



11 DUPONT CIRCLE NW
SUITE 800
WASHINGTON, DC 20036
202-588-5180
NWLC.ORG

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 Women’s Law Center (“NWLC”) writes¹ to express our support for the Department of Labor’s Office of Federal Contract Compliance Programs’ (“OFCCP”) request for reauthorization of its compliance review scheduling letter.² The proposed revisions to the information-collection requirements will strengthen OFCCP’s ability to fulfill its mission to identify and combat discrimination and to promote equal employment opportunity in federal contractor and subcontractor workplaces by allowing the agency to conduct more efficient and effective compliance reviews.

Since 1972, NWLC has fought for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. NWLC advocates for improvement and enforcement of our nation’s employment and civil rights laws, with a particular focus on the needs of women with low incomes, communities of color, and others who face historic and systemic barriers to equality and economic security.

OFCCP plays a key role in ensuring that businesses who receive the privilege of contracting with the federal government do not use taxpayer dollars to unlawfully discriminate against working people. To that end, OFCCP has adopted comprehensive, proactive, systemic strategies to enforce Executive Order 11246 (“E.O. 11246”), Section 503 of the Rehabilitation Act of 1973 (“Section 503”), and the Vietnam Era Veterans’ Readjustment Assistance Act (“VEVRAA”), which prohibit discrimination in employment based on race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran, and impose certain affirmative action obligations on federal contractors. Currently, thousands of private companies, employing approximately 20 percent of the U.S. workforce, fall under OFCCP’s jurisdiction, and many more businesses are likely to become federal contractors and subcontractors as a result of the federal government’s recent infrastructure investments.³ Improving

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

² OMB Control Number 1250-0003.

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

OFCCP's ability to conduct meaningful compliance reviews not only benefits these workers, but it will also bolster economic security for their families and communities.

As explained below, OFCCP has drawn on its broad authority to propose practical 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. These changes will make compliance reviews more efficient and effective while posing a minimal burden on contractors.

I. Discrimination Remains Pervasive in the Workplace, Underscoring the Continued Need for Strong Enforcement of Anti-Discrimination and Equal Employment Opportunity Laws

Working people across the United States, including those in the federal contracting and subcontracting workforce, continue to experience employment discrimination that robs them of employment opportunities, economic security, and dignity on the job. Between fiscal years 2018 and 2021, OFCCP received, on average, more than 1,400 complaints of employment discrimination per year.⁴ Of these complaints, on average, more than 15 percent described sex-based discrimination, almost a quarter described discrimination based on disability, and nearly 40 percent described race-based discrimination.⁵

Research suggests, however, that these numbers reflect only a small percentage of the actual discrimination workers face, as very few people subjected to workplace discrimination file formal charges.⁶ An online survey conducted in 2019, for example, found that as many as 60 percent of working people in the United States have experienced or witnessed workplace discrimination based on age, race, sex, gender identity, or sexual orientation.⁷ Individuals may not report discrimination because they lack information or resources, wish to avoid stigma, or fear retaliation.⁸ Given these realities, OFCCP's unique authority to conduct proactive compliance reviews is critical to detect and address systemic patterns of discrimination that deny equal opportunity.

The stakes are high, especially for women, people of color, immigrants, LGBTQ workers, people with disabilities, and other working people from marginalized or multi-marginalized backgrounds. Workplace discrimination can mean being denied a job or a promotion, being forced to endure a hostile working environment, or being paid less — just 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 sex- and race-based pay gaps, for example, directly harm women, and in particular women of color. In 2021, women working full-time, year-round were paid 84 cents for every dollar paid

⁴ *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).

⁵ *Id.*

⁶ See Carly McCann et al., *Employer's Responses to Sexual Harassment*, Center for Employment Equity, <https://www.umass.edu/employmentequity/employers-responses-sexual-harassment>; *Select Task Force on the Study of Harassment in the Workplace*, U.S. Equal Employment Opportunity Commission (June 2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace> (last visited Jan. 20, 2023).

⁷ Amy Elisa Jackson, *Diversity and Inclusion Study 2019*, Glassdoor (July 22, 2020), <https://www.glassdoor.com/blog/new-study-discrimination>.

