

**REPORT OF THE DIVISION OF HUMAN RIGHTS,
VIRGINIA OFFICE OF THE ATTORNEY
GENERAL**

**Proactive Enforcement of
Virginia's Equal Pay Law
(Chapter 901, 2020)**

**TO THE GOVERNOR AND
THE GENERAL ASSEMBLY OF VIRGINIA**



HOUSE DOCUMENT NO. 8

**COMMONWEALTH OF VIRGINIA
RICHMOND
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COMMONWEALTH *of* VIRGINIA

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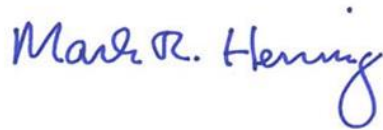
Dear Governor Northam, Lieutenant Governor Fairfax, and Speaker Filler-Corn:

Enclosed is the report required by the enactment of HB624 requiring the Office of the Attorney General's Division of Human Rights "to develop recommendations regarding the type of information about businesses and their employees and the accompanying methodology that would be required for the Division to proactively enforce the provisions of § 40.1-28.6 of the Code of Virginia requiring equal pay of similarly situated employees irrespective of sex [and] ... race." Our report further includes "recommendations regarding appropriate enforcement mechanisms, including causes of action and civil remedies, to address discrimination in compensation based on sex and race."

In preparing this report, the Division communicated with stakeholders representing both employers and employees in the Commonwealth. In addition, we communicated with the U. S. Equal Employment Opportunity Commission regarding its efforts to collect pay data as a means of proactively enforcing federal equal pay laws and reviewed materials produced by the EEOC to further its efforts in this area. The enclosed report briefly summarizes the EEOC's decade-long experience in this area, and our recommendations take this information and experience into account.

The Office of the Attorney General is dedicated to ensuring that all Virginians are compensated for the fine work that they do for their employers and without regard to their sex or race. Through their work-sharing agreement, our Division of Human Rights works collaboratively with the EEOC to review employment discrimination complaints for indications of pay disparity based on race or sex and to conduct investigations where pay disparity issues are found. We hope this information in our report is helpful in identifying ways to strengthen Virginia's laws to more proactively enforce Virginia's equal pay laws, and we stand ready to work with the General Assembly and Governor to strengthen our laws in an effort to eliminate pay disparity based on sex or race.

Sincerely,

A handwritten signature in blue ink that reads "Mark R. Herring". The signature is written in a cursive style with a period at the end of the last word.

Mark R. Herring

Virginia Attorney General

Proactive Enforcement of Virginia's Equal Pay Law

A Report by the Division of Human Rights, Virginia Office of the Attorney General

I. INTRODUCTION

With the enactment of Chapter 901 of the Virginia Acts of Assembly on April 9, 2020, the General Assembly of Virginia and Governor directed the Division of Human Rights (“Division”) to develop recommendations related to the proactive enforcement of statutory requirements for equal pay of similarly situated employees irrespective of sex and race and to report its findings and recommendations to the Governor and the General Assembly by November 30, 2020. Specifically, the General Assembly and Governor tasked the Division with developing recommendations in the following areas:

1. The type of information about businesses and their employees and the accompanying methodology that would be required for the Division to proactively enforce the provisions of Code of Virginia § 40.1-28.6 requiring equal pay of similarly situated employees irrespective of sex;
2. The data and methodological requirements for proactively enforcing a requirement for equal pay irrespective of race; and
3. Appropriate enforcement mechanisms, including causes of action and civil remedies, to address discrimination in compensation based on sex and race.

To prepare this report, the Division engaged stakeholders representing employers and employees in the Commonwealth in developing such recommendations. Given that the U.S. Equal Employment Opportunity Commission (“EEOC”) has been engaged in collecting pay data to assist with enforcing federal equal pay laws for most of the past decade, the Division likewise communicated with EEOC officials involved in that process and reviewed information related to

those efforts, including its regulatory actions and research by the National Academy of Sciences prepared for the EEOC.

The Division's findings and recommendations are set forth below. First, this report provides a brief background on the problem of pay disparity on the basis of sex and race, a legislative overview of federal and state laws that establish an employer's duty to compensate similarly situated employees with equal pay irrespective of sex and race, and current enforcement mechanisms to ensure compliance of these laws. Second, this Report assesses the type of aggregate workforce data and methodology currently collected to enforce employment discrimination laws, the effectiveness of this data to enforce equal pay laws irrespective of sex or race, and the significance and challenges of collecting and using pay data as an enforcement mechanism for unlawful pay discrimination. Within this framework, and taking into account concerns raised by stakeholders representing employers and employees in Virginia, this report proposes recommendations regarding: (1) the type of data and accompanying methodology that would be required for the Division to proactively enforce equal pay laws irrespective of sex or race; and (2) an appropriate enforcement mechanism to address pay discrimination based on sex or race.

II. BACKGROUND

The Problem of Pay Disparity

Inequality in earnings between women and men and between people of different races have been widespread, persistent flaws of the American labor market.¹ In September 2020, the National Partnership for Women & Families reported that women working full-time, year-round in the United States, across all racial and ethnic groups, are typically paid 82 cents for every dollar paid to men, amounting to an annual gender wage gap of \$10,157.² Similarly, another study by PayScale released in 2020 found that the uncontrolled pay gap resulted in women

¹ See, Virginia Office of the Attorney General. *News Release: Attorney General Herring Fights for Equal Pay*. (October 28, 2019). See, <https://www.oag.state.va.us/media-center/news-releases/1567-october-28-2019-herring-fights-for-equal-pay>.

