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## **21<sup>st</sup> Century Tools for Advancing Equal Opportunity: Recommendations for the Next Administration**

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# 21<sup>st</sup> Century Tools for Advancing Equal Opportunity: Recommendations for the Next Administration

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Forty-plus years after passage of our nation’s modern civil rights laws, Americans have much to celebrate with respect to equal opportunity in the workplace. Over the years, overt discrimination has become less prevalent and less socially acceptable. Yet discrimination persists, both the blatant variety and more subtle forms of stereotyping and favoritism, sometimes referred to as “second generation” discrimination.<sup>1</sup>

January 2009 promises to usher in a burst of new reform in many areas of federal law and policy. One area that should be a priority of the next U.S. President – whether Barack Obama or John McCain – is eradicating all forms of discrimination in the workplace. This Issue Brief offers simple yet important reforms that would be relatively easy for a new Administration to implement. These reforms include: (1) harnessing transparency and technology to propel fair workplace practices by employers; (2) strengthening the abilities of federal enforcement agencies to address systemic discrimination; and (3) establishing a standard four-year statute of limitations under federal employment discrimination laws. Taken together, this set of policies will encourage employers to take steps to eliminate discriminatory practices; increase the effectiveness of the federal agencies charged with enforcing the anti-discrimination laws; and facilitate access to the courts for victims of discrimination.

## I. The Challenge: Eradicating Workplace Bias, Including Its Subtle Forms

Overt discrimination on the basis of race, gender or other improper factors clearly still occurs in the 21<sup>st</sup> Century; abundant examples may be found in federal court decisions.<sup>2</sup> “Second generation” discrimination is harder to detect. Professor Susan Sturm describes “second generation” discrimination as “patterns of interaction among groups within the workplace that, over time, exclude non-dominant groups.”<sup>3</sup> For example, a white supervisor might hire a white applicant over a more qualified black applicant because the white supervisor felt more “comfortable” with the white applicant. Research on stereotypes shows that “even

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<sup>1</sup> Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 465-66 (2001).

<sup>2</sup> See, e.g., *Bailey v. USF Holland*, 526 F.3d 880 (6th Cir. 2008) (white co-workers referred to African-Americans as “boy,” “colored boy,” and “nigger” and nooses were hung in the workplace); *Jordan v. City of Cleveland*, 464 F.3d 584 (6th Cir. 2006) (African-American firefighter was referred to as “Sambo” and “the welfare firefighter” and subjected to racial slurs and jokes; supervisors gave him extra work, referred to a predominantly black fire station as the “monkey island” and segregated employees by assigning black firefighters to all black shifts).

<sup>3</sup> Sturm, *supra* note 1 at 468.

before having any interaction with a particular individual, background assumptions will influence how a decision-maker perceives a job candidate.”<sup>4</sup>

While sometimes hard to see, these more subtle forms of discrimination are nonetheless pernicious. The Third Circuit Court of Appeals put it this way:

Though they still happen, the instances in which employers and employees openly use derogatory epithets to refer to fellow employees appear to be declining. Regrettably, however, this in no way suggests that discrimination based upon an individual's race, gender, or age is near an end. Discrimination continues to pollute the social and economic mainstream of American life, and is often simply masked in more subtle forms. It has become easier to coat various forms of discrimination with the appearance of propriety, or to ascribe some other less odious intention to what is in reality discriminatory behavior.<sup>5</sup>

In-group favoritism, out-group aversion, and stereotyping are bolstered in the workplace by organizational policies that rely on subjectivity. Unchecked, undue subjectivity or discretion becomes a mechanism for stereotypes to improperly influence decisions affecting pay, promotions, and advancement.<sup>6</sup> Subtle discrimination is particularly harmful to employees when it is reinforced by organizational structures that do not require decision-makers to be accountable for their choices. Professor Sturm explains: “[t]he glass ceiling remains a barrier for women and people of color largely because of patterns of interaction, informal norms, networking, training, mentoring, and evaluation, as well as the absence of systematic efforts to address bias produced by these patterns.”<sup>7</sup>

Discrimination in the workplace, subtle or not, has significant consequences. First, of course, a victim of discrimination loses an equal opportunity to compete for initial hiring and placement, compensation, and advancement. These barriers to success can in turn affect his or her ability to afford health insurance, pay for a child’s college education, or care for an elderly parent. Workplace discrimination can also adversely affect the employee’s health. And there are significant consequences for employers too. Corporations lose some of their most talented employees and best ideas when they limit opportunities based on stereotypes and biases. In short, the individual and collective stakes are enormous. Having effective tools to battle discrimination in the workplace is essential to the country’s well-being.

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<sup>4</sup> Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 746 (2005).

<sup>5</sup> *Aman v. Cort Furniture Rental Co.*, 85 F.3d 1074, 1081-82 (3d Cir. 1996).

<sup>6</sup> Legal scholar Linda Hamilton Krieger argues that subtle bias is “today’s most prevalent type of discrimination.” Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1164 (1995).

<sup>7</sup> Sturm, *supra* note 1 at 469; see also VIRGINIA VALIAN, *WHY SO SLOW? THE ADVANCEMENT OF WOMEN* (1998).

## II. Solutions: Transparency, Enforcement, and Access to Court

Over the last few decades, the courts<sup>8</sup> and Congress<sup>9</sup> have slowly begun to grapple seriously with how to address subtle forms of discrimination. These developments are important, but additional measures are needed.

The reforms we advocate would hold employers accountable and thus help end discrimination, including “second generation” varieties – favoritism, aversion, and stereotyping. New disclosure requirements that help expose inequities in the workplace will help corporations themselves, as well as advocates and enforcement agencies, identify discrimination and look for ways to eliminate it. Where that does not work, a greater focus by enforcement agencies on systemic discrimination can ferret out the offending practices in the workplace and lead to effective remedies. And, when sunshine and government enforcement are insufficient, extending the statute of limitations to four years will provide workers more effective access to the courts for recourse.

Our proposals would represent a slight shift from the status quo for employers, but would significantly improve the workplace for those subject to discrimination. While these reforms are important to civil rights enforcement, they do not represent an exhaustive list.<sup>10</sup> We hope this article will spur a dialogue in and among corporate, legal, political, and civil rights circles about the best methods for advancing equal opportunity in the 21<sup>st</sup> Century so that the next Administration will be fully equipped to implement changes when it steps into office.

### A. Transparency: Enhancing Disclosures to Expose Patterns of Discrimination

A little bit of sunshine can be a low-cost and highly effective tool for dramatically increasing equal opportunity in the United States. Exposing bias in the workplace can lead to heightened awareness of it, and, in turn, a serious effort to address it. Employers made aware of discriminatory patterns can, for example, take steps to hold supervisors accountable for their actions. Contemporary social science has found that accountability is essential to reducing

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<sup>8</sup> See, e.g., *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 159 n.15 (1982) (noting that plaintiffs might challenge a general policy of subjective decision-making processes); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (recognizing that sex stereotyping, including expectations that a female employee would not be aggressive, is sex discrimination); *Butler v. Home Depot Inc.*, No. c-94-4335, 1997 U.S. Dist. LEXIS 16296 (N.D. Cal. Aug. 29, 1997) (denying summary judgment when plaintiffs had raised an inference of pattern and practice sex discrimination using statistical data and anecdotal evidence of subjective hiring processes that were tainted by stereotyping); *Dukes v. Wal-Mart Stores, Inc.*, 474 F.3d 1214 (9th Cir. 2007) (holding that subjective decision-making is particularly susceptible to causing discrimination) *aff'd en banc*, 508 F.3d 1168 (9th Cir. 2007).

