



December 28, 2015

VIA ELECTRONIC UPLOAD
FEDERAL RULEMAKING PORTAL

Debra A. Carr
Director
Division of Policy and Program Development
OFCCP
Room C-3325
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Letter of Comment of The OFCCP Institute on Proposed Renewal of
Information Collection Requirements (OFCCP-2015-0003-0001)

Dear Director Carr:

The OFCCP Institute (“The Institute”) submits the following Comment in response to the U.S. Department of Labor’s Office of Federal Contract Compliance Programs’ (“OFCCP” or the “Agency”) invitation for comments on its Proposed Renewal of Information Collection Requirements, published in the Federal Register on October 29, 2015. The renewal sets forth proposed changes to OFCCP’s Scheduling Letter and Itemized Listing.¹ The Institute appreciates the opportunity to provide our Comment.

Background on The OFCCP Institute

The Institute is a national nonprofit employer organization that assists and educates federal contractors and subcontractors (collectively “contractors”) in understanding and complying with their affirmative action and equal employment obligations. The Institute is not affiliated with the U.S. Department of Labor’s Office of Federal Contract Compliance Programs.

The Institute recognizes the responsibility of all employers, including contractors, to create a nondiscriminatory workplace. We applaud and support all efforts to make the workplace free from all forms of discrimination. To that end, we agree that OFCCP has a proper and important role in well-designed and effective enforcement efforts.

¹ See Scheduling Letter and Itemized Listing, Office of Management and Budget Control #1250-003 (October 29, 2015), available at <http://www.regulations.gov/#!documentDetail;D=OFCCP-2015-0003-0003>.

I. The OFCCP Should Clarify Its Intentions and Authority to Share Information Amongst Other Agencies and the Public

In its most recent proposed renewal of its Scheduling Letter, OFCCP has added the following paragraphs to the end of the letter, citing 41 CFR § 60-1.20(g) and the Freedom of Information Act, as amended, 5 U.S.C. § 552 (2009):

Please also be aware that OFCCP may use the information you provide during a compliance evaluation in an enforcement action and may share such information with other federal government agencies to promote interagency coordination and collaboration.

Finally, the public may seek disclosure of the information you provide during a compliance evaluation. In response, OFCCP will make any public disclosure consistent with the provisions of the Freedom of Information Act.²

In its Note to Reviewer,³ OFCCP provides the following explanation for the need of the additional language:

Of note for this clearance request, OFCCP inserted language into the Scheduling Letter to provide enhanced transparency to contractors about OFCCP sharing information with other federal government agencies to promote interagency enforcement of equal employment opportunity and related laws. This new language emphasizes OFCCP's regulatory mandate to refer some enforcement actions to DOJ as well as OFCCP's longstanding Memorandum of Understanding ["MOU"] with the EEOC. The new language also clarifies that OFCCP may use information collected during a compliance evaluation in an enforcement action.⁴

OFCCP currently has the authority to share contractors' information with EEOC, on the basis of the MOU, and with the Department of Justice, as provided in 41 CFR §60-1.26(c). This is a limited exception to contractors' Fourth Amendment protections for a limited purpose.⁵ The Institute is concerned that the proposed language seeks to expand OFCCP's ability to share and disclose information without appropriate legal authority.⁶ The rationale and intent of the proposed language is not fully explained and, as a result, the proposed language adds ambiguity to what was a settled matter. We believe that there can be no ambiguity when bed-rock Constitutional rights are at issue.

² *Id.* at 2.

³ *Note to Reviewer- Supporting Statement Supply and Service Program*, OMB No. 1250-003 (October 29, 2015) available at <http://www.regulations.gov/#!documentDetail;D=OFCCP-2015-0003-0002>.

⁴ *Id.* at 16.

⁵ *See* U.S. Const. IV (2013); *see also* 41 CFR §60-1.26 (c).

