

January 18, 2017

Via Federal Rulemaking Portal: <http://www.regulations.gov>

Office of Information and Regulatory Affairs
Attn: OMB Desk Officer for DOL-OFCCP
Office of Management and Budget
725 17th Street NW, Room 10235
Washington, DC 20503

RE: Comments of the Equal Employment Advisory Council on the Office of Federal Contract Compliance Programs' Rehabilitation Act and VEVRAA Information Collection Requirements (OMB Control Numbers 1250-0004 and 1250-005)

The Equal Employment Advisory Council ("EEAC") appreciates the opportunity to file these comments on the Office of Federal Contract Compliance Programs' ("OFCCP") information collection requests ("ICR") related to the recordkeeping and reporting requirements under Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act, as amended ("VEVRAA") and Section 503 of the Rehabilitation Act of 1973, as amended ("Section 503"), notice of which was published in the *Federal Register* on December 19, 2016. 81 Fed. Reg. 91955 and 91956.

These ICRs cover the recordkeeping and reporting obligations imposed upon federal contractors subject to the equal employment opportunity ("EEO") and affirmative action ("AA") obligations found in OFCCP's regulations codified at 41 C.F.R. §§ 60-300 and 60-741, excepting the annual veterans reporting requirement (commonly referred to as the "VETS-4212 report").¹

While EEAC is not recommending any substantive changes to OFCCP's existing information collections, and advises against making changes to OFCCP's "Voluntary Self-Identification of Disability" Form CC-305, we recommend that OMB require, as a condition of approval, that OFCCP provide federal contractors with additional compliance guidance that is consistent with the realities of electronic, online systems used by businesses in the private sector.

Specifically, EEAC recommends that OFCCP provide additional guidance, perhaps in the form of frequently asked questions ("FAQs") to clarify that:

- (1) The eight "data collection analysis" items under the applicable regulations can be collected using the common sense definitions contractors already utilize under Executive Order ("E.O.") 11246;

¹ ICR Reference Numbers 201610-1250-001 and 201610-1250-002.

- (2) Contractors be permitted to pre-populate or eliminate entirely the “name” and “date” fields from electronic versions of the Form CC-305; and
- (3) Contractors can *require* applicants and employees to complete Form CC-305, provided that individuals can still “opt out” by selecting “I don’t wish to answer.”

STATEMENT OF INTEREST

EEAC is the nation’s largest nonprofit association of employers dedicated exclusively to the advancement of practical and effective programs to eliminate employment discrimination. Formed in 1976, EEAC’s membership includes approximately 270 of the nation’s largest private-sector employers who collectively employ millions of workers in the United States alone.

Nearly all EEAC member companies are subject to the nondiscrimination and affirmative action requirements of E.O. 11246, Section 503, VEVRAA, and their respective implementing regulations. As major federal contractors and subcontractors, EEAC members have a significant stake and interest in ensuring that OFCCP’s regulations and paperwork requirements, including those triggered by the agency’s Section 503 and VEVRAA regulations, efficiently and effectively accomplish their underlying policy objectives.

BACKGROUND

OFCCP finalized major revisions to its regulations implementing Section 503 and VEVRAA on September 24, 2013. The new regulations included a number of additional and revised recordkeeping and reporting requirements subject to the Paperwork Reduction Act (“PRA”). The current information collection under Section 503 was approved by OMB under Control Number 1250-0004, and the current information collection under VEVRAA was approved under Control Number 1250-0005.

PRA approval for both ICRs is set to expire on January 31, 2017. OFCCP is seeking to renew both ICRs without change and solicited comments on their renewal before formally requesting a PRA extension from OMB. As noted in OFCCP’s Supporting Statement for these ICRs, EEAC was the only organization to file comments germane to either ICR. While EEAC generally recommends that OMB approve OFCCP’s requests, we respectfully ask OMB to condition its approval on requirements consistent with our specific recommendations set forth in this letter.

