



COMMENTARY ON PROPOSED EXTENSION OF THE APPROVAL OF INFORMATION COLLECTION REQUIREMENTS BY OFCCP (SCHEDULING LETTER AND ITEMIZED LISTING)

The commentary below is submitted by William Osterndorf on behalf of HR Analytical Services, Inc. HR Analytical Services is a Milwaukee, Wisconsin based management consulting firm that specializes in assisting federal contractors and subcontractors that need to prepare affirmative action plans under the federal affirmative action regulations. Our clients range in size from 60 employees to more than 12,000 employees. HR Analytical Services has developed thousands of affirmative action plans for companies throughout the nation, and our clients have been through many successful affirmative action reviews by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

INTRODUCTION

Our commentary responds to the proposed revisions to documents used by OFCCP to gather information at the start of an affirmative action compliance evaluation. These proposed revisions were published on May 12, 2011 in the federal register at 76 F.R. 27670. (These proposed revisions have a control number of 1250-0003.)

OFCCP is proposing to extend its authority to collect information from federal contractors and subcontractors through the use of three documents:

- A letter sent to a company at the beginning of an affirmative action compliance review informing the company of the pending review. This letter is commonly referred to as a "scheduling letter."
- An itemized listing of statistical data and other items that OFCCP is requesting as part of its compliance reviews. This itemized listing accompanies the scheduling letter that is sent to companies at the start of a compliance review.
- A letter sent to a company to inform the company that it has been selected for a compliance check. The compliance check is a limited form of compliance evaluation. Companies are not required to submit the items found in the itemized listing as part of a compliance check.

While there are changes to both the scheduling letter and the compliance check letter, we have no specific comments regarding these changes. The changes to the scheduling letter appear to correspond to OFCCP's current approach to conducting compliance reviews, and should have no significant impact on federal contractors or subcontractors. The compliance check letter appears much the same as the version of the compliance check letter that OFCCP has used in the past, and the minor changes made to this letter should have no significant impact on federal contractors or subcontractors.

The changes to the itemized listing, on the other hand, are far-reaching and highly problematic. Our comments on specific changes to the itemized listing are noted below. However, we can summarize our comments by stating that OFCCP has proposed changes that would be intensively burdensome for federal contractors and subcontractors and that would provide a level of data unnecessary to the fulfillment of OFCCP's mission.

ITEMS 1 THROUGH 10

Much of the initial portion of the itemized listing would remain the same as the current version of the itemized listing. In fact, items 1 through 7 of the proposed itemized listing are almost identical to items 1



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through 7 of the current version of the itemized listing. Federal contractors and subcontractors are aware of their responsibilities to provide this information, and we have no objection to OFCCP's desire to continue receiving these items.

Item 8 in the revised itemized listing is a new item. It requests "copies of...employment leave policies including, but not limited to, policies related to implementing the Family Medical Leave Act, pregnancy leave, and accommodation for religious observances and practices." While this is a new item within the itemized listing, OFCCP has routinely been asking for some of these policies during recent compliance reviews. We have no objection to this request, with the caveat that OFCCP should be aware that not all companies develop these types of policies and that the agency should have no authority to require the development of such policies.

Item 9 in the revised itemized listing is similar to item 8 in the current itemized listing. Both versions request copies of a company's collective bargaining agreement(s). Item 9 in the proposed itemized listing is actually more limited in scope than current item 8. We have no objection to this change.

Item 10 in the revised itemized listing is basically the same as item 9 in the current itemized listing. As with items 1 through 7, federal contractors and subcontractors are aware of their responsibilities to provide this information, and we have no objection to OFCCP's desire to receive this information.

ITEM 11 - INTRODUCTION

Our concerns with the changes to the itemized listing begin with the opening paragraph to item 11. Item 11 is used to request information on applicants, hires, promotions, and terminations from federal contractors and subcontractors. Item 11 in the proposed itemized listing is meant to substitute for Item 10 in the current itemized listing. There is dramatic change in the way that information on these types of personnel actions is to be submitted, but there are two changes in that opening paragraph that require comment.

