

July 17, 2024

Via [www.reginfo.gov](http://www.reginfo.gov)

Office of Information and Regulatory Affairs  
Attn: OMB Desk Officer for DOL-OFCCP  
Office of Management and Budget  
725 17th Street NW  
Washington, DC 20503

Re: Comments of the Center for Workplace Compliance on the Office of Federal Contract Compliance Programs' (OFCCP) Proposed Changes to the Construction Scheduling Letter and Itemized Listing (OMB Control No. 1250-0001)

Dear OMB Desk Officer:

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), Construction Scheduling Letter, published in the *Federal Register* on June 17, 2024.<sup>1</sup>

OFCCP's proposal would significantly expand the Construction Scheduling Letter and Itemized Listing. While we disagree that the proposed expansion is necessary or appropriate, if OFCCP moves forward with its proposal, it is incumbent on the agency to provide a more realistic estimate of burdens associated with the proposal. OMB should not approve OFCCP's proposal until such estimates are submitted.

### Statement of Interest

Founded in 1976, the Center for Workplace Compliance (CWC)<sup>2</sup> 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.

---

<sup>1</sup> 89 Fed. Reg. 51372 (June 17, 2024).

<sup>2</sup> Formerly the Equal Employment Advisory Council (EEAC).

## Background

OFCCP's regulations distinguish between "construction contractors" and "supply-and-service contractors," considering the fluid and temporary nature of construction projects.<sup>3</sup> 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.<sup>4</sup>

OFCCP requires all covered federal construction contractors – whether they have direct or federally assisted contracts – to refrain from discrimination because 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.<sup>5</sup> Construction contractors with direct federal contracts also must 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).<sup>6</sup>

## OFCCP Proposes Expanding the Construction Scheduling Letter

OFCCP initiates a compliance evaluation by sending a Scheduling Letter and Itemized Listing to the construction contractor. The contractor generally has 30 days after receiving the letter to submit the requested data. In addition to retaining the Scheduling Letter's existing requirements, the agency proposes federal construction contractors provide the following information:

- Start and end dates (or anticipated end date) of each project (E.O. 11246 Item 1).
- Payroll data for each trade employee's overtime rate of pay, total overtime pay, bonus or "other" pay, and time period for pay and work hours in all sub-items (E.O. 11246 Item 2).
- Employment activity data for all applicants, hires, promotions, layoffs, recalls, and terminations, "incidental" to actual construction (E.O. 11246 Item 3).<sup>7</sup>
- "Reason for layoff" and additional layoff information (E.O. 11246 Item 3).
- "[A]ntiharassment policies, policies on EEO complaint procedures, policies on employment agreements impacting employees' equal opportunity rights and complaint processes (*e.g.*, policies on arbitration agreements), and any other EEO policies" (E.O. 11246 Item 4).
- List of pre-apprenticeship programs (E.O. 11246 Item 13).
- "All tests and selection procedures" in the hiring process, along with "evidence that these tests and procedures were validated where necessary" (E.O. 11246 Item 16).
- "Evidence" that the contractor "monitored personnel and employment related activities during the preceding year to ensure that seniority practices, job classifications, work assignments and other personnel practices did not have a discriminatory effect and that the EEO policy and the contractor's obligations were being carried out" (E.O. 11246 Item 17).

---

<sup>3</sup> 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.

<sup>4</sup> 41 C.F.R. §§ 60-1.3, 60-4.

<sup>5</sup> 41 C.F.R. §§ 60-4.3.

<sup>6</sup> 41 CFR §§ 60-300, 60-741. OFCCP maintains current thresholds for covered contractors at <https://www.dol.gov/ofccp/taguides/jurisdiction.htm>.

<sup>7</sup> This requirement is consistent with 41 C.F.R. 60-1.3, but new to Item 3.

- Description of “any impediments to equal employment opportunity, and any actions taken, including modifications made or new processes added, as a result of the assessment” of personnel processes (Section 503/VEVRAA Item 3).
- “Documentation of appropriate outreach and positive recruitment activities,” and their effectiveness (Section 503/VEVRAA Item 5).
- Criteria used to evaluate the total and individual effectiveness of outreach and positive recruitment activities (Section 503/VEVRAA Item 5).
- “[D]etailed documentation describing [the contractor’s] actions in implementing and identifying alternative efforts” if the outreach and positive recruitment activities were ineffective (Section 503/VEVRAA Item 5).
- “If any underutilization of individuals with disabilities is identified, provide a description of the steps taken to determine whether and where impediments to equal employment opportunity exist,” including “an assessment of personnel processes, the effectiveness of [the contractor’s] outreach and recruitment efforts (if different than Item 5), the results of [the contractor’s] affirmative action program audit, any other areas affecting the success of the affirmative action program, and a description of action-oriented programs developed and executed to correct any identified problem areas” (Section 503 Item 8).

We respectfully submit that it is neither necessary nor efficient for OFCCP to insist that federal construction contractors and subcontractors include in their initial desk audit submissions the full array of sensitive and confidential employment data proposed by OFCCP. While it may be administratively convenient for OFCCP to have all potentially relevant data in its files as an audit begins, administrative convenience is not the standard by which this information request should be evaluated. Necessity and practical utility in light of the estimated burdens and costs are the appropriate standards.<sup>8</sup> In other words, a proper assessment of OFCCP’s proposal cannot be made without an accurate burden estimate accounting for all *additional* requests for information enumerated above.

