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PROPOSED CHANGES TO OFCCP AUDIT SCHEDULING LETTER WOULD REQUIRE COMP INFORMATION, AMONG OTHER THINGS

May 17, 2011

By Cara Crotty
Columbia Office

You may agree or disagree with its policies, but there is no question that the Obama Administration is aiming to leave its mark on the federal contracting community. Last week, we **reported** on the proposed rule of the Office of Federal Contract Compliance Programs to revise the affirmative action obligations of federal contractors toward covered veterans.

Now, the OFCCP **proposes to revise the audit scheduling letter and itemized listing** that it sends to supply and service contractors initiating an audit. **Comments** will be accepted through July 11.

Overview of Proposed Changes

The proposed changes would require contractors to submit the following:

- (1) Copies of all employment leave policies, including leave under the Family and Medical Leave Act, maternity leave, and religious accommodations. If the policies are part of an employee handbook or manual, the contractor will be required to provide copies of the entire handbook or manual.
- (2) Collective bargaining agreements, if applicable, as well as “any other documents you prepared such as policy statements, employee notices or handbooks, etc. that implement, explain, or elaborate on the provisions of the collective bargaining agreement.”
- (3) For all employment activity (applications, hires, promotions, and terminations), detailed data by job group **and by job title** with the minority information broken out into specific racial categories. The OFCCP estimates that this would increase contractors’ burden by only one hour and claims that the change is justifiable because it “would result in OFCCP obtaining more accurate reporting data for its analyses related to identifying sex and race discrimination indicators.”
- (4) VETS-100 and/or VETS-100A Reports for the past three years.
- (5) Copies of accommodation policies and records of accommodations granted to individuals with disabilities and covered veterans.
- (6) Significantly more information about compensation. (This is described in more detail below.)

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Compensation Data: The Dreaded “Item 12”

The most significant change is to the compensation information requested in Item 11 (which would become Item 12 because of the addition of the leave policy request). Instead of summary or aggregate data, the proposed change would allow the OFCCP to obtain detailed information for each employee as of February 1, as opposed to the contractor’s affirmative action plan date.

Item 12 would request, for each employee as of February 1, sex, race/ethnicity, hire date, job title, EEO-1 category, job group, and compensation. Compensation would include “base salary, wage rate, and hours worked,” and requires that “other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime” be listed separately for each employee. Contractors “may” submit additional information that affects compensation, such as education, experience, location, performance ratings, and salary grades.

Finally, the OFCCP would require submission of policies or documents “that explain the factors and reasoning used to determine compensation.” Because the *summary* of compensation data will no longer be necessary, the OFCCP estimates that responding to Item 12 will take less time than responding to the current Item 11. However, the OFCCP’s estimate is almost surely wrong: the February 1 date means that contractors will have to run reports twice – once for the desk audit, and again for the affirmative action plan – and, of course, they will have to analyze the data themselves before submitting it to the Agency.

Request for Comments

The OFCCP is specifically requesting comments in four areas:

- Whether the proposed collection of information is necessary for the compliance and enforcement functions of the Agency, including whether the information will have practical use
- Whether the Agency’s estimates of the burden to contractors are correct, including the methodology and assumptions used
- Suggestions for enhancing the quality, usefulness, and clarity of the information to be collected
- Suggestions for minimizing the burden to contractors of responding, including use of technology.

Recap of the Obama Administration’s Affirmative Action Changes

As stated above, the Obama Administration is aggressively expanding federal contractors’ affirmative action obligations, including

- Issuing two **Executive Orders** imposing additional burdens on federal contractors, including the requirement that covered contractors post the “anti-*Beck*” notice advising employees of their rights under federal labor laws.
- **Signing into law the American Recovery and Reinvestment Act of 2009**, which had the effect of greatly increasing the number of federal contractors, rendering many unsuspecting companies subject to affirmative action requirements.
- Publishing **interim regulations** that require covered federal contractors and first-tier subcontractors to publish information about their executives’ compensation.

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- **Announcing** its intention to rescind its guidelines to contractors on analyzing compensation and issuing a new directive on the way that it will conduct compliance reviews.
- Issuing a **directive** outlining its new expanded approach toward jurisdiction over health care providers.
- **Stating its intention** to revise the regulations implementing Section 503 of the Rehabilitation Act and the regulations governing federal construction contractors. (We expect proposed regulations to be issued before the end of this year.)

And if that's not enough, numerous media outlets have **reported** that President Obama may sign a controversial Executive Order requiring federal contractors to disclose political contributions.

Again, **public comments** on the proposed changes to the scheduling letter are due by July 11. In addition to providing comments on line, you can send them via regular mail to

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As always, Constangy will continue to follow this development and will report on any final changes adopted by the OFCCP. If you have any questions about this Notice, please contact any member of Constangy's **Strategic Affirmative Action practice group**, or the Constangy attorney of your choice.

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