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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:

I write on behalf of Equal Rights Advocates to comment¹ on the Office of Federal Contract Compliance Programs' (OFCCP's) request for reauthorization of its compliance review scheduling letter.² The proposed revisions to the information-collection requirements will bolster OFCCP's ability to protect workers from discrimination and promote equal employment opportunity in the workplace—twin goals that are at the core of our mission and work.

Founded in 1974, Equal Rights Advocates (ERA) is a national gender justice organization committed to protecting and expanding civil rights and equal access to educational and workplace opportunities for women, girls, and people of all marginalized gender identities. ERA has litigated hundreds of class and individual

¹ This comment was prepared with the assistance of Robin Thurston and Sarah Goetz, Democracy Forward Foundation.

² OMB Control Number 1250-0003.

discrimination cases across the country and up through the United States Supreme Court, including representing workers employed by federal contractors who have faced discrimination and harassment on the job and understand the importance of robust enforcement of anti-discrimination and equal employment opportunity protections for this large segment of the United States workforce. ERA also works closely with women who work in the trades—often employed by federal contractors—by providing them legal representation and direct services, and as a Steering Committee member of the National Taskforce on Tradeswomen Issues. We have observed first-hand how critical it is that OFCCP have the information necessary to ensure compliance by federal contractors with these laws. As an organization dedicated to advancing equity and economic security for women and other workers, we believe that the proposed revisions to the information-collection requirements will help achieve these objectives, by enabling OFCCP do conduct more efficient and effective compliance reviews.

Strengthening OFCCP’s enforcement capacity is critically important given the scope of federal contractor employment in this country. OFCCP has jurisdiction over approximately 120,000 contractor establishments and 25,000 firms, which employ approximately 20% of the American workforce. And given the federal government’s recent historic investments in infrastructure and the economy in the wake of the COVID-19 pandemic, those numbers only stand to increase as the opportunity for federal contracts grows in the coming years.³ This is therefore, a critical moment for OFCCP to safeguard and strengthen its ability to carry out meaningful compliance reviews in service of enforcing civil-rights protections for workers.

The proposed revisions do just that. As explained below, OFCCP has drawn on its substantial authority to propose sensible changes to the scheduling letter that are tailored to improve the quality and completeness of the information it collects at the outset of a compliance review without imposing too great a burden on contractors.

I. The persistence of workplace disparities underscores the continued need for data-driven assessments of hiring and employment practices.

Working people across the United States continue to experience employment discrimination that robs them of employment opportunities, economic security, and dignity on the job. The U.S. Equal Employment Opportunity Commission (“EEOC”), for example, reported that it received over 128,000 charges of employment discrimination in fiscal years 2020 and 2021.⁴ Despite being much less well known, OFCCP received more than 2,700 complaints over that same period from federal contract workers.⁵ And fear of retaliation prevents many working people from reporting discrimination in the first place.⁶ Retaliation claims made up over half of all charges filed at the EEOC in fiscal years 2020 and 2021, and nearly 43% of complaints

³ See OFCCP, FY 2023 Congressional Budget Justification 9, <https://www.dol.gov/sites/dolgov/files/general/budget/2023/CBJ-2023-V2-10.pdf>.

⁴ *Charge Statistics (Charges filed with EEOC) FY 1997 Through FY 2021*, EEOC, <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021> (last visited Jan. 19, 2023).

⁵ *OFCCP By the Numbers: Fiscal Year Data Tables*, OFCCP, <https://www.dol.gov/agencies/ofccp/about/data/accomplishments> (last visited Jan. 19, 2023) (data drawn from Complaints Received, by Employment Practice spreadsheet).

⁶ See generally Deborah L. Brake, *Retaliation*, 90 Minn. L. Rev. 18, 36-42 (2005).

received by OFCCP in the first quarter of fiscal year 2022 alone.⁷ Given incentives not to report discrimination,⁸ it can be difficult to determine its prevalence, but an online survey conducted in 2019 found that as many as 60% of working people in the United States have experienced or witnessed workplace discrimination based on age, race, sex, gender identity, or sexual orientation.⁹

We frequently hear from workers who have experienced egregious discrimination and harassment and yet are too fearful to come forward. This is especially pronounced for low-wage workers who have little to no safety net should they experience retaliation for speaking out. Unfortunately, it is all too common for workers to report to our organization that they were demoted, and in some cases even terminated, for reporting harassment and discrimination. The economic impact of such retaliation is devastating for workers, particularly those in lower paid jobs.