² See, National Partnership for Women & Families. *Fact Sheet: Quantifying America's Gender Wage Gap*. (September 2020). See, <https://www.nationalpartnership.org/our-work/resources/economic-justice/fair-pay/quantifying-americas-gender-wage-gap.pdf>.

making 81 cents to every dollar earned by a man.³ When PayScale looked at the controlled pay gap – which controls for job title, years of experience, industry, location and other compensable factors – it found that the gender gap narrowed to women making 98 cents for every dollar earned by a man.⁴ While the controlled group number is encouraging, when PayScale examined the controlled statistics in certain high-paying fields, it found significant gaps among controlled, high-paying fields, e.g., \$0.83 among anesthesiologists and \$0.90 among sales representatives.⁵ Women working full-time, year-round in Virginia, across all racial and ethnic groups, are paid *below* this national average, at 79 cents for every dollar to men, amounting to an annual wage gap of \$12,303.⁶ In addition, the evidence shows that primarily male-dominated industries have wider pay gaps; in Virginia, these industries include aerospace development, mining, and the military.⁷

While the gender wage gap has slightly narrowed since 1990,⁸ the wage gap for people of different races, particularly Black workers, has not.⁹ In fact, the Economic Policy Institute reported in February 2020 that the wage gap between Black and White workers in the United States has *worsened* significantly since 2000.¹⁰ The University of Virginia Weldon Cooper Center for Public Service reported in July 2020 that the pay gap between Black and White Virginians has not grown considerably smaller or larger since 1970.¹¹ The median family income for Black Virginians has hovered around 70 percent of Virginia’s total median family income for the last 50 years.¹² On average, Black men are paid 87 cents for every dollar paid to

³ See, “The State of the Gender Pay Gap 2020”, PayScale, Mar. 31, 2020, <https://www.payscale.com/data/gender-pay-gap>, last visited Nov. 12, 2020.

⁴ *Id.*

⁵ *Id.*

⁶ See, National Partnership for Women & Families. *The Wage Gap in Virginia*. (Retrieved October 23, 2020). See, <https://www.nationalpartnership.org/our-work/economic-justice/wage-gap/the-wage-gap-in-virginia.html>; Roberts, Madison. *Using Legislation to Remove the Gender-Based Wage Gap in Virginia* (June 2020). See, <https://aauw-va.aauw.net/files/2020/06/Roberts-2020-APP-Final.pdf>.

⁷ See, Madison Roberts.

⁸ See, <https://www.payscale.com/data/gender-pay-gap>; <https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts/>

⁹ See, <https://www.epi.org/publication/black-white-wage-gaps-expand-with-rising-wage-inequality/>

¹⁰ See, Economic Policy Institute. *State of Working America Wages 2019*. (February 20, 2020). See, <https://www.epi.org/publication/swa-wages-2019/>. See also, <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/racial-wage-gaps-persistence-poses-challenge.aspx>.

¹¹ See, <http://statchatva.org/2020/07/31/inside-the-income-gap-for-some-black-virginians/>

¹² See, <http://statchatva.org/2020/07/31/inside-the-income-gap-for-some-black-virginians/>.

a White man.¹³ Even as Black men climb the corporate ladder, they still make less than equally qualified White men. Black men are the only racial/ethnic group that does not achieve pay parity with White men at some level.¹⁴ Hispanic men have the next largest pay gap, at 91 cents for every dollar paid to a White man.¹⁵ There was, though, some better news when PayScale looked at controlled pay gaps – comparing pay for Black and White men with the same experience and education doing the same job in the same geographic location. That controlled pay gap data showed that for every dollar earned by White men, Black men earned 98 cents and Hispanic men earned 99 cents.¹⁶

For women of color, the pay gap has been consistently worse.¹⁷ Black women are typically paid 63 cents for every dollar paid to a White/non-Hispanic man, Latinas are typically paid 55 cents for every dollar paid to a White/non-Hispanic man, and Native American women are typically paid 60 cents for every dollar paid to a White/non-Hispanic man.¹⁸ In Virginia, while White/non-Hispanic women working full time, year-round are paid \$14,044 less than White, non-Hispanic men, Black Virginian women are paid \$26,728 less, and Native American Virginian women are paid \$23,928 less.¹⁹

It is clear that unlawful discrimination on the basis of sex and race contributes to the persistent pay gap described above. In 2016, the Economic Policy Institute found that racial discrimination is the *primary* explanation for the Black/White wage gap.²⁰ In coming to this conclusion, the researchers measured discrimination as the portion of the gap that remains after controlling all the other factors that would reasonably influence one's earnings, including experience, educational attainment, and region of the country.²¹ Correspondingly, Blau & Kahn (2007) suggest that up to 41.4 % of the gender wage gap can be explained by discrimination in

¹³ See, <https://www.payscale.com/data/racial-wage-gap-for-men>. See, also Society for Human Resource Management. *Black Workers Still Earn Less than their White Counterparts*. (June 11, 2020). See, <https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/racial-wage-gaps-persistence-poses-challenge.aspx>.

¹⁴ See, <https://www.payscale.com/data/racial-wage-gap-for-men>.

¹⁵ See, <https://www.payscale.com/data/racial-wage-gap-for-men>

¹⁶ *Id.*

¹⁷ See, <https://www.payscale.com/data/racial-wage-gap-for-men>

¹⁸ See, National Partnership for Women & Families.

¹⁹ See, National Partnership for Women & Families at <https://www.nationalpartnership.org/our-work/economic-justice/wage-gap/the-wage-gap-in-virginia.html>. This resource did not have statistics for Latina women.

