

January 20, 2023

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

*Submitted via regulations.gov*

**Re: Comments on Supply and Service Program; Proposed Approval of Information Collection Requirements; FR Doc. 2022–25311**

Dear Ms. Williams:

A Better Balance appreciates the opportunity to comment on the Office of Federal Contract Compliance Programs' (OFCCP) request for reauthorization of its compliance review scheduling letter.<sup>1</sup> We wholeheartedly support the proposal that the scheduling letter collect more detailed and complete information at the outset of a compliance review. This change is essential for OFCCP to conduct more efficient, consistent, and effective reviews of federal contractors' compliance with nondiscrimination and equal employment opportunity requirements. As Director Yang has concluded, enhancing the effectiveness of these compliance reviews will "positively impact more workers" through increased contractor compliance.<sup>2</sup>

A significant portion of the American workers stand to benefit from enhanced contractor compliance. OFCCP has jurisdiction over approximately 120,000 contractor establishments and 25,000 firms, which employ approximately 20% of the American workforce. And with the new historic federal investments for infrastructure and economic recovery, many more businesses will become federal contractors subject to OFCCP oversight. Enhancing OFCCP's ability to make good jobs free from discrimination available to all is especially critical.

A Better Balance is a national nonprofit legal services and advocacy organization that uses the power of the law to advance justice for workers, so they can care for themselves and their loved ones without jeopardizing their economic security. We run a free and confidential legal helpline through which we hear from thousands of workers a year, including workers who have experienced discrimination because of their pregnancies, disabilities, or caregiver status or have been unable to access their rights to the Family and Medical Leave Act or state level paid sick time or paid family and medical leave. We frequently hear from workers employed in

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<sup>1</sup> OMB Control Number 1250-0003.

<sup>2</sup> Office of Federal Contract Compliance Programs, Directive 2022-02, Effective Compliance Evaluations and Enforcement, <https://www.dol.gov/agencies/ofccp/directives/2022-02>.

industries with whom federal agencies frequently contract including food services, security services, construction, warehouse, and IT workers.

Despite longstanding protections under the law, working people across the United States continue to experience employment discrimination that robs them of employment opportunities, economic security, and dignity on the job.<sup>3</sup> The cost of discrimination for people of color, women, LGBTQ+ people, people with disabilities, veterans, and other marginalized and multi-marginalized groups is significant. Workplace discrimination can prevent access to a job or a promotion, cause a hostile working environment, or lower pay — all because of who you are. These unlawful practices inhibit economic security and opportunity and help to perpetuate disparities in health outcomes, housing, education, and more.

Pregnant people, parents, and caregivers face high rates of discrimination. A 2022 study, for instance, found 1 in 5 mothers have experienced pregnancy discrimination.<sup>4</sup> When pregnant workers face discrimination and are forced off the job, this exacerbates the already persistent wage gap women face and can snowball into lasting economic disadvantage, or what we often refer to as the “pregnancy penalty.”<sup>5</sup> In addition to lost income and opportunity, workers also lose benefits, retirement income, pensions, and more. Another study by the Center for WorkLife Law found that lawsuits alleging discrimination based on the need to provide elder care rose 650% between 2006 and 2015, a trend experts anticipate will only increase as the population and workforce ages.<sup>6</sup> We also know discrimination against pregnant and caregiving workers

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<sup>3</sup> See, e.g., U.S. Equal Employment Opportunity Commission, *Enforcement and Litigation Statistics*, <https://www.eeoc.gov/data/enforcement-and-litigation-statistics-0>; Office of Federal Contract Compliance Programs, *OFCCP By the Numbers*, available at <https://www.dol.gov/agencies/ofccp/about/data/achievements>.

<sup>4</sup> See Ben Gitis, Emerson Sprick & Adrienne Schweer, *BPC – Morning Consult: 1 in 5 Moms Experience Pregnancy Discrimination in the Workplace* (Feb. 2022), <https://bipartisanpolicy.org/blog/bpc-morning-consult-pregnancy-discrimination/>.

