

**STATEMENT OF
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U.S. DEPARTMENT OF LABOR
BEFORE THE
SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES
COMMITTEE ON EDUCATION AND LABOR
U.S. HOUSE OF REPRESENTATIVES**

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Chairman Scott, Ranking Member Foxx, Subcommittee Chair Bonamici, Subcommittee Ranking Member Fulcher, and members of the subcommittee, thank you for inviting me to testify on behalf of the United States Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP). I appreciate the opportunity to highlight OFCCP's strategic priorities and critical work.

OFCCP is charged with protecting America's workers by ensuring that those who do business with the federal government fulfill the promise of equal opportunity. OFCCP has jurisdiction over approximately 120,000 contractor establishments and 25,000 firms, which employ approximately 20% of the American workforce. Our dedicated staff across the country works to advance equal opportunity, promote diversity, and enforce the law.

As our country invests in its infrastructure and rebuilds from the Coronavirus-19 pandemic, OFCCP is redoubling its efforts to make good jobs, free from discrimination, available to all. The historic \$65 billion investment in major infrastructure projects authorized by the Bipartisan Infrastructure Law (BIL) will increase the number of contractors and projects under OFCCP's jurisdiction. To support an inclusive recovery, OFCCP is rebuilding its staff so it can promote greater contractor compliance and empower America's workers.

OFCCP'S ENFORCEMENT RESPONSIBILITIES

OFCCP administers and enforces three legal authorities: Executive Order 11246 (EO 11246); Section 503 of the Rehabilitation Act (Section 503); and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). Collectively, these authorities make it unlawful for federal contractors and subcontractors¹ to discriminate in employment because of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. These authorities also require federal contractors to proactively identify and remove barriers to equal employment opportunity. In addition, contractors are prohibited from

¹ The terms "contractor" and "federal contractor" are used to refer to contractors and subcontractors with direct federal contracts and/or federally assisted construction contracts that fall under OFCCP's jurisdiction, unless otherwise stated. A federally assisted construction contract is any agreement or modification which is paid for in whole or in part with funds obtained from the federal government but where the government is not a party to the construction contract. Federally assisted contracts could be funded through, for example, a federal grant, contract, loan, insurance, or guarantee. An example of a federally assisted construction contract could be a contract to build highways or bridges that is funded by federal grants to state departments of transportation.

discriminating against applicants or employees because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.

Since the creation of OFCCP in 1965, our country has made significant progress in expanding equal opportunity. Yet, discrimination remains a substantial barrier to opportunity for many workers. To remove these obstacles, OFCCP enforces anti-discrimination requirements for federal contractors and promotes compliance with affirmative action commitments through scheduled compliance evaluations and in response to complaints. OFCCP's authority makes it especially well-suited to address systemic barriers to employment opportunity. Through compliance evaluations, the agency identifies discrimination in hiring, compensation, and other employment practices, which often go unaddressed through a complaint process since workers typically do not know the reason for their non-selection or how their pay compares to that of their colleagues.

In fiscal year (FY) 2021, OFCCP recovered nearly \$32 million for workers through compliance evaluations and complaint investigations. This includes discrimination settlements totaling over \$26 million for 23,000 workers and over 900 job opportunities for affected workers. This also includes the agency's monitoring of compensation discrimination resolutions, where OFCCP recovered over \$5.4 million in salary adjustments for nearly 1,300 workers. Since the beginning of this Administration through the end of the second quarter of FY 2022, OFCCP has completed 1,274 supply and service compliance evaluations at establishments employing nearly 800,000 workers. To promote equal opportunity in new jobs created through BIL infrastructure investments, OFCCP has launched renewed enforcement in the construction industry, highlighted further below, including scheduling over 100 construction evaluations of contractor establishments.

OFCCP anticipates that it will have significantly increased enforcement responsibility over a growing number of federal contracts and contractors funded through BIL. This includes direct federal contracts and federally assisted construction contracts. One such category is road and bridge construction projects. In addition to construction contractors, the agency expects that it will have jurisdiction over additional supply and service contractors and contracts in areas such as cybersecurity, clean energy technologies, and weatherization, among others. OFCCP will work to support contractors in creating good jobs in close coordination with state, tribal, and local leaders. This increased enforcement responsibility over a growing number of contractors underscores the agency's need for adequate resources to meet this pivotal moment.

OFCCP'S PRIORITIES

Since the beginning of the Biden Administration, OFCCP has made significant strides to advance equal opportunity for workers. As our nation makes a historic investment in its infrastructure, OFCCP has prioritized efforts to: 1) promote greater contractor compliance through strategic enforcement; 2) empower America's workers by identifying barriers to opportunities in contractor workplaces; and 3) rebuild OFCCP's staff to meet the needs of our nation and promote an inclusive economy.

I. PROMOTING GREATER CONTRACTOR COMPLIANCE THROUGH STRATEGIC ENFORCEMENT

To promote greater progress in achieving the promise of equal opportunity, OFCCP has prioritized strengthening its enforcement to create consistent accountability. The agency's enforcement includes strategic efforts to: a) revitalize its construction enforcement and ensure equity in infrastructure jobs; b) advance pay equity; c) expand opportunity for veterans and workers with disabilities; d) safeguard equality and religious freedom; and e) strengthen compliance evaluations to identify and remedy violations.