The cost of discrimination for people of color, women, LGBTQ+ people, people with disabilities, veterans, and other marginalized groups is enormous. Workplace discrimination can mean not having access to a job or promotion, being forced to endure a hostile working environment, or being paid less — 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. Through our national helpline, we hear from workers who have experienced direct and implicit discrimination affecting the jobs they are hired into, the pay and benefits they receive, and the promotional opportunities they are afforded, all of which has a detrimental effect on their earnings and economic security. This is especially true for women of color who often experience intersection discrimination based on multiple bases.

Discriminatory race- and sex-based pay gaps, for example, directly contribute to high rates of poverty affecting communities of color.¹⁰ In 2021, women working full-time, year-round were paid 84 cents for every dollar paid to men, with women of color paid significantly less than non-Hispanic white men.¹¹ When comparing the wages of all workers — including full-time, year-round, part-time, and part-year workers — gender and race wage gaps are even larger. Using this comparison, all women workers were paid 77 cents for every dollar paid to all men. All Black women workers were paid just 64 cents, Latinas were paid 54 cents, and Native American women were paid only 51 cents for every dollar paid to a white, non-Hispanic man.¹² For women of color especially, unequal pay means having far less money to cover basic necessities, and less money — or no money at all — to withstand a financial emergency, let alone an economic crisis like the one

⁷ *Charge Statistics*, *supra* note 4; *OFCCP By the Numbers*, *supra* note 5.

⁸ *See Brake*, *supra* note 6, at 32-36 (discussing research on the social costs of reporting discrimination, in particular for “low-power or stigmatized social groups.”).

⁹ Amy Elisa Jackson, *Diversity and Inclusion Study 2019*, Glassdoor (July 22, 2020), <https://www.glassdoor.com/blog/new-study-discrimination/>.

¹⁰ *See Poverty Rate by Race/Ethnicity*, Kaiser Fam. Found., <https://www.kff.org/other/state-indicator/poverty-rate-by-raceethnicity/?currentTimeframe=0&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited Jan. 19, 2023).

¹¹ Brooke LePage & Jasmine Tucker, National Women’s Law Center, *A Window Into the Wage Gap: What’s Behind It and How to Close It* (2023), <https://nwlc.org/wp-content/uploads/2023/01/2022-Wage-Gap-Factsheet-1.10.23.pdf>.

¹² *Id.* at 2.

experienced during the height of the COVID-19 pandemic. Beyond immediate basic needs, unequal pay also threatens the economic security of families into the future as it negatively affects access to credit, education, retirement savings, and other investments that help build intergenerational wealth.

Occupational segregation also contributes to wage gaps and economic insecurity. Workers of color, women, and people with disabilities continue to be concentrated in low-paid occupations because of structural barriers to entry as well as discrimination on the job.¹³ For example, research shows that women who experience sexual harassment at work are more likely to leave their jobs.¹⁴ A majority of women in male-dominated workplaces report that sexual harassment is a problem in their industry, and more women in male-dominated workplaces report having personally experienced sexual harassment on the job.¹⁵ We consistently hear from women in the trades that they are often the only woman on a job site, and frequently experience harassment from their male counterparts and supervisors. They are often too scared to speak out because of the risk of being retaliated. Such retaliation ranges from being denied critical on the job training from journey-level workers, to being let go or not hired back onto a specific construction project

While federal contractors tend to do better than other employers with respect to equal employment opportunity, as discussed below, discrimination and disparities remain. From 2012 to 2022, OFCCP obtained monetary relief totaling \$218 million for 267,000 job seekers and employees who were discriminated against.¹⁶ In the past five fiscal years, it entered into a conciliation agreement or consent decree, indicating that there was sufficient noncompliance for OFCCP to pursue, with 14% of contractors following their supply and service compliance evaluations.¹⁷

II. OFCCP has broad authority to collect data to assess contractors' compliance with equal employment opportunity authorities.

OFCCP administers and enforces three equal employment opportunity authorities: Executive Order 11246, as amended (E.O. 11246); Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793 (Section 503); and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. § 4212 (VEVRAA). Collectively, these sources of law prohibit federal contractors from discriminating in employment because of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran.¹⁸ They further prohibit contractors from retaliating against applicants or

¹³ Marina Zhavoronkova et al., Center for American Progress, *Occupational Segregation in America* (2020), <https://www.americanprogress.org/article/occupational-segregation-in-america/>.

¹⁴ See Lauren Haumesser & Melissa Mahoney, Am. Ass'n of Univ. Women, *Factory Flaw: The Attrition and Retention of Women in Manufacturing*, https://www.aauw.org/app/uploads/2021/03/FactoryFlaw_FINAL-for-web_update.pdf.

¹⁵ Kim Parker, *Women in Majority-Male Workplaces Report Higher Rates of Gender Discrimination*, Pew Rsch. Ctr. (Mar. 7, 2018), <https://www.pewresearch.org/fact-tank/2018/03/07/women-in-majority-male-workplaces-report-higher-rates-of-gender-discrimination/>.

