

CHAIRS, AFFIRMATIVE ACTION
PRACTICE GROUP

Cara Crotty, *Columbia, SC*
Angelique Lyons, *Port St. Lucie, FL*

EDITOR IN CHIEF

Robin Shea
Winston-Salem, NC

CHIEF MARKETING
OFFICER

Victoria Whitaker
Atlanta, GA

OFCCP UNDAUNTED BY CHALLENGES TO SCHEDULING LETTER CHANGES

October 3, 2011

By Cara Crotty
Columbia Office

The Office of Management and Budget **announced** last week that the Office of Federal Contract Compliance Programs had submitted its proposed changes to the Scheduling Letter and accompanying Itemized Listing to it for approval. The OMB is seeking comments on the OFCCP's request.

As we **reported** in May, the OFCCP proposed significant changes to the information that contractors are required to submit when the Agency initiates a desk audit. Comments were accepted until July 11, and **many commenters** expressed serious concerns about the scope of the information sought and the increased burden associated with responding to the new requests.

To view the comments, go to regulations.gov, and in the field marked "Enter Keyword or ID," enter "2011-11570" and click on "Search." This will retrieve the 20 comments that were submitted. To read a comment, click on the blue title, and then click on the orange "View Attachment" pdf button. You can either save a copy to your computer or close the pdf when you are finished reading.

Despite these challenges to the OFCCP's proposal, the Agency has submitted its proposed changes to the Scheduling Letter and Itemized Listing virtually unchanged. The OFCCP dismissed most of the concerns raised and continues to maintain that the amount of time contractors will need to respond will actually decrease, while accepting those comments that supported the proposed changes.

Proposed Changes

Some of the proposed changes would require contractors to submit the following:

- (1) Copies of all employment leave policies, including sick leave, medical leave, personal leave, leave for pregnancy, leave for pregnancy-related conditions, leave for religious holidays and observances, Family Medical Leave, and other leaves of absence. If the policies are part of an employee handbook or manual, the contractor can provide copies of the entire handbook or manual or a copy of the cover, the Table of Contents, and relevant pages.

The only substantive change from the OFCCP's initial proposal is to allow contractors to submit portions of its manuals instead the entire manual.

Atlanta
•
Asheville
•
Austin
•
Birmingham
•
Boston
•
Chicago
•
Columbia
•
Dallas
•
Fairfax
•
Greenville
•
Jacksonville
•
Kansas City
•
Lakeland
•
Los Angeles County
•
Macon
•
Madison
•
Nashville
•
Port St. Lucie
•
Princeton
•
St. Louis
•
Tampa
•
Ventura County
•
Winston-Salem

October 3, 2011

(2) Collective bargaining agreements, if applicable, as well as “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.”

The OFCCP did not change this provision despite concern that it was overly broad and concluded that limiting the scope of this request would affect “its ability to examine the entire contract in context for EEO policy, seniority, educational benefits, concentrations, job classifications, and other personnel related activities covered by the agreement.”

(3) For all employment activity (applications, hires, promotions, and terminations), detailed data by job group *and by job title* with the minority information broken out into specific racial categories.

The OFCCP rejected the challenges to the requirement that the data be submitted by job title, stating that the change will “decrease a contractor’s ability to mask discrimination by manipulating the data within either job titles or job groups.” Because contractors are required to record data by job title, the Agency expects only a marginal increase in burden on contractors. Initially, the OFCCP estimated this would increase contractors’ burden by one hour; the Agency “generously” doubled this estimate to two hours.

(4) VETS-100 and/or VETS-100A Reports for the past two years.

The OFCCP reduced this from three years to two years.

(5) Copies of accommodation policies and records of accommodations granted to individuals with disabilities and covered veterans.

This requirement was not changed and would require many contractors to develop a system for tracking such requests. Although contractors are required to keep records of requests for accommodation, there is currently no obligation to “track” these requests in a systematic manner for easy reporting to the OFCCP.

Detailed compensation data would be required

The most significant change continues to be the compensation information requested. Instead of summary or aggregate data, the proposed change would allow the OFCCP to obtain detailed information for each employee as of February 1, as opposed to the contractor’s affirmative action plan date.

Contractors would be required to submit, for each employee as of February 1, sex, race/ethnicity, hire date, job title, EEO-1 category, job group, and compensation. Compensation includes “base salary, wage rate, and hours worked,” and requires that “other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime” be listed separately for each employee. Contractors would be encouraged to submit additional information that affects compensation, such as education, experience, location, performance ratings, and salary grades. Finally, the OFCCP would require submission of policies or documents “that explain the factors and reasoning used to determine compensation.”

Again, the OFCCP was not persuaded by the myriad of concerns raised by commenters. For example, the OFCCP states that submitting data as of February 1 is not arbitrary and was chosen because employers have to provide

October 3, 2011

W-2s by January 31. (How that relates at all to running data for individuals employed on February 1 is not clear.) Amazingly, the Agency still asserts that the change will result in an overall reduction in the time required to respond to the compensation request. And, most unfortunately, the Agency dismissed concerns about the potential exposure of such confidential information under the federal Freedom of Information Act. The OFCCP responds only that contractors would be notified in writing if a request is made for their data and that the Agency would not release data during an open compliance review. These hollow “assurances” are unlikely to assuage contractors’ fears about the safeguarding of their highly sensitive competitive and personnel information.

Now, the OMB wants your comments

Before the OMB approves the changes as requested by the OFCCP, it is asking interested parties to comment specifically on the following:

- Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;
- The accuracy of the agency’s estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;
- How to enhance the quality, utility, and clarity of the information to be collected; and
- How to minimize the burden of the collection of information on those who must respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology; *e.g.*, permitting electronic submission of responses.

The OMB is providing only 30 days for comments, which are due October 28, 2011. Comments may be submitted in the following manners and should reference OMB Control Number 1250-0003:

- By mail to Office of Information and Regulatory Affairs, Attn: OMB Desk Officer for the Department of Labor, OFCCP, Office of Management & Budget, Room 10235, Washington, D.C. 20503.
- By facsimile to 202-395-6881.
- By email to OIRA_submission@omb.eop.gov.

If you have any questions about the OFCCP’s proposal to modify the Scheduling Letter and the Itemized Listing, please contact a member of our **Affirmative Action Practice Group** or the Constangy attorney of your choice.

Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A “Go To” Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 130 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia and Wisconsin. For more information, visit www.constangy.com.