



October 11, 2011

Submitted through the Federal eRulemaking portal at
www.regulations.gov

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Re: RIN No. 1250-AA03
Comments in Support of OFCCP's Proposed Compensation Data
Collection Tool

LAURA W. MURPHY
DIRECTOR

Dear Ms. Carr:

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On behalf of the American Civil Liberties Union (ACLU), over half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we write to comment in support of the Office of Federal Contract Compliance Programs' (OFCCP) proposal to develop and implement a compensation data collection tool. However, in order to comprehensively and effectively redress the discrimination with which we and OFCCP are concerned, we also are writing to recommend that the survey request information, in addition to compensation, on other employment practices as well.

OFFICERS AND DIRECTORS
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ROBERT REMAR
TREASURER

I. Data Collection is Needed to Address Serious Problems of Wage and Other Employment Discrimination.

Despite long recognition of the scope and impact of the wage gap and discrimination at every stage of employment, these problems are persistent, and merit the ongoing commitment of resources to their eradication. Women working full time, year round in 2010 were paid only 77 cents for every dollar paid to their male counterparts, a disparity unchanged from 2009. African American and Latina women suffered from wage gaps even more severe, but also essentially unchanged from the year before: in 2010, African American women earned just 62 cents for every dollar earned by white, non-Hispanic men; Latinas' earnings stood at 54 cents for every dollar earned by white men.¹ In 1963, when the Equal Pay Act became law,

¹ National Women's Law Center calculations from U.S. Census Bureau, Current Population Survey, 2011 Annual Social and Economic Supplement, Table PINC-05: Work Experience in 2010 - People 15 Years Old and Over by Total Money Earnings in 2010, Age, Race, Hispanic Origin, and Sex, *available at* <http://www.census.gov/hhes/www/cpstables/032011/perinc/toc.htm>.

women were making 59 cents for every dollar earned by men.² Thus, in the span of nearly fifty years, we have erased less than half of the disparity between men's and women's wages.

Race and ethnicity-based wage inequality is similarly entrenched in the American workplace. In 2010, African Americans employed full-time were paid a median weekly total of \$611, compared to \$765 for white workers.³ The median weekly pay of Latino workers actually dropped from \$541 in 2009 to \$535 in 2010.⁴ No significant progress has been made in narrowing these wage gaps over the past thirty-five years. In 1975, the median annual pay of African American men equaled 74.3% of that of white men; by 2010, the gap had narrowed a mere two-tenths of a percent, to 74.5%.⁵ During the same period, wages paid to Latino men as a percentage of those paid to white men dropped precipitously, from 72.1% in 1975 to 65.9% in 2010.⁶

Renewed efforts to address stagnant pay disparities have never been more important than they are today, in the midst of difficult economic conditions. There is currently a record population of more than 71 million women in the workforce⁷, and these women are increasingly taking on the role of primary and co-breadwinners in their households.⁸ Because of the importance of women's earnings to their families, the gender compensation gap is undermining the economic security of a majority of American families. It should be no surprise that in a recent poll, 84 percent of voters supported "a new law that would provide women more tools to get fair pay in the workplace."⁹ Race and ethnicity-based disparities likewise affect more and more families as our population demographics shift. Census Bureau figures show that from 2000 to 2009, the percentage of the resident U.S. population that is racial and ethnic minorities grew across the board.¹⁰

² E.g., National Committee on Pay Equity, *The Wage Gap Over Time* (September 2011), available at <http://www.pay-equity.org/info-time.html>.

³ U.S. Department of Labor, Bureau of Labor Statistics, *Median weekly earnings of full-time wage and salary workers by selected characteristics*, Current Population Survey, Table 37 (April 1, 2011), available at <ftp://ftp.bls.gov/pub/special.requests/lf/aat37.txt>.

⁴ *Id.*

⁵ Calculations by Information Please, Pearson Education, based on data from the Bureau of Labor Statistics' Current Population Survey, Weekly and Hourly Earnings Tables, available at <http://www.infoplease.com/ipa/A0882775.html>.

