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VIA FEDERAL eRULEMAKING PORTAL:  http://www.regulations.gov

Debra A. Carr
Director
Division of Policy and Program Development
Office of Federal Contract Compliance Programs
United States Department of Labor
Room C-3325
200 Constitution Avenue, N.W.
Washington, D.C. 20210


Dear Ms. Carr:

The Society for Human Resource Management (“SHRM”) and the College and University Professional Association for Human Resources (“CUPA-HR”) appreciate this opportunity to provide comments on the Notice of Proposed Rulemaking titled, “Government Contractors, Requirement to Report Summary Data on Employee Compensation” (the “NPRM”). These comments were prepared on behalf of SHRM and CUPA-HR by Berkshire Associates Inc.¹

STATEMENT OF INTEREST

Founded in 1948, SHRM is the world’s largest HR membership organization devoted to human resource management. Representing more than 275,000 members in over 160 countries,

¹ Berkshire Associates Inc. (“Berkshire”) is a human resources consulting and technology firm specializing in affirmative action compliance and applicant management. A certified small business enterprise, Berkshire prepares more than 5500 affirmative action plans every year and regularly assists Federal contractors and subcontractors during OFCCP compliance audits. Berkshire also assists its clients with other reporting requirements, including the filing of EEO-1 reports. Berkshire’s clients vary in size from small establishments with one affirmative action plan to nation-wide employers with thousands of employees covered by multiple affirmative action plans. Berkshire regularly provides affirmative action consulting services to clients in a wide range of private industry from manufacturing to professional service organizations, as well as colleges and universities.
SHRM is the leading provider of resources to serve the needs of HR professionals and advance the professional practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India, and the United Arab Emirates.

CUPA-HR serves as the voice of human resources in higher education, representing more than 17,000 HR professionals at over 1,900 colleges and universities across the country, including 91 percent of all U.S. doctoral institutions, 77 percent of all master’s institutions, 57 percent of all bachelor’s institutions, and nearly 600 community colleges and specialized institutions. Higher education employs 3.8 million workers nationwide, with colleges and universities in all 50 states.

COMMENTS ON THE NOTICE OF PROPOSED RULEMAKING

SHRM and CUPA-HR strongly support nondiscrimination in compensation and believe that compensation decisions should be based on an individual’s qualifications and ability to perform a job, not on characteristics that have no bearing on job performance. As organizations, we regularly seek to promote effective practices for advancing equal employment opportunity for all. SHRM provides training to its members on compensation discrimination and its members regularly engage in outreach efforts to civil rights and women’s organizations, both as part of their current affirmative action obligations and as a sound business practice. CUPA-HR has created significant online resources promoting equal opportunity, including articles and links to help HR professionals advance fair compensation practices. CUPA-HR annual, regional, and chapter conferences also frequently include sessions related to compensation discrimination and affirmative action requirements. Likewise, SHRM produces educational and conference programming for HR professionals, including an annual Talent Management conference with sessions focused on compensation-related talent management strategies.

I. GENERAL RESPONSE TO THE OFCCP’S PROPOSAL TO COLLECT ANNUAL COMPENSATION DATA FROM FEDERAL CONTRACTORS

The NPRM proposes to require certain Federal contractors and subcontractors, including colleges and universities, to submit annual employee compensation data to the OFCCP in order to “direct its enforcement resources towards entities for which reported data suggest potential pay violations” and “encourage greater voluntary compliance and identify and analyze industry trends.” Under the agency’s proposal, covered Federal contractors with more than 100 employees would submit an electronic, annual “Equal Pay Report” on employee compensation with the following information:

• Total number of workers by job category listed in the Standard Form 100 (otherwise known as the “Employer Information Report EEO-1” or the “EEO-1 Report”) by race, ethnicity and sex;
• Total W-2 wages defined as the total individual W-2 wages for all workers in the job category by race, ethnicity, and sex; and
• Total hours worked, defined as the number of hours worked by all employees in the job category by race, ethnicity, and sex.
The proposed Equal Pay Report would be filed for the headquarters and each establishment of a covered Federal contractor between January 1 and March 31 of each calendar year and would include compensation information for all employees listed on the employer’s prior year EEO-1 report. The agency’s stated goals for the data collection are (1) developing “a data-driven approach for identifying and focusing OFCCP’s evaluations and resources on Federal contractors that have potentially discriminatory compensation differences” and (2) allowing Federal contractors to make “meaningful self-assessments of their compensation practices and policies” through the public release of aggregate summary compensation by industry and EEO-1 job category, referred to as “objective industry standards.”

As a preliminary matter, we want to share our significant concerns about whether there is a need to collect further compensation data from Federal contractors, the apparent lack of coordination between OFCCP’s efforts and those of its sister civil rights enforcement agencies, the United States Equal Employment Opportunity Commission (“EEOC”) and the Department of Education, and the criticality of protecting Federal contractors’ highly-sensitive and proprietary compensation data from inappropriate public disclosure.

A. There Is Not A Demonstrated Need For Another Compensation Data Collection Tool.

We support the agency’s commitment to rooting out all forms of employment discrimination, including compensation discrimination. However, the agency’s reliance on the raw wage gap between men and women to justify the proposed Equal Pay Report is misplaced. Although the OFCCP asserts that “women working full-time earn approximately 77 cents on the dollar compared to men,” the agency completely fails to acknowledge its own earlier conclusion 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.” U.S. Department of Labor, “An Analysis of Reasons for the Disparity in Wages Between Men and Women” (2009). This fatal flaw permeates the OFCCP’s proposal and its stated reasons for collecting aggregate compensation data from Federal contractors. Just as the raw wage gap should not be used as a basis for enforcement, raw differences in W-2 wages for employees in the same EEO-1 job category should also not be used to prioritize establishments for review.

Moreover, the agency’s own enforcement history does not support its claim that pay discrimination “continues to plague American working families.” Between January 1, 2010 and September 30, 2013, despite a clear emphasis on compensation discrimination issues, less than 1% of the OFCCP’s compliance evaluations have resulted in a finding of compensation discrimination. Furthermore, any findings of compensation discrimination generally have been limited in scope, often concerning pay differences between one or two employees in the same job title, rather than widespread across a Federal contractor’s workforce.

