

December 2, 2019

Via Federal eRulemaking Portal: www.regulations.gov

Harvey D. Fort, Deputy 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: Comments of the Center for Workplace Compliance on the Office of Federal Contract Compliance Programs' Revisions to VEVRAA and Section 503 Information Collection Requests (OMB Control Nos. 1250-0004 and 1250-0005)

Dear Mr. Fort:

The Center for Workplace Compliance (CWC) respectfully submits these comments in response to the U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs' (OFCCP) proposed information collection requests (ICRs) regarding revisions to the recordkeeping requirements imposed on federal contractors under Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) and Section 503 of the Rehabilitation Act of 1973 (Section 503), notice of which was published in the *Federal Register* on October 3, 2019.¹

OFCCP is proposing a handful of minor changes to the agency's prescribed form for collecting disability self-identification data from applicants and employees, formally known as "Form CC-305," and specifically seeks "suggestions from stakeholders regarding alternate or additional options for updating the form."² CWC appreciates this opportunity to comment, as it represents the first meaningful opportunity to address what CWC members have seen as one of the more significant impediments in their ability to develop and implement a successful Section 503 affirmative action program (AAP).

While we appreciate OFCCP's intent to update and streamline Form CC-305, we respectfully submit that the changes proposed by the agency do not address the fundamental flaw with Form CC-305, i.e., the fact that Form CC-305 represents the *only* way that OFCCP allows a contractor to solicit an applicant's or employee's disability status, and cannot be modified. This is in stark contrast to the self-identification forms used by contractors to seek race, ethnicity, sex

¹ 84 Fed. Reg. 52,897 (Oct. 3, 2019).

² DOL-OFCCP Supporting Statement, OFCCP Recordkeeping Requirements—29 U.S.C. § 793, Section 503 of the Rehabilitation Act of 1973, as amended, OMB Control Number 1250-0005, at 8.

and protected veteran status, all of which can be freely edited and crafted in a way that best suits each contractor's workplace culture.

As a better approach, CWC recommends that OFCCP develop an alternative option for contractors that wish to craft their own self-identification form that will better fit their respective workplaces, while still satisfying certain regulatory requirements regarding the confidentiality and proper use of the data collected.

Statement of Interest

CWC³ 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.

Nearly all of CWC's members are subject to the nondiscrimination and affirmative action requirements of Executive Order 11,246, Section 503 of the Rehabilitation Act of 1973, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 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 triggered by the agency's Section 503 and VEVRAA regulations, efficiently and effectively accomplish their underlying policy objectives.

The Challenges Created by Form CC-305

Of the many significant changes that accompanied OFCCP's 2013 revisions to its Section 503 and VEVRAA regulations, by far the most contentious has been the development and implementation of Form CC-305, which is used to satisfy the requirements to collect applicant and employee disability data. From the beginning, CWC and other employer representatives expressed concerns that Form CC-305 was confusing, potentially misleading, inconsistent with the Americans with Disabilities Act (ADA), created unnecessary recordkeeping burdens, and would be difficult to implement in an online environment.

More specifically, CWC members have reported the following challenges with the implementation of Form CC-305 in its current format, each of which we believe has contributed to the relatively low participation of, and self-identification rates for, individuals with disabilities, which in turn has prevented federal contractors from realizing the full potential of their affirmative action programs:

- The inability to modify the contents of the form to better align with the company's corporate culture and/or similar communications and self-identification forms;

³ Formerly the Equal Employment Advisory Council (EEAC).

- The inability to add additional identification fields to the form, such as employee identification number, or to pre-populate the invitation to self-identify with previously collected information such as name, employee identification number or date;
- Applicants and employees are using the form to write down their personal medical histories and/or request workplace accommodations; and
- OFCCP’s position that contractors cannot make it mandatory for applicants and employees to accept the invitation by selecting one of the three answers to the question posed by the form, even when one of those answers is “I DON’T WISH TO ANSWER.”

These challenges, quite simply, are the product of the form itself, as well as OFCCP’s rigid position that unlike virtually every other compliance obligation the agency enforces, where contractors satisfy their regulatory obligations by crafting their own documents and analyses according to certain criteria, Form CC-305 cannot be changed. While we acknowledge that OFCCP’s Section 503 regulations require contractors to extend invitations to self-identify “using the language and manner prescribed by the Director” and published on OFCCP’s website, we respectfully submit there is no reason that the invitation must be as restrictive as Form CC-305.