⁶ *Id.*

⁷ U.S. Department of Labor, Women's Bureau, *Employment Status of Women and Men in 2008*, available at www.dol.gov/wb/factsheets/Qf-ESWM08.htm.

⁸ Pew Research Center, *New Economics of Marriage: The Rise of Wives* (January 19, 2010), available at <http://pewresearch.org/pubs/1466/economics-marriage-rise-of-wives>; U.S. Cong. Joint Econ. Comm., *Understanding the Economy: Working Mothers in the Great Recession* 2-3 (2010), available at http://jec.senate.gov/public/?a=Files.Serve&File_id=c8242af9-a97b-4a97-9a9d-f7f7999911ab; Heather Boushey and Ann O'Leary, *A Woman's Nation Changes Everything: Executive Summary* (October 2009), available at www.awomansnation.com/execSum.php.

⁹ PFA Coalition, *New Polling Data Shows Voters Overwhelmingly Support the Paycheck Fairness Act* (June 9, 2010), available at http://www.aclu.org/files/assets/PFA_Poll_Data_Colored_Graphs.pdf

¹⁰ Latino/as went from constituting 12.55% to 15.77% of the population; Native Americans and Alaskan Natives from .95% to 1.03% of the population; African Americans from 12.69% to 12.91%; and Asian Americans from 3.76% to 4.56%. U.S. Census Bureau, *Resident Population by Race, Hispanic Origin, and Age*, The 2012 Statistical Abstract, Table 10 (September 27, 2011), available at http://www.census.gov/compendia/statab/cats/population/estimates_and_projections_by_age_sex_raceethnicity.html.

A strong response to employment discrimination is imperative, and so we applaud OFCCP's proposal to systematically survey contractors' pay practices in order to better target the agency's Executive Order 11246 enforcement efforts. Wage discrimination is both a significant concern in assuring economic security,¹¹ and a consistent indicator of systemic infringement of equal employment opportunity.¹² Enhanced efforts to identify contractors with suspect practices will go a long way towards enabling OFCCP to apply its limited resources where they are most needed. During the previous Administration, GAO reported to Congress that OFCCP had "stated that compensation discrimination...is a national priority," but had not done the evaluation or validation that was needed of the methods it used to choose contractors for review, which did not involve analysis of any then-current compensation figures.¹³ In addition to compensation information, data regarding employment practices such as hiring, promotions, terminations, and tenure is needed to guarantee the most reliable identification possible of illegal employment practices. Sharing this information regularly will not impose an undue burden on employers, as they are already required to compile and analyze the bulk of it.

II. Comments on Scope of Information to be Collected and Design of Survey (Questions 1-10)

A. *The Collection of Compensation Data*

The ACLU supports the collection of a comprehensive set of pay data that includes the categories cited by OFCCP in its ANPRM: average starting pay broadly defined to include paid time off and benefits; average pay raises and bonuses; minimum and maximum salary; standard deviation or variance of salary; average tenure; and a snapshot look at average total compensation. Each of these categories of information represents a unique indicator of pay discrimination, and failure to collect a full range of data would undermine OFCCP's laudable effort to better monitor wage disparities. For example, starting salaries at a particular company may be set by policy within a tight range, but bonuses may be at the discretion of managers and reflect a culture of bias in favor of one demographic group or another. Unless OFCCP collects complete information about different types of compensation, it will likely miss a phenomenon like this, or misunderstand the cause of any pay disparities it uncovers.

