



AMERICAN ASSOCIATION FOR ACCESS, EQUITY AND DIVERSITY

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**VIA ELECTRONIC UPLOAD**  
**FEDERAL RULEMAKING PORTAL**

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**Re: Comments by the American Association for Access, Equity and Diversity in Response to OFCCP's Proposed Changes to the Agency's Compliance Review Scheduling Letter**

The American Association for Access, Equity and Diversity (“AAAED” or “Association”) submits the following in response to the U.S. Department of Labor’s Office of Federal Contract Compliance Programs’ (“OFCCP” or “Agency”) invitation for comments on its Notice of Proposed Approval of Information Collection requirements for the Supply and Service Program, 87 Fed. Reg. 70867 (Nov. 21, 2022).

**BACKGROUND ON AAAED**

Founded in 1974, AAAED is the longest-serving national organization of professionals who engage in the important work of leading, directing and managing affirmative action, equal opportunity, and diversity programs. AAAED’s mission is to enhance the tenets of access, inclusion and equality in employment, economic and educational opportunities. Its members include Institutional Equity professionals, Equal Opportunity (EEO) and Affirmative Action practitioners, Title IX Coordinators, Diversity and Inclusion staff, company presidents, CEOs, partners, principals, deans and Chief Diversity Officers, students and retirees. Approximately one-half of our members represent institutions of higher education.

At the core of its collective work, AAAED is engaged in advocacy to promote and protect policies that are meant to ensure equity and inclusion in all spheres of opportunity. To that end, we fully support OFCCP's role in ensuring nondiscrimination and promoting diversity through equal employment opportunity in addition to supporting voluntary compliance by federal contractors and subcontractors.

## **INTRODUCTION**

In the comments that follow, AAAED presents its views on the OFCCP's proposed changes to the Agency's compliance review scheduling letter and itemized listing (hereinafter referred to as the "Scheduling Letter"). These comments reflect practical concerns, rooted in decades of experience and feedback from our members nationwide. In offering our comments, we will highlight the major expansion of information contractors must provide and the significant burden it will cause our members – half of whom represent institutions of higher education. We also question the Agency's authority to request certain information given the lack of a connection to the regulations OFCCP enforces. Finally, we offer these comments to ensure that OFCCP's mission of promoting EEO is not hindered by onerous reporting requirements that contractors cannot practically and efficiently meet.

In sum, the proposed changes create an unprecedented expansion to the information OFCCP expects contractors to submit at the outset of a compliance review and a significant increase in the burden on contractors without a sufficiently persuasive justification. This expansion surely will create unnecessary delays and undermine OFCCP's goal of conducting more efficient compliance reviews. Moreover, OFCCP seeks to vastly expand the scope of items requested without any corresponding change to the 30-day deadline. Therefore, AAAED respectfully urges OFCCP to reconsider the practical effects on contractors and revise its proposal to better meet its objectives while minimizing the burden on contractors and its staff.

## **OBJECTIONS TO PROPOSED CHANGES**

AAAED shares in the Agency's mission of ensuring nondiscrimination and promoting diversity through equal employment opportunity. We applaud OFCCP's efforts to explore more efficient ways to ensure contractor compliance with the affirmative action regulations. Nonetheless, we fail to see how the massive expansion of the Scheduling Letter serves either objective. As a result, we object to OFCCP's attempt to obtain many of the new items sought in the Scheduling Letter at the outset of a compliance review.

Our objections to many of the proposed additions fall into one or more of the following categories. First, OFCCP lacks a clear regulatory authority to collect the information. Second, the information will not serve OFCCP's goal of greater efficiency. Third, OFCCP has greatly underestimated the burden. Finally, OFCCP has failed to adequately explain how obtaining the information initially, as opposed to on an "as needed" basis, will enhance the Agency's ability

to efficiently conduct compliance reviews and identify potential discrimination such that it justifies the additional burden.

We have grouped our comments by subject matter and address one or more of the proposed revisions under each section below.