¹⁶ *OFCCP By the Numbers—Monetary Relief*, <https://www.dol.gov/agencies/ofccp/about/data/accomplishments> (last visited Jan. 19, 2023).

¹⁷ *OFCCP By the Numbers—Fiscal Year Data Tables*, *supra* note 5 (data drawn from Supply and Service Compliance Evaluations Conducted spreadsheet).

¹⁸ 41 C.F.R. parts 60-1, 60-300, 60-741.

employees for engaging in protected activities and protect employees' and applicants' ability to discuss their compensation.¹⁹

These laws also require that federal contractors provide equal employment opportunities through affirmative action. Contractors above certain employment thresholds must develop and maintain written affirmative action plans (AAPs), regarding both their nondiscrimination and affirmative action obligations. Such AAPs must address the following:

- Executive Order 11246: Comparing the utilization of women and minorities to their availability; setting placement goals if women or minorities are underutilized; assessing recruitment and outreach efforts; and developing and executing action-oriented programs to address identified problems.²⁰
- VEVRAA: Assessing personnel processes and standards; using effective recruitment and outreach efforts designed to recruit protected veterans; assessing recruitment and outreach efforts; developing and executing action-oriented programs to address identified problems; and establishing a hiring benchmark.²¹
- Section 503: Assessing personnel processes and standards; using effective recruitment and outreach efforts designed to recruit qualified individuals with disabilities; assessing recruitment and outreach efforts; developing and executing action-oriented programs to address identified problems; and using the OFCCP utilization goal as a benchmark to measure representation of individuals with disabilities in its job groups and/or workforce.²²

Supply and service contractors are required to develop an AAP within 120 days of the commencement of a covered federal contract and to update that AAP on an annual basis.²³

These laws are effective. Employers that are federal contractors subject to these requirements have better records when it comes to diversity and compliance with equal employment opportunity laws than employers that are not federal contractors.²⁴ But they are only as good as contractors' compliance with them. As

¹⁹ *Id.*

²⁰ 41 C.F.R. part 60-2.

²¹ 41 C.F.R. part 60-300, subpart C.

²² 41 C.F.R. part 60-741, subpart C.

²³ 41 C.F.R. § 60-2.1(c); 60-300.40(b) and (c); 60-741.40(b)(2) and (3).

²⁴ See, e.g., 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 E.O. 11246 significantly increases an establishment's Black share of employees, with the share continuing to increase over time); Fidan Ana Kurtulus, *Affirmative Action and the Occupational Advancement of Minorities and Women During 1973–2003*, 51 Indus. Rel.: A 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).

Director Yang has explained, “OFCCP will positively impact more workers by increasing federal contractor compliance with nondiscrimination and affirmative action responsibilities.”²⁵

Hence, OFCCP enjoys robust authority under E.O. 11246, Section 503, and VEVRAA (and their implementing regulations) to collect and review data to determine contractors’ compliance with the nondiscrimination and affirmative-action requirements that the laws mandate, and to take enforcement measures against contractors when necessary to bring them into compliance.

For example, E.O. 11246 authorizes the Secretary of Labor to “adopt such rules and regulations and issue such orders as [] deem[ed] necessary and appropriate to achieve” the Order’s nondiscrimination and affirmative-action mandates. § 201. Those actions include authorizing the Secretary to “investigate the employment practices of any Government contractor or subcontractor . . . to determine” whether the entity is complying with the Order’s nondiscrimination and affirmative-action requirements. *Id.* § 206. It grants the Secretary additional enforcement authority, including adjudication authority and the authority to terminate contracts and recoup funds from offending contractors. *Id.* § 209. Likewise, Section 503 “expressly grants the President unqualified authority to implement the Section by regulation.”²⁶ And given that the statute is “silen[t] on the particular tools that OFCCP should use,” “it is eminently reasonable to conclude that the silence is meant to convey nothing more than a refusal to tie the agency’s hands.”²⁷

The implementing regulations permit OFCCP to conduct compliance evaluations to gauge contractors’ compliance with OFCCP’s nondiscrimination and affirmative-action requirements.²⁸ Through the compliance-review process, OFCCP may undertake a “comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor.”²⁹ As courts have held, this regulatory scheme confers broad authority on OFCCP to conduct its compliance reviews.³⁰

This broad authority permits OFCCP to carry out a unique mission through a unique means: it is able to conduct systemic reviews of contractors’ compliance with nondiscrimination and affirmative-action requirements as part of its enforcement authority,³¹ and it is able to do so in a way that requires contractors to affirmatively report their compliance with its statutory and regulatory mandates. OFCCP, moreover, can conduct such compliance reviews without allegations of discriminatory practices. OFCCP’s focus on proactively rooting out systemic discrimination is designed to “(1) [p]rioritize enforcement resources by focusing on the worst offenders; (2) [e]ncourage employers to engage in self audits of their employment

²⁵ OFCCP, Directive (DIR) 2022-02: Effective Compliance Evaluations and Enforcement (Mar. 31, 2022), <https://www.dol.gov/agencies/ofccp/directives/2022-02>.