Likewise, the agency’s failed experiment with the EO Survey, which also gathered aggregated compensation data by EEO-1 job category, is further evidence of the limited utility of using a uniform data collection tool to evaluate whether it is likely that a particular Federal contractor establishment has engaged in potential compensation discrimination. Indeed, the agency itself appears to recognize this, having recently revised its scheduling documents to
require that Federal contractors provide individual, employee-level data during a compliance review. As the OFCCP knows from its own experience, Federal contractors do not use a single, lock-step compensation system like the Federal government and, as a result, pay decisions are based on a variety of factors which cannot easily or efficiently be captured in a uniform reporting format.

Simply put, the OFCCP’s own studies conclude that many factors other than discrimination contribute to the raw wage gap between women and men, and the OFCCP’s own enforcement experiences, both during compliance reviews and with the EO Survey, demonstrate that a review of aggregated compensation data does not accurately identify those contractor establishments more likely to engage in pay discrimination. Given this, the proposed Equal Pay Report appears to be aimed at equating “fair pay” with a uniform approach to compensation that discredits and discourages any pay differential regardless of whether the contractor’s compensation practices are the result of unlawful discrimination. We respectfully submit that this approach goes beyond the agency’s legal mandate to eliminate unlawful compensation discrimination.

B. Coordination with Other Enforcement Agencies Is Critical To Minimizing The Burden On Federal Contractors.

This Administration has placed a priority on coordinated enforcement efforts among and across agencies with common purposes and goals. We applaud that effort and strongly encourage the OFCCP to engage in such inter-agency coordination when finalizing any new compensation data collection tool. As the OFCCP well knows, creating shared tools that provide each enforcement agency with the data needed to carry out its mission greatly reduces the burden of complying with data collection requirements for the regulated community. The positive impact such coordinated efforts have on the regulated community simply cannot be understated. If a compensation data collection tool is finalized by the OFCCP, our members strongly support the filing of one annual report that would fulfill their Equal Pay and EEO-1 reporting obligations.2

We also encourage the agency to coordinate its activities with the Department of Education to minimize the unique burdens imposed on colleges and universities by any additional compensation data collection tool. As the OFCCP appears to recognize, the compensation practices of many colleges and universities are particularly complex. For example, some college and university instructional staff may be paid on a “confidential basis” or through funding agents other than the college and university itself. The Department of Education has recognized these unique pay arrangements when developing Integrated Postsecondary Education Data System (“IPEDS”) reporting. For example, in recognition of these facts, the Department of Education only collects data regarding the number of instructional

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2 As discussed in greater detail below, we believe this may require that the reporting periods for any Equal Pay Report and the EEO-1 Report be coordinated so that Federal contractors are not required to compile and file two separate reports. As the OFCCP knows, Federal contractors file EEO-1 Reports using data gathered from a payroll period between July 1 and September 30 of each year, yet the proposed Equal Pay Report would require additional data points as of December 31 of each year. In essence, this requires the compiling, reviewing and filing of two separate reports, even though some of the data points are the same.
staff, the number of months their salary covers, and the total salary outlay for all such individuals. The Department of Education also allows colleges and universities to estimate the salary of those paid on a confidential basis and to exclude from reporting those individuals whose compensation is funded by an entity other than the college or university. Since the Department of Education already collects compensation data from colleges and universities using the IPEDS Report, we strongly urge the OFCCP to exempt these institutions from filing the proposed Equal Pay Report altogether.\(^3\)

Quite simply, the OFCCP’s NPRM places an unnecessary burden on Federal contractors since it requires that they file separate reports with the OFCCP, the EEOC and the Department of Education, detailing much of the same information, but for different time periods. Multiple reports would not serve the government’s needs any better but would greatly increase the burden on Federal contractors. A report issued by President Obama’s National Equal Pay Enforcement Task Force only serves to underscore the importance of such collaboration in the area of data collection. The report clearly states that the OFCCP will work collaboratively with the EEOC “when evaluating data collection needs, capabilities, and tools.” The same rationale applies to the importance of coordinating any required reporting obligations with the Department of Education. We urge the OFCCP to seriously consider how these various reporting obligations could be consolidated before proceeding further with rulemaking.

C. Any Compensation Data Tool Must Protect Federal Contractors’ Highly-Sensitive And Proprietary Information From Inappropriate Disclosure.

Our members have expressed substantial concerns about the confidentiality of the compensation data the OFCCP proposes to collect. The NPRM proposes to gather very specific compensation information by specific establishments, including very small establishments, using a web-based format. For many small Federal contractors, and even larger Federal contractors with small establishments or few employees in certain EEO-1 job categories, reporting data in this manner will result in the reporting of individual, employee-level data. The NPRM also indicates that OFCCP will publish the compensation data of Federal contractors in an aggregated format, perhaps in a web-based, publicly available, database.

Compensation data of the nature OFCCP intends to collect is especially sensitive and confidential, as it necessarily provides insight into an organization’s competitive strategies, internal costs, and other valuable business details. Release of an organization’s compensation information – through the Freedom of Information Act (“FOIA”), by intentional misappropriation, or through a web-based database of aggregate compensation information – poses potentially devastating consequences to the organizations we represent. For this reason, we urge the OFCCP not to move forward with the implementation of any compensation data collection tool until appropriate data security safeguards are developed, tested, and perfected to

\(^3\) If an exemption is not granted, the reporting period for any compensation data collection tool required of colleges and universities should be coordinated with the reporting period for the IPEDS Reports. Colleges and universities currently submit IPEDS data using a November 1 snapshot date. Race and gender data regarding an institution’s workforce must be submitted on all odd-numbered years and is optional on even-numbered years.
ensure protection of employers’ highly sensitive pay data.\footnote{In doing so, the agency should consider that many Federal contractors have firewalls that prohibit or severely restrict the transmission of data over the Internet. Similarly, any electronic submission system should be designed to permit secure encryption of data and password protection.} The OFCCP also should carefully consider the comments of the National Research Council of the National Academies regarding statistical protection of tabular data and microdata before publishing any aggregated, industry compensation of Federal contractors. See National Research Council of the National Academies, Committee on National Statistics, \textit{Collecting Compensation Data from Employers} (2013), available at \url{http://www.nap.edu/openbook.php?record_id=13496} (website last visited January 5, 2015).