¹¹For example, on the occasion of National Equal Pay Day 2011, President Obama said, "Achieving equal pay for women is vital to strengthening the future prosperity of our country," citing steps his administration had taken to address the issue including the signing into law of the Lilly Ledbetter Fair Pay Act, the creation of the National Equal Pay Task Force, and the publication of *Women in America: Indicators of Social and Economic Well-Being*, the first comprehensive federal report on the status of women to be written in almost 50 years. Office of the Press Secretary, *Presidential Proclamation: National Equal Pay Day 2011* (April 11, 2011), available at <http://www.ustr.gov/about-us/intergovernmental-affairs/white-house-council-women-and-girls/presidential-proclamation-nat>. See also Deborah J. Vagins, ACLU Blog of Rights, <http://www.aclu.org/2009/01/29/a-step-towards-fair-pay-with-a-stroke-of-a-pen> (Jan. 29, 2009, 18:49 EST); Deborah J. Vagins and Georgeanne Usova, ACLU Blog of Rights, <http://www.aclu.org/blog/womens-rights/new-white-house-report-reaffirms-need-paycheck-fairness-act> (Mar. 9, 2011, 17:19 EST).

¹²U.S. Department of Labor, OFCCP, *Report on the Use of the Equal Employment Opportunity Survey, Prepared for The Office of Management and Budget* [hereinafter "OMB 2000 Report"] 7 (stating "[p]otential problems [of discriminatory employment practice] were indicated most often in the compensation area.").

¹³U.S. Government Accountability Office, *Women's Earnings: Federal Agencies Should Better Monitor Their Performance In Enforcing Anti-Discrimination Laws*, No. GAO-08-799 (August 2008), available at <http://harkin.senate.gov/documents/pdf/20080910GAO.pdf>.

For similar reasons, OFCCP should broadly define compensation to include all its components, each of which could by itself indicate discriminatory practice even if no alarms are raised with respect to other categories of compensation: base salary or hourly wage and number of hours worked; holiday, sick, and vacation pay; shift- and hazard-related incentive pay; overtime; cost of living allowances; commissions; stock options; health and retirement benefits; disability and life insurance; and other benefits such as child-care or tuition assistance. In addition, the tool currently under development by OFCCP should require reporting of pay data for part-time and temporary in addition to full-time employees. Data indicating the work schedule and employment status of individuals by race/ethnicity, gender, and job group/title may reveal disproportionate segregation of demographic groups into less than full-time, permanent status, which in turn is highly likely to correspond to lesser pay and benefits.

B. The Collection of Information Regarding Employment Policies

Relevant company policies may also provide guidance to OFCCP in determining barriers to equal opportunity. OFCCP should also collect information about the existence of company policies restricting employees from disclosing or inquiring about wage information, and prescribing penalties for disclosure of pay. Many employers can terminate or take other adverse actions against employees who disclose or inquire about their own wages; in fact, about one third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers.¹⁴ In addition, only one in ten employers have open pay policies.¹⁵ These pay secrecy policies penalize workers unfairly, make it difficult for employees to determine whether they are paid appropriately, and impede OFCCP's goal of reducing wage gap by masking ongoing wage discrimination. In order to minimize burden on this point for employers, we recommend that the data collection survey include a "yes/no" question asking whether any policies exist that restrict employees' access to information about or ability to disclose pay, or that impose penalties or negative employment consequences in response to wage disclosures or inquiries.

Likewise, we advocate inclusion in the survey tool of "yes/no" question regarding the existence of policies that provide for paid family leave. The enactment of the FMLA has been a major step toward valuing families and shared caregiving responsibilities, but it is only a first step. Millions of Americans do not have access to the FMLA's protections, and millions more cannot afford to take advantage of them.¹⁶ We believe that OFCCP knowing the existence of paid family leave policies, to the extent they exist in federal contracting, would give OFCCP a better sense of policies that facilitate employees' ability to take advantage of the leave policies which benefit them and any possible disproportionate impact on the workforce.¹⁷

¹⁴ The Lilly Ledbetter Fair Pay Act of 2007, Hearing Before the Education and Labor Committee, 110th Cong., 1st Sess. (2007) (written testimony of Wade Henderson, President and CEO of the Leadership Conference on Civil Rights, at 3).

¹⁵ *Id.*

¹⁶ See e.g., National Partnership for Women & Families, *Facts About the FMLA: What Does It Do, Who Uses It, and How*, available at <http://www.nationalpartnership.org/site/DocServer/FMLAWhatWhoHow.pdf?docID=965>.

