

January 17, 2023

Via Federal eRulemaking Portal: www.regulations.gov

Tina T. Williams, Director
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room C-3325
Washington, DC 20210

Re: Comments of the Center for Workplace Compliance on the Office of Federal Contract Compliance Programs' Revisions to VEVRAA and Section 503 Information Collection Requests (OMB Control Nos. 1250-0004 and 1250-0005)

Dear Ms. Williams:

The Center for Workplace Compliance (CWC) respectfully submits these comments in response to the U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs' (OFCCP) proposed information collection requests (ICRs) regarding revisions to the recordkeeping requirements imposed on federal contractors under Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) and Section 503 of the Rehabilitation Act of 1973 (Section 503), notice of which was published in the *Federal Register* on November 16, 2022.¹

Among other things, OFCCP is proposing a handful of minor changes to the agency's prescribed form for collecting disability self-identification data from applicants and employees, formally known as Form CC-305, "in an overall effort to increase the response rate on the form." CWC appreciates this opportunity to comment on Form CC-305, which ostensibly serves as the foundation of a successful Section 503 affirmative action program (AAP).

CWC commends OFCCP for its continued efforts to revise Form CC-305 in a manner that will both increase self-identification rates and respond to stakeholder concerns. In this case, we believe that updating the list of disabilities on Form CC-305 to reflect the preferred language for the specific disabilities is an appropriate step. While we appreciate these efforts, we respectfully submit that the changes proposed by the agency do not address the fundamental flaw with Form CC-305, *i.e.*, the fact that it is the *only* way that OFCCP allows a contractor to solicit an applicant's or employee's disability status, and cannot be modified. This is in stark contrast to the self-identification forms used by contractors to seek race, ethnicity, sex, and protected

¹ 87 Fed. Reg. 68743 (November 16, 2022).

veteran status, all of which can be freely edited and crafted in a way that best suits each contractor's workplace culture.

As a better approach, CWC recommends that OFCCP adopt an alternative option for contractors that wish to craft their own self-identification form that will better fit their respective workplaces, while still satisfying applicable regulatory requirements regarding the confidentiality and proper use of the data collected. If OFCCP is reluctant to provide an alternative disability self-identification form option to all contractors at this time, then CWC respectfully suggests that the agency should at a minimum set up a pilot program with a select group of employers to test whether an alternative option would further OFCCP's stated goal of increasing response rates on the form.

Statement of Interest

CWC² is the nation's leading nonprofit association of employers dedicated exclusively to helping its member companies develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Formed in 1976, CWC's membership includes approximately 200 major U.S. employers, collectively providing employment to millions of workers. CWC's members are firmly committed to nondiscrimination and equal employment opportunity.

Nearly all of CWC's members are subject to the nondiscrimination and affirmative action requirements of Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and their implementing regulations. As major federal contractors and subcontractors, CWC's members have a significant stake and interest in ensuring that OFCCP's regulations and paperwork requirements, including those triggered by the agency's Section 503 and VEVRAA regulations, efficiently and effectively accomplish their underlying policy objectives.

The Fundamental Problems With Form CC-305

Form CC-305 response rates have been low since the form was first introduced and have not improved over time. CWC members have consistently reported two major problems with implementation of Form CC-305, each of which we believe has contributed to the relatively low participation of, and self-identification rates for, individuals with disabilities, which in turn has prevented federal contractors from realizing the full potential of their affirmative action programs:

- The inability to modify the contents of the form to better align with the company's corporate culture or similar communications and self-identification forms; and

² Formerly the Equal Employment Advisory Council (EEAC).

- OFCCP’s position that contractors cannot require applicants and employees to accept the invitation by selecting one of the three answers to the question posed by the form, even when one of those answers is “I DON’T WISH TO ANSWER.”

These practical barriers are predominantly the product of OFCCP’s rigid position that unlike virtually every other compliance obligation the agency enforces, where contractors can satisfy their regulatory obligations by crafting their own documents and analyses according to certain criteria, Form CC-305 cannot be changed. Further exacerbating this issue is the fact that employers are required to give applicants and employees the option to skip the form all together. CWC submits that providing more flexibility allowing modification of the form and allowing contractors to require a response on the form will materially increase response rates.

CWC’s Recommendations Regarding Changes to Form CC-305

CWC commends OFCCP for revising and updating the list of disabilities on Form CC-305 to reflect the current preferred language for the specific disabilities and to include additional examples. It would also be helpful if OFCCP updated the form to emphasize that the list of examples is not exhaustive. CWC also appreciates OFCCP’s efforts to make the form easier to read and use by making some plain language edits and minor formatting changes. CWC members support these updates.

OFCCP Should Develop an Alternative to Form CC-305 and Adopt a Self-Identification Model That Mirrors the Framework for Invitations Extended Under VEVRAA

While CWC appreciates the proposed changes, we believe that overall, they will do little to improve applicant and employee participation rates. Over the last several years, CWC members have reported that the fundamental flaw with Form CC-305 is its inflexibility, which prevents employers from being able to modify the contents or the format of the form in a way that is consistent with their own corporate culture. Again, there are no similar restrictions with regard to the manner in which contractors solicit self-identification of race, ethnicity, sex, and veteran status.

We believe that OFCCP’s VEVRAA model presents the most reasonable compromise for satisfying the disability self-identification requirement. Under the VEVRAA model, OFCCP identifies the core elements that an invitation to self-identify protected veteran status *must* contain, but leaves the development and execution of the form itself to the contractor. CWC members have reported that this flexibility is critical to the successful implementation of a new or alternative self-identification invitation under Section 503.

