



April 21, 2022

Tina T. Williams
Director, Division of Policy and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Avenue NW, Room C-3325
Washington, DC 20210

Submitted via regulations.gov

RE: RIN 1250-AA14, Pre-Enforcement Notice and Conciliation Procedures

Dear Ms. Williams:

The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 230 national organizations to promote and protect the rights of all persons in the United States, together with the 15 undersigned organizations, write to express our support of the Office of Federal Contract Compliance Programs (“OFCCP”) Notice of Proposed Rulemaking, RIN 1250-AA14, Pre-Enforcement Notice and Conciliation Procedures, published in the Federal Register on March 22, 2022 (“the Proposed Rule”).¹ The Proposed Rule would modify the final rule titled “Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination,” which took effect on December 10, 2020 (“the 2020 Rule”).²

The 2020 Rule imposed unnecessary, burdensome, and confusing enforcement standards onto OFCCP’s pre-enforcement processes that do not align with the requirements of federal anti-discrimination law and serve to hamper the ability of OFCCP to engage with federal contractors at the earliest stages to remedy potential discrimination. Ultimately, these needless barriers make it more difficult for OFCCP to protect working people from unlawful discrimination and may, even more perversely, expose vulnerable workers to additional discrimination and retaliatory treatment, undermining the ability of OFCCP to fulfill its mission. The proposed modifications would, consistent with federal law, restore flexibility to OFCCP, promote greater efficiency, and allow for earlier resolutions that protect federal contract workers from unlawful discrimination.

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¹ 87 Fed. Reg. 16138 (Mar. 22, 2022).

² 85 Fed. Reg. 71553 (Nov. 10, 2020).

OFCCP Plays a Unique Role in Protecting Federal Contract Workers from Discrimination

The primary function of OFCCP is to ensure that companies with the privilege of doing business with the federal government do not engage in employment discrimination. To that end, OFCCP is charged with enforcing Executive Order 11246, which prohibits federal contractors from engaging in employment discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin; Section 503 of the Rehabilitation Act of 1973, which prohibits employment discrimination against people with disabilities; and the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), which protects veterans. EO 11246, Section 503, and VEVRAA also impose certain affirmative action obligations on federal contractors to ensure equal employment opportunities. Accordingly, OFCCP broadly oversees the employment practices of federal contractors, who are legally required to proactively monitor workplace diversity and pay equity, to make a meaningful effort to recruit qualified applicants from groups who are under-represented in their workplaces, and to break down barriers to equal opportunity for various marginalized and disadvantaged communities.

To achieve its goals, OFCCP does not merely respond to individual complaints of discrimination. Instead, a distinctive feature of OFCCP enforcement is the power to engage in systemic compliance reviews. Individual employees may lack knowledge of discrimination, even when they are being harmed by discriminatory actions, or may face other obstacles to bringing complaints, including fear of retaliation. Through compliance reviews, OFCCP can proactively identify, investigate, and remedy patterns of discrimination, even in the absence of an individual complaint. OFCCP also provides guidance to contractors to encourage voluntary compliance with anti-discrimination laws. Preventing discrimination and addressing it when it occurs is essential to protecting the economic security of millions of working people employed by federal contractors.

Workplace Discrimination is a Significant Problem Contributing to Economic Insecurity

Despite longstanding federal prohibitions against workplace discrimination, working people across the United States continue to experience pernicious discrimination that robs them of employment opportunities, economic security, and dignity on the job. The U.S. Equal Employment Opportunity Commission (“EEOC”), for example, reported that it received over 128,000 charges of employment discrimination in fiscal years 2020 and 2021;³ OFCCP received over 2,700 complaints over that same period from federal contract workers.⁴ Research, however, shows that fear of retaliation prevents many working people from ever reporting discrimination.⁵ The sheer number of retaliation claims underscores that this fear is not unreasonable: retaliation made up over half of all charges filed at the EEOC in fiscal years 2020 and 2021 respectively,⁶ and nearly 43 percent of complaints received by OFCCP just in the

³ U.S. Equal Employment Opportunity Commission, Charge Statistics (Charged filed with EEOC) FY 1997 Through FY 2021, <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2021> (last visited Apr. 18, 2022).

