



VIA ELECTRONIC SUBMISSION

January 5, 2015

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

**Re: RIN 1250-AA03, Comments on OFCCP's Proposed Rulemaking on Requirement of Government Contractors to Report Summary Data on Employee Compensation**

Dear Ms. Carr:

Associated Builders and Contractors, Inc. (ABC) hereby submits the following comments to the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) in response to the above-referenced notice of proposed rulemaking (NPRM or the Proposed Rule), published in the *Federal Register* on August 8, 2014, at, 79 Fed. Reg., at 46562. The NPRM proposes to implement the President's Presidential Memorandum issued on April 8, 2014. The DOL issued an advanced notice of proposed rulemaking (ANPRM) on August 10, 2011.

**About Associated Builders and Contractors, Inc.**

ABC is a national construction industry trade association representing nearly 21,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value. This process assures taxpayers and consumers receive the most for their construction dollar.

ABC submits that OFCCP's Proposed Rule in its current form will not enable the agency to achieve its stated goal of more efficiently deploying its enforcement resources. The data collected by the agency under the Proposed Rule would be flawed and unsuitable for aggregation, preventing the agency from compiling any reliable benchmarks. ABC further

submits that the rule would provide no benefit justifying the burden imposed on contractors. Finally, the Proposed Rule offers no indication that OFCCP understands the sensitivity of the data that it would require contractors to submit, nor has the agency offered satisfactory assurances that it will protect contractors' data from FOIA requests and third-party hackers.

## **Background**

The Proposed Rule follows OFCCP's 2011 advanced notice of proposed rulemaking<sup>1</sup> and President Obama's 2014 Presidential Memorandum directing the Secretary of Labor to propose a rule requiring federal contractors to submit compensation data to the Department of Labor.<sup>2</sup> The effort marks the second time in recent history that OFCCP has attempted to collect compensation data from contractors—the first effort being the failed Equal Opportunity Survey that OFCCP began in 2000 and discontinued in 2006.

In the Proposed Rule, OFCCP seeks to collect compensation data each year from federal contractors that have more than 100 employees, are required to file EEO-1 reports, and have a contract, subcontract, or purchase order from the federal government worth \$50,000 or more and lasting at least 30 days. OFCCP proposes requiring each covered contractor to submit W-2 compensation totals from the previous calendar year for each of the ten EEO-1 reporting categories at each of its EEO-1 reporting locations. Employers would report for only those employees who were captured in the EEO-1 report filed the previous year. Further, for each EEO-1 category reported at each EEO-1 reporting location, contractors would also submit the total number of employees and total number of hours worked. All totals would be reported by race, ethnicity, and sex, and would be submitted to OFCCP each year during a reporting window running from January through March.

### **I. The Proposed Rule Would Not Enable OFCCP to Achieve Its Stated Goals of More Efficiently Targeted Enforcement or Increasing Voluntary Compliance Amongst Contractors**

OFCCP hopes that the data it collects would enable it to more efficiently deploy its enforcement resources, both by allowing it to select for investigation those contractors most likely to be engaging in discriminatory pay practices, and by encouraging contractors to voluntarily self-correct any discriminatory pay practices. The Proposed Rule as it exists would serve neither of these purposes.

OFCCP's proposed methodology would prevent the agency from achieving its stated goals. The approach it sets forth would skew the data such that the results would be unusable. OFCCP proposes collecting W-2 compensation data, aggregated by EEO-1 job category. Both components of this proposal involve aggregating disparate data types that are not comparable. Each employee's W-2 amount consists of all types of pay that he or she received during the prior

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<sup>1</sup> Non-Discrimination in Compensation; Compensation Data Collection Tool, 76 Fed. Reg. 49,398 (August 10, 2011).