²⁰ See, <https://www.epi.org/publication/black-white-wage-gaps-expand-with-rising-wage-inequality/>

²¹ See, <https://www.npr.org/sections/codeswitch/2016/09/23/495013420/black-white-wage-gap-racial-disparity-discrimination>.

salary settings and promotion.²² The heightened pay disparity between White women and women of color, particularly Black women, strongly suggest that race-based biases contribute to a widening of the gender gap.²³

Equal Pay Legislation

The Equal Pay Act of 1963 (29 U.S.C. § 203(s)) (“Equal Pay Act”) and the Virginia Equal Pay Irrespective of Sex (1974) (Code of Virginia § 40.1-28.6) (“Virginia Equal Pay Law”) prohibit unlawful discrimination in pay on the basis of *sex*. Both equal pay laws generally require that employers give equal pay to women and men in the same workplace for jobs “the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”²⁴ Unequal pay between men and women for jobs that are substantially equal violates federal and state equal pay laws, unless the employer can show that the difference in pay is attributable to a bona fide seniority, merit, or incentive system (i.e. such as a system that measures earnings by quantity or quality of production), or another factor other than sex. The federal Equal Pay Act applies to employers engaging in commerce, or in the production of goods for commerce with an annual gross income of \$500,000 or more, and also covers government entities and health and educational institutions irrespective of size. The Virginia Equal Pay Law defines employer as an individual, partnership, association, corporation, legal representative, receiver, trustee, or trustee in bankruptcy doing business in or operating in Virginia who employs another to work for wages, salaries, or on commission, and includes any similar entity acting directly or indirectly in the interest of an employer in relation to an employee.²⁵ While the federal equal pay law was enacted as an amendment to the Fair Labor Standards Act of 1938 (“FLSA”), Virginia’s equal pay law does not apply to employers covered by the FLSA.²⁶

²² See, Part of the gap is unrelated to discrimination, and is instead due to factors such as occupation, parental status, marital status, and career choices. Roberts, Madison. *Using Legislation to Remove the Gender-Based Wage Gap in Virginia* (June 2020). See, <https://aauw-va.aauw.net/files/2020/06/Roberts-2020-APP-Final.pdf>.

See, also Blau, F. D., & Kahn, L. M. (2017). The Gender Wage Gap: Extent, Trends, and Explanations. *Journal of Economic Literature*, 55(3), 789–865.

²³ See, AAUW. (2019b). The Simple Truth About the Gender Pay Gap—Fall 2019 Update. AAUW. https://www.aauw.org/files/2016/02/Simple-Truth-Update-2019_v2-002.pdf.

²⁴ See, 29 U.S.C. § 206(d)(1).

²⁵ See, Code of Virginia § 40.1-2.

²⁶ A covered enterprise is the related activities performed through unified operation or common control by any person or persons for a common business purpose and whose annual gross volume of sales made or business done is

Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Virginia Human Rights Act (Code of Virginia § 2.2-3900 et seq., as amended) (“VHRA”) prohibit pay discrimination on the basis of *sex* and *race*.²⁷ Title VII and the VHRA’s equal pay statutes apply to employers with fifteen (15) or more employees and local government employers. Title VII also covers state employees.²⁸ Title VII and the VHRA prohibitions on pay discrimination are broader than the Equal Pay Act and Virginia Equal Pay Law, in that an employee can challenge not only unequal pay between men and women performing substantially equal work, but also unequal pay on the basis of race, color, religion, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including lactation, age, status as a veteran, or national origin. Title VII and the VHRA also prohibit discriminatory practices that lead to unequal compensation, such as steering women to lower paid jobs than men or maintaining “glass ceilings,” artificial barriers to the advancement of women.²⁹

An employee alleging pay discrimination under Title VII or the VHRA must provide evidence that the employee is paid less than other similarly situated employees because of sex, race or other protected classification. If the employee does so, then the employer must explain the reason for the disparity. The employer may assert any of the defenses in the equal pay laws or a different nondiscriminatory reason for the pay disparity. If the employer is unable to provide a satisfactory explanation for the disparity, the employer may be liable for penalties for pay discrimination. If the employer does provide a satisfactory reason for the disparity, the employee would have to show that the employer’s stated reason is a pretext in order to succeed in proving pay discrimination. Even where an employer does not intend to discriminate, a practice that is, on its face, neutral but has the effect of disproportionately excluding or adversely impacting a member of a protected group can violate Title VII and the VHRA. In such

not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated); or is engaged in the operation of a hospital, an institution primarily engaged in the care of the sick, the aged, or the mentally ill who reside on the premises; a school for mentally or physically disabled or gifted children; a preschool, an elementary or secondary school, or an institution of higher education (whether operated for profit or not for profit); or is an activity of a public agency. *See*, <https://www.dol.gov/agencies/whd/compliance-assistance/handy-reference-guide-flsa#2>.

²⁷ *See*, Code of Virginia § 2.2-3905.

²⁸ The Division refers pay discrimination complaints against state agencies to the Virginia agency that enforces pay discrimination complaints or to the EEOC. *See*, Code of Virginia §2.2-3902.

²⁹ *See*, National Research Council 2012. *Collecting Compensation Data from Employers*. Washington, D.C.: The National Academies Press. <https://doi.org/10.17226/13496>.

“disparate impact” cases, the employee must prove (usually through statistical evidence) that the challenged practice has a substantial and significant adverse effect on a protected group.³⁰

Enforcement Mechanisms³¹

Federal and state government agencies play critical roles in administering these laws, including addressing barriers to equitable enforcement and considering proactive strategies that aim towards ongoing improvement of enforcement mechanisms to ensure compliance of these laws. The EEOC, the Division, and the United States Department of Justice (“DOJ”) enforce violations of the Equal Pay Act of 1963, the Virginia Equal Pay Act, Title VII, and the VHRA through formal administrative and legal mechanisms.³² Employees alleging unlawful discrimination in pay on the basis of sex or race may file an administrative complaint with the EEOC or the Division. The Division is designated by the EEOC as a Fair Employment Practice Agency (“FEPA”), which allows the Division to receive and investigate employment discrimination complaints that fall under the EEOC’s jurisdiction.³³ Accordingly, both agencies have entered into renewing work-sharing agreements under which the agencies conduct investigations alleging employment discrimination, including pay discrimination, and attempt to conciliate charges of discrimination. During the course of their investigations, the EEOC and Division routinely collect comparator employee pay data as part of the prima facie analysis when there are claims or indications of pay disparity. If the EEOC or Division determine through their prima facie analysis that there is reasonable cause to believe that pay discrimination occurred, and conciliation efforts have failed, the EEOC is authorized to commence a civil action against *private* employers under Title VII; and in the case of a violation under the Equal Pay Act, the EEOC may litigate against *private or public* employers. The EEOC refers charges against state and local government employers to the DOJ for litigation, as the DOJ is charged with the enforcement of Title VII against state and local government employees. Under the VHRA, the Virginia Attorney General is now authorized by passage of the Virginia Values Act of 2020 to commence a civil action whenever the Attorney General has reasonable cause to believe that any

³⁰ See, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973).