²⁶ *Assoc. Builders & Contractors, Inc. v. Shiu*, 30 F. Supp. 3d 25, 36 (D.D.C. 2014).

²⁷ *Id.* (quoting *Catawba County v. EPA*, 571 F.3d 20, 37 (D.C. Cir. 2009)).

²⁸ *See* 41 C.F.R. § 60-1.

²⁹ *Id.* § 60-1.20(a)(1).

³⁰ *See, e.g., United Space All., LLC v. Solis*, 824 F. Supp. 2d 68 (D.D.C. 2011) (accepting OFCCP’s interpretation of § 60-1.20(a) as granting it broad authority to obtain supporting documentation from contractor in course of desk audit).

³¹ *See About Us*, OFCCP, <https://www.dol.gov/agencies/ofccp/about> (last visited Jan. 19, 2023).

practices; [and] (3) [a]chieve maximum leverage of resources to protect the greatest number of workers from discrimination.”³²

OFCCP’s approach to compliance and enforcement allows it to uncover discrimination that might otherwise go unreported or undiscovered, because individual workers are poorly equipped to detect it on an individual basis, much less to successfully challenge it in administrative or legal proceedings.³³ For one, even if a worker knows that she has been discriminated against—something that’s not necessarily a given—legal recourse is sometimes hard to come by. Workers trying to prove discriminatory hiring or pay practices often struggle to obtain access to the hiring and pay data required to prove discrimination.³⁴ And analyzing such data to determine whether discriminatory patterns exist is difficult and costly. Likewise, the increased reliance by employers on mandatory arbitration means that employment-discrimination claims are often shunted into secret, individualized resolutions—making both the disclosure and resolution of systemic problems even less likely.³⁵ Indeed, agreements subjecting workers to mandatory arbitration frequently also foreclose their ability to participate in class actions or even to disclose the circumstances of the unlawful conduct to which they were subjected.³⁶

As explained above, ERA is frequently contacted by workers who are too fearful of retaliation to make a complaint to OFCCP. It is therefore imperative that the agency have the necessary processes in place to conduct robust affirmative enforcement.

In short, OFCCP’s broadly authorized compliance and enforcement work fulfills a unique function among the greater scheme of employment-discrimination safeguards. OFCCP therefore must use its broad authority to uproot systemic discrimination.

³² *Id.*

³³ See *Examining the Policies and Priorities of the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance Programs Before the Subcomm. on Civ. Rts. & Human Servs. of the Comm. on Educ. & Labor* (2022) (Statement of Jenny R. Yang, Director, U.S. Dep’t of Labor OFCCP), https://edworkforce.house.gov/uploadedfiles/dol_ofccp_director_yang_testimony_final_4.27_ed__labor_civil_rights_subcommittee_hearing.pdf (explaining that OFCCP “play[s] an important role in rooting out pay inequities” because it “can identify problems that would not otherwise come to light since workers are often unaware of their colleagues pay”).

³⁴ See Maryam Jameel, *Despite Legal Protections, Most Workers Who Face Discrimination Are on Their Own*, Ctr. for Pub. Integrity (Feb. 28, 2019), <https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplaceinequities/injustice-at-work/workplace-discrimination-cases/>.

³⁵ See, e.g., Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Econ. Pol’y Inst. (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/>; Abha Bhattarai, *As Closed-Door Arbitration Soared Last Year, Workers Won Cases Against Employers Just 1.6 Percent of the Time*, Wash. Post (Oct. 27, 2021), <https://www.washingtonpost.com/business/2021/10/27/mandatory-arbitration-family-dollar/>.

³⁶ See, e.g., Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 680-81 (2018).

III. The revisions to the scheduling letter will safeguard and strengthen OFCCP’s ability to ensure compliance with civil-rights mandates.

Strengthening the effectiveness of contractors’ compliance evaluations is part of OFCCP’s strategic enforcement plan.³⁷ The scheduling letter, which OFCCP now proposes to revise, is the document the agency 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. We strongly support OFCCP’s efforts to obtain a more comprehensive picture of contractors’ compliance with nondiscrimination and affirmative-action requirements through this additional data collection. We highlight some of the most important proposed revisions and recommend an additional information-collection measure below.