¹⁷ According to the National Partnership for Women & Families, the majority of workers who take FMLA leave are women. *Id.* An estimated 66% of family caregivers are women. National Alliance for Caregiving & AARP, *Caregiving in the United States* (November 2009), available at www.caregiving.org/pdf/research/Caregiving_in_the_US_2009_full_report.pdf.

C. The Collection of Information on Hirings, Promotions, Terminations, and Tenure

In order to effectively root out the full spectrum of discriminatory practices with which OFCCP is concerned, the proposed data tool under development must request information on more than just compensation. Comprehensive data is needed for OFCCP to understand how the range of employment practices impact compensation, to accurately target investigations and ultimately to ensure full compliance with all the anti-discrimination laws enforced by the agency. Where equal pay violations occur, they are very often inextricably intertwined with other practices which also fall within OFCCP's purview. Just as work schedule and status may provide key indicators of pay discrimination, data concerning hiring, terminations, promotions, and tenure reveal information, such as the disparate selection of particular groups of employees for advancement within the company, that is often determinative of pay disparities, and necessary to the formulation of an effective enforcement response by OFCCP.

OFCCP's mandate, moreover, encompasses more than just wage discrimination. As it is OFCCP's responsibility to ensure that federal contractors do not treat people differently according to their race/ethnicity, gender, religion, national origin, and disability in matters of hiring, promotions, firing, and other conditions of employment including pay, it should be OFCCP's business to monitor employers' performance and direct enforcement efforts with respect to each of its areas of concern.

OFCCP itself recognizes that more than just bare compensation data is necessary in order to root out pay discrimination and more generally to identify the most likely violators of equal employment laws, in that the agency proposes to collect tenure data as part of its compensation survey. In a 2000 report to OMB, moreover, OFCCP noted that collection of hiring, terminations, promotions, and tenure data in addition to compensation data equipped the agency, "with a much greater array of predictive information...allowing OFCCP to more accurately identify those contractors that have a high potential for being in violation of OFCCP's regulations."¹⁸

D. The Format In Which Information Will Be Collected

OFCCP has asked for comments regarding the categories by which compensation data should be disaggregated, with respect to job and establishment groupings. It is equally important to emphasize that each category of data on historical compensation must be disaggregated and cross-tabulated by gender and race in order to ensure its usefulness. Compensation trends differ significantly according to both gender and race, and where race is concerned, different minority groups experience varied wage gaps. Census Bureau data has consistently shown that women earn less than their male counterparts of the same race, but that race further divides women workers: white women earn an average weekly salary of \$684, compared to \$592/week for African American women and \$508/week for

¹⁸ OMB 2000 Report, *supra* n.13, at 1.

Latinas.¹⁹ Statistics must permit OFCCP to discern differential treatment by both specific race/ethnicity and gender simultaneously.

As we recommended on July 11, 2011, in our comments in support of OFCCP's proposed scheduling and compliance check letters, employers should be asked to report employees' compensation according to both the job groups created by the employer for its mandatory Affirmative Action Plan, and specific job titles. In the past, employers have told OFCCP that they maintain detailed data about employment practices according to Affirmative Action Plan job groups, and that it is less-burdensome to report on that basis.²⁰ A recent survey has also indicated that a majority of contractors maintain data and conduct compensation analysis by grouping employees according to job title, so reporting on this basis likewise should not be burdensome for most employers.²¹ Data communicated by job groups and titles will enable more detailed comparisons to be made between employees with similar duties and degrees of responsibility than data organized according to the ten broad job categories delineated on the EEO-1 form.

Employers with multiple establishments should be required to submit survey information for each of their establishments simultaneously (rather than for different establishments in alternating years), and the form of their reporting should mirror the format utilized for the employer's Affirmative Action Plan, where applicable, in order to minimize reporting burden.²² Each individual establishment or unit report from a single employer should utilize the same job groups/titles, so that OFCCP may conduct nationwide multi-establishment reviews by comparing data from the employer's various locations or units. This analysis by OFCCP would reveal systemic patterns of disparity across establishments that reflect the influence of company-wide policies and practices.

