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Submitted via 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 NW, Room C-3325
Washington, DC 20210

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

Dear Ms. Williams:

The Lawyers' Committee for Civil Rights Under Law appreciates the opportunity to comment¹ on the U.S. Department of Labor's 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.

The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity—work that continues to be vital today. Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have voice, opportunity, and power to make the promises of our democracy real. For nearly 60 years, Lawyers' Committee has been at the forefront of many of the most significant cases involving race and national origin discrimination.

Lawyers' Committee has a vested interest in ensuring that equal economic opportunities are available to workers of all racial and ethnic backgrounds, and to that end, we frequently participate as counsel or *amicus curiae* in relevant cases to protect the economic interests of Black people and other people of color. OFCCP's ability to conduct efficient, consistent, and effective reviews of federal contractors' compliance with nondiscrimination and affirmative-action requirements is vitally important. 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

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

² OMB Control Number 1250-0003.

the opportunity for federal contracts grows in the coming years.³ Hence, there has never been a better time for OFCCP to safeguard and strengthen its ability to carry out meaningful compliance reviews in service of enforcing civil rights protections for workers.

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. The Lawyers' Committee supports OFCCP's efforts to obtain a more comprehensive picture of contractors' compliance with nondiscrimination and affirmative action requirements through this additional data collection. As we explain below, the proposed scheduling changes further advance the Administration's priority of effectively utilizing its limited resources to not only increase contractor compliance but also identify and remedy systemic discrimination. By drawing on its substantial authority to propose sensible changes to the scheduling letter, OFCCP will increase the effectiveness and efficiency of its compliance evaluations without imposing too great a burden on contractors.

I. The persistence of workplace discrimination underscores the continued need for robust OFCCP enforcement of federal contractors and subcontractors' compliance with affirmative action regulations.

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 over 2,700 complaints over that same period from federal contract workers.⁵ And fear of retaliation prevents many working people from ever reporting discrimination.⁶ Retaliation claims made up over half of all charges filed at the EEOC in fiscal years 2020 and 2021 respectively, and nearly 43 percent of complaints received by OFCCP just 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 percent of working people in the

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).

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.").

United States have experienced or witnessed workplace discrimination based on age, race, sex, gender identity, or sexual orientation.⁹

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 a 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.

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

COVID-19 has compounded and amplified the impacts of workplace discrimination. Black and Latinx workers disproportionately suffered drastic and enduring economic setbacks from the COVID-19 pandemic. COVID-19 caused unemployment to spike dramatically among all low-wage workers,¹³ but Black and Latinx workers—the racial groups disproportionately

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, *A Window Into the Wage Gap: What's Behind It and How to Close It*, Nat'l Women's L. Ctr (2023), <https://nwlc.org/wp-content/uploads/2023/01/2022-Wage-Gap-Factsheet-1.10.23.pdf>.

¹² *Id.* at 2.

¹³ Between February and April 2020, employment declined by more than one-third for low-wage workers, compared to an 18 percent decline for lower-middle-wage workers, nine percent for upper-middle-wage workers, and essentially no change for high-wage workers. See Jason R. Abel & Richard Deitz, *Some Workers Have Been Hit Much Harder than Others by the Pandemic*, Fed. Rsr. Bank of N.Y. (Feb. 9, 2021), <https://tinyurl.com/2xds64p7> (classifying workers in jobs that typically paid less than \$30,000 annually as low-wage, \$30,000 to \$50,000 as lower-middle, \$50,000 to \$85,00 as upper-middle, and above \$85,000 as high). These data

represented in low-wage jobs—experienced the highest unemployment rates. In April 2020, the unemployment rates for Black and Latinx individuals were 18.9 percent and 16.7 percent respectively, compared to 14.2 percent for white individuals.¹⁴

Women of color were impacted most significantly: while women as a whole lost more jobs than men did during the depths of the recession, the experiences of Black and Latinx women drove those trends.¹⁵ Latina women, for example, had the highest measured unemployment rate in April 2020 of any major group by gender, race, and ethnicity during the pandemic with more than one in five out of work.¹⁶ While the overrepresentation of women of color in industries most impacted by the COVID-19 pandemic likely played a significant role in those trends, even within some of those industries, women of color experienced disproportionate job losses compared to other groups, a finding that the United States Department of Labor has attributed to, *inter alia*, discrimination, among other factors.¹⁷ For example, Black women represented slightly more than one in ten workers in the education and health services industry in 2019 but, when comparing annual data from 2019 to 2021, they lost their jobs at almost double the rate of their representation.¹⁸

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.¹⁹ For example, research shows that women who experience sexual harassment at work are more likely to leave their jobs.²⁰ 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.²¹ Fear of harassment and concern

points reflect a more general trend—well documented by researchers—that those who enter a recession with high average earnings tend to suffer substantially less than those who enter with low average earnings. Faith Guvenen, Serdar Ozkan & Jae Song, *The Nature of Countercyclical Income Risk*, 122 J. of Pol. Econ. 621 (2014).

