

**DEPARTMENT OF LABOR, OFCCP  
GOVERNMENT CONTRACTORS, PROHIBITIONS AGAINST PAY SECRECY  
POLICIES AND ACTIONS  
CONTROL NUMBER 1250-XXXX  
SUPPORTING STATEMENT**

This Information Collection Request (ICR) is submitted for the ultimate purpose of obtaining Office of Management and Budget (OMB) approval under the Paperwork Reduction Act (PRA) for the information collection requirements contained in a proposed rule. As the agency anticipates public comment, OMB is requested to file comment on this ICR so that the Department of Labor may consider views received from the public.

**A. JUSTIFICATION**

The Office of Federal Contract Compliance Programs (OFCCP) administers two equal employment laws and an Executive Order prohibiting discrimination by Federal contractors based on race, color, religion, sex, sexual orientation, gender identity, national origin, disability, and status as a protected veteran.<sup>1</sup> Additionally, these laws require Federal contractors to take affirmative action to achieve equal employment opportunity.

- Executive Order 11246, as amended (EO 11246);
- Section 503 of the Rehabilitation Act of 1973, as amended (Section 503); and
- The Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (VEVRAA).

EO 11246 prohibits employment discrimination based on race, color, religion, sex, sexual orientation, gender identity or national origin and requires affirmative action.<sup>2</sup> EO 11246 applies to Federal contractors and subcontractors, and to federally assisted construction contractors and subcontractors holding a federally assisted construction contract or subcontract of more than \$10,000, or Federal Government contracts or subcontracts that have, or can reasonably expect to have, an aggregate total value exceeding \$10,000 in a 12-month period. EO 11246 also applies to Federal Government bills of lading, depositories of Federal funds in any amount, and to financial institutions that are issuing and paying agents for U.S. Savings Bonds.

Section 503 prohibits employment discrimination based on disability, and requires Federal contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. Its requirements apply to Federal contractors and subcontractors with a Federal Government contract or subcontract in excess of \$10,000.

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<sup>1</sup> On July 21, 2014, the President signed Executive Order 13672 amending Executive Order 11246 to include nondiscrimination based on sexual orientation and gender identity. This Order requires that a regulation be prepared within 90 days of the date of the Order. Though the new Executive Order is effective immediately, the protections apply to contracts entered into on or after the effective date of the new DOL regulation.

<sup>2</sup> Ibid.

VEVRAA prohibits employment discrimination against protected veterans and requires Federal contractors and subcontractors to take affirmative action to employ and advance in employment protected veterans. Its requirements apply to Federal contractors and subcontractors with a Federal Government contract or subcontract of \$100,000 or more.

For the purposes of OFCCP's recordkeeping and reporting requirements, the agency divides the obligations under these authorities into the information collection requests (ICR) listed in the table below. These divisions are based on distinct programs and related regulatory requirements.

OMB Number	Description
1250-0001	Construction Recordkeeping Requirements
1250-0002	Complaint Procedures
1250-0003	Supply and Service Program
1250-0004	VEVRAA Requirements
1250-0005	Section 503 Requirements
1250-0006	Functional Affirmative Action Program Agreement Procedures
1250-AA03	Equal Pay Report
1250-XXXX	Prohibitions Against Pay Secrecy Policies and Actions

Pursuant to the issuance of a final rule publishing revisions to the current EO 11246 implementing regulations at 41 CFR 60-1.3, 60-1.4 and 41 CFR 60-1.35, this ICR seeks approval of a separate OMB Control Number that addresses modifications to the Equal Opportunity Clause which Federal contractors and subcontractors incorporate into their contracts and subcontracts. OFCCP promulgated the final rule and the information collection requirements contained therein in accordance with the Administrative Procedures Act.

### **1. Legal and Administrative Requirements**

On April 8, 2014 President Obama signed Executive Order 13665 entitled Non-Retaliation for Disclosure of Compensation Information. The Executive Order amended Executive Order 11246 to prohibit Federal contractors and subcontractors from discharging or discriminating in any other way against employees or applicants who inquire about, discuss or disclose their own compensation or the compensation of another employee or applicant. Executive Order 13665 directed the Secretary of Labor to propose implementing regulations within 160 days of the date of the Order.

This information collection request supports the proposed rule revising the regulations implementing Executive Order 11246, as amended. These regulations set forth the definitions for compensation, compensation information, and essential job functions. See proposed 41 CFR 60-1.3. In addition the proposed regulations modify the equal opportunity clauses found at 41 CFR 60-1.4(a) and (b). Finally, the proposed regulations add section 60-1.35 Contractor Obligations and Defenses to Violation of the Nondiscrimination Requirement for Compensation.

