January 20, 2023

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

Re: Comments on the Proposed Changes to the Supply and Service Program Scheduling Letter – OMB Number 1250-0003

Dear Ms. Williams,

HR Policy Association ("HR Policy" or "Association") welcomes the opportunity to provide comments to the Office of Federal Contract Compliance Programs (OFCCP) regarding the agency's proposed changes to the supply and service program information collection requirements that were published in the Federal Register on November 21, 2022.[1] We are particularly concerned about the practical utility of the proposed changes at the initial stage of OFCCP's audits and the potential waste of agency and covered contractor resources.

HR Policy Association is a public policy advocacy organization representing the most senior human resources officers in more than 400 of the largest companies doing business in the United States. Collectively, our member companies employ more than 10 million employees in the United States. Over two-thirds of the Association's member companies are federal contractors and are subject to the proposed scheduling letter. The Association's member companies are committed to fostering diverse and inclusive workplaces and fully complying with OFCCP's requirements for federal contractors.

Our detailed comments and recommendations on the proposed information collection are below. In addition to these comments, the Association submitted extensive joint comments with The Institute for Workplace Equality.

Changes to the scheduling letter should not be made until OFCCP updates its service and supply regulations,[2] and any scheduling letter changes should be phased-in to enable contractors to make the necessary adjustments to their Human Resources Information System (HRIS) systems. For example, the pre-promotion and post-promotion supervisor data is currently not required as part of an affirmative action program (AAP), nor are contractors specifically required to document their use of artificial intelligence in screening mechanisms in their AAPs.

[1] 87 Fed. Reg. 70867.

[2] The Office of Federal Contract Compliance Programs is planning to propose changes to modernize its Executive Order 11246, Vietnam Era Veterans' Readjustment Assistance Act of 1974; and Section 503 of the Rehabilitation Act of 1973 compliance programs for federal supply and service contractors and subcontractors, including but not limited to recordkeeping and affirmative action program obligations. In addition, the proposal will consider modifications in light of Executive Order 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. The proposed rule is expected to be published in April 2023. See: https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=1250-AA13.

Moreover, OFCCP's requirement in the proposed scheduling letter for contractors to provide two snapshot dates of employee level compensation data (proposed Item 21) and employment and arbitration agreements (proposed Item 24) fall outside of the AAP requirements set forth in 41 CFR 2.10-2.16. Even the general provisions of 41 CFR 2.17 cannot be read to allow OFCCP to collect this information as part of an AAP. If OFCCP wants to collect this information, it should first propose regulatory changes, and allow contractors sufficient time to comment on any such proposed changes. Only after that process has been completed, should any changes be considered. Further, any finalized rule should allow sufficient time for contractors to implement such changes.

The data provided by contractors under the current scheduling letter already enables OFCCP to conduct sufficient analyses to determine if additional data needs to be collected. Compliance reviews generally proceed in three steps: 1) a desk audit, 2) an on-site review, and 3) an off-site analysis.[3] The current triage process, along with its supplemental data requests, enables OFCCP to most efficiently utilize its resources while reducing the paperwork burden on compliant contractors.[4] However, the proposed expansion of the scheduling letter effectively adds what would typically be supplemental data requests to the scheduling letter for *every* contractor at the initial stage of a compliance review. Due to the unique nature of many job groups, the OFCCP would likely still need to make supplemental requests for information which are, at least in part, needlessly redundant because the initial requests were not tailored to potential indicators. This inefficient approach contravenes OFCCP's longstanding policy of focusing its resources on the most likely violators while simultaneously increasing the burden on compliant contractors. Indeed, most compliance reviews would become bloated with unnecessary and unused data—something that is wholly inconsistent with the Paperwork Reduction Act.