⁸ See Donald Tomaskovic-Devey & Carly McCann, *Who Files Discrimination Charges?*, Center for Employment Equity, <https://www.umass.edu/employmentequity/who-files-discrimination-charges>.

to men, with women of color typically being paid even less in comparison to non-Hispanic white men.⁹ When part-time and part-year workers are included in the comparison, gender and racial wage gaps are even larger. Using this comparison, Asian American, Native Hawaiian, and Pacific Islander women were paid just 80 cents, 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.¹⁰ For women of color especially, unequal pay means having less money to cover basic necessities and less money — or no money at all — to withstand a financial emergency or to invest in education, training, or retirement savings.

Occupational segregation in the form of structural barriers to entry and on-the-job discrimination also denies women opportunity and economic security, while contributing to the persistence of gender- and race-based pay gaps.¹¹ Fear of harassment and concern for personal safety may also prevent women from entering male-dominated workplaces in often better-paying industries. A majority of women in male-dominated workplaces, for example, 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.¹²

More broadly, workplace sex harassment remains a pervasive problem that has serious economic consequences. Since 2018, NWLC has housed the TIME'S UP Legal Defense Fund, which connects individuals facing workplace sex harassment and retaliation with attorneys and funds select workplace harassment cases. A recent analysis of the thousands of requests for assistance received by the Fund found that workplace sex harassment has a severe impact on individuals' economic, physical, and mental health well-being. More than one in five people reported that their experience negatively impacted them economically,¹³ and many survivors reported experiencing depression, anxiety, and other health consequences.¹⁴ Despite these high costs, research reveals that few report the harassment they face, and those who do report too often face retaliation in the form of lost opportunities or outright firing.¹⁵ Our own analysis found that for every 10 people who complained about sexual harassment, seven faced retaliation for lodging the complaint.¹⁶ Retaliation broadly constitutes the most prevalent type of conduct in complaints lodged with the OFCCP, comprising more than half (56.3%) of claims in fiscal year 2020, nearly one-third of claims (31.5%) in fiscal year 2021, and 42.9 percent of claims just in the first quarter of fiscal year 2022.¹⁷

⁹ Brooke LePage & Jasmine Tucker, National Women's Law Center, *A Window Into the Wage Gap: What's Behind It and How to Close It* (January 2023), <https://nwlc.org/wp-content/uploads/2023/01/2022-Wage-Gap-Factsheet-1.10.23.pdf>.

¹⁰ *Id.*

¹¹ Marina Zhavoronkova et al., Center for American Progress, *Occupational Segregation in America* (2020), <https://www.americanprogress.org/article/occupational-segregation-in-america/>.

¹² Kim Parker, *Women in Majority-Male Workplaces Report Higher Rates of Gender Discrimination*, Pew Research Center (Mar. 7, 2018), <https://www.pewresearch.org/fact-tank/2018/03/07/women-in-majority-male-workplaces-report-higher-rates-of-gender-discrimination/>.

¹³ Jasmine Tucker & Jennifer Mondino, National Women's Law Center & TIME'S UP Legal Defense Fund, *Coming Forward: Key Trends and Data from the TIME'S UP Legal Defense Fund* (2020), https://nwlc.org/wp-content/uploads/2020/10/NWLC-Intake-Report_FINAL_2020-10-13.pdf.

¹⁴ *Id.*

¹⁵ See Donald T. Tomaskovic-Devey et al., *63% of Workers Who File an EEOC Discrimination Complaint Lose Their Jobs*, *The Conversation* (Jul. 13, 2021), <https://theconversation.com/63-of-workers-who-file-aneec-discrimination-complaint-lose-their-jobs-163048>.

¹⁶ Tucker & Mondino, *supra* note 13.

¹⁷ *OFCCP By the Numbers: Fiscal Year Data Tables*, *supra* note 4.

The persistence of workplace discrimination and disparities in employment opportunities underscores the need for OFCCP to exercise its strong enforcement authority. OFCCP enforcement works. Through compliance reviews, OFCCP can identify and remedy violations of the law through conciliation agreements with contractors. These agreements can specify both monetary and non-monetary relief, including changes to contractors' employment practices. Just over the course of the past five years, OFCCP entered into conciliation agreements or consent decrees with 14 percent of the contractors who underwent supply and service compliance evaluations.¹⁸ The changes OFCCP now proposes to the compliance review scheduling letter will help the agency conduct better compliance reviews and identify any potential problems more quickly, ultimately benefitting workers, contractors, and U.S. taxpayers.

