

September 28, 2011

VIA U.S. MAIL AND ELECTRONIC MAIL

Debra A. Carr
Director, Division of Policy, Planning, and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Avenue, NW
Room C-3325
Washington, DC 20210

Re: Advance Notice of Proposed Rulemaking: Non-Discrimination in Compensation;
Compensation Data Collection Tool (RIN 1250-AA03)

Dear Ms. Carr:

The following letter is submitted jointly on behalf of the following major employer associations: the Equal Employment Advisory Council, U.S. Chamber of Commerce, National Association of Manufacturers, Center for Corporate Equality, HR Policy Association, Society for Human Resource Management, College and University Professional Association for Human Resources, Associated Builders and Contractors, and The Associated General Contractors of America. Collectively, these groups represent a substantial number of the private sector employers in the U.S. who as government contractors are responsible for complying with the affirmative action and recordkeeping regulations of the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"). As such, our member companies will be directly impacted by any new compensation data collection tool that OFCCP might require contractors to complete and file.

For the reasons set forth below, we are recommending that OFCCP withdraw the above-referenced Advance Notice of Proposed Rulemaking ("ANPRM"), at minimum until such time that OFCCP, in conjunction with the Equal Employment Opportunity Commission ("EEOC") and affected stakeholders, has conducted the research necessary to determine whether there is an actual need for yet *another* collection of sensitive, private sector compensation data, and if so, the least burdensome means for doing so.

In his recent jobs speech to a joint session of Congress, President Obama stated that "[w]e should have no more regulation than the health, safety and security of the American people require. Every rule should meet that common-sense test." Notably, of the 15 questions posed by OFCCP in the ANPRM, none addresses this critical threshold issue. Rather, the ANPRM appears to assume that the need for a new compensation data collection tool already has been established, a premise that we respectfully reject. Indeed, the OFCCP already collects compensation data from thousands of contractor establishments each year, and there is nothing in the agency's enforcement procedures and compliance data to suggest that the current laws and enforcement mechanisms are failing to achieve their stated objectives.

OFCCP Enforcement Data Suggest That Current Compensation Discrimination Laws Are Functioning as Intended

OFCCP already has been collecting detailed compensation data from federal contractors since the year 2000. Employee-specific and/or aggregate compensation data are submitted in every one of the roughly 4,000 compliance evaluations conducted each year. Certainly, the literally millions of compensation data points collected from the nation's federal contractors over this period should have enabled the agency to develop a methodology to identify and root out any widespread systemic discrimination that might have existed.

In fact, according to OFCCP enforcement data that have been published since fiscal year 2006, when the agency began putting a strong emphasis on systemic discrimination enforcement, OFCCP has completed 25,503 compliance evaluations, but only *seven* (7), or 0.027% of those compliance evaluations have ended with a finding of systemic compensation discrimination. When individual cases of compensation discrimination (58) are added to that figure, the number rises only slightly to 0.255% of all compliance evaluations conducted. These figures simply do not support the assertion that compensation discrimination "continues to plague" the U.S. workforce, as stated in OFCCP's press release accompanying the ANPRM.

The So-Called Wage Gap Alone Does Not Provide the Basis for New Federal Contractor Regulation

In its ANPRM, OFCCP relies heavily on the "wage gap" as justification for the need for a new compensation data collection tool, implying that any unexplained portion of the gap is attributable to discrimination, and therefore justifies the extremely burdensome new requirement that OFCCP is proposing to mandate. We respectfully disagree. Standing alone, the wage gap simply cannot be used as the basis for new regulation or information collection. Indeed, OFCCP's own prior research into this issue produced exactly that conclusion.

Three years ago, OFCCP commissioned CONSAD Research Corporation to conduct a statistical analysis of the attributes that contribute to the wage gap. The report, titled "An Analysis of Reasons for the Disparity in Wages Between Men and Women," was published by the agency on January 12, 2009. OFCCP noted in the Foreword to the CONSAD report "that the differences in the compensation of men and women are the result of a multitude of factors and that the raw wage gap should not be used as the basis to justify corrective action. Indeed, there may be nothing to correct." Yet, in the wage gap "research literature" cited in the ANPRM, OFCCP curiously has failed to cite its own report.

