the same \$25,000 signing bonus when he or she began employment in a different EEO-1 reporting year. If the two employees are of different races or genders, aggregating the W-2 wage information of these two employees will make it appear as if there is a potential pay discrimination issue. Again, reporting total hours worked for these two employees would not account for the legitimate, nondiscriminatory reason for the difference in pay.

Collecting Total Hours Worked

The EEOC's revision would require that employers report actual hours worked by employees based on race/ethnicity and gender in each EEO-1 job category. Most SHRM members do not collect data of actual hours worked for employees that are classified as exempt from overtime under the Fair Labor Standards Act. As the Committee knows, exempt employees are compensated for their performance and for accomplishing organizational goals, not for hours worked on the job. The burden associated with collecting actual hours worked for exempt employees, and the impact this would have on other compliance obligations as well as overall company culture, should not be underestimated.

Under the revision, employers that do not collect data of actual hours worked would be expected to use a default hours worked – estimate of 40 hours per week for all full-time exempt employees. However, not all employers adopt a 40-hour workweek; the “standard” workweek for some employers may be 35 or 37.5 hours. In addition, in some local jurisdictions, the maximum workweek for some professions is established by law at a number below 40 hours per workweek. These differences in the standard workweek across employers are not captured in the revision, even though such differences might have a direct impact on how one employer's summary pay data compares to another employer's summary pay data.

Regardless of whether an employer's “standard” workweek is 40 hours, 37.5 hours or 35 hours, many exempt employees regularly work hours that vary from their employer's standard workweek. In these circumstances, using a single default hours worked figure for all exempt employees will lead to anomalous results when looking at pay data in the broad EEO-1 job

categories. For example, adopting the assumption that all exempt employees categorized as professionals work 2,080 hours each year (40 hours/week) does not accurately reflect that one professional, such as a doctor or a lawyer who is female may be more highly compensated precisely because she is expected to be available to handle work matters that arise outside of normal business hours, thus requiring that she work more than 2,080 hours in a year. Yet, the salary of this employee would be averaged with the salary of a lower earning male professional accountant who is paid less in part because he generally does not work outside normal business hours, without any way of accounting for the increased number of hours worked by the exempt female employee.

Reporting total actual hours worked without providing additional information also fails to account for the personal choices some employees make. For example, if two non-exempt employees are both offered the same amount of voluntary overtime, but only one agrees to work the additional hours, how will the agency view this data when it is reported in the employer's annual filing? Under the agency's revision, the pay and hours worked for one employee will be higher than the other, but there will be no way for the employer to indicate that the difference in pay was due to employee choice, rather than any decision by the employer. While the EEOC's revision suggests that collecting this type of data will allow the government to evaluate whether there are barriers to equal opportunity for earning other types of compensation beyond base salary, this example aptly illustrates why drawing any conclusions from this type of data would be flawed.

Given the above limitations associated with collecting total hours worked for exempt employees, SHRM is concerned that any data reported would not be a reliable approximation of the number of actual hours worked. This certain ambiguity raises serious doubt regarding whether the stated purpose of addressing the pay differential can be accomplished from the information collected.

Concerns About Confidentiality

SHRM and its members are very concerned about the confidentiality of the compensation data the EEOC intends to collect. The EEOC's revision would gather very specific compensation information by establishments, including very small establishments, using a web-based format. For many small employers, and even larger employers with small establishments such as MWHC, reporting data in this manner will result in the reporting of individual, employee-level data. Our concerns are not just focused on protecting our companies, but also on protecting our employees, many of whom would not be happy if their personal pay information was widely disclosed because of a data breach of the EEO-1 reporting system.

Furthermore, large employers like MWHC currently e-mail their EEO-1 Reports to the EEOC for batch uploading. It goes without saying that this is obviously not a secure way to transmit large amounts of confidential salary and competitive information, yet the EEOC's revision makes no mention of how the agency plans to revise its own protocols to ensure that employers can safely report their compensation information to the government. In its comments to the EEOC in April 2016, SHRM recommended that the Commission should not move forward with

the implementation of any compensation data collection tool until appropriate data security safeguards are developed, tested and perfected to ensure protection of employees' pay data¹.

Suggested Improvements to the EEOC Complaint Process

Over the course of my career in HR, I have had experience with the EEOC complaints process and see opportunities for improvement in case processing from the employer perspective. In my experience, once the employer has responded to the complaint, the undetermined review period begins. Most of the time, MWHC did not hear anything back from the EEOC for months despite the statute's requirement that the Commission complete its investigation within 180 days. The delay in processing cases hurts both the employee and the employer. The employee, if the case is meritorious, may have a hard time pursuing it after so much time has passed. Employers also value finality and knowing that they are not facing continued exposure on a complaint. In the last 10 years, many of our EEOC complaints have included an option to participate in a non-binding settlement conference with the investigator as the arbiter. If given this opportunity, MWHC always participates to try and reach a conclusion to the complaint in a fair and timely manner. Used properly, mediation and settlement processes can provide a fair, equitable and timely settlement to the employer and employee and can save time and resources for all involved – the employer, the employee and the Commission.

