

October 25, 2016

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

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, DC 20210

**Re: Comments of the Equal Employment Advisory Council on the Office of  
Federal Contract Compliance Programs' Rehabilitation Act and VEVRAA  
Information Collection Requirements (OMB Control Numbers 1250-0004 and  
1250-0005)**

Dear Ms. Carr:

The Equal Employment Advisory Council ("EEAC") respectfully submits these comments in response to the Office of Federal Contract Compliance Programs' ("OFCCP" or "the agency") Paperwork Reduction Act ("PRA") pre-clearance consultation for the information collection requirements ("ICR") under Section 503 of the Rehabilitation Act of 1973 ("Section 503"), as amended, and Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("Section 4212" or "VEVRAA"), as amended, notice of which was published in the *Federal Register* on August 26, 2016. 81 Fed. Reg. 58964.

These ICRs cover the recordkeeping and reporting obligations imposed upon federal contractors subject to the equal employment opportunity ("EEO") and affirmative action ("AA") obligations found in OFCCP's regulations codified at 41 C.F.R. §§ 60-300 and 60-741, excepting the annual veterans reporting requirement (commonly referred to as the "VETS-4212 report").

EEAC appreciates OFCCP's willingness to listen to contractor concerns and implement practical solutions to contractors' compliance challenges. With that in mind, and as discussed in more detail below, EEAC recommends two specific changes to help minimize contractor burdens while still achieving the agency's goals for these ICRs.

Specifically, EEAC recommends that OFCCP provide additional guidance, perhaps in the form of new frequently asked questions ("FAQs"): (1) to clarify that the eight "Data Collection Analysis" items under the applicable regulations can be collected using the common sense definitions contractors already utilize under Executive Order ("E.O.") 11246; and (2) to clarify that contractors have the option of requiring applicants and employees to

complete the Form CC-305, provided that they still can “opt out” by selecting “I don’t wish to answer.”

### Statement of Interest

EEAC is the nation’s largest nonprofit association of major employers dedicated exclusively to the advancement of practical and effective programs to eliminate employment discrimination. Formed in 1976, EEAC’s membership includes approximately 270 of the nation’s largest private-sector corporations, who collectively employ more than 10 million workers in the United States alone. Nearly all EEAC member companies are subject to the nondiscrimination and affirmative action requirements of Executive Order 11246, the Rehabilitation Act of 1973, the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, and their implementing regulations. As major federal contractors and subcontractors, our members have a significant stake and interest in ensuring that OFCCP’s regulations and paperwork requirements, including those triggered by the agency’s Section 503 and Section 4212 regulations, efficiently and effectively accomplish their underlying policy objectives.

### Background

OFCCP finalized major revisions to its regulations implementing Section 503 and Section 4212 on September 24, 2013. The new regulations included a number of additional and revised recordkeeping and reporting requirements subject to the PRA. The current information collection under Section 503 was approved by the Office of Management and Budget (“OMB”) under Control Number 1250-0004, and the current information collection under Section 4212 was approved under Control Number 1250-0005. PRA approval for both information collection requirements is set to expire on January 31, 2017, and OFCCP is seeking comments on their renewal before formally requesting a PRA extension from OMB.

### General Recommendations

EEAC respectfully cautions OFCCP to consider carefully any potential changes to these ICRs that would impose additional obligations on federal contractors. This recommendation is particularly important because contractors already have invested heavily in systems upgrades and modifications to come into compliance with the agency’s revised regulations. Any additional upgrades and modifications to these systems will be expensive in both time and dollar costs.

In particular, should OFCCP propose any changes to its prescribed Form CC-305, EEAC recommends that such changes be *optional* rather than mandatory. For example, the agency currently provides contractors with the option of using either of two versions of Form CC-305 (not counting translations) that allow different methods for selecting a self-identification answer. For many contractors, this option has provided much needed flexibility and allowed for more efficient compliance.

Similarly, we believe that each of the recommendations discussed below can be implemented without additional cost and/or burden on the federal contractor community.