A. Revitalizing Construction Enforcement and Ensuring Equal Opportunity in Infrastructure Jobs

The construction industry is one of the largest industries in America, with nearly 11.3 million employees.² OFCCP's work in construction focuses on increasing equal opportunity in good paying jobs in the trades, where women and workers of color are underrepresented.³ OFCCP is also committed to ensuring that construction workplaces are free from discrimination and harassment for all workers.

1. Revitalizing Construction Enforcement

With the federal government's major investments in the nation's infrastructure, OFCCP has made it a priority to reinvigorate its construction enforcement program and promote greater compliance by new and existing contractors on projects funded through the BIL.

Construction contractors must comply with Executive Order 11246's anti-discrimination requirements and take certain affirmative measures to promote equal employment opportunity. These include documenting recruitment and outreach, tracking applicants and hires, educating managers on equal employment opportunity obligations, validating tests and other selection requirements, developing on-the-job training opportunities, and evaluating advancement opportunities. Through OFCCP's proactive outreach, compliance assistance, and enforcement efforts, the agency works to promote employer practices that provide equal opportunity to underrepresented communities, including through access to apprenticeships and pre-apprenticeships opportunities, fair assignments, and equity in hours worked.

In September 2021, after several years where OFCCP did not engage in significant construction enforcement work, OFCCP issued a compliance evaluation scheduling list of 400 federal construction contractors and federally assisted construction contractors and subcontractors. OFCCP selected this list from the approximately 4,000 construction contractors that OFCCP identified from available data sources that together have an aggregated contract value of nearly

² U.S. Department of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey, Household Data Annual Averages*, Table 18, Employed persons by detailed industry, sex, race, and Hispanic or Latino ethnicity, 2021, <https://www.bls.gov/cps/cpsaat18.htm>.

³ See U.S. Department of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey, Household Data Annual Averages*, Table 18, Employed persons by detailed industry, sex, race, and Hispanic or Latino ethnicity, 2021, <https://www.bls.gov/cps/cpsaat18.htm>.

\$85 billion. This list includes contractors with the highest aggregated contract value for all contracts performed in a district office’s jurisdiction.

OFCCP has already scheduled over 100 evaluations of contractors from this September 2021 list. OFCCP plans to schedule approximately 100 additional evaluations by the end of FY 2022. Under this Administration, OFCCP has returned to comprehensive compliance evaluations of construction contractors. Additionally, OFCCP for the first time is performing construction desk audits, where the agency analyzes a scheduled contractor’s data and policies *prior* to going on-site, which enables compliance officers to focus reviews more efficiently.

During compliance evaluations, OFCCP reviews construction contractors’ policies, personnel activity, and pay data to identify and address potentially discriminatory employment practices. This may include situations in which women or workers of certain racial or ethnic groups are disproportionately assigned shorter hours or lower paid jobs such as cleanup or flagging to control traffic flow. In addition, OFCCP interviews workers to ascertain whether contractors provide equal access to training, skills development, and advancement opportunities.

2. Ensuring Equal Opportunity in Infrastructure Construction Jobs

According to the Bureau of Labor Statistics (BLS), Black workers make up just 6.3% of the overall construction workforce while comprising 12.3% of the overall labor force.⁴ Although Hispanic workers are highly represented in construction, they are less likely to be unionized,⁵ and are disproportionately employed in lower paid construction laborer positions.⁶

BLS data reflects that women comprise only 4.0% of workers in construction and extraction occupations,⁷ while comprising nearly 47% of total employment in the labor force. Black women and Hispanic women each constitute about 1% or less of the construction and extraction workforce.⁸ Discrimination, including harassment, is not only a significant barrier to women’s entry into construction jobs, but also a factor that contributes to driving some women out of these

⁴ U.S. Department of Labor, Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey, Household Data Annual Averages*, Table 18, Employed persons by detailed industry, sex, race, and Hispanic or Latino ethnicity, 2021, <https://www.bls.gov/cps/cpsaat18.htm>; U.S. Department of Labor, Bureau of Labor Statistics, *The Economics Daily, Four states and D.C. had labor force that was more than 30 percent African American in 2020* (Feb. 19, 2022), <https://www.bls.gov/opub/ted/2021/four-states-and-dc-had-labor-force-that-was-more-than-30-percent-african-american-in-2020.htm>.

⁵ Ctr. for Construction Research and Training, *The Construction Chart Book: The U.S. Construction Industry and Its Workers, Labor Force Characteristics – Hispanic Workers in Construction Occupations*, Chart 17d (6th ed. 2018), <https://www.cpwr.com/research/data-center/the-construction-chart-book/chart-book-6th-edition-labor-force-characteristics-hispanic-workers-in-construction-occupations/> (“Hispanic construction workers are less likely to be unionized. In 2015, only 8.2% of Hispanic workers in construction were union members, compared to 16.6% among non-Hispanic construction workers”).