³¹ This report does not evaluate enforcement mechanisms for federal contractors’ obligations related to equal pay.

³² See, Code of Virginia § 2.2-3902.

³³ Federal law directs the EEOC to work with FEPAs to investigate and resolve charges of employment discrimination. Accordingly, the EEOC and the Division, as a designated FEPA, work collaboratively to administer charges alleging employment discrimination through an ongoing work-share agreement.

person or persons are engaged in a pattern or practice of discrimination, including against an employer alleged to have denied the equal pay rights granted by the VHRA to its employees when such denial raises an issue of public importance.³⁴

Virginia employees alleging unlawful discrimination on the basis of sex also have the option to file a private cause of action under the Equal Pay Act or Virginia Equal Pay Law *without filing a charge of discrimination with the EEOC or the Division*. However, Virginia employees who seek to commence a private cause of action under Title VII or the VHRA must first exhaust their administrative remedies through filing a charge with the EEOC or Division.

III. WORKFORCE DATA

The History of Aggregate Pay Data to Enforce Equal Pay Laws

Pay data is an indicator of discriminatory practices, as employees with the same productivity and working conditions in the same jobs at the same employer location may be subject to pay disparity based on their protected class.³⁵ Multiple studies have found that pay data transparency reduces the pay gap.³⁶ In a 2020 PayScale survey of company directors, companies who reported the existence of pay transparency measures were associated with less severe pay disparities.³⁷ In government sectors where pay transparency is already mandatory, a smaller pay gap exists on average. For example, the federal government reports a pay gap of 13 percent between men and women, while the private for-profit sector experiences a pay gap of 29 percent.³⁸ This data suggests that employers who reveal their pay data may be deterred from actively discriminating.³⁹

³⁴ See, Code of Virginia § 2.2-3906.

³⁵ See, National Research Council 2012, *Collecting Compensation Data from Employers*. Washington, D.C.: The National Academies Press, at p. 46. <https://doi.org/10.17226/13496>.

³⁶ See, Roberts, Madison. *Using Legislation to Remove the Gender-Based Wage Gap in Virginia* (June 2020). See, <https://aauw-va.aauw.net/files/2020/06/Roberts-2020-APP-Final.pdf>.

³⁷ However, for companies within male-dominated industries, the reported gaps remained slightly higher (PayScale, 2020).

³⁸ (AAUW, 2019b).

³⁹ See, Roberts, Madison. *Using Legislation to Remove the Gender-Based Wage Gap in Virginia* (June 2020). See, <https://aauw-va.aauw.net/files/2020/06/Roberts-2020-APP-Final.pdf>.

The National Equal Pay Enforcement Task Force, a task force established by President Obama in 2010 to increase enforcement of equal pay laws, identified lack of access to pay data broken down by demographic category as a significant barrier to successful enforcement of equal pay discrimination laws.⁴⁰ However, there was no standardized and universally accepted measure of pay, primarily because of the complex challenges in considering appropriate pay measures to use in determining pay discrimination.⁴¹ Accordingly, the EEOC Chair asked the National Research Council, through its National Academies of Sciences, Engineering, and Medicines' Committee on National Statistics ("NAS") to convene a Panel on Measuring and Collecting Pay Information from United States Employers by Gender Race and National Origin ("Panel") to formulate methods for measuring and collecting pay data by gender, race and national origin from employers for the purpose of administering Title VII. The purpose of collecting pay data would be to *target* employers for investigation regarding their compliance with antidiscrimination laws and assist employers in monitoring their compliance with laws prohibiting pay discrimination.⁴² The EEOC Chair described the absence of employer-specific pay data broken down by demographic category as a significant barrier to the agency's work to eradicate pay discrimination. Because pay discrimination is a largely "invisible" form of discrimination (very few people know what their co-workers are paid), few people file complaints with the EEOC alleging that they are being paid in a discriminatory manner.⁴³ OFCCP officials also addressed the Panel and advocated for the collection of pay information in connection with equal pay laws enforcement of federal contractors. The EEOC asked the Panel to consider suitable data collection instruments, procedures for reducing reporting burdens on employers, and confidentiality, disclosure, and data access issues. In addition, the DOJ indicated to the Panel that the pay data reported on the EEO-4 would allow for more meaningful analysis of pay discrimination if it included salary information in narrower job classes, information about years of services in the job class, and salary information collected in narrower bands reflecting the entire amount earned, not solely on base pay.

⁴⁰See, https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf

⁴¹ See, Roberts, Madison. *Using Legislation to Remove the Gender-Based Wage Gap in Virginia* (June 2020). See, <https://aauw-va.aauw.net/files/2020/06/Roberts-2020-APP-Final.pdf>.

⁴² See, National 2012 report.

⁴³ See, Statement of EEOC Chair Jacqueline A. Berrien.

