

July 11, 2011

Submitted Electronically Via eRulemaking

Debra 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 N3422
Washington, DC 20210

Re: Comment Request for OFCCP's Proposed Changes to Scheduling and Compliance Check Letters

Dear Ms. Carr:

On behalf of the National Women's Law Center, which since 1972 has worked to expand the possibilities for women and girls in the areas of education and employment, family economic security, and health, we write to comment on the Office of Federal Contract Compliance Program's proposal to change its Scheduling and Compliance Check Letters. The Center strongly supports OFCCP's proposed changes to its information collection requirements, as these revisions will improve the agency's ability to gather data and detect and address discriminatory employment practices.

When Congress enacted Title VII in 1964, women working full time were paid approximately 59 percent of what men were paid.¹ Although great strides have been made, the wage gap persists and has remained largely stagnant over the last decade. The disparity between African-American and Hispanic women is even greater.² Women working full time are paid only 77 percent of the salaries paid to male full time workers.³ Even after controlling for factors considered to legitimately influence pay – including workers' qualifications, personal preferences, job responsibilities, occupation type, and industry – an unexplained earnings gap between men and women remains, some of which can be fairly attributed to discrimination.⁴

The recession and ongoing recovery underscore the need for robust protections against unlawful employment practices for women in the workplace. During the recovery, the

¹ U.S. Census Bureau, Historical Income Tables – People, tbl. P-40, *available at* <http://www.census.gov/hhes/www/income/data/historical/index.html>

² Office of Federal Contract Compliance Programs, *FY 2012 Congressional Budget Justification*, (“FY 2012”) at 20.

³ U.S. Census Bureau, Current Population Survey, Annual Social and Economic Supplement, tbl. PINC-05, parts 55 & 109, *available at* <http://www.census.gov/hhes/www/cpstables/032010/perinc/toc.htm> (calculations based on 2009 annual median earnings for all male and female full-time workers).

⁴ See Cheryl Travis et al., *Tracking the Gender Pay Gap: A Case Study*, 33 PSYCHOL. WOMEN Q. 410, 410-11 (2009) (citing studies).

unemployment rate for women has actually increased from 7.7% to 8.0%, while for men it has dropped from 9.8% to 8.9%.⁵ The unemployment rate as of May 2011 continued to be particularly acute for African American women (13.4%, up from 11.8% in July 2009) and single mothers (12.7%).⁶ Since more than one-fifth of the civilian labor force works for employers that contract with the federal government, OFCCP has tremendous responsibility and opportunity to help address barriers to workplace equality that have compounded women's struggles.

The proposed changes to OFCCP's Scheduling and Compliance Check Letters will enable the agency to identify instances of and indicators for discrimination that are either obscured or entirely undetectable under the current format. The Center therefore writes in support of OFCCP's request for documentation related to contractors' employment leave policies and further recommends that contractors be required to submit information on workplace policies relating to paid leave, including sick leave, pay secrecy and arbitration. The Center also supports OFCCP's request for more specific demographic data regarding applicants, hires, promotions and terminations, as well as actual applicant pools. Finally, the Center is pleased that OFCCP is now seeking more particularized and individualized compensation data on all workers and recommends that the submission of information regarding the factors contractors use to determine employee compensation be made mandatory. These revisions will enhance OFCCP's enforcement capabilities, allowing it to conduct more accurate and strategic reviews of contractor employment practices.

I. New Item 8: Employment Policies

A. Documentation on Employment Leave Policies Will Enable OFCCP to Identify Indicators of Discrimination That Might Otherwise Go Undetected.

Newly proposed Item 8 of the Itemized Listing would require contractors to submit copies of their employment leave policies, including policies related to implementing the Family Medical Leave Act and pregnancy leave. The Center strongly agrees that receipt of these policies would assist OFCCP in identifying indicators of discrimination within contractor organizations and is pleased with the addition of this item to the Itemized Listing. The Center recommends that OFCCP bolster this requirement by making explicit that paid leave policies, including sick leave, be among the employment leave policies a contractor must submit to the agency. Information about whether employees are allowed to use sick leave to care for sick children, for example, would be very helpful in determining whether a contractor's workplace supports equal employment opportunities for working mothers.

Although women now comprise nearly half of the U.S. labor force and women's employment has become increasingly important to the economic security of many families,

⁵ NWLC calculations from U.S. Dep't of Labor, Bureau of Labor Statistics, Labor Force Statistics from the Current Population Survey, Table A-1: Employment status of the civilian population by sex and age, seasonally adjusted, available at <http://bls.gov/ces/cesbtabs.htm> (last visited June 28, 2011).

