



NATIONAL
INDUSTRY
LIAISON
GROUP

July 11, 2011

VIA INTERNET SUBMISSION

Debra A. Carr
Director, Division of Policy, Planning and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
Room C-3325
200 Constitution Avenue, NW
Washington, DC 20210

**Re: National Industry Liaison Group Comment on
OFCCP's Proposed Changes to the Compliance
Review Scheduling Letter and Itemized Listing**

Dear Director Carr:

The National Industry Liaison Group ("NILG") Board welcomes the opportunity to comment on the proposed rulemaking regarding the Office of Federal Contract Compliance Program's ("OFCCP" or "Agency") proposed changes to the Scheduling Letter and Itemized Listing, (hereinafter the "Notice").

By way of background, the NILG was created over 25 years ago as a forum for the OFCCP and federal contractors to work together towards equality in the workplace. Throughout the country, local Industry Liaison Groups ("ILGs") have formed to further this unique partnership of public and private sector cooperation to proactively advance workplace equal employment opportunity. The NILG Board is comprised of elected members representing the local ILGs from across the country. Over the years, the NILG and the ILGs, which are comprised of thousands of small, mid-size and large employers across the country, have reached out to OFCCP and other agencies, such as the Equal Employment Opportunity Commission ("EEOC"), with mutual goals of fostering a non-discriminatory workplace. In response to proposed rulemaking, the NILG seeks to present the views of well over 100 local ILGs.

We commend the OFCCP for and share its commitment to promoting equal employment opportunity and the non-discrimination of applicants and employees based on race, color, religion, sex, national origin, and veteran and disability status. In our comments below,

we offer observations and suggestions designed to ensure the OFCCP is able to carry out its duty to review employer practices and evaluate the opportunities and treatment these individuals are afforded while, at the same time, balancing the contractor community's legitimate interest in ensuring the Agency receives data reflective of the employer's actual workplace policies and workforce and minimizing administrative burdens.

The NILG Board has carefully reviewed the Agency's proposed changes to the Scheduling Letter and accompanying Itemized Listing. The Board provides the below comments on the areas which its constituents have expressed considerable substantive concerns, insights or feedback.

PROPOSED CHANGES TO THE SCHEDULING LETTER

I. THE AGENCY SHOULD INCREASE THE AMOUNT OF TIME ALLOWED TO SUBMIT A RESPONSE TO A RECEIVED SCHEDULING LETTER TO PERMIT CONTRACTORS SUFFICIENT TIME TO GATHER AND RESPOND TO THE ADDITIONAL INFORMATION REQUESTED

Members of the NILG and the contractor community in general respect the OFCCP's investigative authority and desire to comply with their obligations to provide information to the Agency in furtherance of that objective. However, the information requested in the proposed version of the Itemized Listing is significantly more than what the Agency currently requests. Despite this significant change, OFCCP does not propose additional time beyond the current 30 days for contractors to respond.

Given the fact that under the proposed Scheduling Letter and Itemized Listing, employers will be required to access multiple systems and collect data that has previously not been collected, the NILG suggests the Agency enlarge the allowed response time to the Scheduling Letter from 30 days to at least 60 days. This enlargement of time will increase the likelihood contractors will be able to timely respond to the Scheduling Letter, necessarily decreasing the flood of extension requests the OFCCP will invariably receive under the current proposal. The NILG Board does not believe this suggestion burdens the Agency in any way, and, to the contrary, would greatly benefit the contractor community and aid the furtherance of equal employment and affirmative action compliance.

II. THE SCHEDULING LETTER SHOULD CONTAIN A COMMITMENT BY THE OFCCP TO THE CONFIDENTIAL TREATMENT OF CONTRACTOR INFORMATION

The proposed Scheduling Letter changes the OFCCP's language regarding the confidential treatment of contractor information and the potential for disclosure under the Freedom of Information Act ("FOIA"). NILG's constituents are concerned this change could lead to the disclosure of confidential and proprietary information, including highly sensitive compensation information. Our constituents consider that information confidential and proprietary due to the competitive advantage that may be gleaned from unfettered review of a particular competitors' information. As a result, the NILG Board requests the OFCCP provide clarification as to the rationale behind the language alteration and reiterate its commitment to

protect contractor's confidential, proprietary and sensitive information to "the maximum extent permitted," as reflected in the current Scheduling Letter.