<sup>9</sup> In 1991, Congress amended the Civil Rights Act to expressly allow mixed motive claims. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). Though the mixed motive framework still focuses somewhat on intent, the mixed motive analysis more clearly allows plaintiffs to challenge employment decisions that are based on many factors, including inadvertent bias. Further, the 1991 Civil Rights Act recognized that a constellation of employment practices could constitute discrimination. See *McClain v. Lufkin Indus.*, 519 F.3d 264, 278 (5th Cir. 2008) (“Title VII permits a plaintiff to demonstrate that the elements of the employer’s decision-making process are not capable of separation for analysis and thus that the process should be analyzed as one employment practice”)

<sup>10</sup> See, e.g., Civil Rights Act of 2008, S. 2554, 110th Cong. (2008); Employment Non-Discrimination Act, H.R. 2105, H.R. 3685 110th Cong. (2007).

discrimination in the workplace.<sup>11</sup> Studies show that bias “can be minimized when decision-makers know that they will be held accountable for the process and criteria used to make decisions, for the accuracy of the information upon which the decisions are based, and for the consequences their actions have for equal employment opportunity.”<sup>12</sup> Examples of effective measures include: (1) requiring supervisors to explain their decision-making processes in hiring and promotion; (2) establishing consequences if employees do not follow anti-discrimination policies and procedures; and (3) tying bonuses and other incentive pay to successful implementation of equal opportunity procedures. An employer whose inequitable hiring, promotion, and compensation patterns are disclosed for all to see is much more likely to take such steps. That is why the next Administration should require the federal government and employers to use existing technological resources for greater transparency in equal employment opportunity statistics.

1. Harnessing the Transparency Tools of the SEC to Advance Equal Opportunity

Any Administration interested in quickly and effectively addressing 21<sup>st</sup> Century discrimination should require publicly traded companies to publicly file a Diversity Report Card along with the other information they submit to the Securities and Exchange Commission (SEC) pursuant to Section 13(a) and Section 14(a) of the Securities Exchange Act.<sup>13</sup>

Under Section 13(a) of the Act, the SEC collects registration statements and periodic reports from publicly traded companies in order to promote a stable market so that investors can make educated decisions about where to invest.<sup>14</sup> Companies must file annual (Form 10-K) and quarterly (Form 10-Q) reports that give investors the information they need to make sound investment decisions. In addition, under Section 14(a) of the Act, the SEC outlines proxy rules for shareholder meetings that require disclosure “as necessary or appropriate in the public interest or for the protection of investors.”<sup>15</sup> For periodic reporting and proxy rules, information must be disclosed if it is material or information which “a reasonable investor would find significant in making an investment decision.”<sup>16</sup> Such transparency is central to the integrity of our marketplace.<sup>17</sup>

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<sup>11</sup> Alexandra Kalev, Frank Dobbin & Erin Kelly, *Best Practices or Best Guesses? Assessing The Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOCIOLOGY REV., 589 (2006); Marc Bendick, Jr., Mary Lou Egan, & Suzanne M. Lofhjelm, *Workforce Diversity Training, From Anti-Discrimination Compliance to Organizational Development*, 24 HUM. RESOURCE PLANNING, 10 (2001).

<sup>12</sup> William T. Bielby, *Promoting Racial Diversity at Work: Challenges and Solutions*, in DIVERSITY AT WORK 53, 68 (Arthur P. Brief, ed., 2008); see also Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, AM. J. OF SOCIOLOGY 97: 1531-1576 (1992); Lauren B. Edelman and S. Petterson, *Symbols and Substance in Organizational Response to Civil Rights Law*, in SOC. STRATIFICATION & MOBILITY 17 (Kevin Leicht, ed., 1999); Sturm, *supra* note 1 at 519-520.

<sup>13</sup> 15 U.S.C. § 78a *et seq.* (2007). For a more in-depth treatment of this proposal, see Cyrus Mehri et al., *One Nation, Indivisible: The Use of Diversity Report Cards to Promote Transparency, Accountability and Workplace Fairness*, 9 FORDHAM J. CORP. & FIN. L. 395 (2004).

<sup>14</sup> See, e.g., 1 THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 9.2 (2d ed. 2002).

<sup>15</sup> 15 U.S.C. § 78n.

<sup>16</sup> 1 HAZEN, *supra* note 14 at § 9.2.

<sup>17</sup> Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335, 1340-41 (1996) (“More than any other nation, we have cast a broad vote of confidence in the

In addition to traditional financial disclosures, the SEC also requires disclosure of information such as competitive conditions in the market,<sup>18</sup> expenditures on environmental protection compliance,<sup>19</sup> the number of company employees,<sup>20</sup> and litigation the company faces.<sup>21</sup> The SEC collects such non-financial information under its authority to ascertain material information for the benefit of investors. This trend of requiring wider disclosures to all stakeholders will likely accelerate given the recent crisis in the financial services industry and the call for “Wall Street” to be more accountable to “Main Street.”

Consistent with emerging trends that urge corporations to value not only stockholders but other stakeholders as well, the next Administration should issue regulations under Section 14(a) of the Securities Exchange Act requiring corporations to disclose equal employment opportunity (EEO) data. Because “corporate social behavior can affect profitability”<sup>22</sup> and competitiveness, disclosure of corporate diversity data should be mandatory. Indeed, corporate diversity information can be seen as “material” to investment decisions, especially given that there has been a substantial rise in social concerns by investors and other stakeholders.<sup>23</sup> In addition to helping investors make sound decisions, mandatory disclosure of diversity data will create a marketplace in which companies will strive to improve their performance. In short, marketplace tools can be used to champion equal opportunity.

In order to serve this dual purpose of sound investments and enhanced civil rights compliance, companies should be required to submit a detailed Diversity Report Card as part of their annual reporting on their Form 10-K. Our proposed Diversity Report Card is based on the theory that corporations must be responsible not only to traditional shareholders but to other stakeholders as well – consumers, employees, and communities. The disclosure of corporate information to third parties or “informational regulation” enhances a corporation’s engagement with its social network and, ideally, produces positive results for that network at minimal cost. For example, studies show that corporate disclosure of environmental information has reduced companies’ environmental impact.<sup>24</sup>

Adding a Diversity Report Card to the environmental and financial information the SEC already collects will provide stakeholders with a more complete understanding of companies in a global market. Indeed, requiring a Diversity Report Card component of SEC filings would be in

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integrity and efficiency of the markets, and in the transparency not just of the markets but of the underlying companies.”).

