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Via Federal eRulemaking Portal: www.regulations.gov

Harvey D. Fort, Acting Director
Division of Policy 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: The Center for Workplace Compliance's Comments on the Office of Federal Contract Compliance Programs' Proposed Information Collection Request, "Construction Compliance Check Letters" (OFCCP-2019-0001)

Dear Mr. Fort:

The Center for Workplace Compliance (CWC) respectfully submits these comments in response to the U.S. Department of Labor's Office of Federal Contract Compliance Programs' (OFCCP) proposed information collection request (ICR) related to compliance evaluations of construction contractors, notice of which was published in the *Federal Register* on April 8, 2019. 84 Fed. Reg. 13,964.

OFCCP is proposing two new letters, which the agency would use to conduct a specific type of compliance evaluation known as a compliance check.¹ While we appreciate the agency's efforts to more efficiently conduct enforcement activities – including a move away from requiring full compliance reviews in every instance – we are concerned that as drafted, the proposed compliance check letters actually may deter federal contractors from agreeing to an off-site records review, which will only increase the burdens on both OFCCP and the contractor community.

Statement of Interest

CWC² is the nation's leading nonprofit association of employers dedicated exclusively to helping its member companies develop practical and effective programs for ensuring compliance with fair employment and other workplace requirements. Formed in 1976, CWC's membership includes over 200 major U.S. corporations, collectively providing employment to millions of workers. CWC's members are firmly committed to nondiscrimination and equal employment opportunity.

¹ One of the letters would enable OFCCP to conduct compliance checks with regard to contractors holding direct federal construction contracts, while the other letter would enable compliance checks with regard to contractors holding federally assisted construction contracts.

² Formerly the Equal Employment Advisory Council.

Nearly all of CWC's members are subject to the nondiscrimination and affirmative action requirements of Executive Order 11,246, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Section 503 of the Rehabilitation Act of 1973, and their implementing regulations. As major federal contractors and subcontractors, CWC's members have a significant stake and interest in ensuring that OFCCP's regulations and paperwork requirements, including those applicable to construction contractors, efficiently and effectively accomplish their underlying policy objectives.

Our recommendations below are designed to further refine OFCCP's proposed compliance check letters in a manner that will encourage voluntary compliance with OFCCP's regulations, while simultaneously reducing the burdens on both contractors and the agency.

Background and Overview

OFCCP's regulations implementing Executive Order 11,246 (E.O. 11,246), the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), and Section 503 of the Rehabilitation Act permit the agency to conduct several types of compliance evaluations to assess contractors' compliance.³ Among them is the "compliance check," which OFCCP can use to make a "determination of whether the contractor has maintained records consistent with" OFCCP's recordkeeping obligations.⁴ While the Office of Management and Budget (OMB) has previously approved a compliance check letter for use by OFCCP for supply and service compliance evaluations (OMB No. 1250-0003), until now there has been no corresponding instrument for construction compliance evaluations.

According to the Supporting Statement that accompanied this ICR, construction compliance checks are intended to "help contractors comply with OFCCP's Affirmative Action Program (AAP) and recordkeeping requirements." Furthermore, because "the scope of a compliance check is narrower than the scope of a compliance review," OFCCP will be able to "reach more contractors without increasing agency resources."

According to the proposed letters, during a construction compliance check, the agency would assess the extent to which a contractor has "maintained AAPs, affirmative action specifications, and required records," by requiring submission of the following records:

- Personnel records;
- Payroll records;
- Examples of job advertisements and postings; and
- Documentation of accommodation requests.

Construction contractors with so-called "direct" federal contracts would also be required to submit:

- Current AAP for individuals with disabilities;
- Current AAP for protected veterans;

³ 41 C.F.R. §§ 60-1.20, 60-300.60, and 60-741.60.

⁴ 41 C.F.R. §§ 60-1.12, 60-300.80, and 60-741.80.

- Data metrics for protected veterans and individuals with disabilities; and
- Documentation that the contractor adopted a hiring benchmark for protected veterans.