On August 15, 2012, the Panel published a report entitled “Collecting Compensation Data from Employers” (“NAS Report”) and made the following six recommendations to the EEOC in regard to pay data collection: (1) prepare a comprehensive plan for use of pay data before initiating data collection; (2) initiate a pilot study to test the collection instrument and the plan for use of data (i.e. to ensure quality data); (3) enhance capacity to summarize, analyze, and protect pay data; (4) collect data on rates of pay, not actual earnings or pay bands, in a manner that permits the calculation of measures of both central tendency and dispersion (use Occupational Employment Statistics (“OES”) survey model);⁴⁴ (5) implement data protection techniques to protect confidentiality of pay data; and (6) seek legislation to increase the ability of the EEOC to protect confidential data. Based on the recommendations made in the NAS report, the EEOC commissioned an independent Pilot Study to identify the most efficient means to collect pay data (which was completed in 2015), and sought input from its staff about updating all the EEO surveys, including adding pay data to the EEO-1 report.⁴⁵

Taking into consideration the 2012 NAS Report, relevant academic literature on compensation practices, public comments and public testimony, a 2015 Pilot Study, and input from EEOC staff, the EEOC proposed a revision to the EEO-1 report to include a second component (“Component 2”) for pay data collection from private employers and federal contractors with 100 or more employees.⁴⁶ Component 2 would include the measure of pay from Box 1 of the IRS Form W-2⁴⁷ and hours-worked data in the twelve pay bands used by the Department of Labor’s Bureau of Labor Statistics OES for each of the ten EEO-1 categories. The EEOC determined that this data collection methodology would best support EEOC data analysis at the early stages of an investigation, using statistical tests to identify significant disparities in reported pay that might warrant further investigation. On September 29, 2016, the

⁴⁴ The OES Survey is a semiannual mail survey designed to measure occupational employment and wage rates among full-time and part-time pay wage and salary workers in non-farm establishments. In this survey, earnings are defined as straight-time, gross pay, exclusive of premium pay. The definition includes a base rate of pay, cost-of-living allowances, guaranteed pay, hazardous-duty pay, incentive pay (including commissions and production bonuses), and tips. The definition excludes overtime pay, severance pay, shift differentials, nonproduction bonuses, employer cost for supplementary benefits, and tuition reimbursements.

⁴⁵ See, Federal Registrar Vol. 81 No. 20, February 1, 2016 – 60-day notice.

⁴⁶ Id.

⁴⁷ After narrowing its consideration of the Bureau of Labor Statistics OES measure of pay and the Internal Revenue Service’s W-2 definition, the EEOC proposed to use W-2 income because it is already calculated by employers, therefore 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 types of compensation. Federal Registrar Vol. 81, No. 135, July 14, 2016.

revised EEO-1 report with Component 2 was approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act for a three-year term expiring on September 30, 2019.

In August 2017, the new federal administration's OMB ordered the EEOC to suspend the collection of Component 2 pay data. In November 2017, workers' rights organizations initiated a legal challenge to the federal administration's decision to suspend the collection of pay data. During the pendency of this lawsuit, in 2018, the new EEOC Chief Data Officer ("CDO") initiated a comprehensive data collection modernization project in coordination with the OMB to update the EEOC's data collection program, including the EEO-1, to use 21st century data collection procedures and technologies. In addition, the CDO assessed that the EEO-1 data collection process, including Component 1 (demographics, i.e. race, ethnicity, gender, and job category) and Component 2 (pay data), required improvement in the areas of data quality assurance and data quality control. The CDO also expressed concern that the 2015 Pilot Study on pay data collection in connection with developing the methodology for Component 2 was not a true pilot study because the EEOC at the time did not administer the data collection tool to a subset of respondents, nor did it test or validate any data collection processes or procedures for collecting and reporting Component 2 data.⁴⁸

In March 2019, a federal court reinstated the pay data collection for FY 2017 and FY 2018. The court determined that OMB did not provide a reasoned explanation for its hold on the data collection and this action was arbitrary and capricious. Accordingly, the EEOC collected pay data for FY 2017 and FY 2018 to support its equal pay law enforcement efforts.

In September 2019, the EEOC announced that it will not collect EEO-1 Component 2 data in the future and discontinued all pay data collection based on quality and utility concerns, in particular concerns surrounding the burden imposed on employers.⁴⁹ The EEOC concluded that the burden imposed on employers to gather data outweighs the usefulness of the data.

In July 2020, the EEOC commissioned NAS to conduct an independent assessment of the quality and utility of the pay data EEOC collected in FY 2017 and FY 2018, including the utilities of the pay bands in measuring pay disparities. NAS started its assessment on July 1,

⁴⁸ See, Chris Chaffer declaration.

⁴⁹ See, <https://www.federalregister.gov/documents/2019/09/12/2019-19767/agency-information-collection-activities-existing-collection>

2020, and the EEOC anticipates that the NAS study will be completed by December 31, 2021. The purpose of this assessment is to inform the EEOC's approach to future pay data collection.

As the EEOC takes a step back to assess the quality and utility of pay data collected in FY 2017 and FY 2018, several states, including New York,⁵⁰ Rhode Island,⁵¹ and the Commonwealth of Virginia⁵² are taking steps forward to figure out ways to collect pay data within their states in order to proactively enforce equal pay laws. On September 30, 2020, California became the first state to pass legislation requiring employers with 100 or more employees to submit annually to their state Department of Fair Employment and Housing ("DFEH") pay data by gender, race, ethnicity, and job category broken down by race, sex, ethnicity, and job category. The data collection methodology is consistent with the data collection method recommended in the 2012 NAS Report and used in the EEO-1 forms (Component 2) during FY 2017 and FY 2018. In particular, the data report must include the number of employees by race, ethnicity, and sex whose annual earnings fall within each of the pay bands used by the United States Bureau of Labor Statistics in the OES Survey.⁵³ The legislation also requires DFEH to make the confidential reports available to the Division of Labor Standards Enforcement ("DLSE") upon request. The legislation ensures privacy by requiring that individually identifiable information be considered confidential and not subject to disclosure pursuant to the California Public Records Act. The DLSE is vested with the duty to enforce labor laws. The DFEH is responsible for enforcing state laws that make it illegal to discriminate against a job applicant or employee because of a protected characteristic. Specifically, the DFEH independently investigates employment discrimination complaints, attempts to resolve the disputes, and if needed may also decide to take legal action. In sum, this new state law empowers both state agencies (DFEH and DLSE) to identify patterns of wage disparities within the state and better enforce wage discrimination laws.