**I. Proposed Changes Impacting Post-Secondary Institutions and Other Contractors with “Campus-Like Settings”**

**A. Requiring Post-Secondary Institutions and Other Contractors with “Campus-Like Settings” to Submit All AAPs Located in the Same City and State Creates an Undue and Disproportionate Burden**

OFCCP proposes to change the Scheduling Letter to include a statement that contractors “with a campus-like setting” must submit the information requested for “*all* AAPs developed for campuses, schools, programs, buildings, departments, or other parts of the institution or company” located in the same city and state as the audited location. OFCCP further states that such a change aligns with the Scheduling Methodology accompanying recent Courtesy Scheduling Announcement Lists. The Agency asserts that “[c]ollecting all AAPs for a campus provides a more efficient use of agency resources and promotes a broader understanding of an organization’s equal opportunity programs through a holistic review of the campus.”

Setting aside the Agency’s claims that it has taken such an approach since the issuance of 2020’s Scheduling Methodology,<sup>1</sup> this request represents a substantial departure from OFCCP’s history in conducting compliance reviews. Until recently, OFCCP conducted compliance reviews for an individual AAP or FAAP only. In fact, the current Scheduling Letter reads that OFCCP has “selected your *establishment* located at [address] for a compliance review.” (emphasis added). The current Scheduling Letter goes on to request the submission of the individual Executive Order AAP, Section 503 AAP, and VEVRAA AAP, not multiple AAPs. While the regulations do not explicitly prohibit OFCCP from conducting compliance reviews of more than one AAP at the same time, the Agency’s burden estimates that serve as the basis for the collection of the AAP and supporting documentation clearly contemplate the submission of a single AAP. For educational institutions and other contractors with “campus-like settings,” this proposed change expands the scope substantially and transforms an audit of *one location* into an audit of the *entire institution* creating an unduly and disproportionate burden to so many of our members.

This proposed change also undermines OFCCP’s own guidance issued to educational institutions regarding the development of AAPs for a campus. Absent a FAAP agreement, the regulations require contractors to prepare separate affirmative action programs for

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<sup>1</sup> OFCCP cannot justify its authority to obtain multiple AAPs from a sub-regulatory document, such as the Scheduling Methodology, as it does not carry the force of law and did not go through a proper notice and comment period for such regulatory action.

each establishment<sup>2</sup> with at least 50 or more employees. *See* 41 CFR § 60-2.1(b). Despite this regulation, OFCCP traditionally expected post-secondary institutions and contractors with campus-like settings to develop and maintain a single affirmative action plan to cover multiple buildings within the same campus because such campuses constituted a single “establishment.” In 2019, OFCCP released the Technical Assistance Guide (TAG)<sup>3</sup> for educational institutions, acknowledging the unique aspects of these types of contractors. The TAG set out the factors to consider when determining if separate buildings and schools within a campus constitute an establishment for the purposes of developing and maintaining a separate affirmative action plan. With the issuance of the TAG, many post-secondary institutions now prepare multiple AAPs for a single campus. However, the proposed Scheduling Letter penalizes such institutions for doing so by requiring them to submit all AAPs for their campuses. This approach unfairly treats such institutions differently from other contractors who only must submit the AAP for the establishment selected for a compliance review, not the AAPs for their entire organization.

OFCCP estimates that contractors will spend 39 hours to comply with the Scheduling Letter. As noted in further detail later in our comments, this figure grossly underestimates the hours needed to respond to the Scheduling Letter. Even assuming the accuracy of the Agency’s estimate, OFCCP fails to account for the additional burden associated with contractors who prepare multiple AAPs for a campus. For example, if an educational institution maintains 10 AAPs for a campus, the burden balloons to 390 hours. With the expectation that a contractor will submit the requested information within 30 days, this would require the contractor in our example to dedicate 2 ½ full-time employees to respond. For a single full-time employee, such an endeavor would take 10 weeks.

Accordingly, AAAED respectfully opposes the proposed change for post-secondary institutions and contractors “with a campus-like setting” to submit the information sought in the Scheduling letter for multiple AAPs.