⁶ Section 207, Executive Order 11246- Equal Employment Opportunity, Office of Federal Contract Compliance Programs, U.S. Department of Labor available at <http://www.dol.gov/ofccp/regs/statutes/eo11246.htm>.

Federal contractors are currently required by Executive Order 11246 to provide information to the OFCCP, which is authorized then to share the information *only* with the EEOC and the DOJ.⁷ Unless agreed to by a contractor, the OFCCP cannot share information with other agencies without violating contractors' Fourth Amendment protections against the unauthorized collection of contractor information. The Institute does not agree that OFCCP can simply include a self-generated, unauthorized, overly broad statement and, thus, expand the Agency's authority to share collected information with any "other federal government agencies."⁸ We do not believe that a contractor can be deemed to have voluntarily consented to an expanded disclosure of information when the information at issue must be provided to the OFCCP *solely* for OFCCP's limited use as authorized by EO 11246.⁹

As a result, The Institute seeks clarification on whether the proposed statement in the Scheduling Letter is being added to inform contractors that the Agency intends to share information more broadly with other federal government agencies, in addition to EEOC and DOJ. Contractors have a right to know if the intent of OFCCP is to share contractor data and information with other agencies within the Department of Labor, with other agencies of the federal government, or even with agencies *outside* the federal government (*e.g.*, State agencies). If the intent is to share information solely with the EEOC and DOJ, as stated in the OFCCP's supporting statement,¹⁰ then the proposed language should be revised to state in relevant part that OFCCP "... may share such information with ~~other federal government agencies~~ the Equal Employment Opportunity Commission and the U.S. Department of Justice to promote interagency coordination and collaboration."

On the other hand, if OFCCP intends to share contractor information with any other federal or State agency, then such a sweeping expansion of the OFCCP's use of information collected from contractors must, at a minimum, be subject to formal rulemaking, with the changes codified in the substantive regulations governing the OFCCP's program, and not simply included in a letter initiating a compliance evaluation.¹¹ Notice and Comment are particularly required when, as in the proposed language, an ambiguous, expanded *public* disclosure of contractor information is contemplated.¹² The Institute is similarly concerned that the proposed language seeks to expand

⁷ *Id.*

⁸ See footnote 6, *supra*.

⁹ *Id.*

¹⁰ See *Note to Reviewer- Supporting Statement Supply and Service Program*, OMB No. 1250-003 (October 29, 2015) available at <http://www.regulations.gov/#!documentDetail;D=OFCCP-2015-0003-0002> at p.16.

¹¹ Executive Order 11246 does not authorize the broad sharing of contractor information by the OFCCP with other agencies. Only information involving labor organizations engaging in work under federal contracts may be shared with federal agencies for limited purposes involving possible violations of Titles VI and VII of Civil Rights Act of 1964 or federal law. In relevant part, EO 11246 states: "[t]he Secretary of Labor shall, in appropriate cases, notify the Equal Employment Opportunity Commission, the Department of Justice, or other appropriate Federal agencies whenever it has reason to believe that the practices of any *such labor organization or agency violate* Title VI or Title VII of the Civil Rights Act of 1964 or other provision of Federal law." EO 11246 Sec. 207. The limitations on the OFCCP's authority to share contractor information can be addressed if the OFCCP decides to address these matters through the comments addressing a proposed rulemaking.

¹² See footnote 1, *supra*.

OFCCP's authority to disclose information protected by FOIA.¹³ The Institute believes the agency's intent should be fully articulated.

Furthermore, if the OFCCP intends to share contractor data with any other federal and state agencies, The Institute respectfully requests that the OFCCP meet with all stakeholders to understand the concerns about the impact of the proposal to share information supplied by federal contractors with "other federal agencies." OFCCP could then use the feedback from the stakeholder meetings to develop an official directive that will be shared with the public. The directive should set forth in detail how, and under what circumstances, the information collected from contractors can be shared with other federal agencies.