## **2. Use of Materials**

Federal contractors and subcontractors are required to include the equal opportunity clause in subcontracts and purchase orders. The purpose is to inform their subcontractors of the Executive Order 11246, as amended requirements. Federal contractors and subcontractors have the discretion of including the clause either verbatim or by reference. *See* 41 CFR 60-1.4(c) and (d). Incorporating the amended equal opportunity clause in contracts, subcontracts and purchase orders increases contractors' awareness and understanding of the obligations and prevents confusion regarding the relevant obligations.

## **3. Improved Information Technology**

In general, under OFCCP regulations each contractor develops its own methods for developing and maintaining information including developing electronic templates. Contractors are free to use whatever methods best suit their needs as long as they can retrieve and provide OFCCP with the data required by the agency's regulations.

## **4. Description of Efforts to Identify Duplication**

The requirements in this request result exclusively from the implementation of EO 11246, as amended by EO 13665. These authorities uniquely empower the Secretary of Labor, and by a Secretary's Order, the OFCCP, to require the collection, analysis, and reporting of data and other information in connection with the enforcement of the laws and regulations requiring Government contractors to take affirmative action to ensure equal employment opportunity. No duplication of effort exists because no other Government agencies have these specific data collection requirements.

## **5. Minimizing the Burden on Small Organizations**

This information collection is required of small organizations that have a Federal contract or subcontract or a federally assisted construction contract or subcontract of more than \$10,000. However, the disclosure of information involved in this information collection involves a one-time amendment to each contractor's existing template used for subcontracts and purchase orders. As such, the burden associated with this ICR is negligible.

## **6. Consequences to Federal Programs if this Information is Collected Less Frequently**

If the clause were not updated or not included in contracts and subcontracts, then contractors would not have the most recent version of the equal opportunity clause and may not be aware of their contractual obligations. As a result, contractors may not be aware that the provision exists and may violate the Executive Order if such a contractor has a policy or takes actions against an employee or applicant who inquires about or discusses their compensation.

## **7. Special Circumstances for the Collection of Information**

There are no special circumstances that would require the information to be collected or kept in any manner other than those normally required under the PRA.

## **8. Consultation Outside the Agency**

Concurrent with the submission of this ICR, OFCCP published a Notice of Proposed Rulemaking (NPRM) on September 17, 2014 in the *Federal Register* seeking public comment on the proposals related to the Prohibitions Against Pay Secrecy Policies and Actions. OFCCP is asking commenters to send their views on the ICR to the agency in the same way as all other comments. The NPRM also invites comments on the information collection requirements to be sent to the Office of Management and Budget within thirty (30) days of the NPRM publication.

All OFCCP regulations containing recordkeeping or reporting requirements are published in the *Federal Register* for public comment before agency adoption. In addition, OFCCP maintains an ongoing dialogue, through compliance assistance, with contractor groups on a number of compliance issues, among which include reporting and recordkeeping.

Assuming OMB files a comment on this ICR that asks the agency to consider comments sent in response to the NPRM, comments received from the public would be addressed under this paragraph for an ICR submitted at the Final Rule stage.

## **9. Incentives**

OFCCP provides neither payments nor gifts to respondents.

## **10. Assurance of Confidentiality**

This information collection consists of third-party disclosures between contractors and sub-contractors; therefore no assurance of confidentiality is provided.

## **11. Sensitive Questions**

This information collection does not contain sensitive questions.

## **12. Estimate of Information Collection Burden**

The following is a summary of the methodology used by OFCCP for the calculation of the information collection burden requirements of the Prohibitions Against Pay Secrecy Policies and Actions.

Federal contractors and subcontractors and federally assisted construction contractors and subcontractors with a contract or subcontract in excess of \$10,000 are required to comply

with the provisions of Executive Order 11246, as amended by Executive Order 13665. OFCCP estimates that this will impact approximately 500,000 contractor companies.<sup>3</sup>

**a. Information Collection**

Executive Order 13665 amends the existing equal opportunity clauses by incorporating a new provision that prohibits contractors from discharging or discriminating in any other way against employees or applicants who inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicants. The amendments to the equal opportunity clauses are found in proposed section 60-1.4(a)(3) and proposed section 60-1.4(b)(3).

