

April 26, 2024

Submitted via Federal eRulemaking Portal: <https://www.regulations.gov>

Tina T. Williams
Acting Deputy Director and
Director of Policy & Program Development
U.S. Department of Labor
Office of Federal Contract Compliance Programs
200 Constitution Avenue NW, Room C-3325
Washington, DC 20210

Re: Comments of the Center for Workplace Compliance in Response to the Proposed Renewal of the Construction Scheduling Letter and Construction Contract Award Notification Requirement Form (OMB Control No. 1250-0001)

Dear Ms. Williams:

The Center for Workplace Compliance (CWC) welcomes the opportunity to submit comments in response to the U.S. Department of Labor's Office of Federal Contract Compliance Programs' (OFCCP) *Proposed Renewal of the Approval of Information Collection Requirements*, regarding revisions to the construction Scheduling Letter and Itemized Listing, published in the *Federal Register* on February 26, 2024.¹

OFCCP proposes revisions to the recordkeeping and reporting obligations imposed upon federal construction contractors that receive a compliance evaluation Scheduling Letter. In particular, Items 2, 3, 16, and 17 of the revised Itemized Listing accompanying the Scheduling Letter would require construction contractors to provide additional payroll and employment activity data, "evidence" that contractors validated tests and selection procedures, and "evidence" that contractors monitored personnel and employment related activities for discriminatory effects.

OFCCP's proposed Scheduling Letter would request new employment activity and payroll data in detail before the agency finds any indicator of noncompliance. While we appreciate OFCCP's goal to improve the efficiency of compliance evaluations, we submit that both OFCCP and contractors would be better served if the agency requested these additional items *after* identifying a potential problem that warrants their submission. In alignment with the supply-and-service Scheduling Letter, the construction Scheduling Letter should allow contractors to submit aggregate data up front, providing OFCCP with an opportunity to request more information later, if necessary.

As detailed below, we respectfully submit that: (1) OFCCP should not insist that construction contractors produce a full array of sensitive and confidential employment information in the initial desk audit submission; (2) OFCCP should allow construction contractors to aggregate employment activity data by construction trade; and (3) OFCCP vastly underestimates the burden of the Scheduling Letter on construction contractors.

¹ 89 Fed. Reg. 14109 (February 26, 2024).

Statement of Interest

Founded in 1976, the Center for Workplace Compliance (CWC)² is the nation's leading nonprofit association of employers dedicated exclusively to helping its member employers better understand and manage their workplace compliance requirements and risks. Its membership includes approximately 200 major U.S. employers, collectively providing employment to millions of workers. CWC's directors and officers include many of the industry's leading experts in the fields of fair employment, workplace compliance, and risk management. Their combined experience gives CWC a unique depth of understanding of the practical, as well as legal, considerations relevant to the proper interpretation and application of workplace rules and regulations.

Nearly all CWC members are federal contractors and subcontractors subject to the nondiscrimination and affirmative action requirements of Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 (Section 503), Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), and their implementing regulations. As major federal contractors and subcontractors, CWC's members have a significant interest in ensuring that OFCCP's programs, policies, and initiatives efficiently and effectively accomplish their underlying policy objectives.

Background

OFCCP's regulations distinguish between "construction contractors" and "supply-and-service contractors," considering the fluid and temporary nature of construction projects.³ Covered construction contractors are further divided into two types: those that have contracts directly with the federal government, and those that have federally assisted contracts that, while not made directly with the federal government, involve federal dollars.⁴

OFCCP requires all covered federal construction contractors – whether they have direct or federally assisted contracts – to refrain from discrimination because of race, color, religion, sex, sexual orientation, gender identity, or national origin, and to take 16 specific affirmative action steps designed to ensure equal employment opportunity.⁵ Construction contractors with direct federal contracts also must comply with OFCCP's regulations under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) and Section 503 of the Rehabilitation Act of 1973 (Section 503).⁶

OFCCP initiates a compliance evaluation by sending a "Scheduling Letter" and "Itemized Listing" to the construction contractor. The contractor generally has 30 days after receipt of the letter to submit the requested data. Until 2021, OFCCP compliance officers conducted onsite reviews, instead of offsite desk audits, to determine whether construction contractors were in compliance with federal regulations.⁷ Now,

² Formerly the Equal Employment Advisory Council (EEAC).