## **B. OFCCP Lacks the Regulatory Authority to Require the Submission of the IPEDS**

The proposed Scheduling letter seeks the submission of the Integrated Postsecondary Education Data System (IPEDS) Human Resources Survey Component data collection reports for the last three years from colleges and universities. OFCCP states that the IPEDS is the equivalent of an EEO-1 Report for post-secondary educational institutions and will help the Agency conduct more efficient analyses. Setting aside the fact that OFCCP fails to

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<sup>2</sup> OFCCP defines an establishment as a “facility or unit that produces goods or services, such as a factory, office, store or mine. In most instances, the unit is a physically separate facility at a single location. In appropriate circumstances, OFCCP may consider as an establishment several facilities located at the same site or two or more sites when the facilities are in the same labor market or recruiting area. The determination as to whether it is appropriate to group facilities as a single establishment will be made by OFCCP on a case-by-case basis.” *See* Office of Federal Contract Compliance Programs, U.S. Dep’t of Labor, Federal Contract Compliance Manual (FCCM); <https://www.dol.gov/agencies/ofccp/manual/fccm/key-words-and-phrases>.

<sup>3</sup> Office of Federal Contract Compliance Programs, U.S. Dep’t of Labor, Educational Institutions Technical Assistance Guide (TAG); <https://www.dol.gov/sites/dolgov/files/OFCCP/CAGuides/files/508-eitag-12032020.pdf>.

mention how such information will create more efficiency, the Agency does not have the authority to seek the IPEDS. OFCCP is charged with enforcing Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 the Vietnam Era Veterans' Readjustment Assistance Act of 1974. Unlike the EEO-1 Report, which the Executive Order regulations require contactors to file (*see* 41 CFR § 60-1.7.), regulations issued by the U.S. Department of Education mandate the filing of the IPEDS under 20 USC 1094 § 487 (a)(17). Furthermore, IPEDS are publicly available, which would allow the Agency to obtain copies without delay and without burdening contractors.<sup>4</sup>

Because OFCCP lacks the authority to obtain the IPEDS as part of its enforcement responsibilities and the fact that IPEDS are publicly available, AAAED opposes the Agency's proposed change requesting IPEDS data.

## **II. Proposed Changes to Compensation-Related Data and Information**

### **A. A Second Compensation Snapshot Adds Little Additional Analytical Value When Compared to the Burden Associated with Its Creation**

OFCCP seeks to obtain a second employee-level compensation report. As the basis for this new item, the Agency states it has the authority to review employment activity data going back two years from the issuance of the Scheduling Letter. Further, OFCCP claims that asking for a second snapshot only when the desk audit analysis reveals a potential disparity is inefficient. The Agency also asserts that obtaining more data at the outset of a compliance review will help OFCCP better identify whether pay discrimination exists.

While AAAED agrees that OFCCP has the authority to obtain data going back up to two years from the date of the Scheduling Letter, it does not necessarily follow that the Agency *should* collect any and all data for that period of time. The Agency's other rationales for requesting the second snapshot similarly are unpersuasive. First, OFCCP fails to state why requesting a second snapshot after the desk audit is inefficient. To the contrary, requesting the additional snapshots creates an enormous burden on contractors for which the desk audit does not reveal a potential issue. We know from the experiences of our members, that OFCCP rarely requests a second snapshot of compensation data. This suggests that the Agency infrequently identifies a potential issue with compensation at the desk audit. Yet, OFCCP inexplicably asks those contractors with no compensation issues to shoulder the burden for the few contractors who do. This creates an enormous burden and is inefficient for both contractors and the Agency.

Further adding to this inefficiency, OFCCP will receive double the amount of compensation data it received previously. That will require the Agency to perform at least twice as much analysis. Given the frequency with which OFCCP finds pay discrimination,<sup>5</sup>

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<sup>4</sup> See <https://nces.ed.gov/ipeds/>.

<sup>5</sup> OFCCP reported 866 completed Supply and Service Compliance Evaluations at the end of fiscal year 2022; a total of 8 pay discrimination cases were reported at the end of fiscal year 2022. Office of Federal Contract Compliance Programs, U.S. Dep't of Labor, <https://www.dol.gov/agencies/ofccp/about/data/accomplishments>.

undertaking even more analysis (akin to “boiling the ocean”) with existing staff levels appears woefully inefficient. The additional information will serve only to further delay the timely completion of compliance reviews. In addition, we are skeptical that obtaining an additional compensation report will substantially improve OFCCP’s ability to identify systemic pay discrimination. Even if the additional data may provide some marginal benefit, such benefit is certainly outweighed by the burden and inefficiencies it creates.