Collecting additional information regarding “minority and female availability” for each job group (Item 4)³⁸

“Availability” indicates the approximate number of “qualified minorities or women” among the pool of all qualified people for a given job group; it offers a point of comparison against a contractor’s own workforce. OFCCP’s current scheduling letter already requires contractors to determine availability; this proposal clarifies that contractors must hew to all the requirements for determining availability that are set out in OFCCP regulations, *see* § 60-2.14 (requiring contractors to, among other things, use the “most current and discrete statistical information” and explain how they chose their recruitment areas and pools). This measure simply extends to the scheduling letter the regulatory requirements by which contractors are already bound, in an effort to generate as accurate data as possible. It is thus both reasonable and should not impose a significant burden.

Identifying “action-oriented programs” (Item 7)³⁹

OFCCP proposes to collect information related to contractors’ self-analyses undertaken to identify and remediate compliance problems relating to their nondiscrimination and affirmative-action requirements. Contractors are already required by OFCCP regulations to conduct “in-depth analyses” to identify problem areas as part of their affirmative-action programs, *see* § 60-2.17(b). This information request requires only that contractors list the programs that they have already undertaken—programs that they are required by regulation to have carried out—and thus furnishing this additional information is not overly burdensome.

OFCCP’s desire to collect information on contractors’ self-assessments at the initial information-gathering stage is consistent with the importance of self-assessment tools in weeding out discrimination and ineffective affirmative-action measures. This Administration has properly prioritized self-assessment measures both because they are effective tools and because they are a vital component of a compliance regime that does not have unlimited financial and personnel resources. Among Director Yang’s strategic enforcement objectives is “[p]romoting a proactive approach to compliance where federal contractors actively self-audit employment

³⁷ OFCCP Directive 2022-02, *supra* note 26.

³⁸ Supporting Statement, OMB Control Number 1250-0003, at 11 (Nov. 2022), <https://downloads.regulations.gov/OFCCP-2022-0004-0002/content.pdf>.

³⁹ *Id.* at 12.

systems.”⁴⁰ And to that end, OFCCP has prioritized “compliance assistance and providing practical resources to help federal contractors conduct effective self-audits.”⁴¹

Requesting documentation of contractors’ recruitment and hiring policies and practices, including the use of artificial intelligence and other automated or technology-based selection processes (Item 19)⁴²

OFCCP proposes to collect information regarding contractors’ recruitment and hiring policies and practices, specifically those surrounding the use of automation and artificial intelligence. This revision is sensible in light of the increased use of these technologies in hiring processes and the attendant concerns raised by various stakeholders regarding the ways that such technologies can lead to discriminatory hiring practices. For example, the Department of Justice and the EEOC each released guidance earlier this year cautioning employers that the use of artificial intelligence in recruitment and hiring may lead to discrimination against workers with disabilities.⁴³ The guidance explains how automated decision-making tools may unlawfully screen out individuals with disabilities by, for example, setting a metric without providing a reasonable accommodation, or by detecting, and thus making an employer aware of, an applicant’s disability, in violation of the ADA.⁴⁴ And the EEOC has separately indicated that eradicating discrimination related to employers’ use of technology in recruitment and hiring is one of its strategic priorities for the next several years.⁴⁵ Among other things, the EEOC plans to scrutinize “the use of software that incorporates algorithmic decision-making or machine learning, including artificial intelligence” and the “use of automated recruitment, selection, or production and performance management tools.”⁴⁶

Scholars and practitioners have likewise highlighted the potential for artificial intelligence to lead to discriminatory hiring practices. Automated recruitment technologies, for example, may push job advertisements

⁴⁰ OFCCP Directive 2022-02, *supra* note 26.

⁴¹ *Id.*

⁴² OFCCP Supporting Statement, *supra* note 39, at 15.

⁴³ See U.S. Dep’t of Justice, Civ. Rts. Div., Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring (2022), https://www.ada.gov/assets/_pdfs/ai-guidance.pdf; *The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees*, EEOC (May 12, 2022), <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>.

⁴⁴ See *id.*

⁴⁵ Draft Strategic Enforcement Plan, 88 Fed. Reg. 1379, 1381 (Jan. 10, 2023).