First, the opening paragraph states that if the company is six months or more into its current AAP year when the company receives this listing, the company should provide information on applicants, hires, promotions, and terminations "for at least the first six months of the current AAP year." [emphasis added] The current itemized listing asks for updated information when a company is six months or more into its current AAP year, but does not specify a time frame regarding the submission of additional information. Many companies have interpreted the current version of the itemized listing as requiring only six months of additional information regardless of how far they are into their current affirmative action plan years. While there is some ambiguity in the current language, there is at least as much ambiguity in the new language proposed by OFCCP. "For at least the first six months" may be interpreted by some OFCCP compliance officers to mean "no less than six months", while it may be interpreted by other compliance officers to mean "from the beginning of the current AAP year until the present date." OFCCP should either clarify this language or leave the present language in place. If a company is at least six months into its current AAP year and OFCCP wants data from the start of the current AAP year until the present date, it should say so.

Our second concern about the opening paragraph involves the last sentence in the paragraph. That sentence reads as follows: "You should present these data by job group (as defined in your AAP) and by job



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title." [emphasis added] The current version of this paragraph reads as follows: "These data must be presented either by job group (as defined in your AAP) or by job title." [emphasis added] This new requirement to present information by BOTH job group and job title will be extremely burdensome for federal contractors and subcontractors.

OFCCP asserts in its supporting statement on the proposed revisions to the itemized listing that widespread use of computer technology will add only one hour of increased burden for the average contractor to provide information by both job group and job title. This is patently false. Companies that have been preparing affirmative action plans typically have systems that are set up to provide summary personnel activity information by job group.¹ A request to provide information by job group AND job title would necessitate the building of new reports to summarize this information. There would be significant time involving both information technology (IT) and human resources (HR) professionals involved in this endeavor.

Even after these systems were built, there would be significant time associated with analyzing data by both job group and job title. While an average company of 200 employees may have as few as six job groups, it could easily have as many as 100 job titles. We have a client with 650 employees that has an affirmative action plan with 30 job groups and 350 job titles. For this client (and many of our clients), a requirement to provide data by both job group and job title would result in a huge expansion of time associated with preparing data and with analyzing data that must be presented to OFCCP.

OFCCP's proposal to review data by job title rather than job group will not only be time-consuming, but it will at times produce a significant level of useless data. Many statistical analyses by job title will be totally meaningless because of the small number of incumbents in a job title.

OFCCP's desire to receive information by job title as well as job group appears to be prompted by issues concerning the use of job groups as the basis for providing data. There are actions that OFCCP can take if it is concerned that information provided by job group is not sufficient to evaluate a company's affirmative action practices.

- First, the agency should provide more effective guidance regarding the construction of job groups. The current guidance in the affirmative action regulations states that job groups should be combinations of jobs that have "similar content, wages, and opportunities." (See 41 CFR 60-2.12.) While this guidance provides significant flexibility to federal contractors and subcontractors, it also allows for the construction of job groups that have far too many unlike jobs. OFCCP should provide more explicit instruction on the factors to consider in developing effective job groups. These factors may include the number of job titles in a job group, the number of employees in a given job title, pay grades, and FLSA status.
- Second, if OFCCP truly believes that it must have information by job title, it should limit the number of situations where data is delivered by job title to those situations where the data might be

¹ Please note that there are, in fact, companies that currently prepare summary reports on personnel activity by running detailed reports and then typing summary figures into spreadsheets. For these companies, any expansion of the type of reporting to be done for affirmative action purposes would be a major burden.



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statistically meaningful. For example, OFCCP could ask for information by job title for those situations where there were 30 or more hires into a job title, 30 or more promotions into or out of a job title, and 30 or more terminations from a job title. While this would not relieve the burden on larger companies that would be required to provide this additional information by job title, it would relieve the burden on smaller organizations and it would limit the level of additional data that must be presented by larger organizations.