II. OFCCP Has Broad Authority to Collect Data to Assess Contractors' Compliance with Federal Law

OFCCP administers and enforces Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793; and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. § 4212. Together, 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' and applicants' ability to inquire about or discuss their compensation.¹⁹

These laws also require that federal contractors provide equal employment opportunity 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.²⁰ Current regulations require supply and service contractors to develop an AAP within 120 days of the commencement of a covered federal contract and to update that AAP on an annual basis.²¹

In addition to requiring federal contractors to take proactive steps to ensure equal opportunity, E.O. 11246, Section 503, and VEVRAA (and their implementing regulations) provide OFCCP with robust authority 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.²² 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.²³ E.O. 11246 also grants the Secretary additional enforcement authority, including adjudication authority and the authority to terminate contracts and recoup funds from offending contractors.²⁴ Likewise, Section 503 "expressly grants the President unqualified authority to implement the Section by regulation."²⁵ And

¹⁸ *Id.* (data drawn from Supply and Service Compliance Evaluations Conducted spreadsheet).

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

²⁰ 41 C.F.R. part 60-2 (pertaining to E.O. 11246); 41 C.F.R. part 60-741, subpart C (pertaining to Section 503); 41 C.F.R. part 60-300, subpart C (pertaining to VEVRAA).

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

²² E.O. 11246 § 201.

²³ *Id.* at § 206.

²⁴ *Id.* at § 209.

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

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.”²⁶

The implementing regulations permit OFCCP to conduct compliance evaluations to gauge contractors’ compliance with OFCCP’s nondiscrimination and affirmative-action requirements.²⁷ 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.”²⁸ As courts have held, this regulatory scheme confers broad authority on OFCCP to conduct its compliance reviews.²⁹

This broad enforcement authority permits OFCCP to require contractors to report their compliance with their 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.”³⁰

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. Individual workers are also not likely to have sufficient information to challenge systemic patterns of discrimination.³¹ Workers trying to prove discriminatory hiring or pay practices, for example, often struggle to obtain access to the hiring and pay data required to prove discrimination.³² In addition, the increased reliance by employers on mandatory arbitration means that employment-discrimination claims are often pushed into secret, individualized resolution—making both the disclosure and resolution of systemic problems even less likely.³³ Frequently, agreements subjecting workers to mandatory arbitration also foreclose their ability to participate in class actions or even to disclose the circumstances of the unlawful conduct to which they were subjected.³⁴

²⁶ *Id.* (quoting *Catawba County v. EPA*, 571 F.3d 20, 37 (D.C. Cir. 2009)).

²⁷ 41 C.F.R. § 60-1.20; 60-741.60; 60-300.60.

²⁸ *Id.* at § 60-1.20(a)(1).

²⁹ *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).

³⁰ *See About Us*, OFCCP, <https://www.dol.gov/agencies/ofccp/about> (last visited Jan. 20, 2023)

³¹ *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”).

³² *See* Maryam Jameel, *Despite Legal Protections, Most Workers Who Face Discrimination Are on Their Own*, Center for Public Integrity (Feb. 28, 2019), <https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplaceinequities/injustice-at-work/workplace-discrimination-cases/>.

³³ *See, e.g.,* Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, Econ. Pol’y Inst. (April 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/>.

³⁴ *See, e.g.,* Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. Rev. 679, 680-81 (2018).

In short, OFCCP has broad authority to engage in enforcement, including the ability to require contractors to report on their compliance with their statutory and regulatory mandates in order to proactively protect workers from discrimination and ensure access to employment opportunities.

III. The Proposed Revisions to the Scheduling Letter Will Allow OFCCP to Conduct More Efficient and Effective Compliance Reviews With Minimal Burden to Contractors

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. Strengthening the effectiveness of contractors' compliance evaluations is part of OFCCP's strategic enforcement plan.³⁵ The additional information OFCCP proposed to collect will allow the agency to obtain a more comprehensive picture of contractors' compliance with nondiscrimination and affirmative-action requirements and lead to more efficient and effective compliance reviews. We support these efforts and highlight some of the most important proposed revisions below:

- Collecting more information regarding “minority and female availability” for each job group (Item 4)³⁶

“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. As a result, OFCCP requests information demonstrating that contractors have considered “the most current and discrete statistical information available,” identified a “reasonable recruitment area,” and have “not defined the pool of promotable, transferable, and trainable employees in such a way as to have the effect of excluding minorities or women” as required by 41 C.F.R § 60-2.14. This measure therefore simply extends to the scheduling letter the regulatory requirements to which contractors are already bound. By requesting this information in the scheduling letter, OFCCP will be better able to evaluate whether a contractor is in compliance with the law. It is thus both reasonable and should not impose a significant burden.