⁴ Office of Federal Contract Compliance Programs, OFCCP By the Numbers. Fiscal Year Data Tables: Complaints Received by Employment Practice, available at, <https://www.dol.gov/agencies/ofccp/about/data/accomplishments> (last visited Apr. 18, 2022).

⁵ See generally, Deborah L. Brake, *Retaliation*, 90 Minn. Law. Rev. 18, 36-42 (2005), available at, https://www.minnesotalawreview.org/wp-content/uploads/2011/12/Brake_Final.pdf (last visited Apr. 18, 2022).

⁶ U.S. Equal Employment Opportunity Commission, *supra* note 3.

first quarter of fiscal year 2022 alone.⁷ Given incentives not to report discrimination,⁸ it can be difficult to determine its prevalence, but an online survey conducted in 2019 found that as many as 60 percent of working people in the United States have experienced or witnessed workplace discrimination based on age, race, sex, gender identity, or sexual orientation.⁹

The cost of discrimination for people of color, women, LGBTQ people, older workers, people with disabilities, and other marginalized and multi-marginalized groups is significant. Workplace discrimination can mean not having access to a job or a promotion, being forced to endure a hostile working environment, or being paid less — all because of who you are. These unlawful practices inhibit economic security and opportunity and help to perpetuate disparities in health outcomes, housing, education, and more.

Discriminatory race- and sex-based pay gaps, for example, directly contribute to high rates of poverty affecting communities of color.¹⁰ In 2020, women working full-time, year-round were paid 83 cents for every dollar paid to men, with women of color paid significantly less than non-Hispanic white men.¹¹ When comparing the wages of all workers — including full-time, year-round, part-time, and part-year workers — gender and race wage gaps are even larger. Using this comparison, all women workers were paid 73 cents for every dollar paid to all men. All Black women workers were paid just 58 cents, Native American women were paid 50 cents, and Latinas were paid only 49 cents for every dollar paid to a white, non-Hispanic man.¹² For women of color especially, unequal pay means having far less money to cover basic necessities, and less money — or no money at all — to withstand a financial emergency, let alone an economic crisis like the one experienced during the height of the COVID-19 pandemic. Beyond immediate basic needs, unequal pay also has ripple effects for the economic security of families into the future as it negatively impacts access to credit, education, retirement savings, and other investments that help build intergenerational wealth.

Occupational segregation also contributes to wage gaps and economic insecurity. Workers of color, women, and people with disabilities continue to be concentrated in low-paid occupations because of structural barriers to entry as well as discrimination on the job.¹³ For example, research shows that women who experience sexual harassment at work are more likely to leave their jobs.¹⁴ A majority of women in male-dominated workplaces report that sexual harassment is a problem in their industry, and

⁷ Office of Federal Contract Compliance Programs, *supra* note 4.

⁸ See Brake, *supra* note 5 at 32-36 (discussing research on the social costs of reporting discrimination, in particular for “low-power or stigmatized social groups.”).

⁹ Glassdoor, *Diversity and Inclusion Study 2019*, available at <https://www.glassdoor.com/blog/new-study-discrimination/> (last visited Apr. 18, 2022).

¹⁰ See Kaiser Family Foundation, *Demographics and the Economy, People in Poverty: Poverty Rate by Race/Ethnicity* (2019), available at <https://www.kff.org/state-category/demographics-and-the-economy/people-in-poverty/> (last visited Apr. 18, 2022).

¹¹ Jasmine Tucker, National Women’s Law Center, *Fact Sheet: The Wage Gap Robs Women of Economic Security as the Harsh Impact of COVID-19 Continues* (March 2022), available at <https://nwlc.org/wp-content/uploads/2022/03/Equal-Pay-Day-Factsheet-2022.pdf>.

