



May 19, 2017

**VIA FEDEX EXPRESS**

The Honorable R. Alexander Acosta  
Secretary of Labor  
U.S. Department of Labor  
S-2521  
200 Constitution Avenue, NW  
Washington, DC 20210

The Honorable Mick Mulvaney  
Director  
The Office of Management and Budget  
725 17th Street, NW  
Washington, DC 20503

**Re: The Possible Consolidation or Merger of the OFCCP into EEOC**

Dear Secretary Acosta and Director Mulvaney:

The Institute for Workplace Equality opposes the possible consolidation or merger of the U.S. Department of Labor's Office of Federal Contracts Compliance Programs ("OFCCP") and OFCCP's responsibilities into the Equal Employment Opportunity Commission ("EEOC"). Published reports have stated that the consolidation may be included in the proposed FY2018 budget. For the reasons stated below, The Institute for Workplace Equality respectfully submits that it is not sound policy nor in the interests of federal contractors for OFCCP's duties and functions to be transferred from the Department of Labor to the EEOC.

The Institute for Workplace Equality ("The Institute"), formerly known as The OFCCP Institute,<sup>1</sup> is a national non-profit employer association based in Washington, D.C. The Institute's mission includes the education of federal contractors as to their affirmative action, diversity and equal employment opportunity responsibilities. Members of The Institute are senior corporate leaders in EEO compliance, compensation, legal and staffing functions representing many of the nation's largest and most sophisticated federal contractors.

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<sup>1</sup> The OFCCP Institute is not affiliated with the U.S. Department of Labor's Office of Federal Contract Compliance Programs. The OFCCP Institute changed its name to reflect a broader mission. See press release at <http://www.prnewswire.com/news-releases/the-institute-for-workplace-equality-is-new-name-for-the-ofccp-institute-300454901.html>.

As you know, the OFCCP enforces the federal government contractors' affirmative action and nondiscrimination obligations under Executive Order 11246, as well as for protected veterans and individuals with disabilities. These affirmative action and nondiscrimination obligations are an integral part of the federal contracting requirements included in Part 22.000 of the Federal Acquisition Regulations ("FAR"). The FAR prescribes general policies regarding contractor labor relations as they pertain to the acquisition process as well as the policies and procedures to implement each pertinent labor law and Executive Order. The affirmative action and nondiscrimination requirements are among many of the workplace related requirements imposed on federal contractors that principally are enforced by the Labor Department's agencies, including OFCCP. As an integral part of the Labor Department's enforcement of federal contractors' compliance with the labor laws, the OFCCP's remedies are grounded on the government's contractual relationship (current and future) based on the employer's compliance, and include the loss (known as "debarment") of current and future federal contracts. Additional remedies—which currently can be pursued by either OFCCP or the EEOC—include "make-whole" relief for victims of unlawful discrimination, *e.g.*, back pay, reinstatement or other make-whole relief.

Since the inception of Executive Order 11246 in 1965,<sup>2</sup> the federal contractor obligations that are enforced by OFCCP have been overseen by Department of Labor, along with federal contractors' additional federal labor obligations.<sup>3</sup> The EEOC was established on July 2, 1965, and certain program functions involving the enforcement of workplace nondiscrimination laws subsequently were transferred to EEOC from the Department of Labor, including the Age Discrimination in Employment Act and the Equal Pay Act. The enforcement of the federal contracting obligations related to affirmative action and nondiscrimination requirements enforced by OFCCP as well as federal contractor obligations involving wage and hour compliance, however, were retained by the Labor Department.

The retention of the administration of federal contractors' workforce obligations by the Department of Labor is an integral part of the federal government's control of its government contracting and procurement programs. The assignment of responsibilities to the Labor Department to administer the labor obligations ensures that the Executive Branch retains full authority over the administration of the government contracting programs. One significant concern with the proposed transfer of the responsibilities for the enforcement of the contractual remedies for violating affirmative action and nondiscrimination obligations to the EEOC is that the Executive Branch would lose control over a key component of its ability to contract with the best qualified parties. Unlike the Department of Labor, the EEOC is a semi-independent agency and is not a cabinet agency within the Executive Branch.<sup>4</sup> As a result, the federal government

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<sup>2</sup> Executive Order 11246, Equal Employment Opportunity, Office of Federal Contract Compliance Programs, U.S. Department of Labor available at <http://www.dol.gov/ofccp/regs/statutes/eo11246.htm>.

