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Minor Changes from OFCCP on the “Revised” Scheduling Letter and Itemized Listing

On September 28, 2011 the Office of Federal Contract Compliance Programs (OFCCP) submitted to the Office of Management and Budget (OMB) its “revised” scheduling letter and itemized listing with minor changes to the [original submission in May](#). Contractors will once again have 30 days to submit comments before OMB gives final approval. Until final approval is given, the OFCCP is using the [current scheduling letter](#).



As important as the proposed Itemized Listing the OFCCP is, it is the [supporting statement](#) they submitted that provides the rationale for their revisions or lack thereof. To get a sense of the mindset of the OFCCP here is a quote:

“OFCCP seriously considered the comments we received and the calculation of burden that our proposed changes would create for contractors. After doing so, we determined that the benefits associated with received improved data from contractors and the net reduction of 1.34 hours in the total burden hours spent by contractors in supplying the OFCCP with that data are the best most innovated and least burdensome tasks for achieving regulatory ends.

Moreover, our assessment finds societal benefits result from finalizing the proposed changes to the Scheduling Letter and Itemized Listing Among them are the:

- *Inclusion of more qualified workers in the nation’s workforce,*
- *Ability to provide America’s returning veterans and wounded warriors meaningful employment opportunities as they transition from the military,*
- *Opportunity to develop a workforce that reflects the diversity of the nation, and*
- *Strengthening of our ability to compete effectively in a global economy based on the diversity and skill of America’s workforce.”*

Now that you understand that regardless your concerns regarding burden the OFCCP is going to move forward as originally planned, let’s discuss what is in store for contractors at the desk audit stage upon final approval.

Employment Leave Policies

First, is the request of your employment leave policies including, but not limited to FMLA, pregnancy leave, sick leave, medical leave, personal leave, religious and holiday observances and any other leaves of absence. OFCCP is not requiring contractors to create policies where they do not exist but to submit existing policies. Contractors are also given the option to submit the entire employee handbook or manual.

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From Carla's Blog

Tyson Fresh Meats to pay \$2.25 million to settle sex discrimination cases with OFCCP:
<http://blog.carlairwininc.com/?p=469>

OFCCP FAQ Series: Federal Contractor Selection System (FCSS):
<http://blog.carlairwininc.com/?p=465>

OFCCP Files Complaint Against Colorado-Based Cheese Producer For Discriminating Against Minority Job Applicants:
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Suggested Preparation: Dust off your HR policies and have them reviewed and/or created.

Collective Bargaining Agreements

Second, for those in a union environment, the OFCCP is requesting “any other documents you prepared, such as policy statements, employee notices or handbooks, etc. that implement, explain or elaborate on the provisions of the collective bargaining agreement.”

Suggested Preparation: Like the HR policies we discussed above review and update as needed.

Employment Activity

Third, and this one is a big one, the OFCCP is proposing the submission of employment activity data (applicant, hire, terminations and promotions) 1) by both job group and job title 2) by individual race/ethnicity categories and 3) for promotions and terminations, to include candidate “pools” by job title and job group. In addition with regard to applicants OFCCP is requesting for each job group and job title numbers of unknown applicants. With regard to terminations, identify voluntary and involuntary by job title and job group.

OFCCP responds to this increased request by stating “that obtaining data by job group and job title will decrease a contractor’s ability to mask discrimination by manipulating the data within either job groups or job titles.” Contractors in the initial comments argued that collection by job title could produce small sample sizes skewing statistical results. The OFCCP responded by saying “Even where a job title has insufficient data to test for statistical significance, there may be enough data to suggest potential discrimination.”

When OFCCP shifted their audit strategy from Active Case Management to Active Case Enforcement at the beginning of this year, they stated that indicators of discrimination would include both individual and class (two or more). That individual analysis will be much easier with the additional information they are requesting.

Suggested Preparation: During your annual AAP process, analyze data by all permutations stated above.

Compensation Data

Fourth, and one of the most controversial, are the changes to the compensation request. OFCCP is requesting employee level data as of February 1st for all employees, including but not limited to full-time, part-time, contract, per diem or day labor and temporary. Data points include gender, race/ethnicity, hire date, job title, EEO-1 Category, job group and compensation (including base salary, wage rate and hours worked). Where applicable submit by employee “other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime”. Also OFCCP states contracts “should” submit by employee “other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime”. In addition you can choose to provide any additional data factors, documentation and policies related to compensation practices.

Contractors raised concerns about the February 1st date because it doesn’t take into consideration the employer’s AAP start date. OFCCP states they “selected this date because we believe it is less burdensome for contractors if relevant compensation information is already available, in whole or in part, for tax purposes.” It will be interesting to see guidance from the OFCCP on this issue because the AAP workforce snapshot used in producing the plan will not match the compensation data from February 1st unless your AAP start date is February 1st.

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Contractors also commented on the definition of “employee” arguing that the OFCCP expanded it by including contract, per diem and day labor. OFCCP responded by saying that sub-regulatory guidance defines employee broadly enough to include full-time, part-time and temporary employees. Therefore, “The proposed language in Item 12 does not change this longstanding requirement. Item 12 does, however, seek compensation data for “contract, per diem, or day laborers as categories of temporary employees on the contractor’s payroll. This is not an expansion but a clarification of covered employees for reporting compensation data that supports enhanced data analysis.”