As noted above, we do not believe federal contractors give up the right to protect and control access to their data just because they are obligated to submit the data to the OFCCP during the course of a compliance evaluation. Thus, it is The Institute's recommendation that the directive include a specific process for notifying contractors when the OFCCP intends to share information with other agencies as well as setting forth a mechanism for contractors to challenge the sharing of the information. Finally, this directive should specifically address data security and how the Agency intends to ensure that contractor data will remain secure if it is released to another agency. The current shortcomings in the federal government's ability to secure confidential information collected from employers were specifically raised by the National Academy of Sciences Report "Collecting Compensation Data from Employers," and corresponding recommendation.¹⁴ Until the OFCCP addresses the concerns identified by the National Academy of Sciences, the OFCCP's proposal to expand the number of federal agencies that may receive contractor information is, at a minimum, premature.

II. The OFCCP Should Remove the Additional Requirements Included in the Itemized Listing To Provide Data Every Six Months Because It Is Not Consistent with the Requirements Under Section 503 and VEVRA To Provide Annual Data.

1. Section 503

The current version of the Agency's Itemized Listing reflects obligations derived from OFCCP's recent revisions to Section 503 of the Rehabilitation Act ("Section 503") and the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA").

With respect to Section 503, Item 9 of the revised Itemized Listing requires contractors to provide documentation of the computations or comparisons described in 41 CFR §60-741.44(k) for the immediately preceding AAP year.¹⁵ The listing also requires contractors " **if you are six months or more into your current AAP year when you receive this listing, provide the**

¹³ 5 U.S.C. § 552(b) (6) (2009).

¹⁴ The National Academy of Sciences' Report: "Collecting Compensation Data from Employers" (August 15, 2012) available at https://download.nap.edu/catalog.php?record_id=13496.

¹⁵ See footnote 1, supra.

information for at least the first six months of the current AAP year.”¹⁶ (emphasis added). However, Section 741.44(k) requires analysis *only on an annual basis*.¹⁷ As a result, the obligation to provide six-month data is beyond the requirements of the regulations and is improperly included in the Itemized Listing.¹⁸ As a result, the collection and analysis of the additional six months of personnel activity data was not factored into the burden estimates of both the regulations and in the revised Itemized Listing, which does even address this issue.¹⁹

More specifically, in the Supporting Statement, the Agency stated, “OFCCP estimates that the assembling and submitting of the documentation of the computations and comparisons of employment activity described in 41 CDR 60-741.44(k) will take contractors **20 minutes**.”²⁰ (emphasis added). Clearly, this burden estimate does not take into account the significant amount of time necessary to query the required information out of the Applicant Tracking System “ATS” and Human Resource Information System “HRIS” nor does it take into account the time needed to prepare the required computations.

Similarly, Item 10 of the current Itemized Listing asks contractors to provide the utilization analysis for individuals with disabilities for the first six months of the current AAP year if a contractor is more than six months into its current AAP year at the time of scheduling of a compliance review.²¹ As is the case with a contractor’s obligations under 741.44(k), the revised Section 503 regulations addressing utilization, requires that contractors conduct utilization analyses on an annual basis.²² The collection and analysis of six months of this personnel activity data was also not factored into the burden estimates either of the regulations or in the revised Itemized Listing.

The fact that OFCCP did not take the additional six months analysis into account in determining the burden on contractors is clearly shown in the Agency’s 2014 Supporting Statement for the Scheduling Letter. In this previous Supporting Statement, the Agency stated that “OFCCP estimates that the assembling and submitting of the documentation of the utilization analysis evaluating the representation of individuals with disabilities described in 41 CFR 60-741.45 will take contractors **15 minutes**.”²³ (emphasis added). Clearly, this burden estimate does not take into account the significant amount of time needed to query the required information out of the HRIS nor does it take into account the time needed to prepare the required computations.