In addition, the agency should reconsider its position that a Federal contractor must affirmatively object in order to avoid production of its compensation data to the general public. Instead, we believe that any proposal should presume that individual employer-level compensation report data be maintained confidentially. This approach is consistent with the manner in which the EEOC handles requests for unaggregated EEO-1 Report data. See 29 CFR §1610.17(e) (“Each executed statistical reporting form required under part 1602 of this chapter, such as Employer Information Report EEO-1, etc., relating to a particular employer is exempt from disclosure to the public prior to the institution of a proceeding under Title VII involving information from such form’’); \textit{EEOC Questions and Answers: Freedom of Information Requests}, available online at \url{http://www.eeoc.gov/eeoc/foia/qanda_foiarequest.cfm} (website last visited January 5, 2015) (“EEOC will not disclose to the public charges of employment discrimination, charge conciliation information and unaggregated EEO survey data . . . A request for EEO-1 data of a particular employer . . . must be accompanied by a copy of court complaint stamped “Filed”, indicating that the charging party has filed suit . . . against the named respondent.”). Although we recognize that the EEOC has a statutory obligation to maintain the confidentiality of such information, we do not believe that Executive Order 11246 prohibits the extension of similar confidentiality protections. Alternatively, if the OFCCP believes that it does not have such authority, then we urge the agency to seek such authority from the President through an amendment to the Executive Order before proceeding with any compensation data collection tool.

**II. COMMENTS ON THE FORMAT AND UTILITY OF THE PROPOSED EQUAL PAY REPORT**

As an initial matter, we applaud the agency for not proposing that Federal contractors submit detailed employee-level compensation data, information regarding the specific factors that influence pay, and/or specific policies relating to a Federal contractor’s compensation practices as part of the proposed Equal Pay Report. As we noted in our comments to the Advance Notice of Proposed Rulemaking (“ANPRM”) regarding this same topic, we believe that collecting this type of information in a uniform, annual report format is not likely to capture sufficient information to adequately explain the relevant variables influencing compensation at any given organization. Unlike the Federal government, which maintains a rigid compensation pay scale, many companies provide more flexibility within the pay system that managers are to follow when determining compensation, promotions and bonuses. As the OFCCP rightly
recognized, reporting this type of data in an annual report would be both too burdensome for Federal contractors and cumbersome for the OFCCP to manage.

We also support the agency’s decision to not require businesses that are bidding on future Federal contracts to submit compensation data as part of the Request for Proposal process, as suggested in the ANPRM. As we indicated previously, we believe there is limited utility in collecting compensation data from all bidders on a proposed Federal contract in order to “target[] contractors for post-award compliance reviews.” First, the contract award process can be extremely lengthy, meaning that any compensation data collected at the bidding stage likely will be outdated by the time many contracts are actually awarded. Second, requesting data from all contract bidders is an extremely overbroad mechanism for targeting the one business that will be awarded the Federal contract. Third, submission of such data only adds another layer of bureaucracy and cost to an already complex process, which in turn will only serve to increase the costs of Federal procurement activities at a time when our government is focused on reducing government spending. Because many of these businesses are likely to be small businesses, including minority- and women-owned businesses, they also may be deterred from bidding on Federal opportunities.

Finally, we strongly support the agency’s decision to exempt small employers of less than 100 employees from the proposed reporting requirements. Our members that are small employers are far less likely to have existing payroll and personnel systems from which they could easily retrieve the type of data likely to be requested by the OFCCP. They also are far less likely to be able to absorb this additional cost of doing business with the Federal government. In addition, data cells by EEO-1 job category are likely to be small for these employers, increasing concerns that an individual employee’s pay information will be revealed. For these reasons, and because any analysis of such small groupings of employees is unlikely to reveal meaningful disparities in compensation, we strongly support the OFCCP’s proposal to exempt businesses with 100 or fewer employees from the proposed filing requirement.

Despite our support of the agency’s decision to omit some of the elements originally outlined in the ANPRM, we do not support the agency’s proposal to require Federal contractors to submit an Equal Pay Report on an annual basis. For the reasons discussed below, we do not believe that the proposed Equal Pay Report will meet any of the OFCCP’s stated objectives for collecting this data from Federal contractors. Moreover, the collection of this data in the format proposed is far more burdensome than the agency estimated. Given the limited utility of the aggregated data to be collected in furthering the agency’s enforcement purposes or Federal contractor’s proactive compliance efforts, the burden of this new collection requirement cannot be justified.

A. Collecting Aggregated W-2 Wage Information

Evaluating an organization’s compensation data, even if for the purpose of determining whether further investigation is required, necessarily demands an individualized approach tailored to the particular manner in which that organization makes compensation decisions. Indeed, even different jobs within the same organization may be compensated differently and pursuant to different policies and practices. For these reasons, our members strongly believe that
collecting aggregated compensation data through a “one size fits all” data collection tool will not allow the agency to better identify those contractors who may have engaged in pay discrimination. This was one of the primary reasons the agency abandoned its earlier EO Survey.

We appreciate the OFCCP’s stated desire to collect compensation data that may be “readily available” to Federal contractors. However, the agency’s proposed collection of total W-2 wage information is misplaced. First, this data will not aid the OFCCP in identifying Federal contractors who may have engaged in pay discrimination because reported W-2 wage earnings are impacted by a host of decisions made by wage earners themselves. According to the NPRM, Federal contractors would report W-2 wages based on the “pay listed in Box 1 of the W-2 form submitted annually” to the Internal Revenue Service (“IRS”). The IRS instructions for reporting W-2 wages provide that elective deferrals, such as employee contributions to a section 401(k) or 403(b) plan, should not be included. See Department of Treasury, Internal Revenue Service, 2014 General Instructions for Forms W-2 and W-3, available online at http://www.irs.gov/pub/irs-pdf/iw2w3.pdf (website last visited January 5, 2015). Given this, the W-2 wage information reported for a male and female employee in the same job at the same establishment with the same compensation could vary by up to $17,500 based solely on the fact that the male employee chose not to make any contributions to his 401(k) plan while the female employee chose to make the maximum allowable contribution. In such a case, by using W-2 wage information, it would appear that the female employee was earning $17,500 less than the male employee, even though both actually earned the same pay.

In addition, W-2 wages include other non-discriminatory variables that may impact pay, including shift differentials, bonuses, commissions, and overtime compensation. As a result, collecting W-2 wage data will not allow the OFCCP to evaluate comparable compensation data points. For example, in a university setting, a faculty member’s W-2 wage earnings could be significantly impacted by whether or not the faculty member voluntarily decides to teach during the summer semester. Two faculty members in the same discipline could have vastly different W-2 wages based simply on this fact alone, even though both may have had the same opportunity to teach during the summer semester.