¹² *Id.*

¹³ Marina Zavoronkova, Matthew Brady, and Rose Khattar, Center for American Progress, *Occupational Segregation in America* (Mar. 29, 2020), <https://www.americanprogress.org/article/occupational-segregation-in-america/>.

¹⁴ See Lauren Haumesser and Melissa Mahoney, AAUW, *Factory Flaw: The Attrition and Retention of Women in Manufacturing*, available at <https://www.aauw.org/resources/research/factory-flaw/> (last visited Apr. 18, 2022).

more women in male-dominated workplaces report having personally experienced sexual harassment on the job.¹⁵ Fear of harassment and concern for safety may also prevent women from entering these, often better-paying, industries. At the same time, occupational segregation adds to the devaluation of work largely performed by women and marginalized groups, keeping wages low and perpetuating wage gaps.¹⁶

The 2020 Rule Must be Modified to Support More Effective OFCCP Enforcement

As a preliminary matter, The Leadership Conference notes that the Notice of Proposed Rulemaking that preceded the final 2020 Rule was published in the Federal Register on December 30, 2019, and provided only a 30-day comment period.¹⁷ On January 27, 2020, The Leadership Conference, together with 31 organizations, sent a letter to Craig Leen, then the director of OFCCP, requesting that the comment period be extended by 30 days to allow the public the opportunity to provide meaningful comments on the proposal given the publication of the notice in the middle of the winter holiday season and before two federal holidays.¹⁸ In our letter, The Leadership Conference noted that the proposed rule, which sought to set out new standards for issuing preliminary notices to contractors, was a “complex undertaking” that necessitated more time for engagement with the public. That time was not granted despite the nature of the rule.¹⁹

The resulting 2020 Rule weakens critical antidiscrimination protections for federal contract workers by restricting the ability of OFCCP to effectively engage federal contractors early in the compliance evaluation process once indicators of discrimination have been identified but before OFCCP determines whether violations have occurred. In addition, the requirements of the 2020 Rule may undermine OFCCP enforcement by potentially exposing working people to further discrimination or retaliation. By rescinding the inflexible enforcement standards imposed by the 2020 Rule, the proposed modifications would restore the ability of OFCCP to effectively address indicators of discrimination and ultimately strengthen OFCCP enforcement.

The 2020 Rule Imposes Unnecessary, Burdensome Enforcement Standards on OFCCP

Pre-enforcement review of preliminary indicators of discrimination is central to OFCCP’s unique enforcement role. The compliance evaluation process allows OFCCP to address potential discrimination quickly and proactively with contractors and identify patterns of discrimination that individual workers may be unable to uncover or challenge. To be effective, the process — which, by definition, is not an enforcement proceeding — must be nimble, within the bounds of the law.

¹⁵ Kim Parker, Pew Research Center, *Women in Majority-Male Workplaces Report Higher Rates of Gender Discrimination* (Mar. 7, 2018), <https://www.pewresearch.org/fact-tank/2018/03/07/women-in-majority-male-workplaces-report-higher-rates-of-gender-discrimination/>.

¹⁶ See Zhavoronkova et al., *supra* note 13.

¹⁷ 84 Fed. Reg. 71875 (Dec. 30, 2019).

¹⁸ Letter from The Leadership Conference on Civil and Human Rights et al., to Craig E. Leen, Director, Office of Federal Contract Compliance Programs, U.S. Department of Labor (Jan. 27, 2020), <https://civilrights.org/resource/request-for-extended-comment-period-nprm-rin-1250-aa10/>.

¹⁹ We note that the current NPRM provides only a 30-day comment period. Executive Order 13563 requires agencies to provide the public with an opportunity to participate in the regulatory process through a comment period, which should “generally be at least 60 days.” 73 Fed. Reg. 3821 (Jan. 21, 2011).