OFCCP estimates that construction contractors with direct federal contracts will spend 35.8 hours retrieving and submitting documentation in response to the proposed Scheduling Letter. The agency anticipates construction contractors with federally assisted contracts will spend just 19.7 hours. These estimates are unrealistic and do not account for the personnel required across industries who spend hours in collaboration, reviewing and completing documentation requested by OFCCP. Company lawyers, analysts, human resources personnel, and managers at every level are involved in this work.

### **OMB Should Not Approve the ICR Without a More Realistic Burden Estimate**

As summarized above, OFCCP has proposed a dramatic expansion of the information that federal construction contractors must submit in response to a Scheduling Letter and Itemized Listing. In many ways, this expansion is parallel to OFCCP’s expansion of its Scheduling Letter and Itemized Listing currently in use for supply and service contractors, which was approved by OMB on August 24, 2023.<sup>9</sup> CWC members have had eight months of experience with the new supply and service Scheduling Letter and Itemized Listing. This experience informs our comments about burden estimates in conjunction with the proposed changes to the Construction Scheduling Letter.

---

<sup>8</sup> 5 C.F.R. 1320.5(e).

<sup>9</sup> OMB Control No. 1250-0003.

In response to OFCCP's proposal, we submitted comments to OFCCP suggesting that the true burden was closer to 60-80 hours. For instance, we noted proposed Item 2 would require construction contractors to provide OFCCP with each employee's regular rate of pay, total regular pay, overtime hours worked in each trade, overtime rate of pay, total overtime pay, bonus or other pay, and time period covered for pay and work hours provided. Contractors do not provide the agency with any of this information in the current Construction Scheduling Letter. CWC assessed the practical impact of the proposed Item 2 on construction contractors. Based on experience with the new Supply and Service Scheduling Letter, which asks for similarly detailed payroll data, contractors know that collecting and disclosing payroll information is a lengthy process requiring the skills and contributions of employees across departments.

Yet, in its Supporting Statement, OFCCP simply replies, "contractors are already obligated to provide most of the information in this item pursuant to the currently approved scheduling letter." The agency fails to acknowledge that the *additional* information requested in Item 2 alone – overtime rate of pay, total overtime pay, bonuses or other pay, etc. for every employee – takes time and resources to collect and disclose beyond the time and resources required for the already approved Construction Scheduling Letter.

OFCCP then suggests that because the regulations require construction contractors to record the rate of pay for employees,<sup>10</sup> and "furnish all information and reports required by Executive Order 11246 of September 24, 1965, and of the rules, regulations, and orders of the Secretary of Labor" to OFCCP,<sup>11</sup> the burden estimate does not need to account for the time and resources spent collecting and disclosing a complete breakdown of all payroll data. We respectfully disagree.

Under the PRA, the time, effort, and resources required to comply with an ICR that would be "incurred by persons in the normal course of their activities (e.g. in compiling and maintaining business records) will be excluded from the 'burden' *if the agency demonstrates that the reporting, recordkeeping, or disclosure activities needed to comply are usual and customary.*"<sup>12</sup> Construction contractors are required to compile and maintain the rate of pay for employees.<sup>13</sup> However, a full breakdown the payroll data for each employee with overtime rate of pay, total overtime pay, and bonuses or "other pay," is not required by OFCCP's regulations or the current Scheduling Letter. Nor has the agency defined the limits or scope of what "other" pay must be submitted in response to the Scheduling Letter. Thus, OFCCP has not shown that "the reporting, recordkeeping, or disclosure activities needed to comply are usual and customary." To the extent that Item 2 is not usual and customary, Item 2 imposes a burden on construction contractors. This burden must be weighed against the ICR's utility.<sup>14</sup>

Other items in the proposed Construction Scheduling Letter that should have been considered in the burden calculation include all new items that ask for "evidence" or "documentation." For example, the proposed Item 17 asks for "evidence" that the contractor monitored personnel and employment related activities. Construction contractors must monitor personnel and employment related activities under 41 C.F.R. 60-4.3(a)(14). However, collecting and disclosing this information is not "usual and customary." There is *no written requirement* in the regulations, and no expectation, before now, that construction contractors record, collect, and submit "evidence" to OFCCP on personnel monitoring. The proposed Item 17 and other

---

<sup>10</sup> 41 C.F.R. 60-4.3(14).

<sup>11</sup> 41 C.F.R. 60-1.4(a)(6).

<sup>12</sup> 5 C.F.R. 1320.3 (b)(2). Emphasis added.

<sup>13</sup> 41 C.F.R. 60-4.3(14).

<sup>14</sup> 5 C.F.R. 1320.5(e).

July 17, 2024

Page 5 of 5

items increase the burden on construction contractors. OMB must consider this burden and compare it to the utility of the information requested.

Unfortunately, it appears that these concerns were not given proper consideration. While we are not suggesting that OFCCP has an obligation adopt our exact burden estimate, CWC member employers' experience responding to similar OFCCP requests should be given the proper evaluation under the Paperwork Reduction Act.

CWC members have spent considerable time and resources adjusting to the new supply and service Scheduling Letter, so it is with confidence that we say the burdens associated with the proposed Construction Scheduling Letter are vastly underestimated. After soliciting feedback from CWC members about their experiences with the Supply and Service Scheduling Letter, we estimate that federal construction contractors would spend approximately 60-80 hours, not 35.8 hours, retrieving and submitting documentation in response to the proposed Scheduling Letter. OMB should insist that OFCCP update its burden estimates to align with contractors' experiences.

## **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, reading "Gabrielle Lattery". The signature is written in a cursive, flowing style.

Gabrielle Lattery  
Counsel, Center for Workplace Compliance