While AAAED supports OFCCP’s increased focus on ensuring pay equity, this proposed change will not advance that objective. Accordingly, AAAED recommends that the OFCCP remove the request for an additional compensation report from its proposed Scheduling Letter.

**B. Requiring Proof of Evaluation of Compensation at the Outset of a Compliance Review Contradicts Directive 2022-01 Revision 1.**

OFCCP seeks approval to add language that requests documentation that the contractor has satisfied its obligation to evaluate its “compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities,” as part of the contractor’s “in-depth analyses of its total employment process” required by 41 CFR 60-2.17(b)(3). OFCCP claims that having this information at the outset of a desk audit will enable the Agency to conduct a more efficient analysis of a contractor’s compensation for systemic discrimination, rather than waiting to request the documentation only if the desk audit reveals disparities in pay or other concerns about the contractor’s compensation practices.

However, this addition to the Scheduling Letter is in direct contradiction to Directive 2022-01 Revision issued in August 2022.<sup>6</sup> The Directive specifically states that “*if the desk audit reveals disparities* in pay or other concerns about the contractor’s compensation practices, OFCCP may request additional information to investigate the contractor’s compliance,” which includes “additional compensation data, follow-up interviews, and additional records and information from the contractor, including its compensation analysis conducted pursuant to 41 CFR 60-2.17(b)(3).” (emphasis added). This contradiction will only burden the contractor with confusion and additional work. As previously mentioned, the OFCCP rarely finds pay discrimination and requiring this information at the outset is more than likely to cause further delays to the desk audit phase.

Accordingly, AAAED opposes this proposed change to the Scheduling Letter and urges the OFCCP to follow its Directive to request this information in response to pay disparities revealed by a preliminary analysis.

**C. OFCCP Should Not Collect Pay Data on Non-Contractor Employees**

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<sup>6</sup> See Office of Federal Contract Compliance Programs, U.S. Dep’t of Labor Directive (DIR) 2022-01 Revision 1, <https://www.dol.gov/agencies/ofccp/directives/2022-01-Revision1>

AAAED objects to OFCCP's proposal to require contractors to submit compensation data for individuals assigned to contractors to work by staffing agencies. Not only does OFCCP lack the authority to do so, but also requiring contractors to submit such data creates an unnecessary and undue burden.

First, the regulations do not authorize OFCCP to review the terms and conditions of employment for workers employed by a third-party who are assigned to work at a contractor. While the regulations do not define employee, the FCCM explains OFCCP generally uses the "common-law agency test" for determining who is an employee under the laws OFCCP enforces and considers several factors, including the method of payment.<sup>7</sup> In the overwhelming number of situations, OFCCP would determine that agency staff fall outside the scope of any compliance review of the contractor's employment practices as it relates to non-employees.<sup>8</sup> While OFCCP may believe the contractor and staffing agency act as joint employees in some circumstances, the Agency cannot assume joint employment status without a fact-specific examination.

Second, staffing agencies finalize the rates of pay of its workers, even when assigned to a contractor. Therefore, contractors do not directly control the rates of pay for such individuals. Moreover, contractors do not have access to payroll data for such individuals. Including this item in the Scheduling Letter would require a contractor to rely wholly on a third-party to collect the necessary data. It would also subject the staffing agencies to a data collection burden that may not apply to them if they do not serve as a subcontractor.

Third, even if it had the authority to obtain the requested data, OFCCP could not consider the contractor's employees and the staffing agency's employees similarly situated for any analysis of compensation. As a result, OFCCP derives virtually no benefit from collecting both the data of the contractor and that of the staffing agency.

Given the lack of regulatory authority, additional burden to the contractor and staffing agency, and questionable value to a compliance review of a contractor, AAAED urges OFCCP to remove this item from its proposed Scheduling Letter.

**D. Collecting Data on Additional Factors Related to Compensation at the Outset of a Compliance Review Creates an Extremely Onerous Burden on Contractors and Adds Significant Workload to OFCCP**

OFCCP seeks authorization to obtain information on additional factors that affect pay at the outset of a compliance review. In support of this request, the Agency claims that this information "will ensure OFCCP is conducting a meaningful compensation analysis that aligns with the contractors' pay practices." Additionally, OFCCP assumes that obtaining more

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<sup>7</sup> See Office of Federal Contract Compliance Programs, U.S. Dep't of Labor, Federal Contract Compliance Manual (FCCM); <https://www.dol.gov/agencies/ofccp/manual/fccm/key-words-and-phrases>.