³ 41 C.F.R. § 60-2 establishes the affirmative action obligations for non-construction (supply and service) contractors, while 41 C.F.R. § 60-4 establishes obligations for construction contractors.

⁴ 41 C.F.R. §§ 60-1.3, 60-4.

⁵ 41 C.F.R. §§ 60-4.3.

⁶ 41 CFR §§ 60-300, 60-741. OFCCP maintains current thresholds for covered contractors at <https://www.dol.gov/ofccp/taguides/jurisdiction.htm>.

⁷ 41 C.F.R. §§ 60-1.20(a), 60-300.60(a), 60-741.60(a).

OFCCP reviews construction contractors' data and records onsite, unless the agency identifies compliance problems or indicators of noncompliance during the desk audit.

OFCCP Should Not Insist That Construction Contractors Produce a Full Array of Sensitive and Confidential Employment Information in the Initial Desk Audit Submission

Apart from the existing requirements, all of which would continue under OFCCP's proposed letter, the agency proposes that federal construction contractors provide the following *additional, new information*:

- Start and end dates (or anticipated end date) of each project (E.O. 11246 Item 1).
- Payroll data for each trade employee's job title, regular hours worked in each trade, regular rate of pay, total regular pay, overtime hours worked in each trade, overtime rate of pay, total overtime pay, bonus or other pay, and time period covered for pay and work hours provided (E.O. 11246 Item 2).⁸
- Employment activity data for all applicants, hires, promotions, layoffs, recalls, and terminations, "incidental" to actual construction (E.O. 11246 Item 3).⁹
- "Reason for layoff" and additional layoff information (E.O. 11246 Item 3).
- "[A]ntiharassment policies, policies on EEO complaint procedures, policies on employment agreements impacting employees' equal opportunity rights and complaint processes (e.g., policies on arbitration agreements), and any other EEO policies" (E.O. 11246 Item 4).
- List of pre-apprenticeship programs (E.O. 11246 Item 13).
- "All tests and selection procedures" in the hiring process, along with "evidence that these tests and procedures were validated where necessary" (E.O. 11246 Item 16).
- "Evidence" that the contractor "monitored personnel and employment related activities during the preceding year to ensure that seniority practices, job classifications, work assignments and other personnel practices did not have a discriminatory effect and that the EEO policy and the contractor's obligations were being carried out" (E.O. 11246 Item 17).
- Description of "any impediments to equal employment opportunity, and any actions taken, including modifications made or new processes added, as a result of the assessment" of personnel processes (Section 503/VEVRAA Item 3).
- "Documentation of appropriate outreach and positive recruitment activities," and their effectiveness (Section 503/VEVRAA Item 5).
- Criteria used to evaluate the total and individual effectiveness of outreach and positive recruitment activities (Section 503/VEVRAA Item 5).
- "[D]etailed documentation describing [the contractor's] actions in implementing and identifying alternative efforts" if the outreach and positive recruitment activities were ineffective (Section 503/VEVRAA Item 5).
- "If any underutilization of individuals with disabilities is identified, provide a description of the steps taken to determine whether and where impediments to equal employment opportunity exist," including "an assessment of personnel processes, the effectiveness of [the contractor's] outreach and recruitment efforts (if different than Item 5), the results of [the contractor's] affirmative action program audit, any other areas affecting the success of the affirmative action program, and a

⁸ While the current Itemized Listing requests "total hours worked in each trade," "overtime hours worked in each trade," and "wage rate(s) for each trade," the proposed Itemized Listing would require this information to be further subdivided. The proposed Itemized Listing adds, "bonus or other pay, as indicated in your certified payroll."

⁹ This requirement is consistent with 41 C.F.R. 60-1.3, but new to Item 3.

description of action-oriented programs developed and executed to correct any identified problem areas” (Section 503 Item 8).