CURRENT OFCCP GUIDANCE REGARDING THE “DATA COLLECTION ANALYSIS” REQUIREMENTS OF ITS DISABILITY AND VETERANS REGULATIONS IS CONFUSING AND INCONSISTENT WITH PAST POLICY STATEMENTS BY SENIOR OFCCP OFFICIALS

OFCCP’s regulations require federal contractors to annually collect, maintain for a three-year period, and report a total of eight unique data elements pertaining to disability

and veteran hiring activity. Specifically, contractors are required to collect and report the total number of:

- 1) "Job openings";
- 2) "Jobs filled";
- 3) "Applicants" for all jobs;
- 4) "Applicants hired";
- 5) Disabled² "applicants";
- 6) Disabled "hires";
- 7) Protected veteran³ "applicants"; and
- 8) Protected veteran hires.

OFCCP's regulations do not define key terms such as "job openings," "jobs filled," "applicants," or "hires." Rather, the agency has provided sub-regulatory guidance in the form of "Frequently Asked Questions" posted on its website.⁴

Without exception, our member companies have advised us that the definitions of these key terms in the above-referenced FAQs are confusing, resulting in frustration as to how the resulting data is useful for the stated purpose of evaluating the effectiveness of their disability and veteran outreach efforts.⁵

For instance, although a plain reading of OFCCP's regulations suggests that "jobs filled" is meant to represent the subset of "job openings" that resulted in an actual "hire," this is not the case according to OFCCP's FAQs. Rather, the FAQs state "job openings" refer to the number of "individual positions advertised as open in a job vacancy announcement or requisition." "Jobs filled" is not limited to advertised positions, however, but instead refers to the much broader set of "jobs the company filled by any means, be it through a competitive process or non-competitively, e.g., through reassignment or merit promotion."

These interpretations disassociate "jobs filled" from "job openings" entirely and eliminate any meaningful comparison to the rest of the "data collection analysis" elements that contractors are required to use to evaluate the effectiveness of their disability and veteran outreach and recruiting efforts.

² Note that EEAC uses the term "disabled" here to mean applicants and employees who have self-identified as, or who are otherwise known to be, individuals with disabilities as defined under Section 503.

³ Note that EEAC uses the term "protected veteran" here to mean applicants and employees who have self-identified as belonging to one or more of the four defined categories of U.S. military veterans protected under Section 4212 of VEVRAA.

⁴ Specifically, EEAC refers to numbers 1-3 under the heading, "Data Collection Analysis" in OFCCP's "503 Final Rule FAQs" and "VEVRAA Final Rule FAQs" available at <https://www.dol.gov/ofccp/regs/compliance/faqs/offags.htm>.

⁵ Note that EEAC does not use the term "protected veteran" here because to our knowledge there are no outreach or recruiting organizations that target just "protected veterans." Therefore, contractors' required outreach to protected veterans is more accurately described as simply "veteran outreach."

Further, OFCCP's FAQs define "hired" in the context of Section 503 and VEVRAA as "applicants" (both internal and external candidates) who are "hired" through a "competitive process, including promotions." The perplexing use of a term in its own definition aside, these definitions are at odds with the way many contractors define the same terms for their analyses of employment transactions under OFCCP's E.O. 11246 regulations and the Uniform Guidelines on Employee Selection Procedures.⁶

In July 2015, EEAC participated in a "listening session" with then OFCCP Director Patricia Shiu and senior staff officials to discuss the pressing issues contractors were facing as they worked to come into full compliance with OFCCP's revised Section 503 and VEVRAA regulations, including the confusing definitions of key "data collection analysis" terms.

During this session, OFCCP officials explained to EEAC representatives that the definitions in the agency's FAQs were meant to convey that contractors have the flexibility to define these terms in a way that "makes sense" and allows for "meaningful analysis" for each individual organization. For example, they indicated that if the company's usual hiring process includes a mix of internal and external recruiting, candidates, and selections, then internal and external "applicants" and "hires" *could* be included in the definitions of those terms to better reflect the company's actual processes.

