

Writer's direct phone

(312) 460-5870

Writer's e-mail

vhoffman@seyfarth.com

July 11, 2011

VIA FACSIMILE TO (202) 693-1304

Debra A. Carr
Director, Division of Policy, Planning and Program Development
Office of Federal Contract Compliance Programs
Room N3422
200 Constitution Avenue, NW
Washington, DC 20210

Re: Control Number 1250-0003

Dear Ms. Carr:

This letter provides comments in response to the Office of Federal Contract Compliance Programs' ("OFCCP") May 12, 2011 Notice entitled "Proposed Extension of the Approval of Information Collection Requirements; Comment Request," in which OFCCP announced its intent, and seeks approval from the Office of Management and Budget (OMB), to modify the scheduling letter and itemized listing of required data used to initiate every compliance evaluation of supply and service federal contractors and subcontractors.

INTRODUCTION

Seyfarth Shaw LLP ("Seyfarth") is a full-service international law firm serving a diverse group of clients globally. Seyfarth has an extensive practice in labor & employment counseling and litigation, including a very substantial national practice in affirmative action and equal employment opportunity (EEO) compliance for federal contractors and subcontractors. In this capacity, we represent hundreds of employers in matters involving compliance with affirmative action and EEO obligations and legal requirements. We have discussed the impact of the proposed changes to the scheduling letter and itemized listing with a great many of our clients and received their feedback and input. The comments we provide herein reflect our own thoughts as experienced practitioners on the proposed changes as well our clients' thoughts and concerns.

PROPOSED CHANGES TO SCHEDULING LETTER AND ITEMIZED LISTING

OFCCP's Notice provides virtually no detail on the substance of the proposed changes, but a comparison of the proposed and current scheduling letter and itemized listing uncovers a number of



significant proposed changes. Some of the proposed changes add entirely new categories of information not sought by the current scheduling letter or itemized listing, while other proposed revisions add considerably to the breadth and scope of information currently requested. In addition to unnecessarily affecting the burden on federal contractors and subcontractors at the outset of every single OFCCP audit, the changes will affect the way federal contractors and subcontractors must develop portions of their annual affirmative action programs and maintain their human resources information systems.

NEW CATEGORIES OF INFORMATION

OFCCP's proposed scheduling letter and itemized listing seeks two new items of information.

Leave Policies, Religious Accommodations and Employee Handbooks

New Item 8 of the itemized listing requests "Copies of your employment leave policies including, but not limited to, policies related to implementing the Family and Medical Leave Act [FMLA], pregnancy leave, and accommodations for religious observances and practices." It further directs contractors to provide copies of employee handbooks or policy manuals if the requested policies are contained therein.

OFCCP's Supporting Statement for the proposed changes states that receipt of these policies "would assist OFCCP in better determining the existence of sex or religious discrimination indicators within contractor organizations" and "enhance OFCCP's broad authority under Executive Order 11246 to prohibit sex and religious discrimination in employment and its share[d] enforcement responsibilities with the EEOC under Title VII." (Supporting Statement, at 16-17.)

We respectfully disagree with these statements for three primary reasons. First, producing leave policies to OFCCP at the outset of a compliance evaluation will not provide OFCCP with meaningful information about a contractor's practices concerning equal employment opportunity for women or based on religion. The FMLA provides for leave for individuals under various circumstances, including, but hardly limited to, medical conditions related to pregnancy or maternity. It has nothing to do with leave available for religious purposes. Moreover, federal contractors and subcontractors subject to the FMLA are required to provide that leave irrespective of the existence of a policy. Similarly, the existence or absence of a written policy discussing accommodations for religious practices is not a legal requirement. Many contractors provide such accommodations routinely without having a formal policy in place.

Second, OFCCP does not have authority to enforce the FMLA, and thus cannot determine liability assess penalties or fines for any related violations (assuming lack of an FMLA policy would be a violation). In light of OFCCP's announcement in November 2010 that it would no longer inspect contractors' Form I-9, Employment Eligibility Verification documentation during onsite compliance evaluations, it is perplexing that OFCCP would now seemingly reverse course

and endeavor to request and review information on issues over which it has no authority to remedy or resolve.

Third, OFCCP compliance officers have little to no experience or expertise related to the FMLA or leave policies. Thus, to be effective, OFCCP will have to expend significant resources to train compliance officers on legal standards applicable to these areas. We do not believe that this would be an effective use of OFCCP's resources, nor that it would serve the DOL's stated purpose for these proposed revisions to "carry out its responsibility to enforce the anti-discrimination and affirmative action provisions of the three legal authorities it administers," particularly as OFCCP lacks any enforcement authority.

ADDITIONS/CHANGES TO EXISTING ITEMS

The proposed scheduling letter and itemized listing significantly increases the scope of employee transaction data and compensation data sought during OFCCP compliance evaluations.

Employment Activity Data

OFCCP proposes to add several requirements to current Item 10 (proposed Item 11) related to applicants, hires, promotions and terminations.