Our concern about analyzing information by job group and job title does not mean that our clients are unaware of their responsibilities under the Uniform Guidelines on Employee Selection Procedures. Our clients routinely investigate issues uncovered by statistical reports in their affirmative action plans when there is a statistical indication that a problem exists. It is not unusual for a statistical disparity revealed by analyzing data by job group to disappear when an analysis is done by job title instead.

ITEM 11 - APPLICANTS AND HIRES

The proposed version of the itemized listing would require that federal contractors and subcontractors provide information on applicants and hires by job group and job title. While the current version of the itemized listing requires this information by "the number of minority and the number of female applicants and hires", the proposed version of the itemized listing requires this information by the racial subgroups used in the OFCCP's current regulations.² The revised version of the itemized listing also requires information on applicants and hires for whom race and/or gender is unknown.

OFCCP's request for information on applicants and hires by minority subgroup, as well as its request for information regarding persons of unknown race and/or gender, conforms to the agency's current practice of asking for more detailed racial and ethnic information on applicants and hires. When my company prepares affirmative action plans for presentation to OFCCP, we routinely include information on minority subgroups and applicants of unknown race or gender. However, there are companies that would find it extremely burdensome to provide information on all racial subgroups. Companies that are able to electronically generate the data required in the current itemized listing would need to prepare new versions of reports in order to present the information required in the proposed itemized listing. More importantly, HR staff members who do not have systems that can produce these statistical summaries would be required to spend significant additional time tabulating information. The number of tabulations, whether done by hand or electronically, would increase significantly from what is currently done because of the proposed requirement to provide minority subgroup information by job group and job title.

In light of the potential burden associated with this proposal, we encourage OFCCP to retain its current version of the itemized listing that requests data on applicants and hires for total minorities and total whites

² These racial subgroups are as follows: African American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaskan Native, and White. OFCCP has not conformed its regulations to the race and ethnicity categories used by EEOC, and it is not clear when and if OFCCP will do so. OFCCP has provided informal guidance suggesting that federal contractors and subcontractors may use EEOC's race and ethnicity categories in the preparation of reports included in affirmative action plans. However, the use of the five traditional racial subgroups in the itemized listing calls into question the manner in which OFCCP expects to receive data.



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by job group OR job title. If OFCCP believes that it must request additional data on applicants and hires by job title, we encourage OFCCP to find some way to limit the type of data requested. Again, OFCCP may want to consider asking for data by job title only when there are at least 30 applicants within a particular job title. OFCCP may want to consider asking for information by minority subgroup in those situations where there are at least 30 minority applicants.

ITEM 11 - PROMOTIONS

The proposed version of the itemized listing would require that federal contractors and subcontractors provide information by job group and job title on promotions. However, there is a dramatic change from the manner in which data is currently requested. While the current itemized listing asks companies to define the population against which promotions are compared, the proposed itemized listing requires that companies provide information on "the actual pool of candidates who applied or were considered for promotion." Again, information is request by minority subgroup and by both job group and job title.

While we would renew our concerns about providing information by minority subgroup and by both job group and job title, we have a new concern in regard to the proposed itemized listing. OFCCP assumes that there is an "actual pool of candidates who applied or were considered for promotion" for all situations where there is an employee advancement of some type. In essence, OFCCP believes that promotional opportunities are much like hires: there are specific pools of candidates who express interest in and are considered for an opening. This is not accurate. There are many types of promotions where there is only one candidate considered. For example, employees are routinely promoted within well-defined job families after meeting certain goals or objectives. In such cases, no other employees are considered. As another example, it is not unusual for a company to groom a certain employee for a new position because the employee has shown exceptional skill and/or knowledge. Again, in these cases, no other employees are considered. There are also situations where multiple candidates are considered for promotion and there is no well-defined pool. For example, it is not unusual for a manager to consider all employees within a department for a supervisory position, regardless of whether employees have formally expressed interest in such an opening.