E. OFCCP's Analysis of Information Collected

We also support OFCCP's potential use of survey data to conduct industry-wide trend analyses. Data released by the Bureau of Labor Statistics earlier this year revealed that the pay gap between men and women varies significantly by industry, with the field of finance exhibiting the largest disparity.²³ Survey data should be used to conduct like analysis of industry-specific disparities in pay, for those industries in which women and people of color in the aggregate have the lowest earnings in comparison to their peers.

¹⁹ Women of Color Policy Network calculations, set forth in *Policy Brief: Wage Disparities and Women of Color* (April 2011), available at http://wagner.nyu.edu/wocpn/publications/files/Pay_Equity_Policy_Brief.pdf.

²⁰ See, e.g., 65 Fed. Reg. 68037 (2000) ("...reporting Survey data by EEO-1 category represented an additional burden, because contractors usually maintain data by job groups.")

²¹ Affirmative Action Services, *Back to the Future and Into the Past: What to Expect from the OFCCP in 2011* 30 (2011), available at <http://affirmativeactionservices.com/OFCCPin2011June.pdf>.

²² Most employers will prepare establishment-level Affirmative Action Plans, per 41 CFR Part 60-2; however, certain multi-establishment businesses will have obtained permission from OFCCP to prepare Functional Affirmative Action Plans which compile employment information according to functional or business units that cut across multiple establishments. Functional Affirmative Action Plan employers should simultaneously submit survey responses that cover each of their units.

²³ U.S. Department of Labor, Bureau of Labor Statistics, *Women's earnings and employment by industry, 2009* (Feb. 16, 2011), available at http://www.bls.gov/opub/ted/2011/ted_20110216_data.htm.

III. Comments on Survey Logistics (Questions 11-14)

The ACLU supports requesting electronic submission of survey data by contractors. Information submitted in electronic format will be easier to manipulate and search by OFCCP than paper reports. In addition, electronic data could be readily aggregated and reported online.

The efficacy of OFCCP's enforcement efforts will be maximized by requiring submission of survey data as part of the process of bidding on federal contracts, where permissible under Executive Order 11246. It is imperative that federal funds not subsidize discriminatory employment practices. An effective tool for ensuring against this occurrence is to prevent companies that may be violating equal employment opportunity laws from winning contracts in the first place.

The usefulness of OFCCP's data collection effort will also be enhanced by requiring its completion by construction contractors in addition to supply and service contractors. Construction contractors are equally bound by the prohibitions on discrimination set forth in Executive Order 11246, and available data indicate that equal employment opportunity remains far from realized in this industry. Women are grossly underrepresented in the construction industry, comprising only 2.7 percent of construction workers.²⁴ Hispanics or Latinos represent 29.1 percent of the workforce in the construction industry, African Americans represent 6.1 percent, and Asians represent just 1.4 percent.²⁵ Construction contractors, like supply and service contractors, have an obligation to take affirmative action to ensure equal employment opportunity for women and minorities, and OFCCP should vigorously enforce this obligation.

IV. Comments on Costs and Benefits (Question 15)

The survey proposed by OFCCP would provide the agency with information that is critically important to effective enforcement efforts, the collection of which will not significantly burden federal contractors since they are already required to maintain the bulk of it. The prospective benefits of this data collection easily outweigh its costs.

The only data presently available to OFCCP prior to commencement of an audit that reflects an employer's current workforce profile is the information collected on the EEO-1 form, managed by the Equal Employment Opportunity Commission (EEOC). This survey collects only snapshot total numbers of employees in ten broad job categories disaggregated by gender and race/ethnicity, and is required to be completed by contractors with 50 or more employees and federal contracts worth at least \$50,000.²⁶

OFCCP needs to know much more in order to accurately identify equal employment opportunity violations. As the agency explained to OMB, "[p]ersonnel activity data, including hires, promotions and terminations, and applicant information cannot be derived

²⁴ U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 43 (2010), available at <http://www.bls.gov/cps/wlf-databook-2010.pdf>.