<sup>5</sup> See Dina Bakst & Phoebe Taubman, *A Better Balance, The Pregnancy Penalty: How Motherhood Drives Inequality and Poverty in New York City* 3 (2014), [https://www.abetterbalance.org/wp-content/uploads/2016/11/ABB\\_PregnancyPenalty-Report-2014.pdf](https://www.abetterbalance.org/wp-content/uploads/2016/11/ABB_PregnancyPenalty-Report-2014.pdf); see also Long Over Due: Exploring the Pregnant Workers’ Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. on Ed. & Lab., 116th Cong. (2019), <https://edlabor.house.gov/download/10/22/2019/baksttestimony102219> (testimony of Dina Bakst) (citing to *Orr v. Albuquerque*, 531 F.3d 1210 (10th Cir. 2008) (police officers were forced to exhaust accrued sick leave and were not allowed to use accrued compensatory time for their pregnancy-related leaves, affecting their eligibility for early retirement); Brief of Am. Civil Liberties Union & A Better Balance et al. as Amici Curiae Supporting Petitioner, *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015) (No. 12-1226), <https://www.abetterbalance.org/resources/supreme-court-pregnancy-decision-young-v-ups/> (citing to Michelle J. Budig, Third Way NEXT, *The Fatherhood Bonus & the Motherhood Penalty: Parenthood and the Gender Gap in Pay* 7–8, 13–14 (2014)).

<sup>6</sup> See Cynthia Thomas Calvert, Center for WorkLife Law, *Caregivers in the Workplace: Family Responsibilities Discrimination Litigation Update 2016* (2016), <https://worklifelaw.org/publications/Caregivers-in-the-Workplace-FRD-update-2016.pdf>.

disproportionately impacts workers of color. For example, according to the AARP, Black workers over 50 report experiencing a much higher incidence of discrimination based on their family caregiving responsibilities than white workers.<sup>7</sup>

When companies have the privilege of contracting with the federal government, they not only must refrain from employment discrimination, but also must agree to take affirmative steps to promote employment opportunities for individuals who are members of certain underrepresented groups.<sup>8</sup> These affirmative steps include proactively monitoring workplace equal employment opportunity and pay equity, making a meaningful effort to recruit qualified applicants from groups who are underrepresented in their workplaces, and breaking down barriers to equal opportunity for veterans and individuals with disabilities. Federal contractors subject to these requirements have better records when it comes to equal employment opportunity than employers who are not federal contractors.<sup>9</sup> OFCCP oversees and enforces compliance with these nondiscrimination and affirmative action requirements.

OFCCP is unique in being able to conduct systemic compliance reviews as part of its enforcement authority. Through compliance reviews, OFCCP can proactively identify, investigate, and remedy patterns of discrimination, even in the absence of an individual complaint, and can evaluate contractors' compliance with affirmative action obligations. The scheduling letter, which OFCCP now proposes to revise, is the document OFCCP uses to notify contractors that they have been selected to undergo a compliance review and identifies the initial information those contractors must provide.

OFCCP proposes that its scheduling letter request more detailed and specific information from contractors at the outset of compliance reviews. Updating the scheduling letter to obtain critical information at the beginning of the compliance review will support OFCCP's goal of strengthening the effectiveness of its compliance evaluations, promoting greater contractor compliance, and ultimately benefiting more workers. It will also encourage employers to self

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<sup>7</sup> See AARP, *The Economic Impact of Supporting Working Family Caregivers* (2020), [https://www.aarp.org/content/dam/aarp/research/surveys\\_statistics/econ/2021/longevity-economy-working-caregivers.doi.10.26419-2Fint.00042.006.pdf](https://www.aarp.org/content/dam/aarp/research/surveys_statistics/econ/2021/longevity-economy-working-caregivers.doi.10.26419-2Fint.00042.006.pdf).

<sup>8</sup> OFCCP enforces Executive Order 11246, which prohibits federal contractors from engaging in employment discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin; Section 503 of the Rehabilitation Act of 1973, which prohibits employment discrimination against people with disabilities; and the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), which protects veterans. These authorities also impose certain affirmative action obligations on federal contractors to ensure equal employment opportunities.

<sup>9</sup> Conrad Miller, *The Persistent Effect of Temporary Affirmative Action*, 9 Am. Econ. J.: Applied Econ., 152 (2017), <https://www.aeaweb.org/articles?id=10.1257/app.20160121>, (affirmative action requirements of EO 1126 significantly increases an establishment's black share of employees, with the share continuing to increase over time); Fidan Kurtulus, *Affirmative Action and the Occupational Advancement of Minorities and Women During 1973–2003*, 51 Indus. Rels.: J. of Econ. and Soc'y 213, (2012), <https://doi.org/10.1111/j.1468-232X.2012.00675.x>, (more women and minorities in higher skill jobs at federal contractors compared with non-contractors between 1973 and 2003).