In my experience, the EEOC investigators want to do a good job and genuinely want to ensure people are not discriminated against. Unfortunately, they have too many cases to accomplish either of their endeavors. I have never had the EEOC find that the claim I have responded to had merit. About 50 percent of the claims I have responded to have been dismissed after the initial response. The other 50 percent, the EEOC found no reasonable cause to pursue action and the complaint was finally given back to the employee with a right-to-sue letter. In my experience, if a complaint does not have merit, it can sit on a pile of claims and wait for months or even years to move forward. However, if the claim deals with a “hot issue” like systemic gender discrimination, it moves at a reasonable or accelerated pace through the system.

The process could be improved with better focus on what the EEOC can and should be doing with the resources it has. Overburdening EEOC staff with a large caseload slows the process almost to a halt and with neither the employee or employer community served well. Employees with legitimate claims of discrimination can't wait to get their “right-to-sue” letters because there are private attorneys ready and willing to take on their cases. Those with weak claims are greatly impacting the overall process. The EEOC needs to find a way to better prioritize cases – an experienced investigator or attorney can ask the right questions quickly leaving them to make an appropriate and educated decision on the merit of the claim right from the start.

SHRM appreciates that the Commission has been struggling with this backlog for several years. SHRM encourages the EEOC to address reducing the backlog through directing its resources to encourage greater efforts at mediation and settlement and continuing to pursue a balance between individual discrimination claims and systemic claims. Proposals to require review of litigation by the commissioners themselves could help better balance the Commission's priorities.

¹ <https://www.regulations.gov/document?D=EEOC-2016-0002-0911>

Working with Employers

One area of positive actions with the EEOC is its efforts to inform, educate and gather input more frequently from the employer community. Similar to mediation, SHRM encourages additional educational and outreach efforts to the employer community to foster a working relationship between employers and the Commission which results in better employer practices. As a SHRM member, I have appreciated hearing from commissioners and EEOC staff speaking at SHRM conferences about the Commission's policy priorities and how the Commission is focusing its work. Having access to the Commission's multi-year strategic enforcement plans has helped put those areas of focus in the minds of employers.

SHRM and its members also appreciate the opportunity to provide input and expertise into the Commission's regulatory and educational activities as it considers issues affecting the workplace. Employers have appreciated the ability to provide written comment on proposed guidance that is not required to go through the formal rulemaking process. This guidance, as an interpretation of existing regulations and court cases, has a tremendous impact on employers' compliance, and as such, it is critical that employers and others affected by the guidance have the ability to review and provide insight and comment.

The goal of employers, along with the Commission, is to prevent discrimination before it happens. Employer education is key to that outcome. Many SHRM members and employers have benefitted from the EEOC's Training Institute, its seminars and courses. Proactive outreach to and education for employers, from both the Institute and certain regional offices, has been an important aspect of prevention.

The Commission's use of task forces also moves policy discussions in a positive direction. A good example of the EEOC reaching out to employers and other stakeholders was its recent Task Force on the Study of Harassment in the Workplace. This Task Force, which included SHRM members, as well as employment lawyers and employee representatives who had suffered harassment, carefully studied and considered the issue. This broad perspective resulted in a very helpful and useful report. Most significantly, the report included several checklists for HR and employers and a compilation of promising practices. Materials that are designed to assist, inspire and guide employers are critical to ensuring that organizations continue to innovate to create what we call a "world-class" work environment.

Employer Needs Regarding Regulation

When it comes to regulations, employers and HR value clarity and non-duplication. One recent major regulation promulgated by the Commission unfortunately missed this standard and is in need of additional modification to be consistent with federal law and other agency regulatory guidance.

In May of 2016, the EEOC issued final rules under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act on employer-sponsored workplace wellness programs. Guidance and clarification was badly needed on workplace wellness programs and this provided an opportunity to align regulations under these statutes with the existing

requirements of the Affordable Care Act and the Health Insurance Portability and Accountability Act.

Unfortunately, the final EEOC regulations were not consistent with the existing rules which only discourages employers from adopting wellness programs, invites additional litigation and further increases compliance costs for these plans. Therefore, it would be advantageous if the EEOC would reexamine these rules to provide ultimate clarity on what is allowable for wellness plans under the Affordable Care Act.

Conclusion

Mr. Chairman, thank you again for convening this hearing to examine the need for responsible regulatory and enforcement priorities at the EEOC. SHRM looks forward to continuing to work with the EEOC to institute effective nondiscriminatory practices for the 21st century workplace and workforce.

SHRM would also encourage the EEOC to reevaluate its investigative process to help reduce the backlog of outstanding complaints while at the same time providing finality to those employers facing complaints. In the end, both the employee and the employer gain from a fair and expeditious process.

As I outlined in my testimony, SHRM remains concerned that the revised EEO-1 Report will not prove useful in achieving the stated objective of curtailing unlawful compensation discrimination. Therefore, SHRM believes the recent changes to the EEO-1 Report should be rescinded.

Finally, SHRM members continue to implement employer-sponsored wellness programs to improve the health and well-being of all employees, but EEOC guidance regarding these programs has created ambiguity for many employers as they incorporate financial incentives for participation in wellness initiatives. SHRM encourages Congress to advance H.R. 1313, the Preserving Employee Wellness Programs Act, which would provide much needed clarity to employers on the use of financial incentives within employer wellness programs.

Thank you for your time. I appreciate the opportunity to share my perspective with you today and would be happy to answer any questions.