



July 3, 2008

Ms. Hazel M. Bell
U.S. Department of Labor
200 Constitution Ave., NW.
Room S-3201
Washington, DC 20210

Electronic (pdf file) Transmission
bell.hazel@dol.gov

Dear Ms. Bell:

**OFCCP Recordkeeping and Reporting Requirements
Request for Scheduling Letter Extension, Supply and Service
(OMB Number: 1215-0072)**

This letter responds to the *Federal Register* announcement of May 6, 2008 regarding the Office of Federal Contract Compliance Programs' (OFCCP) request for comments regarding the extension of its Supply and Service Scheduling Letter (Scheduling Letter).

Maly Consulting LLC

Maly Consulting is a management consulting firm representing government contractor clients across the United States. We specialize in OFCCP audit preparation and response as well as the analysis and reporting of human resource data for equal employment and affirmative action compliance. We assist clients in understanding and complying with the federal regulations for affirmative action, including those issued pursuant to Executive Order 11246, the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), and Section 503 of the Rehabilitation Act of 1973.

Summary

The consultants at Maly Consulting LLC believe the OFCCP should take this opportunity to reexamine the Scheduling Letter to determine its appropriateness and to thoroughly evaluate what information it needs to conduct the types of audits it is currently performing — or should be performing under recent court decisions. A blanket extension to the current Scheduling Letter will not solve the problems that face the OFCCP in its auditing process with contractors.

Our Comments

While there are flaws in several other aspects of the Scheduling Letter and the way information is collected by the OFCCP for audits, which we have described in previous public comment letters¹ on this topic, the most egregious flaw or process we wish to comment on today is the collection of compensation data. The request for compensation data is made under Item 11 of the OFCCP's Scheduling Letter which is currently being submitted for extension.

¹ See Maly Consulting's Public Comment Letters dated May 21, 2004 and August 25, 2004 available at [www.malyconsulting.com/PressRoom/Public Comment Letter-OFCCP Scheduling Letter.pdf](http://www.malyconsulting.com/PressRoom/Public%20Comment%20Letter-OFCCP%20Scheduling%20Letter.pdf) and [www.malyconsulting.com/PressRoom/Public Comment Letter - OFCCP Scheduling Letter - OMB.pdf](http://www.malyconsulting.com/PressRoom/Public%20Comment%20Letter%20-%20OFCCP%20Scheduling%20Letter%20-%20OMB.pdf).

The OFCCP has gone to great lengths to improve its ability to analyze compensation data. The Agency has hired national and regional statisticians and developed its own Interpretive Standards² involving several tiers of review and rigorous statistical processes but has yet to change the data that it requests as part of the Scheduling Letter. That is, the OFCCP has spent a great deal of time and money to allow it to make a meaningful analysis of compensation but the compensation data it collects through the Scheduling Letter do not allow for meaningful analysis.

Furthermore, legal authorities are advising contractors that the U.S. Supreme Court ruling on May 29, 2007 in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, invalidates the OFCCP's Interpretive Standards because those standards call for an analysis of current pay rather than discrete pay decisions. While the OFCCP has denounced this argument, it nonetheless leaves contractors in an uneasy and uncomfortable position. Upon submitting summarized current pay data — which is called for and allowed under the current Scheduling Letter — contractors almost universally receive an immediate follow-up request for much more detailed, confidential employee information. That follow-up OFCCP request is not authorized nor does it meet the requirements of *Ledbetter* — nor does the OFCCP provide a reasonable cause for requesting same. And, as far as we can determine, the OFCCP has not shown, in its request to extend the Scheduling Letter, the additional burden placed on contractors for the OFCCP's demands for additional data and information. The conflicting interpretations between the legal community and the OFCCP would be removed through an open and honest discussion about thoroughly revising the Scheduling Letter rather than a mere extension.

The problem for the OFCCP is that based on the pay data that it is authorized to collect under the current Scheduling Letter, the Agency cannot perform any analysis that gives it an actionable reason to demand anything more. In addition, even when it has cause to do so, the OFCCP only has the authority to come on-site to a contractors' offices to collect additional data. The OFCCP's solution to these problems has been to bully employers into sending private and confidential employee compensation data to the Agency. These demands for additional compensation data are not presented as requests but as requirements of the investigative process and are routinely accompanied by threats of legal action.

For those employers who simply wish to exercise their rights and recognize that the OFCCP has exceeded its authority, the burden becomes staggering. The Agency puts employers in the position of having to hire attorneys and statisticians just to ensure that the OFCCP plays by its own rules.

The Scheduling Letter is an anachronism. The manner and form in which the OFCCP collects compensation data using this tool provide no basis for meaningful analysis and, according to many in the legal field, do not meet the requirements of the Supreme Court's *Ledbetter* decision. The Scheduling Letter should be entirely overhauled. Is it really possible that the Scheduling Letter without any real change since the induction of Item 11 (originally labeled Item 8) in 1999 can have any relationship to current employer data collection and storage practices much less current data analysis methods?

² See OFCCP's Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination available at www.dol.gov/esa/regs/fedreg/notices/2006005458.pdf.

Ms. Hazel M. Bell
U.S. Department of Labor
July 3, 2008

Page 3 of 3

We thank you for this opportunity to submit our comments and hope that you will reconsider the current request for extension of the Scheduling Letter without making significant changes to it.

Sincerely,

A handwritten signature in black ink, reading "George A. Sartor III". The signature is written in a cursive style with a long, sweeping underline.

George A. Sartor III
Senior Consultant

GS/ETC/JN/AMM