CWC’s Recommendations Regarding Changes to Form CC-305

To its credit, OFCCP is now proposing a number of “nonmaterial” changes to Form CC-305, which include:

- Attempting to soften the form’s tone to make the language more positive;
- Updating and alphabetizing the types of disabilities; and
- Removing the form’s reasonable accommodation notice.

Also to its credit, in its *Federal Register* notice, OFCCP states that it would like “suggestions from stakeholders regarding alternate or additional options for updating the form,” in particular, “methods other than name to match self-identification information with applicants or employees for utilization and other analysis.”

OFCCP Should Develop an Alternative to Form CC-305 and Adopt a Self-Identification Model That Mirrors the Framework for Invitations Extended Under VEVRAA

While OFCCP’s proposed changes—in particular the removal of the reasonable accommodation notice—represent an improvement over the current form, we believe that overall, they will do little to improve applicant and employee participation rates. Over the last several years, CWC members have reported to us that the fundamental flaw with Form CC-305 is its inflexibility, which prevents them from being able to modify the contents or the format of the form in a way that is consistent with their own corporate culture. Again, there are no similar restrictions with regard to the manner in which contractors solicit self-identification of race, ethnicity, sex, and veteran status.

OFCCP’s regulations collectively require covered contractors to invite applicants and employees to self-identify their race, ethnicity, sex, and status as an individual with a disability

and/or protected veteran. 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 regards to race, ethnicity, sex, 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 11,246 and VEVRAA.

In fact, under OFCCP's Executive Order implementing regulations, there are no mandatory rules governing the invitations to self-identify race, ethnicity and sex, and yet in practice contractors have successfully collected these data for years without any input from OFCCP. CWC recognizes, however, that there are additional considerations regarding the solicitation of sensitive disability information, and our recommendations do not advocate a "no rules" approach.

Rather, we believe that OFCCP's VEVRAA model presents the most reasonable compromise for satisfying the disability self-identification requirement. Under the VEVRAA model, OFCCP identifies the core elements that an invitation to self-identify protected veteran status *must* contain, but leaves the development and execution of the form itself to the contractor. For example, 41 C.F.R. § 60-300.42(c) provides that invitations to self-identify protected veteran status "shall" contain the following information:

- That the contractor is a Federal contractor required to take affirmative action to employ and advance in employment protected veterans pursuant to VEVRAA;
- A summary of the relevant portions of VEVRAA and the contractor's AAP;
- That the information is being requested on a voluntary basis and will be kept confidential;
- That refusing to self-identify will not subject the applicant to any adverse treatment; and
- That the information will not be used in a manner inconsistent with VEVRAA.

The development and implementation of the VEVRAA invitations—one for applicants and one for employees—is then left to the contractor. CWC members have reported that this flexibility is critical to the successful implementation of a new or alternative self-identification invitation under Section 503.

Any Changes Should Not Impose Additional Obligations

In the event OFCCP adopts our recommendation to provide a new or more flexible framework to the Section 503 invitation to self-identify, CWC respectfully requests that OFCCP not make any changes that would impose additional mandatory 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 Section 503 regulations. Any additional upgrades and modifications to these systems will be expensive in both time and dollar costs. Contractors should be able to make these modifications over time as resources and budgets permit.

CWC Supports Removing the Reasonable Accommodation Notice

OFCCP explains that it is removing the accommodation notice because “it is not necessary to the information collection and [has] created confusion among applicants and employees who thought that completing the form automatically referred them for a reasonable accommodation.” Indeed, CWC urged OFCCP and OMB not to include this notice in Form CC-305 in the first place.⁴

When OFCCP first proposed this section, CWC explained that it would cause confusion at all three stages of the selection process—application, hiring, and onboarding—misleadingly giving the impression that Form CC-305 was intended to collect and record requests for accommodation. Indeed, several CWC member companies have reported 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 they should or must check “yes” if they have (or have had) one of the conditions listed. Perhaps most troubling from an affirmative action standpoint, users have interpreted the form the other way and not checked “yes” because their specific conditions were *not* listed.