The equal opportunity clauses contain several provisions that may be considered “collections of information” as defined by the PRA. Specifically, the incorporation of the clause into covered subcontracts and purchase orders and notifications given to employees and job applicants. Sections 60-1.4(a)(1) and 60-1.4(b)(1) require contractors to post a notice for job applicants and employees. The notice is provided by the contracting officers. The disclosure of information originally supplied by the Federal Government to the recipient for the purpose of disclosure is not included within the PRA’s definition of “collection of information.” See 5 CFR 1320.3(c). Thus, OFCCP has determined that the posting requirements found in sections 60-1.4(a)(1) and 60-1.4(b)(1) do not meet the PRA’s definition of “collection of information” and therefore these provisions are not subject to the PRA’s requirement. Additionally, this NPRM does not change the tag line contractors are required to include in solicitations for employees. The burden associated with the information collection related to the tag line is included under OMB approved collections of information (OMB control numbers 1250-0001 and 1250-0003). However, OFCCP has determined that the amendment to the equal opportunity clauses could be considered is an information collection with burden and reflects that burden and its time value (monetization) below.

**b. Summary of Burden Hours and Time Value (Monetization)**

The NPRM proposes that contractors are required to amend their existing contract, subcontract, and purchase order language to reflect these amendments. OFCCP requires contractors to either incorporate the clause verbatim or by reference. In the first year, OFCCP estimates that existing contractors will spend approximately 15 minutes modifying existing contract templates to ensure the additional language is included. The burden for this provision is 125,000 hours (500,000 contractors x 0.25

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<sup>3</sup> Legacy CCR Extracts Public ("FOIA") Data Package, May 2014, <https://www.sam.gov/portal/public/SAM/>; last accessed June 14, 2014. There is at least one reason to believe the SAM data yield an underestimate of the number of entities affected by this rule and other reasons to believe the data yield an overestimate. SAM does not necessarily include all subcontractors, thus potentially leading to an underestimate, but this limitation of the data is offset somewhat because of the overlap among contractors and subcontractors; a firm may be a subcontractor on some activities but have a contract on others and thus be included in the SAM data. The SAM data may produce an overestimate of the entities affected by this rule because the data set includes: inactive contractors, contracts below this proposed rule’s \$10,000 threshold, and recipients of Federal grants and Federal financial assistance.

hours = 125,000 hours). After the first year, existing contractors will not need to update their equal opportunity clause, though new contractors will. Thus, OFCCP estimates that 1 percent of its contractor universe will be new contractors. This estimate is based on OFCCP's historical data related to compliance evaluations of initial contractors. Using this estimate, in years two and three of this approval OFCCP estimates that in those years, the burden for this provision will be 1,250 hours (500,000 contractors x 0.01 x 0.25 hours = 1,250 hours). Thus the average annual burden for this provision is 42,500 hours.

The time value, or monetization, of the burden to contractors is based on Bureau of Labor Statistics data in the publication "Employer Costs for Employee Compensation" (December 2013), which lists total compensation for management, professional, and related occupations as \$51.58 per hour and administrative support as \$24.23 per hour. OFCCP estimates that 25 percent of the burden will be management, professional, and related occupations and 75 percent will be administrative.

Therefore, the time value of the average annual burden is estimated as \$1,320,369 ((42,500 hours x 0.25 x \$51.58) + (42,500 hours x 0.75 x \$24.23)).

### **13. Annual Operations and Maintenance Cost Burden to Respondents**

OFCCP does not believe there will be any annual operations or maintenance costs associated with this ICR.

### **14. Estimate of Cost to the Federal Government**

The average Federal Government cost for a year of operation is the activities that occur during a compliance evaluation. These costs are included in OMB Control No. 1250-0003 which expires on September 30, 2014 and OMB Control No. 1250-0001 which expires on December 31, 2014.

### **15. Reason for Burden Changes**

On April 8, 2014 President Obama issued Executive Order 13665 prohibiting Federal contractors and subcontractors from discharging or discriminating in any other way against employees or applicants who inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant. OFCCP has published a proposed rule to implement that Executive Order and this ICR contains the new information collection requirements found in that proposed rule.

### **16. Statistical Uses and Publication of Data**

OFCCP does not intend to publish data collected as a part of this ICR.

### **17. Approval Not to Display the Expiration Date**

OFCCP is not seeking such approval.

**18. Exceptions to the Certification Statement**

There is no exception sought.

**B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS**

This information collection does not employ statistical methods.