

July 11, 2011

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

Ms. Debra A. Carr
Director, Division of Policy, Planning
and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Avenue, NW, Room C-3325
Washington, DC 20210

Re: Pre-Clearance Consultation Regarding Proposed Extension of Supply and
Service Information Collection Requirements, Control Number 1250-0003,
76 *Fed. Reg.* 27670 (May 12, 2011)

Dear Ms. Carr:

The Office of Federal Contract Compliance Programs (OFCCP) has solicited pre-clearance public comment on its intention to seek approval from the Office of Management and Budget (OMB) to revise the Compliance Evaluation Scheduling Letter and Itemized Listing used to initiate routine compliance evaluations of federal contractor and subcontractor affirmative action programs. The Equal Employment Advisory Council (EEAC) appreciates the opportunity to comment, and is pleased to provide our views on the proposed revisions.

EEAC's Interest in the Proposed Scheduling Letter Revisions

EEAC is a nationwide association of employers organized in 1976 to promote practical approaches to the implementation of affirmative action initiatives and the elimination of employment discrimination in the workplace. EEAC's members are committed firmly to the principles of affirmative action, nondiscrimination and equal employment opportunity as indispensable prerequisites to a fair and inclusive workplace. Our membership includes approximately 300 major U.S. corporations, nearly all of whom are covered federal contractors or subcontractors. As such, the procedures and methodologies utilized by OFCCP in conducting compliance evaluations are of great importance to EEAC's member companies.

EEAC's directors, officers and member representatives include many of industry's most experienced practitioners in complying with OFCCP's affirmative action and nondiscrimination requirements. Collectively, an estimated 1,500 to 2,500 compliance evaluations are conducted each year at EEAC member establishments. Some

of our member companies routinely manage in excess of 20 compliance evaluations each year. Given this volume, EEAC members over the years have developed a keen understanding and appreciation for the importance of objective and efficiently managed compliance evaluations as a precondition to implementation of effective corporate affirmative action programs. They also understand how compliance evaluations that are unnecessarily burdensome or not efficiently conducted can quickly erode internal management and non-management support for affirmative action initiatives.

OFCCP is proposing to expand the Itemized Listing of information required to be furnished by contractors to OFCCP at the outset of a compliance evaluation, particularly in the areas of compensation data and employment transactions (hires, promotions and terminations). In response to the May 12 *Federal Register* Notice, EEAC has evaluated the agency's proposed changes in terms of (1) their necessity for OFCCP's compliance and enforcement function, (2) their practical utility, and (3) the accuracy of the burden estimates.

Overview

OFCCP is proposing that federal contractors provide within 30 days of receipt of a Scheduling Letter initiating a compliance evaluation the following additional, new information:

- Employee-specific compensation data as of the most recent February 1 for all employees, ranging from the CEO to temporary and contract workers;
- Summary employment transaction data by job group and job title, broken out by gender and specific race and ethnic category;
- The actual pool of employees who applied or were considered for promotion;
- The actual pool of employees who were considered for termination, along with data on whether the termination was voluntary or involuntary;
- Copies of employment leave policies regarding accommodations for religious observances and practices; and
- Copies of VETS-100/VETS-100A Reports for the past three years.

When the scope of the new data requested by OFCCP is measured against the agency's estimates of contractor burden hours to produce it, it appears OFCCP's proposed changes are predicated upon two assumptions: (1) federal contractors and subcontractors have achieved a level of technological sophistication that enables them to generate an infinite variety of employment data instantly at the touch of a keystroke; and (2) in order to effectively carry out its enforcement responsibilities OFCCP must have access at the outset of a compliance evaluation to virtually every piece of employment data that *might* become relevant *in case* a compliance issue surfaces during the audit.

