

January 20, 2023

Electronic Submission via Regulations.gov  
<https://www.regulations.gov/commenton/OFCCP-2022-0004-0001>

Tina T. Williams  
Director, Division of Policy and Programs Development  
U.S. Department of Labor  
Office of Federal Contract Compliance Programs  
200 Constitution Avenue NW  
Room C-3325  
Washington, D.C. 20210

**Re: Comment on OFCCP's Supply and Service Program; Proposed Approval of Information Collection Requirements; Comment Request**

Dear Ms. Williams:

HR Works, Inc. appreciates the opportunity to provide comments on the proposed rule for Supply and Service Program; Proposed Approval of Information Collection Requirements (OMB No. 1250-0003). HR Works is a human resource outsourcing and consulting firm. Our services include affirmative action plan development, EEO-1 and VETS-4212 reporting, and consultation on the implementation of affirmative action programs and related requirements. In addition to being a Federal subcontractor ourselves, we provide affirmative action-related services to hundreds of clients, which represent a wide variety of employment industries, ranging in size from 50 to 30,000 employees, and are geographically dispersed throughout the United States. We believe that, as proposed, the Scheduling Letter and Itemized Listing changes will be overly burdensome on contractors and will not further OFCCP's mission of ensuring contractor compliance with E.O. 11246, Section 503 and VEVRAA. Since OFCCP is looking to significantly expand the amount of information that contractors must provide at the onset of a compliance review, we assert the following: (1) the 30 day submission deadline does not provide enough time to provide all the information in the Scheduling Letter and Itemized Listing; (2) OFCCP needs to provide additional clarification on certain aspects of these proposed changes prior to finalization; and (3) in some cases, OFCCP is using the Scheduling Letter and Itemized Listing to issue rules without following the regulatory process.

HR Works is providing comments below on some of the key aspects of the proposed changes and how these changes may impact contractors.

## ADMINISTRATIVE MATTERS

### Timing of Scheduling Letters and Notices

While not a part of the proposed changes, HR Works believes that the timing of notices and letters from OFCCP needs to be modified. The timing in which these proposed changes were announced (November 21, 2022) presented challenges for contractors to have enough time to submit meaningful comments to the Agency prior to the close of the comment period on January 20, 2023. The announcements of these proposed changes and the period for comment coincided with the Thanksgiving and Christmas holidays, during which time many contractors had holiday closures/shutdowns and observances which limited their time to respond before the close of the comment period. As a result, HR Works is recommending that OFCCP extend the comment period to allow more interested parties additional time to provide meaningful comments on these proposed changes.

As a general matter, HR Works also recommends that OFCCP review and amend its practices related to the timing for contractors to respond to letters and notices from the Agency. As noted above, the Agency has a practice of issuing notices without consideration of the date and the reasonable ability of the contractor to reply during situations in which a notice is received around a holiday or on a weekend day, in which there may be a business closure. In addition to the timing of this NPRM, OFCCP released a significant notice regarding the EEO-1 FOIA request two days before Thanksgiving, and we have seen several instances in which our clients have received Scheduling Letters on a Friday. These scenarios create an automatic loss of time for contractors to respond to OFCCP requests due to the Agency practice of setting deadlines based on calendar days. As a result, HR Works recommends that the Agency consider amending its practice to allow the use of "business days" in the timing for responding to Agency letters and notices or extend the number of calendar days available to respond.

HR Works is also aware that the Agency is proposing the use of email for delivery of audit letters which could alleviate some delays in receipt and increase contractor response time; however, email delivery still does not account for times when a contractor may be closed (i.e., holidays or weekends), and therefore, not checking email. Further, HR Works has questions surrounding the Agency's use of email to deliver letters and notices. Specifically, the proposed changes do not indicate how and/or from where OFCCP intends to gather contractors' email addresses. In our experience, government emails often go to "spam" or "junk" folders and aren't readily seen. How will OFCCP enforce a deadline in an instance where the email is not received? Prior to finalizing the proposed changes, OFCCP needs to provide additional clarity on this matter and provide guidance on how contractors may ensure that the Agency has an accurate email address and can confirm receipt to avoid missed notices.

### Deadline for Submission of Audit Information

The proposed changes would significantly increase the amount of data OFCCP requires contractors to submit at the onset of a compliance review. In reviewing the proposed changes, OFCCP is not proposing to give contractors additional time to prepare and submit the newly added and expanded items from the Itemized Listing. Notably, the proposed changes emphasize that failure to provide the requested information within 30 calendar days may lead to enforcement proceedings. In the past, contractors could request and receive

extensions for at least some items from the Itemized Listing. HR Works understands that the Agency may argue that this change is consistent with OFCCP's [Directive \(DIR\) 2022-02](#), but it should be noted that this DIR does not acknowledge that OFCCP's rules do not require contractors to maintain records in the form in which they are requested by a Scheduling Letter and Itemized Listing and that a contractor's need for additional time to gather this additional data cannot be considered an explicit indicator of non-compliance.

