



June 11, 2019

Submitted Electronically via Regulations.gov

Harvey D. Fort
Acting Director
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Avenue, Room C-3325
Washington, DC 20210

RE: DirectEmployers Association's Comments Regarding OFCCP's Proposed Renewal of the Approval of Information Collection Requirements

Dear Mr. Fort:

DirectEmployers Association ("DE") appreciates the opportunity to provide comments and recommendations on the Information Collection request published in the April 12, 2019 Federal Register regarding OFCCP's "Proposed Renewal of the Approval of Information and Collection Requirements; Comment Request."

DE presents these comments in the spirit of cooperation and partnership with OFCCP and appreciates the opportunity to be heard regarding OFCCP's significant and controversial proposed changes to its Supply and Service Scheduling Letter ("Scheduling Letter") and Itemized Listing and OFCCP's proposed 503 and VECRRA "Focused Review" scheduling letters. We hope OFCCP finds DE's comments to be constructive and helpful as the agency considers whether and how to proceed with the Proposal.

I. About DirectEmployers

DE represents one of the largest consortiums of federal government contracting businesses. Established in 2001, DE is a Member-owned and managed non-profit consortium of over 910 companies, most of them from within the Fortune 1000. DE specializes in talent acquisition and helping companies comply with the regulatory obligations OFCCP imposes on covered federal contractors and subcontractors. As an Association, DE strives to bring compliance professionals together to cultivate labor market efficiencies and reduce costs for employers. Each product and service is developed based upon the evolving needs of our 910+ global Members, most of which are federal contractors or federal subcontractors, further demonstrating our "member-driven, not profit-driven" philosophy.



DE's flagship products are federal contractor compliance solutions. DE's products assist contractors to comply with the OFCCP's Vietnam Era Veterans' Readjustment Assistance Act, (38 U.S.C. Section 4212 ("Section 4212")) mandatory job listing requirements and the outreach and positive recruitment requirements of both Section 503 of the Rehabilitation Act of 1973 ("Section 503") and Section 4212. DE's innovative Partner Relationship Manager (PRM) aids employers to track, record, and maintain partner outreach efforts with diversity, disability, veteran, female, and other minority organizations. Through these products and collaboration with partners, like the National Association of State Workforce Agencies (NASWA), DE is revered for its knowledge and robust suite of compliance tools that many of the nation's largest federal contractors use day-in and day-out. As an Association, DE has been able to act as the voice of its vast federal contractor community when it comes to working with federal entities and is viewed as an authority on OFCCP compliance.

II. Concerns Regarding the Proposal to Revise OFCCP's Scheduling Letter and Itemized Listing

DE conducted a survey of its Members to obtain their opinions on the Proposal. DE Members range from having fewer than 50 employees to over 50,000 employees and are from a variety of industries. As discussed in detail below, the survey results reveal that DE's Members are extremely concerned about certain aspects of the Proposal.

Concern #1 – Inability or Difficulty to Provide a List of Subcontractors.

OFCCP's proposed Scheduling Letter for supply and service establishment reviews requires contractors to provide "a list of their three largest subcontractors based on contract value, excluding those expiring within six months of receipt of the scheduling letter." The proposed Scheduling Letter further instructs contractors to identify "only subcontractors that perform work or provide supplies or services necessary to the performance of the federal contract, and those subcontractors who perform, undertake, or assume any portion of the contractor's obligation."

Providing this information to OFCCP will be problematic in that many contractors do not maintain information sufficient to identify the covered federal subcontractors that supply them goods or services. In fact, 59 percent of DE's members who responded to DE's survey regarding OFCCP's Proposal ("Responding Members") indicated that they do not have a list identifying their covered federal subcontractors. This is because federal contractors often contract with a number of subcontractors to provide supplies and services, some of which, but not all of which, may be related to the contractor's federal contracts. Most contractors do not track which of its subcontractors provide services or supply goods related to the contractor's federal contract work. In many cases, tracking this information would be extremely difficult, burdensome, and



expensive, if not impossible. For example, if a contractor manufactures a product that is sold in part to the federal government and sold in part to non-federal entities or individuals, and the contractor uses a subcontractor (or multiple subcontractors) to manufacture a necessary component of that product, the contractor may not have a means of tracking which of those subcontractor components are used in products provided to the federal government.

Even if a contractor is able to identify its covered federal subcontractors, identifying the three largest subcontracts based on value presents an additional layer of complexity as many federal contractors do not have a list of the values of their federal government subcontracts and cannot easily determine the value of these contracts for the same reason discussed above. In addition to the logistical difficulties to determine the three largest subcontractors, 44 percent of DE's Responding Members indicated they do not even have an understanding of how to calculate the "value" of a covered federal subcontract so as to allow them to identify their three largest subcontractors.

RECOMMENDATION: Due to the burdensome nature of this proposed request, and the likelihood of contractors providing inaccurate responses due to their inability to accurately respond to the request, DE recommends that OFCCP remove this request from its proposed Scheduling Letter.

