



December 16, 2014

Debra A. Carr, Director
Division of Policy, Planning, and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Avenue, NW, Room C-3325
Washington, DC 20210

Re: RIN 1250-AA06, Comments in Support of OFCCP's Notice of Proposed Rulemaking Prohibiting Pay Secrecy Policies and Actions

Dear Ms. Carr:

The National Partnership for Women & Families appreciates the opportunity to comment on the Office of Federal Contract Compliance Programs' (OFCCP) proposed rule implementing Executive Order 13665, prohibiting federal contractors from discharging or discriminating against employees or applicants who discuss, disclose, or inquire about their own compensation or that of another employee or applicant. Currently, federal contractors are able to mask compensation discrimination with pay secrecy policies that forbid employees from discussing pay and benefits. The proposed rule prohibits that conduct. The rule will address and eliminate some of the barriers that prevent workers from obtaining the information they need to identify and make complaints about pay discrimination to their employers and, if needed, to OFCCP. This rule will also make OFCCP's own on-site reviews more productive. We strongly support this rule, which will facilitate OFCCP's ability to detect and reduce unlawful compensation discrimination by federal contractors and, as such, improve the economy and efficiency of government contracting.

OFCCP plays a vital role in combatting unlawful employment discrimination in the federal contracting workforce, and in turn, impacts the lives of millions of workers. OFCCP has responsibility for enforcing executive orders and laws requiring federal contractors and subcontractors to ensure equal employment opportunity. The agency's jurisdiction reaches employers that employ a total of at least 28 million workers, comprising nearly one quarter of the civilian workforce. Identifying and remedying compensation discrimination is an important part of OFCCP's enforcement efforts.

As OFCCP has recognized, women and workers from communities of color continue to face significant pay disparities in the United States. On average, women working full time, year round are paid only 78 cents for every dollar paid to men.¹ African-American and Latina women are at a particular disadvantage: they are paid only 64 cents and 56 cents for year-round, full-time work, respectively, for every dollar paid to white men.² Women in every age group,³ at every level of educational achievement⁴ and in every industry⁵ are paid less than their male counterparts. Yet workers often do not have information that allows them to learn about and challenge these disparities. In a survey of private sector workers, over 62 percent of women and 60 percent of men reported that their employers discourage



or prohibit the discussion of wage and salary information.⁶ These troubling statistics underscore the need for reform of federal contractors' salary disclosure policies and protections for workers who seek compensation information.

For these reasons, we strongly support this rule. In addition, with OFCCP's objectives in mind, we offer the following comments and recommendations:

I. The proposed rule protects workers throughout the contracting workforce while imposing minimal burdens on contractors.

OFCCP has recognized that prohibiting pay secrecy policies and discrimination against workers who share compensation information is not a heavy burden for contractors. The proposed rule merely asks employers to refrain from discriminating against employees who discuss, disclose or inquire about compensation – a protection that will make a real difference in combatting pay disparities. Additionally, the new rule does not require federal contractors to disclose wage information and reaffirms the right of employees to refuse to discuss their own or others' compensation information. In recognition that this will not create special burdens for smaller contractors, OFCCP correctly proposes to apply the rule to all contractors with contracts over \$10,000, regardless of the contractor's number of employees.

Successful implementation of the rule necessitates broad awareness of this new provision by employees and by the companies that have received or are applying for federal contracts. To that end, OFCCP should require contracting agencies to include the new nondiscrimination provision in the already mandatory equal opportunity clauses in their contracts. Furthermore, we encourage OFCCP to include in its final rule the requirement that the provisions of the nondiscrimination clause be posted at worksites, included in all solicitations and advertisements, included in trainings for managers and supervisors, and disseminated in employee handbooks and manuals.