<sup>8</sup> While it may have jurisdiction to audit the staffing agency as a subcontractor, OFCCP must schedule such a compliance review independently and pursuant to a neutral selection process.

information at the desk audit phase “will also reduce the number of additional requests sent to contractors.”

Producing the additional information sought by OFCCP creates a substantial new burden on contractors. Most contractors consider a myriad of factors in determining compensation, including prior experience, education, special skills, etc. Many of those factors are not recorded or retained in any centralized fashion. Additionally, contractor cannot easily quantify some of this information. For example, the amount of prior experience may not be only a matter of years worked, but also the type and quality of that work. Producing such information often will require an extremely time-consuming effort, well beyond the burden hours estimated by OFCCP. Moreover, even if a contractor had some information readily available, other information will not be as accessible. As a result, at best, OFCCP will receive an incomplete set of data and the Agency will be no better off than it is with the data currently collected. As explained earlier, OFCCP rarely identifies compensation discrimination in a compliance review. Therefore, to burden the entire contractor community with this significant new data collection requirement in search of a rare occurrence seems unreasonable and unnecessarily burdensome.

Furthermore, collecting this information from a contractor at the desk audit stage will create additional work for OFCCP, as it tries to understand the implications of the information and run appropriate analyses. Given the Agency’s staffing constraints, any additional work undertaken by OFCCP undoubtedly will create inefficiencies and add to the time needed to complete a compliance review.

Based on the foregoing, AAAED respectfully urges OFCCP to remove this request from the proposed Scheduling and collect data on additional factors impacting pay if the Agency identifies initial pay differences at the desk audit stage.

### **III. Additional Data Related to Promotions and Terminations**

OFCCP seeks approval to collect additional information related to promotions and terminations that it claims is “vital to ensuring that OFCCP has all the necessary data to conduct a thorough and timely desk audit.” Specifically, the Agency seeks data on whether promotions are competitive or non-competitive, along with previous supervisor and pay rate and current supervisor and pay rate. For terminations, OFCCP seeks a breakdown of terminations by reason.

The production of such information at the outset of a compliance review represents a significant burden to the contractor community. Many contractors, including many of our members, do not track this information in a centralized manner. As such, responding to this request will require such contractors to manually generate this data, a time-consuming process. Furthermore, OFCCP’s claim that such information is “vital” to the compliance review rings hollow. As stated previously, not all desk audits identify issues with promotions or terminations. In fact, in our members’ experience, most compliance reviews do not require the submission of additional information related to promotions and terminations. Accordingly, requiring the submission of this information in the absence of a concern, presents an unnecessary burden,



especially when the Agency can collect additional data from a contractor once a potential issue is identified.

Based upon the foregoing, AAAED urges OFCCP to continue to reserve requests for this type of data to instances where the Agency identifies an initial indicator of a potential problem area.

#### **IV. Proposed Changes Related to Assorted Evaluations and Assessments**

##### **A. Requiring Contractors to Supply Additional Information Related to the Evaluation of Effectiveness of Outreach and Recruitment Effort for Individuals with a Disability and Protected Veterans Should Be Reserved for Follow Up Requests**

OFCCP seeks authorization to obtain documentation of all activities undertaken to comply with the obligations in 41 CFR § 60-741.44(f) and § 60-300.44(f), including “the criteria used to evaluate the effectiveness of each effort, and whether [the contractor] found each effort to be effective,” in addition to whether “the totality of efforts” was effective. OFCCP claims this addition is in response to expressed confusion by contractors over what documentation is sufficient for their submission and this addition will allow the Agency to more efficiently assess whether the contractor is in full compliance.

Requiring this documentation at the outset of a compliance review is unnecessary in most instances and only serves to add to the burden of contractors. The current Scheduling Letter already requires contractors to submit the results of the evaluation of effectiveness of outreach and recruitment efforts related to individuals with disabilities and protected veterans, as described in 41 CFR § 60-741.44(f) and § 60-300.44(f). Among the criteria used to determine effectiveness are the data collected pursuant to 41 CFR § 60-741.44(k); 41 CFR § 60-741.44(k). OFCCP has satisfactorily assessed compliance with the regulatory obligation to undertake required outreach through these data for years, including through focused reviews of contractor compliance with Section 503 and VEVRAA.

