

Equal Employment Opportunity Commission
Preliminary Plan for Retrospective Analysis of Existing Rules
May 24, 2011

I. Executive Summary of Equal Employment Opportunity Commission's Preliminary Plan for Retrospective Review and Compliance with Executive Order 13563

Executive Order (E.O.) 13563 recognizes the importance of maintaining a consistent culture of retrospective review and analysis throughout the executive branch. Determining the costs and benefits of a regulation before it is implemented is a challenging task and it often cannot be accomplished with perfect precision. The Equal Employment Opportunity Commission's (EEOC or Commission) Preliminary Plan for Retrospective Review (Retrospective Review Plan or Plan) is designed to create a defined method and schedule for identifying certain significant rules that warrant repeal, modification, strengthening, complementing, or modernizing where necessary or appropriate for effective and efficient enforcement that considers costs and benefits, both quantifiable and non-quantifiable.

II. Scope of Plan

This Plan covers significant regulations (including regulations currently in effect and regulations that have not yet been finalized by the Commission) and existing information collections.

III. Public Access and Participation

- a. On March 8, 2011, the EEOC published a notice on the homepage of its website, www.eeoc.gov, seeking public comment on both the design of the Plan and the identification of specific rules that should be included in the Plan. *See* http://www.eeoc.gov/laws/regulations/comment_retrospective.cfm. That day, the EEOC also issued and posted online a press release regarding the request for comments and distributed it to press contacts. <http://www.eeoc.gov/eeoc/newsroom/release/3-8-11.cfm>.

The EEOC requested comments by March 22, 2011, but also stated that it would consider late-filed comments to the extent practicable. In fact, the EEOC considered the 10 comments that were submitted after March 22, 2011.

b. Summary of Public Comments

The EEOC sought input from members of the public, stakeholders, and internal components, such as EEOC's Offices of Field Programs and Office of General Counsel. The EEOC received a total of 53 comments (from 38 parties, some of whom filed multiple comments). Of the 38 commenters, 14 were organizations or law firms representing employers and civil rights groups, 16 were individual

members of the public, 5 were internal EEOC stakeholders, 2 were industry professionals and consultants, and 1 was an academic.

Several commenters addressed the retrospective review process, noting that the EEOC's public comment period was brief, and also suggesting that the EEOC's review should extend beyond significant regulations and encompass all regulations and guidance. Several civil rights groups stated that, due to the EEOC's limited resources, regulations already approved by OMB should not be subjected to further cost benefit analysis, especially since the elimination of discrimination is difficult to quantify.

Many commenters identified specific regulations for retrospective analysis, including regulations under Title VII of the Civil Rights Act of 1964, as amended (Title VII), the Americans with Disabilities Act of 1990, as amended (ADA), and the Age Discrimination in Employment Act of 1967, as amended (ADEA). Commenters also sought revisions to EEOC's private sector charge processing procedures, as well as EEOC's federal sector EEO complaint processing procedures and the EEO-1 survey.

The regulations that commenters most frequently cited for review were:

(1) The ADEA rulemaking addressing "reasonable factors other than age"

Various organizations suggested that EEOC should finalize the regulations regarding the ADEA disparate impact burden of proof and "reasonable factors other than age" defense. These commenters argued that without a final rule, there was confusion and lack of clarity, which could lead to an increased burden on covered entities. Representatives of employers expressed concern about the potential burden of the rule as proposed. See *Notice of Proposed Rulemaking: Definition of "Reasonable Factors Other Than Age" Under the Age Discrimination in Employment Act*, 75 Fed. Reg. 7212 (Feb. 18, 2010).

(2) The Commission's regulations on recordkeeping and reporting

Several civil rights organizations suggested that the Commission should issue new regulations in order to collect more complete compensation data to improve efforts to remedy wage discrimination. Other commenters urged that more specific data be collected on the EEO-1 survey, including disability data and more detailed race/ethnic data.