⁴⁶ *Id.* at 1382. State and local governments, too, have begun to regulate the use of artificial intelligence in hiring. See, e.g., Amber M. Rogers and Michael Reed, *Discrimination in the Age of Artificial Intelligence*, 49 Am. Bar Ass’n Labor & Emp. L. Newsletter 1 (2021), https://www.americanbar.org/content/dam/aba/publications/labor_employment_law_news/2020-21/lel-vol49-no2.pdf; Erin Mulvaney, *Artificial Intelligence Hiring Bias Spurs Scrutiny and New Regs*, Bloomberg Law (Dec. 29, 2021), <https://news.bloomberglaw.com/daily-labor-report/artificial-intelligence-hiring-bias-spurs-scrutiny-and-new-regs>.

to or otherwise target applicants from specific demographic groups.⁴⁷ Employers may be feeding biased data into an automated system, thereby generating biased results.⁴⁸ Another concern is “the ‘black box’ problem”—the fact that it can be difficult to even understand *why* an automated system yielded a given outcome, making it harder to identify the lurking biases that led to the outcome.⁴⁹

As the use of automated technologies in hiring proliferates, understanding whether and how contractors are using these technologies is a vital step toward ensuring that the technologies are not being put to discriminatory ends. The revision here is a sensible one, in keeping with other agencies’ burgeoning oversight of the use of artificial intelligence in hiring. And it will not carry a heavy burden. OFCCP’s request is modest—it merely asks contractors to explain in narrative form the technologies that it is relying on in its recruiting, screening, and hiring practices. It thus places a small burden on contractors in exchange for much-needed transparency about how they are screening candidates or making other hiring determinations.

Requiring contractors to supply more detailed applicant-flow data (Item 20)⁵⁰

OFCCP requires contractors to supply data on employment activity, including applicant and hiring data broken down by gender and race/ethnicity. While OFCCP does not currently propose to modify its requirements concerning contractors’ obligations to supply applicant data under Item 20(a), we encourage OFCCP to update this provision to require contractors to explain how they are refining their applicant flow data for each job group or job title according to the definition of “Internet Applicant” as set out in § 60-1.3. We encourage OFCCP to request information concerning contractors’ data-refining practices upfront, which would increase transparency by allowing OFCCP to better understand contractors’ applicant data and assess whether contractors may be masking potential indicators of adverse impact by refining their data in ways that are arbitrary, inconsistent, or at odds with their recordkeeping obligations.⁵¹ It would also help OFCCP to more quickly identify discriminatory hiring practices.

Requiring contractors to supply additional compensation data (Item 21)⁵²

OFCCP proposes to expand the information that it collects upfront regarding compensation data. First, it would require contractors to provide compensation data spanning a period of two years, rather than the single year of data that it currently requires during the initial information-gathering stage. Contractors are already obligated to retain compensation records for this period.⁵³ Second, OFCCP will require contractors to provide upfront documentation of the additional factors that affect compensation. Having additional data on employee

⁴⁷ See Ifeoma Ajunwa, *An Auditing Imperative for Automated Hiring Systems*, 34 Harv. J.L. & Tech. 621, 635-36 (2021); Keith E. Sonderling et al., *The Promise and the Peril: Artificial Intelligence and Employment Discrimination*, 77 U. Miami L. Rev. 1, 22 (2022).

⁴⁸ Sonderling et al., *supra* note 48, at 22 (providing example of employer that feeds resumes of current employees into applicant-screening software, allowing the software to “simply learn and repeat [the] company’s past discriminatory biases and preferences”).

⁴⁹ *Id.*

⁵⁰ OFCCP Supporting Statement, *supra* note 39, at 15-16.

⁵¹ See 41 C.F.R. § 60-1.12.

⁵² OFCCP Supporting Statement, *supra* note 39, at 17-18.

⁵³ See 41 C.F.R. § 60-1.12.

pay will bolster OFCCP’s ability to uncover systemic pay disparities. Finally, the revised scheduling letter clarifies that contractors must provide compensation data for temporary workers supplied by staffing agencies. This revision not only provides contractors with greater clarity on the meaning of “temporary employees,” but also ensures that compensation data will be collected about a category of worker that is uniquely susceptible to pay inequity and other poor working conditions.⁵⁴

As an organization committed to advancing pay equity, including through chairing the national Equal Pay Today campaign, ERA knows the importance of pay data collection to enable OFCCP to identify pay disparities and occupational segregation within companies where women and people of color are often concentrated in lower paid jobs and underrepresented in higher-paid positions. We led the effort to enact a pay data reporting law in California in 2019 requiring employers of 100 or more employees to report pay data broken down by gender, race, ethnicity and job category. Aggregate data published by the California Civil Rights Department⁵⁵ after the first year of data collection demonstrates clear trends of occupational segregation within companies, that would not have been discernible without the pay data. Effective this year, California expanded these pay data reporting requirements to apply to employers with 100 or more workers hired through third party staffing agencies, who are more often women and people of color and often earn less than their direct hire counterparts performing the same work. Oversight over the pay these “temporary workers” receive is critical to identify and remedy unlawful gender and race-based pay disparities.