Neither of these assumptions is valid. OFCCP knows from past compliance evaluation experience that multiple electronic systems storing employment-related

information, mergers, acquisitions, system conversions, system upgrades, and user challenges all may inhibit a company's ability to generate desired employment data quickly. OFCCP thus cannot simply assume that technology will enable contractors to generate the new employment data with little or no time or cost burdens.

Nor is it necessary for effective enforcement for OFCCP to insist that federal contractors include in their initial desk audit submissions the full array of sensitive and confidential employment data that *might* at some point in the evaluation become relevant to a determination of compliance. It is entirely appropriate for the agency to solicit summary data at the outset of a compliance evaluation and then request additional, more detailed information when and if needed.

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 — in fact, necessity and practical utility in light of the estimated burdens and costs are the appropriate standards. For the reasons set forth below, EEAC believes that several of OFCCP's proposed changes are fundamentally inconsistent with the principles set forth by President Obama earlier this year in Executive Order 13563 on Improving Regulation and Regulatory Review. That Executive Order requires federal agencies to “use the best, most innovative and least burdensome tools for achieving regulatory ends” and to “tailor [their] regulations to impose the least burden on society.”

EEAC respectfully submits that the agency's proposal fails to meet these standards. The proposal places a disproportionate emphasis on requiring all covered federal contractors and subcontractors to routinely collect, maintain and submit to OFCCP upon 30 days' notice a wide range of personal, sensitive and commercially confidential employment information prior to any indication of a compliance-related need for it.

We now turn to the specifics of OFCCP's proposed revisions.

Scheduling Letters

EEAC does not have any concerns with respect to the proposed changes to either the standard supply and service Scheduling Letter or to the compliance check Scheduling Letter. Indeed, specifying in the standard Scheduling Letter itself the scope of compliance evaluation to be conducted — *i.e.*, establishment, functional unit, or corporate headquarters — is a welcome addition.

Itemized Listing

Item 11: Employment Transactions Data

OFCCP is proposing that the initial submission of applicant, hire, promotion and termination data be: (1) by job group and job title [rather than job group or job title], and (2) by individual race/ethnicity categories [rather than by minority/non-minority status]. The agency's estimated increase in burden per contractor for these changes is one hour — “given the widespread use of computer technology for Human Resources data entry and management.”

Here is a clear illustration of the first erroneous assumption underlying OFCCP's proposed changes — the assumption that federal contractors and subcontractors have achieved a level of technological sophistication that enables them to generate an infinite variety of employment data instantly. Given the significant number and variety of job titles existing in many EEAC member companies, extracting accurate data on applicants, hires, promotions and terminations by job title is an enormously challenging and time-consuming task. One EEAC member company estimates that it will take approximately 200 hours to convert its human resource information system to one capable of generating employment data at the level recommended by OFCCP.

In addition to the increased burden, EEAC also questions the practical utility of conducting minority-subgroup statistical analyses at the individual job title level. It is true that the Uniform Guidelines on Employee Selection Procedures contemplate such analyses. To its credit, however, OFCCP over the years has elected to conduct its initial statistical analyses for all minorities and non-minorities in the context of affirmative action plan job groups. Only in cases where “indicators” of adverse impact are found at the job group level have the more refined analyses been performed at the job title level.

The reason for this traditional two-step process is based on the notion of practical utility: the vast majority of job titles in most EEAC member companies are too small to support a valid statistical analysis.¹ Accordingly, analyses are first conducted in broader job groups before moving, when and if appropriate, to job titles. At the job title level small numbers may again dictate use of non-statistical “cohort” analyses in lieu of statistical analyses.

There is no practical utility from a compliance standpoint to insist upon collecting *in all cases* employment data that is too granular to be included in most selection rate statistical analyses. Thus, there is no reason to change a process that has worked satisfactorily for many years. Allowing submission of employment transactions data by job group or job title allows contractors to submit data appropriate for the structure of

¹ Statisticians generally agree that in order to be reliable, statistical analyses of selection rates require a minimum of 30 individuals in the overall candidate pool and a minimum of 5 candidates for each of the two groups being compared. While some job titles may satisfy these minimum threshold standards, most do not.

their job titles. If as the compliance evaluation unfolds it becomes appropriate to conduct more refined analyses by job title and/or minority subgroup, additional information addressed to the potential problem areas can be submitted at that time.