(3) The Commission's rules on Federal Sector EEO

Many of the comments submitted by individual members of the public cited the individual's own experience with this regulation. Internal stakeholders as well as federal EEO representatives submitted comments

requesting improvements to various aspects of the federal sector EEO process.

(4) The Uniform Guidelines on Employee Selection Procedures (UGESP)

Professionals from the field of industrial and organizational psychology, as well as the Society for Industrial and Organizational Psychology and the Center for Corporate Equality, submitted comments stating that the current standards for validating employee selection procedures are out of date and should be updated to comply with current research and practice.

Several organizations submitted comments urging the EEOC to update certain guidance and policy documents. For example:

Civil rights groups:

- AARP, the National Partnership for Women & Families, and the National Leadership Conference on Civil and Human Rights urged the Commission to issue guidance on discrimination against the unemployed; guidance on employer use of credit checks in hiring; and updated guidance on the use of arrest and conviction records for screening. Commenters noted that the Commission held public meetings about these topics in recent years.
- The American Association of People with Disabilities requested additional reasonable accommodation guidance in light of the Americans with Disabilities Act Amendments Act (ADAAA).
- The American Association of University Women requested guidance on wage discrimination.

Employer organizations:

- The Chamber of Commerce urged repeal of EEOC's July 1997 *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment*.
- Littler Mendelson, P.C. generally encouraged an open and transparent process for the EEOC's sub-regulatory documents, and urged the EEOC to solicit substantive feedback from employers before issuing guidance on criminal background checks and/or credit history.

- c. Due to time constraints and limited resources, the EEOC did not hold public meetings to obtain input on its Retrospective Review Plan.

IV. Current Agency Retrospective Review Independent of E.O. 13563

- a. The EEOC currently conducts retrospective analysis of existing regulations on several bases, including:

1. Legal: When the Congress and President enact new federal EEO laws, or when the Supreme Court issues a decision on the laws enforced by the Commission, the EEOC reviews existing regulations to determine whether any regulatory changes should be made. For example, the Commission's rulemaking concerning the ADEA's disparate impact burden of proof and "reasonable factors other than age" defense, which is now in the final rule stage, involves updating the EEOC's ADEA regulations in light of two Supreme Court decisions.
 2. Congressional and Executive Branch Input: Both congressional input and comments from other federal agencies are considered by the EEOC and, as appropriate, may prompt review of an existing regulation.
 3. Clarity and Interaction with Other Laws: The EEOC maximizes clarity of language and coordination with other laws, considering (a) whether significant regulations are clear to those with rights and responsibilities under the law, and (b) whether the regulations take into account the existence of other laws enacted after they went into effect and how they interact with those subsequently-enacted laws.
 4. Stakeholder Input: Both employees and employers, including organizations representing their respective interests, provide their input to the agency through meetings, letters, telephone calls, and questions at conferences. In addition, EEOC Chair Berrien plans to institute a process for stakeholder comment following Commission meetings. EEOC staff considers all input and responds, as appropriate, depending on the nature of the request.
- b. On the EEOC's fall 2010 Regulatory Agenda, all of the items in the categories for Final or Completed Rules are revisions to current regulations based on statutory amendments, Supreme Court decisions, or stakeholder/congressional input. See <http://www.regulations.gov/public/custom/jsp/navigation/main.jsp>.

V. Elements of Preliminary Plan/Compliance with E.O. 13563

a. Fostering a Culture of Retrospective Analysis

The EEOC currently has a robust culture of retrospective analysis. As soon as Congress enacts new EEO legislation or the Supreme Court issues a decision interpreting a statute enforced by the EEOC, agency attorneys analyze whether regulatory changes are necessary and present recommendations to the Chair, who oversees the regulatory process. A majority vote of the Commissioners is required in order to finalize a regulatory revision.

The EEOC also is in compliance with the Regulatory Flexibility Act (RFA). Under section 610 of the RFA, any regulations that have a significant economic impact on a substantial number of small entities must be reviewed within 10 years of implementation. The RFA review focuses on the regulation's impact on small business to determine whether the rule should be revised or rescinded.