- Requesting information on “action-oriented programs” (Item 7)³⁷

OFCCP proposes to collect information related to contractors' self-analyses undertaken to identify and correct any problems relating to equal employment opportunity, including disparities in employment or advancement of women and people of color, and any gender-, race-, or ethnicity-based compensation disparities. Contractors are already required by OFCCP regulations to conduct “in-depth analyses” to identify problem areas as part of their affirmative-action programs.³⁸ This information request would require 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. Collecting this information from contractors at the outset of a compliance review is also the most efficient way for OFCCP to ensure that contractors are engaging in these required self-assessments,

³⁵ OFCCP, Directive (DIR) 2022-02: Effective Compliance Evaluations and Enforcement (Mar. 31, 2022), <https://www.dol.gov/agencies/ofccp/directives/2022-02>.

³⁶ OFCCP Supporting Statement, OMB Control Number 1250-0003, at 11 (Nov. 2022), <https://downloads.regulations.gov/OFCCP-2022-0004-0002/content.pdf>.

³⁷ *Id.* at 12

³⁸ 41 C.F.R § 60-2.17(b).

which are important tools not only for uncovering potential discrimination that can be addressed voluntarily by employers but also for identifying ineffective affirmative-action measures.

- 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)³⁹

OFCCP proposes to collect information regarding contractors’ recruitment and hiring policies and practices, including specifically those surrounding the use of automation and artificial intelligence. This revision reflects the increased use of these technologies in hiring processes as well as concerns raised by diverse stakeholders, including NWLC, that these hiring technologies can reproduce existing patterns of systemic discrimination in the workforce or create new barriers for job applicants, especially for women, people of color, transgender, nonbinary and gender nonconforming people, people with limited English proficiency or non-native accents, and people with disabilities.⁴⁰ Moreover, applicants and employees receive little information about how they are being evaluated by these tools, making it difficult for individuals to know whether they have experienced unlawful discrimination.

Scholars and practitioners have likewise highlighted the potential for artificial intelligence and other automated or technology-based selection processes to lead to discriminatory hiring practices. Automated recruitment technologies, for example, may push job advertisements to or otherwise target applicants from specific demographic groups.⁴¹ Employers may be feeding biased data into an automated system, thereby generating biased results.⁴² Another concern is “the ‘black box’ problem”—the fact that it can be difficult to understand why an automated system yielded a given outcome, making it harder to identify the lurking biases that led to the outcome.⁴³

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 impeding equal employment opportunities or promoting unlawful discrimination. The proposed revision here is a sensible one designed to acknowledge modern day employment practices. The request is also modest and does not impose a heavy burden on employers: OFCCP would merely ask contractors to explain in narrative form the technologies that it is relying on in its recruiting, screening, and hiring practices. This information would provide much-needed transparency in this area and help ensure that federal contractors who use these tools continue to provide equal opportunity.

³⁹ OFCCP Supporting Statement, *supra* note 36, at 15.

⁴⁰ See *Civil Rights Principles for Hiring Assessment Technologies*, The Leadership Conference on Civil and Human Rights (July 2020), <https://civilrights.org/resource/civil-rights-principles-for-hiring-assessment-technologies/> (noting that the use of hiring technologies can replicate discrimination and deepen inequities). Earlier this year, the Department of Justice and the U.S. Equal Employment Opportunity Commission also released guidance specifically cautioning employers that the use of artificial intelligence in hiring processes may unlawfully screen out qualified individuals with disabilities or unlawfully seek disability-related information. *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>.

⁴¹ See e.g., 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).

⁴² Sonderling et al., *supra* note 41, 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”).