III. THE SCHEDULING LETTER SHOULD INCLUDE AN EXPLANATION AS TO WHAT CONSTITUTES A CONTRACTOR'S "REASONABLE EFFORT" TO COMPLY

The current Scheduling Letter references an explanation as to what the Agency considers a contractor's "reasonable efforts" to comply with the relevant regulations. The NILG constituents expressed a desire for the OFCCP to include such language, or reference again by note, what will be considered "reasonable efforts" by a contractor. Without such an explanation, the contractor community will be left without any guidance as to the meaning of this ambiguous phrase and will be substantially prejudiced by the OFCCP's efforts to enforce such provisions in future audits.

PROPOSED CHANGES TO THE ITEMIZED LISTING

I. PROPOSED ITEM 12'S REQUEST FOR DETAILED COMPENSATION DATA FOR ALL EMPLOYEES, INCLUDING CONTRACT AND DAY LABORERS AS OF FEBRUARY 1ST DOES NOT REFLECT THE WAY THE CONTRACTOR COMMUNITY COLLECTS COMPENSATION INFORMATION AND IS OVERLY BURDENSOME

When the NILG Board solicited feedback from its constituents on the proposed changes to the Itemized Listing, the proposed revisions to Item 12 garnered significant response and unease. Specifically, NILG's constituents were most concerned about the burden of collecting the requested information in the absence of an indicator of potential pay inequity. Currently, the Agency sends a similar version of the request contained in Item 12 only after it has uncovered an indicator of potential discriminatory pay inequity. The current proposal does not require such an initial indicator. The NILG Board asks the OFCCP to evaluate the utility of requesting this information from the outset in light of the significant burden collecting this data imposes on the contracting community.

A. Requiring the Submission of Data as of February 1st is Arbitrary, Burdensome and Will Not Provide Data that Accurately Reflects the Contractor's Current Compensation Practices

Proposed Item 12 requires contractors to submit compensation data for all employees as of February 1st, regardless of the date of the Scheduling Letter. An overwhelming majority of NILG's constituents reported compiling compensation data as of this date is not only arbitrary, but is exceedingly burdensome because the February 1st date does not coincide with most of their AAP plan year dates or other compensation activities within the calendar year. As many of the constituents mentioned, it fails to coincide with any standard accounting reporting periods, such as the end of a quarter.

Moreover, for example, pulling compensation data as of February 1st for an audit initiated in June would not, in many instances, provide an accurate snapshot of the actual, and current, contractor's workforce compensation. Thus, the data would not provide for meaningful

compensation analysis and a re-pulling of the data as of a more appropriate and current date would be required. Such an exercise would be clearly burdensome and wasteful of contractor time and other resources. It does not seem the OFCCP's estimate of the time and burden involved with such an endeavor reflects the actual effort involved in this process and is thus grossly underestimated. As a result, the NILG Board requests the OFCCP re-evaluate the purpose and benefit of requiring contractors to submit compensation data as of February 1st and revise the Itemized Listing to reflect a date coinciding with either the contractor's plan year or the timing of the audit.

B. The Request that Contractors Submit Compensation Information for Contract Laborers and Other Temporary Employees Encompasses Groups of Individuals for Whom the Contractor Community Does Not Set Compensation Rates

The Agency includes contract and temporary workers in its request for compensation information for *all employees* in Item 12. NILG's constituents are concerned about this request because contract laborers and temporary workers traditionally are not on contractor payrolls. As a result, contractors often do not have access to this information. Even more, contractors rarely have the ability (or authority) to influence or establish the compensation rates or practices of the companies actually employing the contract labor and temporary workers. Additionally, these particular worker groups are not included in any of the other analyses requested or performed by the Agency. The NILG Board, therefore, requests the OFCCP consider removing these groups of non-employees from Item 12's information request.

C. The Disaggregation of Information Will Take Time and Significant Resources and is Unduly Burdensome in the Absence of an Indicator of Potential Pay Discrimination

The Agency's proposed Item 12 will require contractors to provide separately detailed compensation components for all employees, including bonuses, commissions, incentives, locality pay and overtime. NILG's constituents collectively voiced great concern that these highly variable, individualized components of pay are not reflective of a company's overall compensation scheme. To compound the issue, these data variables are not traditionally collected or housed in a centralized database.