In light of Executive Order 13563, the EEOC intends to strengthen its culture of retrospective analysis by developing a timeline for the periodic review of its existing significant regulations; identifying staff to conduct the review; and providing for ongoing public participation by, for example, asking the public to comment on regulations selected for retrospective review and by making the results of such reviews publicly available. If a future regulation has a significant economic impact on a substantial number of small entities, the EEOC also will comply with the retrospective review requirements of Section 610 of the RFA.

b. Prioritization

The factors and procedures the EEOC will use to guide its retrospective review process have been tailored to the EEOC's mission of promoting equality of opportunity in the workplace and enforcing federal EEO laws, as well as to the resources available to the agency. The EEOC will use the following factors to identify matters for retrospective review:

- Legal developments – legislation or Supreme Court decisions
- Enforcement input – experience derived from litigation or enforcement
- Public comments – including stakeholder, congressional, and executive branch input
- Clarity and interaction with other laws – clarity to stakeholders and effect of subsequently-enacted laws on existing regulations
- Changed circumstances – administrative policy, economic conditions, technological or scientific knowledge, new information about the effects of regulations including actual costs and/or benefits, or obsolete information

- Significant economic impact on a substantial number of small entities – usually identified through a review of the rule pursuant to Section 610 of the Regulatory Flexibility Act.
- Other requests for interpretation or petitions from the public

The EEOC prioritizes regulatory reviews that are mandated by new legislation or Supreme Court decisions.

c. Initial list of candidate rules for review over the next two years

1. ADEA Rulemaking: Disparate Impact Burden of Proof under the Age Discrimination in Employment Act; Reasonable Factors Other Than Age Under the Age Discrimination in Employment Act, 29 CFR Part 1625. Prior to the Supreme Court’s decision in *Smith v. City of Jackson*, 544 U.S. 228 (2005), Commission regulations interpreted the Age Discrimination in Employment Act (ADEA) to require employers to prove that actions with an age-based disparate impact were justified as a business necessity. In *Smith*, the Supreme Court announced that the defense was not business necessity but reasonable factors other than age (RFOA). Subsequently, the Supreme Court held in *Meacham v. Knolls Atomic Laboratory*, 131 S. Ct. 413 (2010), that employers bear the burden of proving the RFOA defense.

While the Court in *Smith* and *Meacham* decided major unresolved questions involving disparate impact and the ADEA, it did not provide guidance on the meaning of RFOA except to say that the RFOA defense is a lower standard than job-related and consistent with business necessity (the employer’s defense to ADEA impact in the EEOC’s prior rule). What this means in practice is still unclear to employers. The purpose of this EEOC rulemaking, and of including it in the retrospective review, is to provide clear guidance about this lower RFOA standard to employers as soon as possible.

2. Federal Sector Equal Employment Opportunity Complaint Processing, 29 CFR Part 1614. The federal sector process provides the framework by which federal employees and applicants seek redress of alleged employment discrimination by federal government employers. Clarifying and streamlining this regulation will ease the burdens of compliance.

The EEOC initiated this rulemaking to address specific proposed corrections and changes to the current process. These changes include: revising provisions due to case law development, accommodating electronic filing, and allowing agencies to obtain temporary variances from parts of the required process. All proposed changes will make the process more fair and efficient, thereby reducing costs and increasing benefits. The Commission continues its review of the entire federal sector EEO complaint process and how to make other aspects of the process more efficient and effective.

3. Procedures for Coordinating the Investigation of Complaints or Charges of Employment Discrimination Based on Disability Subject to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, 29 CFR Part 1640. Executive Order 12067 granted EEOC the authority to coordinate all federal EEO law enforcement. In its coordination role, the EEOC has established procedures for processing charges or complaints of employment discrimination when there is overlapping jurisdiction over private and state or local employers between the EEOC and the Department of Justice, the Department of Labor, or another federal civil rights enforcement authority. These coordination rules reduce duplicative efforts by different federal agencies, and also reduce the burden on employers subject to these laws.

