

**DEPARTMENT OF LABOR, OFCCP  
GOVERNMENT CONTRACTORS, PROHIBITIONS AGAINST PAY SECRECY  
POLICIES AND ACTIONS  
CONTROL NUMBER 1250-0008  
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 this final rule. In accordance with the PRA, OFCCP solicited public comments on the proposed changes to the information collection proposed in the Notice of Proposed Rulemaking (NPRM). See 79 FR 55712 (September 17, 2014). OFCCP also submitted a contemporaneous request for OMB review of the proposed information collection in accordance with 44 U.S.C. 3507(d). On December 5, 2014, the OMB issued a notice that instructed the agency to resubmit the information collection request upon promulgation of the final rule and after consideration of public comments received. Thus, having considered the comments received, OFCCP is resubmitting this information collection request.

## **A. JUSTIFICATION**

### **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 ICR supports the final 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* 41 CFR 60-1.3. In addition the final rule modifies the equal opportunity clauses found at 41 CFR 60-1.4(a) and (b), and adds section 60-1.35 Contractor Obligations and Defenses to Violation of the Nonretaliation 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 their obligations under Executive Order 11246, as amended. 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 Executive Order 11246, as amended by Executive Order 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**

OFCCP sought public comments regarding the potential burdens imposed by information collections contained in the NPRM, which reflected burden related to the amendment to the equal opportunity clause incorporated into contracts and subcontracts.

OFCCP received 11 comments regarding costs and burdens from employer groups, women's group, employers and individuals. Of the 11 comments, one stated that the new rule should not incur any significant cost as the language will be prescribed by OFCCP and that the rule eliminates a policy of taking adverse action against employees. Some of the commenters indicated that the rule was unduly burdensome or unnecessary because it had no clear effect on addressing the pay gap. Some of these commenters indicated that the pay gap could be explained by other nondiscriminatory factors.

OFCCP disagrees that the rule is unnecessary and unduly burdensome. OFCCP worked with several other Federal agencies on the National Equal Pay Task Force to identify the persistent challenges to equal pay enforcement and develop an action plan to implement recommendations to resolve those challenges. OFCCP also consulted a number of sources in order to assess the need for the rule. For instance, OFCCP reviewed national statistics on earnings by gender produced by BLS and the U.S. Census Bureau. Those statistics show persistent pay gaps for female and minority workers. These well-documented earnings differences based on race and sex have not been fully explained by nondiscriminatory factors including differences in worker qualifications such as education and experience, occupational differences, work schedules or other similar factors. Thus, some of the remaining unexplained portion of the pay gap may be attributable to discrimination. In addition, prohibiting pay secrecy policies will enhance the ability of Federal contractors and their employees to detect and remediate unlawful discriminatory practices. Thus, the rule improves the efficacy of Executive Order 11246 and the efficiency of the market in Federal contracting. In order to reduce the burden of implementing Executive Order 13665, OFCCP allows contractors to incorporate the equal opportunity clause by reference into its subcontracts. In addition, OFCCP is providing the specific language for incorporation into handbooks and the notice for applicants and employees. Thus, OFCCP has followed the most efficient manner to implement the amendments.

Other commenters asserted that OFCCP underestimated the burdens created by the new rule. In this area, one commenter proposed alternative calculations related to the implementation of the rule. In considering the alternative calculations of burden, OFCCP took into consideration that although the commenter represents a segment of the contractor universe, it is not reflective of the entire SAM contractor universe. OFCCP expects the costs to vary by contractor. While some contractors may incur more costs, others will likely incur less. Thus, the estimates of burden reflect an average estimate for all covered contractors in the SAM contractor universe. Therefore, OFCCP has retained its calculation of the burden and its information collection as proposed in the NPRM.

Another commenter indicated that OFCCP did not include burdens associated with the definition of compensation and the impact that the definition proposed in the NPRM may have on Federal contractors. The commenter indicated that OFCCP should take the

burden that the compensation definition “will impose on annual evaluations under contractors’ identification of problem areas section of their affirmative action programs.” OFCCP disagrees with this commenter’s assertion. Contractors are required to perform an in-depth analysis of its total employment process to determine whether and where impediments to equal employment opportunity exist. (See 41 CFR 60-2,17(b).) The evaluation includes an analysis of each contractor’s compensation system. OFCCP’s guidance and regulations have historically included salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options, profit sharing and contributions to retirement. Thus, OFCCP did not assess additional burden, as this obligation has not changed. Another commenter asserted that OFCCP did not assess the additional burden associated with data requests received during compliance evaluations. The collection of information during an investigation or the conduct of a civil action is an exception within the PRA’s definition of collection of information. See 5 CFR 1320.4(a)(2).

One commenter suggested that OFCCP allow contractors discretion regarding the wording of the notice for incorporation in the handbook and posting. In order to reduce burden, associated with the information collection OFCCP provides the wording for the notification. As the majority of comments received related to burden were opposed to increasing burden, OFCCP declines to increase burden and instead will provide the exact wording for the notice and language to incorporate into existing employee handbooks.

Therefore, having considered all of the comments received OFCCP retains the information collection included in its NPRM

## **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 subcontractors; 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>1</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 section 60-1.4(a)(3) and 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 final rule 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)**

Contractors are required to amend their existing subcontract and purchase order language to reflect the new equal opportunity clause. 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 hours = 125,000

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<sup>1</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 rule’s \$10,000 threshold, and recipients of Federal grants and Federal financial assistance.

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 that expires on March 31, 2016 and OMB Control No. 1250-0001 that expires on February 28, 2018.

### **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 final rule to implement that Executive Order and this ICR contains the new information collection requirements found in that 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.