⁶ *Id.* (“27% of Hispanic workers were employed in lower paid construction laborer positions, compared to 16% of all construction workers”).

⁷ U.S. Department of Labor, Bureau of Labor Statistics, *Women in the labor force: a databook*, Table 11, Employed people, by detailed occupation and gender, 2020 annual averages (Mar. 2022), <https://www.bls.gov/opub/reports/womens-databook/2021/home.htm>.

⁸ U.S. Department of Labor, Bureau of Labor Statistics, *Women in the labor force: a databook*, Table 12, Employed women, by occupation, race, and Hispanic or Latino ethnicity, 2020 annual averages (percent distribution) (Mar. 2022), <https://www.bls.gov/opub/reports/womens-databook/2021/home.htm>.

jobs.⁹ And some women consider leaving the trades after facing difficulties finding childcare and lack of pregnancy accommodations.¹⁰

Last month, OFCCP partnered with other DOL agencies, including the Women's Bureau, the Wage and Hour Division, and the Occupational Safety and Health Administration, to conduct an outreach event on employment opportunities for women in construction. During the event, OFCCP and its sister agencies highlighted the important role of job training and apprenticeship programs to recruit and retain women, as well as affirmative action to expand access to employment opportunities.

To support equal opportunity in recruitment and hiring practices in the construction trades, OFCCP will provide enhanced compliance assistance through the agency's Mega Construction Projects Program to a selected group of BIL-funded infrastructure projects. OFCCP's past efforts demonstrate that a proactive, intensive strategy focused on recruitment and outreach on some of the most consequential construction projects, along with compliance evaluations, can increase opportunities for underrepresented workers. From the earliest stage of each Mega Construction Project, OFCCP offers contractors and subcontractors extensive compliance assistance and helps to build partnerships among the public and private sectors, including the project funding agency, other federal, state, and local government agencies, the prime contractor, subcontractors, community stakeholders, unions, and apprenticeship programs.

OFCCP is also contributing to DOL's Good Jobs Initiative to collaborate with workers, employers, and government agencies to improve job quality and expand access to good jobs free from discrimination. DOL and the U.S. Department of Transportation (DOT) recently entered into [a memorandum of understanding](#) that includes commitments to integrate job quality, labor standards, and equal employment opportunity requirements across grants related to transportation infrastructure. Transportation Secretary Buttigieg recently announced \$2.9 billion in funding for major infrastructure projects through a combined Notice of Funding Opportunity (NOFO) under BIL. The program will provide grants on a competitive basis to support multijurisdictional or regional projects of significance that may also cut across multiple modes of transportation. The NOFO provides that DOT will require project sponsors that receive awards above \$35 million to partner with OFCCP as a condition of their DOT award.

B. Advancing Pay Equity

OFCCP has prioritized tackling systemic pay discrimination across industries. Almost 60 years after the passage of federal anti-discrimination protections, significant pay disparities remain by race, ethnicity, and gender. OFCCP's compliance evaluations play an important role in rooting out pay inequities, as the agency reviews contractors' pay data and can identify problems that would not otherwise come to light since workers are often unaware of their colleagues' pay.

⁹ U.S. Department of Labor, Women's Bureau, *Bearing the Cost: How Overrepresentation in Undervalued Jobs Disadvantaged Women During the Pandemic* (Mar. 2022), <https://www.dol.gov/sites/dolgov/files/WB/media/BearingTheCostReport.pdf> (highlighting why women in male-dominated fields, like construction, face discrimination—including being undervalued, lower paid, and having fewer network connections and mentors); Institute for Women's Policy Research, *A Future Worth Building: What Tradeswomen Say about the Change They Need in the Construction Industry* 13-16; 17-18 (Nov. 2021).

¹⁰ *Id.* at 21-23.

OFCCP has found systemic pay discrimination in over a third of its discrimination resolutions since the beginning of this Administration. For example:

- On December 8, 2021, OFCCP resolved allegations of pay discrimination in an agreement with [AlliedBarton Security Services LLC](#) providing \$1,175,000 to 2,263 female, Black and American Indian employees working as security officers. OFCCP found the company's assignment practices led to placement of impacted employees at lower-paying job sites. The company also agreed to take corrective action to eliminate discriminatory compensation and job-site placement policies, conduct training, and monitor compensation and job-site placements.
- On October 6, 2021, OFCCP announced [a settlement with Thomson Reuters](#) providing \$550,000 in back wages and interest to resolve the agency's findings that the company discriminated in pay against 113 female, Black and Hispanic employees working in administrative and technical professional and client specialist positions at its U.S. headquarters office in New York. The company agreed to change their pay practices and to provide pay equity training for individuals responsible for compensation decisions.
- On February 1, 2021, OFCCP announced [a settlement with Google](#) resolving the agency's allegations relating to the company's failure to develop and execute appropriate action-oriented programs designed to correct hiring barriers and pay disparities affecting female employees in software engineering positions, and hiring rate differences that disadvantaged female and Asian applicants at its California and Washington State facilities. Google agreed to pay over \$3.8 million to more than 5,500 current employees and job applicants. Google also agreed to take corrective action to ensure non-discrimination in hiring and compensation and conduct proactive gender pay equity analyses of salaries for employees in the software engineering job family at the impacted facilities.