Concern #2 – The Requested Compensation Analysis May Not Be Documented or It May be Privileged.

OFCCP's new proposed Itemized Listing asks for the results of the most recent analysis of the contractor's compensation system(s) to determine whether there are gender, race, or ethnicity-based disparities. As an initial matter, it is not clear whether the phrase "analysis" as used in OFCCP's proposed itemized listing has a different meaning from the requirement set forth in 41 C.F.R. section 60-2.17(b)(3), which states that contractors must "evaluate" their compensation system(s).

Assuming the terms "analysis" and "evaluate" are meant to have the same meaning, the regulations do not specify the type of compensation evaluation a contractor must conduct and what type of documentation a contractor must have, if any, to show that it conducted an analysis. Consequently, many contractors may have conducted the requisite evaluation but may not have documentation reflecting or evidencing its evaluation. This may be particularly true in situations in which the contractor conducts a cohort analysis comparing comparators against one another.

In addition, many contractors conduct their compensation analyses under attorney-client privilege due to the sensitive nature of the information. To comply with OFCCP's proposed compensation analysis request, contractors will be forced to either change their practice of conducting the analysis under privilege, waive the privilege, or not comply with OFCCP's request.



RECOMMENDATION: To the extent the terms “analysis” and “evaluate” have the same meaning, OFCCP should be consistent and replace the term “analysis” in its proposed Itemized Listing with the term “evaluation.” To the extent the terms have different meanings, OFCCP should clarify how the requested compensation “analysis” differs from the compensation evaluation contractors are required to perform pursuant to the regulations. OFCCP should also clarify exactly what type of information it is seeking from contractors with respect to compensation analyses/evaluations. The Itemized Listing should further state that OFCCP does not seek information protected by the attorney-client privilege or attorney work product. Alternatively, OFCCP should consider requiring contractors to certify that they have conducted the requisite analysis, rather than require documentation of the analysis.

Concern #3 – Electronic Submission of Data Poses Security Issues

OFCCP’s proposed Scheduling Letter requires contractors to submit all information responsive to the Scheduling Letter and attached Itemized Listing “electronically.” The data that OFCCP’s Itemized Listing requests is of a highly sensitive nature as it may include social security numbers, compensation information, and personal contact information. As such, contractors have concerns about the security of the data that they will be required to submit electronically.

Specifically, 74 percent of DE’s Responding Members indicated that they have data security concerns related to providing information electronically to OFCCP. When asked to briefly explain the concerns they have, DE received responses such as the following:

- “On one of our audits, we uploaded our compensation data to a secure site for OFCCP. The compliance officer later EMAILED the entire file back to me. They don’t seem to understand the significance of protecting data, including where it relates to individuals.”
- “Potential risk of detailed employee and or comp data would need a way to transfer files securely (SFTP). We would not email this info.”
- “U.S. Government isn’t particularly known for having tight security protocols. We’d expect SOC-2 compliance with any other company we do business with.”
- “OFCCP has not addressed concerns about security. Since security provisions are unknown, they are highly suspect.”
- “It is against company security policy to email confidential information over the internet. We would need a secure site to upload the information.”
- “How do we know this won’t be leaked?”
- “We would want some level of assurance from the OFCCP that the data format in which they are requesting the data is at the highest level of security for submission and storage.”



In addition to the above concerns, some Responding Members expressed concerns about the fact that not all of their data is maintained electronically, that the data is often too large to send via email, and that their electronic data may not be maintained in a format consistent with OFCCP's preferred format (which is currently unknown).

RECOMMENDATION: OFCCP should establish a secure web-based data-submission portal for data submission to provide contractors comfort that their applicant and employee data will not be vulnerable to a data breach and to ensure that contractors have a means of electronically transmitting files that are too large for email. In addition, OFCCP should train its employees on the importance of data security and maintaining the confidentiality of any contractor data OFCCP receives. OFCCP should also provide clarification as to the manner in which contractors must submit data electronically. Finally, OFCCP should make exceptions to the electronic submission requirement if the contractor does not maintain the requested data electronically.

Concern #4 - It Will Take Significantly Longer Than 29 Hours for Contractors to Compile the Requisite Data.

OFCCP estimates the burden hours for assembling and submitting the data and information requested in its proposed Scheduling Letter and Itemized Listing is approximately 29 hours per contractor (only 1.1 hours more than 27.9 estimated burden hours for contractors to respond to the current Scheduling Letter and Itemized Listing). DE and its members strongly disagree with OFCCP's estimate.

When DE surveyed its members regarding whether they estimate it will take longer than 29 hours to assemble and submit the data requested in OFCCP's Scheduling Letter and Itemized Listing, 95 percent of Responding Members said "Yes."

DE asked its members to estimate how long they thought it would take to assemble and submit the requisite data and, as expected, the responses varied with the lowest response being 40 hours and the highest being 1000 hours. The average response was approximately 132 hours. Responding Members further estimated that it would cost them between \$5,000 on the low end and over \$75,000 on the high end to assemble and submit the requisite data. The average response was \$26,000.