OFCCP has long construed EO 11246's nondiscrimination requirements to align with those of Title VII.²⁰ This well-established interpretation promotes consistency in the law and increases certainty among employers and employees, which can encourage greater compliance. The 2020 Rule, however, incorrectly and inappropriately burdens OFCCP's pre-enforcement process by imposing evidentiary standards that are not required by Title VII or OFCCP caselaw and that may create, absurdly and without justification, higher evidentiary standards for OFCCP to make out preliminary findings of discrimination than to prove a Title VII case at trial. For example, the 2020 Rule requires OFCCP, with limited exceptions, to present both "quantitative" and "qualitative" evidence of disparate treatment before it can take the initial step of issuing a Predetermination Notice — a notice setting out *preliminary indicators* of discrimination. Yet, as the Proposed Rule notes, Title VII itself does not dictate the specific forms of evidence required to make out a *prima facie* case of discrimination, let alone *require* a showing of both a particular statistical threshold of disparities coupled with qualitative evidence to justify an investigation.²¹ Similarly, the 2020 Rule requires OFCCP to demonstrate "practical significance" to support either a disparate impact or disparate treatment theory of discrimination. Practical significance refers to the magnitude of the impact a disparity has on a protected group. The Proposed Rule, however, correctly notes that whether Title VII requires a showing of practical significance is unsettled as a matter of law, and there is no generally accepted understanding of what quantitative measure would even establish a finding of practical significance.²² Given that the law is unclear with respect to practical significance, including it as a requirement in OFCCP regulations unnecessarily creates confusion and inefficiency.

The 2020 Rule undermines the purpose of OFCCP's pre-enforcement processes: to notify federal contractors that OFCCP has identified preliminary indicators of discrimination. The notice begins a multi-step process of engagement with contractors to clarify and potentially resolve compliance issues. The 2020 Rule, however, forces OFCCP to delay notice to contractors at an investigatory stage until it can present a "trial ready" case using rigid evidentiary standards that are inconsistent with federal law.

By rescinding the requirement to provide both quantitative and qualitative evidence and to demonstrate practical significance before issuing a Predetermination Notice or Notice of Violation, the Proposed Rule restores to OFCCP the flexibility that allows it to issue pre-enforcement notices based on the specific facts and circumstances discovered through the compliance evaluation. There is no requirement in applicable federal law that forces OFCCP to wait until it can prove a case of discrimination before it can engage a contractor in addressing preliminary indicators of discrimination. The 2020 Rule therefore created an inefficiency where none existed, forcing OFCCP to expend resources to make evidentiary

²⁰ See, e.g., *OFCCP v. Oracle America*, 17-OFC-00006, 2020 WL 6779321 (U.S. Dept. of Labor Sept. 22, 2020) ("The anti-discrimination provisions of EO 11246 are interpreted through the legal analyses that have been applied to Title VII of the Civil Rights Act.")

²¹ The preamble to the 2020 Rule itself acknowledges that the standards contained in the Rule are "neither compelled nor prohibited by Title VII and OFCCP caselaw." 85 Fed. Reg. at 71554. Cf. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 ("[T]he facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from (a plaintiff) is not necessarily applicable in every respect to differing factual situations.") (alterations omitted) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.13 (1973)).

²² 87 Fed. Reg. at 16144. See also Office of Federal Contract Compliance Programs, *Practical Significance in EEO Analysis Frequently Asked Questions*, <https://www.dol.gov/agencies/ofccp/faqs/practical-significance> (last visited Apr. 18, 2022) ("There is no universally accepted measure of practical significance in the EEO field.")

showings not required by law and delaying its efforts to mitigate harm to workers experiencing unlawful discrimination. The 2020 Rule also created perverse incentives for contractors who received these early notices to challenge whether OFCCP had satisfied these unnecessary evidentiary burdens — burdens that are, again, not required by law and potentially higher than what OFCCP would have to show at trial — instead of working with OFCCP to determine whether discrimination exists, and if so, how it could be eliminated.