On Equal Pay Day, March 15, 2022, OFCCP issued a new directive to promote greater contractor attention to the longstanding requirement for federal supply and service contractors to conduct an annual pay equity audit. Contractors are responsible for conducting an annual in-depth analysis of their compensation practices to determine whether pay disparities exist based on gender, race and/or ethnicity, and to develop action-oriented programs to address these problems. The new [Pay Equity Audits](#) directive explains how OFCCP will evaluate compliance with this requirement. The Directive explains that where OFCCP's initial review reveals concerns about compensation practices, the agency may request additional information, including the contractor's pay equity audit, to investigate compliance. The directive clarifies that contractors may not withhold pay equity audits conducted to comply with regulatory requirements on claims of privilege since there is no expectation of confidentiality. In addition, since a significant portion of the pay gap is driven by occupational segregation patterns, the directive highlights that the agency will examine disparities that result from assignment, placement, or promotion barriers that contribute to pay inequality.

Also on Equal Pay Day, President Biden signed a new Executive Order to promote pay equity and transparency for job applicants and employees of federal contractors.¹¹ The Executive Order directs the Federal Acquisition Regulatory Council, in consultation with DOL, to consider proposing rules limiting or prohibiting federal contractors from seeking and considering information about job applicants' and employees' existing or past compensation when making employment decisions.

C. Promoting Equal Employment Opportunity for Workers with Disabilities and Veterans

OFCCP promotes equal employment opportunity for individuals with disabilities and covered veterans in all aspects of employment by federal contractors, including in hiring, compensation, and promotions, by enforcing Section 503 of the Rehabilitation Act and VEVRAA through its comprehensive compliance evaluations and the investigation of complaints. Across the country, OFCCP is actively engaged with advocacy groups supporting workers with disabilities and veterans to help connect these workers to jobs with federal contractors. OFCCP also provides extensive compliance assistance to federal contractors seeking to make their workplaces more inclusive for workers with disabilities and veterans.

Section 503 provides that it is unlawful for a contractor to discriminate against a qualified individual on the basis of disability or to discriminate against a qualified individual because of the known disability of someone with whom the individual associates. Section 503 also requires covered contractors to take affirmative action, such as through outreach and recruitment activities. Under VEVRAA, it is unlawful for a federal contractor to discriminate in employment against protected veterans, including disabled veterans, as well as their spouses or others known to associate with protected veterans. VEVRAA also requires that covered federal contractors take affirmative action to recruit, hire, and promote certain categories of veterans, including disabled veterans and veterans recently separated from service.

To assist contractors with compliance, [OFCCP hosts several resources](#) on its website, including tools to assist in outreach and recruitment, as well as aids to encourage self-identification of a disability. To assist workers, OFCCP's website contains [frequently asked questions](#) (FAQs) and a [Disability Rights Fact Sheet](#), available in several languages. Additionally, OFCCP has a [Requesting Reasonable Accommodation pocket card](#), which explains in plain language how workers may request a reasonable accommodation.

OFCCP is working to remove unnecessary qualifications standards and other barriers to hire, such as physical lifting restrictions or gaps in employment, that limit equal employment opportunity for people with disabilities. In addition, OFCCP is committed to advancing President Biden and Secretary Walsh's priority of transforming how the nation addresses mental health. The pandemic has had an impact on mental health issues for many Americans. The Equal Employment Opportunity Commission (EEOC) recently announced that charges alleging disability discrimination based on mental health issues constituted 30% of Americans with

¹¹ Executive Order 14069, *Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency*, 87 F.R. 15315 (Mar. 18, 2022).

Disabilities Act-related charges in FY 2021, an increase from 20% reported in FY 2010.¹² Posttraumatic Stress Disorder (PTSD) and anxiety accounted for nearly 60% of all mental health charges filed in FY 2021.¹³ In addition, some employers use personality screens as well as tech-based hiring systems that may operate to exclude individuals with disabilities or mental health issues. For example, a veteran with depression may be unfairly screened out by assessments that exclude qualified workers with mental health issues. OFCCP will address these barriers through enforcement, ongoing outreach, and engagement with disability groups, including the joint HIRE effort launched with EEOC described below.

OFCCP is committed to strengthening its work to ensure equal employment opportunity in the civilian workforce for veterans. For example, in April 2021, OFCCP reached an [agreement](#) that included remedies to address violations related to outreach and recruitment to persons with disabilities and protected veterans. During the monitoring period, the contractor recently reported improved outreach and hiring of persons with disabilities and protected veterans.

