

PUBLICATION

Federal Contractors: My Baby (well, actually, the OFCCP) Just Wrote Me A Letter!!

November 18, 2014

On October 1, 2014, the Office of Management and Budget (OMB) blessed a new Office of Federal Contractor Compliance Programs (OFCCP) Scheduling Letter and Itemized Listing for Supply and Service contractors, which is effective immediately. Hopefully, you have not received one of these yet. However, chances are that if you are a covered federal contractor or subcontractor under Executive Order 11246, you will eventually be the recipient of the new letter and itemized listing.

What has changed?

Most federal contractors and subcontractors are familiar with the previous standardized letter sent by the OFCCP announcing that it is commencing a compliance review on one or more of the contractor's establishments. The former scheduling letter stated that the OFCCP has chosen the contractor's establishment for a compliance review and that the contractor should, no later than thirty (30) days from receipt of the letter, submit the contractor's EO 11246 Affirmative Action Plan (AAP), its Section 503/38 U.S.C. 4212 AAP (disabled/Veterans AAP), and the data requested in the Itemized Listing which contained 11 items (the first six of which were satisfied by submitting the contractor's EO 11246 AAP). The real "meat" of the response to OFCCP's previous scheduling letter were Items 9 through 11 of the Itemized Listing which requested information regarding placement goals for the previous year and progress in the current year to meet those goals (Item 9); adverse impact analyses for hiring, promotions and terminations (Item 10); and annualized employee compensation data which could be presented in a variety of ways (Item 11).

The new Scheduling Letter has not really changed much other than bringing the letter up-to-date with citations to the new Section 503 and the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) regulations that became effective March 24, 2014. However, the new Itemized Listing doubled, from 11 items to 22 items. While the new Itemized Listing changes some of the requests with regard to EO 11246 compliance, it adds two new sections devoted to Section 503 and Section 4212 (VEVRAA).

EO 11246 modifications

The new item 18 of the itemized listing (old item 10), clarifies that OFCCP only seeks data on the number of applicants and hires, promotions and terminations by gender and race/ethnicity (not minorities as a whole). Although a contractor will most assuredly want to perform adverse impact analyses before submitting this data, the analyses themselves are not a required submission. The new number 18(b), promotions, specifically requires the contractor to submit its definition of what constitutes a promotion. The biggest change to the itemized listing concerns new item 19 (old item 11) which requests, at the first submission, employee level compensation data for all employees at the contractor's establishment. Although OFCCP has been gathering this information in the form of supplemental data requests for the past four or five years, it now demands this data on day 31 after the contractor's receipt of the scheduling letter. Item 19 seeks base salary or wage rate for each employee, along with typical hours worked. In addition, the request seeks any other forms of compensation, such as bonuses, incentives, commissions and/or overtime pay for each employee. Further, OFCCP requests that the contractor include any documentation or policies related to compensation practices as well as factors the contractor uses to determine compensation, such as education, past experience, time on

job, location, etc. As you can probably extrapolate from the above, OFCCP is requesting the contractor's assistance in providing the necessary data so that its statisticians can perform a multiple regression analysis of the contractor's compensation practices. More than ever before, contractors should formulate narrow job groups (similar wages, content and opportunity) so that they do not give OFCCP justification for analyzing compensation or employment activity on dissimilarly situated employee groupings.

Section 503

The new Section 503 items in the listing correlate to the documentation requirements set forth in the new Section 503 regulations that became effective March 24, 2014. These items request:

1. Results of the effectiveness of the contractor's outreach and recruitment efforts to individuals with disabilities;
2. Documentation of all actions taken to comply with the contractor's Section 503 audit and reporting system requirements;
3. Documentation of the data metrics required by subsection (k) analyzing total applicants, applicants with disabilities, total hires and total hires of individuals with disabilities; and
4. The utilization analysis the contractor performed for individuals with disabilities.

In addition to these requests, new item 20 requests a copy of the contractor's reasonable accommodation policy, if any, and documentation of any accommodation requests and their resolution. Contractors should have, or be putting, systems in place to be able to respond to these requests.

Section 4212

The new Section 4212 requirements mirror, in large part, the new items requested under Section 503 – specifically numbers (1) through (3) above, although number (3) under Section 4212 analyzes total number of new hires to total number of veterans hired rather than those with disabilities. The difference between number (4) above in Section 503 and the new item for Section 4212 is documentation of the hiring benchmark adopted by the contractor. Our recommendation is that contractors simply adopt the Veterans hiring benchmark established by the OFCCP, which can be found on its website (currently 7.2%).

Applicable to both Section 503 and Section 4212 are two new items: (1) the contractor's most recent assessment of its personnel policies and any actions taken as a result of the assessment; and (2) the contractor's most recent assessment of physical and mental qualifications and any actions taken as a result of the assessment.

GOOD NEWS (not really)

OFCCP estimates that it will take contractors only 27.9 hours to respond to these 22 items. As most contractors know, 27.9 hours would have been ambitious even back in the Charles James era, before the proliferation of new regulations and Executive Orders that have bombarded federal contractors in recent years.

Need Assistance?

Responding to OFCCP compliance reviews has become increasingly difficult, time consuming and fraught with technicalities. Please feel free to reach out to a Baker Donelson attorney if you have any questions regarding the substance of the above information or any other labor or employment issue.