<sup>2</sup> Presidential Documents, Memorandum of April 8, 2014, "Advancing Pay Equality Through Compensation Data Collection," Memorandum for the Secretary of Labor, April 11, 2014 (79 FR 20,751).

calendar year: base pay, overtime, commission, piecework, shift differentials, and bonuses, if earned, are all included. Comparing just two employees' W-2 data, given only the number of hours that each employee worked, would invite misleading conclusions to be drawn. OFCCP instead proposes comparing the W-2 wages of all employees in a given industry who are in the same EEO-1 category. The resulting total would consist of an unknown number of different compensation types, some related to straight-time hours worked (or base pay), others related to premium hours, and yet others not related at all to the number of hours worked. Then, OFCCP would divide this total by the number of hours worked to arrive at that EEO-1 category's average pay rate, and somehow compare employers' results.

Aggregating W-2 pay by EEO-1 category adds further distortion. EEO-1 categories are extremely broad. OFCCP admits in the Proposed Rule that EEO-1 categories are too broad to identify discrimination on an individual employer level, but asserts without evidence that aggregating compensation data across entire industries would smooth out any issues brought about by using W-2 wages and EEO-1 categories.<sup>3</sup> This assumes that employers within a given industry share common approaches to compensation and employ similar mixes of employees within each EEO-1 category. In reality, even employers within the same industry employ different mixes of employees within their EEO-1 categories. The Proposed Rule does not adequately account for the different realities that exist among even very similar employers—differences that would impact the data that OFCCP collects and would fatally undermine its utility.

The utility of OFCCP's results would be further compromised by the timing of the contractors' reports. If contractors were to report compensation data to OFCCP in 2015, they would be required to submit their reports during a January-March 2015 window. Each report would contain the W-2 earnings of a given contractor's workforce as it existed in the EEO-1 report that the contractor filed on or before September 30, 2014, which itself was based on a snapshot taken during July-September 2014. In other words, many reports would reflect workforces as they existed up to eight months prior. After OFCCP aggregates and analyzes the data, and the results are incorporated into OFCCP's scheduling algorithm, it's not difficult to imagine that the data would be more than one year old. The utility of such dated information is highly questionable, especially in industries that experience high rates of employee turnover such as construction. OFCCP admitted in the Proposed Rule that "stale or outdated data...would compromise the integrity of [its] enforcement program."<sup>4</sup> OFCCP does not explain the utility posed by stale or outdated data that would arise due to contractors' reports being based on months-old snapshots.

Moreover, the OFCCP tends to be at least an EEO-1 cycle or two behind in using the submitted data to select contractors for an audit. The EEO-1s are filed on or before September 30, and OFCCP's fiscal year audit cycle commences the next day: October 1. Thus, for use in the 2014-2015 audit cycle, the OFCCP most likely is using EEO-1s from September 30, 2013 (or earlier). It is not clear, then, whether the compensation data that contractors submit during the proposed January-March filing window similarly will be a year or two old by the time OFCCP integrates it into whatever audit selection tool it is using to select employers at random for a compliance review. In the construction industry, an entire field workforce could have turned over in a year's

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<sup>3</sup> Government Contractors, 79 Fed. Reg. 46,572.

<sup>4</sup> Government Contractors, 79 Fed. Reg. 46,581.

time. ABC's members are concerned about the usefulness of such submitted compensation and hours data to select its members for audit, when that selection tool is based on data from a population that no longer works for the company.

In looking at the breadth of the EEO-1 category itself from the perspective of a construction company, categories 6, 7 and 8 include hundreds of different trades, all of which are going to have a different base pay starting rate. ABC members are not going to find any value at all in looking at a measure of pay that aggregates different trades. Moreover, in our industry, within a trade, the great differentiator above base pay or scale pay is not how many hours a person worked; the differentiator is skill set, and nothing in our members' payroll or HR systems, assuming they have such sophisticated systems, quantifies skill set. ABC members are entitled to exercise discretion to pay a worker more if that individual has a proven reputation of doing careful, quality work, shows up to work on time, and, in some cases, will always answer his or her phone to come into work in an emergency. A significant percentage of contractors do not perform written performance evaluations of each laborer's annual performance because they employ a transient workforce. In addition, the aggregation of wage data nationwide is inconsistent with the requirements of the Davis-Bacon Act, 40 U.S.C. 3141, in which Congress mandated that wage rates for government construction contracts be determined separately for each civil subdivision in each state, and that such rates be determined separately for different types of construction work.