Summary of Recommendations

CWC supports OFCCP's stated goal of using the construction compliance check to reduce burdens while increasing the efficiency of the agency's compliance evaluations. CWC is concerned, however, that the letters as proposed will not serve either of those ends. We therefore recommend several changes to the letters that we believe will help the agency better reduce burdens on contractors and OFCCP, while still helping OFCCP to more readily identify those contractors that have failed to comply with their affirmative action obligations.

CWC's comments are heavily informed by the fact that OMB has already approved a compliance check letter for supply and service contractors that presents much lower burdens than the proposed construction compliance check letters. In fact, OFCCP's goals in conducting compliance checks should be the same regardless of the type of contract. We therefore recommend that the agency closely model the construction compliance check letters after the already-approved letter for supply and service contractors, by: (1) tightly focusing on records that reflect compliance with affirmative action obligations; and (2) simply asking for examples of these records.

The agency should also permit responding contractors to submit (off-site) paper records if that is the only way they are kept. The proposed letters require either submission of electronic documents or an onsite evaluation. However, because many construction contractors keep only paper copies of records, we think that requiring submission of electronic documents would increase the number of onsite evaluations that the agency must conduct, further burdening both contractors and OFCCP.

Finally, we propose other improvements to the text of the letter to add clarity and further reduce burdens, including: (1) specifying the timeframe for which the listed items will be requested; (2) removing the requirement that federally assisted construction contractors submit accommodation information (as they are not covered by Section 503); (3) and populating footnote 4 in the proposed letter for direct construction contractors (it is currently missing).

The Proposed Compliance Check Letters Are Too Burdensome and Will Deter Voluntary Compliance

OFCCP's supporting statement indicates that through the construction compliance checks, the agency aims to "help contractors comply with OFCCP's Affirmative Action Program (AAP) and recordkeeping requirements," while "impos[ing] a smaller contractor burden," and "reach[ing] more contractors without increasing agency resources." The agency explains that this will be possible because "the narrower scope of a compliance check carries less burden" than the traditional, "lengthier and more involved" compliance reviews to which construction contractors are currently subjected, and which the agency says it intends to replace in some instances with compliance checks.

CWC is concerned that the letters as proposed would actually increase burdens associated with the review of construction contractors, similar to those posed by the Scheduling Letter and Itemized Listing that OFCCP uses to conduct full compliance reviews of supply and service contractors. As such, we respectfully

submit that the proposed construction compliance check letters would not contribute to OFCCP's stated purposes of more efficiently using its enforcement resources while reducing burdens on both the agency and on contractors.

For example, OFCCP's Scheduling Letter and Itemized Listing requires supply and service contractors to compile and tabulate a large volume of data on, among other things, personnel transactions (hires, applicants, promotions, and terminations), compensation, and accommodations. *See* Items 18-20. Responding to these three items requires intensive data analysis and preparation, and typically represents the highest burden – by far – on contractors undergoing a full compliance review.

Yet, the proposed construction compliance check letters, which are supposedly “narrow” in scope, would essentially require these same three burdensome items. Indeed, during each compliance check, the proposed letters would require a contractor to analyze and prepare the following items, for perhaps dozens of sites at which the contractor may have performed work across the geographic area identified by the letter:

- “Personnel records” relating to “applicants, hires, promotions, layoffs, recalls, voluntary terminations, and involuntary terminations”;
- “Payroll records” consisting of “name or ID, gender, race/ethnicity, hire date, trade(s), total hours worked in each trade, overtime hours worked in each trade, wage rate(s) for each trade, apprenticeship status, and employment type (e.g., full-time, part-time, temporary, contract, per diem, day labor)”; and
- “Documentation of accommodation requests received and their resolution.”

These items effectively mirror items 18-20 from the OFCCP's Scheduling Letter and Itemized Listing. Rather than request the most burdensome items contractors must submit during full compliance reviews, CWC respectfully suggests that OFCCP instead adopt an approach more akin to the compliance check letter already approved for use by the agency for supply and service contractors.