While the above comments are applicable equally to hires, promotions and terminations, there are additional issues raised by OFCCP's proposed changes that are unique to promotions and terminations. With respect to promotions, OFCCP wants contractors to submit the "actual pool of candidates who applied or were considered for promotion." OFCCP also is asking contractors to provide all definitions of the term "promotion" used by the company.

Depending upon a contractor's promotion system, the burden associated with this request could be enormous. One EEAC member company indicates that the identification of promotion pools would be a manual task entailing more than a 1,000 hours annually.

The real challenge is with regard to promotions that are "noncompetitive" in the sense that there are no formal "candidate pools." Such promotions are awarded to employees individually based upon their years of service, level of performance, and eligibility for a higher level of job responsibility. Since not all employees in a job group or job title are equally ready for such advancement, requiring contractors to review and submit information on all other individuals who could have been considered for noncompetitive promotions would be an enormously burdensome task.

With respect to terminations, requesting contractors to differentiate between voluntary and involuntary terminations "where available" should not be a problem. On the other hand, requiring contractors to identify the "actual pool of candidates who were considered for terminations by gender and race/ethnicity" could be a problem in many circumstances. EEAC members estimate that identifying pools for reductions-in-force or similar restructurings would take between 25 and 50 hours annually depending upon frequency.

Aside from the reductions-in-force, contractors generally do not have "pools" of candidates they consider for termination. If OFCCP is simply suggesting that in such cases the termination "pools" be deemed to be the incumbent job group population at the beginning of the AAP year, that information already is included in the affirmative action plan requested in paragraphs 1-6 of the Itemized Listing.

Item 12: Compensation Data

OFCCP is proposing that the requirements for desk-audit submission of compensation data be changed in three ways: (1) the *date* the compensation "snapshot" is taken, (2) the *range of employees* for whom compensation information must be provided, and (3) the *scope and detail* of the compensation data requested. Each one of these changes imposes additional recordkeeping challenges and burdens on contractors.

Yet, inexplicably, OFCCP estimates that the cumulative effect of these changes will be a net reduction of 3.36 hours in the time required by contractors to collect compensation data for desk audit submission. To the contrary, one EEAC member estimates that the new requirements actually will triple the time required to prepare the compensation data for desk audit review.

Snapshot Date

Currently, many EEAC members perform their annual AAP updates and compensation analyses simultaneously at the beginning of the AAP year utilizing the same workforce information. OFCCP now wants to require all contractors to submit compensation information as of the most recent February 1 regardless of the contractor's AAP year. With the exception of those few contractors that begin their AAPs on February 1, the new requirement will require that contractors run their workforce profiles and compensation data twice — once as part of the annual AAP update and again on February 1, thereby effectively doubling the current burden.

Employees Covered

OFCCP is proposing that compensation data be provided for all employees including, but not limited to, “full-time, part-time, contract, per diem or day labor [and] temporary” employees. This too represents a significant extension of current requirements. Contractors currently are instructed to determine employee totals for inclusion in their compensation data using the same method “as that used to determine employee totals in the organizational profile for the AAP.”

OFCCP's regulations do not define what constitutes an “employee” for purposes of inclusion in the organizational profile of contractors' AAPs. Many contractors exclude contract, per diem or day labor, and temporary workers from their AAPs because they are only working on the contractor's premises for a limited duration or set contract period, and are not subject to the contractor's personnel policies or compensation practices. Indeed, individual compensation for contract and temporary workers is often dictated by their employers, rather than the contractor.