The requirement to compare promotions to "actual pool[s] of candidates" would result in confusion for both companies and OFCCP. It is not clear what OFCCP would consider an "actual pool of candidates" for the types of situations noted above. If the "actual pool of candidates" for those situations where only one person was considered is the person who was promoted, any statistical analysis of these situations would be meaningless. In the situations where a large pool of employees were considered regardless of an expression of interest, it is not clear that a statistical analysis should include all of these employees, since some employees may not be interested in the position and some employees may not be qualified for the position. While OFCCP's Internet applicant rule provides limitations regarding applicant pools that should be compared to hires, no such rule exists for promotional pools, and thus there would be on-going confusion about the employees to include in any such analysis. Companies and compliance officers would routinely come into conflict over the definition of a proper pool of internal applicants.

The fact that there is no clear definition of "actual pool of candidates" and the fact that this is a new requirement for contractors would result in significant additional burden for contractors. Again, there would need to be significant changes to current HR systems to produce reports comparing promotions and pools

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of candidates. More importantly, any attempt to report on pools of candidates would be compromised by the lack of a definition of what these pools constitute.

While we understand OFCCP's desire to properly compare promotions to the persons who were considered for these openings, we encourage OFCCP to withdraw the language in the proposed itemized listing. OFCCP should give companies the flexibility to provide comparisons of promotions to the most appropriate employee population, whether that involves the starting numbers in a job group, pools of employees who have expressed interest in openings, or something else entirely. Where there are statistical disparities, OFCCP could then ask for additional information.

ITEM 11 - TERMINATIONS

The proposed version of the itemized listing would require that federal contractors and subcontractors provide information by job group and job title on terminations. While the current itemized listing only asks companies to provide information on terminations, the proposed itemized listing asks companies to provide information on "the actual pool of candidates who were considered for termination." Again, this is a dramatic change from the manner in which data is currently requested.

As with hires and promotions, information on terminations is request by minority subgroup and by both job group and job title. We would renew our concerns about providing information by minority subgroup and by both job group and job title. However, there are two additional problems with OFCCP's proposal regarding terminations. One problem is an on-going nomenclature issue. OFCCP routinely uses the word "terminations" to mean "persons leaving the company voluntarily or involuntarily." However, human resources professionals routinely use the word "terminations" to mean "persons who left the company INVOLUNTARILY." OFCCP finally seems to understand that this has been an issue, as it asks in the proposed itemized listing that companies "identify employee terminations as either voluntary or involuntary." It would be more helpful still if OFCCP would use some word other than "terminations" when it generically refers to persons leaving a company.

A more fundamental problem with the proposed itemized listing involves the idea that companies are to compare "terminations" against "the actual pool of candidates who were considered for termination." OFCCP appears to assume that there are pools of candidates who are routinely considered for termination. This is totally false. It is rare for there to be more than one employee involved in any particular situation where the employee leaves the company. When an employee leaves to take a new job with another employer, there is no "actual pool of candidates" considered for termination. Similarly, when an employee is terminated for poor performance, there is no "actual pool of candidates" considered for termination.

There are basically two types of situations where multiple employees are considered for termination: situations where there is a reduction in the workforce and situations where employees are laid off. Most layoffs are constrained by the provisions of a bargaining agreement, and in these situations the company has little or no control over who is chosen for layoff.

The one situation where there may actually be a meaningful pool of candidates who were considered for termination is the situation where there is reduction in the workforce. If OFCCP is interested in analyses of



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situations where there were reductions in the workforce, it should say so in its itemized listing. Otherwise, OFCCP should retain the language in the current itemized listing. This would give both companies and the agency the ability to review situations where there might be issues regarding persons leaving the workforce.

ITEM 12 - COMPENSATION DATA

Item 11 in the current itemized listing requests compensation data from federal contractors or subcontractors. Companies are asked to "provide annualized compensation data...by either salary range, rate, grade, or level showing total number of employees by race and gender and total compensation by race and gender." Companies typically provide this information for employees who are included in the organizational profile that is part of the relevant AAP.