OFCCP provides technical assistance and guidance to contractors to meet their equal employment opportunity obligations, as well as [a number of resources](#) including the [VEVRAA Regulations FAQs](#) and current [VEVRAA Hiring Benchmark](#). OFCCP also has [resources for veterans](#) to understand their rights, including [a know your rights fact sheet](#) and a [military spouses rights FAQ](#). OFCCP also facilitates relationships among contractors, community organizations, and diversity recruitment resources to support the hiring of workers with disabilities and veterans. For example, in November 2021, OFCCP's Northeast region participated in a career expo with over 200 attendees to educate workers on their rights and promote employment and training opportunities, including fellowships, internships, and apprenticeships for veterans, veteran spouses, and individuals with disabilities. OFCCP's Southwest and Rocky Mountain region is planning an event with Wells Fargo to increase outreach and recruitment to veterans and Historically Black Colleges and Universities.

D. Safeguarding Equality and Religious Freedom

On November 9, 2021, OFCCP published in the Federal Register its *Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption*.¹⁴ The agency's proposal would protect workers from discrimination and safeguard religious freedom by rescinding the unnecessary and problematic final rule, effective January 8, 2021, *Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption*.

Since 2002, Executive Order 11246 has contained a religious exemption mirrored on the religious exemption in Title VII of the Civil Rights Act of 1964. Generally, the religious exemption does not permit religious employers to make employment decisions that amount to discrimination based on protected characteristics other than religion, even if those decisions are based on sincere religious beliefs.

¹² J. Edward Moreno, "Anxiety, PTSD Drive Rise in Mental Health Employment Bias Claims," *Bloomberg Law*, Apr. 11, 2022.

¹³ *Id.*

¹⁴ U.S. Department of Labor, Office of Federal Contract Compliance Programs, *Proposal to Rescind Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption*, 86 F.R. 62115 (Nov. 9, 2021).

For nearly 18 years, OFCCP implemented the Executive Order 11246 religious exemption without issuing regulations that attempted to codify applicable law. Under the presidencies of both George W. Bush and Barack Obama, OFCCP had a policy and practice of applying Title VII case law as it developed, with reference to relevant religious liberty authorities where appropriate.¹⁵ However, the final rule that became effective in January 2021 adopted new standards at odds with the weight of relevant case law, including under Title VII.

OFCCP's notice of proposed rescission, published in November 2021, explained that the agency would preserve the exemption for religious employers under Executive Order 11246. The agency proposed a return to the policy in place under both the Bush and Obama Administrations of analyzing a contractor's exemption claim on a case-by-case basis consistent with Title VII precedent and other applicable law. Over 5,200 comments were submitted during the 30-day public comment period, which closed on December 9, 2021. OFCCP is carefully considering all the comments received during the notice and comment period to prepare a final rule.

E. Strengthening Compliance Evaluations to Identify and Remedy Violations

To promote greater contractor compliance, OFCCP has prioritized strengthening its compliance evaluation and enforcement process. Through rulemaking, guidance, and enforcement, OFCCP seeks to avoid delays and more efficiently identify and remedy discriminatory practices. The agency aims to better focus its resources by identifying risk factors for non-compliance through improvements to its neutral scheduling process. OFCCP is committed to regular and transparent communication with contractors to reach successful resolutions where the agency finds violations and to efficiently conclude reviews where the agency does not identify concerns.

1. Enhanced Neutral Scheduling Processes to Adopt a Risk-based Approach

OFCCP is deploying its resources more strategically by strengthening its process for scheduling federal contractors for compliance reviews. The agency is incorporating broader sets of data and information to identify risk factors for noncompliance and better align its selection process with enforcement priorities. OFCCP schedules employers for evaluation using a "general administrative plan . . . derived from neutral sources,"¹⁶ which includes various labor economic data and analytical procedures. This can include, for example, a focus on industries or sectors with high prior labor and employment law violation rates or particular geographic regions. OFCCP will be issuing its next supply and service contractor scheduling list this May, which will incorporate analyses based on employer workforce demographic data¹⁷ and BLS data on growth industries and those with active hiring.

¹⁵ See U.S. Department of Labor, Office of Federal Contract Compliance Programs, *Discrimination on the Basis of Sex*, 81 F.R. 39108, 39119 (June 15, 2016) ("There is no formal process for invoking RFRA specifically as a basis for an exemption from E.O. 11246. Insofar as the application of any requirement under this part would violate RFRA, such application shall not be required").

¹⁶ See *United Space Alliance, LLC v. Solis*, 824 F. Supp. 2d 68, 91 (D.D.C. 2011) (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320, 321 (1978)).

¹⁷ The EEO-1 Component 1 report is a mandatory annual data collection that requires all private sector employers with 100 or more employees, and federal contractors with 50 or more employees meeting certain criteria, to submit

Additionally, in those instances in which a company has common policies or practices across establishments that create barriers to opportunity, OFCCP is moving towards a coordinated multi-establishment or corporate-wide approach. On March 31, 2022, the agency issued a new directive, [Effective Compliance Evaluations and Enforcement](#), which explains that where an employer has multiple establishments scheduled for review pursuant to OFCCP's neutral scheduling methodology, OFCCP will coordinate evaluations of common policies and patterns across establishments. This coordination can benefit more workers where the contractor agrees to remedy violations and revise practices or policies company-wide or across a broader group of establishments that have similar practices. This coordination will enable time and cost savings for all parties.

