



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:

The National Disability Rights Network (NDRN) 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.

NDRN is the non-profit membership association of Protection and Advocacy (P&A) and Client Assistance Program (CAP) agencies located in all 50 States, the District of Columbia, and the United States Territories. In addition, there is a P&A and CAP affiliated with the Native American

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

Consortium which includes the Hopi, Navajo, and San Juan Southern Paiute Nations in the Four Corners region of the Southwest. P&A and CAP agencies are authorized under various federal statutes to provide legal representation and related advocacy services.

NDRN and the P&A and CAP agencies often work collaboratively with federal and state agencies to investigate abuse and neglect of individuals with disabilities in a variety of settings. The P&A / CAP Network comprises the nation's largest provider of legally based advocacy services for persons with disabilities, including ensuring competitive employment opportunities for the disability community.

The proposed 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 OFCCP Director Yang has concluded, enhancing the effectiveness of these compliance reviews will "positively impact more workers" through increased contractor compliance.<sup>2</sup> Enhancing OFCCP's ability to make good jobs free from discrimination available to all Americans, including those with disabilities, is especially critical.

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 the disability community, especially those who belong to other marginalized and multi-marginalized groups is significant. These unlawful practices inhibit economic security and opportunity and help to perpetuate disparities in health outcomes, housing, education, and more. In particular, people with disabilities have been, and continue to be disproportionately affected by higher unemployment rates compared to nondisabled Americans (<https://www.bls.gov/news.release/disabl.nr0.htm>).

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<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>.

<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/accomplishments>.

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 underrepresented groups.<sup>4</sup> These affirmative steps include proactively monitoring workplace equal employment opportunity and pay equity, making a meaningful effort to recruit qualified applicants from varying backgrounds, and breaking down barriers to equal opportunity for 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>5</sup>

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.

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<sup>4</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>5</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>,

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-audit the employment systems referenced in OFCCP's updated requests (e.g., technology-based employment systems) to identify potential Equal Employment Opportunity (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.
- 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 data related to compensation of workers with disabilities, and 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 employ individuals with disabilities. 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>6</sup>
- For post-secondary institutions and contractors with “campus-like settings” (e.g., hospitals or information technology companies), the relevant information for all Affirmative Action Plans (AAP) 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.

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.

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<sup>6</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>.

Accordingly, we enthusiastically support OFCCP's requested authorization of the enhanced compliance review scheduling letter and encourage the agency to finalize it without change. Please do not hesitate to reach out to us with any questions by contacting Stephanie Flynt at [Stephanie.Flynt@ndrn.org](mailto:Stephanie.Flynt@ndrn.org).

Sincerely,

A handwritten signature in blue ink that reads "Marlene Sallo". The signature is fluid and cursive, with a long horizontal stroke extending from the end of the name.

Marlene Sallo  
Executive Director  
National Disability Rights Network