Contractors Must Submit Data By Job Group and Job Title

Under the revised itemized listing, contractors will be required to submit data by both job group and job title, rather than choosing one or the other. In its Supporting Statement, OFCCP summarily states that this revised submission would result in OFCCP obtaining more accurate reporting data for its analyses related to identifying sex and race discrimination indicators. OFCCP estimates that this addition plus the new requirement to submit data by specific race/ethnicity (discussed below) will result in a **combined** 1 hour increased burden per contractor. (Supporting Statement, at 17.)

We respectfully disagree. First, OFCCP provides no explanation as to why obtaining data by job group and job title will result in a more accurate analysis. We do not believe that data by job title will be more accurate because OFCCP's position presupposes that all employers have uniform job titles throughout all departments and locations. In reality, however, many contractors have inconsistent job titles within and across their organizations. Thus, in order to be able to submit useful data by job title, many contractors will have to expend significant resources and time to internally standardize job titles so that the various analyses, including pay equity analyses and adverse impact analyses, are meaningful for affirmative action compliance purposes. Moreover, anticipating that OFCCP will now be conducting adverse impact by job title, in addition to job group, this will place a significant burden on contractors in terms of the sheer number of adverse impact analyses conducted due to the number of job titles within each job group. Given all of this, OFCCP's estimate of 1 hour (or less) increased burden per contractor is grossly understated.

Contractors Must Submit Data By Specific Race/Ethnicity

New Item 11 would require contractors to provide applicant, hire, promotion and termination data by particular race/ethnicity group (specifically, African-American/Black, Asian/Pacific Islander, Hispanic, American Indian/Native Alaskan, and White) instead of just by minorities and non-minorities. According to OFCCP's Supporting Statement, requiring more specific demographic information will eliminate ambiguous minority and non-minority terminology. And as noted above, OFCCP estimates that this addition as well as requiring data by job title will result in a 1 hour increased burden per contractor. (Supporting Statement, at 17.)

We believe this will result in a significantly increased burden on contractors to provide this information. Moreover, it seems clear that with this change OFCCP wants employers to shoulder the burden of creating, maintaining and reporting additional information so that OFCCP can search it for evidence of discrimination. We do not believe that this is an appropriate use of OFCCP's regulatory authority, particularly in light of Executive Order 13563 (Jan. 18, 2011) (EO 13563). EO 13563 requires federal agencies to use the "least burdensome tools to achieve regulatory ends." Given the OFCCP's recent focus on adverse impact in employment activity and the huge amount of penalties OFCCP has collected for violations in this area, it is not appropriate for OFCCP to use its regulatory authority to make compliance more difficult for employers and make its job easier when it is already achieving its regulatory ends.

Actual Pools of Candidates for Promotions by Gender and Specific Race/Ethnicity

Under new Item 11, contractors will be required to provide the gender and particular race/ethnicity composition of the "actual pool of candidates who applied or were considered for promotion."

OFCCP does not address this change in its Supporting Statement or provide any justification for it. Yet this change will result in a significantly increased burden because it will likely require significant action by contractors to begin tracking such data. Many contractors do not currently maintain data on the specific pool of employees considered for promotion, or if they do, it is housed in hard copy files, not in any automated system. In order to provide such information, contractors will need to ensure their internal promotions policies and processes, including their internal applicant tracking technology, allow them to identify and record specific pools. It will also require that managers and human resources professionals involved in the competitive promotion process to be trained to accurately identify and record promotion pools.

Notably, many contractors make certain promotions decisions without requiring a cumbersome application process for internal employees. Where contractors routinely examine their existing workforces to provide additional training or developmental opportunities for employees to be eligible for promotion, and where employees and supervisors routinely discuss individual performance and developmental plans, decisionmakers possess extensive information about employees who are qualified and best qualified for promotions without utilizing a formal application process in all situations. Many smaller employers do not have multiple current employees who would be eligible for specific promotional opportunities, and thus pools do not

exist. Additionally, some promotions are noncompetitive and thus do not involve promotional pools.

We appreciate this proposed change conceptually provides a more accurate promotion analyses, but the issue the OFCCP is completely disregarding is that many contractors, especially small employers, do not maintain data systems that track this information, and that the cost and time involved to do so is truly substantial. We recommend that OFCCP provide that contractors "may, at their option" submit data regarding the actual pools of applicants.

We also note that even if contractors have this information and can provide it readily, the OFCCP has not addressed a more fundamental problem which is the way OFCCP analyzes opportunities. For a great many contractors, both internal and external applicants are considered for job openings. The OFCCP's current practice to analyze "hires" separately from "promotions" creates an artificial distinction between the activity of filling job opportunities. The best practice by OFCCP would be to eliminate the distinction between hires and promotions and instead analyze data on the basis of job openings and the actual pool of candidates for each opening, whether external, internal, or a combination of the two. We also suggest that this approach be offered as an option to contractors who have the ability to provide this information.