Regardless of their size, contractors will need more time to prepare the new and expanded items, in addition to time to ensure data integrity prior to submission. HR Works recommends that OFCCP revisit the estimated impact that these proposed changes will have on contractors, and that, prior to finalizing these changes, the 30 day submission deadline be amended to no less than 60 days and/or that an option to request an extension with liberal consideration from OFCCP be granted.

### **Use of OFCCP's Contractor Portal as a Method for Contractors to Utilize When Uploading and Submitting Their Itemized Listing Data**

HR Works experienced a number of issues with user access to OFCCP's Contractor Portal in 2022 and believes the Agency would need to ensure these issues have been thoroughly identified and resolved prior to using the portal for audit submissions. In several of our clients' cases in 2022, users from other companies appeared as though they had access to a contractor's account. Additionally, the system commonly accepted invalid data without prompting an error message. Ultimately, where there are data integrity issues, we question whether there are also security concerns.

HR Works would also like clarification as to whether the portal will be updated to accommodate different user access permission, beyond the "Admin" and "Non-Admin" categories currently available. If there is more than one active user for a contractor's account in the portal, can the contractor limit what types of data can be accessed on an individualized basis? The information to be submitted under the Itemized Listing is considerably more sensitive than the current information in the Contractor Portal, including individual-level compensation data. HR Works is asking OFCCP to provide guidance on how various user permission levels can be set in the portal, as in our experience, there will be situations where a contractor may have one contact who they'd like to grant user access for certifying in the portal, but a different individual to be responsible for handling OFCCP audit submissions due to the various levels of sensitive information.

### **POST-SECONDARY INSTITUTIONS AND CAMPUS-LIKE SETTINGS**

#### **Post-Secondary Institutions and Contractors With "Campus-Like Settings"**

HR Works has concerns with the proposal to require post-secondary institutions and contractors with "campus-like settings" to submit all AAPs and Itemized Listing information for the entire campus in the city where OFCCP schedules the compliance review. All three sets of regulations enforced by the Agency reference that OFCCP will review the "written affirmative action program" (singular) in the relevant "compliance review" sections. HR Works questions whether the proposed change for "campus-like settings" is an attempt to use the Scheduling Letter to make a regulatory change. We would argue that this change requires the Agency to follow the process for formally amending the regulations to address "campus-like settings," as the scope of an audit has historically been limited to the establishment identified in the

Scheduling Letter. It is our view that OFCCP regulations arguably do not support an expansion of audit scope. To better understand this proposed change and whether formal regulatory changes are needed, HR Works further asserts that the Agency should provide clarity on what it intends to do with this information and how providing it will allow OFCCP to make more "efficient use of its resources".

### **Submission of IPEDS by Post-Secondary Educational Institutions**

The proposed Itemized Listing would require post-secondary educational institutions to submit their Integrated Postsecondary Education Data System (IPEDS) Survey Component data collection reports for the past three years. While IPEDS reports may be an alternative to EEO-1 reports as they contain equivalent types of data, HR Works questions whether OFCCP has the regulatory authority to require IPEDS, as their enforcement is governed by the Department of Education. It would be helpful if OFCCP can clarify how they intend to use this information to better understand what, if any, jurisdiction the Agency may have over these reports.

### **EMPLOYMENT ACTIVITY AND SELECTION PROCEDURES**

#### **Support Data for Promotions and Terminations**

The support data for promotions and terminations contain several new elements in the proposed Itemized Listing. Among promotions, the new data elements include competitive/non-competitive status, previous and current supervisor, previous and current compensation, job group, and titles from and to. This effectively creates a burden for the contractor to provide a full data set for promotions rather than the numbers that are needed to conduct an impact ratio analysis. Some of these elements, such as supervisor and compensation information, exceed what OFCCP needs to determine if a selection process is negatively impacting any group of employees. HR Works agrees that OFCCP may need some of these elements to effectively investigate a finding of adverse impact. However, we assert that a minority of contractors under compliance review have adverse impact in their promotion activity and therefore data in excess of job group or job title, gender, and race/ethnicity should not be requested unless warranted by such a finding. Similarly, the proposed Itemized Listing requests termination reasons and department information, which we believe employers should not need to prepare and submit unless statistical indicators of adverse impact are found. We appreciate OFCCP's decision to continue offering contractors the opportunity to submit either job group or job title information for employment activity.