Requiring additional data on contractors’ compensation analyses (Item 22)⁵⁶

Currently, as part of the self-audits that they are required by regulation to undertake,⁵⁷ contractors must complete compensation analyses that evaluate gender, race, and other disparities in employees’ pay. OFCCP now proposes to require contractors also to provide certain additional information regarding their compensation analyses—for example, when the analysis was conducted, the number and categories of employees included and excluded, and the method of analysis employed. Existing regulations already require contractors to “maintain and make available to OFCCP documentation of their compliance with” the provisions obligating contractors to conduct compensation analyses.⁵⁸ This revision therefore requires only that they supply such information to OFCCP at the outset of a desk audit.

Contractors often contend that their compensation analyses are protected by attorney-client privilege. But OFCCP has carefully crafted its information-collection requirements to ensure that contractors are able to supply the information that OFCCP needs to evaluate compliance with their legal obligations without requiring them to produce privileged information. Indeed, the revised scheduling letter does not ask for the entire contents of contractors’ compensation analyses. Instead, it enumerates five discrete kinds of information that contractors

⁵⁴ See, e.g., Nat’l Emp. L. Project, *Temp Workers Demand Good Jobs: Survey Reveals Poverty Pay, Permatemping, Deceptive Recruitment Practices, and Other Job Quality Issues* (2022), <https://s27147.pcdn.co/wp-content/uploads/Temp-Workers-Demand-Good-Jobs-Report-2022.pdf>.

⁵⁵ Pay and Demographics of California Workers: Results from Pay Data Reports from Large Employers, *available at* <https://calcivilrights.ca.gov/paydatareporting/results/>.

⁵⁶ OFCCP Supporting Statement, *supra* note 39, at 18-19.

⁵⁷ 41 C.F.R. § 60-2.17(b)(3).

⁵⁸ 41 C.F.R. § 60-2.10(c).

must supply.⁵⁹ And none of the requested information is privileged. OFCCP is seeking factual information about how and when the analysis was conducted, and the number of employees and forms of compensation that were analyzed—not the contents of the analysis itself.⁶⁰ Such underlying factual information is not protected by attorney-client privilege.⁶¹

And Director Yang has specifically offered assurances that OFCCP’s assessment of contractors’ compensation analyses is not intended to force contractors to turn over privileged materials.⁶² The recent directive on compensation analyses proposed several means by which contractors could fulfill the requirements of § 60-2.10: contractors could provide redacted versions of the compensation analysis, conduct a separate analysis that removes any concerns about privilege, or submit an affidavit setting forth the specific underlying facts required to establish compliance.⁶³ In its revised scheduling letter, OFCCP prescribed the last—a carefully tailored request that contractors supply the underlying factual information necessary for OFCCP to determine whether the contractor is fulfilling its legal obligations concerning pay practices.

Requiring contractors with “campus-like setting[s]” to submit AAP information for the campus as a whole⁶⁴

OFCCP proposes to require that post-secondary institutions and contractors with “campus-like setting[s],” such as hospitals and information-technology companies, submit compliance-review information for all AAPs campus-wide, not just for any particular building or department’s AAP. As an initial matter, this proposal would bring other institutions in line with post-secondary institutions, which are already required to submit information according to this requirement.⁶⁵ It will also disincentivize contractors from shielding

⁵⁹ OFCCP Supporting Statement, *supra* note 39, at 18-19.

⁶⁰ *Id.*

⁶¹ *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981) (attorney-client privilege protected “disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney”); *FTC v. Boehringer Ingelheim Pharms., Inc.*, 892 F.3d 1264 (D.C. Cir. 2018) (privilege “did not and does not prevent the FTC’s discovery of the underlying facts and data possessed by [the defendant] and its employees,” nor did it “prevent the FTC’s discovery of pre-existing business documents”); *see also, e.g., In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 805 (E.D. La. 2007) (“[W]hen a corporate executive makes a decision after consulting with an attorney, his decision is not privileged whether it is based on that advice or even mirrors it.”); *Stout v. Ill. Farmers Ins. Co.*, 150 F.R.D. 594, 611 (S.D. Ind. 1993) (“The attorney-client privilege is not so broad as to cover all of a client’s actions taken as a ‘result[] of communications between attorney and client.’”); *cf., e.g., EEOC v. BDO USA, L.L.P.*, 876 F.3d 690, 695 (5th Cir. 2017) (“[C]ourts have indicated that the privilege should be granted cautiously where administrative investigations are involved.”). The same holds true with respect to claims that information is protected attorney work product. *See, e.g., Adams v. Mem. Hermann*, 973 F.3d 343, 349-50 (5th Cir. 2020) (“Like the attorney-client privilege, the work-product doctrine protects only the [attorney’s work product] and not the underlying facts.” (alteration in original) (internal quotations omitted)).