Similarly, in other workplace settings, two production workers could have different W-2 earnings if one was excused from working overtime hours as a reasonable accommodation under the Americans with Disabilities Act (“ADA”), while another not only worked continuously throughout the year but also worked all overtime hours offered to her. Providing hours worked by both employees does not adequately account for the differences in pay because there is no way to account for the fact that some of the hours of one employee were paid at a premium rate, while the other employee asked to be excused from all overtime hours for a legitimate, nondiscriminatory reason.

Likewise, two sales employees may report different W-2 wage information in a calendar year if one of the sales employees receives a $25,000 signing bonus that year, and the other did not. This is the case even if the other employee received the same $25,000 signing bonus when he or she began employment in a different calendar year. If the two employees are of different races or genders, aggregating the W-2 wage information of these two employees will make it
appear as if there is a potential pay discrimination issue. Again, reporting total hours worked for these two employees would not account for the legitimate, nondiscriminatory reason for the difference in pay.

For colleges and universities, reporting W-2 wages for some faculty and staff will be particularly misleading. Some faculty members, for example, are paid, in whole or part, by other entities through grants and other funding opportunities. In these cases, the W-2 wages reported by the college or university would significantly underreport the employee’s actual compensation. In other cases, a staff member may receive multiple W-2 wage forms if she works on multiple campuses for which separate payroll are processed. In addition, colleges and universities with academic medical centers will face unique challenges in reporting W-2 wages for clinical faculty since a significant portion of their salary may be earned from an associated private practice plan.

Given these limitations of collecting W-2 wage information, we believe that base salary or wage rate is a more meaningful data point to collect for conducting a preliminary analysis of Federal contractors’ compensation practices, if a compensation reporting obligation is implemented. We recognize that a compensation data collection tool that collected this information still likely would result in a high number of false positives, simply because of the fact that there are a multitude of other factors that impact compensation. However, we believe that a data collection tool limited to this wage information appropriately balances the burden on the regulated community with any benefit of providing compensation data to the Federal government using a generic compensation data tool.5

B. Collecting Total Hours Worked Information

The proposed Equal Pay Report also would require that Federal contractors report total hours worked by race/ethnicity and gender in each EEO-1 job category. The agency proposed that actual hours of work be provided for non-exempt employees, and that Federal contractors report actual hours for exempt employees, if available, or assume 2,080 hours for full-time, exempt employees and 1,040 hours for part-time, exempt employees. Reported hours also may be adjusted for workers who only worked a portion of the calendar year by using date of hire or dates of absence.

The NPRM mistakenly concludes that “many contractors will be able to provide actual hours worked . . . for those employees who are exempt.” The vast majority of our members, however, do not collect actual hours worked data for exempt employees. Indeed, at the most fundamental level, one of the hallmarks of being classified as an exempt employee is that one’s compensation is not based on hours worked. Instead, most exempt employees are compensated based on outcomes and projects completed.

5 As discussed below, requiring that Federal contractors provide compensation data other than base salary or wage rate would require extensive research and data entry for most Federal contractors. The majority of Federal contractors do not maintain W-2 wage information, EEO-1 job category, and race, gender and ethnicity information in a single, centralized system or database. In light of this, many of our small to mid-size members believe that such data would have to be compiled manually on an annual basis. For larger employers, where manual tabulation is simply not possible, responding to a compensation data collection tool that requires reporting of W-2 wage information by EEO-1 job category will require a capital investment in new systems or programs. The OFCCP significantly underestimated the burden associated with these tasks in the NPRM.
Under the OFCCP’s proposal, it appears that employers who did not collect actual hours worked data would be required to use a default hours estimate of 2,080 hours for all exempt employees. However, not all employers adopt a 40-hour workweek; the “standard” workweek for some employers may be 35 or 37.5 hours. In addition, in some local jurisdictions, the maximum workweek for some professions is established by law at a number below 40 hours per workweek. Regardless of whether an employer’s “standard” workweek is 40, 37.5, or 35 hours, many exempt employees regularly work hours that vary from their employer’s standard workweek, rendering the use of a single, default hours worked figure for all exempt employees meaningless.

Further, using the agency’s proposed default assumptions will lead to anomalous results. For example, assuming that all exempt employees categorized as professionals work 2,080 hours does not accurately reflect that one professional, such as a doctor or lawyer, may be more highly compensated precisely because she is expected to be available to handle work matters that arise after normal business hours, thus requiring that she work more than 2,080 hours. Yet, the salary of this employee would be averaged with the salary of a lower-earning male professional accountant who is paid less in part because he generally does not work outside normal business hours, without any way of accounting for the increased number of hours worked by the exempt female employee. Similarly, the NPRM suggests that Federal contractors assume that all part-time employees work 1,040 hours, or 50% of a full-time schedule. However, part-time work arrangements vary widely, with many part-time employees working 60-75% of a full-time schedule and other employees working less than 50% of the same schedule. Under the OFCCP’s proposal, the total W-2 wages for these workers would be reported accurately, but the total hours worked by each would not.

Reporting total actual hours worked without additional information also fails to account for the personal choices some employees make. For example, if two non-exempt employees are both offered the same amount of voluntary overtime, but only one agrees to work the additional hours, how will the agency view this data, as reported under the proposed Equal Pay Report? Under the agency’s proposal, the pay and hours worked for one employee will be higher than the other, but there will be no way for an employer to indicate that the difference in pay was due to employee choice, rather than any decision by the employer. While the NPRM suggests that collecting this type of data will allow the agency to evaluate whether there are barriers to equal opportunity for earning other types of compensation beyond base salary, this example aptly illustrates why drawing any conclusions from this type of data would be flawed.