Actual Pools of Candidates for Terminations by Gender and Specific Race/Ethnicity

Under proposed Item 11, contractors would be required to provide the gender and particular race/ethnicity composition of the "actual pool of candidates who were considered for terminations." With regard to terminations, contractors will be required to identify all employees for whom termination was considered but not effectuated during the preceding twelve months, as well as identifying whether terminations were voluntary or involuntary. As with the pool of candidates for promotions, OFCCP does not address this change in its Supporting Statement or provide any justification for it.

We believe this proposed change is especially burdensome for employers who have had to implement reductions in force or other group terminations. It is our experience that most employers do not memorialize the particular pool of employees considered for each such reduction. Employers would need to redesign their internal systems for recording terminations to ensure that the discrete pool of employees considered for termination are "tied" to a particular termination decision. Because many employers' HRIS systems do not currently have the functionality to allow this recording, contractors and their HRIS or applicant tracking vendors would need to explore designing, implementing and training for use of such a tool. Moreover, most termination decisions (virtually all decisions outside the reduction in force or layoff context) do not involve pools of employees. Termination decisions often are made on the basis of individual employee performance or disciplinary violations, and they do not involve a specific comparison of the terminated employee to any other specific employees. Contractors will consider whether any other employees or former employees committed similar infractions, which involves an informal comparison of the terminated employee to every other current and former employee. Providing the name of all current and former employee is neither realistic not helpful to OFCCP in conducting any type of meaningful

analysis. As a result, this proposed change, which would involve expenditures of time, cost and effort not currently accurately portrayed by OFCCP's proposal, is unreasonable and ineffective in furthering OFCCP's enforcement goals.

Additional Compensation Data

Also significant is OFCCP's proposed change to the current Item 11 (proposed Item 12), concerning the initial compensation data submission. Proposed Item 12 seeks the following (in Excel format, if available): (a) "employee level compensation data;" (b) data broken down by particular race/ethnicity group rather than for minorities as a whole; (c) gender and particular race/ethnicity data for each employee by job title, EEO-1 category and job group in a single file; and (d) hire dates for all employees. Compensation data must include base salary, wage rate and hours worked, and bonuses, incentives, commissions, merit increases, locality pay and/or overtime should be identified separately for each employee. Contractors are invited to produce data on factors used to determine employee compensation, such as education, past experience, duty location, performance ratings, department or function, and salary level/band/range/grade; and they must produce documentation and policies related to compensation practices, especially those used to explain the factors and reasons for compensation decisions.

In its Supporting Statement, OFCCP states that this change will require contractors to submit more precise data that will allow OFCCP to perform specific compensation analyses, and pinpoint possible discrimination based on race or sex. OFCCP further states that it will no longer ask for aggregate compensation data, which ostensibly will result in a decreased burden on the contractor on average of 3.36 hours. (Supporting Statement, at 17-18.)

Although contractors will no longer have to aggregate their compensation data, proposed Item 12 will require contractors to provide significantly more compensation information at the outset of each and every compliance evaluation. This request for detailed data represents an increase in contractor burden; it is certainly not a net decrease. Many contractors do not maintain all of these data and the burden will fall unevenly on small employers. Moreover, the short amount of time allotted to contractors to provide its information in response to a scheduling letter (30 days) is insufficient for most employers to gather such detailed information. Many employers have multiple data systems, data may be maintained in different electronic system languages, systems often do not "talk" to each other, and so on. As OFCCP knows from the history of asking for such information during audits, accurate production of such information often requires substantial amounts of time and effort, and resources.

In fact, most of the additional compensation data that will be requested under the proposed revised scheduling letter and itemized listing is information that OFCCP currently requests as additional compensation data (often referred to as a "12 or 15 Factor" request) if the current initial data submission shows indicators of potential, alleged compensation discrimination. With the proposed changes, however, all contractors will be required to provide all of this compensation data without regard to, and in fact before any determination is made as to, whether a contractor's data reveals indicators of potential, alleged compensation discrimination. Again, this seems an

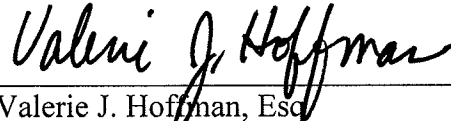
inappropriate and overbroad use of OFCCP's regulatory authority, and certainly not the "least burdensome tool for achieving regulatory ends." EO 13563.

SUMMARY

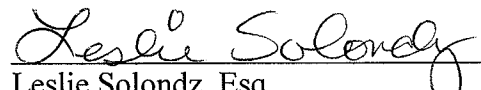
Despite statements to the contrary in the Supporting Statement, the proposed revisions to the scheduling letter and itemized listing will substantially increase the burden on federal contractors and subcontractors. The extensive, additional data sought by OFCCP at the outset of a desk audit will affect federal contractors and subcontractors in many ways, including requiring them to collect and track information not currently tracked or recorded and conduct self-audits to analyze whether this information contains indicators of discrimination. We urge OFCCP to reconsider and eliminate, or make optional, the proposed changes identified above in light of the practical issues and the increased burdens that would be imposed by the revised itemized listing.

SEYFARTH SHAW LLP

By


Valerie J. Hoffman, Esq.
Partner

By


Leslie Solondz, Esq.
Partner