Most contractors would be required to manually research, and manually add, the requested components to the data containing employees' base compensation information. A lot of contractors simply do not have the capability of "hitting a button" and generating all, or even most, of the detailed compensation components the Agency seeks to collect, and the manual data entry would likely result in errors. For these reasons, OFCCP has grossly underestimated the burden and time associated with its proposed change. As a result, the NILG Board urges the Agency to re-evaluate both the utility of including these items in its definition of compensation under Item 12 and requiring contractors to disaggregate these elements when reporting employee compensation.

The proposed Item 12 also *invites* contractors to provide information regarding bonuses, incentives, performance ratings, department and/or function, for all employees. NILG's constituents are troubled by the suggestive nature of this language, many indicating they will feel compelled to provide this additional information to explain *any* pay differences. This request threatens to impose an overwhelming burden on the contractor community given the resources they will have to expend to collect this information for every employee, regardless of any indication of pay discrimination. As such, NILG's constituents are particularly concerned about this language given these information variables are not customarily maintained in the same systems or even tracked in a centralized way. In addition, many contractors voiced particular concern about the reliability of some of the identified variables, performance ratings as an example, as appropriate compensation factors.

As noted above, contractors are currently required to provide the detailed information contained in the proposed Item 12 only upon a preliminary indication of pay inequity. The proposed request will require contractors to submit detailed information explaining every legitimate and non-discriminatory pay difference for the entire workforce, which is undeniably a significant burden on the contractor community. As a result, the NILG Board suggests the OFCCP evaluate the utility of requiring contractors to provide this information in the absence of an indicator of discriminatory treatment and withhold the request for this detailed information until a more appropriate time in the audit – after an indication of a potentially problematic pay disparity has been identified.

D. Item 12 Should Permit Contractors to Submit a General Explanation of Their Compensation Philosophy

The proposed Item 12c would require contractors to submit documentation and policies related to compensation practices, including those that explain compensation determinations. NILG's constituents consistently reported this is an untenable requirement for two main reasons. First, most employers do not maintain a compensation policy, but rather have compensation guidelines that are communicated to hiring managers.

Second, most, if not all, employers make compensation determinations on a case-by-case basis. Thus, requiring the submission of documents explaining compensation determinations would necessitate contractors locating and providing documentation for each individualized compensation decision. This is excessively burdensome, and the NILG doubts the OFCCP intended to subject the contractor community to such a burden. As a result, the NILG Board suggests the OFCCP instead request contractors provide a summary or general explanation of their compensation scheme and/or philosophy.

II. THE ITEMIZED LISTING'S PROPOSED REQUIREMENTS FOR THE SUBMISSION OF PERSONNEL ACTIVITY DATA WILL RESULT IN AN INACCURATE ACCOUNT OF THE WORK FORCE, ASKS FOR DATA NOT REGULARLY COLLECTED AND WILL IMPOSE AN UNDUE BURDEN ON THE CONTRACTOR COMMUNITY

Item 11 of the proposed Itemized Listing sets forth requirements for the submission of personnel activity data for applicants and hires, promotions and terminations.

NILG addresses each in turn below. As an initial matter, however, the NILG Board would like to share concerns raised by its constituents about the timeframe of the data required to be submitted and the submission of data by both job title and job group.

A. The Requirement to Provide at Least 6 Months of Additional Data and the Requirement to Provide the Data by Both Job Group and Job Title are Burdensome and Should Be Reconsidered

First, a significant portion of NILG's constituents reported unease with the requirement that contractors submit "*at least*" the first 6 months of data from the current plan year if the contractor is more than 6 months into their plan year at the time of the audit. More specifically, the constituents expressed concern this requirement will disadvantage those employers audited towards the latter months of their plan year. They also expressed concern that the indefinite nature of the "*at least*" proposed language opens the possibility of a data request up to the date of the Scheduling Letter, leaving the contractor with no meaningful time for analysis. As a result, the NILG suggests and requests the OFCCP revise the language to reflect the current obligation to provide 6 months of data if an employer is more than 6 months into their current plan year at the time of the audit.

Second, NILG's constituents expressed great concern over proposed Item 11's requirement to submit information by both job title *and* job group. In addition to the increased amount of time it will take employers to collect and organize data in these two different manners, the constituents expressed concern about being *required* to submit data in a manner not reflective of their workforce structure or how they apply their workforce practices.