⁶ NWLC calculations from *id.* at Table A-1: Employment status of the civilian population by sex and age, seasonally adjusted, Table A-3: Employment status of the Hispanic or Latino population by sex and age, not seasonally adjusted, and Table A-10: Selected Unemployment Indicators, seasonally adjusted.

women continue to be most families' primary caregivers.⁷ Consequently, women have encountered limited employment opportunities due to both real and presumed conflicts between work and family responsibilities. Notably, these conflicts tend to be felt most profoundly by lower-paid women workers, who are disproportionately women of color, as they are more likely to face inflexible employer policies.⁸ Weak, nonexistent, or inconsistently applied family leave policies can be a significant indicator of an employer that does not foster equal employment opportunities for women. OFCCP's request for such policies is therefore important as such information will enhance the agency's ability to identify potentially discriminatory workplaces.

To further these efforts, the Center suggests that OFCCP also require that employers provide demographic data – organized by race/ethnicity and sex – that shows the number of workers who actually utilize a contractor's leave policies. Whether use of a formal policy is actually discouraged can be a powerful indicator of a workplace that fails to provide equal opportunities for women.

B. OFCCP Should Also Require That Contractors Report on Policies Relating to Pay Secrecy and Arbitration.

In addition to employment leave policies, OFCCP should require that contractors report on both formal and informal policies relating to pay secrecy and on arbitration policies. Like the absence of leave policies, the presence of policies requiring pay secrecy and arbitration may indicate a work environment that cultivates discriminatory practices.

Nearly half of all workers nationally are either contractually forbidden or strongly discouraged from discussing their pay with their colleagues.⁹ These formal and informal policies discourage workers from gathering information that would suggest they have experienced wage discrimination and, consequently, undermine attempts to reduce the gender wage gap.¹⁰ In fact, evidence suggests that pay transparency would reduce the gender wage gap, since the gender wage gap for all full-time workers is 23%, while the gender wage gap in the federal government - where pay rates are transparent and publicly available - is only 11%.¹¹ The Center therefore recommends that OFCCP, in its effort to isolate potential indicators of discrimination and improve contractor compliance rates, also require that contractors submit information on their policies relating to pay secrecy.

Arbitration policies can also be indicators of discrimination, and review of such policies is particularly important in light of the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). That case involved a cell phone contract clause that waived consumers' right to class arbitration – a clause that was “unconscionable” and therefore unenforceable under California law. However, the Supreme Court held that the state law was preempted by the Federal Arbitration Act (FAA), so the contract could be enforced. That

⁷ EQUAL EMPLOYMENT OPPORTUNITY COMM'N, Enforcement Guidance: *Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 23, 2007) available at <http://www.eeoc.gov/policy/docs/caregiving.html>.

⁸ *Id.*

⁹ Institute for Women's Policy Research, Fact Sheet, June 2011 available at <http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination>.

¹⁰ *Id.*

¹¹ *Id.*

holding could also allow companies to require employees to sign agreements that waive their right to class arbitration. OFCCP enforcement efforts are crucial where contractors have required their employees to give up their right to join together to sue not only under the civil rights laws, but also under their arbitration agreements.

II. New Item 11: Applicant, Hire, Promotion and Termination Data

A. Specific Demographic Information Related to Applicants, Hires, Promotions and Terminations Is Integral to OFCCP's Ability to Conduct Accurate and Useful Analyses.

OFCCP's newly proposed Item 11 requires that contractors provide more detailed applicant, hire, promotion and termination data arranged by gender and specific race or ethnicity group, instead of by the more ambiguous categories of minority and non-minority. Specifically, this data is to be submitted by job group *and* job title (instead of job group *or* job title) and should specifically provide the number of African American/Black, Asian/Pacific Islander, Hispanic, American Indian/Native Alaskan and White and the number of female and male applicants, hires, promotions and terminations. Requiring contractors to submit data by job group and job title, rather than by one or the other, will enable OFCCP to identify similarly situated employees with the same job title or within the same job group. In some cases, comparisons within job group may be appropriate, while in other cases comparing employees with the same job title may yield more useful information. The Center therefore supports this revision.

The Center also commends OFCCP for recognizing the importance of gaining access to more detailed demographic information in its enforcement efforts. This information will help the agency conduct more accurate analyses of contractors' compliance with their nondiscrimination and affirmative action obligations. In particular, the proposed categorical breakdown will allow OFCCP to identify discriminatory trends that could not be identified when data was arranged simply by minority/non-minority. For example, OFCCP recently noted that the pay gap among African-American and Hispanic women and men is even greater than that between women and men in general.¹² If all minorities are grouped together into one data set, this particular discriminatory trend, if present in a contractor's workplace, will not be identifiable, hampering OFCCP's ability to carry out its responsibilities under EO 11246.