The proposed change to “decouple” employee compensation coverage from the AAP organizational profile creates additional complexities and burdens in terms of extracting compensation data. Some EEAC members report that compensation information on contract and temporary employees often will be retained by their employer, or if retained by the contractor is retained in files separate and distinct from those used for regular employees. In addition, compensation on some categories of temporary employees and hourly workers are kept in a separate database because of differences in benefits.

Scope and Detail of Requested Data

Finally, OFCCP is proposing that contractors be required to submit for desk audit review not the high-level aggregate information mandated by current paragraph 11 of the Itemized Listing, but rather detailed employee-specific data including such sensitive and confidential information as base salaries and wage rates, bonuses, incentives, commissions, merit increases, locality pay, and overtime. The significance of this change to federal contractors cannot be overstated.

This proposed change illustrates the second erroneous assumption made by the agency that we described earlier — the assumption that in order to effectively carry out its enforcement responsibilities OFCCP must have access at the outset of a compliance evaluation to virtually every piece of employment (*e.g.*, compensation) data that *might* become relevant *in case* a compliance issue surfaces during the audit. At the outset of a compliance evaluation, there is no reason to assume that there exists a compensation compliance issue that warrants requesting such a comprehensive list of personal, confidential information for the entire workforce.

There is no question that potential discrimination in compensation on the basis of race, gender, disability, or covered veteran status is an appropriate area of inquiry for OFCCP during a compliance evaluation. Nor is there any question that at some point during the evaluation OFCCP may become entitled to access to sensitive company records necessary to conduct such an inquiry. The issue for EEAC members is not *whether* OFCCP is entitled to such access, but rather *when* OFCCP is entitled to such access, and on *what terms* such access shall be granted so as not to compromise unduly contractors' legitimate claims to confidentiality.

Compensation information can be highly sensitive. As one moves up the management ladder to the top of an organization, it becomes increasingly easy to associate compensation levels with specific jobs (and individuals), even in the absence of employee names. OFCCP's traditional willingness to code names, therefore, is of little comfort with respect to the compensation of a contractor's most valued employees. Disclosure of compensation information either externally to competitors, or internally to the workforce, can have significant adverse consequences. For this reason, compensation figures are among contractors' most sensitive employment information.

In paragraph 10 of the agency's justification statement — titled "Assurance of Confidentiality"— OFCCP in fact acknowledges that "much of the employment data that OFCCP collects as a result of the requirements within this activity is viewed by contractors who submit it as extremely sensitive." OFCCP then states, however, that the Labor Department's rules implementing FOIA protect contractors by permitting them to object to public disclosure of information and, if necessary, to seek administrative and judicial review of the agency's decision. But reliance upon the Labor Department's FOIA rules is not enough to assure nondisclosure because "Congress made clear both that the federal courts, and not the administrative agencies, are ultimately responsible for

construing the language of the FOIA ... and that agencies cannot alter the dictates of the Act by their own express or implied promises of confidentiality.” Public Citizen Health Research Group v. FDA, 704 F.2d 1280, 1287 (D.C. Cir. 1983).

EEAC believes that the appropriate balance between the interests of OFCCP and federal contractors with respect to compensation lies in the two-step evaluative process that OFCCP has utilized in the past in which aggregate information is furnished initially and additional detailed information is furnished on an as needed basis as the investigation proceeds.

Item 13: VEVRAA Support Data

OFCCP proposes adding a new paragraph 13 to the Itemized Listing, requiring the submission of VETS-100 and/or VETS-100A Reports for the last three years. In its justification statement, OFCCP states that since contactors already are required to file these Reports, there will be no additional burden for complying with the new requirement. While it is true that contractors must complete these forms, OFCCP’s proposal will create new recordkeeping obligations.