<sup>18</sup> 17 C.F.R. § 229.101(c)(x) (2008).

<sup>19</sup> *Id.* § 229.101(c)(xi).

<sup>20</sup> *Id.* § 229.101(c)(xii).

<sup>21</sup> *Id.* § 229.103.

<sup>22</sup> Note, *Should the SEC Expand Nonfinancial Disclosure Requirements?*, 115 HARV. L. REV. 1433, 1436 (2002). This Harvard Note responds to a seminal article by Cynthia Williams that argues in favor of mandatory social disclosure. Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1266 (1999).

<sup>23</sup> *Should the SEC Expand Nonfinancial Disclosure Requirements?*, *supra* note 22 at 1436 (summarizing Williams’ argument in favor of social disclosure).

<sup>24</sup> MARY LOU EGAN, FABRICE MAULEON, DOMINIQUE WOLFF & MARC BENDICK, JR., FRANCE’S MANDATORY “TRIPLE BOTTOM LINE” REPORTING: AN INFORMATIONAL REGULATION APPROACH TO SUSTAINABLE DEVELOPMENT, SECOND INTERNATIONAL CONFERENCE OF THE INTERNATIONAL CENTER FOR CORPORATE ACCOUNTABILITY 11 (June 2007) (on file with authors).

line with new global trends. One report estimates that in 2003, “approximately 1,500 – 2,000 corporate annual reports world-wide provided information about the firms’ activities on some combination of social, environmental, and sustainability topics” as compared to 100 firms in 1993.<sup>25</sup> According to this report, “[i]n 2005, almost 80 percent of the *Fortune* Global 250 firms in 21 countries or regions issued corporate responsibility reports.”<sup>26</sup> France now requires all companies that are publicly traded on the Paris Stock Exchange to report financial, environmental and social/employment data.<sup>27</sup> Moreover, even some U.S. companies, such as IBM, have voluntarily disclosed equal employment opportunity data in the past.<sup>28</sup> And some states require employers to keep records of employees’ wages to help identify discrimination.<sup>29</sup>

The Diversity Report Card should include the following information:

- *Key Glass Ceiling Indicators*, such as the race, ethnicity, and gender of the 200 highest paid employees based on *total* compensation;
- *Special Compensation Data*, including the distribution of stock options and other forms of compensation by race, ethnicity, and gender;
- *Pay Equity Data*, including the range, median, and mean salary by job function by race, ethnicity, and gender;
- *Applicants and New Hire Data*, including the race, ethnicity, and gender of applicants and those hired by job function; this data should include positions that are internal promotions; and
- *Diverse Candidate Slates for Boards of Directors*, including the race, ethnicity and gender of candidates interviewed in-person for Board Positions.<sup>30</sup>

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<sup>25</sup> *Id.* at 15.

<sup>26</sup> *Id.* at 30.

<sup>27</sup> *Id.* at 20-21, 42-43. France requires reporting of employment data such as the total number of employees, salaries, representation of women in the workforce, efforts to integrate women in physically challenging positions, and efforts to comply with the U.N. International Labor Organization’s conventions on employment discrimination.

<sup>28</sup> SOCIAL INVESTMENT RESEARCH ANALYST NETWORK, A CALL TO ACTION: FOR GREATER CORPORATE TRANSPARENCY 10 YEARS AFTER THE GLASS CEILING COMMISSION RECOMMENDATIONS (Dec. 2005), *available at* <http://www.siran.org/pdfs/calltoaction.pdf>. Through the result of litigation, The Coca-Cola Company publicly disclosed diversity data and reported systemic efforts to improve equal opportunity on its website for five years. The Coca-Cola Company, [http://www.thecoca-colacompany.com/citizenship/our\\_progress.html](http://www.thecoca-colacompany.com/citizenship/our_progress.html) (last visited Oct. 7, 2008).

<sup>29</sup> For example, in 2008, Maryland adopted House Bill 1156, establishing a commission to study pay disparities and segregation in female-dominated occupations. It also requires Maryland employers to keep records of gender and racial makeup of their employees. Act of Apr. 8, 2008, ch. 114, 2008 Md. Laws 114. As another example, Minnesota requires all public employers (including cities, counties and school districts) to “attempt to establish equitable compensation relationships” between female-dominated and male-dominated jobs, and requires employers to report wage data. MINN. STAT. § 43A.01 (2007), §§ 471.991-471.999.

<sup>30</sup> Letter from Mehri & Skalet, PLLC to Jonathan Katz, U.S. Sec. of Sec. Exch. Comm’n (Sept. 12, 2003), *available at* <http://www.sec.gov/rules/proposed/s71403/mehriskalet091203.htm>.

Shining sunlight on diversity in this manner will inspire companies to take the actions necessary to advance equal opportunity. This data will help reveal areas in which companies could better address patterns of discrimination in the workplace. For example, in our experience, investigations of our clients' claims reveal over and over again that the pay grade where stock options begin in earnest is where the glass ceiling is most apparent. The overlooked scandal about stock options is that female and minority employees have been virtually locked out of wealth-creating opportunities in most companies.<sup>31</sup> Other pay discrimination will also come to light. This is especially important given how difficult it is for employees to know what their co-workers are being paid, and thus whether they are the victims of pay discrimination. As Justice Ginsburg recognized in her dissent in *Ledbetter v. Goodyear Tire & Rubber Co.*: "Compensation disparities . . . are often hidden from sight. It is not unusual . . . for management to decline to publish employee pay levels, or for employees to keep private their own salaries."<sup>32</sup> Similarly, racial and gender breakdowns of hiring data will shine light on the effects of unchecked subjectivity in decision-making, which is "a ready mechanism for . . . discrimination."<sup>33</sup>

If diversity and EEO information is made public, employees, consumers and other stakeholders can make educated decisions about places they want to work, products they want to buy, and companies in which they want to invest. Just as some transnational corporations voluntarily disclose human rights and labor rights compliance information "primarily in an effort to improve public relations and attract consumers and investors,"<sup>34</sup> public access to a Diversity Report Card will create a new burst of progress in advancing equity in the workplace. With these disclosures, companies will no longer neglect glass ceiling issues, but likely will move mountains to ensure fair compensation and equal opportunity in promotion and hiring decisions.<sup>35</sup> Many companies will be forced to examine the ways in which structural systems support subtle discrimination, and to embrace best practices to level the playing field. Companies will be motivated to improve diversity not only to avoid litigation but to impress stakeholders. The best companies will be rewarded.

The burden on companies to complete a Diversity Report Card will be relatively minimal. Companies are already required to collect baseline race, ethnicity and gender information in the EEO-1 Report they provide annually to the Equal Employment Opportunity Commission (EEOC).<sup>36</sup> To make this heightened reporting requirement palatable to companies that may be

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<sup>31</sup> See, e.g., Alys Lebeau, *The New Workplace Woman: "Are We There Yet?"* BUSINESS WOMAN, Fall 2001, (citing studies finding that men are awarded stock options and other bonuses at 20 to 30 times the rate of women and that men's compensation consisted of 85% salary and 15% other (stock options, bonuses, profit sharing, etc.) whereas women's compensation consisted of 91% salary and 9% other).