We are not by any means suggesting that compensation discrimination has been eliminated from the U.S. workforce. Indeed, the CONSAD study also concluded that further research in this area was "clearly needed." The ANPRM, however, offers no indication that OFCCP either has conducted that research or commissioned a third party to do so. We respectfully submit that the ANPRM should be withdrawn until that research can be performed, some of which already is underway by other agencies.

In 2010 President Obama formed the National Equal Pay Enforcement Task Force. Among other things, a subsequent report issued by the Task Force repeatedly states that the OFCCP and EEOC would “work collaboratively when evaluating data collection needs, capabilities, and tools,” *so as to avoid duplicative efforts* (emphasis added). Given the absence of OFCCP’s own research, and the fact that EEOC has already commissioned the National Academy of Sciences (“NAS”) to conduct a study “to evaluate currently available and potential data sources, methodological requirements, and appropriate statistical techniques for the measurement and collection of employer pay data,” it would seem both prudent and consistent with the task force’s direction for the OFCCP to withdraw its proposal pending the outcome of the NAS study.

OFCCP Has Not Justified the Significant Burden and Confidentiality Concerns That Would Be Created by Its Proposed New Compensation Data Collection Tool

President Obama's Executive Order 13563 requires federal agencies to tailor their regulations to impose the least burden on society, consistent with obtaining regulatory objectives, taking into account, among other things, and to the extent practicable, *the costs of cumulative regulations*. With the current ANPRM, the agency’s pending proposed changes to its desk audit scheduling letter and itemized listing, the Notice of Proposed Rulemaking (“NPRM”) under Section 4212 of the Vietnam Era Veterans’ Readjustment Assistance Act, and the upcoming NPRM under Section 503 of the Rehabilitation Act, OFCCP is actively moving forward on four major regulatory proposals, each of which standing alone is anticipated to produce new and increased burdens on the contracting community. Accordingly, we implore OFCCP to take seriously the President’s commitment to reduce the regulatory burdens on covered contractors, rather than proceeding to create new ones such as the new compensation data collection tool.

Finally, we ask that OFCCP consider the data confidentiality implications associated with the new data collection tool. We are deeply concerned by the fact that OFCCP apparently intends to publicize contractors’ compensation data. While not stated directly in the ANPRM, OFCCP has stated separately to Congress that it “will design a web-based, searchable database system comprised of aggregated data from the Compensation Data Collection Tool.” We fail to see how publishing the compensation data of millions of American workers, even if at an aggregate level, will serve this nation’s interests.

Conclusion

For the reasons outlined above, we respectfully urge OFCCP to withdraw its ANPRM, unless and until such time as there is reliable evidence to show that a new compensation data collection tool, over and above the tools that OFCCP already uses to collect detailed compensation data from contractors, is needed. Thank you for the opportunity to comment.

Sincerely,



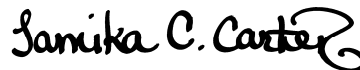
Jeffrey A. Norris
President
Equal Employment Advisory Council



Randel K. Johnson
Senior Vice President, Labor, Immigration
& Employee Benefits
U.S. Chamber of Commerce



Joe Trauger
Vice President, Human Resources Policy
National Association of Manufacturers



Tamika C. Carter, PHR
Director, Construction HR
Associated General Contractors of America



David Cohen
Senior Vice President
Center for Corporate Equality



Michael D. Peterson
Director, Labor & Employment Policy
HR Policy Association



Michael P. Aitken
Vice President, Government Affairs
Society for Human Resource Management



Joshua A. Ulman
Chief Government Relations Officer
The College and University Professional
Association for Human Resources



Geoffrey Burr
Vice President, Federal Affairs
Associated Builders and Contractors

cc: Hon. Hilda L. Solis, U.S. Department of Labor
Seth D. Harris, U.S. Department of Labor
Jacob J. Lew, Office of Management and Budget
Cass R. Sunstein, Office of Management and Budget