⁴³ *Id.*

- Requiring contractors to supply additional compensation data upfront (Item 21)⁴⁴

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 currently required. Large contractors are already obligated to retain compensation records for a two-year period.⁴⁵ Collecting this data at the outset of the compliance review is more efficient as it allows OFCCP to identify systemic pay disparities more quickly and effectively earlier in the compliance review process, without having to request additional data, creating delay and additional burdens on OFCCP resources.

Second, OFCCP proposes to require contractors to provide documentation on additional factors that affect compensation. Having this additional information on employee pay will provide OFCCP with greater clarity concerning contractors' pay practices, leading to a more accurate compensation analysis during the compliance review. The proposed change would also clarify for contractors what information is necessary for OFCCP to conduct a desk audit, reducing the need for OFCCP to make additional data requests, prolonging the compliance review process for contractors and the agency.

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.⁴⁶

- Requiring additional data on contractors' compensation analyses (Item 22)⁴⁷

Currently, as part of the self-audits that they are required by regulation to undertake, contractors must analyze their compensation systems to evaluate whether there are disparities by gender, race, or ethnicity.⁴⁸ OFCCP now proposes to require contractors to provide certain additional information regarding their compensation analyses, including when the analysis was conducted, the number and categories of employees included and excluded in the analysis, the forms of compensation analyzed, and the method of analysis employed.⁴⁹ 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.⁵⁰ This proposed revision would require only that contractors supply such information to OFCCP at the outset of a desk audit.

Despite progress made to narrow pay gaps based on race, sex, and ethnicity—in part through enforcement of the Equal Pay Act and employment anti-discrimination laws—ongoing efforts to address the significant pay disparities that remain are critical for the economic security of women, and particularly women of color. For businesses, one of the most effective strategies for promoting pay equity is to

⁴⁴ OFCCP Supporting Statement, *supra* note 36, at 17-18.

⁴⁵ 41 C.F.R. § 60-1.12. Contractors with fewer than 150 employees or those with government contracts of less than \$150,000 are required to maintain records for a minimum of one-year. *Id.*

⁴⁶ See National Employment Law Project, *Temp Workers Demand Good Jobs: Survey Reveals Poverty Pay, Permatemping, Deceptive Recruitment Practices, and Other Job Quality Issues* (Feb. 3, 2022), <https://www.nelp.org/publication/temp-workers-demand-good-jobs/>

⁴⁷ OFCCP Supporting Statement, *supra* note 36, at 18-19.

⁴⁸ 41 C.F.R. § 60-2.17(b)(3).

⁴⁹ OFCCP Supporting Statement, *supra* note 36, at 18-19.

⁵⁰ 41 C.F.R. § 60-2.10(c).

conduct self-assessments of their pay practices to uncover and remedy pay disparities;⁵¹ and according to OFCCP Director Jenny Yang, “often where OFCCP identifies pay-related concerns during compliance evaluations, we discover that contractors have not performed an analysis of pay or have more adequately analyzed their compensation system.”⁵² Adding a requirement for contractors to provide documentation that they have satisfied their obligation to conduct a compensation analysis would strengthen contractor compliance with this obligation, signal its importance as a tool to promote equal pay, and allow OFCCP to more efficiently use its resources to quickly and more effectively identify systemic discrimination.

Contractors often contend that their compensation analyses are protected by attorney-client privilege,⁵³ but OFCCP has carefully crafted its proposed 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. OFCCP has consistently reaffirmed that the agency does not require contractors to produce attorney-client privileged communications or attorney work product.⁵⁴ Indeed, the proposed scheduling letter does not ask for the entire contents of contractors’ compensation analyses. Instead, OFCCP enumerates five discrete kinds of information that it requires contractors to supply.⁵⁵ None of the requested information would touch on privileged information, as none involves legal advice or legal analysis. Rather, OFCCP is seeking only 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—in order to determine whether the contractor is fulfilling its legal obligations concerning pay practices.⁵⁶ That information is not privileged.⁵⁷

- Requiring contractors to provide written employment policies (Item 24)⁵⁸

OFCCP proposes to require contractors to provide documentation of existing written employment policies, including anti-harassment policies, EEO complaint procedures, and other employment agreements impacting equal opportunity rights and complaint processes, including arbitration

⁵¹ See Maya Raghu & Caitlin Lowell, National Women’s Law Center, *Employer Leadership to Advance Equal Pay: Examples of Promising Practices* (March 2017), <https://nwlc.org/wp-content/uploads/2017/03/Equal-Pay-Practices-4.19.17.pdf>.