An internal EEOC stakeholder alerted the Retrospective Review Team that the coordination rules are not consistent in terms of tolling the statute of limitations and referring charges between agencies. This lack of consistency creates delays and prevents resolution of charges, thus increasing the burden on charging parties and employers.

The Commission will review this regulation to conform and clarify procedures for referring “dual-filed” or “joint” disability discrimination complaints or charges as between the relevant federal grant-making department or agency and the EEOC.

4. Procedures for Complaints/Charges of Employment Discrimination Based on Disability Filed Against Employers Holding Government Contracts or Subcontracts, 29 CFR Part 1641. Executive Order 12067 granted EEOC the authority to coordinate all federal EEO law enforcement. In its coordination role, the EEOC has established procedures for processing charges or complaints of employment discrimination when there is overlapping jurisdiction over private and state or local employers between the EEOC and the Department of Justice, the Department of Labor, or another federal civil rights enforcement authority. These coordination rules reduce duplicative efforts by different federal agencies, and thereby reduce the burden on employers subject to these laws.

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The Commission will review this regulation to conform and clarify procedures for referring “dual-filed” or “joint” disability discrimination

complaints or charges as between the Department of Labor's Office of Federal Contract Compliance Programs and the EEOC.

5. Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance, 29 CFR Part 1691. Executive Order 12067 granted EEOC the authority to coordinate all federal EEO law enforcement. In its coordination role, the EEOC has established procedures for processing charges or complaints of employment discrimination when there is overlapping jurisdiction over private and state or local employers between the EEOC and the Department of Justice, the Department of Labor, or another federal civil rights enforcement authority. These coordination rules reduce duplicative efforts by different federal agencies, and thereby reduce the burden on employers covered by more than one of these laws.

An internal EEOC stakeholder alerted the Retrospective Review Team that the coordination rules are not consistent in terms of the tolling the statute of limitations and referring charges between agencies. This lack of consistency creates delays and prevents resolution of charges, thus increasing the burden on charging parties and employers.

The Commission will review this regulation to conform and clarify procedures for referring "dual-filed" or "joint" complaints based on race, color, national origin, religion or sex as between the relevant federal grant-making departments or agencies and the EEOC.

d. **Structure and Staffing**

Regulatory revisions, policy changes, and the Retrospective Review Plan itself must be approved by a majority vote of the EEOC's 5-member, bipartisan Commission. The EEOC's Office of Legal Counsel (OLC) staffs the EEOC's retrospective review process. The Legal Counsel directs the Office of Legal Counsel in all regulatory activities – both retrospective and new -- and reports to the Office of the Chair. The structure and resources of the EEOC do not allow for a separate office, such as a sub-agency or program-specific entity, to staff the retrospective review process.

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e. Independence of Retrospective Review Team

OLC attorneys, functioning as the Retrospective Review Team, consult with the agency's litigation and enforcement staff before sending proposed revisions of regulations to the Chair and to the Commissioners for a vote. The 5-member, bipartisan Commission must approve the Retrospective Review Plan, as well as regulatory and policy changes, by a majority vote. Each Commissioner's office is staffed with legal personnel who review all regulations prior to a vote.

f. EEOC's Retrospective Review Expertise

The Retrospective Review Team is comprised of attorneys who are very familiar with administrative law, the Regulatory Flexibility Act, and the Paperwork Reduction Act. The Retrospective Review Team participates in executive branch briefings about E.O. 13563 and receives ongoing training consistent with the agency's resources.

The Retrospective Review Team and EEOC Chair Berrien make every effort, in light of staffing and budget, to "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." E.O. 13563 § 1(c). Many of the Commission's regulations create important benefits that stem from "values that are difficult or impossible to quantify," including "equity, human dignity, fairness and distributive impacts." *Id.* In response to the EEOC's request for public comment on the retrospective review process, the American Association of University Women, the AARP, and the National Women's Law Center all stressed the importance of evaluating the qualitative benefits of the EEOC's regulations.