## Recommendations for Revisions to Data Collection Analysis Requirements

EEAC recommends that OFCCP issue guidance, perhaps in the form of FAQs, stating that contractors are permitted to define key terms such as “applicant” and “hire” consistently with the way they define those terms for Executive Order 11246 compliance purposes. OFCCP’s revised regulations implementing Section 503 and Section 4212 require qualifying federal contractors to collect, maintain for a three-year period, and report a total of eight unique data elements pertaining to disability and veteran hiring activity. Specifically, contractors are required to collect and report the total numbers of:

- 1) “Job openings;”
- 2) “Jobs filled;”
- 3) “Applicants” for all jobs;
- 4) “Applicants hired;”
- 5) Disabled<sup>1</sup> applicants;
- 6) Disabled hires;
- 7) Protected veteran<sup>2</sup> applicants; and
- 8) Protected veteran hires.

Key terms such as “job openings,” “jobs filled,” “applicants,” and “hired” are not defined in OFCCP’s regulations implementing Section 503 and Section 4212. Rather, the agency has provided sub-regulatory guidance in the form of “Frequently Asked Questions” available on-line.<sup>3</sup>

Without exception, our members have advised us that the definitions of key terms in OFCCP’s FAQs are confusing, and that they have struggled to understand how the resulting data could be useful for the stated purpose of evaluating the effectiveness of their disability and veteran outreach efforts.<sup>4</sup>

For instance, although a plain reading of the regulations would suggest that “jobs filled” is meant to represent the subset of “job openings” (openings that resulted in an actual “hire”), this is not the case according to OFCCP’s FAQs. Rather, the FAQs state “job openings” refers to the number of “individual positions advertised as open in a job vacancy announcement or requisition.” “Jobs filled,” however, is not limited to advertised positions, but instead refers to the much broader set of “jobs the company filled by any means, be it through a competitive process or non-competitively, e.g., through reassignment or merit promotion.”

---

<sup>1</sup> Note that EEAC uses the term “disabled” to mean applicants and/or employees who have self-identified as, or who are otherwise known to be, individuals with disabilities as defined under Section 503.

<sup>2</sup> Note that EEAC uses the term “protected veteran” to mean applicants and/or employees who have self-identified as belonging to one of the four defined categories of U.S. military veterans protected under Section 4212.

<sup>3</sup> Specifically, EEAC refers to numbers 1-3 under the heading, “Data Collection Analysis” in OFCCP’s “503 Final Rule FAQs” and “VEVRAA Final Rule FAQs” available at <https://www.dol.gov/ofccp/regs/compliance/faqs/offaqs.htm>.

<sup>4</sup> Note that EEAC does not use the term “protected veteran” here because to our knowledge there are no outreach or recruiting organizations that target just “protected veterans.” Therefore, contractors’ required outreach to protected veterans is more accurately described as simply “veteran outreach.”

Further, OFCCP's FAQs define "hired" in the context of Section 503 and Section 4212 as "applicants" (both internal and external candidates) who are "hired" through a "competitive process, including promotions." The perplexing use of a term in its own definition aside, these definitions are at odds with the way many contractors define the same terms for their analyses of employment transactions under OFCCP's E.O. 11246 regulations and the Uniform Guidelines on Employee Selection Procedures.

In July of 2015, EEAC participated in a "listening session" with OFCCP Director Patricia Shiu and senior OFCCP staff officials to discuss some of the more pressing issues contractors were then facing as they worked to come into compliance with OFCCP's revised Section 503 and Section 4212 regulations, including the confusing definitions of key "data collection analysis" terms. During this session, OFCCP officials explained to EEAC representatives that the definitions in the agency's FAQs were meant to convey that contractors have the flexibility to define the metrics in a way that "makes sense" and allows for "meaningful analysis" for each individual organization. For example, they indicated that if the company's usual hiring process includes a mix of internal and external recruiting and selections, then internal and external applicants and "hires" could be included in the metrics to better reflect the company's actual process.

EEAC subsequently requested that OFCCP update its FAQs to reflect this guidance. We renew this request now. We also respectfully recommend that OFCCP explicitly clarify that contractors are permitted to define terms such as "applicant" and "hire" consistently with the way they define those terms for Executive Order 11246 AAP purposes.