B. Information on the Actual Pool of Candidates Considered for Hire, Promotions, and Terminations Would Allow OFCCP to Identify Potentially Discriminatory Decision-Making that May Otherwise Go Undetected.

OFCCP is also proposing a revision to current Item 10 that would require contractors to include actual pool data, arranged by gender and race/ethnicity, for those candidates considered for hire, promotion and termination. The Center supports this revision.

Applicant pool data has long been used to flag potentially discriminatory decision-making in a workplace and the demographic makeup of an applicant pool contains valuable

¹² FY 2012, at 20.

information as to whether a contractor may be discriminating in its hiring, firing or promotion decisions. Even where applicant pool data does not suggest discrimination in hiring or firing, the data can still be useful in isolating other kinds of discriminatory employment practices. The homogenous makeup of an applicant pool may itself indicate that some other form of discriminatory practice is occurring. As the Supreme Court suggested in *Dothard v. Rawlinson*, 433 U.S. 321, 330 (1977), a homogenous applicant pool may indicate that there is some discriminatory standard or process occurring in the workplace that discourages a certain demographic from even applying.

Thus, applicant pool data can be an extremely useful analytical tool for OFCCP in its efforts to identify potentially discriminatory employment practices in a contractor workplace and may uncover discriminatory practices that would otherwise have remained undetected.

III. New Item 12: Compensation Data

A. Access to Disaggregated Compensation Data Would Allow OFCCP to Conduct Better Informed Assessments of Contractors' Compliance with EO 11246.

OFCCP is proposing a revision to current Item 11, proposed Item 12, which would require contractors to supply compensation data on each individual employee rather than data that is aggregated by race/ethnicity and gender. The Center strongly supports this request for disaggregated data as it would provide OFCCP with access to detailed information about potentially discriminatory practices – systematic and individualized– that is otherwise concealed when data is delivered in an aggregated format. In addition, this proposed requirement would not be burdensome to contractors; indeed it would relieve them of the task of aggregating the data themselves.

In the process of aggregating their compensation data, contractors make critical labeling and grouping decisions that may conceal valuable information about their compensation systems. Thus, in some cases contractor aggregation may undermine OFCCP's ability to carry out the function most central to its enforcement responsibilities – data collection and analysis. It also leaves open the opportunity for contractors to manipulate their data in order to conceal discriminatory practices.

Finally, aggregated data may not allow OFCCP to use its review processes to “focus on individual cases of discrimination, including harassment, retaliation, termination and failure to promote.”¹³ Aggregation of data thwarts this goal by obscuring details that would allow OFCCP to pinpoint individual discrimination.

B. More Detailed Compensation Data Would Provide OFCCP a Clearer Picture of a Contractor's Potentially Discriminatory Compensation System.

¹³ Office of Federal Contract Compliance Programs, *FY 2011 Congressional Budget Justification*, (“FY 2011”) at 15-16.

Under the current Scheduling Letter, contractors are only required to submit annualized total compensation data on employees by salary range, rate, grade or level. But this data does not provide OFFCP with a full picture of how employees are actually being compensated in a given workplace. The Center therefore applauds OFCCP for its revision of this item to make clear that compensation data must now include not only base salary, wage rate, and hours worked, but also other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay and overtime.

This new information will give OFCCP a more detailed understanding of how and why employees of federal contractors are being compensated, sharpening its ability to identify indicators of discrimination. Data that does not account for the various forms compensation can take is simply too limited to allow OFCCP to conduct an accurate analysis of a contractor's compensation system. For example, data relating to bonuses can be critical to identifying potentially discriminatory compensation practices in a workplace. A 2008 survey by the National Association of Women Lawyers found that on average, women earn \$7,000 less in annual pay than men at the associate level, even with a lockstep compensation system (a system in which all law school graduates who graduated in the same year receive the same base pay, regardless of the background, experience, or ability of each).¹⁴ Discretionary bonus policies were identified as a culprit in creating this significant gap, since base salaries themselves did not indicate that there was any difference in compensation between men and women.¹⁵

C. Submission of Data on the Factors Used by a Contractor to Determine Employee Compensation Should be Made Mandatory.

In requiring more particularized compensation data for employees in new Item 12, OFCCP has also provided that a contractor “may provide additional data on factors used to determine employee compensation, such as education, past experience, duty location, performance ratings, department or function, and salary level/band/range/grade.” The Center urges OFCCP to make submission of this data mandatory, since information as to why employees are being rewarded or demoted can be a powerful indicator of whether or not employment decisions in a given workplace are discriminatory. It is often details about the factors employers use to make compensation decisions that reveal both conscious and unconscious discrimination. Access to this valuable information at the outset of OFCCP's analysis can also allow contractors to provide legitimate explanations for what might otherwise appear to be questionable disparities.