Item 12 in the proposed itemized listing acts as a comprehensive change to the manner in which compensation data is provided. Companies are asked to provide:

- Compensation data on employees as of February 1st rather than the date of the organizational profile in the AAP.
- Compensation data on "all employees (including but not limited to full-time, part-time, contract, per diem or day labor, temporary)" employees.
- Gender, race/ethnicity, hire date, job title, EEO-1 category, and job group for all employees.
- Base salary, wage rate, hours worked, bonuses, incentives, commissions, merit increases, locality pay, and overtime for all employees.
- An electronic version of the data noted above in Excel format.

This is a radical departure from the provisions of the current itemized listing. Rather than asking for summary data, OFCCP is demanding highly specific pieces of information on all employees as of a particular date to be delivered electronically in Excel format.

There are many problems associated with the proposed request for compensation data. One of these problems involves the request for data as of February 1. This is entirely inconsistent with the manner in which OFCCP approaches any other data request during a compliance review. Affirmative action plans typically contain two types of statistical reports: reports as of the start date of the AAP and reports for the one-year period preceding the start date of the AAP. The organizational profile, job group analysis, and comparison of incumbency to availability are all based on a snapshot of persons employed by the company as of the start date of the AAP. Information on applicants, hires, promotions, terminations, and progress toward meeting placement goals are primarily based on information for the one-year period prior to the start date of the AAP. There is no other situation in which OFCCP requests data for some other arbitrary date such as February 1. The use of a February 1 date for providing compensation data would mean that OFCCP would be unable to compare information used in the compensation analysis with information presented in the organizational profile or job group analysis. More importantly, the use of the February 1 date would present a significant burden for contractors, as contractors would need to prepare a new and specialized report for a date other than the start date of their current AAPs (unless, by chance, the contractor happened to have an AAP start date of February 1).

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A second major problem associated with the proposed request for compensation data involves the request for data on all "employees." We place the word "employees" in quotation marks here because there are a number of individuals included in OFCCP's list who may not actually be employees of the relevant federal contractor or subcontractor. For example, companies routinely use agencies to provide individuals for contract, temporary, or day labor assignments. These individuals are not employees of the federal contractor or subcontractor; they are employees of the outside agency. OFCCP should make it clear that companies are to provide information on persons who are true, direct employees of the company.³

A third major problem associated with the proposed request for compensation data involves the burden associated with this request. OFCCP suggests in its supporting statement to its proposed changes that the burden to provide the information noted in its proposed itemized listing would be less than the current request for annualized compensation and employee information. For companies that have built systems to provide the annualized data requested in the current itemized listing, the assertion that it would be easier to provide the information found in the proposed itemized listing is absurd. These companies would be required to build new systems that could provide the newly requested data. The data elements required for this listing are not routinely requested, and thus there would be time and expense associated with creating customized reports to provide this information. For the companies that currently do not have a system to automatically provide the annualized compensation reports, the time and effort associated with gathering the data required to meet OFCCP's demands in the proposed itemized listing would be considerable.

A fourth major problem associated with the proposed request for compensation data involves the data elements required by OFCCP. Most HR information systems contain the basic elements requested by OFCCP such as gender, race/ethnicity, hire date, job title, and base salary. However, it is not unusual for EEO-1 code and job group code to be contained in some other system, and thus there would be a number of hours associated with adding this information to any customized report. More importantly, gathering data on bonuses, incentives, commissions, and other forms of compensation would be difficult for most companies. This type of information may be contained in some type of payroll system, but it is often not readily accessible to the HR professionals who must prepare reports for OFCCP. Even something as seemingly simple as hours worked during the course of a year may not be easily accessible to HR professionals providing information for OFCCP.