⁵² Jenny R. Yang, *Advancing Pay Equity Through Compensation Analysis*, U.S Dep’t of Labor (Aug. 18, 2022), <https://blog.dol.gov/2022/08/18/advancing-pay-equity-through-compensation-analysis> (last visited Jan. 20, 2023).

⁵³ See *id.*

⁵⁴ 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>.

⁵⁵ OFCCP Supporting Statement, *supra* note 36, at 18-19.

⁵⁶ *Id.*

⁵⁷ 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)).

⁵⁸ OFCCP Supporting Statement, *supra* note 36, at 19.

agreements.⁵⁹ Strong workplace anti-discrimination and equal employment opportunity policies are key tools that businesses can use to help ensure that they are in compliance with relevant federal law. For example, the EEOC Select Task Force on the Study of Harassment in the Workplace found that “employees in workplaces without [anti-harassment] policies report the highest levels of harassment.”⁶⁰ Indeed, OFCCP regulations lay out a series of best practices to help contractors create an environment free of sex harassment, including the development of workplace policies “to ensure that employees are not harassed because of sex”⁶¹ and “establishing and implementing procedures for handling and resolving complaints about harassment and intimidation based on sex.”⁶² Providing copies of these workplace policies should not be particularly burdensome for contractors, as OFCCP seeks only copies of existing written policies, which employers should already have made readily available to all employees.

With this information, OFCCP would also be able to ascertain whether there are specific provisions within a workplace policy or employment agreement that may hinder the ability of an employee to exercise their rights under federal anti-discrimination law. In particular, unfair, mandatory, pre-dispute arbitration agreements in employment contracts can prevent workers from disclosing discriminatory treatment or exercising their legal rights and may help unscrupulous businesses avoid accountability. By collecting these agreements from contractors, OFCCP will have a more complete picture of a contractor’s employment practices and be better able to assess their compliance with their legal obligations to provide equal employment opportunity.

IV. OFCCP’s Proposed Changes 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.⁶³ But for the reasons already explained above, that is not so. It is also not reasonable for contractors to claim that collecting this information at the outset of a compliance review is overly burdensome as 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.”⁶⁴ 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.”⁶⁵ 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.⁶⁶

* * * * *

⁵⁹ *Id.*

⁶⁰ *Select Task Force on the Study of Harassment in the Workplace*, *supra* note 6.

⁶¹ 41 C.F.R. part 60-2 app. § 7.

⁶² *Id.* at § 7(c).

⁶³ *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>.

⁶⁴ 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>.

⁶⁵ *Id.*

⁶⁶ OFCCP Supporting Statement, *supra* note 36, at 16.

OFCCP plays a critical role in ensuring that federal contractors comply with their legal obligations to proactively monitor workplace diversity and pay equity, to make meaningful efforts to recruit qualified applicants from groups underrepresented in their workplaces, and to break down barriers to equal opportunity for various marginalized and disadvantaged communities. Compliance reviews are an important enforcement tool, and the proposed revisions to the scheduling letter only allow OFCCP to be more efficient and effective.

Increasing efficiency is particularly crucial for OFCCP given its limited resources. Despite overseeing employers of approximately 20 percent of the American workforce, the agency only has about 420 employees.⁶⁷ In its most recent budget request, the agency sought to increase its budget and expand its staff to more than 600, in order “to strengthen its enforcement of civil rights protections and affirmative action requirements.”⁶⁸ Disappointingly, Congress allocated only steady-state funding for OFCCP,⁶⁹ even as the agency anticipates a growing federal contractor and subcontractor workforce, meaning that OFCCP 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.

For all of 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. Please contact Gaylynn Burroughs, Director of Workplace Equality & Senior Counsel, at gburroughs@nwlc.org with any questions.

Sincerely,



Emily Martin
Vice President for Education & Workplace Justice



Gaylynn Burroughs
Director of Workplace Equality & Senior Counsel

⁶⁷ OFCCP Congressional Budget Justification, *supra* note 3, at 2.

⁶⁸ *Id.* at 9.

⁶⁹ See Consolidated Appropriations Act of 2023, Pub. L. No. 117-328 (Jan. 3, 2023); *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/>.