¹⁴ U.S. Bureau of Lab. Stat., *Employment Situation News Release* (May 8, 2020), <https://tinyurl.com/2s3sy9e3>.

¹⁵ U.S. Dep’t of Labor, *Bearing the Cost: How Overrepresentation in Undervalued Jobs Disadvantaged Women During the Pandemic* (Mar. 15, 2022), <https://tinyurl.com/48z8c484>.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Sarah Jane Glynn & Mark DeWolf, *Black Women’s Economic Recovery Continues to Lag*, U.S. Dep’t of Lab. Blog (Feb. 9, 2022), <https://tinyurl.com/tcuakh88>.

¹⁹ Marina Zhavoronkova et al., *Occupational Segregation in America*, Ctr. for Am. Progress (2020), <https://www.americanprogress.org/article/occupational-segregation-in-america/>.

²⁰ See Lauren Haumesser & Melissa Mahoney, *Factory Flaw: The Attrition and Retention of Women in Manufacturing*, Am. Ass’n of Univ. Women, https://www.aauw.org/app/uploads/2021/03/FactoryFlaw_FINAL-for-web_update.pdf.

²¹ 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/>.

for personal safety may also prevent women from entering these often better-paying industries. At the same time, occupational segregation adds to the devaluation of work largely performed by women and marginalized groups, keeping wages low and perpetuating wage gaps.²²

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.²³ 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.²⁴

The OFCCP has a critical role to play in leveling the playing field for Black workers and other workers of color. Women and people of color are overrepresented in many federal contract industries including, nursing care, meat/food processing, building, administrative, and security services.²⁵ Thus, the proposed changes are anticipated to advance racial and economic justice.

II. Under this Administration, OFCCP has prioritized increasing contractor compliance and more effectively utilizing its resources to identify and remedy systemic discrimination.

OFCCP's primary function is to ensure that businesses receiving federal dollars do not engage in employment discrimination. OFCCP administers and enforces three equal employment opportunity authorities: Executive Order 11246, as amended (EO 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. They further prohibit contractors from retaliating against applicants or employees for engaging in protected activities and protect employees' ability to discuss their compensation. These laws also require that federal contractors provide equal employment opportunity through affirmative action. These laws are effective. Employers that are federal contractors subject to these requirements have better records when it

²² See Zhavoronkova et al., *supra* note 19.

²³ *OFCCP By the Numbers—Monetary Relief*,

<https://www.dol.gov/agencies/ofccp/about/data/accomplishments> (last visited Jan. 19, 2023).

²⁴ *OFCCP By the Numbers—Fiscal Year Data Tables*, *supra* note 5 (data drawn from Supply and Service Compliance Evaluations Conducted spreadsheet).

²⁵ Karla Walter, *Federal Contracting Doesn't Go Far Enough to Protect American Workers*, Ctr for Am. Progress Action (Nov. 19, 2020),

<https://www.americanprogressaction.org/article/federal-contracting-doesnt-go-far-enough-protect-american-workers/>.

comes to diversity and compliance with equal employment opportunity laws than employers that are not federal contractors.²⁶

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 total employment processes, including hiring, promotions, terminations, and compensation to assess whether there are disparities based on gender, race, or ethnicity; and developing and executing action-oriented programs to address identified problems.²⁷
- 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.²⁸
- 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.²⁹

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.³⁰ However, contractor delay at the outset and during compliance evaluations often frustrates the OFCCP's ability to conduct efficient compliance reviews. The U.S. Government Accountability

²⁶ See, e.g., Conrad Miller, *The Persistent Effect of Temporary Affirmative Action*, 9 (3) Am. Econ. J.: Applied Econ. 152 (2017), <https://www.aeaweb.org/articles?id=10.1257/app.20160121> (affirmative action requirements of EO 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. 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).

