



July 11, 2011

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, N.W., Room C-3325
Washington, D.C. 20210
Submitted via regulations.gov

Re: OMB Control No. 1250-0003
Comments in Support of OFCCP's Changes to Scheduling and Compliance Check Letters

Dear Ms. Carr:

The National Partnership for Women & Families appreciates this opportunity to comment on the Office of Federal Contract Compliance Programs' proposal to extend the Office of Management and Budget's approval of the non-construction supply and service Information Collection.

We applaud OFCCP for revising its Scheduling Letter and Itemized Listing to gather more comprehensive and detailed information about contractors' personnel policies and hiring, promotion, termination, and compensation decisions. The Itemized Listing has not undergone significant change since 1999 and should be updated to reflect recent trends in personnel practices.

With jurisdiction over at least 26 million workers, comprising nearly one quarter of the civilian workforce, OFCCP plays a vital role in combating unlawful employment discrimination. The agency is responsible for enforcing Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act, which require federal contractors and subcontractors to ensure equal employment opportunity. The enhanced Information Collection will help OFCCP marshal the data it needs to effectively and efficiently root out discrimination in the supply and service contractor community.

The revised Itemized Listing will bolster OFCCP's efforts to combat pay discrimination by requesting additional compensation data. In recent years, OFCCP has redoubled its efforts to root out pay discrimination among federal contractors. The new item 12 in the Itemized Listing (current item 11) will aid OFCCP in these efforts. The new item requires contractors to provide individualized compensation data for each employee, rather than collective compensation data for each sex and racial/ethnic group. With the aid of individualized, employee-level data, OFCCP will be better able to pinpoint pay disparities.

The new item 12 also requires contractors to submit documentation and policies that explain the factors affecting compensation levels. This documentation will assist OFCCP in determining

whether pay disparities are attributable to unlawful discrimination or legitimate considerations such as education and experience. Additionally, redefining “compensation” to include base salary, wage rate, bonuses, incentives, commissions, merit increases, locality pay, and overtime will ensure that all possible forms of employee remuneration are taken into account when OFCCP assesses a contractor’s compensation practices.

In addition to this documentation, we recommend that OFCCP require contractors to submit any policies relating to employee communications about compensation. Pay secrecy policies make it difficult for workers to discover and challenge compensation discrimination on their own, and thus can perpetuate unlawful pay discrimination. Therefore, where such policies exist, OFCCP’s role in enforcing equal pay requirements becomes all the more important.

In addition to augmenting the request for compensation data in the Itemized Listing, OFCCP should implement a separate compensation data collection tool. OFCCP has announced plans to develop a web-based compensation data collection tool that would collect compensation data from 70,000 to 110,000 contractors. We urge the agency to see these plans to fruition as quickly as possible. OFCCP traditionally has used a variety of investigative tools to identify compensation discrimination, which can manifest in complex, nuanced ways. A compensation data collection instrument would complement the enhanced request for compensation data at the desk audit phase and give OFCCP the flexibility to choose the tool or combination of tools appropriate in a given case. The data collected will enable OFCCP to detect indicators of pay discrimination and thereby streamline its enforcement efforts.

By requiring copies of leave policies, the revised Itemized Listing will facilitate the detection of sex, disability, and religious discrimination. The new item 8 in the Itemized Listing would require contractors to submit copies of their employment leave policies, including those related to the Family and Medical Leave Act, pregnancy leave, and accommodations for religious observances and practices. Analysis of leave policies would help OFCCP detect and remedy discrimination on the basis of sex, religion, and disability. Because FMLA leave sometimes overlaps with Executive Order 11246 requirements concerning leave for pregnancy and pregnancy-related conditions, FMLA leave and pregnancy leave policies may be relevant to an investigation of unlawful sex discrimination. In some circumstances, Executive Order 11246 may require contractors to provide leave for religious reasons. Employees may also need leave as an accommodation for a disability, and inflexible leave policies may run afoul of the Rehabilitation Act.

OFCCP should require contractors to provide arbitration provisions. Arbitration provisions should be included among a request for key personnel policies. Earlier this year, in *AT&T Mobility v. Concepcion*, the Supreme Court decided that federal law requires courts to enforce arbitration agreements containing class action waivers. These agreements are already common in the employment context and will likely proliferate in the wake of the *Concepcion* ruling. Therefore, millions of employees of federal contractors may be forced to sign away their rights to challenge systemic employment discrimination. Where such policies are in place and evidence of systemic discrimination exists, OFCCP has a heightened responsibility to step in to obtain systemic relief for workers who cannot vindicate their own rights.

Requesting data on personnel decisions by job title, job group, and racial/ethnic group will enhance the accuracy of OFCCP analyses. The new item 11 in the Itemized Listing (current item 10) would require contractors to submit data related to applications, hires, promotions, and terminations by job group *and* job title, rather than one or the other. OFCCP will be able to more accurately determine whether employees are similarly-situated and adapt its methodology to suit the facts of a particular case. Collecting more thorough data will provide OFCCP with the flexibility to compare employees either in a specific position or across a job group, as the facts of the case require.

The new item 11 also asks contractors to provide data by specific racial and ethnic group; this more refined request marks an improvement over the ambiguous “minority” and “non-minority” terminology currently in use. Simply comparing all minority applicants and employees to all non-minority applicants and employees does not reveal whether individuals of a particular race or ethnicity are experiencing discrimination. By requiring more precise data in this respect, OFCCP can ascertain whether contractors are in fact providing equal opportunities to members of all racial and ethnic groups, as the law requires.

The revised Itemized Listing will conserve OFCCP’s resources by enabling more strategic enforcement and encouraging contractors to self-evaluate and self-correct. As a general matter, an augmented request for information at the desk audit phase will allow OFCCP to determine which cases are appropriate for further investigation and enforcement. The agency can identify potential compliance issues early on and strategically focus its auditing and enforcement efforts on those contractors most likely to be violating the law. Furthermore, if contractors are required to provide a comprehensive set of data in the initial stage of an investigation, they may become aware of problematic practices and modify their practices voluntarily. This could obviate the need for an on-site review, thus decreasing the burden on both high-road contractors and OFCCP.

Thank you for this opportunity to provide comments. We strongly support the proposed revisions to the Information Collection and believe that this action will significantly advance OFCCP’s mission and enforcement goals. As a next step, we urge OFCCP to swiftly develop a new compensation data collection tool that will further strengthen efforts to combat discrimination.

If you have any questions regarding these recommendations, please contact Sarah Crawford, Director of Workplace Fairness at the National Partnership for Women & Families, at scrawford@nationalpartnership.org or 202-986-2600.

Sincerely,

National Partnership for Women & Families