Calculating total hours worked is particularly challenging for colleges and universities. Many faculty work only nine months of the year, yet are paid on a calendar year basis. Still others teach additional classes in the evening or perform additional duties, such as faculty advising services, for which pay is calculated on credit hours or student headcount, not hours worked. Other faculty members may be on an extended sabbatical, but this information would not be reflected in the institution’s time keeping systems. Most colleges and universities do not track the specific hours worked by faculty members, and doing so is impracticable if not impossible, even though the previous examples illustrate how additional work clearly impacts W-2 wages. Determining hours worked for adjunct faculty, who are typically paid for specific
academic deliverables (e.g. teaching a course) rather than by the hour, is so complicated that the IRS developed specific guidance for post-secondary institutions to follow when determining whether these individuals worked at least 30 hours per week under the Affordable Care Act. Under those guidelines, colleges and universities may credit adjunct faculty with:

2 1/4 hours of service (representing a combination of teaching or classroom time and time performing related tasks such as class preparation and grading of examinations or papers) per week for each hour of teaching or classroom time (in other words, in addition to crediting an hour of service for each hour teaching in the classroom, this method would credit an additional 1 1/4 hours for activities such as class preparation and grading) and, separately, (b) an hour of service per week for each additional hour outside of the classroom the faculty member spends performing duties he or she is required to perform (such as required office hours or required attendance at faculty meetings).

See Preamble to Department of Treasury, Shared Responsibility for Employers Regarding Health Coverage, Final Rule 79 FR 8551 (February 12, 2014). These estimates have no relationship whatsoever to the 2,080 and 1,040 hour assumptions used in the proposed Equal Pay Report. Moreover, the IRS guidelines allow and colleges and universities do use other reasonable approximations for hours worked by adjunct faculty members.

Given the above limitations associated with collecting actual total hours worked for exempt employees, we respectfully suggest that the OFCCP abandon its proposal to require annual reporting of this information to the government. Quite simply, even without further study, it is clear that any data reported would not be a reliable approximation of the number of actual hours worked by these employees, making the collection of such data utterly useless for the OFCCP’s stated purposes.

C. Collecting Aggregated Compensation Data By EEO-1 Job Category

One of the most significant weaknesses of the EO Survey was that it aggregated data by EEO-1 job category. As discussed above, aggregated compensation data of any kind is simply not useful to the OFCCP’s stated purposes. Indeed, the OFCCP’s own validation studies of the EO Survey conclusively demonstrated that particular data collection tool was not a valid predictor of discrimination or compliance with the agency’s regulatory requirements. 71 Federal Register 53037 (September 8, 2006). Despite the failings of the EO Survey, the proposed Equal Pay Report also would gather aggregate compensation data by EEO-1 job category.

Reviewing compensation data at this level is unlikely to shed any light whatsoever on whether a Federal contractor’s pay practices are discriminatory. This is because each EEO-1 job category includes a wide range of job titles, for which vastly different rates of pay are provided based on a variety of legitimate, nondiscriminatory factors. For example, the Professionals EEO-1 job category may include entry-level marketing professionals as well as medical providers with advanced degrees in specialty practices and IT professionals with sought-after skills. The pay for each of these positions, even though they are within the same broad EEO-1 job category, will vary significantly. In addition, reporting compensation data by EEO-1 establishment compounds this problem. For example, one employer may have a single establishment where all IT
Professionals work. Another employer in the same industry may have its IT Professionals scattered among many different establishments, such that the compensation data of the IT Professionals would be reported with that of other employees in the Professionals EEO-1 job category. Even assuming the two employers employ the same number of male and female IT Professionals and pay them similarly and fairly, the Equal Pay Reports for each employer will look vastly different because the relevant data for each Federal contractor is aggregated by the artificial parameters of EEO-1 job category and establishment location.

Reporting compensation data by EEO-1 job category is particularly difficult for post-secondary institutions because, as the OFCCP acknowledges, these employers are not required to file an EEO-1 Report, and thus, have not generally classified their employees by EEO-1 job category. For the same reasons colleges and universities are not required to file EEO-1 Reports, they also should be exempted from filing an Equal Pay Report. Significantly, the EEO-1 Report, unlike the IPEDS Report, has no specific job categories for faculty members, which means that all faculty would be reported in the EEO-1 job category for Professionals, regardless of discipline, academic rank, tenure status, and instructional, research, or public service duties. This also means that these employees, who are often compensated based on unique factors, would be compared with other non-faculty professionals whose pay is set under different policies and practices. Given these unique challenges, we believe that colleges and universities should be exempt from filing an Equal Pay Report based on EEO-1 job category.6

Generally speaking, for all employers, we believe that it is most appropriate to analyze compensation data by individual job title. Other groupings simply are too broad for meaningful analysis of the reasons for particular compensation disparities. However, providing such granular data to the OFCCP increases our members’ concerns about the confidentiality of such data. In many companies, there will only be one, two or three individuals who perform the same job, making it much more likely that publishing any compensation data collected will have a negative impact on an organization’s overall competitiveness. Moreover, reporting individual employee data on an annual basis is simply not a viable option for Federal contractors, because reporting even individual employee-level data cannot account for the complexity and individualized nature of contractor compensation practices unless additional information regarding the factors that influence pay are also collected. These limitations of the proposed data collection, and the lack of viable alternatives, only serve to underscore the need to abandon the proposed data collection effort altogether.

D. Using Data For Industry-Wide Compensation Trend Analyses And Compliance Review Scheduling

The OFCCP states that it will use the Equal Pay Report to “direct its enforcement resources toward federal contractors whose summary data suggests potential pay violations.” Our members’ experiences with evaluating their own pay systems strongly imply that the use of aggregated compensation data is not an effective tool for identifying discriminatory pay

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6 If the OFCCP decides to collect compensation data from colleges and universities, we recommend that the agency do so using a report similar in content to the IPEDS Report. Otherwise, colleges and universities will have to maintain employment data for each employee by two separate categories, the Standard Occupational Codes used for IPEDS Reports and the EEO-1 job categories used in the proposed Equal Pay Report.
practices, particularly in light of the limitations discussed above regarding the data points the OFCCP plans to collect. The OFCCP itself understands this for two reasons. First, the agency recently revised its scheduling documents to require employee-level compensation data, precisely because aggregated compensation data proved ineffective at ferreting out compensation discrimination. Second, the OFCCP’s experience with the EO Survey has already confirmed that analyzing aggregated compensation data by EEO-1 job category is not useful for identifying potential discrimination by Federal contractors. Indeed, an independent team of experts concluded that OFCCP’s efforts to collect compensation data by EEO-1 job category in the EO Survey had “no relation to the determination of systemic discrimination.” This led the OFCCP itself to conclude that the compensation data required by the EO Survey was collected in such a raw and aggregate form that it had “negligible value in predicting compensation discrimination.” 71 Federal Register 53037 (September 8, 2006).