OFCCP Should Issue Guidance Clarifying That Contractors Can Compel a Response to the Invitation to Self-Identify

CWC also recommends that OFCCP issue guidance clarifying that contractors may, at their option, require individuals to complete the invitation to self-identify, so long as there is an “opt out” or “I don’t wish to answer” option on the form, as currently exists with Form CC-305.

CWC members have reported that they have been frustrated by the inability to require users to complete the form. Form CC-305 provides the user with three answer options: (1) “Yes, I have a disability (or previously had a disability);” (2) “No, I don’t have a disability;” and (3) “I don’t wish to answer.” Accordingly, as intended, users can complete the form without providing any information regarding their disability status. But Form CC-305 also inexplicably states that “Completing this form is voluntary,” and requires employers to allow users to skip the form altogether, thereby negating the purpose of the third answer option.³

CWC therefore respectfully recommends that OFCCP provide additional guidance that will allow employers to require users to complete the form. As previously noted, the “voluntary” nature of the form would still remain because individuals always have the option to select “I don’t wish to answer.”

OFCCP Can Implement These Needed Changes Through a Pilot Program

CWC believes the best path forward to increase response rates on Form CC-305 is to allow all government contractors more flexibility on the format and presentation of the form’s content. However, if OFCCP is reluctant to make these changes for purposes of updating the current form that expires on May 31, 2023, then CWC recommends the agency implement a pilot program whereby a select group of employers test this new flexible option. The pilot program, in addition to allowing the test employer group to modify the form in certain ways without compromising the core elements that an invitation to self-identify disability status *must* contain, should also allow the pilot participants to mandate a response from applicants and employees.

A pilot program would allow OFCCP to evaluate the impact that allowing flexibility on and requiring a response to Form CC-305 would have on response rates with little to no downside if these permitted changes do not have a positive effect. OFCCP could offer this pilot program to government contractors that are clearly meeting their Section 503 obligations such as those companies selected for the Excellence in Disability Inclusion (EDI) Award or the Certificates of Merit recipients in FY 2019 and FY 2020. Such a pilot program would provide OFCCP reliable data points from trustworthy sources on the increase in response rates that CWC believes will occur if the agency adopts a disability self-identification model that mirrors the framework for invitations extended under VEVRAA.

Additional Recommendations Regarding Data Collection Analysis Requirements

Apart from Form CC-305, CWC recommends that OFCCP issue new guidance, perhaps in the form of FAQs, stating that contractors are permitted to define key terms such as “applicant” and “hire” consistent with the way they define those terms for Executive Order 11246 compliance purposes. OFCCP’s revised regulations implementing Section 503 and VEVRAA require qualifying federal contractors to collect, maintain for a three-year period, and report a total of eight unique data elements pertaining to disability and veteran hiring activity. Specifically, contractors are required to collect and report the total numbers of:

³ Note that OFCCP’s original proposed disability self-identification form stated, “Your submission of information is voluntary,” a more accurate description of this longstanding requirement.

- 1) Job openings;
- 2) Jobs filled;
- 3) Applicants for all jobs;
- 4) Applicants hired;
- 5) Applicants with disabilities;
- 6) Hires with disabilities;
- 7) Protected veteran⁴ applicants; and
- 8) Protected veteran hires.

Key terms such as “job openings,” “jobs filled,” “applicants,” and “hired” are not defined in OFCCP’s Section 503 or VEVRAA regulations. Rather, the agency has provided sub-regulatory guidance in the form of “Frequently Asked Questions” available online.⁵

Without exception, our members have advised us that the definitions of key terms in OFCCP’s FAQs are confusing, and that they have struggled to understand how the resulting data could be useful for the stated purpose of evaluating the effectiveness of their external disability and veteran outreach efforts.

For instance, although a plain reading of the regulations would suggest that “jobs filled” is meant to represent the subset of “job openings” that resulted in an actual “hire,” this is not the case according to OFCCP’s FAQs. Rather, the FAQs provide that “job openings” refers to the number of “individual positions advertised as open in a job vacancy announcement or requisition.” “Jobs filled,” however, is not limited to advertised positions, but instead refers to the much broader set of “jobs the company filled by any means, be it through a competitive process or non-competitively, e.g., through reassignment or merit promotion.”

Further, OFCCP’s FAQs define “hired” in the context of Section 503 and VEVRAA as “applicants” (both internal and external candidates) who are “hired” through a “competitive process, including promotions.” The perplexing use of a term in its own definition aside, these definitions are at odds with the way many contractors define the same terms for their analyses of employment transactions under OFCCP’s Executive Order regulations and the Uniform Guidelines on Employee Selection Procedures.

We also respectfully recommend that OFCCP explicitly clarify that contractors are permitted to define terms such as “applicant” and “hire” consistent with the way they define those terms for Executive Order 11246 AAP purposes. Regarding the “job openings” and “jobs filled” elements, simply allowing contractors to define these terms in the way that best fits each individual organization should suffice.

⁴ Note that CWC uses the term “protected veteran” to mean applicants or employees who have self-identified as belonging to one of the four defined categories of U.S. military veterans protected under VEVRAA.

⁵ Specifically, CWC refers to numbers 1-4 under the heading, “Data Collection Analysis” in OFCCP’s “Section 503” and “VEVRAA” FAQs, available at <https://www.dol.gov/ofccp/regs/compliance/faqs/offaqs.htm>.

Conclusion

CWC appreciates the opportunity to offer these comments regarding OFCCP's Section 503 and VEVRAA recordkeeping requirements, and in particular OFCCP's expressed willingness to consider changes to Form CC-305 that will allow a contractor to solicit disability self-identification information in a way that realizes the full potential of the contractor's affirmative action program.

Sincerely,

A handwritten signature in blue ink, appearing to read "Michael Bracken", with a stylized flourish extending to the right.

Michael Bracken
Assistant General Counsel