D. Compensation Information for All Employees, Including Full-time, Part-time, Contract, Per Diem or Day Labor and Temporary Workers Ensures that Workers are Properly Classified and Receive Appropriate Protections and Benefits.

¹⁴National Association of Women Lawyers, Report of the Third Annual National Survey on Retention and Promotion of Women in Law Firms, (November, 2008) *available at* http://nawl.timberlakepublishing.com/files/2008_Survey_Report_FINAL_as%20of%2011-10-08.pdf

¹⁵ See, e.g., Anna T. Collins, *The Wage Gap Puzzle in the Legal Profession: Why Women Lawyers Still Earn Less Than Men & What Can be Done About It*, theglasshammer.com, (February 5, 2009) *available at* <http://www.theglasshammer.com/news/2009/02/05/the-wage-gap-puzzle-in-the-legal-profession-why-women-lawyers-still-earn-less-than-men-what-can-be-done-about-it/>

The Center is pleased that OFCCP has proposed a revision to new Item 12 that would require contractors to provide compensation information on *all* employees. OFCCP has rightly recognized that misclassification of workers as independent contractors has become a pervasive problem in its efforts to enforce EO 11246.¹⁶ First, workers who are misclassified as independent contractors “do not receive the protections and benefits to which they are entitled, including protections under the nation’s civil rights law.”¹⁷ Furthermore, federal contractors may misclassify their workers in order to mask discriminatory employment practices, hindering OFCCP’s investigative and enforcement capabilities.¹⁸ This revision is therefore necessary if OFCCP is to ensure that federal contractors are complying with their contractual obligations under EO 11246. In keeping with this goal, the Center suggests that OFCCP make clear that contractors are required to provide information on all workers by changing the term “employee(s)” found in Item 12 to “worker(s).” This revision will clarify that a contractor’s own (mis)classification of a given worker as an independent contractor does not excuse it from providing OFCCP with compensation data on that worker.

Requiring contractors to include temporary and part-time employees in their affirmative action plan data is particularly vital to the agency’s efforts to combat gender discrimination. Ensuring equal treatment of part-time and temporary workers is critical to combating gender inequity in the workforce, since over two thirds of American workers working part-time are women, and over one quarter of all women working are working part-time.¹⁹

IV. The New Compliance Check Letter Is a Valuable, But Limited Tool in OFFCP’s Enforcement Efforts.

Finally, the new Compliance Check Letter, which would provide contractors with the option to mail the requested information to the OFCCP within 30 days, improves the utility of a valuable tool for OFCCP in its enforcement efforts. The Center supports OFCCP in its efforts to diversify its enforcement capabilities and maximize its resources. However, while we agree that a compliance check may reveal indicators of discrimination, it only allows for a quick review of a contractor’s compliance with record-keeping requirements and is no substitute for a more comprehensive review of its employment practices.

Nor is the new Compliance Check Letter a substitute for the compensation data collection tool currently on OFCCP’s regulatory agenda. The Center urges OFCCP to continue to develop and implement such a tool. Implementing an instrument specific to compensation data will enable OFCCP to more effectively identify pay disparities among federal contractors and identify those whose compensation practices warrant closer inspection.

* * * *

¹⁶ FY 2012, at 20.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ U.S. Department of Labor, US Bureau of Labor Statistics, Report 1025, at 39-41 (June 2010) *available at* <http://www.bls.gov/cps/cpswom2009.pdf>

In sum, we strongly support OFCCP's proposed revisions to the information collection requirements for the non-construction Supply and Service program, and believe that these changes will significantly aid OFCCP in identifying and addressing discrimination among federal contractors and subcontractors. We thank you for the opportunity to submit comments on this important issue. We would be happy to discuss our comments further or answer any questions you may have. Please contact Fatima Goss Graves at fgraves@nwlc.org or (202) 588-5180, for any questions.

Sincerely,

A handwritten signature in cursive script that reads "Fatima Goss Graves".

Fatima Goss Graves
Vice President for Education and Employment