II. Providing narrow defenses for contractors appropriately balances the interests of contractors and employees.

The "essential job functions" defense allows contractors to guard against certain improper disclosures, but the term "essential job functions" and its application should be defined narrowly and applied selectively to specific positions. The proposed defense to the rule protects contractors who take an adverse employment action against an employee who shares compensation information if the employee has access to compensation information as part of the essential functions of his or her job. This type of defense reflects circumstances in which it would be improper for select employees, particularly those in certain human resources positions, to disclose compensation information, while also acknowledging circumstances in which the information may need to be discussed, such as in an investigation.



However, in order to fulfill OFCCP's objective to provide a defense that narrowly applies to select human resources positions and others whose job duties are intimately tied to employees' compensation information, the standard should not be whether these employees have *access* to compensation information as part of their essential job functions, but whether they *use* that information on a consistent basis. Use is a more appropriate descriptor for the type of positions that the defense is intended to target. For instance, some supervisors may have access to compensation information of certain employees but rarely use that information as part of their core duties. In comparison, certain human resources employees, payroll and benefits administrators, and financial officers engage in work that is inextricably tied to workforce compensation information and related activities, such as issuing paychecks and discussing or implementing benefits programs. OFCCP should tailor this defense so that it does not broadly subsume most supervisors and managers, who are often in the best positions to remedy problems. Modifying the factors that determine essential job functions to emphasize use rather than access is an important step in this direction.

To determine whether access to compensation data is part of an employee's essential job functions, OFCCP proposes adapting factors used in the Americans with Disability Act Amendments Act (ADAAA) and Section 503 of the Rehabilitation Act ("Section 503"). In ADAAA and Section 503 these factors are used to determine whether a person with a disability can perform the essential functions of a position while receiving a reasonable accommodation for their disability. In the context of this Notice of Proposed Rulemaking (NPRM), however, the relevant inquiry is not whether pay information is *performed* by an employee, but whether it is *maintained and used* by an employee as part of his or her "fundamental job duties." OFCCP should therefore adapt the ADAAA and Section 503 factors to account for that difference and focus the factors on the key purposes for which employees use compensation information.

OFCCP should also make clear that "essential job function" is narrowly defined, as exceptions generally are, and that any factors considered be limited and given narrow interpretations. The evidence cited in the proposed rule, including written job descriptions, terms of collective bargaining agreements, and the contractor's judgment, are useful factors in determining whether an employee's use of compensation information is an essential function, but the contractor's judgment alone should not be given conclusive weight. In addition, we encourage OFCCP to identify and include other factors, such as the amount of time spent on the job using pay information; involvement in hiring, promotion and pay decisions; and the importance of using compensation information as compared to the employee's other functions as applicable to the determination of whether the employee's use of compensation information constitutes an "essential job function." Providing these well-defined and limited explanatory factors provides clarity to both employers and employees on which employees fall within the essential job functions defense. It is important that employees not be dissuaded from exercising their rights because of a concern that an overbroad interpretation of the defense could lead their employers to take adverse employment actions against them.



The NPRM’s proposed exemptions to the “essential job functions” defense are necessary and appropriate. In the NPRM, OFCCP provides certain exemptions from the essential job functions defense. An employer may not retaliate against an employee who would otherwise be covered by the defense 1) if the employee obtained the information through means other than the access that is part of her essential job functions, or 2) if the employee is pursuing her own possible compensation discrimination claim or bringing possible compensation disparities to the attention of a contract manager. The first exemption would allow employees who hear information about pay in a water cooler conversation with a co-worker to discuss that information with other employees without punishment, since no employee discovered this information as a result of their essential job functions. The second exemption is particularly valuable for women because women make up a large proportion of human resources positions and are also affected by a wage gap along gendered lines. Therefore these employees require protection from retaliation for simply voicing their own concerns. We encourage OFCCP to include both exemptions in the language of the proposed rule.