A related problem involves the value of some of the data elements requested by OFCCP. OFCCP is attempting to gather additional compensation data so that it can determine whether there are any disparities in regard to the way in which members of any gender or race/ethnicity are paid. While an analysis involving base salary may be useful in that regard, an analysis of other compensation is likely to skew the data. While

³ There is an unresolved issue in regard to the persons who should be considered "employees" under the federal affirmative action regulations that goes beyond this issue with contractors and temporaries. The term "employee" is not formally defined in 41 CFR 60. Some commentators have suggested that the term "employees" includes only the regular, full-time, direct employees of a federal contractor or subcontractor. Other commentators suggest that the term "employees" may include part-time persons, but not irregular employees such as per diem employees, interns, or seasonal employees. While OFCCP has routinely asserted that it has jurisdiction over all persons working for a federal contractor or subcontractor, this point has never been fully litigated. If OFCCP expects companies to include all persons working for the company in all statistical analyses, it has had opportunities to change its regulations to so indicate. The agency's failure to do so leaves open the question of who is considered an "employee" for inclusion in various statistical analyses.



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base salary is almost entirely controlled by the employer, other compensation such as bonuses, incentives, commissions, merit increases, locality pay, and overtime is often controlled by the employee. For example, two Account Managers may have the same base salary but may have significantly different total compensation packages because one Account Manager has put in the kind of time and effort required to receive commissions, bonuses, and other additions to base salary.

A final problem associated with the proposed request for compensation data involves OFCCP's demand to have the data provided in an electronic format. Providing data electronically would allow OFCCP to do a variety of statistical analyses on the data. Unfortunately, OFCCP has been unwilling to provide contractors with information on the types of analyses it is doing. While we expect that OFCCP may anticipate doing both multiple regression analyses and cohort analyses with the data it receives, we have nothing to tell us the manner in which these analyses will be done or the circumstances under which OFCCP will suggest there is a disparity.

OFCCP has an obligation to tell the contractor community what it is doing and what it expects to do with the compensation data it receives. Federal contractors and subcontractors should be provided with an opportunity to conduct studies that parallel those occurring at OFCCP. This way, companies can determine where problems exist and can prepare responses for questions that OFCCP may ask. Without some type of formal explanation from OFCCP about what it expects to do with compensation data, companies should not be required to provide a significant level of highly-confidential data in an electronic format.

In light of all the problems associated with OFCCP's proposal regarding compensation data, we strongly encourage OFCCP to withdraw item 12 entirely from its proposed itemized listing. Item 12 would create significant new burdens for federal contractors and subcontractors. It would create on-going tension between OFCCP and companies over the type of data to be submitted for compensation analyses and over the type of questions that would grow out of these analyses. Rather than asking for an extraordinary level of additional compensation-related data at the start of every compliance review, we encourage OFCCP to work on developing guidance that would replace the (now withdrawn) compensation guidance produced in June of 2006.

ITEMS 13 - SUPPORT DATA FOR AAP ON PERSONS WITH DISABILITIES AND VETERANS

Item 13 in the proposed itemized listing has no parallel in the current version of the itemized listing. Item 13 requests copies of a company's three latest VETS-100 or VETS-100A reports and copies of accommodation policies and records of accommodations made under the affirmative action regulations for persons with disabilities and veterans. While these are new requests in the itemized listing, OFCCP is currently making a routine request of these items when it conducts compliance reviews.

While we have no strong objection to the requests made here, we should note that there is some burden associated with providing records of accommodations. Many companies have no centralized database that tracks accommodations granted to persons with disabilities. We have found that gathering this information during a review typically involves several hours of work, and we expect that gathering this information to present to OFCCP at the beginning of a compliance review would similarly require several hours of work. Companies have been reluctant to develop databases regarding accommodations because of their concerns



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about protecting medical information and privacy rights for employees with disabilities. However, if OFCCP expects to ask for information on specific accommodations made during a compliance review, it would be better to have this request made at the time the compliance review opens rather than immediately prior to the time an on-site review is scheduled or at some other problematic time for the company.