Yet another weakness in the data that OFCCP proposes to collect flows from employers' latitude in reporting the numbers of hours worked by exempt employees. Employers are allowed to report any part-time exempt employee as having worked 1,040 hours, despite the fact that many part-time employees work far more or less than this. Employers are also allowed, but not required, to adjust the number of hours worked by exempt employees who were on leave. These two provisions of the Proposed Rule would distort the results even further: The data would include some employees who were paid 25 percent base pay for working 25 percent of the year, but who were reported as working 50 percent of the year. It also would include accurate hours totals for some employees, and completely inaccurate totals for others. In short, the data would be skewed, but neither contractors nor OFCCP would know how much or in which direction.

The approach contained in the Proposed Rule contains far too many flaws, each of which would distort the data collected and prevent OFCCP from achieving its goal of efficiently deploying its enforcement resources and encouraging voluntary compliance. In short, pay gaps would likely exist because of non-discriminatory factors that are related to differences in compensation systems and reporting—not due to discrimination. OFCCP's proposed method would not point the agency in the right direction in terms of efficiently (and correctly) focusing its enforcement resources.

## **II. Given That the Rule Would Not Enable OFCCP to Achieve Its Stated Goals, the Burden on Contractors Is Unjustifiably High**

OFCCP underestimated the burden presented by the Proposed Rule. Gathering W-2 pay data by EEO-1 establishment would be extremely burdensome to contractors, as many of the systems that contain W-2 data do not also contain demographic data. Therefore, contractors would be

required to re-configure their systems in order to marry pay data with their demographic data. This burden would hit contractors with many small EEO-1 locations particularly hard.

Regardless, a burden in any amount would be too high. The benefit of the Proposed Rule is zero, given that the data collected by OFCCP would be so flawed that it would not enable the agency to effectively target contractors engaging in pay discrimination. The Proposed Rule would require contractors to spend time and money re-configuring their systems and compiling data for OFCCP, but neither OFCCP nor the contractors would be able to use the results to accurately determine where pay discrimination exists.

### **III. The Proposed Rule Lacks Sufficient Detail in Several Key Areas**

If OFCCP decides to move forward with the Proposed Rule, it must provide additional details on several vague portions of its proposal. First, as the Proposed Rule currently stands, contractors are not assured that their data would be protected. OFCCP must not lose sight of the fact that the Proposed Rule creates a centralized depository containing nearly all federal contractors' compensation data. The creation of such a depository would grant hackers from around the world yet another attractive target to exploit. Beyond offering assurances that the OFCCP's systems would meet certain government standards, the Proposed Rule offers no indication that OFCCP understands the sensitivity of the data that it would require contractors to submit. Likewise, OFCCP has not offered satisfactory assurances that it would protect contractors' data from FOIA requests. If the Proposed Rule were to become a Final Rule, OFCCP must offer more specifics regarding how it would protect this extremely sensitive data.

OFCCP also proposes supplementing the data it collects with labor market survey data. The Proposed Rule does not identify the source of this data. Unless OFCCP has identified an existing resource that similarly analyzes W-2 take-home pay by EEO-1 category, it remains unclear exactly how the data collected from contractors can be supplemented without further distorting the results. The agency must be specific about precisely how it would supplement contractors' data.

Finally, OFCCP fails to address how it would define terms that are crucial to aggregating the compensation data: Terms such as "industry" and "peer employers" are used without any indication as to their meaning.<sup>5</sup> Contractors need to know how OFCCP would group and compare them.

### **IV. Conclusion**

ABC appreciates the opportunity to provide its views for consideration on this important matter. As indicated above, ABC and its members strongly oppose the Proposed Rule as it stands. OFCCP proposes collecting summary data reflecting widely varying circumstances, and then aggregating the data without accounting for the differences. This approach would not enable OFCCP to accomplish its stated goals of efficiently allocating its enforcement resources and encouraging voluntary self-correction. Accordingly, this rule would impose significant costs on

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<sup>5</sup> Government Contractors, 79 Fed. Reg. 46,571.

contractors without conferring any benefits on either contractors or the American public. ABC urges the reconsideration and withdrawal of this proposal.

Respectfully submitted,

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

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Vice President, Government Affairs

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