OFCCP should clarify what constitutes a “legitimate workplace rule” to provide better guidance for contractors and employees alike. In the proposed rule, OFCCP provides a general defense whereby an employer may take adverse action against an employee who discusses compensation information if the employer can point to a consistently and uniformly applied workplace rule that the employee violated, other than a rule prohibiting discussing compensation information. Although employers should be able to take appropriate and necessary actions for serious workplace violations, the defense risks being so broad that it allows employers to use such rules as a pretext to discharge or discriminate against employees who discuss compensation information. OFCCP should provide a clear, narrow definition and specific examples of legitimate workplace rules that are permitted as an affirmative defense. In defining such rules, OFCCP should emphasize legitimate sources for workplace rules such as employee handbooks and collective bargaining agreements so that employers cannot rely on informal or unwritten rules to abuse the defense or cause a chilling effect on employee conversation. The definition must be sufficiently narrow to prohibit contractors from using the defense to swallow the rule.

OFCCP should continue to evaluate compensation discrimination, including the contractor defenses provided for in this Executive Order, under a Title VII nondiscrimination framework. The NPRM discusses the appropriate causation standard for analyzing potential violations of the proposed rule in light of the Supreme Court’s recent decision in *University of Texas Southwestern Medical Center v. Nassar*. The *Nassar* court held that, although plaintiffs can prove discrimination under Title VII by showing that race, color, religion, sex or national origin was a “motivating factor” behind an employment practice even if other benign factors also motivated the practice, a stricter “but for” standard applies to Title VII retaliation claims. Under the “but for” standard, plaintiffs must prove that, but for their protected activity, their employer would not have taken adverse employment action against them.⁷



The contractor defenses provided for under the proposed rule should be analyzed under the Title VII nondiscrimination framework, or “motivating factor” analysis, that OFCCP has consistently used to analyze pay discrimination claims rather than the “but for” standard. Under the motivating factor analysis, even if other factors may have motivated the employer in taking adverse action against the employee, the complaining party would only need to prove that her protected activity was a motivating factor in the adverse employment action.⁸ The proposed rule does not address traditional retaliation against a worker for lodging a complaint or assisting or participating in an investigation or hearing against the employer; rather, it addresses barriers to workers discovering whether there is compensation discrimination in their workplaces in the first instance, before any complaint process has even begun. In carrying out its mandate to address compensation discrimination in the workplace, OFCCP relies in part on receiving complaints from workers who suspect discriminatory practices. Through this proposed rule, OFCCP is increasing its capacity to combat compensation discrimination, and therefore should analyze the defenses under a nondiscrimination framework by applying the “motivating factor” test.

OFCCP can further clarify that the Title VII nondiscrimination framework will apply to any and all litigation arising from this Executive Order by incorporating the “motivating factor” test and its remedies into the text of the rule itself. OFCCP should make clear that it is adopting all aspects of the motivating factor analysis, including remedies. Under Title VII, employers are not liable if they would have taken the same adverse action against an employee in the absence of the protected activity. However, if the employee also meets her burden of proof that her protected activity was a motivating factor, Title VII will still grant relief to the employee, in the limited form of declaratory and injunctive relief, as well as attorney’s fees and costs. Under this proposed rule, the “legitimate workplace rule” defense is silent as to remedies, and it reads as if a contractor can avoid liability altogether simply by pointing to a workplace rule. We encourage clear adoption of the Title VII remedies in the rule’s text so that liability is not avoided altogether.

III. OFCCP’s definition of “compensation” and its training requirement advance the proposed rule’s purpose of uncovering pay discrimination.

OFCCP’s definition of “compensation” acknowledges the varying forms of employee remuneration. We applaud OFCCP’s use of a broad definition of “compensation.” This definition includes payments made as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and contributions to retirement. This definition aligns with the definition OFCCP uses in the context of compensation discrimination investigations. This inclusive approach accounts for the various types of compensation that an employee may currently be prohibited from discussing and that could contribute to pay disparities. A further improvement to the definition would be including paid sick time and paid leave, alongside vacation and holiday pay. This is a common-sense addition, as some



employers use paid sick time and paid leave to compensate employees for their services and employees may be treated differently with regard to these benefits.

