

April 23, 2024

Submitted via Federal eRulemaking Portal: <https://www.regulations.gov>

Tina T. Williams
Acting Deputy Director
Director of Policy & Program Development
U.S. Department of Labor
Office of Federal Contract Compliance Programs
200 Constitution Avenue NW, Room C-3325
Washington, DC 20210

Re: Comments of the Center for Workplace Compliance (CWC) in Response to the Proposed Reinstatement With Change of Information Collection Requirements - Monthly Employment Utilization Report (Form CC-257)

Dear Ms. Williams:

The Center for Workplace Compliance (CWC) welcomes the opportunity to submit written comments on the *Proposed Reinstatement With Change of Information Collection Requirements*, as published in the *Federal Register* on February 23, 2024.¹

OFCCP proposes reinstating the Monthly Employment Utilization Report, Form CC-257, requiring covered federal construction contractors to collect and report on a monthly basis headcount and hours-worked data by race, ethnicity, sex, and construction trade. According to the Supporting Statement accompanying OFCCP's announcement, Form CC-257 will accomplish two goals: (1) "improve the process for neutrally scheduling contractors for compliance evaluations;" and (2) "inform compliance assistance activities and track the progress of outreach efforts of OFCCP's Megaproject Program."

CWC supports the agency's goals and has a shared interest in increasing the efficiency of compliance evaluations. We respectfully submit, however, that reinstating Form CC-257 will not materially move OFCCP any closer to achieving its goals. The qualitative information requested in Form CC-257 (such as contract value, awarding agency, and related information) is already provided to OFCCP pursuant to 41 CFR 60-4.2 (c). This burden falls on federal agency contracting officers, not construction contractors.²

Further, we submit that Form CC-257's headcount and hours-worked data has little utility, and the burdens associated with providing this information outweigh any nominal benefit. At most, these data may shed light on the participation rates of women and minorities on specific construction projects. However, there is no reasonable benchmark to measure these data against, given that OFCCP's published participation rate goals for women and minorities have not been updated in 44 years.³ OFCCP would have to update participation goals for this information to be relevant.

¹ 89 Fed. Reg. 13748 (February 23, 2024).

² Similarly, prime contractors are already required to provide this information to OFCCP regarding their subcontractors through the Construction Contract Award Requirement Form (CC-314).

³ 45 Fed. Reg. 65976-65991 (October 3, 1980); 45 Fed. Reg. 85750-85751 (December 30, 1980).

Statement of Interest

Founded in 1976, the Center for Workplace Compliance (CWC)⁴ is the nation's leading nonprofit association of employers dedicated exclusively to helping its member employers better understand and manage their workplace compliance requirements and risks. Its membership includes approximately 200 major U.S. employers, collectively providing employment to millions of workers. CWC's directors and officers include many of the industry's leading experts in the fields of fair employment, workplace compliance, and risk management. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of workplace rules and regulations.

Nearly all CWC members are federal contractors and subcontractors subject to the nondiscrimination and affirmative action requirements of Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 (Section 503), Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), and their implementing regulations. As major federal contractors and subcontractors, CWC's members have a significant interest in ensuring that OFCCP's programs, policies, and initiatives efficiently and effectively accomplish their underlying policy objectives.

Background

OFCCP's regulations distinguish between "construction contractors" and "supply-and-service contractors," considering the fluid and temporary nature of construction projects.⁵ Covered construction contractors are further divided into two types: those that have contracts directly with the federal government, and those that have federally assisted contracts that, while not made directly with the federal government, involve federal dollars.⁶

OFCCP requires all covered federal construction contractors – whether they have direct or federally assisted contracts – to refrain from discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin, and to take 16 specific affirmative action steps designed to ensure equal employment opportunity.⁷ Construction contractors with direct federal contracts must also comply with OFCCP's regulations under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) and Section 503 of the Rehabilitation Act of 1973 (Section 503).⁸ These regulations prohibit discrimination and require affirmative action regarding protected veterans and individuals with disabilities.

In 1995, the last time OFCCP required construction contractors to complete the Monthly Employment Utilization Report proposed today, compliance officers were still conducting onsite reviews

⁴ Formerly the Equal Employment Advisory Council (EEAC).

⁵ 41 C.F.R. § 60-2 establishes the affirmative action obligations for non-construction (supply and service) contractors, while 41 C.F.R. § 60-4 establishes obligations for construction contractors.

⁶ 41 C.F.R. §§ 60-1.3, 60-4.

⁷ 41 C.F.R. §§ 60-4.3.

⁸ 41 CFR §§ 60-300, 60-741. OFCCP maintains current thresholds for covered contractors at <https://www.dol.gov/ofccp/taguides/jurisdiction.htm>.

rather than offsite desk audits. OFCCP abandoned Form CC-257 “to utilize its limited resources more efficiently.”⁹

Contracting Officers Already Provide OFCCP with the Contractor Information in Form CC-257

According to the Supporting Statement accompanying OFCCP’s announcement, Form CC-257 will help the agency “improve its process for neutrally scheduling contractors for compliance evaluations” by providing information such as when projects are active and the number of employees working on the project. We respectfully submit, however, that OFCCP already has access to this information and OFCCP can accomplish these goals without Form CC-257.