Because this welcome guidance was contrary to a plain reading of OFCCP's FAQs, EEAC subsequently requested that OFCCP update its FAQs to reflect this guidance. Regrettably, that never occurred. As a result, contractors and even OFCCP's own compliance officers are often unaware of the flexibility in the definitions provided in OFCCP's FAQs, leading to unnecessary confusion for all. In its comments to OFCCP, EEAC renewed its request that OFCCP update the FAQs regarding these ICRs. As noted in OFCCP's Supporting Statement, the agency has only committed to "consider whether further refinement of its FAQs on these definitions is needed."

EEAC respectfully recommends as a condition of PRA clearance that OFCCP explicitly clarify that contractors are permitted to define terms such as "applicant" and "hire" consistently with the way they define those terms for E.O. 11246 AAP purposes. This guidance, consistent with OFCCP's own policy statements to EEAC, is needed so that both contractors and OFCCP can use the information collected as effectively as possible as envisioned by OFCCP's regulations.

ELECTRONIC VERSIONS OF FORM CC-305 CURRENTLY HAVE TO INCLUDE UNNECESSARY AND CONFUSING FIELDS

OFCCP's regulations require contractors to invite applicants and employees to voluntarily self-identify their disability status "using the language and manner prescribed by the Director and published on OFCCP's website."⁷ The "language and manner" referred to

⁶ See 41 C.F.R. § 60-2 and 41 C.F.R. § 60-3 respectively.

⁷ 41 C.F.R. § 60-741.42.

consists of OMB-approved Form CC-305 titled, “Voluntary Self-Identification of Disability,” and guidance in the form of FAQs published on OFCCP’s website.

Form CC-305 appears to have been designed for use primarily as a physical, paper form. In fact, OFCCP published a FAQ specifically stating that it is permissible for contractors to replicate Form CC-305 in an electronic format.⁸ As originally proposed, the form did not provide fields for users to input their name and the date the form was completed. At the urging of EEAC and other organizations and individuals, these fields were subsequently added to the form submitted to and approved by OMB.

However, in the electronic or online context, these fields are unnecessary. The underlying computer system utilizing the electronic form typically “knows” the identity of the user and the current date, and can record this information into the database along with any answer indicated on the form when “submitted” by the user. Moreover, EEAC members report that users are often frustrated by having to enter information already previously provided, such as their name. To compound the issue, users can enter a different name and/or a different date on the form, leading to inconsistencies in contractors’ self-identification databases.

EEAC members often inquire as to whether it is permissible in an electronic environment either to omit these fields entirely, or to pre-populate them with the user’s previously input name and the current date. However, OFCCP’s FAQs require electronic versions of the form to “contain the text of the form without alteration.”

As noted in OFCCP’s Supporting Statement, the agency has only committed to, “If appropriate ... develop and provide guidance on how contractors can display the form in a manner consistent with both the regulations and the way that online application systems function.” EEAC respectfully advises that such guidance is without question both appropriate and necessary. This small, nonsubstantive change to OFCCP’s current guidance will make the form easier for users and easier for contractors to administer.

CONTRACTORS SHOULD BE ABLE TO REQUIRE INDIVIDUALS TO FILL OUT FORM CC-305 AS LONG AS THE PERSON UNDERSTANDS THAT HE OR SHE CAN SELECT THE "OPT-OUT" ANSWER

OFCCP’s regulations require contractors to invite *employees* to “voluntarily inform the contractor whether the employee believes that he or she is an individual with a disability” as defined by OFCCP’s regulations.⁹ OFCCP’s regulations similarly require contractors to invite *applicants* to “inform the contractor” whether the applicant believes that he or she is an individual with a disability at both the pre-offer and the post-offer/pre-employment phases of the selection process.¹⁰ The applicant self-identification requirements omit the word “voluntarily,” however, and OFCCP’s regulations do not define that term.

