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March 20, 2023

VIA FEDERAL eRULEMAKING PORTAL: [WWW.REGULATIONS.GOV](http://WWW.REGULATIONS.GOV)

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

**Re: Comments of the Center for Workplace Compliance on the Office of Federal Contract Compliance Programs' Proposed Renewal of the Approval of its Information Collection Request, *Complaint Discrimination Form (CC-4)* & New *Pre-Complaint Intake Form (CC-390)* (Docket OFCCP- 2022-0005-0002)**

Dear Ms. Williams:

The Center for Workplace Compliance ("CWC") appreciates the opportunity to submit these comments regarding the Office of Federal Contract Compliance Programs' ("OFCCP") proposed Information Collection Request ("ICR") for its complaint program -- "*Complaint Involving Employment Discrimination by a Federal Contractor or Subcontractor*" (Form CC-4) and "*Form CC-390 Pre-Complaint Inquiry for Employment Discrimination Involving a Federal Contractor or Subcontractor*" (Form CC-390) -- notice of which was published in the *Federal Register* on January 18, 2023.<sup>1</sup>

OFCCP is proposing that individuals who wish to file a formal complaint ("Form CC-4") with the agency will need to first complete and submit a pre-complaint intake form ("Form CC-390"), in order to help OFCCP determine if it has jurisdiction and is the proper agency to investigate the allegation(s). OFCCP's proposal essentially creates a new two-step complaint intake process similar to the one already utilized by the U.S. Equal Employment Opportunity Commission ("EEOC").

By creating a pre-complaint phase through the use of the new Form CC-390, OFCCP avers that this will "improve the efficiency" and "modify" its complaint intake procedures under a

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<sup>1</sup> 88 Fed. Reg. 2971 (January 18, 2023).

new complaint process that will ultimately benefit potential complainants and the agency.<sup>2</sup> OFCCP also suggests that federal contractors and subcontractors will benefit from this new complaint process, since OFCCP would no longer be required to unnecessarily contact employers about incoming complaints that the agency subsequently decides to not investigate.<sup>3</sup> These agency decisions would be conducted during the pre-complaint intake phase, not after a formal complaint is filed with OFCCP.

CWC supports OFCCP's new Form CC-390, and the agency's efforts to improve upon its complaint procedures to make the complaint filing process more efficient for potential complainants, the agency, and the federal contractor community.

We would also respectfully request that the agency issue new guidance (*i.e.*, a directive or updating the Federal Contract Compliance Manual ("FCCM")) to its Compliance Officers working in agency field offices to prevent improper inquiries during the pre-complaint intake process, such as conducting a so-called "pre-investigation" of any potential claims against an employer before a complaint has been formally filed.

### **Statement of Interest**

CWC<sup>4</sup> is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Formed in 1976, CWC's membership includes approximately 200 major U.S. employers collectively providing employment to millions of workers. CWC's members are firmly committed to the principles and practice of equal employment opportunity and meaningful affirmative action.

Nearly all of CWC's members are subject to the nondiscrimination, nonretaliation, and affirmative action requirements of Executive Order ("E.O.") 11246, Section 503 of the Rehabilitation Act of 1973 ("Section 503"), the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA"), and their implementing regulations. As major federal contractors and subcontractors, CWC's members have a significant stake and interest in ensuring that OFCCP's regulations and paperwork requirements, including those triggered by the agency's E.O. 11246, Section 503, and VEVRAA regulations, efficiently and effectively accomplish their underlying policy objectives.

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<sup>2</sup> See *OFCCP Justification Statement for Complaint Involving Employment Discrimination by a Federal Contractor or Subcontractor*, OMB Control No. 1250-0002, ICR Ref. No. \_\_\_\_\_, p. 1.

<sup>3</sup> *Id.*, p. 4.

<sup>4</sup> Formerly the Equal Employment Advisory Council (EEAC).

## Background and Overview

OFCCP's regulations implementing E.O. 11246, Section 503, and VEVRAA permit the agency to conduct complaint investigations to assess contractors' compliance with nondiscrimination and affirmative action obligations.<sup>5</sup> Although an important component of its overall enforcement regime, OFCCP's complaint investigation activity each fiscal year ("FY") has generally been considerably less than OFCCP's compliance review activity of federal contractors.<sup>6</sup>

Under OFCCP's current complaint process, individuals will submit a completed Form CC-4 to OFCCP alleging discrimination by an employer. OFCCP will then examine whether the complaint satisfies any jurisdictional concerns and whether OFCCP will retain, close, or refer the complaint to another agency. After conducting an initial examination of the allegations raised in the Form CC-4, OFCCP may determine in some instances that it is unable to investigate the claims because the complaint is untimely, alleges a basis of discrimination (*i.e.*, age) that OFCCP has no authority to investigate, or is invalid because the employer is not a covered contractor subject to OFCCP's laws and regulations. If this occurs, OFCCP will refer the complaint to another agency, such as the U.S. Equal Employment Opportunity Commission ("EEOC"), or close the complaint for lack of jurisdiction and conduct no further investigation on the merits of the claims.