<sup>32</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162, 2181 (2007) (Ginsburg, J. dissenting) (citation omitted).

<sup>33</sup> See, e.g., *Miles v. M.N.C. Corp.*, 750 F.2d 867, 871 (11th Cir. 1985).

<sup>34</sup> Rachel Cherington, *Securities Laws and Corporate Social Responsibility: Toward an Expanded Use of Rule 10b-5*, 25 U. PA. J. INT'L ECON. L. 1439, 1441-42 (2004).

<sup>35</sup> David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41 (1999). Hess argues that "[I]f corporations were required to disclose information about their actions affecting [stakeholders], then pressure would mount to justify those acts; and justifying one's acts, most ethicists would grant, is the first step toward improving one's behavior." *Id.* at 41.

<sup>36</sup> Private companies with 100 or more employees are required to file EEO-1 Reports with the EEOC describing the demographics of their workforce. This data can show employment patterns and point to potential problem areas,



resistant, the SEC should establish a one- to two-year gradual phase-in of the Diversity Report Card. This will allow the worst actors a chance to improve before the transparency begins. If there is one way that a new Administration can bring about the most progress for equal opportunity in America, with almost no taxpayer cost, it is to champion EEO transparency in the SEC's 10-K Forms.

## 2. Using Technology to Increase Transparency and Disclosures to OFCCP

Under Executive Order 11246, signed by President Johnson in 1965,<sup>37</sup> federal contractors and federally-assisted construction contractors are prohibited from discriminating in employment on the basis of race, sex, religion, or national origin. This Executive Order is enforced by the Office of Federal Contract Compliance Programs (OFCCP) within the U.S. Department of Labor. OFCCP collects data from federal contractors, conducts compliance reviews, and investigates complaints.<sup>38</sup> According to OFCCP, federal contractors covered by the Executive Order employ approximately 26 million individuals, comprising nearly 22% of the U.S. civilian workforce.<sup>39</sup> The program thus has the capacity to have a huge impact on equal opportunity for workers across the country.

Under the Executive Order, federal contractors are required to develop written Affirmative Action Programs or Affirmative Action Plans (AAPs) annually, containing detailed information about representation and utilization of female and minority employees in their workforces.<sup>40</sup> The goal is to provide a diagnostic tool to ensure that women and minorities are being employed at a rate that would be expected given their availability in the relevant labor pool. If underutilization of women or minorities is uncovered, the contractor must offer practical steps to address this underutilization and work toward achieving the workforce that would be expected in the absence of discrimination.<sup>41</sup> The main components of the AAP include: (1) an organizational and workforce profile; (2) job position analysis, which includes analysis of available minorities and women and the contractor's utilization of them in the workforce; (3) identification of problematic practices; and (4) development of programs to alleviate identified problems.<sup>42</sup> Federal contractors typically prepare separate AAPs for each of the company's business units or locations. Thus, one federal contractor, depending on its size or internal organization, may create multiple AAPs.

One might think that these AAPs would be routinely reviewed by OFCCP. They are not. The plans are not even filed with OFCCP. Instead, the AAPs collect dust at corporate offices only to be tossed out in a few years, usually untouched and unseen by OFCCP unless OFCCP

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such as the underrepresentation of females or minorities in certain job categories. The EEOC is required by Title VII to keep these reports confidential. 42 U.S.C. § 2000e-8(e) (1976).

<sup>37</sup> Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sept. 24, 1965); Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967); Exec. Order No. 12,067, 43 Fed. Reg. 28,967 (June 30, 1978).

<sup>38</sup> The Executive Order applies to federal contractors who have contracts or subcontracts over \$10,000.

<sup>39</sup> OFCCP, U.S. DEP'T OF LABOR, FACTS ON EXECUTIVE ORDER 11,246 (Jan. 4, 2002), <http://www.dol.gov/esa/ofccp/regs/compliance/aa.htm>

<sup>40</sup> 41 C.F.R. § 60-2.1. (2000). The AAP requirements apply to contractors with contracts of \$50,000 or more, and 50 or more employees.

<sup>41</sup> 41 CFR § 60-2.10.

<sup>42</sup> *Id.*

initiates a compliance review. But OFCCP conducts very few compliance reviews; for example, in 1999, OFCCP reviewed only 4% of federal contractors.<sup>43</sup> In 2004, OFCCP conducted nearly 2,000 fewer compliance reviews than in 2003.<sup>44</sup> No wonder many companies view OFCCP as a paper tiger.

The Executive Order program should be modified to require each contractor to electronically submit the statistical data from its AAPs to OFCCP each year. In addition, each contractor should also file a national statistical AAP report, combining the statistical information from each business unit's AAP into one national report. The information to be electronically submitted to OFCCP annually would include the statistical data only, and not the narrative sections of the AAP describing problematic practices and potential solutions. Employers would continue to prepare and keep on-site the traditional AAPs, including the written components discussed above.

Our proposal that employers electronically file a report of their statistical AAP data is designed to reduce the burden on employers while simultaneously improving OFCCP's systemic enforcement. OFCCP could use existing state-of-the-art technology to electronically search the submitted data to identify employers with potential underrepresentation of women and people of color. The understaffed OFCCP could use this data to maximize its compliance review efforts, by auditing employers based on indicators from analysis of the statistical data. This, in turn, would reduce the burden on employers because compliant employers would not be targeted for review and would not have to expend resources assisting OFCCP with a needless audit.

Electronic submission of AAP statistical data would take full advantage of 21<sup>st</sup> Century technology to address 21<sup>st</sup> Century discrimination. OFCCP could learn the technical aspects of electronic filing from the EEOC, which already collects its EEO-1 reports electronically.<sup>45</sup> Technology to search electronic EEO data to target potential problems already exists and is ready for OFCCP to adopt.<sup>46</sup> Most importantly, electronic filing with OFCCP would give employers a greater incentive to engage in the good-faith self-analysis of opportunities for female and minority employees that the program contemplates. The current, rarely-seen, paper-only system does not provide that incentive.

In addition to requiring electronic submission of AAP statistical data, a new Administration should collect data that will enable OFCCP to measure wage inequalities and equal opportunity in promotions, retention, hiring, terminations, and other areas of

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<sup>43</sup> Katia Hetter, *A White Man's World: Diversity in Management*, NEWSDAY, Apr. 16, 2000, at A6.

<sup>44</sup> U.S. COMMISSION ON CIVIL RIGHTS, FUNDING FEDERAL CIVIL RIGHTS ENFORCEMENT: THE PRESIDENT'S 2006 REQUEST 25 (2005). The number of compliance reviews dropped to 6,529 in 2004. *Id.* In its Fiscal Year 2009 budget justification, the Department of Labor reported that the OFCCP conducted 8,000 "compliance evaluations" in 2007, but did not report the number of compliance reviews. U.S. DEP'T OF LABOR, FY 2009 CONGRESSIONAL BUDGET JUSTIFICATION EMPLOYMENT STANDARDS ADMINISTRATION (2008) (emphasis added), available at <http://www.dol.gov/dol/budget/2009/PDF/CBJ-2009-V2-03.pdf>.

