

ROFFMAN HORVITZ, PLC
LEGAL COUNSELING
FEDERAL CONTRACT COMPLIANCE & EMPLOYMENT DATA ANALYTICS

April 23, 2024

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

Re: Reinstatement of the Monthly Employment Utilization Report (CC-257)

Dear Ms. Williams:

We are writing on behalf of Roffman Horvitz, PLC and its clients, to comment on OFCCP's proposed reinstatement of the construction contractor Monthly Employment Utilization Report (CC-257). We predict that the re-imposition of this report at a \$10,000 threshold will be very burdensome to many small- and medium-sized construction employers and will cause some of them to decline to work on federal projects in the future. This will result in a shrinking base of companies competing for and participating in federal sub-contracting and, in turn, higher costs to taxpayers.

Roffman Horvitz is a boutique law firm founded by the former shareholders and OFCCP compliance practice group managers at the nation's largest employment law firm. Our team focuses on assisting federal contractor employers to comply with Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA) and OFCCP's implementing regulations. The firm's client base ranges from Fortune 100 companies to small-business owners, including several direct and federally-assisted construction company employers.

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1. We applaud OFCCP's decision in footnote 22 to require subcontractors to submit their own reports, and not have prime contractors be the gatekeepers or enforcers for the subs.
2. OFCCP needs to develop an electronic upload template, like the EEOC's EEO-1 upload template, if it wants to obtain this data electronically. It is not convenient to have to type in each number into a portal and doing that increases the likelihood of inadvertent mistakes in reporting. In comparison to 1995 – when this report was last required from construction employers doing business with the federal government – to now in 2024, construction employers want their HRIS or payroll system developers to design a report that will export collected data into an up-loadable format, and OFCCP should be on the forefront of enabling this efficiency to reduce the burden on employers and in turn reduce the costs that get passed along to taxpayers.

3. The instruction page indicates that OFCCP will be using a “secure, web-based platform” for the electronic submission of the CC-257. The NCAP portal, the OFCCP Contractor Portal, and KiteWorks are three very different “secure, web-based” portals that OFCCP uses, and OFCCP should be clearer about which portal it intends to use for the CC-257. NCAP enables users to access previously submitted notifications, which is useful, while KiteWorks removes all user uploads if the user does not access the system at least once a month to preserve access rights (frustrating). We would discourage OFCCP from using KiteWorks or the supply and service contractor certification portal for the upload of the CC-257. Either create a new portal like NCAP or add features to NCAP.
4. Once OFCCP develops the upload template, it should afford contractors and their HRIS system developers at least 6 months to configure the systems to export the data and upload their first report.
5. The obligation to submit reports should have a future effective date and be imposed on federal contracts and subcontracts bid on after a six-month implementation or preparation period, and not on current prime contractors and their subcontractors. It is unlikely that the cost of this reporting obligation was factored into many employers’ bids but will need to be factored into bids going forward.
6. The notion that OFCCP is proposing to collect data in 2024 on only two genders is disappointing. OFCCP should be leading by example and permitting non-binary gender reporting. The agency is using Forepersons in lieu of Foremen and Journey Workers instead of Journeymen, but it proposes to collect information only two genders. We appreciate that a gender-neutral job title label and gender identity self-identification are not the same thing, but there is a cultural hypocrisy to having one of the nation’s preeminent civil rights agencies ask about only two genders in 2024.
7. OFCCP’s statement that there are zero burden hours associated with this record keeping obligation is unfair. The systems used to keep track of the forepersons, journey workers, apprentices, and trainees by count and hours may not include the funding agency. Some employers are going to need time to set up these new reports or create custom reports because none of these data-recording systems currently are configured to export these fields. OFCCP hasn’t required submission of this information since 1995, nearly 30 years ago. Multiple systems are going to have to “talk” to each other to marry the contract numbers and the funding agencies to the projects, genders, races, hours, and employee classifications.
8. If OFCCP views that process of marrying the data from multiple systems as a “reporting burden” and not a “record keeping burden,” then it will certainly involve more than 1.5 hours per month to submit this information for each trade in each covered area. The inclusion of salaried exempt forepersons in a report that also includes hourly trades employees is going to be complicated to configure.
9. OFCCP estimates in footnote 37 that an average report will cover three SMSAs, which amounts to 7 pages per report. That estimate does not factor into account all the different trades within each SMSA. If the employer has 18 trades in 3 SMSAs, the report will be 13 pages per SMSA or 39 pages, not 7.
10. OFCCP should not mandate one single day per month for the report’s due date. Employers should be given a window of time in which to submit these reports. For example, giving employers 30 days in which to submit the data for the prior month would be very welcome. The same HR or Payroll employees who are going to end up submitting these monthly

reports are often the same employees who are dealing with multiple HR and payroll functions, particularly in smaller subcontractor environments. They are juggling a lot on their plates.