Furthermore, an employer’s affirmative action plan (“AAP”) structure does not necessarily align with the proposed requirement to file an Equal Pay Report for each separate establishment, as that term is defined for EEO-1 reporting purposes. Because there is not a one-to-one relationship between EEO-1 establishments and location-based AAPs, any information the agency might obtain through a review of summary compensation data on an EEO-1 establishment basis would not enable OFCCP to target its enforcement efforts to a corresponding AAP location. For example, OFCCP’s affirmative action regulations require that an employee be reported in the AAP where his or her manager works. 41 CFR § 60-2.1(d)(1). However, there is no such requirement for EEO-1 reporting, unless the employee does not regularly work at an establishment of the employer, in which case the employee should be included on the EEO-1 Report for the location to which he or she reports. Given this, there is no utility in reviewing compensation data collected on an EEO-1 establishment basis for scheduling purposes because there may not be a single AAP covering all of the employees listed on the establishment-based Equal Pay Report.

Similarly, the NPRM suggests that Federal contractors will have to file separate, detailed Equal Pay Reports for small establishments of less than 50 employees, even though such locations are not required to prepare a separate AAP under the OFCCP’s regulations. It is unclear how the OFCCP could use this data to refine its scheduling practices since a location of under 50 employees cannot be selected for audit. These problems are further compounded for Federal contractors who maintain functional AAPs (FAAPs), as their EEO-1 establishments bear no relationship to their FAAPs. The OFCCP has not accounted for any of these facts in its proposed rule, yet each of these issues significantly undermines the use of any collected compensation data for scheduling purposes.

We also respectfully urge the OFCCP to reconsider using any compensation data collected from Federal contractors to conduct industry-wide compensation trend analyses. In order to conduct meaningful trend analyses, we believe the agency would have to collect far more detailed information than we believe is necessary or desirable for enforcement purposes, particularly on an annual reporting basis. The agency’s interest in conducting industry-wide trend analyses must be balanced against the significant burden such data collections would impose on the Federal contractor community, discussed in greater detail below.
E. Using Data For Contractor Self-Assessment and As A Compliance Deterrence

The NPRM broadly states that “the disclosure of compensation data summarized at the industry level” – characterized as “objective industry standards” – will allow “contractors and subcontractors to assess their compensation structure along with those of others in the same industry.” Although the NPRM does not provide detailed information about how these objective industry standards will be established, the purpose of “routinely sharing aggregate compensation data at the industry and/or labor market level with contractors” is to “drive some additional portion of the contractor community to engage in voluntary self-assessments of their compensation practices and make needed corrections.”

For the same reasons that the Equal Pay Report will not provide OFCCP meaningful data on which to select contractors for review, the proposed “objective industry standards” will also not serve as a useful tool for contractors to evaluate whether their pay practices are non-discriminatory, which is what is required under the law. For example, it appears that the OFCCP plans on creating “objective industry standards” by NAICS codes. We have concerns about this approach. NAICS codes are very broad; as a result, groupings by NAICS code will combine organizations of various sizes in different geographic areas with varying operations, both in terms of products and services, corporate mission, and scope of operation. In addition, the EEO-1 report, and by extension, the proposed Equal Pay Report, only permits an organization to select a single work activity for each establishment (the work activity performed by a majority of employees at that establishment), even if multiple work activities are performed at that location. These two facts alone will render any “objective industry standards” created by NAICS code useless for purposes of comparing compensation by similar industry in an appropriate geographic area.

Moreover, most Federal contractors already have practices and policies in place to conduct meaningful self-assessments of compensation decisions and to benchmark their compensation practices against others in their industry. The methods of analysis vary from contractor to contractor depending on the type of job and other relevant variables. For example, an employer may benchmark the compensation of its mailroom staff against the compensation paid to other mailroom employees within a relatively short distance, regardless of industry. On the other hand, this same employer might evaluate the compensation of its chief executive officer against that of other chief executives working in the same industry on a nationwide basis.

For these reasons, and others, our members report that they are highly unlikely to use any compensation data collection tool developed by the agency to conduct any self-analyses of their own compensation practices. The data that could be assembled through the Equal Pay Report will lack the reliability of targeted market data and internal compensation information that Federal contractors already can access. Accordingly, the proposed Equal Pay Report will not supplant the more specific strategies Federal contractors already have in place for analyzing

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7 For example, knowing the industry standard for pay for all male and female production workers will not allow a Federal contractor to assess whether its pay is discriminatory because such information does not indicate the relative skill or experience of these employees, their geographic location or job duties, or their job performance.
compensation decisions and comparing their compensation system against those of comparable companies.

Our members also do not believe that the Equal Pay Report will have the “deterrent” effect the OFCCP believes. The OFCCP’s proposal is based, in part, on the assumption that mere collection of compensation data will have a deterrent effect, regardless of the reliability of the data collected. We respectfully disagree with this conclusion because we do not believe the OFCCP will be able to use the information collected to effectively target non-compliant Federal contractors. Given this, the clear import of the OFCCP’s stated deterrence objective is that the agency believes Federal contractors are likely to change pay practices that are below the objective industry standards, regardless of the reason for the disparity, in order to avoid a compliance review. This is not an appropriate use of the agency’s enforcement authority, however, because the Executive Order only requires non-discriminatory pay practices, not “fair pay” or equal pay across dissimilar jobs on an aggregated basis.

F. Collecting the Requested Data Is Burdensome

We urge the OFCCP to thoughtfully consider the implications of imposing yet another regulatory requirement on already-overburdened Federal contractors. As the OFCCP is aware, Federal contractors are still working to implement the agency’s significant revisions to the regulations under Section 503 of the Rehabilitation Act and the Vietnam Era Veterans’ Readjustment Assistance Act. Adding yet another reporting obligation, particularly one that will require significant infrastructure changes, will seriously strain the already-stretched far too thin resources and staff of these employers. In evaluating its proposal, the agency must evaluate the limited benefits of the proposed Equal Pay Report, given the significant limitations discussed above, against the overall burdens imposed by the tool, which are far greater than the OFCCP estimated. The OFCCP also should further examine the utility of the compensation data it already has available to it for purposes of conducting trend analyses and creating preliminary screening mechanisms.

In the NPRM, the OFCCP estimates a total one-time burden of $33.5 million dollars to implement the Equal Pay Report. This estimate includes the cost of rule familiarization, which the agency estimates will require one hour of one management employee’s time at $51.58 per hour for each establishment and the cost of modifying IT systems, which the agency estimates will require 30 hours of a single IT professional’s time per contractor at $47.22 per hour.