OFCCP's requirement that contractors with manager training programs or meetings include a regular review of the nondiscrimination provision is key to proper implementation of the new rule. OFCCP correctly states in the NPRM that implementing a rule without requiring engagement between employers and employees results in an unused enforcement mechanism. Regular trainings educate both employees and employers about their rights and obligations and minimize the prevalence of workplace discrimination. OFCCP should extend this proposed requirement to all contractors, because all managers and supervisors would benefit from knowing the rights of their employees. Furthermore, OFCCP should require all contractors covered by this proposed rule to inform their employees about the nondiscrimination provision through individual notice, such as inclusion in staff meetings, reviews, human resources emails or other channels. While managers must be well-informed of workplace policies and legal requirements, employees must be equally informed about their affirmative rights in the workplace as well as the behavior that is still prohibited under the relevant defenses. Contractors should be allowed to fulfill such a requirement by integrating information on the proposed rule into existing programs and meetings for managers and employees to ensure that contractors are not heavily burdened by the requirement.

We appreciate the opportunity to submit comments on this rule, which takes an important step toward promoting equality in the workplace. We strongly support the swift implementation of the prohibition against pay secrecy policies and applaud OFCCP's commitment to eradicating pay disparities. We look forward to working with OFCCP on this issue in the future. If you have any questions regarding these recommendations, please contact Vicki Shabo, Vice President (vshabo@nationalpartnership.org or 202.238.4832), Sarah Fleisch Fink, Senior Policy Counsel (sfleischfink@nationalpartnership.org or 202.238.4852) or Vasu Reddy, Policy Counsel at the National Partnership for Women & Families (at vreddy@nationalpartnership.org or 202.238.4842).

Sincerely,

National Partnership for Women & Families

1 U.S. Census Bureau. (2014). *Current Population Survey, Annual Social and Economic (ASEC) Supplement: Table PINC-05: Work Experience in 2013 – People 15 Years Old and Over by Total Money Earnings in 2013, Age, Race, Hispanic Origin, and Sex*. Retrieved 1 December 2014, from http://www.census.gov/hhes/www/cpstables/032014/perinc/pinc05_000.htm (Unpublished calculation based on the median earnings of all men and women who work full-time, year-round.)

2 Ibid.

3 U.S. Census Bureau. (2014). *Current Population Survey, Annual Social and Economic (ASEC) Supplement: Table PINC-04. Educational Attainment--People 18 Years Old and Over, by Total Money Earnings in 2013, Work Experience in 2013, Age, Race, Hispanic Origin, and Sex*. Retrieved 1 December 2014, from http://www.census.gov/hhes/www/cpstables/032014/perinc/pinc04_000.htm



4 U.S. Census Bureau. (2014). *Current Population Survey, Annual Social and Economic (ASEC) Supplement: Table PINC-03. Educational Attainment--People 25 Years Old and Over, by Total Money Earnings in 2013, Work Experience in 2013, Age, Race, Hispanic Origin, and Sex*. Retrieved 1 December 2014, from http://www.census.gov/hhes/www/cpstables/032014/perinc/pinc03_000.htm

5 Bureau of Labor Statistics. (2013). *Highlights of Women's Earnings in 2012* (pp. 61-73). Retrieved 1 December 2014, from <http://www.bls.gov/cps/cpswom2012.pdf>

6 Drago, R., Hegewisch, A., & Williams, C. (2014, January). *Pay Secrecy and Wage Discrimination*. Institute for Women's Policy Research Publication. Retrieved 1 December 2014, from <http://www.iwpr.org/publications/pubs/pay-secrecy-and-wage-discrimination>

7 Univ. of Texas Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2532-33 (2013).

8 Civil Rights Act of 1964 tit. 7, § 703(2)(m), 42 U.S.C. § 2000e-2(m).