The 2020 Rule May Expose Working People to Additional Discrimination and Retaliation

In addition to creating burdensome standards that undermine OFCCP's efforts to prevent and remedy workplace discrimination, the 2020 Rule risks exposing working people to additional discrimination and retaliation. The 2020 Rule requires OFCCP not only to gather a robust factual record — including qualitative, anecdotal evidence — to simply begin the preliminary enforcement process but also to disclose that information to contractors “in sufficient detail to allow contractors to investigate allegations and meaningfully respond.”²³ With this level of information, even if OFCCP withheld personally identifying information, employers may be able to identify specific employees who shared their experiences of discrimination with OFCCP, who could then be subject to further discrimination or retaliation. Retaliation is already the largest source of charges filed with civil rights enforcement agencies like OFCCP and EEOC.²⁴ Processes that could even potentially subject employees to further victimization may chill potential claimants and witnesses from coming forward altogether. This chilling effect brought on by retaliatory conduct — especially at this stage in the process — frustrates OFCCP's enforcement efforts by making it more difficult to discover and weed out discrimination.

OFCCP Should Maintain Portions of the 2020 Rule that Expedite Resolutions of Discrimination

Although OFCCP should rescind the unnecessary and burdensome evidentiary standards imposed on its pre-enforcement processes by the 2020 Rule, it should retain the portion of the 2020 Rule clarifying that federal contractors can enter into a voluntary conciliation agreement — even at the earliest stages of the pre-enforcement process — to resolve violations of antidiscrimination protections.²⁵ The availability of early conciliation protects OFCCP resources and improves efficiency while ensuring that unlawful discrimination can be remediated expeditiously, mitigating the harm to working people as quickly as possible. Restoring the ability of OFCCP to use the pre-enforcement process more flexibly than the 2020 Rule allows could also incentivize conciliation as OFCCP would be able to put contractors on notice earlier of any preliminary indicators of discrimination. In keeping with the goal of efficient resolution, the Proposed Rule would also restore the previous practice of providing contractors 15 calendar days, instead of 30 calendar days, to respond to a Predetermination Notice, with the possibility of extension for good cause. This modification is an acknowledgment that the harm wrought by workplace discrimination — both to the workers who directly experience the harm, to the taxpayers who unwittingly support it through their tax dollars and who pay the cost of any inefficiencies caused by the failure to provide equal

²³ 41 C.F.R. 60-1.33(a)(4).

²⁴ See U.S. Equal Employment Opportunity Commission, *supra* note 6; Office of Federal Contract Compliance Programs, *supra* note 7.

²⁵ 41 CFR 60-1.33(c)-(d).

opportunity — necessitates that contractors address preliminary indicators of discrimination promptly, while also allowing reasonable flexibility.

Conclusion

OFCCP's enforcement powers are critical to ensuring nondiscrimination, supporting legal requirements to take affirmative action, and securing proactive compliance with Executive Order 11246 and federal civil rights laws that prohibit discrimination in employment based on race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. The 2020 Rule hampers the ability of OFCCP to identify and remedy systemic discrimination, making it more difficult to address problems such hiring and pay discrimination. The Proposed Rule would rescind needless barriers to OFCCP pre-enforcement processes and restore the ability of OFCCP to effectively address preliminary indicators of discrimination at the earliest stages and provide robust protection of workers' civil rights.

Thank you for your consideration of our views. Please contact Josh Boxerman, policy analyst (boxerman@civilrights.org) and Chanel Sherrod, government affairs program manager (sherrod@civilrights.org) at The Leadership Conference, or Gaylynn Burroughs, director of workplace equality (gburroughs@nwlc.org) and Samone Ijoma, legal fellow (sijoma@nwlc.org) at the National Women's Law Center with any questions.

Sincerely,

The Leadership Conference on Civil and Human Rights
National Women's Law Center
A Better Balance
Asian Pacific American Labor Alliance, AFL-CIO
Bazon Center for Mental Health Law
Economic Policy Institute
Equal Rights Advocates
Institute for Women's Policy Research
Lawyers' Committee for Civil Rights Under Law
League of United Latin American Citizens (LULAC)
National Employment Law Project
National Employment Lawyers Association
National Organization for Women
National Taskforce on Tradeswomen Issues
Public Citizen
Service Employees International Union