For example, under 41 C.F.R. 60-4.2, federal agency contracting officers are *already* required to provide written notice to OFCCP within 10 working days of award of a contract. This information includes the contractor’s name, address, and employer identification number, along with the contract number and dollar value, estimated starting and completing dates, and the geographical area where the contract is performed.¹⁰ Similarly, prime contractors are already required to provide this information to OFCCP regarding their subcontractors through the Construction Contract Award Requirement Form (CC-314). The agency should consult the resources at its disposal instead of requiring construction contractors to report this information monthly.

The Burdens of Completing Form CC-257 Outweigh Any Nominal Benefit

Apart from the fact that OFCCP already has the qualitative information required for the agency to enforce federal regulations, as articulated above, we submit that the data provided in Form CC-257 will not further the agency’s goals. Headcount and work-hours data may indicate participation rates for women and minorities, but without updated participation rate goals, this information is purposeless. OFCCP has not updated the participation rate goals for women and minorities in 44 years.¹¹ These goals must be updated for headcount and work-hours data to be relevant.

We also question OFCCP’s ability to review monthly reports, considering the agency abandoned the form years ago. OFCCP discontinued the Monthly Utilization Report on December 8, 1995, noting it offered little utility in exchange for a high cost to both the agency and contractors.¹² An electronic format may expedite the process, but the time and resources required to review and respond to monthly reports make the exercise impracticable for OFCCP and construction contractors alike.

OFCCP estimates 9,982 total respondents, averaging 1.5 hours per response, for a total monetized burden cost of \$13,700,054. Reporting headcount and hours-worked data by race, ethnicity, sex, and construction trade for every Standard Metropolitan Statistical Areas (SMSA) or Economic Area (EA) will take significant time and resources, far more than 1.5 hours per response. Construction contractors generally do not have the personnel required to report utilization every month. Creating a written reporting requirement for construction contractors will demand tremendous amounts of time and resources.

⁹ 60 Fed. Reg. 63061 (Dec. 8, 1995).

¹⁰ 41 C.F.R. 60-4.2 (c).

¹¹ 45 Fed. Reg. 65976-65991 (October 3, 1980); 45 Fed. Reg. 85750-85751 (December 30, 1980).

¹² 60 Fed. Reg. 63061 (Dec. 8, 1995).

By Reinstating Form CC–257, OFCCP is Creating a Written AAP Requirement for Construction Contractors

Form CC–257 does not originate from a regulatory requirement. OFCCP’s Technical Assistance Guide states, “Unlike federal supply and service contractors, federal construction contractors are not required to develop written AAPs under Executive Order 11246.”¹³ Although construction contractors must be able to demonstrate good-faith efforts to meet affirmative action goals, construction contractors are not required to develop written affirmative action programs (AAPs) for women and minorities.¹⁴ Form CC–257 would change this longstanding rule and effectively require construction contractors to develop and maintain written AAPs for women and minorities.

Construction contractors have recordkeeping obligations under 41 CFR 60-4.3(a)(14). Construction contractors must record each employee’s “name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed.”¹⁵ Construction contractors use these hours to evaluate female and minority participation within each Standard Metropolitan Statistical Areas (SMSA) or Economic Area (EA). Significantly, the frequency of this evaluation is not specified in the regulations.

In other words, while construction contractors must record and maintain workforce data, OFCCP’s regulations do not specify the frequency, format, or method for evaluating this data. By reinstating Form CC–257, OFCCP transforms a *non-written* review that occurs at an *unspecified frequency* into a *written* report issued *every month* that does little to help the construction community. This is a heavy lift for the agency and construction contractors alike, with nominal benefit.

Recommended Modifications to Form CC–257

While we do not support reinstatement of Form CC–257, if OFCCP does move forward with this requirement, we suggest that OFCCP require annual reporting, rather than monthly, and only for construction projects that exceed specific reporting thresholds by contract value, duration, or hours worked. An annual report is less burdensome than a monthly report and accomplishes the same goals. Start and end dates of active projects are already provided to the agency through 41 CFR 60-4.2(c), so an annual report would be all that is required for OFCCP to track headcounts and hours worked.

Furthermore the “foreman” or “foreperson” category should be excluded from the report, as “foreman” or “foreperson” is not a construction trade subject to evaluation. It is true that OFCCP’s regulations list “foreman” twice, but only in lists of “onsite supervisory personnel” obligated to oversee anti-harassment, anti-discrimination, and affirmative action practices at 41 CFR 60-4.3(a)(7). 41 CFR 60-4.3(a)(14) lists examples of construction trades such as “mechanic, apprentice trainee, helper, or laborer,” but not “foreman.” As “foreman” is not a construction trade, contractors should not be required to include them as a classification on Form CC–257.

¹³ Office of Federal Contract Compliance Programs, “Construction Contractors Technical Assistance Guide” (October 2019).

¹⁴ 41 C.F.R. 60-4.

¹⁵ 41 C.F.R. 60-4.3(a)(14).

Tina T. Williams

April 23, 2024

Page 5 of 5

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,

A handwritten signature in black ink that reads "Gabrielle Lattery". The signature is written in a cursive, flowing style.

Gabrielle Lattery

Counsel, Center for Workplace Compliance