As a matter of course, contractors compile and analyze data either by job title *or* by job group in their AAPs depending on how they collect and analyze the data in the normal course of business. Thus, requiring analyses of data compiled in an unfamiliar and artificial form will likely lend itself to meaningless analyses, both by the contractor and the OFCCP. The NILG requests the Agency re-evaluate the proposed requirement that contractors submit personnel activity data by both job group and job titles and consider continuing to allow contractors to provide the data in the form that affords the most accurate picture of their workforce and employment practices, which will result in more accurate and meaningful analyses for the OFCCP.

B. Applicants and Hires

Item 11a of the Itemized Listing requires contractors to submit information reflecting employment activity broken down by sub-minority groups. NILG's constituents are concerned about the inherent flaws with this request which will not allow for meaningful or accurate analyses.

Data collected through self-identification methods often is unreliable, to the extent it is actually reported. This inherent unreliability, coupled with the current lack of consistency in the manner in which race is reported, will invariably yield data that cannot support meaningful or consistent statistical analyses the Agency sets out to conduct with information

obtained in Item 11a. In addition, breaking the data down into these sub-minority groups has the potential to skew the analyses based on groups extremely small in size. As a result, we suggest the Agency re-evaluate the utility of this request.

NILG constituents also have concerns and questions about the Agency's proposed requirement that contractors include information for applicants for whom they do not have race or gender information. The constituents are questioning how this data will be used if the individuals cannot be included in race and/or gender analyses. As a result, we ask the OFCCP to provide guidance as to the way(s) it intends to use this information and consider removing this requirement from the Itemized Listing.

C. Promotions

Item 11b of the Itemized listing requires employers to submit data reflecting the "actual pool" of candidates who applied or were considered for promotions. The NILG constituents are concerned this request does not reflect the reality of the majority of promotions. The requirement does not appear to take into consideration the reality that not every promotion is the result of a competitive process, but employees are frequently promoted as a result of regular job progression. In these situations there is understandably no "pool" from which the employee was selected.

There is also concern about the burden imposed by this requirement due to the fact promotion pool information is not regularly or easily collected or tracked by the current versions of HRIS systems. In order to comply with this request, employers will need to reconfigure their systems and employ personnel to identify and input this individualized pool information. Both of these are costly, and burdensome, tasks. Based on the above, the NILG Board requests the OFCCP revisit this requirement and revise the Itemized Listing language to address the concerns of our constituents.

D. Terminations

The same types of concerns raised above with respect to promotions were raised by the constituents in connection with the proposed terminations requirements in Item 11c. Specifically, NILG's constituents raised concerns that, outside the scope of a reduction in force situation, nearly all terminations are individualized events. This is true in the case of both voluntary and involuntary terminations. Therefore, for the majority of terminations, there would be no pool of employees for a contractor to identify. In light of this reality, the NILG suggests the OFCCP limit the request in Item 11c to situations where contractors are currently required to identify affected and non-affected individuals, like situations where there is a group decisional unit under the Older Workers Benefit Protection Act.

III. THE ITEMIZED LISTING'S REQUIREMENT IN ITEM 8 THAT CONTRACTORS PROVIDE COPIES OF EMPLOYMENT LEAVE POLICIES AS WELL AS EMPLOYEE HANDBOOK IS FUTILE, WILL HAVE AN AVOIDABLE ENVIRONMENTAL IMPACT AND IS UNDULY BURDENSOME

Item 8 in the Itemized Listing proposes that contractors submit copies of specific leave policies, including the contractor’s pregnancy leave and religious accommodation policies. According to our constituents, the majority of them, and other employers, do not maintain separate pregnancy leave policies but instead maintain a general leave policy covering all types of leaves. In light of this proposed requirement, the constituents fear they will be deemed non-compliant if they are unable to submit the requested policies.

In addition, we received overwhelming feedback that to the extent an employer maintains a handbook, the handbook is not maintained in paper form. Rather, “handbooks” are kept in an electronic format with links leading to other links requiring great effort to produce in hard copy. In connection thereto, handbooks typically contain a multitude of policies that are not relevant or applicable to OFCCP’s review of contractor employment practices. Thus, to require a contractor to submit a hard copy of such a handbook, most of which would be extraneous material of little to no utility to the OFCCP, would not only burden the employer but would have a negative environmental effect that could be easily avoided. Taking these issues into consideration, the NILG Board requests the Agency review the proposed language of Item 8 and revise the request to require contractors to submit “relevant leave policies” and only those portions of the handbook that relate to leaves or the contractor’s policy on religious accommodations.

