

In This Issue:

May 2011

In an obscure notice published in the May 12, 2011 *Federal Register*, the Office of Federal Contract Compliance Programs (OFCCP) announced an intention to alter the forms it uses to collect information in connection with compliance reviews. These changes, if implemented, will substantially impact federal contractors in their record retention practices and in their responses to audit scheduling letters.

OFCCP Looks to Overhaul Audit Procedures Through Revisions to Scheduling Letter and Itemized Listing

By David Goldstein

In an obscure Notice published in the May 12, 2011, *Federal Register*,¹ the Office of Federal Contract Compliance Programs (OFCCP) announced an intention to alter the forms it uses to collect information in connection with compliance reviews. These changes, if implemented, will substantially impact federal contractors in their record retention practices and in their responses to audit scheduling letters.

OFCCP commences its audits by first sending a “Scheduling Letter” to the selected government contractor advising it of the audit and requiring the contractor to provide certain information. The Scheduling Letter is always accompanied by a standard form known as the “Itemized Listing,” which sets forth the information and documentation that the contractor is required to produce.

The May 12 Federal Register Notice indicates that OFCCP intends to change the text of the Scheduling Letter and alter the Itemized Listing. In a supporting statement prepared by OFCCP in connection with these proposed changes—but not published in the *Federal Register*—OFCCP states that its revisions to the body of the Scheduling Letter are simply made for clarity.² However, the agency acknowledges that its proposed changes to the itemized listing are substantive and, as discussed below, some of the proposed changes would be very significant.

First, OFCCP seeks to revise the Itemized Listing³ to require contractors, as part of their initial submission of documentation in connection with an audit, to include employment policies covering the Family and Medical Leave Act, pregnancy leave and accommodations for religious observances and practices. OFCCP states that:

Receipt of these policies would assist OFCCP in better determining the existence of sex or religious discrimination indicators within contractor organizations. Additionally, the policy requirements would 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.

OFCCP also seeks to change what used to be Item 10 of the old Itemized Listing to require more specific demographic information related to applicants, hires, promotions, and terminations.

For example, with regard to applicants and hires, Item 10 currently requires employers to report the “total number of applicants and the total number of hires, as well as the number of minority and the number of female applicants and hires” by job group OR job title. The current reporting requirements with regard to promotions and terminations similarly require reporting of minorities and females and give contractors the option of reporting by job group OR by job title.

Again using applicants and hires as an example, under OFCCP’s proposed revision to Item 10 (which would also be renumbered and become a new Item 11), contractors would instead be required to specifically provide:

the total number of applicants and the total number of hires, as well as the number of African-American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaskan Native, White, and the number of female and male applicants and hires. For each job group and job title, applicants for whom race and/or sex is not known, should be included in the data submitted.

The same requirement would also apply with regard to promotions and terminations.

With regard to this new requirement, OFCCP apparently intends to continue using racial and ethnic categories that differ from those used by the U.S. Census Bureau and those used in connection with the EEO-1 form. In addition, based on these proposed revisions, OFCCP does not appear interested in data regarding individuals who report themselves as being of two or more races.

Adding to the burden on employers, the revised Itemized Listing would no longer allow contractors to provide this data by job group OR job title. Instead, contractors under the proposed change would be required to provide the data by job group AND job title.

Significantly, OFCCP also proposes to change current Itemized Listing Number 11 that relates to compensation data. Under OFCCP’s proposal, Item 11 would be renumbered, becoming Item 12 and would require employers to produce the following:

Employee-level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, temporary) as of February 1 (*i.e.*, the data as it existed on the most recent February 1 date). Provide gender and race/ethnicity information and hire date for each employee by job title, EEO-1 category and job group in a single file. Provide all requested data electronically in Excel format, if available.

- a. For all employees, compensation includes base salary, wage rate and hours worked. Other compensation or adjustments to salaries such as bonuses, incentives, commissions, merit increases, locality pay or overtime should be identified separately for each employee.
- b. You may provide any additional 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.
- c. Documentation and policies related to compensation practices of the contractor should also be included in the submission, particularly those that explain the factors and reasoning used to determine compensation.

There are a number of ways in which this proposal would substantially change contractors’ burdens:

- Requiring data as of February 1 means that audited employers will likely have to run special data reports separate from the snapshots normally used in preparing their affirmative action plans or conducting self-audits of compensation.
- The proposed request broadens the categories of individuals for whom data must be provided. Government contractors typically do not consider independent contractors to be covered under their affirmative action programs. Similarly, temporary employees are also often not included in affirmative action plan data.
- Old Item 11 permitted employers to report compensation information by “salary range, rate, grade, or level.” Proposed Item 12 would mandate reporting by job title AND EEO-1 Category AND job group.

Finally, OFCCP also proposes adding a new Item 13 to the Itemized Listing that would require the employer to provide a copy of the contractor's Vets-100 or Vets-100A report for the last three years.

Compliance Checks

As part of its May 12 Notice, OFCCP has also sought approval from the Office of Management and Budget of a revised letter to be used to schedule Compliance Checks.

Compliance Checks involve a limited purpose evaluation of a contractor's establishment to determine whether the contractor has maintained records consistent with OFCCP's regulations—a type of limited compliance evaluation that has not been utilized by the Obama Administration OFCCP. Although OFCCP is seeking to revise the form of the letter from what was approved in the past, it still does not appear to have any plans to begin conducting Compliance Checks, at least for the time being. The Supporting Statement prepared by OFCCP in support of this change, states that "OFCCP has not scheduled any Compliance Checks for FY 2011."

Conclusion

OFCCP's proposed changes to the Itemized Listing are a clear indication of the agency's intention to scrutinize contractors' employment data more aggressively.

The proposals, if implemented, will significantly add to contractors' compliance burdens. Moreover, there appear to be aspects of the proposed revisions that involve the imposition of burdens that appear either unnecessary or unjustified given the potential enforcement benefit. As OFCCP will be accepting comments on the proposed changes through July 11, 2011, contractors are encouraged to examine the proposed revisions and either provide comments directly to OFCCP regarding concerns or share such concerns with their employment counsel. Littler will expect to be commenting as well.

.....
David Goldstein is a Shareholder in Littler Mendelson's Minneapolis office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Mr. Goldstein at dgoldstein@littler.com.

1 76 Fed. Reg. 27,670 (May 12, 2011).

2 The Supporting Statement is available at <http://www.regulations.gov/#!documentDetail;D=OFCCP-2011-0003-0002>.

3 The proposed new Itemized listing is available at <http://www.regulations.gov/#!documentDetail;D=OFCCP-2011-0003-0003>.