As an added note, the Department of Labor recently signed a memorandum of understanding with the Internal Revenue Service (IRS) to share information and help end misclassification of employees.

Suggested Preparation: The OFCCP has put increasing focus on compensation over the past few years and so should contractors. Conduct compensation analyses, understand and account for factors that impact pay and analyze status under Fair Labor Standards Act (FLSA).

503/4212 Supporting Documents

Lastly, OFCCP is requesting two years of your VETS-100 and/or 100A forms and copies of your accommodations policies and records of accommodations. This is one area that the OFCCP did make a change from the May version, initially they asked for three years and changed due to the conflicting record retention requirements for the VETS-100 and 100A reports.

Contractors expressed concern that providing records of accommodations may violate the employee’s right to privacy. The OFCCP responded by saying the request is not for “personal information on individuals requesting accommodation; however, it does seek records of accommodations...” Another concern from contractors was the tracking and reporting of accommodations requiring the burden of the development of an automated process into their existing HR systems. OFCCP was quick to point out that “it currently requires federal contractors to maintain records of requests for reasonable accommodations.” Therefore not additional burden is imposed on contractors.

Suggested Preparation: Review your accommodations policy and tracking procedures. Communicate and train HR, managers and employees.

Cognitive Dissonance Man and the Compensation Data Collection Tool

I’m sure you’ve heard by now that OFCCP published the [Advanced Notice of Proposed Rulemaking](#) on the compensation data collection tool. According to the ANPRM, the purpose of the new tool is “to provide insight into potential problems of pay discrimination by contractors that warrant further review or evaluation by OFCCP or contractor self-audit.” OFCCP should be commended for its efforts at creating equal opportunity workplaces. Undoubtedly, there are real cases of compensation discrimination and OFCCP can - and should - play a role in ending discrimination. On its face, the compensation data collection tool appears to be one way to do this. But a closer reading of the Advanced Notice leads me to believe OFCCP has been visited by Cognitive Dissonance Man - they’re trying to do the right thing, but for the wrong reasons:



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Women still earn only 77 cents for each dollar earned by a man... Potentially non-discriminatory factors can explain some of these differences. Even so, after controlling for differences in skills and job characteristics, women still earn less than men. Some scholars find that these differences can be explained, to some extent, by differences in education and prior labor market experience. Others identify job segregation as an important cause of the pay gap. Ultimately, the research literature still finds that an unexplained gap exists even after accounting for potential explanations. Moreover, research literature finds that the narrowing of the pay gap has slowed since the 1980s. To the extent that these factors, such as type of job or amount of continuous labor market experience, are also influenced by discrimination, the “unexplained” difference may understate the true effect of discrimination.

Even though OFCCP acknowledges the vast body of research that indicates occupation, industry, labor market experience, and other factors that explain a large portion of the gender pay gap, the Advanced Notice seems to dismiss the research. The Advanced Notice also suggests that some of these explanatory factors themselves, such as continuous labor market experience and occupational choice, are influenced by discrimination.

Let’s think about continuous labor market experience. Research shows that compared to men, women tend to experience greater periods of absence from the labor market. Part of this is due to physiology. Right now, women are the only ones who can become pregnant and give birth (advances in medical technology may change that in the future, but let’s concentrate on what we know to be true today). Most women prefer not to give birth underneath their desks at the office, so they take time off from work to have their babies in more appropriate surroundings.

Physiology - not discrimination - explains why women have greater career interruptions for childbirth, barring discriminatory intent on the part of God, evolution, the aliens who engineered us, or however else you think we ended up here in our current Human form. More data, increased regulation and stiffer penalties won’t change this, nor will it change the fact that compensation and labor market experience are positively correlated.

Women also have greater periods of absence from the labor market because of care-giving responsibilities. Whether right or wrong, women in American society spend more time caring for children, ill or disabled family members, elderly parents, etc. This might be because of discrimination at the societal level and our cultural norms about the roles women should play. Should employers be held liable for discrimination in cultural norms?

A similar argument can be made for differences in occupational or industry choices. While it’s true that “back in the day” women’s choices were limited - women could be nurses but not doctors, teachers but not administrators, and secretaries not CEOs. Occupational segregation does still exist, but not to the extent that we once saw. Women have come a long way, baby.

Arguing that women’s occupational choices are pre-determined because of discrimination fails to recognize the achievements of hundreds of women who are not only working but succeeding in historically male-dominated occupations. It also undermines the validity of the choices of those women who want to work in historically “female” occupations.

Compensation discrimination is a real problem that needs a real solution. The compensation data collection tool would provide OFCCP with an enormous volume of data which could be used to detect patterns of discrimination. But I think we’re looking in the wrong places. We’ve been studying compensation data for years now, and still have not been able to successfully predict or prevent pay discrimination.

We need to take a new approach and start looking at the “non-metrics” side of things- things like compensation expectations, willingness to engage in compensation negotiations, the cash/benefits trade-off, and the reasons why people make the career choices they do. This avenue is a lot more difficult to study, but I think it’s an avenue that will pay off in terms of really understanding differences in compensation by gender and race. Doing the right thing for the wrong reasons won’t give us new insights into an old problem.

Image courtesy of [Forest For the Trees Blog](#)