Supplying this documentation with the initial submission will increase the number of hours contractors require to respond to the Scheduling Letter significantly. Our members reported that gathering this documentation will take up to 20 hours, as it often takes extensive coordination between multiple departments (e.g., talent acquisition, diversity, equity, and inclusion, employee resource groups, etc.).

While some small percentage of contractors may not fully understand the requirements of 60-741.44(f) and 60-300.44(f), requiring all contractors to submit detailed information on their evaluations in every compliance evaluation is overly burdensome. Moreover, OFCCP could achieve this goal through more effective means, such as publishing examples on its website or offering more widespread technical assistance.

For these reasons, AAAED urges OFCCP to remove these additions to the proposed Scheduling Letter and continue to request the additional documentation related to the evaluation of effectiveness of outreach and recruitment efforts only as a follow-up when the OFCCP suspects the contractor's efforts to be insufficient. The Agency also should consider increasing its compliance assistance efforts to better enable contractors to comply with the above-stated regulations.

**B. Requiring Contractors to Supply All Action-Oriented Programs Designed to Address Problem Areas Is Unnecessary**

OFCCP seeks authorization to add a new item to the Scheduling Letter requesting a list identifying all action-oriented programs designed to correct any problem areas identified pursuant to 41 CFR § 60-2.17(b). The Agency claims that adding this item to the Scheduling Letter will allow OFCCP to more thoroughly review contractors' compliance and better understand a contractor's action-oriented programs at the beginning of a compliance review.

This addition seems unnecessary given the fact that OFCCP has satisfactorily assessed compliance with the regulatory obligation to evaluate whether there are problems with minority or female utilization; selection disparities; gender-, race-, or ethnicity-based compensation disparities; disparities in the employment or advancement of minorities or women; and any other areas that might impact the success of the AAP.

Thus, AAAED strongly opposes adding this additional item to the Scheduling Item since a minimal benefit does not outweigh the burden placed on contractors to compile even more documentation and information at the desk audit. OFCCP should reserve this request for follow up when it identifies a potential issue.

**C. Requiring Contractors to Provide a Description of Steps Taken to Determine Whether and Where Impediments for Equal Employment Opportunity Exist When Underutilization of Individuals with Disabilities Is Identified Creates a Significant Burden**

OFCCP seeks authorization to require contractors to provide a description of the steps taken to determine whether and where impediments for equal employment opportunity exist in accordance with 41 CFR § 60-741.45(e), if *any* underutilization of individuals with disabilities is identified. The description must include the contractor's assessment of personnel processes, the effectiveness of outreach and recruitment efforts, the results of affirmative action program audits, any other areas that might affect the success of the affirmative action program, and a description of action-oriented programs developed and executed to correct any identified problem areas. OFCCP claims that adding this item to the letter will allow OFCCP to thoroughly review a contractor's compliance in this important area, as well as enable OFCCP to understand the action-oriented programs that a contractor is undertaking as part of its AAPs at the beginning of a compliance review.

Once again, compiling this additional documentation with the initial submission will significantly increase the number of hours contractors require to respond to the Scheduling Letter. Moreover, as OFCCP understands, underutilization of individuals with a disability often reflects employee reluctance to self-identify, not actual underrepresentation. Requiring contractors to justify such underutilization, even when it may not exist, in all instances serves only to create an unnecessary burden. Thus, AAAED urges OFCCP to remove these additions to the proposed Scheduling Letter and reserve this request as follow up when the Agency suspects non-compliance.

**D. Requiring Contractors to Supply Their Most Recent Assessment of Personnel Processes Is Not Needed in Every Audit and Should Be Reserved for Follow up When Necessary**

OFCCP seeks approval to obtain a more detailed description of contractors' assessment of its personnel processes that includes "any impediments to equal employment opportunity identified through the assessment, and any actions taken, including modifications made or new processes added, as a result of the assessment" as required by 41 CFR §§ 60-300.44(b) and 60-741.44(b). OFCCP claims these additions also address confusion expressed by contractors over what documentation satisfies this requirement and will allow the Agency to more efficiently assess whether the contractor is in full compliance.