<sup>45</sup> U.S. Equal Employment Opportunity Commission, 2008 EEO-1 Survey, <http://www.eeoc.gov/eeo1survey/> (last visited Oct. 8, 2008).

<sup>46</sup> Marc Bendick, Jr., How Can the EEOC Effectively Promote Employer Efforts to Hire the Best Employees and Avoid Discrimination?, Testimony Before the Equal Employment Opportunity Commission's Hearings on the E-RACE (Eliminate Racism and Colorism in Employment) Initiative (Feb. 2007).

employment.<sup>47</sup> In order to focus its enforcement efforts, OFCCP should be armed with data regarding applicant flow, new hires, promotions, terminations, compensation, and tenure by race, ethnicity, and gender. Currently, OFCCP does not collect data that discloses compensation or that tracks applicants, hires, and terminations. Without such data, OFCCP's ability to enforce the law is significantly undermined. An OFCCP that is committed to enforcement could use such data to more efficiently scan all federal contractors to target compliance reviews.

### 3. Adding Critical Data to EEOC Disclosures

As noted above, private companies with 100 or more employees are required to file EEO-1 Reports with the EEOC describing the demographics of their workforce. Unfortunately, this data does not reveal disparities in salary or other forms of compensation.<sup>48</sup> We recommend that the EEOC expand the data collected in the EEO-1 report to include the data outlined in the Diversity Report Card described above. This would equip the EEOC with data that would point to wage disparities,<sup>49</sup> promotion and retention problems, and other areas of discrimination, instead of merely revealing the underrepresentation of women and minorities.

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The disclosure requirements we recommend target several different types of employers and should be adopted concurrently. To be clear, only publicly traded companies would be required to disclose the Diversity Report Card required by the SEC. The EEOC would collect enhanced EEO-1 disclosures from employers who are already required to submit EEO-1 data – private employers with 100 or more employees. OFCCP would only collect data from federal contractors who meet the contract and employee size thresholds of the Executive Order program. Our proposed new disclosure requirements would complement one another and be consistent with the important business maxim – “What gets measured, gets done.”

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<sup>47</sup> In 2000, OFCCP implemented, on a pilot basis, an Equal Opportunity Survey to collect data along these lines, but discontinued the survey before it was seriously or consistently implemented. *See* Government Contractors, Affirmative Action Requirements, Final Rule, 65 Fed. Reg. 68022 (Nov. 13, 2000) (codified at 41 C.F.R. pt. 60-2.18); Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors: Equal Opportunity Survey, 71 Fed. Reg. 53032 (Sept. 8, 2006) (codified at 41 C.F.R. pt. 60-2.18); MARC BENDICK, JR. ET AL, BENDICK AND EGAN ECONOMIC CONSULTANTS, INC., THE EQUAL OPPORTUNITY SURVEY: ANALYSIS OF THE FIRST WAVE OF SURVEY RESPONSES (Sept. 2000); Letter from Marc Bendick, Jr. to Director of Division of Policy, Planning and Program Development, OFCCP (Mar. 2, 2006) (on file with author) (comments on proposed rule making RIN 1215-AB53 Equal Opportunity Survey). The next Administration should, at the very least, collect compensation data by race, ethnicity, and gender, whether or not it revives the discontinued survey.

<sup>48</sup> *See, e.g.,* Mary E. Graham & Julie L. Hotchkiss, *A Systemic Assessment of Employer Equal Opportunity EFFORTS as a Means of Reducing the Wage Earnings Gap*, 12 CORNELL J. L. & PUB. POL'Y 169 (2002) (proposing that the EEOC collect data that would reveal wage gap issues).

<sup>49</sup> Legislation is pending in Congress that would also require the disclosure of data on wage disparities. One such bill is the Paycheck Fairness Act, which, in addition to strengthening the Equal Pay Act in a number of respects, would require the EEOC to survey pay data that is already available and issue regulations, to the extent necessary to enhance the EEOC's ability to enforce the equal pay laws, that would require employers to submit additional pay data identified by the race, sex, and national origin of employees. H.R. 1388, 110th Cong. (2007); S. 766 110th Cong. (2007).

## B. Enforcement: Focusing on Systemic Discrimination

A new Administration must ensure that each of the federal agencies charged with enforcing the laws against discrimination in the workplace has strong leaders at the helm, committed to the agency's mission and to effectively using all of the tools at its disposal. It is also critical that the Administration's budget requests for these agencies reflect the priority that must be given to their important missions and the difficulties the agencies have faced due to budget shortfalls and staffing declines. According to the EEOC's Inspector General, "The Agency is challenged in accomplishing its mission of promoting equality of opportunity in the workforce and enforcing federal laws prohibiting discrimination due to a reduced workforce and an increasing backlog of pending cases."<sup>50</sup> Between 1999 and 2006, the EEOC lost roughly 350 employees.<sup>51</sup> Meanwhile, EEOC charges are on the rise.<sup>52</sup> OFCCP, for its part, had a staff in 2004 roughly one-third the size of its workforce in 1980.

Beyond those threshold requirements for success, it is essential that the agencies focus more on systemic discrimination and step up their enforcement activities in systemic cases. Following are our suggestions toward that end.

### 1. The EEOC Should Enhance Its Enforcement of Systemic Cases

The next Administration must better equip the EEOC to track and challenge systemic discrimination. In 2005, the EEOC created a Systemic Task Force ("the Task Force") that released a report in 2006, with recommendations for improving systemic enforcement.<sup>53</sup> This effort represents a laudable step in the right direction toward improved systemic enforcement, and the next Administration should build on many of the recommendations in the Task Force's report, including the proposal that the Agency link charge data with EEO-1 data.<sup>54</sup>

Systemic discrimination cases are "pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company or geographic location."<sup>55</sup> The agency has recognized that "[i]t is imperative that the Commission make the identification, investigation, and litigation of systemic discrimination a top priority."<sup>56</sup> It also

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<sup>50</sup> EEOC, FISCAL YEAR 2007 PERFORMANCE AND ACCOUNTABILITY REPORT: INSPECTOR GENERAL'S STATEMENTS (Nov. 15, 2007), [http://www.eeoc.gov/abouteeoc/plan/par/2007/inspector\\_general\\_statements.html](http://www.eeoc.gov/abouteeoc/plan/par/2007/inspector_general_statements.html).

<sup>51</sup> *Id.*

<sup>52</sup> EEOC charges increased modestly from 1997 (80,680 charges) to 2007 (82,792 charges). Stewart J. Schwab, The Allan R. Tessler Dean Cornell University Law School, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?, Presentation at the American Constitution Society, at slide 7 (Sept. 18, 2008), *available at* <http://www.acslaw.org/node/7149>. According to the most recent data available thus far for 2008, the EEOC has experienced a 15% rise in charges compared with 2007. Barriers to Justice: Examinign Equal Pay for Equal Work: Hearing Before the U.S. S. Judiciary Comm., 110th Cong. (Sept. 23, 2008) (testimony of Cyrus Mehri), *available at* [http://judiciary.senate.gov/hearings/testimony.cfm?id=3564&wit\\_id=7439](http://judiciary.senate.gov/hearings/testimony.cfm?id=3564&wit_id=7439).