Aggregate Workforce Data to Enforce Equal Pay Laws

For the better part of the past decade, the EEOC has gathered aggregate workforce data from employers to further enforce federal equal pay laws. Title VII requires employers to

⁵⁰ See, <https://www.nysenate.gov/legislation/bills/2019/S4065>

⁵¹ See, http://status.rilin.state.ri.us/bill_history_report.aspx?year=2019&bills=172

⁵² See, HB 624 <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB624>.

⁵³ See, <https://www.dfeh.ca.gov/paydatareporting/>.

regularly provide aggregate workforce data to the EEOC for the purpose of enforcing unlawful employment practices.⁵⁴ The EEOC collects the following types of aggregate employee data under a pledge of confidentiality:⁵⁵

- EEO-1 reports provide data from private-sector employers with more than 100 employees and federal contractors with 50 or more employees. These reports include seven race/ethnicity categories and ten job groups by gender. Ninety-nine percent of the EEO-1 reports are received electronically.⁵⁶ ***For FY 2017 and FY 2018, Component 2 of the EEO-1 reports included pay data.***
- EEO-3 reports provide data on union membership and referrals by race/ethnicity and gender.
- EEO-4 reports provide state and local government employment data by job groups and ***salary range*** for race/ethnicity and gender (eight pay bands for eight job categories).
- EEO-5 reports provide data from each school district with 100 or more employees by race/ethnicity and gender for relatively detailed job groups.

Workforce data is valuable in identifying possible discriminatory practices. The EEOC shares aggregate EEO data for enforcement purposes and with the United States Department of Labor Office of Federal Contract Compliance Programs (OFCCP). The OFCCP uses EEO-1 reports to ensure equal employment opportunity compliance by federal contractors. The DOJ uses the demographic data from EEO-4 reports to initiate “*pattern or practice cases*” that seek systemic injunctive relief as part of enforcement efforts.⁵⁷ Currently, FEPAs, including the Division, can obtain EEO-1 data from the EEOC upon request as needed for individual cases involving alleged pay discrimination based on sex or race by making a request to its respective EEOC field or regional office. To obtain EEO data unrelated to a particular case, FEPAs must submit a request to the EEOC headquarters and meet its guidelines for the sharing of such information. These restrictions were put in place by the EEOC due to the highly sensitive and confidential nature of the information gathered in the EEO-1 Component 2 data.

⁵⁴ Section 2000e-8(c) of Title VII requires employers to preserve “records relevant to the determination of whether unlawful employment practices have been or are being committed,” and to “make such reports therefrom as the Commission shall prescribe by regulation or order, after public hearing, as reasonable, necessary, or appropriate for the enforcement of [Title VII] or the regulations or orders thereunder.”

⁵⁵ See, Title VII, Section 709(e) sets for the requirements of confidentiality.

⁵⁶ See, National Research Council 2012.

⁵⁷ DOJ obtains EEO-4 data from EEOC on a regular basis and holds it in confidence as a member of the joint state and local reporting committee.

The principal data collected in the EEO reports is demographic in nature, i.e., gender, race/ethnicity, and job categories. A major use of the demographic employment data is in the context of charge-based investigations, in which the data is used to assist the EEOC in identifying employers that warrant statistical comparison, which could, in turn trigger further investigation of their EEO practices. The demographic data is also used in different ways at different stages of the investigation, and the analysis becomes more refined as the investigation progresses. The aggregate demographic employment data has contributed to the efficiency of EEOC investigations and DOJ litigation, particularly in systemic issues.⁵⁸

To a limited extent, the EEOC also collects pay data. In particular, the EEO-4 reports include pay data of state and local government employees in the form of salary grades.⁵⁹ While the DOJ uses the demographic information on the EEO-4 report to enforce Title VII against state and local government employers, the agency has reported that the pay data provided on the EEO-4 form has not been effective in determining pay disparity primarily because the pay bands reported on the form are too broad, and the form does not include other information such as years of services, which can be a key determinant of salary in the public sector.⁶⁰ In addition, the EEOC collected pay data on EEO-1 forms in FY 2017 and FY 2018 for the purpose of improving enforcement capability in the area of pay discrimination. The complicated history of pay data reported on EEO-1 forms for FY 2017 and FY 2018 and the challenges of meaningful pay data collection for enforcement purposes are discussed further below.

IV. VIRGINIA STAKEHOLDERS

Employee advocates nationwide broadly support the collection of pay data as a primary indicator of pay discrimination and a fundamental means to enforce equal pay laws of similarly situated employees irrespective of sex and race. The National Women's Law Center and the Labor Council for Latin American Advancement were the leading employee stakeholders advancing the 2017 legal challenge to the federal administration's decision to suspend the

⁵⁸ See, National Research Council 2012. While the primary purpose of EEO workforce data is to enforce employment discrimination, it is relevant to note that this data is also used for purposes other than enforcement, including statistical, analytical, research, and proactive prevention of unlawful discrimination.

⁵⁹ Pay data collection through the EEO-1 in FY2017 and FY 2018 is discussed further below.

⁶⁰ See, 2012 NAS Report.

EEOC's pay data collection. In support of this litigation, this Division, as the Commonwealth's designated civil rights agency and a FEPA charged with safeguarding all individuals in the Commonwealth from unlawful pay discrimination because of sex or race, submitted an *amicus brief* as part of a multi-state coalition of state Attorneys General and state agencies.⁶¹

Notwithstanding the dynamics at the federal level, ensuring equal pay for all workers has been identified as a top priority for EEOC's strategic enforcement plan for fiscal years 2017 to 2021.⁶² In doing so, the EEOC recognizes the inherent complexities of determining the type of data collection and methodology needed to ensure quality, utility, validity, and reliability.

