Dear Ms. Carr:

On behalf of the more than 170,000 members and supporters of the American Association of University Women (AAUW), I am pleased to share with you AAUW’s strong support for the Office of Federal Contract Compliance Programs’ (OFCCP) proposed rule implementing Executive Order 13665, prohibiting government contractors from discharging, penalizing, or otherwise discriminating against any employee or applicant for discussing, disclosing, or inquiring about their compensation or that of another employee or applicant. This rule will protect members of our federal contracting workforce who wish to inquire about wages without fear of reprisal, and will help employees and employers alike to identify and correct pay disparities.

Introduction
President Barack Obama’s signing of Executive Order 13665 on April 8, 2014, protecting individuals employed by federal contractors from retaliation for wage disclosure, has moved our nation a step closer to fulfilling the commitment the president set out in his second inaugural address that “our wives, our mothers and daughters can earn a living equal to their efforts.” Despite civil rights laws and advancements in women’s economic status, workplace discrimination still persists. This proposed rule, like the Paycheck Fairness Act currently pending in Congress, seeks to level the playing field by increasing transparency and giving workers a much needed tool to help fight pay discrimination. We stand with the president and U.S. Department of Labor as they work to implement new tools to address our nation’s ongoing and pernicious wage gap.

I. The Anti-Retaliation Rule Will Help Facilitate Access to Information that Can Address Ongoing Gender-Based and Race-Based Pay Disparities in Federal Contracting.

Over fifty years after the passage of the Equal Pay Act of 1963, glaring pay disparities still exist between men and women. Women working full time, year round in 2013 were paid only 78 cents for every dollar paid to their male counterparts. African American women and Latinas suffered from wage gaps even more severe. African American women earn just 64 cents for every dollar earned by white, non-Hispanic
men; Latinas’ earnings stood at 56 cents for every dollar earned by white men. Among college-educated workers, AAUW’s *Graduating to a Pay Gap* controlled for factors known to affect earnings such as education and training, parenthood, and hours worked, and found that college-educated women still earn 7 percent less than men just one year out of college—even when they have the same major and occupation as their male counterparts.

In 1963, when the Equal Pay Act became law, women were making 59 cents for every dollar earned by men. Thus, in the span of over fifty years, we have erased almost half of the disparity between men’s and women’s wages, but what exists is still unacceptable. Race and ethnicity-based wage inequality is similarly entrenched in the American workplace. In 2013, African Americans employed full-time were paid a median weekly total of $629, and Latino workers received a median salary of only $578 compared to $802 for white workers.

Renewed efforts to address stagnant pay disparities have never been more important than they are today, as the country emerges from difficult economic conditions. The implementation of this rule will go a long way to address these disparities for the 28 million employees of federal contractors, as we continue to push for permanent change for all employees through the passage of the Paycheck Fairness Act.

According to the Institute for Women’s Policy Research, nearly half of all workers are either forbidden or strongly discouraged from discussing their pay with colleagues. If workers do not know what they are being paid, it is very difficult to do anything about possible wage disparities. Removing these restrictions will help facilitate conversations with employees and between coworkers and supervisors, as well as provide opportunities for employers to self-correct when disparities are identified. No company or employer is required to disclose wage information under this rule, but employees would have the ability to voluntarily share information or ask without fear.

The case of Lilly Ledbetter illustrates the importance of this rule. Ms. Ledbetter was an employee of Goodyear Tire—a federal contractor—for nearly twenty years. Goodyear prohibited employees from discussing or sharing their wages, so Ms. Ledbetter did not know of the discrimination against her until someone slipped her an anonymous note, years after the discrimination began. Had anti-retaliation protections applied to her or her coworkers, Ms. Ledbetter might have discovered the wage discrimination earlier and sought a remedy without fear of punishment. For these reasons, AAUW strongly supports this rule. In addition, we provide the following recommendations, based on the NPRM’s request for comments, to help improve the ability of employees to discuss their wages without fear of retaliation and to avoid a cramped interpretation of the rule.

II. Affirmative Defenses and Exceptions to the Rule’s Protections Need to Be Narrowly Tailored with Limited Subjective Factors

a. The Definition of “Essential Job Functions”

In carrying out the Executive Order, the NPRM provides an exception for its protection when an employee with access to compensation information of other employees or job applicants, as part of such employee’s “essential job functions,” discloses it to individuals who would not otherwise have that information (other than in response to a formal charge or investigation). The NPRM proposes factors to consider in defining “essential job functions” in order to determine what employees would be exempt from the proposed rule’s protections against retaliation for wage disclosure.