11. Insofar as the reporting period is concerned, the form itself seems to permit a more open-ended reporting cycle, while the instruction sheet states “monthly or as directed by OFCCP beginning with the effective date of the contract.” We urge OFCCP to give employers flexibility in setting the reporting period. Some employers are going to find it easier to report using a calendar month; others may find it easier to report by payroll period. Please do not impose reporting requirements commencing on a random date that OFCCP selects because construction employers already are struggling with that:
 - a. Federal direct contractors need to prepare AAPs for Section 503 and VEVRAA requirements on an annual basis, and they need applicant and hire data in which to prepare the .44(k) analyses and an end-of-the-year snapshot to compute their Section 503 utilization table. Most of our construction employers are querying for those reports on an annual cycle, typically calendar year.
 - b. When an audit scheduling letter arrives, however, the letter commands the employer to query applicant, hire, promotion and termination data using the arbitrary receipt date of the letter going back 12 months, which requires the employer to query its systems using dates that often are in the middle of a payroll period and don’t match the applicant and hire date in the .44(k) tables
 - c. Now, there is a possibility that OFCCP is going to impose yet another random-day-of-the-week or random-date-of-the-month for the CC-257.
 - d. It’s so burdensome to have all these competing multiple dates already; please do not add more. Give the employer some flexibility on the reporting cycle.
12. This data collection is not going to give OFCCP any lens into harassment or steering and asserting those as the basis for the need to reimpose the CC-257 data counts is disingenuous.
13. Requiring the submission of work hours will not ensure “that all forepersons are given equal opportunity to work hours and pay.” The report does not collect any pay data, and there are many factors that influence which forepersons in which trades are working on which projects each month. That ebb and flow cannot possibly be evaluated properly from this report, and the notion that OFCCP could select an employer for a compliance audit based on this information is troubling.
14. The submission should be configured for an e-signature or digital signature.
15. OFCCP should be clearer on the basis for the reporting obligation.
 - a. If an employer has a current federal or federally-assisted contract for \$10,000 or more and recorded hours on a federal direct project or federally-assisted project in the prior month, it has a reporting obligation for that month.
 - b. Projects stop and start for many different reasons. Just because the contract itself is unexpired does not mean that the subcontractor worked on it. If an employer did not record hours on any federal project in the prior month, it should have no reporting obligation.
 - c. How is OFCCP going to know which employers are required to submit reports, and which ones have no reporting obligations? The NCAP portal? OFCCP also needs to identify what, if any consequences, will arise for an employer that was obligated to submit this report but did not.

16. OFCCP should ensure that the instruction booklet is specific about what projects and hours must be counted in the submission, or it should develop a very detailed set of FAQs. If OFCCP intends for the employer to count people and hours working on all projects (private, residential, non-government), so long as the federal contract dollar threshold is triggering a reporting obligation, then OFCCP needs to say that clearly. There is an entire generation of payroll and HR personnel who are not going to remember the 1995 CC-257, and OFCCP should be clear about what gets counted and reported.
- a. If the employer has a federally-funded project only in SMSA #1, but it has operations in SMSA #2 and SMSA #3, does it report on federal, non-federal, private, and non-governmental projects only in SMSA #1? Or all three SMSA's?
17. If an employer submitted a report to OFCCP, and later discovers that its report contained errors, will there be a way to "un-report" an already-submitted report and re-upload a corrected report? What are the consequences to the employer if it can't correct a report it knows contains past errors? For example, the employer certifies a report that lists two federal funding agencies, but it inadvertently omitted a third funding agency. Will it need to submit a correction? Will there be consequences for not correcting it?

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Thank you for the opportunity to comment on OFCCP's proposal to reimpose a CC-257 reporting requirement. Our construction clients would prefer that OFCCP abandon its proposal to reinstate it, but if OFCCP intends to press forward, we hope that our comments will enable OFCCP to minimize the burden.

Respectfully submitted,

Roffman Horvitz, PLC

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