While employer stakeholders generally support the notion of enforcing equal pay irrespective of sex and race, some Virginia employer stakeholders have expressed concern about HB 624 in regard to the negative impact of pay data collection on employers, and particularly small businesses. Chief concerns raised by a leading employer stakeholder in Virginia, the Virginia Chamber of Commerce, include the following:

- Gathering this information accurately is not a small undertaking. It puts a great burden on employers. More importantly, the cost to obtain this information will vary across employers depending on their size, their line of business and the type of industry they are in. For large employers, the challenge will be standardizing this information in a consistent manner across their organization. For small employers, some of the pieces simply may not exist (e.g. not all employers have job grade).
- Requiring employers to report hours worked is difficult for exempt employees as employers usually don't track their hours.
- Base wage or salary data collection is different than what is reported on W-2 earnings. This potentially could create high cost to employers to segregate out this information.
- Not all payroll systems segregate out overtime and bonuses. Also, timing inconsistencies among various components of compensation may lead to an inaccurate picture of total compensation. For example, sales commissions and bonuses are usually assessed on a different time cycle than merit increases on base pay.

⁶¹ See, https://oag.ca.gov/system/files/attachments/press-docs/NWLC%20v.%20OMB%20Amicus.FILED_.pdf.

⁶² See, <https://www.eeoc.gov/us-equal-employment-opportunity-commission-strategic-enforcement-plan-fiscal-years-2017-2021>.

- Because of the extreme variances in job titles, departments, job grades and levels across businesses, the Virginia Chamber of Commerce is concerned that there is no easy way to show pay disparity.
- The Chamber of Commerce has a potential privacy concern relating to the reporting of performance scores or ratings. Because of the staffing size of some companies, employees may be able to determine who received what score based on the job title, department, job grade, hire date, and job location.

In addition, the Northern Virginia Technology Council expressed concern that additional data collection to enforce equal pay laws may be onerous and expensive to employers in Virginia. The additional reporting mechanisms can potentially lead to numerous hours of additional work for employers to track, review, and verify the information in order to comply annually.⁶³

V. FINDINGS AND RECOMMENDATIONS

Based on the information gathered above, the Division finds the following:

As shown above, pay disparities based on race and gender persist in the Commonwealth and nationally despite laws at both state and federal levels that prohibit pay disparities based on such protected characteristics. Studies show that uncontrolled pay gaps have remained or widened since 2000. Indeed, women of color experience substantially greater pay disparity than White women or men of different races. And although some studies that looked at controlled data (comparing pay for persons with the same experience and education doing the same job in the same geographic relocation) found in general smaller pay gaps, examinations into specific types of job classifications revealed that significant pay disparity based on sex or race remain.

To combat pay disparity, the EEOC began collecting additional pay data from certain employers in 2012. In particular, the EEOC focused on collecting demographic information about employees, salary ranges based on employees' IRS Form W-2 wages, and employees' jobs as classified by OES job categories, among other data. During this regulatory process, employer

⁶³ See,

https://www.nvtc.org/NVTC/Advocacy/2020_General_Assembly_Crossover/NVTC/Advocacy/2020_General_Assembly_Update_Crossover.aspx?hkey=784282b4-3db1-4623-960d-ff5ae0a479a1

stakeholders expressed concerns about the burdens imposed by such data collection, the cost/benefit analysis of such aggregated pay data with regard to enforcement, and maintaining the confidentiality and privacy of such data. It appears that one lesson the EEOC learned is that while such data collection was adequate for indicating possible pay discrimination issues at a macro level, the information collected was often insufficient to identify individual instances of pay discrimination. As the EEOC continues through different administrations to refine its data collection to improve its enforcement capabilities, it currently awaits the results of an assessment by the National Academies of Sciences that will assess the quality and utility of its most recent data collection efforts in order to consider how it will engage in such data collection in the future. The NAS assessment is scheduled to be completed by December 31, 2021.

As the EEOC's data collection efforts are being studied, at least one state, California, has forged ahead with a state law that basically encapsulates on the state level what the EEOC most recently had done with regard to pay data collection for enforcement purposes and making that data available to its state agencies for enforcement purposes. In its original form, HB624 sought to create a pay data reporting mechanism, but Virginia stakeholders raised similar concerns as before the EEOC.

Like the EEOC, the Division is vested with the authority to investigate employment discrimination, including pay disparity based on sex or race. As a FEPA, the Division can request EEO-1 data to assist with processing its employment discrimination investigations. The Division is likewise able to request aggregate EEO-1 data from the EEOC by making a request to EEOC's headquarters staff. The EEOC's current strategic enforcement plan includes a focus on combating pay discrimination based on sex and race, and the Division, in furtherance of the EEOC's efforts, routinely assesses the information gathered during its investigations for indicators of potential pay discrimination issues. With the passage of the Virginia Values Act in 2020, the Division also now possesses the authority to pursue civil actions in instances of pattern or practice of discrimination or discrimination that is a matter of general public importance. Clearly, pay disparities based on race or sex are ripe for such civil actions.

The purpose of this report is to develop recommendations to the General Assembly and Governor regarding the type of information about businesses and their employees and the accompanying methodology that would be required for the Division to proactively enforce

Virginia's laws requiring equal pay irrespective of race or sex and the appropriate enforcement mechanisms, including causes of action and civil remedies, to address pay discrimination based on race or sex. Based on the information and findings of this report, the Division proposes following recommendations:

1. If Virginia elects to create a state requirement for collecting pay data from employers, the Division recommends that the General Assembly and Governor first prepare a comprehensive plan for the use of such data prior to initiating any data collection. Such a plan should address the mechanisms by which the information would be assembled, assessed, compared, and used to proactively enforce equal pay laws. To this end, the General Assembly and Governor may wish to form a commission or task force that includes enforcement agency personnel, data analysts, statisticians, employee and employer stakeholders, etc. to develop this comprehensive plan.
2. Any efforts to collect pay data for use in proactively enforcing Virginia's equal pay laws should require at least the reporting of the information required of employers to complete the EEO-1 survey and Component 2. This information would include data regarding employee information by Job Category (10 data points); Salary Band (12 data points); Race (7 data points); and Gender (2 data points) for both salaried and hourly workers. As noted above, data collected at this level may help identify possible discrimination within the Job Categories, but it will likely lead to the proactive identification of individual instances of pay discrimination only rarely. From a data collection viewpoint, the collection of this data should impose little burden on employers since their human resource information systems are likely already calibrated to track and report such information.
3. If the General Assembly and Governor desire to create a reporting system that allows for the identification of individual cases of pay discrimination based on sex or race, then the data collected will have to identify employees individually, list their actual pay (recommend that this be the wages reported on the employee's IRS Form W-2), their years of service, education, and other individual factors that may affect their compensation. We must note, though, that this option would require Virginia employers

subject to this reporting requirement to enhance their human resources information systems so that such information could be tracked and reported.