Viewed in their entirety, it appears OFCCP’s proposed changes are predicated upon the assumption that in order to carry out its enforcement responsibilities effectively, OFCCP must have at the outset of a compliance evaluation virtually every piece of employment data or policy that *might* become relevant in case a compliance issue surfaces during the audit. We respectfully disagree with this position, and submit that it is neither necessary nor efficient for OFCCP to insist that federal construction contractors and subcontractors include in their initial desk audit submissions the full array of sensitive and confidential employment data proposed by OFCCP. While it may be administratively convenient for OFCCP to have all potentially relevant data in its files as an audit begins, administrative convenience is not the standard by which this information request should be evaluated. Necessity and practical utility in light of the estimated burdens and costs are the appropriate standards.¹⁰

It is entirely appropriate for the agency to solicit summary data at the outset of a compliance evaluation and then request additional, more detailed information when and if needed. For example, if the agency identifies a preliminary indicator of adverse impact in Item 3 (employment activity data), it would be appropriate for the agency to request “evidence” that the contractor monitored its personnel and employment-related activities, as suggested in the new Item 17. If the agency reviews this “evidence” suggested in the new Item 17, and decides that a test or selection procedure may have contributed to the adverse impact, then the agency should request additional “evidence” that the contractor validated its tests and procedures, as suggested in the new Item 16. In other words, until the agency identifies adverse impact, Items 16 and 17 are unnecessary. Given the fact that the agency infrequently identifies unlawful discrimination in compliance evaluations (approximately two percent of all cases), it is unduly burdensome for the agency to require this information up front from all construction contractors.

As such, OFCCP should exclude Items 16 and 17 from the Scheduling Letter. It does not make sense for OFCCP to request this type of detailed information when the agency has not yet identified any preliminary indicators of adverse impact.

OFCCP Should Align E.O. 11246 Item 3 with the Supply-and-Service Model By Allowing Construction Contractors to Submit Aggregate Data

The current E.O. 11246 Item 3 requires construction contractors to report employment activity (applicants, hires, promotions, layoffs, recalls, and terminations) during the preceding 12 months for all trade employees. The proposed Itemized Listing would require construction contractors to report employment activity for employees involved in the supervision, inspection, and other on-site functions “incidental” to the actual construction.

While supply-and-service contractors generally submit employment activity data by job group, construction contractors must provide a detailed log of all payroll data for all trade employees. A complete log of all applicants, hires, promotions, layoffs, recalls, and terminations, including components such as name, race/ethnicity, gender, dates, job titles, etc. is far more information than is needed during an initial

¹⁰ We believe that OFCCP’s burden estimates are understated based on discussions with CWC members. We estimate 60-80 hours, not 30.4, hours for construction contractors with direct contracts with the federal government to retrieve and submit documentation to OFCCP. See our full argument on pages 5.

compliance evaluation. We submit that OFCCP should allow construction contractors to submit data aggregated by trade.

OFCCP Vastly Underestimates the Burden of the Proposed Scheduling Letter on Construction Contractors

CWC members have spent considerable time and resources adjusting to the new supply-and-service Scheduling Letter, so it is with confidence that we say the burdens associated with the proposed construction Scheduling Letter are vastly underestimated. OFCCP estimates that construction contractors with direct federal contracts will spend 35.8 hours retrieving and submitting documentation in response to the proposed Scheduling Letter. The agency anticipates construction contractors with federally assisted contracts will spend 19.7 hours.

These estimates are unrealistic and do not account for the personnel required across industries who spend hours in collaboration, reviewing and completing documentation requested by OFCCP. Company lawyers, analysts, human resources personnel, and managers at every level are involved in this work. After talking with CWC members about their experiences, we understand that federal construction contractors would spend approximately 60-80 hours, not 35.8 hours, retrieving and submitting documentation in response to the proposed Scheduling Letter. OFCCP should update its burden estimates to align with contractors' experiences.

Conclusion

CWC appreciates the opportunity to offer these comments regarding OFCCP's proposal. Please do not hesitate to contact me if CWC can provide further assistance as you consider these important issues.

Sincerely,

A handwritten signature in black ink that reads "Gabrielle Lattery". The signature is written in a cursive, flowing style.

Gabrielle Lattery
Counsel, Center for Workplace Compliance