Based on these responses, it is clear that OFCCP has drastically underestimated the time and cost burden the proposed requirements will place on contractors, particularly since many contractors already spend significantly more than the 27.9 hours OFCCP estimated it would take to respond to the current Scheduling Letter and Itemized Listing and because many contractors will have to develop new processes, systems, or tools to report the data requested in the proposed Scheduling Letter and Itemized Listing.



It is not clear how or why OFCCP believes it will only take contractors 1.1 additional hours to respond to the proposed Scheduling Letter and Itemized Listing. OFCCP has not provided an explanation as to how it arrived at this figure, but the estimate defies logic given that the proposed Scheduling Letter significantly increases contractors' response obligations. In fact, 33 percent of DE's Responding Members indicated that just the requirement to identify their top three subcontractors would cost them more than \$25,000 to accomplish – a figure that clearly exceeds OFCCP's 1.1-hour estimate.

RECOMMENDATION: OFCCP should reevaluate its burden estimate and/or provide contractors with an explanation as to how it arrived at its estimate.

Concern #5 – Creating a Unique Identifier as Required by OFCCP's 503 and VEVRA Focused Review Scheduling Letters Will be Burdensome and Costly.

OFCCP's 503 and VEVRA "Focused Review" scheduling letters require that employers submit the data with a single unique identifier for each applicant to permit OFCCP to track an applicant and/or employee across all reports the contractor provides to OFCCP. OFCCP states that this identifier must be consistent across all databases (i.e., self-identification information, compensation information, and employment activity data).

Although this may seem like a simple request, the reality is that a unique identifier will be extremely burdensome and costly for many contractors. While many applicant tracking systems (ATS) assign a unique identifier to each person expressing interest ("PEI"), and many Human Resources Information Systems ("HRIS") also assign a unique identifier to each employee, those unique identifiers are typically different because the ATS and the HRIS are different systems that function independently of one another.

In response to DE's member survey, 81 percent of Responding Members indicated that their applicant tracking system assigns a unique identifier to each PEI and 94 percent of Responding Members indicated that their HRIS assigns a unique identifier to each employee. However, 82 percent of responding members indicated that the unique identifier their ATS assigns to its PEI is not the same as the unique identifier its HRIS assigns to its employees. Only seven percent of Responding Members indicated that it would cost their company less than five thousand dollars to create a system which reports a unique identifier that would comply with OFCCP's request. Most Responding Members believe it would be much more costly to comply with OFCCP's request, with 21 percent indicating it would cost between five to ten thousand dollars, 29 percent believing it would cost ten to twenty-five thousand dollars, and 42 percent believing it would cost over twenty-five thousand dollars to create a unique identifier that is consistent across the company's ATS and HRIS.



When DE asked its members to briefly explain the challenges they foresee with respect to providing a unique identifier consistent across all databases, members provided responses such as the following:

- “We utilize third party vendors for our HRIS systems and would be subject to their decisions regarding what functionality would be provided.”
- “We are highly dependent on how effectively the different vendors could sync their systems in order to identify a common identifier. This effort will also take additional time away from our staff’s regular responsibilities to make this change.”
- “The problem with the OFCCP’s logic is they seem to think that employers use the same system for applicant tracking as they do for their HRIS, which is rarely the case.”
- “We use two different systems which are not integrated.”
- “These are two separate systems and would need to be done manually.”
- “Applicant numbers are not captured in our HRIS, therefore we would have to match up all hires to the applicant flow data.”
- “Having to manually merge data from two systems would be extremely time consuming and staff intensive.”
- “It would have to be done manually.”
- “Assigning and maintaining unique identifiers in multiple systems and external data reports [would be challenging with] 300,000+ employees.”
- “Our HRIS and ATS are not compatible and each auto-assigns identifiers for candidates and employees. We cannot override the employee identifier to link it to the candidate ID.”
- “Applicants may have more than one unique identifier which would be very difficult to match to the [employee] identifier. Ensuring accuracy of data would be very time consuming and manual!”
- “We would have to determine either a system methodology to assign the unique identifiers or assign them manually, a daunting and extremely time consuming task.”

RECOMMENDATION: OFCCP should eliminate this requirement, as contractors will not be able to comply without significant difficult and expense.

III. Conclusion

DE hopes these comments provide insight regarding the real-world concerns that many contractors have about OFCCP’s Proposal. Prior to implementing its Proposal, DE respectfully



urges OFCCP to consider and address contractors' concerns and realistically consider the additional burden the Proposal will impose on federal contractors.

Once again, DE appreciates the opportunity to submit these comments and hopes they are helpful to the agency.

Sincerely,

A handwritten signature in black ink that reads "Candee J. Chambers". The signature is fluid and cursive.

Candee J. Chambers, SPHR, SHRM-SCP, SR. CAAP
Executive Director
DirectEmployers Association