Further, and as predicted, for the employers who utilize paper versions of Form CC-305, it is not at all uncommon for applicants or employees to use the form to record their personal medical histories or to request a workplace accommodation. 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. Indeed, in certain environments, such as manufacturing and retail, paper forms are often the only practical way to extend the invitation. We therefore expect this trend to continue as long as the form provides applicants and employees with space to provide this information.

CWC thus supports the removal of this section, which will encourage applicants and employees to request accommodations through regular company procedures.

OFCCP Should Issue Guidance Clarifying that Contractors Can Compel a Response to the Invitation to Self-Identify

CWC also recommends that OFCCP issue guidance clarifying that contractors may, at their option, require individuals to complete the invitation to self-identify, so long as there is an “opt out” option on the form, as currently exists with Form CC-305.

⁴ Comments of the Equal Employment Advisory Council on the Office of Federal Contract Compliance Programs' Proposed Voluntary Self-Identification of Disability Form CC-305 (OMB Control Number 1250-0005) (October 24, 2013).

CWC members have reported that they 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. Expensive customization is required to allow the system to present a screen or form with data input fields that can be “skipped” by the user.

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).⁵ A plain reading of the 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.⁶

CWC 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.”

Contractors Should Be Permitted to Modify the Form or Add to it Identifying Information About the Employee

CWC also recommends that OFCCP publish additional FAQs to clarify that contractors are explicitly permitted to pre-populate electronic versions of Form CC-305 with information previously collected or recorded by the system, such as name, date, and applicant or employee identification numbers. Likewise, on paper forms, pre-populating employee identification data, such as employee identification number, is critical to successfully mapping individual employees back to their respective affirmative action programs, particularly in cases where many employees share the same name.

Additional Recommendations Regarding Data Collection Analysis Requirements

Apart from Form CC-305, CWC recommends that OFCCP issue new guidance, perhaps in the form of FAQs, stating that contractors are permitted to define key terms such as “applicant” and “hire” consistent with the way they define those terms for Executive Order

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

⁶ 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.

11,246 compliance purposes. OFCCP's revised regulations implementing Section 503 and VEVRAA 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) Disabled⁷ applicants;
- 6) Disabled hires;
- 7) Protected veteran⁸ applicants; and
- 8) Protected veteran hires.

Key terms such as "job openings," "jobs filled," "applicants," and "hired" are not defined in OFCCP's Section 503 or VEVRAA regulations. Rather, the agency has provided sub-regulatory guidance in the form of "Frequently Asked Questions" available on-line.⁹

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 external disability and veteran outreach efforts.

For instance, although a plain reading of the regulations would suggest that "jobs filled" is meant to represent the subset of "job openings" that resulted in an actual "hire," this is not the case according to OFCCP's FAQs. Rather, the FAQs provide that "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."

Further, OFCCP's FAQs define "hired" in the context of Section 503 and VEVRAA 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 Executive Order regulations and the Uniform Guidelines on Employee Selection Procedures.

⁷ Note that CWC 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.

⁸ Note that CWC 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 VEVRAA.

⁹ Specifically, CWC refers to numbers 1-4 under the heading, "Data Collection Analysis" in OFCCP's "Section 503" and "VEVRAA" FAQs available at <https://www.dol.gov/ofccp/regs/compliance/faqs/offaqs.htm>.

In July 2015, CWC participated in a “listening session” with senior OFCCP 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 VEVRAA regulations, including the confusing definitions of key “data collection analysis” terms. During this session, OFCCP officials explained 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.

CWC subsequently requested that OFCCP update its FAQs to reflect this guidance,¹⁰ and 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” consistent with the way they define those terms for Executive Order 11,246 AAP purposes. Regarding 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.

Conclusion

CWC appreciates the opportunity to offer these comments regarding OFCCP’s Section 503 and VEVRAA recordkeeping requirements, and in particular OFCCP’s expressed willingness to consider changes to Form CC-305 that will allow a contractor to solicit disability self-identification information in a way that realizes the full potential of the contractor’s affirmative action program.

Sincerely,

A handwritten signature in black ink, appearing to read "Danny Petrella". The signature is stylized with a large, looping initial "D" and a cursive "Petrella".

Danny Petrella
Senior Counsel

¹⁰ Comments, *supra* note 4.