²⁷ 41 C.F.R. part 60-2.

²⁸ 41 C.F.R. part 60-300, subpart C.

²⁹ 41 C.F.R. part 60-741, subpart C.

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

Office found in 2015, that close to 85 percent of evaluated contractor establishments did not submit their AAP within 30 days of OFCCP’s request.³¹

Under the Biden Administration, OFCCP has prioritized increasing contractor accountability through comprehensive evaluations, reaching a broader universe of contractors *and* subcontractors, and focusing its resources on contractors with greater risk factors for noncompliance with nondiscrimination and affirmative action requirements. As Director Yang has explained, “OFCCP will positively impact more workers by increasing federal contractor compliance with nondiscrimination and affirmative action responsibilities.”³²

To that end, covered contractors and subcontractors are now required to certify, on an annual basis, whether they are meeting their requirement to develop and maintain annual AAPs.³³ OFCCP also recently updated its scheduling methodology to focus on industries that have experienced employment growth during the pandemic, and contractor and subcontractor establishments that have lower representation of people of color and women than industry and local labor market averages.³⁴ The proposed changes to OFCCP’s scheduling letter further advances this Administration’s goals of increasing contractor compliance with EEO and affirmative action regulations, and more effectively utilizing the agency’s resources to promptly identify and remedy systemic discrimination.

III. OFCCP’s broad authority to collect data to assess contractors’ compliance with equal employment opportunity authorities support the proposed scheduling letter changes.

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. § 206. It grants the Secretary additional enforcement authority, including adjudication authority and the authority to terminate contracts

³¹ U.S. Gov’t Accountability Off., *Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance*, (Sep. 22, 2016) <https://www.gao.gov/products/gao-16-750>.

³² OFCCP, Directive (DIR) 2022-02: Effective Compliance Evaluations and Enforcement (Mar. 31, 2022), <https://www.dol.gov/agencies/ofccp/directives/2022-02>.

³³ *OFCCP Contractor Portal*, OFCCP, <https://www.dol.gov/agencies/ofccp/contractorportal> (last visited Jan. 19, 2023).

³⁴ *Methodology for Developing the Supply and Service Scheduling List FY 2022, Release – 1*, OFCCP, <https://www.dol.gov/sites/dolgov/files/OFCCP/scheduling/files/SL22R1-SS-Methodology.pdf>.

and recoup funds from offending contractors. § 209. Likewise, Section 503 “expressly grants the President unqualified authority to implement the Section by regulation.”³⁵ 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.”³⁶

The implementing regulations permit OFCCP to conduct compliance evaluations to gauge contractors’ compliance with OFCCP’s nondiscrimination and affirmative-action requirements.³⁷ 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.”³⁸ As courts have held, this regulatory scheme confers broad authority on OFCCP to conduct its compliance reviews.³⁹

This broad authority permits OFCCP to carry out its 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,⁴⁰ 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 practices; [and] (3) [a]chieve maximum leverage of resources to protect the greatest number of workers from discrimination.”⁴¹

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.⁴² For one, even if a worker knows that she has been

³⁵ *Assoc. Builders & Contractors, Inc. v. Shiu*, 30 F. Supp. 3d 25, 36 (D.D.C. 2014).

³⁶ *Id.* (quoting *Catawba County v. EPA*, 571 F.3d 20, 37 (D.C. Cir. 2009)).

³⁷ *See* 41 C.F.R. § 60-1.

³⁸ *Id.* § 60-1.20(a)(1).

³⁹ *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).

⁴⁰ *See About Us*, OFCCP, <https://www.dol.gov/agencies/ofccp/about> (last visited Jan. 19, 2023).

⁴¹ *Id.*

⁴² *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”).

discriminated against—something that is far from a given—legal recourse is frequently 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.⁴³ 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 resolution—making both the disclosure and resolution of systemic problems even less likely.⁴⁴ 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.⁴⁵

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 as effectively as possible to correct noncompliance and uproot systemic discrimination.

IV. The revisions to the scheduling letter will safeguard and strengthen OFCCP’s ability to identify and remedy systemic discrimination, and ensure compliance with civil rights mandates.

Under the proposed changes to its scheduling letter, OFCCP seeks to increase its effectiveness⁴⁶ by promoting the timely submission of vital information necessary to efficiently identify non-compliance and potential discrimination. We highlight some of the most important revisions below.