⁸ See number 1 under the heading, “Self-Identification” in OFCCP’s “503 Final Rule FAQs” at https://www.dol.gov/ofccp/regs/compliance/faqs/503_faq.htm.

⁹ 41 C.F.R. § 60-741.42(c).

¹⁰ 41 C.F.R. § 60-741.42(a) and (b).

Longstanding guidance published by the Equal Employment Opportunity Commission (“EEOC”) regarding employer solicitations of disability self-identification under the Americans with Disabilities Act of 1990 (“ADA”) requires employers to, among other things, “state clearly that *the information* is being requested on a voluntary basis” (emphasis added).¹¹ Despite the omission of the word voluntary in OFCCP’s regulations, the agency appears to agree that EEOC’s guidance is applicable to all required solicitations of disability status under OFCCP’s regulations.

The originally proposed Form CC-305 contained the statement, “Your submission of information is **voluntary**” (bold text in the original), and is consistent with EEOC’s guidance. The proposed form provided just two answer options for the user to indicate whether he or she has a disability, however: “Yes, I have a disability (or have previously had a disability);” and “No, I don’t wish to identify as having a disability.”

In comments on the proposed Form CC-305 submitted to OFCCP, EEAC noted that the two answer options as written were potentially confusing. In particular, we said it was unclear whether users should select the “no” option to affirmatively indicate that they do not have a disability, or to indicate that they simply did not wish to disclose their disability status. EEAC recommended that OFCCP revise the answer options, clarifying that the “no” option meant that the user was affirming he or she was not an individual with a disability, and adding an explicit “opt-out” answer by which users could indicate their desire not to disclose their disability status one way or the other.

Part of the purpose of the “opt-out” answer is to allow contractors to require users to complete the form without violating EEOC guidance requiring that the provision of disability information be voluntary. To its credit, OFCCP subsequently revised the answer options consistent with EEAC’s recommendation. However, OFCCP also changed the language at the top of the form from, “Your submission of information is voluntary,” to, “Completing this form is voluntary, but we hope that you will choose to fill it out.”

EEAC members report that this language has created a significant problem. Most major corporations utilize third-party vendor platforms for their electronic applicant tracking systems. These systems typically take the user through multiple “screens” or “pages” for each step of the application process wherein each step must be completed before moving to the next. These systems do not typically allow users to “skip” a screen or step and expensive programming modifications are required in order to allow a user to do so.

OFCCP’s Supporting Statement accompanying the current ICRs notes that the agency’s regulations require contractors to invite applicants and employees to voluntarily identify whether they have a disability and notes: “Accepting the invitation by completing the form is a choice to be made by the applicant or employee. Contractors cannot make it mandatory for applicants and employees to accept the invitation by selecting an answer to

¹¹ See Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, October 10, 1995, available at <https://www.eeoc.gov/policy/docs/preemp.html>.

the question posed by the form before proceeding to the next stage of the online application process.”

These statements fail to articulate a valid reason for OFCCP’s policy position. The “opt-out” answer option provides users with a way to complete the form without divulging information regarding their disability status in any way. Moreover, requiring users to complete the form would not violate EEOC’s longstanding guidance, and there are no provisions in Section 503 or OFCCP’s implementing regulations that would prohibit contractors from requiring users to complete the form. Finally, requiring users to complete the form, in both the electronic or physical environments, would allow contractors to better demonstrate, and OFCCP to better verify, that applicants and employees are receiving the required invitations.

EEAC strongly recommends that OMB require, as a condition of PRA approval, OFCCP to issue additional guidance allowing contractors to require users to complete Form CC-305 where and when it is consistent with other similar practices or otherwise required by system specifications. Any necessary changes to the language of the form would be nonsubstantive and could be provided by OFCCP through informal guidance.

CONCLUSION

We appreciate the opportunity to make our views known to OMB, and would welcome any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read "Matt A. D. Nusbaum", with a long horizontal flourish extending to the right.

Matt A. D. Nusbaum
Senior Counsel and Director of
OFCCP Compliance Policy