²⁵ U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, HOUSEHOLD DATA ANNUAL AVERAGES (2010), available at: <http://www.bls.gov/cps/cpsaat11.pdf>.

²⁶ 41 C.F.R. § 60-1.7(a).

from EEO-1 information, yet these are important areas in OFCCP's analysis of a contractor's compliance posture. Additionally, the compensation and tenure information are not parts of the EEO-1 data collection. Compensation is another area where OFCCP frequently finds compliance violations at contractor establishments. The tenure data are useful in providing understandings of the contractor's historical employment patterns and in interpreting the compensation information."²⁷

Reporting of data on hiring, promotions, terminations, tenure, and compensation will not unduly burden contractors, as much of the information we have proposed be collected is already maintained pursuant to regulations and as a part of mandatory Affirmative Action Plans, and/or in anticipation of potential audits. Contractors will assuredly have access to much of the information needed to complete the survey, as they are required by regulation to keep comprehensive employment data on file for at least one to two years, depending on size of the employer's workforce and government contracts.²⁸ This includes everything from job postings and the race/ethnicity and gender of applicants to results of tests given to employees and employee records of terminated individuals. Employers are also required to compile various pieces of this data in preparation of their Affirmative Action Plans, a mandate for all supply and service contractors with at least 50 employees and \$50,000 in government contracts.²⁹

In addition to data prepared for Affirmative Action Plans, employers must maintain the categories of information required to be submitted in the event of selection for an audit. Such efforts further minimize any added burden that a survey might impose. OFCCP's most recent proposed Scheduling Letter, OMB No. 1250-0003, requests information including applicants, hires, promotions, and terminations by job title, race/ethnicity and gender, and detailed compensation information for each individual employee cross-referenced to the employee's race/ethnicity, gender, hire date, job title and group, and EEO-1 category.

V. Conclusion

The ACLU appreciates this opportunity to submit comments on a data collection tool and the important role it would play in OFCCP's mandate. OFCCP can best fulfill its critical mission to ensure equal employment opportunity in federal contracting by regularly gathering the basic information that will permit full enforcement of its anti-discrimination mandate. A comprehensive survey that provides a pertinent overview of employment and compensation practices is the most effective means at OFCCP's disposal to ensure that the agency makes the most impact possible in eliminating discrimination in employment.

As OFCCP develops its new data collection tool, we also urge concerted efforts to protect individuals' privacy. Information reported by employers containing personally identifying data must not be publicly disseminated, except with the prior assent of concerned employees or as otherwise permitted in connection with resolution of a complaint, charges, or litigation against an identifiable person's employer. These protections are vital to ensuring that personal information on employees is not handled inappropriately or leaked to

²⁷ OMB 2000 Report, *supra* n.13, at 10.

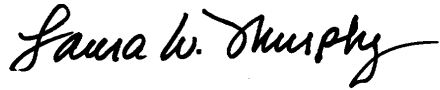
²⁸ 41 C.F.R. § 60-1.12.

²⁹ 41 C.F.R. § 60-2.1.

the public. However, none of these controls prevent the long-term storage and publication of aggregate, non-identifiable data on contractors and employees that is so critical to civil rights monitoring and enforcement.

Please feel free to contact Deborah J. Vagins, ACLU Senior Legislative Counsel, at dvagins@dcaclu.org or (202) 675-2335 with any questions.

Sincerely,

A handwritten signature in black ink that reads "Laura W. Murphy". The signature is written in a cursive style with a long, sweeping tail on the "y".

Laura W. Murphy
Director, Washington Legislative Office

A handwritten signature in black ink that reads "Deborah J. Vagins". The signature is written in a cursive style with a long, sweeping tail on the "s".

Deborah J. Vagins
Senior Legislative Counsel