The agency may also review corporate headquarters through Corporate Management Compliance Evaluations, which specifically analyze a contractor's selection, development, and retention practices that affect advancement into middle and senior-level corporate management.¹⁸ In addition, OFCCP may evaluate a business function or unit where the contractor has entered into a Functional Affirmative Action Program (FAAP) agreement, which permits supply and service contractors to develop Affirmative Action Programs (AAPs) that are based on a business function or business unit rather than contractor establishments.¹⁹ FAAPs allow contractors more flexibility in structuring their AAPs to better align with how their organization operates rather than where their facilities are physically located. In turn, these agreements enable the agency to engage in a more efficient review of analyses of personnel practices.

2. Contractor Accountability for Affirmative Action Program Requirements

OFCCP recently launched an electronic platform to promote greater contractor compliance with the requirement for covered supply and service contractors to develop and maintain annual AAPs for each of their establishments or functional/business units. Federal contractors must prepare written AAPs for each legal authority for which they have met the dollar and employee thresholds. If a contractor is required to have an AAP, the contractor must develop the program within 120 days from the start of the contract and must update it annually. When OFCCP neutrally schedules contractors for a compliance evaluation, OFCCP sends contractors a scheduling letter listing the data and information contractors must provide to the agency, which includes AAPs. The AAPs and data provide the foundation for OFCCP's evaluation of a contractor's employment practices.

OFCCP developed the electronic platform, known as [the Contractor Portal](#), to address a U.S. Government Accountability Office (GAO) finding that in 2015, close to 85% of contractor establishments did not submit a written AAP within 30 days of receiving a scheduling letter, as required.²⁰ GAO found that because OFCCP relied too heavily on voluntary compliance, it could

demographic workforce data, including data by race/ethnicity, sex, and job categories. The EEO-1 report is a joint data collection to meet the enforcement needs of both the EEOC and OFCCP, while avoiding duplicative information collections and minimizing the burden on employers. For more information, see <https://www.eeoc.gov/employers/eo-1-data-collection> (last visited April 10, 2022).

¹⁸ 41 CFR § 60-2.30.

¹⁹ 41 CFR § 60 2.1(d)(4).

²⁰ U.S. Gov't Accountability Office, *Equal Employment Opportunity*:

not ensure that contractors comply with “basic requirements like developing and maintaining an AAP,” impacting the agency’s ability to accomplish its mission.²¹ OFCCP launched the Contractor Portal on February 1, 2022, and OFCCP provided a period during which federal contractors could register for an account and validate their company information through the Contractor Portal. As of March 31, 2022, covered federal contractors and subcontractors are required to register and annually certify through the Contractor Portal that they have developed and maintained AAPs in compliance with OFCCP’s requirements. More than 800 contractors certified their compliance as of April 6, 2022. Existing federal contractors must certify their AAP compliance for each of their establishments or functional/business units no later than June 30, 2022. OFCCP’s goal is for this certification process to increase contractors’ timely development and production of their AAPs during a compliance review, which will in turn facilitate a more effective and efficient compliance evaluation process.

3. Pre-enforcement Notice and Conciliation Procedures Notice of Proposed Rulemaking

On March 22, 2022, OFCCP published in the Federal Register a Notice of Proposed Rulemaking (NPRM), *Pre-Enforcement Notice and Conciliation Procedures*, to modify a final rule that became effective December 10, 2020.²² OFCCP’s proposed modification aims to create a streamlined, efficient, and flexible process allowing the agency to use its resources strategically to remove barriers to equal employment opportunity. As OFCCP explains in the NPRM, the 2020 rule attempted to codify complex evidentiary requirements early in the pre-determination phase of a compliance evaluation, which impedes OFCCP’s ability to effectively bring the full range of cases within its authority. The heightened standards in the 2020 rule impose different proof requirements for OFCCP enforcement that depart from Title VII case law and constrain the agency’s ability to identify discrimination and pursue the strongest cases under its jurisdiction. The agency is concerned that the rigid and overly burdensome evidentiary standards and definitions imposed by the 2020 rule create confusion and unnecessarily divert agency and contractor resources away from addressing discrimination by giving rise to time-consuming disputes about their implementation.

OFCCP’s 2022 NPRM proposes to retain use of the Predetermination Notice and Notice of Violation, two formal notices the agency provides to contractors when it finds violations. These notices explain to contractors the compliance concerns the agency has identified and provide contractors with an opportunity to respond to and resolve the identified noncompliance, prior to an enforcement referral. The agency is committed to early and open communication with contractors so that all parties understand each other’s perspective and can work towards a prompt and mutually agreeable resolution. The public comment period on the NPRM closed on April 21, 2022, and the agency will carefully consider all comments in preparing a final rule.

Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance (GAO-16-750, Sept. 2016), <https://www.gao.gov/products/gao-16-750>.

²¹ *Id.*

²² U.S. Department of Labor, Office of Federal Contract Compliance Programs, *Notice of Proposed Rulemaking, Pre-Enforcement Notice and Conciliation Procedures*, 87 F.R. 16138 (Mar. 22, 2022).