<sup>53</sup> EEOC SYSTEMIC TASK FORCE, SYSTEMIC TASK FORCE REPORT TO THE CHAIR OF THE EEOC 1 (Mar. 2006), *available at* [http://www.eeoc.gov/abouteeoc/task\\_reports/systemic.pdf](http://www.eeoc.gov/abouteeoc/task_reports/systemic.pdf)

<sup>54</sup> *Id.* at 11-12. Improved technology for data sharing between offices and a greater commitment to timely and complete data regarding individual charges would significantly enhance the Agency's ability to recognize systemic discrimination.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 5.

has recognized that the EEOC is uniquely positioned to litigate systemic cases because, unlike private litigants, the EEOC need not meet the stringent requirements for certifying a case as a class action under federal rules, and because the agency may be able to bring cases that the private bar is not likely to handle, for example where the monetary relief might be limited, the focus is on injunctive relief, or the victims are in underserved communities.<sup>57</sup>

Yet the EEOC expends the vast majority of its limited resources on processing individual charges,<sup>58</sup> which makes it difficult for the agency to analyze and challenge systemic employment discrimination. A new Administration must shift the EEOC's focus to systemic discrimination, and support this shift with additional, appropriately trained staff.

Additionally, at least one of the Task Force's recommendations must be modified for optimal systemic enforcement. The Task Force recommended that investigation of systemic discrimination should occur in the field in existing field offices, with technical support coming from the Washington, D.C. office. While investigation at multiple sites is desirable, this structure does not address the multi-jurisdictional problem of the district offices and the need to develop expertise for systemic cases. It also does not allow for enough synergy and interaction among attorneys and labor economists/statisticians, nor does it sufficiently account for the inadequate resources of the under-funded and under-staffed agency.

To successfully address systemic discrimination, the EEOC must be restructured so that *all* regions of the country have the expertise to monitor systemic discrimination by employers. In the last four decades, as Administrations have come and gone, the commitment to national resources for addressing systemic discrimination has waxed and waned.<sup>59</sup> Sometimes, all the systemic discrimination resources have been concentrated in Washington, D.C. At other times, there have been efforts to try to make the EEOC's district or area offices the home for systemic enforcement without providing staff with significant statistical expertise.

Both EEOC models have faced significant challenges in practice. When the systemic enforcement has been concentrated in Washington, D.C., it has been difficult for the office to cover all areas of the country, especially when there has been "virtually no hiring [in the systemic unit] since the early 1990s."<sup>60</sup> In addition, focusing systemic enforcement in the national office makes it very susceptible to the political whims of each Administration. For instance, the George W. Bush Administration reassigned most of the systemic staff to non-systemic cases, crippling the Agency's enforcement efforts. On the other hand, when the responsibility for systemic enforcement has been spread throughout the district and area offices, the staff often has been overwhelmed with other duties. Another problem with some district offices cover multiple U.S. Courts of Appeals, requiring the attorneys to be experts in the relevant law of multiple circuits. Resources are wasted when more than one office is responsible for the same circuit's law. For example, the New York District Office covers some areas within the First, Second, and Third Circuits and the Philadelphia District Office covers some areas

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<sup>57</sup> *Id.* at 2.

<sup>58</sup> *Id.* at Executive Report 1.

<sup>59</sup> *See generally, id.* at App. C (describing the history of the EEOC's systemic efforts).

<sup>60</sup> *Id.* at 60.

within the Third, Fourth, and Sixth Circuits.<sup>61</sup> This is very problematic for systemic enforcement as the standards dealing with systemic discrimination vary greatly among the circuits.

Thus, to consolidate the EEOC's limited resources, we recommend that the next Administration create one Systemic Enforcement Team with 12 Regional Systemic Teams (RSTs) – one covering the geographic area of each of the U.S. Courts of Appeals. Each RST should have two well-trained investigators, a labor economist/statistical expert, several trial lawyers with expertise in pattern and practice discrimination, and one appellate/public policy lawyer who monitors trends within the Circuit, files high-impact *amicus* briefs, and intervenes in cases for the public when appropriate. Each RST will become expert on the systemic discrimination case law that is specific to its jurisdiction. Moreover, working together as a team will improve the ability of the whole team – investigators, attorneys, and statisticians -- to understand and identify all facets of systemic discrimination. When necessary, EEOC headquarters could lend support and assist with coordination between the teams. These RSTs could have an enormous impact, particularly if all subgroups are well-staffed, well-funded, and have technological capabilities to regularly interact with the entire team and to analyze data from Charges of Discrimination as well as EEO-1 Reports.

## 2. OFCCP Should Step Up Its Compliance Reviews

A new Administration must revitalize OFCCP's commitment to enforcing the requirements of the Executive Order program discussed above. That means stepping up OFCCP's compliance reviews and invoking the remedies at OFCCP's disposal when contractors fall short – up to and including barring violators from future federal contracts.<sup>62</sup> In addition, OFCCP could have much greater impact if it collected wage and applicant flow data as described above. Because this data will reveal discriminatory patterns, it will help the agency target its compliance reviews.

OFCCP will need staff increases as well, especially if new data is to be collected and analyzed and more compliance reviews conducted. In 2004, the OFCCP staff was approximately one-third the size of what it was in 1980; in Fiscal Year 2004, the office had only 663 employees.<sup>63</sup> Statistical experts are especially needed. Equipped with easier access to data and more staff with the expertise to perform statistical analyses, OFCCP can have a significantly greater impact.

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<sup>61</sup> EEOC Offices, <http://www.eeoc.gov/offices.html>, (last visited July 15, 2008).

<sup>62</sup> Though OFCCP claims to have a new focus on systemic discrimination, it has not provided data by which to fully assess its efforts. See, e.g., U.S. DEP'T OF LABOR, *supra* note 44; U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 44 at 25.

<sup>63</sup> U.S. COMMISSION ON CIVIL RIGHTS, *supra* note 44 at 24. An understaffed OFCCP cannot live up to its mission. In addition to completing fewer compliance reviews, the number of complaints resolved by the OFCCP fell from 802 in 1994 to 219 in 2004. *Id.* at 24-25. In 2007, the OFCCP resolved only 280 complaints. U.S. DEP'T OF LABOR, *supra* note 44.

### C. Access to the Courts and Judicial Efficiency: Fair and Standardized Statutes of Limitations in Employment Discrimination Cases

Even if disclosure and enforcement reforms like those outlined above are adopted, additional measures are needed to ensure that victims of workplace discrimination have access to the courts to vindicate their rights when all else fails. Plaintiffs in employment discrimination cases face many barriers to success, including what new empirical research shows to be a double standard in the federal appellate courts.<sup>64</sup> The barriers they face include (among many others): (1) the arbitrarily short statutes of limitations that apply in many discrimination cases and (2) a recent Supreme Court decision that unfairly interprets when the limitations period begins for some claims. We therefore recommend standardizing and lengthening, where necessary, the applicable statutes of limitations to four years for plaintiffs in employment discrimination cases. A four-year limitations period would enhance the ability of employees to challenge subtle forms of discrimination, and a standard period would improve judicial efficiency by significantly reducing litigation over the appropriate period.