The supply and service compliance check letter is a suitable model because it already does what OFCCP says it hopes the proposed construction compliance checks will do: dramatically scale back the burdens imposed by full compliance reviews. The approved compliance check letter requests three items (AAP results for the preceding year; *examples* of job advertisements and job listings sent to state employment services; and *examples* of accommodations made), none of which requires the submission of data. This is in sharp contrast to the 22 data-intensive items required during a full compliance review.

Thus, the supply and service compliance evaluation model as implemented by OFCCP in fact creates two distinct paths as envisioned by the regulations: compliance *reviews* involving “comprehensive analysis and evaluation[s],” and compliance *checks* focusing only on “whether the contractor has maintained records consistent with” OFCCP's recordkeeping requirements.⁵ We recommend that OFCCP implement this same model for construction compliance evaluations. Rather than requiring the submission of large volumes of

⁵ 41 C.F.R. §§ 60-1.20, 60-300.60, and 60-741.60.

transactional and compensation data associated with a full compliance review, the proposed construction compliance check letters should embrace a tight focus on examples of those records that would show that a contractor has in fact fulfilled its affirmative action obligations.

In short, as currently proposed, we believe that OFCCP's construction compliance check letters would result in contractor burdens closer to a full compliance review, undermining the narrower scope and lower burden that the agency says it intends to impose on contractors. Likewise, the proposed letters impose unnecessary burdens on OFCCP, as review of this voluminous information would require the agency to expend resources on par with those needed for a full compliance review, undercutting the agency's stated goal of using its enforcement resources more efficiently.

Additional Recommendations

In addition to the foregoing, we also suggest that OFCCP make the following modifications to the text of the letters:

- ***Permit submission of paper documentation.*** The proposed construction compliance check letters offer only two options for submitting responses: "the requested information must be submitted via email," or the contractor "may make the records available for on-site review." In other words, a contractor that does not have electronic records must submit to an onsite review.

Contractors are not required to maintain documents electronically. Indeed, because construction employers primarily operate from field sites that may lack computers and Internet connections, many have opted to keep at least some records exclusively on paper. We suggest that OFCCP make the following modification (in italics): "*for records that are maintained electronically, the requested information must be submitted via email to _____. Records that are maintained exclusively in paper may be mailed to the address listed at the top of this letter.*"

- ***Clarify the timeframe for which the listed items will be requested.*** OFCCP's proposed letters do not specify the timeframe for which the agency will request the listed items. Instead, both versions contain blanks to be filled in when a specific letter is drafted ("during the period of *(insert date)* through *(insert date)*").

At the very least, the letters should state in general terms the period for which the agency will request information. For example, the letters could be modified by inserting "during the prior year" in place of the existing line that reads, "during the period of *(insert date)* through *(insert date)*."

- ***Do not require submission of disability accommodation information by contractors with federally assisted contracts.*** In the proposed letter for contractors with federally assisted construction contracts, item 4 requests submission of "documentation of accommodation requests received and their resolution." Although OFCCP's regulations require all covered contractors to maintain "records having to do with requests for reasonable accommodation," 41 C.F.R. § 60-1.12, OFCCP does not have jurisdiction over federally assisted construction contractors with regard to individuals with disability, because these contractors are not subject to Section 503.

- **Populate footnote 4 in the proposed letter for contractors with direct contracts.** In the proposed letter for contractors with direct construction contracts, items 6, 7, and 8 are followed by references to footnote 4. However, the footnotes section at the bottom of the page does not contain a footnote 4. We request that OFCCP either include the proposed text of this footnote, or delete reference to it in items 6, 7, and 8.

Conclusion

CWC appreciates the opportunity to offer these comments regarding OFCCP's Proposed Construction Compliance Check Letters. Please do not hesitate to contact us if we can provide further assistance as you consider these important issues.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Annand', written in a cursive style.

John Annand
Senior Counsel
Center for Workplace Compliance