We support OFCCP’s use of the ADA in interpreting “essential job function.” However, OFCCP should make clear that “essential job function” must be narrowly defined, as exceptions generally
are, and that any factors considered be limited and given a narrow interpretation. Essential job function must be critical to performing the position in question and an employer's judgment is not to be given conclusive weight on the question of what constitutes an essential job function. Narrowly defining the essential functions of a job reduces the risk that loopholes will be exploited rendering the rule ineffective. This is necessary in order to ensure that frank conversations about wages between employees, and between employees and supervisors, can occur without fear of retaliation. It is important to note, however, that this rule would not require supervisors to disclose pay information, but would make sure that conversations about pay are not prohibited. If given a broad interpretation, this exception would defeat the Executive Order’s goal of helping to root out discrimination and would have the potential of swallowing the rule.

b. Essential Job Functions as an Affirmative Defense
In general, in order to ensure that the protections in the Executive Order apply to the broadest number of employees as possible, any affirmative defenses available to employers must also be narrowly tailored. The NPRM proposes two possible employer affirmative defenses when a claim of retaliation is made by an employee.

First, the NPRM proposes that “essential job functions” serve as an employer affirmative defense, as well as an exception to the rule. This definition would also apply to the employers’ defense that his adverse employment action was taken against an employee whose duty it was to maintain and protect the wage privacy of employee personnel records information as part of an essential job function. All of the same previously-discussed concerns and recommendations would apply here. As discussed above, the employer’s ability to assert “essential job functions” as an affirmative defense must be limited to only a very narrow subset of employees whose job it is to maintain and protect the privacy of employee personnel records information as part of an essential job function.\textsuperscript{9}

All of the same previously-discussed concerns and recommendations would apply here. As discussed above, the employer’s ability to assert “essential job functions” as an affirmative defense must be limited to only a very narrow subset of employees whose job it is to maintain and protect the privacy of employee personnel records information in order to ensure that the rule can be robust in scope. For example, the mere fact that a supervisor, or even a human resources professional, just has access to pay information is not sufficient to exclude them from protections in the first instance and is also insufficient to constitute a defense when adverse action is taken. If employees with mere access to information on pay are excluded from these protections, it could mean large groups of employees – those, for example, who are in the best positions to remedy problems (such as supervisors), and those in fields that are predominately women (such as human resources), will not be able to engage in frank discussions with those seeking their assistance, or worse still, would not be protected themselves as noted in the discussion section of this NPRM.

c. Violation of Workplace Rules as an Affirmative Defense
Second, the NPRM also proposes an affirmative defense for violations based on legitimate workplace rules. While employers should be able to take appropriate and necessary actions for serious workplace violations, as it is currently proposed, this defense runs the risk of being so broad as to allow pre-textual reasons for adverse actions. Such a broad and undefined proposal, that allows excessive employer subjectivity, could serve as a proxy for an employer wanting to fire an employee for discussing or disclosing wages. In fact, the example that is proposed to illustrate this affirmative defense – an employee being “disruptive” – opens the door to this exact problem. Such a subjective example is unclear, too broad, and could allow an employer to define any type of discussion of pay as “disruptive.” OFCCP providing more narrowly tailored definitions and examples of the types of legitimate workplace rules that are permitted as an affirmative defense will reduce the chance that these defenses are abused.
III. OFCCP Should Require Training and Best Practices for the Anti-Retaliation Rule.

DOL also requested comments on the implementation of this rule. Training for managers on the new rule, including providing best practices, is important in order to ensure that managers and employees alike understand their new protections and obligations. For companies that have had longstanding policies against wage discussions, such trainings and the dissemination of this new information are critically important. Merely eliminating a basis on which to take adverse action against employees should not be a financial or significant administrative burden on employers. For example, instruction on other nondiscrimination provisions and similar protections are already part of many employers’ mandatory training courses and in employee manuals or material.

Conclusion

We commend President Obama for his administrations ongoing efforts to ensure fair pay for all workers, including his signing of the anti-retaliation executive order and the U.S. Department of Labor for its implementation. The EO and this subsequent rulemaking will benefit 28 million workers, representing nearly a quarter of the national workplace and billions of dollars in federal contract funds that will no longer be able to be used to underwrite this kind of discrimination. We urge the administration to adopt final regulations on this anti-retaliation proposed rule swiftly and without any unnecessary delay.

Thank you for the opportunity to submit comments on an issue that is so critical for working women and their families. Please do not hesitate to contact me at maatzl@aauw.org or 202/785-7793 if we can provide further information.

Sincerely,

Lisa M. Maatz
Vice President of Government Relations

AAUW advances equity for women and girls through advocacy, education, and research. Since 1881, AAUW has been one of the nation’s leading voices promoting education and equity for women and girls. AAUW has a nationwide network of more than 170,000 members and supporters across the United States, as well as 1,000 local branches and 800 college and university partners.