So that our proposal for a uniform, four-year limitations period can be effectual, Congress must adopt legislation to overrule the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber*,<sup>65</sup> which took an unsupportable position on when the limitations period begins to run in equal pay cases under Title VII of the Civil Rights Act of 1964.<sup>66</sup> In *Ledbetter*, the Supreme Court severely restricted plaintiffs' ability to address pay discrimination by holding that an employer's first discriminatory act triggers the 180-day period for filing a claim under Title VII, even if every subsequent paycheck was discriminatory and even if the employee did not learn about the pay disparity until much later. Because salaries are often confidential and compensation disparities hidden, this ruling effectively means that in many cases, by the time an employee learns that she has been paid less than a co-worker doing equal work, it will simply be too late to file an equal pay claim.

In response to *Ledbetter*, the Lilly Ledbetter Fair Pay Act of 2007 was introduced in Congress. It would amend Title VII so that the 180-day filing period would start to run each time an employee is affected by compensation tainted by discrimination, *i.e.*, with each unfair paycheck.<sup>67</sup> The bill was passed by the House on July 31, 2007, and awaits a vote in the Senate.<sup>68</sup> A new Administration should endorse this legislation and work to ensure its enactment early in the next Congress.

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<sup>64</sup> A recent study of employment cases in the federal courts produced striking data showing that plaintiffs in these cases fare poorly compared with plaintiffs in other cases, both at trial and on appeal, reflecting what the authors described as an "anti-plaintiff" effect. Stewart J. Schwab & Kevin M. Clermont, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. (forthcoming 2009), available at [http://www.hlpronline.com/Vol3.1/Clermont-Schwab\\_HLPR.pdf](http://www.hlpronline.com/Vol3.1/Clermont-Schwab_HLPR.pdf).

<sup>65</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S.Ct. 2162 (2007).

<sup>66</sup> 42 U.S.C. § 2000e *et seq.* Currently, under Title VII's limitations period, an employee has 180 days (or in some circumstances 300 days) to file a charge with the EEOC. 42 U.S.C. § 2000e-5(e)(1).

<sup>67</sup> H.R. 2831, 110th Cong. (2007); S. 1843, 110th Cong. (2007).

<sup>68</sup> On April 23, 2008, an effort was made to bring the bill to a vote in the Senate, but fell three votes short of the 60 needed to close debate and consider the bill. GOVTRACK.US, SENATE VOTE ON CLOTURE MOTION TO PROCEED: H.R. 2831: LILY LEDBETTER FAIR PAY ACT OF 2007, <http://www.govtrack.us/congress/vote.xpd?vote=s2008-110> (last visited Oct. 7, 2008).

But what has been overlooked in the *Ledbetter* debate is that Title VII’s 180-day filing period – even if subject to the “fix” contained in the legislation described above – is grossly inadequate, even absurd. The next Administration should therefore advocate that in addition to a *Ledbetter* fix, Congress should adopt a four-year filing period for federal employment discrimination statutes, including, at a minimum, not only Title VII but also the Equal Pay Act of 1963 (EPA);<sup>69</sup> the Age Discrimination in Employment Act of 1967 (ADEA);<sup>70</sup> the Americans with Disabilities Act of 1990 (ADA);<sup>71</sup> the Civil Rights Act of 1866 (Section 1981);<sup>72</sup> and the Civil Rights Act of 1871 (Section 1983).<sup>73</sup> A four-year, uniform filing period would recognize that a great deal of discrimination in the workplace is subtle and not easily or immediately detected and would also be consistent with the limitations period that courts now apply to most Section 1981 race discrimination claims, as explained below.

Generally, the purpose of limitations periods is to “provid[e] fairness to the defendant, promot[e] efficiency, and ensur[e] institutional legitimacy.”<sup>74</sup> Traditionally, courts have adopted exceptions to the statute of limitations under which the limitations period may be tolled. For example, the limitations period may be tolled when a plaintiff is not aware that her rights have been violated (the discovery rule), when misconduct by a defendant prevents a plaintiff from filing a timely claim (equitable estoppel), or when a plaintiff does not have enough information or the ability to file suit during the statutory period (equitable tolling).<sup>75</sup>

Professor Suzette Malveaux examined the purpose of the statute of limitations in the context of claims for reparations and found that the limitations period can sometimes be a method for courts to restrict disfavored claims. Indeed, courts that strictly adhere to a statute of limitations without broadly interpreting exceptions deprive plaintiffs of their substantive rights, which can be especially harmful to civil rights plaintiffs. As Professor Malveaux notes, “[a]ccess to the courts is particularly important for minorities...and other disenfranchised groups who must rely on the legal system for protection of basic human and civil rights.”<sup>76</sup>

Congress and state legislatures exercise discretion in establishing statutes of limitations. Claims that are harder to detect should have longer limitations periods, but legislatures sometimes give disfavored claims shorter limitations periods. Breach of contract claims, which are often utilized by corporate America, tend to have long limitations periods. For example, the statute of limitations for breach of contract in California is four years;<sup>77</sup> in Florida the limitations period for breach of written contract is five years;<sup>78</sup> and the statute of limitations for breach of

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<sup>69</sup> 29 U.S.C. § 206(d) (2008).

<sup>70</sup> 29 U.S.C. §§ 621-633a (2008).

<sup>71</sup> 42 U.S.C. § 12101 *et seq.* (2008).

<sup>72</sup> 42 U.S.C. § 1981 (2008).

<sup>73</sup> 42 U.S.C. § 1983 (2008).

<sup>74</sup> Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 75 (2005). Though Professor Malveaux recognizes that statutes of limitations are a “fixture” of the American legal system, she also notes that little scholarship has questioned the “validity of their underlying purpose.” *Id.*

<sup>75</sup> *Id.* at 85-92.

<sup>76</sup> *Id.* at 84.

<sup>77</sup> Cal. Code Civ. Proc. § 337 (LexisNexis 2008).