#### **Request for Policies Relating to the Use of AI and Other Technology-based Selection Procedures**

HR Works understands that OFCCP is placing a focus on contractors' use of artificial intelligence (AI) and that the use of such tools raises potential questions related to equal opportunity and discrimination pursuant to the [Uniform Guidelines on Employee Selection Procedures](#). However, the upfront request for documentation of policies and practices regarding the use of AI, algorithms, automated systems and other technology-based selection procedures is yet another burden for contractors that will in most cases require additional time and resources. It will be unclear to most employers what documentation should exist or be created, and against what regulatory standards OFCCP will be assessing such documentation. Notably, jurisdictional enforcement of the Uniform Guidelines on Employee Selection Procedures falls under the Equal Employment Opportunity

Commission (EEOC) and while agencies may jointly pursue initiatives and enforcement actions, it does not appear that either OFCCP or EEOC has a specific regulatory foundation on the use of AI in employment. As such, HR Works recommends that, prior to introducing this into the audit process, OFCCP continue to define its expectations in this regard and that formal regulatory actions be taken prior to burdening contractors with another item for submission.

## COMPENSATION

### Compensation Snapshot

The revised Itemized Listing requires submission of the current and prior year compensation data, increasing the requirement from providing only the current year's compensation data to providing two years of compensation data. While in the proposed changes, OFCCP notes its authority to review employment activity data covering the two years preceding the initiation of the compliance review, its existing practice is to request this data only after a desk audit reveals a potential disparity. OFCCP states that this current practice is "inefficient" because "requesting additional data delays the compliance review process" and "reviewing more data will allow OFCCP to identify whether there is systemic pay discrimination happening at a contractor's workforce and whether the potential discrimination was ongoing prior to the first snapshot."

It is the view of HR Works that the Agency has greatly underestimated the additional efforts and time that will be required to provide the additional snapshot within the 30 day deadline. As previously mentioned, it is recommended that OFCCP consider a reasonable timeframe for submission of data. It is also arguable whether providing OFCCP with additional data will speed up the review process, as more information introduced into the audit process has a greater likelihood of increasing the review time and lengthy compensation investigations may result. Over a two-year period, the employees, their individual compensation, and their job titles will change considerably when viewing an employer's workforce as a whole. Compensation is a "moving target," adding complexity to any attempts OFCCP might make to analyze multiple years of data simultaneously. Additionally, OFCCP has asked contractors to self-audit and self-correct barriers to equal opportunity in compensation practices. Looking at multiple years of data discredits contractors who have taken steps to improve equity in the preceding year when OFCCP audits practices the contractor may have identified and corrected in conformance to principles of affirmative action.

### Compensation Data for Staffing Agency Employees

The proposed changes also require contractors to provide two years of compensation data and factors that impact compensation of "temporary employees," including those provided by "staffing agencies." The Agency has noted this change as an attempt to provide clarification, but it does the opposite. If OFCCP is attempting to get pay data for employees not on the contractor's payroll, this change is problematic. In most cases, contractors do not determine compensation for staffing agency employees and may not even know the wage rates the staffing agency is paying its employees. It is unclear how contractors would gain access to this data. Because OFCCP's regulations do not define "employee," and this proposed change is seeking to implement a mandated requirement, HR Works is recommending that OFCCP provide a definition of "employee" either through regulatory rulemaking or via guidance prior to finalizing these changes.

## CONCLUSION

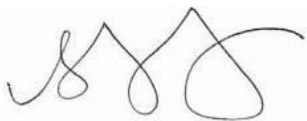
HR Works is asking OFCCP to address the following key concerns with the proposed changes to the Scheduling Letter and Itemized Listing:

- The timing of issuance of notices and letters by OFCCP, including extending the comment period, extending the time allowed to submit the Scheduling Letter and Itemized Listing materials, and considering business days as an alternative to calendar days for deadlines;
- The functionality and security of the Contractor Portal;
- The impact and number of hours that will be required for contractor compliance with the new and expanded Itemized Listing;
- The need for additional clarification and guidance from OFCCP on some of the proposed changes; and
- Appropriately utilizing the regulatory process for some of the proposed changes.

If approved, the new Scheduling Letter and Itemized Listing will have an expanded impact on contractors and OFCCP's estimates simply do not reflect the reality for most contractors. Thirty (30) calendar days is not enough time for most contractors to provide the extensive amount of additional data that OFCCP is proposing to collect, much of it not in a format that conforms to prepared AAP reports. It is imperative that contractors be provided more than 30 days to comply, if these changes are implemented as proposed.

If the Agency makes changes to the proposed Scheduling Letter and Itemized Listing in an effort to address the time commitment and data volume burdens placed on contractors, OFCCP can be successful in meeting their goal of reducing delays in the compliance review process while effectively enforcing the regulations. HR Works encourages OFCCP to look more critically at the extent of information requested, the reasonableness of response deadlines, and consistency with existing regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "Shannon L. Craig".

Shannon L. Craig  
Vice President, Compliance Services