¹⁶ *Id.*

¹⁷ 41 C.F.R. §60-741.44(k) (March 2014).

¹⁸ See 41 C.F.R. §60-741.44(k) (March 2014); see also footnote 1, supra. at p.2.

¹⁹ See footnote 1, supra.

²⁰ Note to Reviewer, Scheduling Letter and Itemized Listing Supporting Statement Supply and Service Program, OMB No. 1250-0003 (September 11, 2014) at p.14.

²¹ *Scheduling Letter and Itemized Listing*, Office of Federal Contract Compliance Programs, U.S. Department of Labor available at https://www.dol.gov/ofccp/regs/compliance/faqs/SchedulingLetter_ItemizedListing_508c.pdf.

²² 41 C.F.R. §60-741.44(k) (March 2014).

²³ See footnote 22, supra.

As a result, like the requirement to provide interim 44(k) analytic data, the Agency's requirement for submission of six-month utilization analyses is improper and The Institute requests that should be removed from Items 9 & 10 of the Itemized Listing.²⁴

2. VEVRAA Requirements

The same circumstances discussed above in reference to Items 9 and 10 under Section 503 apply to Items 13 and 14 under VEVRAA. As with Items 9 and 10 of the Itemized Listing, with respect to Item 13, OFCCP estimates that the annual and six month collection and computation of this information will take contractors 20 minutes.²⁵ Further, Items 9 and 10 require that contractors provide an additional six months of data on their computations "pertaining to applicants and hires"²⁶ even though the regulations at 300.44(k) only require contractors to do this analysis on "an annual basis."²⁷ Similarly, Item 14 asks for documentation of the contractors' hiring benchmark not only "annually" as required by 60-300.45(b).²⁸ In addition, the Supporting Statement adds:

If you are six months or more into your current AAP year on the date you receive this listing, please also submit information that reflects current year results.

As it is with the improper requests under Section 503, OFCCP's request for this information pursuant to the revised VEVRAA regulations is misplaced.

As a result, The Institute recommends that OFCCP remove the six month reporting obligations in Items 13 and 14 to reflect the regulatory requirements of VEVRAA that contractors perform annual analyses.

Conclusion

As detailed above, The Institute recommends that OFCCP reassess the purpose of its proposed confidentiality language. Instead, the Agency should develop a regulation and a public directive based on input from its stakeholders to address the circumstances surrounding any contemplated data sharing outside of the OFCCP.

The Institute also recommends OFCCP revise Items 9, 10, 13 and 14 of the Itemized Listing to eliminate the requirement that contractors provide the Agency with six month update data so that it will be consistent with current regulatory requirements.

²⁴ *Id.*

²⁵ *Id.*

²⁶ See footnote 1, *supra.* at p. 5.

²⁷ 41 C.F.R 60-300.44(k) (2014).

²⁸ As stated in the Supporting Statement, OFCCP estimates that the annual and six month collection and computation of this information will take contractors 15 minutes. See footnote 22, *supra.*

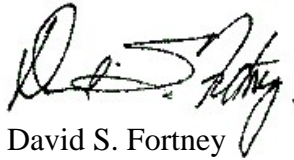
The Institute again thanks the OFCCP for this opportunity to comment on the proposed revisions to the Scheduling Letter and Itemized Listing and would be pleased to provide the OFCCP with any additional information or clarification it may require or request. We look forward to continuing to work with the OFCCP to effectuate the successful promulgation of regulations that are reasonable, enforceable, and efficient for both the Agency and the federal contractor community while achieving the goal of eliminating all forms of unlawful discrimination where it may exist.

Respectfully submitted,

By: The OFCCP Institute Co-Chairs (on behalf of
The OFCCP Institute)

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David B. Cohen

A handwritten signature in black ink, appearing to read 'D. S. Fortney'.

David S. Fortney

A handwritten signature in blue ink, appearing to read 'Mickey Silberman'.

Mickey Silberman