The agency also estimates that it will cost each covered establishment $186.41, on average, to compile and submit the annual Equal Pay Report. This figure is based on the OFCCP’s estimate that it will take an establishment six hours to generate the report data, conduct the analysis, review the analysis, complete the online report form, review the report, submit it to the OFCCP, and save a copy of the report. This includes 4.5 hours of administrative staff time at $24.23 per hour and 1.5 hours of management supervision time at $51.58 per hour. The filing estimate is increased to 8 hours for those establishments that do not file online. The total recurring annual burden is estimated at $12.5 million dollars.

Our members’ experiences with other reporting obligations suggest that these figures are grossly underestimated, perhaps as much as ten-fold. First, our members believe that it will take
more than one hour to become familiar with any finalized reporting requirement. Based on past experiences with implementing the EO Survey and revisions to the EEO-1 and IPEDS Reports, our members anticipate that more than one individual at each establishment will need to understand any new reporting obligations. In addition, our members believe it will likely take each establishment no less than 10 hours to become familiar with the new requirements, as proposed.

Second, the OFCCP fails to recognize the burden associated with generating W-2 wage and hours worked information by EEO-1 job category and race/ethnicity and gender. As an initial matter, contrary to the agency’s assumption in the NPRM, not all Federal contractors who might have to file the proposed Equal Pay Report maintain these required data points electronically. These contractors will have to manually match the employees reported on the last EEO-1 report with their W-2 wage data and hours worked. The annual recurring costs for these employers, many of whom will not create electronic systems to gather this data, will be far greater than the $186.41 the OFCCP has estimated.

Furthermore, even when electronic data management systems are in place, W-2 wage information is typically stored in an employer’s payroll system, while EEO-1 job category and race/ethnicity/gender data is stored in an employer’s human resources information system. Gathering data from two different systems is far more complicated than pulling additional data points from the same system. The fact that the proposed Equal Pay Report covers a different time period than the EEO-1 Report makes creating a single report that will gather the necessary data for the correct employees even more complicated.

The agency also must keep in mind that these types of changes will be incorporated into various types of electronic systems. In some cases, despite having all of the required data available in electronic format, the Federal contractor will be unable to create a single report format. In other cases, the Federal contractor will not have the budget for this type of system change or will have to wait until this change can be prioritized over other competing IT needs. In any case, the affirmative action compliance team member will first have to develop detailed specifications for the required data collection, and then IT will have to review, implement and test those specifications before an electronic report can be finalized. This process will take far longer than the agency’s estimate of 30 hours of work by one IT professional. Based on our members’ experiences in making other system changes, we believe that this level of programming may take hundreds of hours for some Federal contractors.

Colleges and universities, if subject to the proposed Equal Pay Report, will have additional, significant implementation costs that are unaccounted for in the agency’s proposal. As noted above, colleges and universities do not currently use EEO-1 job categories to classify their employees. This is because the IPEDS Report requires that institutions report gender and race/ethnicity data of employees by Standard Occupational Codes. Accordingly, colleges and universities would have to classify each of their existing employees in the appropriate EEO-1 job category before they could file the proposed Equal Pay Report. This will require significant time and expense that is completely unaccounted for in the agency’s proposal.

Finally, the agency’s annual burden estimate is also too low. Our members’ experiences with filing the EEO-1 and IPEDS Reports are instructive in this regard. On average, our
members indicate that compiling and verifying the underlying data and then filing these required reports takes far longer than the six hours the OFCCP estimates for the proposed Equal Pay Report. In many cases, members with even just 500 -1000 employees report that it takes their team close to 40 hours to compile and file just a handful of EEO-1 Reports. The proposed Equal Pay Report will necessarily require more time, since two additional data points will need to be gathered (again, usually from an entirely different system) and verified for every employee on the EEO-1 Report.

As noted above, the data collected would literally be of no value to the OFCCP’s mission and to Federal contractor’s self-assessments of their pay practices. Moreover, the actual burden of the proposed Equal Pay Report is far more significant than the agency estimates and will increase measurably the costs of doing business with the government. In light of the burdens imposed by other new initiatives of the OFCCP and the Administration, the NPRM does not provide sufficient justification for the burdens associated with yet another new data collection requirement.

G. Harmonizing Reporting Periods For Required Data Collections By Federal Contractors

If the OFCCP decides to move forward with its proposal, we urge the agency to harmonize any required compensation data collection reporting period with the reporting periods of other required reports, specifically those of the EEO-1 and IPEDS Reports. The proposed Equal Pay Report would require that Federal contractors report compensation data between January and March of each year based on the W-2 wage information paid in the prior calendar year to those employees reported on the Federal contractor’s last EEO-1 Report. Put more simply, Federal contractors would report compensation data for those employees who worked for the employer during a single payroll period between July 1 and September 30 of the prior year. This approach necessarily requires that Federal contractors prepare two reports, one which gathers the gender and race/ethnicity snapshot required for EEO-1 reporting purposes and the second which will add the W-2 wage and hours worked information for those employees as of December 31.

As discussed above, compiling this data is more complicated than the OFCCP believes, since W-2 wage information is stored in an employer’s payroll system, not an employer’s human resources information system. A much simpler approach would be to report all of the data points at one time, using a single report. Unifying the reporting requirements could more easily be accomplished if OFCCP collected base salary information, rather than W-2 wage information. Under this approach, a Federal contractor could gather the data required for the EEO-1 and Equal Pay Reports at the same time, and in many cases, from a single human resource information system.

If colleges and universities are required to file an Equal Pay Report, the OFCCP should also seek to harmonize its reporting requirements with the IPEDS reporting obligations. Basing data collection on a payroll period between July 1 and September 30 of each year would not make sense for these institutions, given a typical school calendar. For this reason, IPEDS reporting is based on a November 1 snapshot and any compensation data collection tool for colleges and universities should be aligned with this same reporting period.
H. The Importance Of An Independent Pilot Study And Phased-In Compliance

The agency should undertake a pilot project of the proposed Equal Pay Report before it is finalized, as was suggested by the National Academy of Sciences. See National Research Council of the National Academies, Committee on National Statistics, *Collecting Compensation Data from Employers* (2013), available at [http://www.nap.edu/openbook.php?record_id=13496](http://www.nap.edu/openbook.php?record_id=13496) (website last visited January 5, 2015). Any such pilot should not only examine whether Federal contractors are able to submit the requested data, but also should examine the burden of doing so and the utility of the data in meeting OFCCP’s stated objectives for collecting it. The pilot project should be conducted by an independent third party, as suggested by the National Academy of Sciences, and should not be used for actual enforcement purposes.