The redundant and inefficient nature of the proposed changes represent an astounding increase in cost and burden hours placed on contractors. Currently, the OMB-approved scheduling letter and itemized listing have a burden estimate of 28 hours. By OFCCP's own estimates, the proposed changes to the scheduling letter will increase the burden hour estimate **by 40%** to 39 hours, which as noted below, is considerably underestimated. This estimated increase in burden hours does not account for the significant additional burden on contractors with a large number of employees and complex operations. Indeed, many of the factors to be documented under the proposed changes to the scheduling letter will not be captured in a HRIS, and contractors will be required to manually document such information for each employee covered by the compliance evaluation in order to comply. A survey of contractors by The Institute for Workplace Equality indicates that the actual burden will be approximately **89 hours**—over 125% higher than OFCCP's estimate.[5]

Further, the $75 per hour estimate in the "monetized burden costs" significantly underestimates a contractor's cost of assembling and submitting requested documents as part of a compliance review.[6] HR Policy member companies indicate that the current calculation utilizing an 80/20

---

[3] 41 CFR 60-1.20(a)(1).

[4] For more than a decade, OFCCP has identified discrimination in only two to three percent of all compliance reviews. This statistic has remained relatively constant despite efforts by the Agency to undertake more expansive compliance reviews.

[5] See Appendix to comments submitted to OFCCP by the Institute for Workplace Equality, U.S. Chamber of Commerce, and the HR Policy Association

[6] See footnote 36 on page 28 of OFCCP's "Supporting Statement 1250-0003 60-day FINAL" at https://www.regulations.gov/docket/OFCCP-2022-0004/document..

split between Management Analysts and Human Resource Managers provides far too much weight to the per hour cost of Management Analysts, and should be weighted to the higher cost of Human Resources Managers. In addition, the estimates do not consider the related and necessary technical costs and additional follow-up work required. Most contractors engage multiple external partners to complete the scheduling letter submission, including consultants and outside legal counsel. Fees to external partners to use technology to run reports required for the submission should also be considered. External partners' hourly fees are typically several hundred dollars per hour and technology fees are likewise high.

The requirement on federal contractors to provide AAPs for all parts of a company in a "campus-like setting" will create confusion and unnecessary compliance burdens on contractors. OFCCP's proposed scheduling letter changes would require a federal contractor "*with a campus-like setting* that maintains multiple AAPs" to "submit the information requested in this scheduling letter for all AAPs developed for campuses, schools, programs, buildings, departments, or other parts of your institution or company located in [city and state only]." (Emphasis added)

Nowhere within Executive Order 11246 or within the regulations implementing the Executive Order is "campus-like setting" defined. Nor is there any case law defining such a concept that may prove useful to employers. To the extent the term "campus-like settings" is defined it is in sub-regulatory guidance (FAQs and a Technical Assistance Guide) and the FAQs specifically state "[t]he contents of this document do[es] not have the force and effect of law and are not meant to bind the public in any way."[7] Moreover, both the FAQs and Technical Assistance Guide clearly state that contractors and educational institutions "may" do a number of things, but are not required to create multiple-establishment AAPs. Therefore, the proposed scheduling letter effectively sets in motion compliance reviews for multiple establishments in a city, a feature that is not accounted for in OFCCP's burden hour calculation. One company estimates as many as twelve potential AAP submissions would be tied to a single scheduling letter, if not more. If such a requirement is finalized, the burden is such that companies will need multiple plan years to adjust how they gather and sort data.

Finally, it is highly questionable whether OFCCP has executive order or regulatory authority to review multiple AAPs in a "campus like setting" in general, let alone in a single compliance review. Indeed, OFCCP's proposal arguably runs afoul of its own Functional Affirmative Action Program (FAAP) procedures. HR Policy Association and the Institute for Workplace Equality address these issues in depth in comments recently submitted.

Requiring compensation data for temporary employees provided by staffing agencies should be done through notice and comment rulemaking. As a threshold matter, OFCCP does not appear to have the authority to require covered contractors to submit compensation data of temporary employees – *i.e.*, employees of third-party staffing agencies that are provided on a temporary basis to the contractor. The text of Executive Order 11246 provides coverage for "employees" and "applicants." OFCCP regulations do not provide a definition of "employee"

---

[7] OFCCP, Developing and Maintaining Establishment-Based Affirmative Action Programs for Campus-Like Settings Frequently Asked Questions, available at: https://www.dol.gov/agencies/ofccp/faqs/campus-settings; and OFCCP, EDUCATIONAL INSTITUTIONS TECHNICAL ASSISTANCE GUIDE, available at: https://www.dol.gov/sites/dolgov/files/ofccp/CAGuides/files/OFCCP-EI-TAG.pdf.

and OFCCP's Federal Contract Compliance Manual directs covered contractors to rely on common law agency principles for determining whether a worker is an employee for purposes of OFCCP compliance. Under common law agency principles, temporary employees supplied by staffing agencies would generally not be "employees" of a covered contractor. In sum, OFCCP provides no legal basis for temporary employees being "employees" of a covered contractor for purposes of OFCCP compliance and does not have the authority to compel covered contractors to submit compensation data of the same.