Specifically, the DOL’s Veterans’ Employment and Training Service, which is responsible for the VETS-100/100A forms, only requires contractors to keep VETS-100 forms for two years and VETS-100A forms for one year. Thus, under OFCCP’s proposal, contractors would need to retain their VETS-100/100A Reports for three years, rather than the two or one. Accordingly, there is an increase in the recordkeeping burden imposed by OFCCP that is not accounted for under OMB Control Number 1293-0005 that should be accounted for in this information collection request.

Item 8: Employment Leave Policies

Requiring the creation and/or submission of employment leave policies does add a new compliance burden. OFCCP estimates that it would take 2 hours to prepare a religious accommodation policy. Our members estimate that it would take approximately 20 hours to create, approve and publish a religious accommodation policy; an additional 15 hours to create related processes for such things as education and monitoring of accommodations; and 5 hours per year to maintain the policy on an ongoing basis. Notwithstanding these additional burdens, the new item 8 is not duplicative of any current requirement and EEAC does not object to its inclusion in the Itemized Listing.

Item 9: Collective Bargaining Agreements

OFCCP proposes to modify the phrase “other information” so as to extend beyond the current focus on employee mobility and promotion, to include “any other documents ... that implement, explain, or elaborate on the provisions of the collective bargaining agreement.” The justification statement indicates that the intent is to “clarify for contractors specific information requested.” No change in burden hours is contemplated.

This proposed change converts a narrowly-focused request for information pertaining to employee mobility and promotions into an open-ended request for all documents that are in any way related to implementation of the collective bargaining agreement. It is hard to agree that this is a “clarification,” much less one with no associated burdens.

EEAC recommends that only the collective bargaining agreement itself be required as part of the initial desk audit submission. If during the course of the evaluation specific provisions of the contract become relevant to a compliance issue (most typically the seniority and compensation provisions), additional documentation can be requested at that time.

Item 10: Goals Progress Reports

EEAC does not object to changing the time period for the goals progress reports from the preceding year to the “immediately” preceding year.

Conclusion

EEAC’s comments articulate the practical impact OFCCP’s proposed changes to the Scheduling Letter and Itemized Listing will have on federal contractors and subcontractors. We have described the operational impact the proposed changes are likely to have as well as the additional financial burden imposed. In addition, we have cautioned OFCCP against placing undue emphasis on technology as justification for unrealistically low burden cost estimates, and have questioned OFCCP’s assumption that effective enforcement is dependent upon having access to comprehensive employment data at the earliest stages of a compliance evaluation. EEAC believes that OFCCP has significantly underestimated the burdens the new requirements will place on contractors, and overestimated the benefits to be derived by the agency.

Moreover, the proposed changes to the scheduling letter and itemized listing do not exist in isolation. They are part of a more comprehensive OFCCP effort to update all of its enforcement regulations, including those protecting the rights of covered veterans. In addition to this comment letter, EEAC today is also filing written comments on OFCCP’s Notice of Proposed Rulemaking – Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans (RIN 1250-AA00). As our comments on that proposal point out, the excessive and unnecessary paperwork requirements/inadequate burden estimates inherent in the proposed scheduling letter changes also are reflected in the veterans AAP proposal.

In addition, it is reasonable to assume that OFCCP’s approach to regulatory reform reflected in the Scheduling Letter and covered veteran proposals is likely to carry over to the anticipated regulatory initiatives involving individuals with disabilities and women and minorities in the construction industry. EEAC believes that, taken

Ms. Debra A. Carr

July 11, 2011

Page 10

collectively, the new compliance responsibilities proposed for federal contractors and subcontractors will significantly undermine rather than further the objective of Executive Order 13563 to promote “economic growth, innovation, competitiveness and job creation.”

We appreciate the opportunity to make our views known at the pre-clearance stage, and would welcome any questions you may have.

Sincerely,

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

Jeffrey A. Norris
President

cc: Hon. Hilda L. Solis, U.S. Department of Labor
Seth D. Harris, U.S. Department of Labor
Jacob J. Lew, Office of Management and Budget
Cass R. Sunstein, Office of Management and Budget