<sup>3</sup> An excellent history of Executive Order 11246 is available through the Institute's video that was prepared in 2016 to commemorate the 50<sup>th</sup> anniversary of the Executive Order, and that video can be viewed on the Institute's website, at <https://theinstitute4workplaceequality.org/video/50-years-of-equality-at-work/>.

<sup>4</sup> Section 705 of Title VII, 42 U. S. Code §2000e-4, Equal Employment Opportunity Commission available at <https://www.eeoc.gov/laws/statutes/titlevii.cfm>.

would be relying on the assessment of a semi-independent agency as to whether companies are complying with their obligations as federal contractors.

Another practical concern is that the two agencies have very different areas of focus and expertise. The EEOC primarily responds to individual complaints of equal employment discrimination while the OFCCP proactively audits federal contractors' compliance with their affirmative action and nondiscrimination obligations.<sup>5</sup>

Still another concern is that the EEOC has an extensive backlog of approximately 73,508 pending charges,<sup>6</sup> and even assuming greater resources, it is hard to understand how imposing federal contracting enforcement obligations on a currently overextended agency is a sound approach for ensuring effective enforcement of affirmative action and nondiscrimination requirements.

Furthermore and importantly, the affirmative action obligations overseen by OFCCP are highly valued by federal contractors as they follow these foundational principles in designing and implementing successful diversity and inclusion programs. The EEOC does not have affirmative action as part of its portfolio. As reflected in the *amicus* briefs filed by hundreds of major employers in the U.S. Supreme Court's decisions in *Grutter* and *Gratz*, the Court cited the strong support of U.S. corporations for affirmative action in upholding the University of Michigan Law School's application process.<sup>7</sup>

Moreover, not only are the areas of focus of each agency different, the enforcement procedures and the remedies for each agency are as well. The laws enforced by the EEOC allow for jury trials, issuance of subpoenas as part of the EEOC's investigation, lawsuits filed in federal district court, and remedies that include compensatory and punitive damages. The OFCCP, on the other hand, follows the administrative processes established by the Department of Labor allowing for "make-whole" remedies as well as contractual remedies up to and including debarment, which are determined by separate proceedings.

A final significant consideration that prevents the simple reassignment of the OFCCP's responsibilities to the EEOC is that the statutes providing protections for individuals with disabilities<sup>8</sup> and protected veterans<sup>9</sup> would have to be amended by Congress. The relevant laws currently delegate the enforcement responsibilities to the Secretary of Labor—not the EEOC.

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<sup>5</sup> OFCCP also handles claims of discrimination but it receives only about to about 200 complaints per year. Compare that to the fact that EEOC resolved 97,443 charges in FY2016 while it received an additional 91,503 charges during the same fiscal year. See footnote 5 below.

<sup>6</sup> Based on EEOC's FY2016 Performance Report, Equal Employment Opportunity Commission, available at <https://www.eeoc.gov/eeoc/plan/upload/2016par.pdf>.

<sup>7</sup> *Grutter v. Bollinger*, 539 U. S. 306, 331-332, 123 S. Ct. 2325 (2003).

<sup>8</sup> Section 503 of the Rehabilitation Act of 1973, as amended, Office of Federal Contract Compliance Programs, U. S. Department of Labor available at <https://www.dol.gov/ofccp/regs/compliance/sec503.htm>.

<sup>9</sup> Vietnam-Era Veterans Readjustment Assistance Act, Office of Federal Contract Compliance Programs, U. S. Department of Labor available at <https://www.dol.gov/ofccp/regs/statutes/4212.htm>.

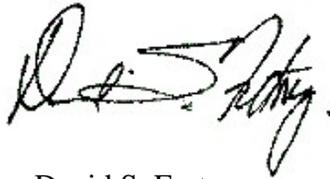
For all of the above reasons, The Institute respectfully submits that the OFCCP's responsibilities should not be transferred to and merged into the EEOC. We would be pleased to provide additional information on these matters.

Respectfully,

The Institute for Workplace Equality



David B. Cohen



David S. Fortney



Mickey Silberman

Co-Chairs of The Institute for Workplace Equality