4. The General Assembly and Governor should provide the state agency (or agencies) that will collect and use this pay data with the resources necessary to enhance their capacity to collect, summarize, analyze, and protect the collected data. In particular, we note that currently the Division has neither the staff nor infrastructure to receive, analyze, summarize, and protect such a data collection. This recommendation includes passing any legislation necessary to ensure that such pay data is protected and remains confidential from general disclosure while including provisions to specifically authorize data-sharing agreements with other agencies with legislative authority to enforce antidiscrimination laws.
5. With regard to enforcement mechanisms, the Virginia Human Rights Act, as amended in 2020, now has a proactive enforcement mechanism for the Virginia Attorney General to initiate civil actions for allegations of systemic/pattern-or-practice pay discrimination on the basis of sex or race, which includes the following civil remedies: permanent or temporary injunction, restraining order, civil remedy not exceeding \$50,000 for a first violation and in an amount not exceeding \$100,000 for any subsequent violation, reasonable attorney fees and costs. Accordingly, the VHRA, as currently structured, seems to possess appropriate enforcement mechanisms to combat pay discrimination based on sex or race.

VI. APPENDIX 1. FEDERAL EQUAL PAY LAWS

Equal Pay Act of 1963 (as amended by the Fair Labor Standards Act) (SEC. 206 [Section 6])

No employer ... shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

Title VII of the Civil Rights Act of 1964 (SEC. 2000e-2 [Section 703])

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

VII. APPENDIX 2. VIRGINIA EQUAL PAY LAWS

2020 General Assembly Session House Bill 624

CHAPTER 901

An Act to direct the Division of Human Rights to determine the requirements for proactively enforcing statutory requirements for equal pay irrespective of sex.

[HB 624]

Approved April 9, 2020

Be it enacted by the General Assembly of Virginia:

1. § 1. *That the Division of Human Rights of the Department of Law (the Division) is directed to develop recommendations regarding the type of information about businesses and their employees and the accompanying methodology that would be required for the Division to proactively enforce the provisions of § 40.1-28.6 of the Code of Virginia requiring equal pay of similarly situated employees irrespective of sex. Additionally, the Division shall develop recommendations regarding the data and methodological requirements for proactively enforcing a requirement for equal pay irrespective of race. The Division shall also develop recommendations regarding appropriate enforcement mechanisms, including causes of action and civil remedies, to address discrimination in compensation based on sex and race. In developing such recommendations, the Division shall engage stakeholders representing employers and employees in the Commonwealth. The Division shall report its findings and recommendations to the Governor and the General Assembly no later than November 30, 2020.*

§ 40.1-28.6 Equal Pay Irrespective of Sex (1974)

§ 40.1-28.6. Equal pay irrespective of sex.

No employer having employees shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

For purposes of administration and enforcement, any amounts owing to any employee which have been withheld in violation of this section shall be deemed to be unpaid wages or unpaid overtime compensation and the employee whose wages have been wrongfully withheld in violation of this section shall have a right of action therefor to recover damages to the extent of two times the amount of wages so withheld.

This section shall not apply to employers covered by the Fair Labor Standards Act of 1938 as amended. Every action under this section shall be brought within two years next after the right to bring the same shall have accrued; provided, however, that nothing herein shall be construed to give rise to a cause of action for work performed prior to July 1, 1974.

§ 2.2-3900 et seq. The Virginia Human Rights Act (1987, amended in 2020) (Relevant Portions)

§ 2.2-3905. Nondiscrimination in employment...

B. It is an unlawful employment practice for:

1. An employer to:⁶⁴

a. ... discriminate against any individual with respect to such individual's compensation ... because of such individual's race ... [and]... sex...⁶⁵

§ 2.2-3906. Civil action by Attorney General.

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by [§ 2.2-3905], or that any person or group of persons has been denied any of the rights granted by [§ 2.2-3905] and such denial raises an issue of general public importance, the Attorney General may commence a civil action in the appropriate circuit court for appropriate relief.

§ 2.2-3907 Procedures for a charge of unlawful discrimination; notice; investigation; report; conciliation; notice of the right to file a civil action; temporary relief.

Any person claiming to be aggrieved by an unlawful discriminatory practice⁶⁶ may file a complaint in writing under oath or affirmation with the [Division]. The Division itself or the Attorney General may in a like manner file such a complaint...

§ 2.2-3908. Civil actions by private parties.

A. An aggrieved person who has been provided a notice of his right to file a civil action pursuant to § 2.2-3907 may commence a timely civil action in an appropriate general district or circuit court having jurisdiction over the person who allegedly unlawfully discriminated against such person in violation of this chapter.

⁶⁴ An employer for purposes of unlawful discrimination in compensation is a person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar. See, *Va. Code § 2.2-3905 (A)*.

⁶⁵ It is not unlawful for an employer to apply different standards of compensation pursuant to a bona fide seniority or merit system, or a system that measures earnings by quantity or quality of production, or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of sex or race. See, *Va. Code § 2.2-3905(C)(3)*.

⁶⁶ Unlawful discriminatory practice under the Virginia Human Rights Act at *Va. Code 2.2-3900 et seq.*, is conduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, marital status, pregnancy, childbirth or related medical conditions including lactation, age, status as a veteran, or national origin. See, *Va. Code § 2.2-3902*.