However, the expressed confusion of a small percentage of contractors should not burden all contractors moving forward. Collecting this information will only create hours of additional work and this documentation will not be needed in every audit. Some of our members indicated that compiling this documentation can take over 40 hours.

The burden placed on contractors outweighs the OFCCP's claim this documentation will help the Agency more efficiently assess compliance. Thus, AAAED urges OFCCP to remove these additions to the proposed Scheduling Letter and reserve this request as follow up when necessary.

**V. Collection of Various Personnel Policy and Practice Documents**

**A. The OFCCP Should Inquire About the Use of Artificial Intelligence, Algorithms or Other Automated Systems Used in the Selection Process *Only* When the Agency Identifies a Potential Violation Based on Statistical Analysis**

OFCCP seeks approval to add new item to the Scheduling Letter seeking "documentation of policies and practices regarding all employment recruiting, screening, and hiring mechanisms, including the use of artificial intelligence, algorithms, automated systems or other technology-based selection procedures." The Agency claims that "[a]ddition of this requirement will allow OFCCP to assess the contractor's use of such technology to determine whether these tools are creating barriers to equal employment opportunity."

OFCCP's justification for this request does not speak to why the Agency should collect documentation of all policies and practices related to recruiting, screening, and hiring. To the contrary, OFCCP only offers a rationale for inquiring into technology-based selection procedures. Therefore, the Agency's request seems overly broad and unnecessarily burdensome.

The use of artificial intelligence in hiring procedures represents a fairly new development. Collecting information on its use is neither quick nor easy. Our members reported that the submission of this information will require coordination between several persons including, but not limited to, IT specialists, recruiters, hiring managers, and automatic transfer switch (ATS) suppliers. Contractors with campus-like settings and higher education institutions also will have a particularly hard time collecting this data across departments, locations, and schools, as applicable such as, e.g., law, medicine, business, graduate schools and the undergraduate school or college. In total, some of our members indicated that compiling technology-based procedure information can take over 200 hours.

While the Association agrees that the use of artificial intelligence can lead to potential bias, it appears inefficient to collect the sought-after information from all contractors undergoing a compliance review. Moreover, identifying whether a contractor uses such technology, without more, will not allow OFCCP to determine if the technology creates a barrier to equal employment opportunity.

Accordingly, we recommend that OFCCP limit inquiries into this type of information to instances where the Agency identifies potential adverse impact through a preliminary statistical analysis. Additionally, because the use of artificial intelligence in employment is an emerging development, OFCCP may wish to consider providing more technical assistance and guidance for contractors on issues that may affect compliance and equal employment opportunity before adding this request to the Scheduling Letter.

**B. Requiring Contractors to Supply a Myriad of Employment Policies and Documentation of Practices Should Be Reserved for Follow Up When Necessary**

Through multiple additions across the Scheduling Letter (Items 20, 21 and 24), OFCCP seeks approval to obtain "copies of existing written employment policies concerning equal opportunity, including anti-harassment policies, EEO complaint procedures, and employment agreements, such as arbitration agreements, that impact employees' equal opportunity rights and complaint processes," in addition to "established policies and practices related to promotions," and "documentation and policies related to compensation."

OFCCP claims this additional information will allow OFCCP to better assess a contractor's EEO compliance and that an "early review of this documentation will also help OFCCP ascertain whether there are any provisions in these employment policies and agreements that limit or interfere with employees' rights under antidiscrimination authorities." However, this justification does not outweigh the added burden on both contractors and the Agency.

Like many of the other proposed changes, requiring this additional documentation at the outset of a compliance review is unnecessary in most instances, as issues related to such policies do not arise in most audits. Supplying this documentation with the initial submission will significantly increase the number of hours contractors require to respond to the Scheduling Letter. Our members reported that gathering this documentation will take up to 20-30 hours.

Accordingly, AAAED recommends that the OFCCP remove the request to obtain these policies and continue to reserve this type of request during follow up when an issue arises.