Under the current complaint procedure, even when OFCCP has determined that it will no longer investigate the incoming complaint for jurisdictional reasons, or refers the complaint to another agency, OFCCP is still required to notify the employer that it received a complaint. OFCCP contends that this is an unnecessary notification sent to an employer for a matter it will not fully investigate and could expose the submitter to a greater risk of retaliation.

## OFCCP's Proposal

To alleviate these concerns, OFCCP has proposed in its ICR a new two-step complaint process. This includes the creation of a new Form CC-390, a pre-complaint intake form (*i.e.*, Step One), that individuals will be required to complete and submit before any formal complaint, Form CC-4 (*i.e.*, Step Two), can be filed with the agency. OFCCP has also modified its Form CC-4 to accommodate this pre-complaint feature by instructing submitters that they must first complete the Form CC-390 before filing a complaint with the agency.

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<sup>5</sup> 41 C.F.R. §§ 60-1.24(b), 60-300.61(d), and 60-741.61(e).

<sup>6</sup> Since FY 2019, OFCCP has scheduled an average of 1,112 non-construction compliance reviews each fiscal year. See *OFCCP By the Numbers*, available at <https://www.dol.gov/agencies/ofccp/about/data/accomplishments> (last accessed March 16, 2023).

The new Form CC-390 would enable OFCCP to conduct a jurisdictional evaluation of any potential claims *before* (not after) a complaint is formally filed. During the pre-complaint intake phase, OFCCP could contact the individual, if needed, and obtain information to determine if OFCCP is the proper agency to retain and investigate the claim(s). If OFCCP determines that it is the proper agency to investigate the claim described in the intake form, OFCCP would then notify the submitter and provide them with information on how to file a formal complaint with the agency by completing Form CC-4.

Importantly, submission of the pre-complaint intake form does not require OFCCP to notify an employer that a complaint has been filed. If, after its pre-complaint evaluation, OFCCP decides to refer the matter to another agency, or determines that it does not have the authority to investigate, or that the claims are untimely, then the employer would not need to be notified about these potential claims. Under OFCCP's proposal, the employer would only be notified if a formal complaint (Form CC-4) is later submitted to the agency after the pre-complaint evaluation is completed. This proposed two-step complaint process is modeled after the format implemented by the EEOC that requires individuals to first submit a pre-complaint intake form that the agency will evaluate prior to providing approval for the submitter to file a formal charge with the agency.

OFCCP believes that the proposed two-step complaint process will increase efficiency for contractors and the agency while reducing burdens and will provide the opportunity to focus its limited resources on that subset of complaints it receives that have successfully completed the pre-complaint intake phase of the complaint process.

### **CWC Supports OFCCP's Proposed Changes to Its Complaint Process**

CWC supports OFCCP's proposal to create a two-step complaint process with a new pre-complaint intake phase followed by the filing of a formal complaint form. Our members appreciate OFCCP's efforts to reduce burdens on both the agency and contractors by creating a more efficient process.

We respectfully submit that OFFCP should retain the following items from its current proposal to achieve these goals:

- Retain the current instructions on both the proposed pre-complaint intake form and the revised complaint form that notifies a submitter the number of days – either 180 or 300 days – needed to file a timely, formal complaint with OFCCP;
- Retain the current instructions on each page of the proposed pre-complaint intake form that clearly informs the submitter that completing the intake form is not a substitute for filing a formal complaint with the agency; and

- Retain the first fill-in section of the revised complaint form that clearly informs the submitter that they must first complete the pre-complaint intake form before submitting the Form CC-4 to the agency.<sup>7</sup>

CWC also respectfully recommends that OFCCP revise the pre-complaint intake form's instructions, under the "Important Deadlines" section, to specifically state that filing Form CC-390 does not toll the requisite time period needed for an individual to file a formal complaint with the agency. The Form CC-390's instructions can be revised to say the following in order to provide the submitter with greater clarity: "Submitting this inquiry form to OFCCP does not constitute filing a complaint, nor does it toll the required time period for timely filing a formal complaint with the agency."

Finally, some CWC members have expressed concern that if this new complaint process is approved, it would give OFCCP the opportunity to conduct a so-called "pre-investigation" of a contractor's employment or personnel practices without prior notice, during the pre-complaint intake process, before any formal complaint is filed. To alleviate this concern, we would respectfully request that OFCCP issue new guidance (*i.e.*, a directive or updating the Federal Contract Compliance Manual ("FCCM")) to its Compliance Officers working in agency field offices that prohibits any improper preliminary investigation of a contractor's employment practices during the pre-complaint intake process.

## **Conclusion**

CWC appreciates the opportunity to offer these comments regarding OFCCP's proposal. Please do not hesitate to contact me if CWC can provide further assistance as you consider these important issues.

Sincerely,



Gilberto Garcia, Jr.  
Senior Counsel  
Center for Workplace Compliance

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<sup>7</sup> See OFCCP's proposed *Complaint of Employment Discrimination Involving a Federal Contractor or Subcontractor (Form CC-4)*, p. 2.