The proposed regulations also require contractors to submit a copy of any collective bargaining agreement as well as any documents explaining, implementing or elaborating on the provisions of the collective bargaining agreement. This requirement is overbroad as it seeks to obligate contractors to submit information on topics beyond the Agency’s jurisdiction. For those contractors that have entered into local agreements with the local union shops in the company’s varying locations, this request could require the identification and collection of hundreds of documents not necessarily relevant to the OFCCP’s area of authority. As a result, the NILG requests the Agency revise the language of this request to tailor the contractor’s obligation to the submission of formalized documents affecting the contractor’s employment practices under the OFCCP’s jurisdiction and clarify the request is for information related to only the location under review.

IV. THE REQUIREMENT THAT CONTRACTORS TRACK AND PROVIDE RECORDS OF ACCOMMODATIONS GRANTED IS UNDULY BURDENSOME IN LIGHT OF THE AVAILABILITY OF A LESS BURDENSOME ALTERNATIVE

Item 13b in the proposed Itemized Listing requires contractors to provide records of accommodations granted pursuant to Section 503 of the Rehabilitation Act and/or Section 4212 of the Vietnam Era Veterans’ Readjustment Assistance Act. NILG’s constituents expressed concern about the feasibility of this request and the significant burden of compliance. Tracking and recording accommodations is not currently a requirement of the aforementioned laws, regulations, or the ADA or its amendments and regulations. As a result, the OFCCP’s proposed requirement will impose an obligation on contractors not mandated under any federal law, which may expose the Agency to challenges to the scope of its authority.

Because contractors are not legally required to record afforded accommodations, most contractors do not have a process in place to track this information. Requiring contractors to provide records reflecting granted accommodations will necessitate the development of a universal process by which they can obtain this information from all of the contractors' locations, which will be burdensome. Furthermore, this process would very likely need to be automated into the contractor's HRIS system, thereby causing the contractor community additional time and expense. Overall, the requirements set forth in Item 13b will require the expenditure of significant time and resources – all for a requirement that goes beyond anything currently mandated by any federal law.

Requiring contractors to provide any detailed information on accommodations is burdensome, however, there are alternatives to the proposed requirements that are less burdensome, such as a generic list of accommodations the contractor has provided in the past and is willing to provide for the establishment undergoing an audit. Our constituents expressed interest in being allowed to submit this type of information, as opposed to detailed "records of accommodation." In light of the above, the NILG Board requests the OFCCP evaluate whether the submission of this current listing will satisfy the Agency's need for information in this regard and suggests Item 13b be revised to reflect acceptance of this listing in satisfaction of the request.

V. THE OFCCP'S ESTIMATION OF THE TIME ASSOCIATED WITH RESPONDING TO THE PROPOSED REQUESTS IN THE ITEMIZED LISTING IS GROSSLY UNDERESTIMATED

The Supporting Statement submitted by the OFCCP to the OMB in connection with the Notice estimates that contractors will spend *less time* responding to the new Scheduling Letter than they spend responding to the current Itemized Listing. NILG's constituents universally agree the OFCCP has grossly underestimated its calculation.

The OFCCP estimates it takes employers 28.35 hours to respond to the current Scheduling Letter and, by contrast, it will take only 26.01 hours to respond to the proposed letter. As detailed above, the requirements contained in the proposal are undeniably more detailed and exponentially more burdensome than the obligations of the current Scheduling Letter. As it is, most contractors spend significantly more time than the current estimated time of 28.35 hours compiling the required information. The NILG believes these changes would not only dramatically increase the time burden on contractors, but submit the estimated burden should not be based on the Agency's current 28.35 hour estimate.

The time expended to respond to the proposed letter will necessarily surpass current effort levels. This is especially true given the fact some of the proposed requests will require contractors to develop new systems, implement new processes and revise existing data collection methods, while others will require contractors to collect, manually enter, and synthesize information from multiple sources. Thus, in light of the extraordinary burdens and the above referenced areas of limited utility offered by the requested information, the NILG Board requests the OFCCP review and re-evaluate the obligations imposed by the Agency's proposed changes to the Scheduling Letter and Itemized Listing to address the concerns set forth herein.

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We thank the OFCCP in advance for its consideration of our comments and suggestions. If the Agency should wish to discuss this request, please contact Mickey Silberman, NILG Board Counsel, at (303) 225-2400 or silbermanm@jacksonlewis.com.

Respectfully submitted,

The National Industry Liaison Group Board