4. Effective Compliance Evaluations Enforcement Directive

The new OFCCP directive, [Effective Compliance Evaluations and Enforcement](#), strengthens the agency's enforcement and promotes increased contractor compliance through comprehensive compliance evaluations that foster consistent accountability and avoid delay. The agency is emphasizing a proactive approach to compliance where federal contractors actively self-audit employment systems to identify and resolve problems in their employment practices. In addition, OFCCP announced that it will be implementing a coordinated, cross-regional approach to conducting multi-establishment compliance reviews. The directive also clarifies the agency's policies regarding scheduling contractors for evaluation and describes contractors' obligations regarding timely submission of AAP and support data, supplemental information, and access to employees, applicants, and other witnesses.

5. Planned Supply and Service Regulatory Update

On its regulatory agenda, [OFCCP has announced its intention](#) to modernize its supply and service regulations, which were developed decades ago. The agency will propose updates to align these requirements with the realities of today's workforce. For example, as a result of the pandemic, many workers are fully remote and do not report to a physical establishment. OFCCP is considering alternatives to its traditional establishment-based approach to analyze workforce patterns more comprehensively. The agency is also exploring opportunities to streamline our processes and reduce unnecessary burdens on contractors while increasing OFCCP's impact. This includes better integrating OFCCP compliance obligations with broader organizational diversity, equity, inclusion, and access efforts.

II. PREVENTING AND REMEDYING DISCRIMINATION THROUGH OUTREACH AND EDUCATION

In addition to its enforcement, OFCCP has a strong commitment to providing compliance assistance to contractors, as well as education to workers, through national and regional outreach and education. In FY 2021, OFCCP conducted 736 compliance assistance and outreach events and has conducted 267 events to date in FY 2022.

A. Providing Compliance Assistance for Contractors

In addition to compliance assistance and outreach events, OFCCP offers federal contractors compliance support through several avenues, including: a help desk; webinars; an online video training library; and online resources, such as FAQs, technical assistance guides, and templates.

OFCCP is committed to supporting proactive steps by employers to monitor and address barriers to equal opportunity to prevent discrimination and expand access to good jobs. OFCCP is prioritizing its work to aid federal contractors in developing connections to diversity recruitment sources such as state workforce agencies, local vocational rehabilitation agencies, non-profit organizations, and minority-serving educational institutions. Through these "linkage" agreements, OFCCP can help increase employment opportunities available to underrepresented groups; enhance the effectiveness of compliance assistance activities by providing contractors with additional recruitment sources; assist federal contractors in meeting their affirmative action

responsibilities; and increase cooperation between private sector employers and community recruitment resources.

B. Empowering and Listening to Workers

Since the beginning of this Administration, OFCCP has prioritized empowering workers through strong engagement with workers' rights organizations to better identify potential systemic issues in contractor workplaces. The agency is committed to listening to and supporting workers to come forward to report concerns through the agency's complaint process and during compliance evaluations. OFCCP accepts third party complaints from community organizations, unions, worker advocacy groups, or others aware of problems. Communications from organizations can be especially helpful in understanding workers' concerns where individual workers may fear coming forward due to concerns of retaliation.

In FY 2021, almost 32% of the complaints OFCCP received, alleged retaliation. In some cases, complainants alleged they were terminated for filing internal complaints of discrimination or discussing or inquiring about pay. As a worker protection agency, OFCCP has prioritized preventing and remedying retaliation. Individuals or groups may file complaints alleging retaliation or interference under any of the authorities OFCCP enforces. OFCCP's anti-retaliation regulations prohibit intimidation, threats, coercion, harassment, and discrimination against any individual because that person has engaged in protected activity. Yet, many workers are afraid to come forward to report violations due to concerns of retaliation. OFCCP is working to better protect employees and educate employers about prevention of retaliation. OFCCP also supports interagency engagement to protect workers from retaliatory conduct and remedy retaliation through a joint initiative with DOL, EEOC and the National Labor Relations Board to educate the public and engage with employers, business organizations, labor organizations, and civil rights groups.

In addition, OFCCP collaborates closely with EEOC and other DOL agencies, such as the Women's Bureau and Office of Disability Employment Policy, to engage a broad array of stakeholders, including organizations representing workers. In March, we launched a series of listening sessions with workers, unions, and employers in the construction industry. This outreach supports the agency's ability to identify key issues for enforcement as well as areas where greater employer education and assistance is needed.

C. Expanding Access to Good Jobs through HIRE

In January of this year, OFCCP and EEOC launched [HIRE, a Hiring Initiative to Reimagine Equity](#) — a multi-year collaborative effort to engage a broad array of stakeholders to expand access to good jobs for workers from underrepresented communities and help address key hiring and recruiting challenges. Since the beginning of this Administration, we have added 7.9 million jobs to our economy.²³ Yet, many workers from historically underrepresented communities still face disproportionately high levels of unemployment. At the same time, employers are confronting changing labor market dynamics, in which they are searching for strategies to recruit

²³ The White House, *Statement from President Joe Biden on Unemployment Insurance Claims*, Apr. 7, 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/07/statement-from-president-joe-biden-on-unemployment-insurance-claims-6/#:~:text=Over%20the%20last%20four%20weeks,any%20other%20President%20in%20history>.

and hire from new and diverse talent sources for jobs, from entry-level positions to leadership opportunities. Ensuring equal employment opportunity in hiring has always been part of our mission, but it is even more critical now because the pandemic has disproportionately impacted women, workers of color, persons with disabilities, older workers, and immigrant workers.