We do not believe that the OFCCP’s experience with the EO Survey constitutes an adequate or reliable study regarding the utility of the proposed Equal Pay Report. Most importantly, the independent studies of the EO Survey commissioned by the OFCCP showed that the tool was not useful for analyzing compensation discrimination precisely because aggregated compensation data was collected. Moreover, the EO Survey and proposed Equal Pay Report collect different data points, such that any study of the EO Survey cannot reasonably be considered an accurate pilot study of the feasibility of implementing the proposed Equal Pay Report. Further, the agency has not collected EO Survey data from more than 10 years now. Given technological advances, and heightened concerns about data security, a new study is warranted to ensure that any data collected can be gathered and maintained securely by the OFCCP.

We also request that the agency adopt a phased-in compliance schedule for all Federal contractors that will be required to file the proposed Equal Pay Report. Our members believe that they will need at least one calendar year between the date of any final rule and the first required filing in order to prepare for this new reporting requirement. While we believe that colleges and universities should be exempted from filing the proposed Equal Pay Report altogether, at a minimum, such institutions should be provided with an even longer phased-in compliance schedule. Deferred compliance is necessary because, unlike other Federal contractors, these institutions do not currently file EEO-1 Reports, and thus do not currently classify their employees on the basis of EEO-1 job categories. Accordingly, colleges and universities will need additional time in order to come into compliance with the proposed Equal Pay Report.

I. The Regulatory Text Should Be Revised To Specify All Of The Data Points To Be Collected And To Clarify Who Must File An Equal Pay Report

The OFCCP’s proposal regulatory language regarding the proposed Equal Pay report provides that Federal contractors must submit “summary data on the compensation paid to employees by sex, race, ethnicity, specified job categories, and other relevant data points. Contractors must submit the Equal Pay Report in the format and manner required by OFCCP.” The OFCCP should specify, in the regulatory language, the specific compensation data required, i.e. W-2 wage information as reported to the IRS, as proposed in the NPRM, or base salary or
wage rate, as we suggest. The regulation also should expressly state that this compensation data will be submitted by the job categories listed in the EEO-1 Report. Finally, the OFCCP should replace the language regarding “other relevant data points” with the specific, additional data points that will be required. In particular, although the NPRM only mentions the number of hours worked as an additional data element, other parts of the proposal indicate that the OFCCP plans on “using aggregate compensation based on W-2 earnings along with one or more other relevant data points.” (emphasis added). Our members are concerned that the OFCCP will rely on this language in an effort to justify later adding data points, without further public comment. While this may not have been what the agency intended, we request that the proposed regulatory language be revised to specifically state the data points that must be reported and the job categories by which such information should be collected.

The agency also should clarify who must file the required Equal Pay Report. The NPRM provides that “the Equal Pay Report must be filed by each prime contractor and first tier subcontractor . . . that has more than 100 employees, and a contract, subcontract, or purchase order amounting to $50,000 or more that covers a period of at least 30 days.” It is unclear whether the agency intends for this language to alter its long-standing view that the obligations of the Executive Order only apply during the performance of a covered contract or subcontract. For example, if an employer is performing work on a covered contract when it files its EEO-1 reports, must it file the proposed Equal Pay Report the following year, if its work on the covered contract is completed on December 31? Similarly, if an employer’s work on a covered contract begins February 1 of a given year, must it still file an Equal Pay Report for that year even though the report would itemize W-2 wage earnings for a period of time when the employer was not a covered Federal contractor? The agency should clarify the scope of the reporting requirement in any final regulation.

CONCLUSION

SHRM and CUPA-HR wholeheartedly support the OFCCP’s primary objective – to root out unlawful compensation discrimination, to the extent it exists. However, we urge the agency to thoughtfully consider whether the proposed Equal Pay Report will meet the agency’s stated objectives. Given the type of pay data to be collected, and the highly aggregated manner in which such data is to be reported, we believe that, like the earlier EO Survey, the proposed Equal Pay Report will prove to be fatally flawed. In addition, because such data will be reported by EEO-1 establishment, rather than by affirmative action plan location, the data, even if reliable in other ways, will not assist the OFCCP with its scheduling process. For the same reasons that the collected data will not prove useful to the OFCCP, we also believe that the publication of “objective industry standards” will not be useful to Federal contractors who want to voluntarily assess their compensation practices, nor will they create a deterrent effect. Moreover, the burden on Federal contractors of collecting the information required by the proposed Equal Pay Report is far greater than what the agency has estimated. In light of the limited utility of the proposed Equal Pay Report – both to the agency and Federal contractors, we urge the OFCCP to reconsider its proposal.

Should the OFCCP decide to move forward, we ask that the agency collect aggregated wage rate or base salary information, rather than W-2 wage data, since these data points are more readily available and easily matched to gender, race and ethnicity data for employees in existing
human resources information systems. The agency also should exempt colleges and universities from the reporting requirement, since the burden on these institutions is far greater because they do not currently use EEO-1 job categories or file EEO-1 Reports. Closer coordination with sister enforcement agencies is absolutely critical to minimizing the burdens associated with a new data collection tool. The OFCCP also must take steps to ensure the confidentiality of the data both during the reporting process and in response to requests for such information from the public. Finally, the agency should, as the National Academy of Sciences suggested, commission a pilot study by an independent third contractor of any compensation data collection tool before it is implemented on a wide-scale basis.

We appreciate the opportunity to submit these comments. We welcome the opportunity to meet with you to discuss possible ways to address the underlying objectives of the agency’s proposal that would prove more workable for the agency, employees, and employers.

Respectfully submitted,

Michael P. Aitken
Vice President of Government Affairs
Society for Human Resource Management
1800 Duke Street
Alexandria, VA 22314
703.548.3440

Joshua A. Ulman
Chief Government Relations Officer
The College and University Professional Association for Human Resources
Center Point Commons
1811 Common Points Drive
Knoxville, TN 37932
703.435.7119

Prepared By:
Lynn A. Clements
Director, Regulatory Affairs
Berkshire Associates Inc.
8924 McGaw Court
Columbia, MD 21045
410.995.1195, Ext. 1246