Collecting more information regarding “minority and female availability” for each job group (Item 4)⁴⁷

“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. Contractors are required to identify job groups where women and/or minorities are underutilized, *i.e.*, where the presence of women or minorities is

⁴³ 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/>.

⁴⁴ 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/>.

⁴⁵ See, e.g., Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 680-81 (2018).

⁴⁶ OFCCP Directive 2022-02, *supra* note 32.

⁴⁷ Supporting Statement, OMB Control Number 1250-0003, at 11 (Nov. 2022), <https://downloads.regulations.gov/OFCCP-2022-0004-0002/content.pdf>.

lower than would reasonably be expected based on their availability. Where contractors identify underutilization for women or minorities, they must establish placement goals to measure progress toward achieving equal employment opportunity. Goals require that contractors engage in good faith diversity outreach and recruitment efforts to broaden the pool of qualified candidates.

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). Contractors are allowed to use a number of methods to determine availability and areas of underutilization. However, contractors must "uniformly apply the same method to all job groups, as appropriate, and contractors should not use more than one method *to mask underutilization*."⁴⁸

This change simply extends to the scheduling letter the regulatory requirements by which contractors are already bound, in an effort to allow OFCCP to more quickly assess whether contractors are appropriately identifying the availability of minorities and women that underlies their goals, or whether contractors are masking underutilization. It is, thus, reasonable and will not impose a significant burden.

Identifying "action-oriented programs" (Item 7)⁴⁹

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 in their workforce utilization, personnel activity (e.g., hiring, promotions, terminations), compensation, and personnel practices, policies and procedures. *See* § 60-2.17(b). When a contractor identifies problem areas, it has to develop and implement a program designed to eliminate those issues.

This new 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. This information is particularly useful for problem areas identified by contractors in hiring and compensation, especially if a contractor tends to identify the same problem areas year after year.

OFCCP's desire to collect information on contractors' self-assessments at the initial information-gathering stage will allow the agency to assess whether a contractor is taking this obligation seriously and actually implementing effective programs to remove barriers to opportunity that can perpetuate inequality for underrepresented employees.

⁴⁸ OFCCP, Supply and Service Contractors Technical Assistance Guide, at 38 (Nov. 2020), https://www.dol.gov/sites/dolgov/files/OFCCP/SupplyService/files/508_OFCCP_SS_TAG.pdf.

⁴⁹ OFCCP Supporting Statement, *supra* note 47, at 12.

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)⁵⁰

OFCCP proposes to collect information regarding contractors’ recruitment and hiring policies and practices, and 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 accompanied by concerns raised by diverse stakeholders regarding the fact that these technologies can lead to unlawful hiring practices. Algorithms used to automate the hiring process can produce discriminatory outcomes against underrepresented workers, including people of color, women, and people with disabilities.⁵¹ The Department of Justice and the EEOC earlier this year each released guidance cautioning employers that artificial intelligence used in hiring practices may lead to discrimination against workers with disabilities.⁵²

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 unintentionally discriminatory ends. It is also important for OFCCP to assess whether contractors are (1) properly tracking candidates assessed by artificial intelligence (AI) screens, and (2) analyzing screening devices that use algorithms to assess qualifications for adverse impact. Federal contractors are required to assess all hiring screens, including those that use AI for adverse impact, and if a selection procedure is having adverse impact, contractors are required to validate the selection procedure using an appropriate validation strategy.⁵³

The revision here is a sensible one, and one that 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

⁵⁰ *Id.* at 15.

⁵¹ See Miranda Bogen & Aaron Rieke, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias*, Upturn (Dec. 2018), <https://www.upturn.org/static/reports/2018/hiring-algorithms/files/Upturn%20--%20Help%20Wanted%20-%20An%20Exploration%20of%20Hiring%20Algorithms,%20Equity%20and%20Bias.pdf>; Jeffrey Dastin, *Amazon scraps secret AI recruiting tool that showed bias against women*, Reuters (Oct. 10, 2018), <https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G>.

⁵² See U.S. Dep’t of Justice Civ. Rts. Div., *Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring* (May 12, 2022), <https://www.ada.gov/resources/ai-guidance/>; *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>.

⁵³ OFCCP, *Validation of Employee Selection Procedures*, <https://www.dol.gov/agencies/ofccp/faqs/employee-selection-procedures#Q6> (last visited Jan. 19, 2023).

contractors in exchange for much-needed transparency about how a given contractor is screening candidates or making other hiring determinations.