Even when the benefits of EEOC regulations might in theory be quantifiable, little data may exist. *See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended*, 76 Fed. Reg. 16978, 16987 (Mar. 25, 2011) ("Our assessment of both the costs and benefits of this rule was necessarily limited by the data that currently exists. Point estimates are not possible at this time. For that reason, and consistent with OMB Circular A-4, we have provided a range of estimates in this assessment.")

g. EEOC's Retrospective Analysis over the Next Two Years and Beyond

Based on the priorities identified in this Plan, the Retrospective Review Team has reviewed the agency's regulations to identify candidates for review over the next two years. The final decisions about regulatory changes reside with the

Commissioners. However, once a final Plan for retrospective review is approved by the Commission, no further action will be needed for staff to begin work on the rules identified herein for review during the next two years.

The Retrospective Review Team will maintain an EEOC email address for public comment on regulatory review, Public.Comments.RegulatoryReview@eoc.gov. This email address also is available to EEOC enforcement and legal staff.

h. Agency Action Based upon Retrospective Review Analysis

The Retrospective Review Team reports on all regulatory actions to the Office of the Chair. A majority vote by the Commissioners is necessary to approve this Plan and to approve all regulatory, policy, and recordkeeping initiatives and changes. After Commission approval, notices of proposed rulemaking or proposals to modify information collections that result from this retrospective review will be made public, and the EEOC will post all public comments for further discussion as soon as possible.

i. Periodic Review

The EEOC has identified the rules it will review over the next two years. The Retrospective Review Team will establish a timeline to examine significant rules that require periodic retrospective analysis in light of the EEOC's regulatory review factors discussed in Sections IV and V above. Going forward, the EEOC contemplates reviewing such regulations at least once every ten years, or more frequently if circumstances warrant. The Regulatory Review Team will ensure that appropriate staff is consulted to determine whether the EEOC should revise the regulations being reviewed.

j. Inter-Agency Consultation

The EEOC has coordination responsibilities pursuant to E.O. 12067, as well as overlapping jurisdiction with several agencies, such as the Department of Labor and the Department of Justice. The EEOC coordinates regularly with these agencies regarding joint rules and memoranda of understanding, to ensure that the executive branch is consistently enforcing the equal employment opportunity laws. The EEOC will continue to engage in such inter-agency coordination.

k. Peer Review

The EEOC coordinates on an ongoing basis with the Department of Labor's Office of Federal Contract Compliance Programs and with the Department of Justice's Civil Rights Division, both sister civil rights agencies. Because it can ultimately act only through a Commission vote, the EEOC's reliance on peer review is limited.

VI. Components of Retrospective Cost-Benefit Analysis

The EEOC must provide the Office of Management and Budget with an assessment of the potential costs and benefits of a regulatory action whenever the rule meets E.O. 12866's definition of a "significant" regulation. E.O. 12866, § 6(a)(3)(B)(ii). Most of the Commission's significant rules are "significant" because they raise "novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth" in Executive Order 12866, as amended. *Id.* at § 3(f)(4).

E.O. 13563 emphasizes that the nation's regulatory system must take into account benefits and costs, both quantitative and qualitative. "Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts." E.O. 13563 § 1(c). Because the Commission's mission is to promote equality of opportunity in the workplace and enforce federal anti-discrimination laws, qualitative factors are highly relevant to assessing the benefits of its rules.

In the context of this mission, current staffing, and budget, the EEOC makes every effort to "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." E.O. 13563 § 1(c). Even when benefits might in theory be quantifiable, however, little data may exist. *See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended*, 76 Fed. Reg. 16978, 16987 (Mar. 25, 2011) *See supra* Section V.f.

VII. Publication of EEOC's Plan

- a. The EEOC will publish its Retrospective Review Plan on the agency website dedicated to retrospective review pursuant to E.O. 13563. *See* http://www.eeoc.gov/laws/regulations/comment_retrospective.cfm. The Plan will also be published on EEOC's Open Government website www.eeoc.gov/open. The appropriate agency contact for the Open Government website is Deidre Flippin, Director of EEOC's Office of Research, Information and Planning.