Through HIRE, our agencies aim to expand opportunity to enable all workers to realize their full potential and contribute to the country's economic success. We plan to develop practical resources for employers to promote adoption of innovative and evidence-based recruiting and hiring practices that advance equal opportunity. Our work will assist employers in developing job-related requirements that better utilize the breadth of America's workforce.

We are hosting convenings on workplace policy and practices to expand opportunity in hiring by bringing together leading employer, worker, and research efforts. We held our first public roundtable in January 2022 to launch our initiative and are hosting a public roundtable on April 28, 2022, "Untapped Potential: Reimagining Equity for Workers with Gaps in Employment History" to discuss the challenges workers face when reentering the workforce after periods of unemployment. Hiring criteria that exclude those with gaps in work history could screen out those who are formerly incarcerated; caregivers who are often women; people with disabilities; or veterans. We have also held smaller listening sessions and meetings to learn more about challenges, solutions, and promising practices from different stakeholders.

At OFCCP, we see the impact of hiring and recruitment practices through our compliance evaluations. For example, in 2021 [OFCCP resolved a case against Blue Cross Blue Shield of South Carolina](#), which alleged race discrimination in hiring. During the compliance evaluation, OFCCP found that a pre-employment test in the selection process had an adverse impact against Black, Hispanic, Asian, and/or multi-racial applicants. The company agreed to provide \$226,484 in back pay and interest to 117 impacted workers and to hire five eligible workers. Additionally, the company agreed to cease using the test and provide training to staff on the hiring process.

Another objective of HIRE is to promote equal opportunity in the use of tech-based hiring systems. Employers have increased their reliance upon machine learning and algorithms to recruit, hire, and assess workers. Systems may filter out candidates for reasons that may not be job related, such as gaps in employment, criminal background screens, unnecessary degree requirements, or overly narrow experience criteria, that disproportionately screen out qualified workers based on characteristics such as race, national origin, gender, or disability. OFCCP is collaborating with the White House Office of Science and Technology Policy and EEOC to consider safeguards and auditing procedures to promote equal opportunity in hiring technology.

III. REBUILDING OFCCP'S WORKFORCE AND NECESSARY BUDGETARY SUPPORT

To achieve greater progress in advancing equal opportunity during this critical juncture, OFCCP must rebuild our staff. After reaching the agency's lowest level of staffing in decades, OFCCP is working actively to hire and onboard over 100 personnel this fiscal year in the field and headquarters, which includes approximately 70 compliance officers. OFCCP's compliance officer levels are down more than 50% from a decade ago, significantly limiting the agency's ability to evaluate contractors.

OFCCP's FY 2022 budget of \$108.4 million includes an increase of \$2.5 million from the FY 2021 enacted funding level. The projected hires would bring the agency to utilizing approximately 451 FTE and ending the year with 492 onboard staff. This FTE level would represent the first year over year increase in actual FTE use since FY 2011 when OFCCP used 755 FTE hires. The hires this fiscal year will support OFCCP's efforts to rebuild and increase our impact as the federal government makes significant investments in our infrastructure.

President Biden's budget for FY 2023 requests \$147,051,000 in funding for OFCCP, which would support an anticipated increase in the agency's responsibilities from BIL. The President's budget would support 628 FTE, an increase of approximately 177 FTE above the FY 2022 projected usage. This support would play a critical role in rebuilding capacity lost over the past decade. The President's budget level would allow OFCCP to substantially boost its hiring and training of much needed field enforcement staff as well as individuals with specialized expertise, including regulatory analysts, data scientists, statisticians, and labor economists. OFCCP would invest in strengthening its capacity to promote greater compliance through consistent enforcement and enhanced compliance assistance on large infrastructure projects to both contractors and federal procurement agencies. OFCCP will also support new contractors, including small businesses, to understand how to comply with their equal opportunity commitments. Additionally, the agency will forge new relationships with state and local entities playing a key role in these projects.

The funding will also enable the agency to make vital technological investments to its case management system and external facing systems. These investments will enable the agency to better utilize data to drive strategic decision making, more effectively track processes to promote efficiency, and foster collaboration across regions. This much needed support will play a vital role in advancing civil rights protections for America's workers.

CONCLUSION

I would like to thank the Committee and Subcommittee for supporting the work of the agency. To meet the needs of our nation during this moment, we must fully utilize the breadth of America's talent. As our nation answers the call for greater action to achieve the promise of equal opportunity, OFCCP will play an important role in ensuring those who do business with the federal government expand access to opportunity and provide good jobs free from discrimination to all workers. OFCCP looks forward to working with Congress in the years ahead.