Requiring contractors to supply more detailed applicant-flow data (Item 20)⁵⁴

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.⁵⁵ It would also help OFCCP to more quickly identify discriminatory hiring practices.

Requiring contractors to supply additional compensation data upfront (Item 21)⁵⁶

OFCCP proposes to expand the information that it collects upfront regarding compensation data. First, it proposes to 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.⁵⁷ Second, OFCCP will require contractors to provide upfront documentation of the additional factors that affect compensation. Having additional data on employee 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.⁵⁸

Requiring additional data on contractors' compensation analyses (Item 22)⁵⁹

Currently, as part of the self-audits that they are required by regulation to undertake,⁶⁰ contractors must complete compensation analyses that evaluate gender, race, and

⁵⁴ OFCCP Supporting Statement, *supra* note 47, at 15-16.

⁵⁵ *See* 41 C.F.R. § 60-1.12.

⁵⁶ OFCCP Supporting Statement, *supra* note 47, at 17-18.

⁵⁷ *See* 41 C.F.R. § 60-1.12.

⁵⁸ *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 (Feb. 2022), <https://s27147.pcdn.co/wp-content/uploads/Temp-Workers-Demand-Good-Jobs-Report-2022.pdf>.

⁵⁹ OFCCP Supporting Statement, *supra* note 47, at 18-19.

⁶⁰ 41 C.F.R. § 60-2.17(b)(3).

other disparities in employees' pay. OFCCP now proposes to require contractors 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.⁶¹ 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 information necessary for OFCCP to evaluate their compliance 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 it requires contractors to supply.⁶² And none of the requested information touches on privileged information. Rather, OFCCP is seeking factual information about the *type* of analysis and *how* the analysis was conducted—not the contents of the analysis itself. That information is not privileged.⁶³

More generally, Director Yang has offered assurances that OFCCP's assessment of contractors' compensation analyses is not intended to force contractors to turn over privileged materials.⁶⁴ The recent directive on compensation analyses offered several means by which contractors could fulfill the requirements of § 60-2.10: providing redacted versions of the compensation analysis, conducting a separate analysis that removes any concerns about privilege, or submitting an affidavit setting forth the specific underlying facts required to establish compliance.⁶⁵ In its revised scheduling letter, OFCCP prescribed the last—a carefully tailored request for contractors to supply only the underlying factual information necessary for OFCCP to determine whether the contractor is fulfilling its legal obligations concerning pay practices.

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

⁶¹ 41 C.F.R. § 60-2.

⁶² OFCCP Supporting Statement, *supra* note 47, at 18-19.

⁶³ *See, 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.’”).

⁶⁴ *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>.

⁶⁵ *Id.*

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 for information. Obtaining more complete information in response to its initial request is necessary for OFCCP to effectively fulfill its functions in a timely manner. One employer-side commentator’s description of contractors’ current response practices reveals the necessity of requiring more detailed information. 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. OFCCP is only able to audit about two percent of contractors every year.⁷⁰ Despite overseeing employers of approximately 20% of the American workforce, the agency only has about 420 employees. The agency requested a substantial budget increase in the most recent budget, expanding its staff to more than 600, in order “to strengthen its enforcement of civil rights protections and affirmative action requirements.”⁷¹ Disappointingly, Congress allocated only steady-state funding for OFCCP.⁷² The agency will accordingly continue having to fulfill its mission with inadequate resources, meaning that 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 enable staff to assess compliance promptly and reduce the need for time-consuming follow-up requests for information and delayed resolution of the review.

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 47, at 16.

⁷⁰ U.S. Gov’t Accountability Off., *supra* note 31

⁷¹ OFCCP Congressional Budget Justification, *supra* note 3.

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/>.

For the foregoing reasons, we strongly support OFCCP's requested authorization of the enhanced compliance review scheduling letter and encourage the agency to finalize it without change.

Thank you for the opportunity to submit comments on the proposed rule. Please do not hesitate to contact Kathryn Youker, Director, Economic Justice Project, at kyouker@lawyerscommittee.org if you have any questions about these comments.

Sincerely,

Lawyers' Committee for Civil Rights Under Law

By: /s/Kathryn J. Youker

Kathryn J. Youker

Director, Economic Justice Project