<sup>78</sup> Fla. Stat. § 95.11 (2)(b) (LexisNexis 2008).



contract in Illinois is ten years for most contracts<sup>79</sup> and four years for a contract for sale.<sup>80</sup> The federal government has six to ten years under the False Claims Act to bring fraud claims.<sup>81</sup>

Yet under Title VII, the ADA, and ADEA, which are the primary federal laws addressing discrimination in the workplace, plaintiffs have only 180 (or at most, in some cases, 300) days to file a charge of discrimination with the EEOC, which is required before a claim may be filed in court.<sup>82</sup> Based on our research, we are aware of no other federal law with such a short limitations period.<sup>83</sup> This is particularly troubling given the subtle but debilitating forms of most 21<sup>st</sup> Century workplace discrimination. Plaintiffs filing federal employment discrimination cases should be afforded at least a four-year filing period, which is similar to many breach of contract limitations periods. Even Congress has recognized that four years is a fair, standard limitations period by establishing a default four-year limitations period for federal laws enacted after 1990 that do not specify a limitations period.<sup>84</sup>

Victims of race discrimination in employment have a federal alternative to Title VII: Section 1981, which provides people of all races the same rights to “make and enforce contracts.”<sup>85</sup> Section 1981 currently has a four-year statute of limitations for most claims. When Section 1981 was passed, however, no limitations period was specified.<sup>86</sup> Thus, until recently, federal courts applied the statute of limitations in the state claim considered most analogous to Section 1981 claims.<sup>87</sup> In 1990, Congress passed 28 U.S.C. § 1658, a new uniform four-year statute of limitations for all federal statutes enacted after 1990 that do not expressly provide another limitations period. In 1991, Congress amended Section 1981 to clarify that “make and enforce contracts” includes “the termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.”<sup>88</sup> In *Jones v. Donnelley & Sons Co.*, the Supreme Court unanimously held that because Congress amended Section 1981 in 1991, the new federal four-year catch-all limitations period should apply to claims under Section 1981 regarding the termination and benefits of contracts, which covers employment claims after hire.<sup>89</sup>

All federal civil rights laws that address employment discrimination should have the benefit of the four-year filing period that is now available in most employment claims involving race discrimination. In addition to basic fairness, another benefit of a uniform filing period for federal employment discrimination statutes is that it would eliminate unnecessary delays caused

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<sup>79</sup> 735 Ill. Comp. Stat. 5/13-206 (LexisNexis 2008).

<sup>80</sup> 810 Ill. Comp. Stat. 5/2-725 (LexisNexis 2008).

<sup>81</sup> 31 U.S.C. § 3731 (2006).

<sup>82</sup> 29 U.S.C. § 626(d) (ADEA); 42 U.S.C. § 12117(a) (ADA).

<sup>83</sup> See, e.g., Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C.L.REV. 859 (2008) (“Title VII’s limitations period remains unusually short when compared to the vast majority of other laws seeking to vindicate personal rights”). *Id.* at 869-70.

<sup>84</sup> 28 U.S.C. § 1658(a) (2008).

<sup>85</sup> 42 U.S.C. § 1981 (2008).

<sup>86</sup> Section 1983 is another option for victims of race discrimination (as well as sex discrimination) in *public* employment. Section 1983 also does not specify a limitations period.

<sup>87</sup> *Jones v. Donnelley & Sons Co.*, 541 U.S. 369, 377 (2004). Courts also apply the most analogous state law limitations period in Section 1983 claims.

<sup>88</sup> 42 U.S.C. § 1981(b).

<sup>89</sup> *Donnelley & Sons Co.*, 541 U.S., at 383.

by extensive motion practice over the applicable statute of limitations.<sup>90</sup> The Supreme Court in *Donnelley & Sons Co.* described the lack of a uniform statute of limitations for federal laws as a “void [that] has spawned a vast amount of litigation,”<sup>91</sup> including substantial litigation over the appropriate statute of limitations for Section 1983 and Section 1981 claims.<sup>92</sup> The Court described the taxing process for determining the statute of limitations for federal law without a limitations period as “generat(ing) a host of issues that required resolution on a statute-by-statute basis.”<sup>93</sup> Moreover, the Court noted that when it has decided cases regarding the most analogous state statute of limitations for Section 1981 and Section 1983 claims, those decisions have “provoked dissent and further litigation.”<sup>94</sup> Thus, enormous judicial resources would be saved if all federal employment discrimination claims all had a uniform four-year filing period. This would also encourage potential plaintiffs to carefully investigate and narrow claims when appropriate rather than rushing to initiate litigation.

One further modification to the limitations period should be adopted. Under Title VII, the ADA, and the ADEA as noted, plaintiffs must file complaints of discrimination with the EEOC (within 180 days) before proceeding to court. After an employee files her administrative charge, she has several additional obstacles to confront. While the EEOC investigates the charge, the plaintiff is not entitled to traditional discovery, and employers often use this investigation period to comb through company records and marshal one-sided evidence against the employee. At the end of the EEOC’s investigation, it issues a “right to sue letter.” The employee then must overcome another hurdle: she has a mere 90 days to file a complaint in federal court. In that 90-day period, she must move mountains, including: finding and retaining a suitable lawyer and helping the lawyer complete an investigation. Also in the 90-day period, the lawyer must draft, finalize, and file a complaint in court. In other words, many victims of discrimination have a mere 90 days to do what realistically requires several months, if not a year or more. As a result of this nearly impossible time frame, scores of valid claims are not pursued. While one can debate the soundness of the public policy that requires plaintiffs to exhaust their remedies with the EEOC before going to court, at the very least, the 90-day deadline for filing a complaint in court should be expanded to 180 days, if not one year. A new Administration should support legislation to implement this change.

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<sup>90</sup> Because of Title VII’s short statute of limitations, there is significant litigation and motions practice over legal principles that might make the claim viable, such as the continuing violation doctrine, the discovery rule, and equitable tolling. For a discussion of these legal principles as applied to Title VII, see Brake & Grossman, *supra* note 85 at 870-79.

<sup>91</sup> *Donnelley & Sons Co.*, 541 U.S., at 377.

<sup>92</sup> As discussed above, courts until recently had to rely on the most analogous state law for Section 1981 claims. Courts usually found that tort law was the most analogous statute to Section 1981 and applied tort law statute of limitations. This spurred a difficult analysis because some states had multiple tort statutes of limitations and because the statute of limitations varies from state to state. California, for example, has a two-year statute of limitations for personal injury while Minnesota and Wisconsin have a six-year limitations period. Cal. Civ. Proc. Code § 335.1 (2008); Minn. Stat. § 541.05 (2007); Wis. Stat. § 893.53 (2007).

<sup>93</sup> *Donnelley & Sons Co.*, 541 U.S., at 378.

<sup>94</sup> *Id.* While *Donnelley* represents a step in the right direction, some lower courts have created further uncertainty in limitations law by refusing to apply the four-year statute of limitations to employment discrimination cases involving hiring decisions, based on the assertion that the portion of Section 1981 that gives rise to hiring claims was not amended in 1991.

### III. Conclusion

Though much progress has been made toward eliminating discrimination in the workplace, continued efforts are needed to address harmful biases that continue to block full realization of the dream of equal employment opportunity. The next Administration should adopt 21<sup>st</sup> Century measures suited to the 21<sup>st</sup> Century workplace, including the set of reforms advanced in this paper. The change we advocate is simple, and the framework is already in place: (1) *sunshine*: disclose Diversity Report Card data in SEC reports that companies already file, electronically collect the Affirmative Action Plans that federal contractors are already required to create, and adopt the other disclosure enhancements measures we propose; (2) *enforcement*: strengthen the government's ability to address systemic discrimination, including re-organizing the EEOC's systemic enforcement teams; and (3) *access to justice*: provide a uniform, four-year statute of limitations for federal employment discrimination claims. These reforms have the potential to dramatically improve the American workplace.