**VI. If OFCCP Adds Additional Items to the Scheduling Letter, the Agency Must Afford More Time for Contractors to Respond**

AAAED appreciates that OFCCP would like to improve efficiency in conducting, and shorten the duration of, compliance reviews. Its members would welcome such developments. Unfortunately, the Association firmly believes that most of the proposed revisions to the Scheduling Letter will not achieve this goal. Nonetheless, if OFCCP moves forward, it must provide contractors with additional time to make their initial submissions. Failure to do so only will lead to delays in AAP submissions, frustrating the Agency and contractors alike.

As OFCCP has previously acknowledged, contractors struggle to submit the information required by the existing Scheduling Letter within the 30-day period. The proposed Scheduling Letter will undoubtedly exacerbate the pressure contractors currently face to meet the deadline when gathering information and data because of: (1) the increased amount of information and data to be collected upon receipt of a scheduling letter; (2) some existing HRIS systems' inability to collect newly requested information and data; and (3) the fact that many contractors do maintain the information and data, however, it may not be digitized and/or easily retrievable in the format OFCCP proposes. Accordingly, AAAED requests that OFCCP extend the deadline to respond to any new Scheduling Letter to *at least 60 calendar days*. We acknowledge that such a change may require amending the Agency's regulations at 41 CFR 60-1.20(e). However, given the tremendous increase in information requested at the desk audit stage, such a change would be essential for timely data collection and compliance.

OFCCP estimates that contractors will spend 39 hours to comply with the Scheduling Letter. The Agency's estimate is very low for all contractors, but especially so for post-secondary institutions. AAPs for colleges and universities, especially those that prepare a single AAP for an entire campus, tend to be significantly larger than AAPs for private sector establishments. Because of the AAP sizes and complexities associated with the development of AAPs for institutions of higher education, AAAED surveyed our members and found that 94.74% said this estimate is too low. In fact, most of our members estimated they spend 80-100 hours to assemble the information requested in the current scheduling letter for a single AAP. For those institutions that prepare multiple AAPs for a single campus, this figure increases with each additional AAP. Thus, these proposed changes disproportionately burden these kinds of institutions compared to private sector contractors.

## **VII. Service by E-mail May Cause Confusion and Create Lapses in Communication**

AAAED appreciates and supports OFCCP's proposal to add an option to issue scheduling letters via email in order to reduce paperwork and increase communication efficiency. However, in practice, this option can create issues of its own. For example, OFCCP may send the email to an inappropriate individual. Similarly, the recipient may be out of office or accidentally glance over the email. And, in some instances, the email could be quarantined as "spam." Yet, in all these situations, the contractor seemingly would have only 30 calendar days to respond, calculated from the date the OFCCP sent the Scheduling Letter.

While AAAED shares in OFCCP's mission to reduce paperwork and increase communication efficiency, the Agency needs to address the concerns noted. Specifically, AAAED recommends: (1) prior to issuing the scheduling letter, OFCCP reach out via email or phone to confirm the correct recipient and contact information for the letter; (2) OFCCP calculate the due date the date the email is read (as opposed to when the email is sent); and (3) OFCCP confirms receipt of the letter and expected due date with recipient via email or phone call.

For these reasons, AAAED urges OFCCP to consider AAAED's recommendations.

### **CONCLUSION**

AAAED, an organization of Equal Opportunity Professionals founded in 1974, strongly supports the mission of the OFCCP. Moreover, AAAED understands and appreciates that OFCCP's aim with many of the proposed revisions to the Scheduling Letter is to improve efficiency and effectiveness during the compliance review process. However, the Association strongly believes that many of these additional requirements will undermine those objectives. Adding what OFCCP woefully underestimates to be approximately 30% more work on contractors will only further add to delays in initial submissions. Furthermore, the additional information will necessitate at least a comparable increase in the work of compliance officers. With no anticipated increase in staffing at OFCCP, this additional work will undoubtedly lead to fewer audits and longer reviews.

We strongly urge OFCCP to continue largely with its current process of requesting additional information from contractors only when necessary to address issues identified at the desk audit stage of the compliance review. This approach will ensure the efficient use of contractor and OFCCP resources alike.

AAAED sincerely appreciates the opportunity to provide feedback to the Agency regarding the proposed changes to the Scheduling Letter. We thank the OFCCP in advance for its consideration of our comments and suggestions. Please let AAAED know if you would like us to submit any additional information that may be helpful in your evaluation of these comments.

Respectfully submitted,

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