Further, and of greater practical concern for HR Policy members, collecting and submitting such data would be extremely burdensome at minimum and likely practically unfeasible generally. HR Policy members frequently use numerous workers supplied by staffing agencies on a temporary basis, often for short-term projects outside the course of the company's usual business. Because such workers are not employees of the member, they are generally not included in HRIS and limited data if any is kept for each such worker. For large companies, identifying the staffing agencies utilized over the course of a year is often a time-consuming and complex process, involving multiples teams utilizing multiples systems. And this must be done before obtaining and compiling the requested data from multiple external sources.

Simply put, covered contractors generally do not have the complex compensation data sought by the OFCCP for workers supplied by temporary staffing agencies. Such data would have to be supplied by the agencies themselves – to the extent that they have it – and would create significant practical burdens for both parties such that even if such data was available and feasible to collect, would take multiple contract cycles to meet.

Further, California data privacy laws – specifically the CCPA and CPRA – provide data privacy protections to employees regarding their race and ethnicity data. Accordingly, staffing agencies could potentially violate such laws by providing this type of information without employee permission to the OFCCP under the proposed scheduling letter. At minimum, the conflict between the OFCCP requirements and California's data privacy laws create yet another administrative burden for covered contractors and staffing agencies. At worst, a covered contractor could be forced to choose between complying with the OFCCP or with California's data privacy laws. This legal quagmire is another reason for the OFCCP to drop its requirement to provide data for temporary employees from staffing agencies.

These requirements could also run afoul of federal antitrust law. Covered contractors and the staffing agencies they utilize sometimes compete for talent in the same space. For example, it is not uncommon for engineers and IT professionals to work side-by-side on specific projects with temporary engineers and IT professionals provided by staffing agencies. Sharing detailed compensation data between covered contractors and staffing agencies in such instances, as would be required by the OFCCP, may run afoul of guidance issued by the Federal Trade Commission and the Department of Justice on sharing of compensation data between competitors.[8]

The OFCCP, by its own formulations of "employee," does not have authority to require covered contractors to submit compensation data of temporary employees, and scheduling letters should not require this information. Even assuming the OFCCP does have such authority, given the

[8] Antitrust Guidance for Human Resource Professionals: Department of Justice Antitrust Division and Federal Trade Commission, October 2016. Available at: https://www.ftc.gov/legal-library/browse/antitrust-guidance-human-resource-professionals-department-justice-antitrust-division-federal-trade.

enormous practical burden associated with collecting such information that would be placed on covered contractors and staffing agencies, particularly when juxtaposed with the purported benefits of having such data, the OFCCP should not require such data in its scheduling letter. Finally, such requirements could force violations of both California data privacy laws and federal antitrust law. At absolute minimum, the OFCCP should provide a longer period of time for covered contractors to further review and discuss this issue.

Additional information regarding promotions is unnecessary at the desk audit stage. OFCCP is proposing to collect data at the initial scheduling letter phase of a compliance review that is unnecessary for determining if there is a statistical indicator of discrimination. While it is reasonable for OFCCP to ask for competitive vs. noncompetitive promotion data in order to get accurate pools for promotion impact ratio analyses, it is unreasonable, and is of very little, if any, practical utility for OFCCP to ask for information on previous and current supervisors at the desk audit stage of a compliance review. Moreover, many contractors do not have such detailed data (previous and current supervisors) readily available in their HRIS and gathering whatever details they can will often involve a manual, lengthy, and burdensome process. The amount of data that OFCCP collects on promotions aside from the data on current and previous supervisors is more than sufficient to determine if there is some statistical indicator of discrimination. At the very least, this type of change should first be made by rulemaking or through an OFCCP directive ***and*** contractors should be afforded one full AAP year to implement the change before the agency begins to collect this data via the scheduling letter.