With regard to the "job openings" and "jobs filled" elements, simply allowing contractors to define these terms in the way that best fits each individual organization should suffice.

### Recommendations for Revisions to Form CC-305

EEAC also recommends that OFCCP issue guidance clarifying that contractors may, at their option, require individuals to complete Form CC-305. OFCCP's regulations collectively require covered contractors to invite applicants and employees to self-identify their sex, race/ethnicity, disability status, and protected veteran status. In broad terms, the requirements for these employer-initiated solicitations are essentially the same: the provision of self-identifying information must be voluntary; the information received by the employer must be kept confidential; and the data collected must be used only for purposes consistent with the underlying regulations. With regard to sex, race/ethnicity, and protected veteran self-identification, the content, wording, and format of forms or other documents used to solicit self-identification is left up to the individual contractor, so long as such documents meet certain requirements as outlined in OFCCP's regulations implementing Executive Order 11246 and Section 4212.

With regard to disability self-identification, however, OFCCP has prescribed specific language and formatting that must be used without alteration. Rather than enumerating the requirements in the regulations, however, OFCCP developed Form CC-305, "Voluntary Self-

Identification of Disability,” an OMB-approved government information collection instrument that cannot be altered. The inability of contractors to customize Form CC-305 to meet the needs and reflect the culture of their own organizations has proven frustrating for many of our members.

For example, several EEAC member companies report that applicants and employees are often confused by the list of conditions on the form. They have reported confusion on the part of users as to whether or not they should or must check “yes” if they have (or have had) one of the conditions listed. Similarly, users have interpreted the form the other way and not checked “yes” because their specific condition was *not* listed. With paper forms, users often interpret the list of conditions as a prompt to inappropriately provide specific information regarding their condition(s) by either circling one or more of the conditions listed or writing specific medical information on the form.

In addition, many contractors have been frustrated by the inability to require users to complete the form, especially in the online or electronic context. Many online systems are designed to progress the user through a series of screens or forms that must be completed before advancing to the next screen or form. Customization is required to allow the system to present a screen or form with data input fields that can be “skipped” by the user. These customizations have in many instances proven to be expensive and time-consuming and of little practical value.

Longstanding EEOC guidance on employer solicitations of disability self-identification under the Americans with Disabilities Act of 1990 (“ADA”) requires employers who invite applicants to self-identify to, among other things, “state clearly that *the information* is being requested on a voluntary basis” (emphasis added).<sup>5</sup> A plain reading of EEOC’s guidance indicates that providing information about one’s disability status, one way or the other, must be at the individual’s discretion.

Form CC-305 provides the user with three answer options: (1) “Yes, I have a disability (or previously had a disability);” (2) “No, I don’t have a disability;” and (3) “I don’t wish to answer.” Accordingly, as intended, users can complete the form without providing any information regarding their disability status. But Form CC-305 also inexplicably states that “Completing this form is voluntary,” thereby negating the purpose of the third answer option.<sup>6</sup>

EEAC respectfully recommends that OFCCP provide additional guidance that will allow employers to require users to complete the form. As previously noted, the “voluntary” nature of the form would still remain because individuals always have the option to select “I don’t wish to answer.”

Finally, EEAC recommends that OFCCP publish additional FAQs to clarify that contractors are explicitly permitted to pre-populate with previously collected information the

---

<sup>5</sup> See “Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations,” October 10, 1995, available at <https://www.eeoc.gov/policy/docs/preemp.html>.

<sup>6</sup> Note that OFCCP’s original proposed disability self-identification form stated, “Your submission of information is voluntary,” a more accurate description of this longstanding requirement.

Debra A. Carr  
October 25, 2016  
Page 6

“name” and “date” fields on electronic versions of Form CC-305 or exclude or de-activate these fields entirely. These fields are only necessary for paper forms and are frustrating for online users and system programmers.

### Conclusion

We appreciate the opportunity to make our views known to OFCCP, and would welcome any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Matt A. D. Nusbaum". The signature is stylized with a large, bold "M" and a long, sweeping horizontal line extending to the right.

Matt A. D. Nusbaum  
Senior Counsel and Director of  
OFCCP Compliance Policy