audit the employment systems referenced in OFCCP's updated requests (e.g., technology-based employment systems) to identify potential EEO issues *before* they are selected for a compliance review by the OFCCP. The new information would include:

- Existing employment policies concerning equal opportunity, including anti-harassment policies, EEO complaint procedures, and employment agreements, such as arbitration agreements, that impact employees' equal opportunity rights and complaint processes. Having this information at the outset is essential for OFCCP to understand the contractors' systems and proceed with an informed and targeted review.
  - We agree that collecting employment policies at the outset is critical to OFCCP understanding contractors' systems. As part of this collection, we recommend the agency also make clear that the following types of employment policies will be sought as part of the review of existing employer policies:
    - No-fault attendance and absence control policies
    - Reasonable accommodation policies
    - Policies regarding sick time, leave, and time off from work
  - The above-mentioned policies significantly impact the ability of pregnant people, caregivers, and people with disabilities to maintain employment and ensure equality and equity on the job. OFCCP should obtain those policies as part of a thorough compliance review.
  - We also recommend that in addition to arbitration agreements, OFCCP review other types of "agreements" that may infringe upon workers' rights, including mandatory jury waivers and limits on the applicable statute of limitations to file claims against the employer.
- More details about the number of qualified people of color and women available for employment in each job group, enhancing OFCCP's ability to evaluate contractors' affirmative action programs.
- A list of any programs the contractor developed to respond to problem areas identified in the contractor's required analyses of their employment process, enabling OFCCP to better tailor its review process.
- More complete information on compensation practices, including documentation of contractors' compensation analyses and two years of compensation data, rather than one.
- Additional information about the contractor's outreach and recruitment efforts to individuals with disabilities and veterans. This level of detail will require more than the current cursory summaries from the contractors, making OFCCP analysis more informed.

- More detailed information about promotions and terminations, including information necessary to make the review meaningful, such as whether the promotions were competitive and the reason for termination.
- New information on the contractor’s use of technology-based employment selection procedures, including artificial intelligence, algorithms, and automated systems, made essential given the documented potential for bias in such systems.<sup>10</sup>
- For post-secondary institutions and contractors with “campus-like settings” (e.g. hospitals or information technology companies), the relevant information for all AAPs for the campus as a whole. This clarification ensures that OFCCP will have complete and holistic information regarding the campus and enhances the efficiency of the review.

In order for OFCCP to meet its goal of more efficiently identifying problem areas, A Better Balance also recommends OFCCP collect data about the number of employment claims filed against each contractor. This information should be disaggregated by forum (e.g. arbitration, agency, or court) as well as type of claim (e.g. discrimination, wage dispute, FMLA or leave-related claim). Furthermore, the contractor should disclose the outcome of the claim (i.e. whether the claim was settled, dismissed, or if a judgment was reached against the contractor) and any damages or government fees and/or penalties that were imposed or agreed to as a result of the claim. This data is critical to ensuring that the federal government is contracting with employers who are meeting their legal obligations and treating their workers with dignity and respect.

If authorized as proposed, these changes will speed the pace of reviews, conserve scarce agency resources, provide additional clarity for employers as to their obligations, and enable OFCCP to more quickly and accurately identify both potential problem areas and successes.

OFCCP has tailored the proposed changes to the scheduling letter to minimize the additional burden on contractors. As the agency explains, the new scheduling letter would reduce contractor uncertainty over what documentation is sufficient for the review and enhance review efficiency for both the contractor and OFCCP. And it would have minimal impact on small businesses, given limited recordkeeping and reporting requirements for contractors with relatively few employees.

Accordingly, we enthusiastically support OFCCP’s requested authorization of the enhanced compliance review scheduling letter and encourage the agency to finalize it without change. This enhanced review will significantly improve outcomes for the pregnant, parenting,

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<sup>10</sup> Manish Raghavan & Solon Barocas, *Challenges for mitigating bias in algorithmic hiring*, Brookings (Dec. 6, 2019), <https://www.brookings.edu/research/challenges-for-mitigating-bias-in-algorithmic-hiring/> (“Left unchecked, algorithms can perpetuate the same biases and discrimination present in existing hiring practices.”); Miranda Bogen, *All the Ways Hiring Algorithms Can Introduce Bias*, Harvard Business Review (May 6, 2019), <https://hbr.org/2019/05/all-the-ways-hiring-algorithms-can-introduce-bias>.

and caregiving workers A Better Balance serves, especially those working in low-wage industries in which women and people of color are overly represented.

Sincerely,

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A Better Balance

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