⁶² *See* OFCCP Directive (DIR) 2022-01 Revision 1: Advancing Pay Equity Through Compensation Analysis (Aug. 18, 2022), <https://www.dol.gov/agencies/ofccp/directives/2022-01-Revision1>.

⁶³ *Id.*

⁶⁴ OFCCP Supporting Statement, *supra* note 39, at 9-10.

⁶⁵ *See* OFCCP Supporting Statement, *supra* note 39, at 9-10.

relevant compliance information from review by disaggregating operationally related facilities into separate AAPs. Most importantly, though, this revision will provide OFCCP with a more complete picture of a contractor's compliance with its affirmative-action obligations. And if OFCCP determines that a contractor is not in compliance, the revised information-collection process will allow for coordinated, broader-based relief for workers across an institution's campus—not just one discrete part of it.

IV. OFCCP's proposed changes to the scheduling letter are not overly burdensome.

Some contractor commentators have opined that the new requirements are overly burdensome and will require significant expenditures of time and money.⁶⁶ But for the reasons already explained above, that is not so.

Crucially, it is no answer for contractors to say that this information can be obtained, if necessary, through follow-up requests by OFCCP in the course of the compliance-review process. Obtaining more complete information in response to its initial request is necessary for OFCCP to effectively fulfill its functions in a timely and efficient manner. One employer-side commentator's description of contractors' current response practices reveals the necessity of requiring more detailed information upfront. It notes that "most" narratives about affirmative-action plans provided in initial responses to a scheduling letter "provide a generic statement that the contractor has conducted an in-depth review of all personnel processes and found no areas for concern."⁶⁷ Similarly, with respect to Section 503 obligations, a frequent practice is "a cursory statement that the contractor has undertaken an assessment of its outreach and recruiting efforts and has determined that its efforts were effective."⁶⁸ Given these practices, it is no wonder that OFCCP often has to submit follow-up requests for more detailed information, making the process inefficient and protracted.⁶⁹

Obtaining complete information at the outset of a compliance review is particularly important given OFCCP's limited resources. Despite overseeing employers of approximately 20% of the American workforce, the agency only has about 420 employees.⁷⁰ The agency requested a substantial budget increase in the most recent budget request, which would allow it to expand its staff to more than 600, in order "to strengthen its enforcement of civil rights protections and affirmative action requirements."⁷¹ But Congress allocated only steady-state funding for OFCCP.⁷² Accordingly, the agency will have to continue to fulfill its mission with inadequate resources. Hence, it must maximize efficiency in its enforcement efforts. Obtaining complete and detailed information at the outset of a compliance review, as the revised scheduled letter would request, will

⁶⁶ See, e.g., *OFCCP Wants to Expand its Reach for More Data Upfront in Audits: Your 3-Step Action Plan to Prepare for the Changes*, Fisher Phillips (Dec. 16, 2022), <https://www.fisherphillips.com/news-insights/ofccp-expand-its-reach-more-data-upfront-audits.html>.

⁶⁷ Consuela A. Pinto & Nancy Van Der Veer Holt, *OFCCP Proposes Burdensome Changes to Its Compliance Review Scheduling Letter*, Ford Harrison (Nov. 28, 2022), <https://www.fordharrison.com/ofccp-proposes-burdensome-changes-to-its-compliance-review-scheduling-letter>.

⁶⁸ *Id.*

⁶⁹ OFCCP Supporting Statement, *supra* note 39, at 16.

⁷⁰ OFCCP Congressional Budget Justification, *supra* note 3, at 2.

⁷¹ *Id.* at 9.

⁷² See Consolidated Appropriations Act of 2023, Pub. L. No. 117-328 (Jan. 3, 2022); see also Candee Chamber et al., *OFCCP Week in Review—January 2023*, JDSupra (Jan. 4, 2023), <https://www.jdsupra.com/legalnews/ofccp-week-in-review-january-2023-1680486/>.

enable staff to assess compliance promptly and reduce the need for time-consuming follow-up requests for information and delayed resolution of the review.

* * * * *

Given the pervasive nature of discrimination and harassment and in the harmful effect it has on workers' economic security, it is critical that OFCCP have adequate processes in place to ensure enforcement efforts are conducted in the most efficient and effective manner possible. As outlined above, the proposed revisions to the information-collection requirements will help to achieve this important objective. For these reasons, we strongly support OFCCP's requested authorization of the enhanced compliance review scheduling letter.

Sincerely,



Jessica Stender
Policy Director and Deputy Legal Director
Equal Rights Advocates