



Berkshire Associates, Inc. is a leading consulting firm specializing in Affirmative Action Plan (AAP) preparation headquartered in Columbia, MD. Berkshire prepared over 4,000 AAPs in 2010 and provides outsourced and software solutions for Federal contractors across the United States. We support over 250 audits per year in all six regions of the OFCCP. Berkshire has prepared these comments in regards to the proposed scheduling letter changes based on input from our consultants as well as a number of our clients.

Our comments begin with item 8 of the Support Data section of the Itemized Listing section of the proposed letter, the first substantial change to the existing letter. Regarding OFCCP's explicit request for feedback regarding the utility of the information requested, most Federal contractors have these policies in place, and requesting them before any investigation that shows reasonable cause or an infraction is not necessary.

In regards to item 11, the personnel data, providing this information grouped both by job group and job title is an undue burden on contractors and will likely slow down an already arduous audit process. Since the agency has moved away from Active Case Management, contractors commonly describe audits of locations with less than 100 employees taking nine months or more to complete. This time frame will most certainly increase when the OFCCP doubles the amount of information requested in this section. In addition, the specific request for race data by the "old" five race categories is a huge burden on contractors who have implemented the "new" seven categories that are required by EEOC on the EEO-1 report in 2007. None of Berkshire's more than 2,500 clients maintain the "old" race categories. Issues with submitting the personnel actions according to the "old" racial breakouts is twofold: first, it ignores the racial category that was implemented in the 2000 census that allowed respondents to self-identify as belonging to more than one racial category, reported in the "Two or More Races" column. Second, it is in direct opposition to OFCCP's Directive 283, dated August 14, 2008, which states, "OFCCP will accept AAPs and supporting records that reflect the race, ethnicity, and job categories outlined in either 41 CFR Part 60-2 or the new EEO-1 Report." Requiring Federal contractors to maintain two separate race categories, one for EEO-1 reporting purposes and one for OFCCP auditing purposes, is an undue burden on the contractor community.

In regards to item 11(b), personnel data for promotions, again we object to the requirement to provide the requested information by job group and by job title. When the 60-1 and 60-2 regulations were revised in 2000, OFCCP specifically allowed for contractor flexibility in this item, and we respectfully request that the OFCCP retain this flexibility in the new audit requirements. In regards to the request for the pools of incumbents considered for promotion, in many cases this is impossible to determine by title, and will therefore be inaccurate when presented by job group. Consider a contractor who has career (non-competitive promotions that reward individual performance in a given position) and bid (competitive promotions where a position is posted and employees are given the opportunity to indicate their interest in the open position) *in the same job title* over the course of the plan year. Even when the "pool" is presented by job title, it will not be accurate because of the career promotions: not every promotion has a defined candidate pool. Further complicating this issue is when competitive promotions have both internal and external candidates. In this case, a contractor may be subject to the double jeopardy of reporting external candidates in the applicant log as well as in the promotion pool.



We recommend OFCCP drop the request for promotion pools because this information is of limited practical utility to the agency.

For item 11(c), personnel data for terminations, it is nearly impossible to determine the pool of candidates for those considered for termination. There is only one scenario, the case of planned layoffs, where this pool is readily available. There is simply no reliable way to determine the pool “considered for terminations” when the termination at issue is a voluntary separation from the contractor, or even some involuntary terminations such as a failed drug test or insubordination. We recommend OFCCP drop the request for termination pools because this information is of limited practical utility to the agency. If the pool requirement should remain in effect, in order to minimize contractor burden, it should only be required in the case of planned layoffs resulting in 5 or more separations.

Item 12, the compensation data is of particular concern to our clients. OFCCP's contention that requesting the data in individual form, rather than summary form, is a relief for contractors is not accurate, as most contractors have an automated process of pulling compensation data into the current requested format. For those who do not have an automated solution, it can be easily provided in an Excel® pivot table. Additionally, OFCCP's current standard of 2% or \$2,000 difference in pay is far too strict to allow for meaningful analysis for discerning differences in pay. Finally, OFCCP has stated in previous regulation updates that flexibility is important for contractors; requiring the compensation data to be reported as of an arbitrary date (February 1), will result in two issues. First, all contractors will likely move to a plan date of February 1 (so the annual plan data will coincide with the request) or August 1 (so the update plan data will coincide) because any other plan date would result in more than one data pull to support an OFCCP audit. The additional data pull requires the contractor to validate more data, creating an additional data burden. Second, this inflexible date does not take into account any contractor specific information – for example, a contractor who has a focal merit increase date of April 1 and is audited anytime after that date will be compelled to provide out of date information for the audit. The current regulations allow the contractor latitude to set the plan date as of April 1, when the increases are reflected in the AAP, and the compensation data presented when audited.

In conclusion, Berkshire's experts believe these revisions to the scheduling letter are a *de facto* change to the regulations that govern AAP development. We believe the burden estimates for over 100,000 contractor establishments to comply with the revised requests are grossly underestimated. For this reason, we respectfully request the agency consider these comments and make appropriate regulation updates before the scheduling letter is revised. Thank you for your time.