The proposed changes to submit information on AI places overly ambiguous and unrealistic requirements on contractors. The proposed changes would require of employers "documentation of policies and practices regarding all employment recruiting, screening, and hiring mechanisms, including the use of artificial intelligence, algorithms, automated systems or other technology-based selection procedures." HRPA is concerned that the requirement to produce documentation of the above is overly broad, enormously cumbersome, and impenetrably vague.

Critically, the term "mechanism" introduces a level of ambiguity that would prevent any conscientious employer from being confident in their submission of documentation to cover the requirement. The following examples—"artificial intelligence, algorithms, automated systems or other technology-based selection procedures"—do not add clarity in that they are not exhaustive and are ambiguous themselves. For example, what does it mean for a selection procedure to be "technology based?" Indeed, an employer seeking to comply with these proposed changes may arguably ignore the technological aspect of the requirement, as they would require documentation of "practices regarding all employment recruiting…mechanisms." Taken literally, the proposed changes would require employers to document all outreach to potential job candidates, whether "technology-based" or not, including word of mouth interactions, job fair visits, partnerships with institutions of higher education, etc.

Even if the proposed changes were defined to be limited to the documentation of decision-making software used to screen and hire job applicants, the burden on employers would still be considerable. Contractors maintain multiple electronic systems used in the HR context—particularly large contractors. These tools involve multiple teams at various points of the recruiting, screening, and hiring cycle, and represent considerable resources to document. In addition, thirty days is an unrealistic timeframe within which a company can respond to such a request, given the significant time and resources that would be required.

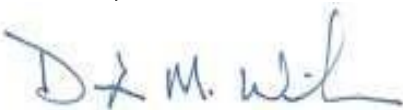
Requiring the submission of two compensation snapshots in the scheduling letter is unnecessary given all of the other compensation analysis information OFCCP collects. Under OFCCP's regulations (41 CFR 60-2.17(b)(3) and (c)), federal contractors must proactively perform in-depth analyses of its compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities *and* develop and execute action-oriented programs designed to correct any problem areas that are identified.[9] Currently, contractors are required to provide OFCCP with employee-level compensation data as of the date of the organizational display or workforce analysis (generally, the first day of a contractor's AAP year) *and* documentation that the contractor has satisfied its obligation to evaluate its compensation systems including when the analysis was completed. Further, to promote the timely and efficient exchange of information needed to conduct a compliance evaluation, and to minimize reporting burdens, OFCCP's long-standing policy is for the agency to request supplemental data, follow-up interviews, and/or additional records and information *if* OFCCP identifies issues that warrant further analysis.[10]

The proposed scheduling letter seeks to collect a second snapshot of compensation data that is not necessary at the initial stage of a compliance review because of the obligations described above. Adding a second year of compensation data will double the burden of time and expense for the vast majority of federal contractors that do not discriminate. Among the 866 service violations OFCCP completed in FY 2022, only 26, or three percent, resulted in a finding of any type of discrimination violation, so the percentage of compensation discrimination violations is likely to be even lower.[11] Given the minimal number of audits in which OFCCP finds compensation discrimination, there is no compelling justification for requiring a second snapshot of compensation data from *all* contractors at the outset of a compliance review, particularly given how burdensome it would be to collect. In order to minimize burdens as required by the Paperwork Reduction Act, OFCCP should only require a second snapshot of compensation data from those contractors whose initial snapshot reveals statistical indicators of discrimination.

* * * *

We urge OFCCP to consider these comments and the joint comments the Association submitted with The Institute for Workplace Equality when considering changes to its scheduling letter. We are happy to provide any additional information you may need or to answer any questions you may have.

Sincerely,



Vice President, Health & Employment Policy
HR Policy Association

---

[9] Also see OFCCP Directive (DIR) 2022-01 Revision 1; https://www.dol.gov/agencies/ofccp/directives/2022-01-Revision1.

[10] OFCCP Directive (DIR) 2022-02; https://www.dol.gov/agencies/ofccp/directives/2022-02.

[11] OFCCP, By the Numbers, at: https://www.dol.gov/agencies/ofccp/about/data/accomplishments.