



Federal Highway Administration

23 CFR Part 230

[FHWA Docket No. FHWA-2019-0026]

RIN 2125-AF87

State Highway Agency Equal Employment Opportunity Programs

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: The FHWA is proposing to remove its outdated and duplicative regulations requiring State highway agencies to submit to FHWA, on an annual basis, Equal Employment Opportunity (EEO) Program plans for FHWA approval. Currently, FHWA is responsible for oversight of State highway agencies' EEO programs, which include collection and analysis of internal employment data, development of an internal affirmative action hiring plan, and contractor compliance reporting. These regulations overlap with, and are duplicative of, other Federal requirements enforced by other Federal agencies. Elimination of these regulations would reduce administrative and monetary burdens on Federal-aid recipients.

DATES: Comments must be received on or before [INSERT DATE 60 DAYS AFTER PUBLICATION IN FEDERAL REGISTER]. Late-filed comments will be considered to the extent practicable.

ADDRESSES: Mail or hand deliver comments to the U.S. Department of Transportation, Dockets Management Facility, 1200 New Jersey Ave., S.E., Washington, D.C. 20590, or submit electronically at www.regulations.gov. All comments should include the docket number that appears in the heading of this document. All comments received will be available for examination and copying at the above address from 9 a.m.

to 5 p.m., e.t., Monday through Friday, except Federal holidays. Those desiring notification of receipt of comments must include a self-addressed, stamped postcard or may print the acknowledgment page that appears after submitting comments electronically.

FOR FURTHER INFORMATION CONTACT: Nichole McWhorter, Team Leader, Office of Civil Rights, Federal Highway Administration, 1200 New Jersey Ave., S.E., Room E81-330, Washington, D.C. 20590, Nichole.McWhorter@dot.gov, or James Esselman, Office of the Chief Counsel, Federal Highway Administration, 1200 New Jersey Ave., S.E., Room E82-322, Washington, D.C. 20590, James.Esselman@dot.gov. Office hours are from 8:00 a.m. to 4:30 p.m. e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

This document and all comments received may be viewed online through the Federal eRulemaking portal at <http://www.regulations.gov>. The Web site is available 24 hours each day, 365 days each year. An electronic copy of this document may also be downloaded by accessing the Office of the Federal Register's home page at:

<https://www.federalregister.gov>.

Background

The FHWA regulations at 23 CFR Part 230, Subpart C, currently require that all State highway agencies submit to FHWA for approval, on an annual basis, an EEO Program, which must include provisions for reporting on contractor compliance and internal State highway agency employment. The internal employment provisions require submission of an affirmative action plan and an analysis of employment statistical data.

In addition to FHWA, other Federal agencies share an interest in ensuring nondiscrimination in employment of State highway agency personnel and Federal-aid

contractors. The Office of Federal Contract Compliance (OFCCP) is a U.S. Department of Labor (DOL) program that, since reorganization in 2009, reports directly to the Secretary of Labor. The OFCCP Program regulations at 41 CFR part 60 were implemented to achieve the objectives found in parts II, III, and IV of Executive Order (EO) 11246¹ for the promotion of and ensuring equal opportunity for all persons, regardless of race, color, religion, sex, sexual orientation, gender identity, or national origin, employed or seeking employment with Federal Government contractors or with contractors performing under federally assisted construction contracts.

The Equal Employment Opportunity Commission (EEOC) is the Federal agency responsible for enforcing nondiscrimination laws in the workplace. Its jurisdiction extends to private as well as State and local government employers that meet certain employee thresholds. The EEOC has contracts with State and local fair employment practice agencies (FEPA) that may process complaints on EEOC's behalf. The EEOC enforces Federal employment laws, including: Title VII of the Civil Right Act of 1964, as amended;² the Age Discrimination in Employment Act of 1967;³ the Equal Pay Act of 1963;⁴ Title I of the Americans with Disabilities Act of 1990, as amended;⁵ and the Genetic Information Nondiscrimination Act of 2008.⁶

The EEOC shares jurisdiction of Title VII and Title I of the Americans with Disabilities Act with the U.S. Department of Justice (DOJ). Both have the authority to initiate, mediate, investigate, and conciliate charges of discrimination, but only DOJ has the jurisdiction to litigate cases against State and local employers under these laws. In cases where EEOC is unable to satisfactorily resolve employment discrimination complaints or reasonable cause findings, it transfers the files to DOJ for litigation

¹ EO No. 11,246, 30 FR 12319 (Sept. 24, 1965).

² 42 U.S.C. 2000e et seq.

³ 29 U.S.C. 621-634.

⁴ 29 U.S.C. 206(d).

⁵ 42 U.S.C. 12101 et seq.

⁶ Pub. L 110-233, 122 Stat 881.

consideration. For age-related cases, EEOC has sole authority for investigation and litigation.

In addition to addressing charges of discrimination, EEOC collects and publishes workforce parity data from private employers each year through Form EEO-1 (<https://www.eeoc.gov/employers/eeo1survey/index.cfm>) and from State and local governments biennially through Form EEO-4 (<https://egov.eeoc.gov/eeo4/pdf/EEO4.pdf>). The reporting agencies provide information on their employment totals, employees' job categories, and salary by sex and race/ethnic groups as of June 30 of the survey year (every odd-numbered year).

The FHWA added Subpart C to the regulations at 23 CFR Part 230, in 1976, as an administrative amendment to the regulation. The subpart was written prior to the creation of many State equal opportunity programs and prior to President Carter's issuance of Reorganization Plan No. 1 of 1978, which consolidated many EEO authorities that had been spread among various departments and agencies under the EEOC. The FHWA's regulation states that State EEO programs that meet or exceed the standards prescribed in the regulation will comply with FHWA requirements. In the more than 40 years since the subpart was added to the regulation, the equal employment laws of States and related equal employment enforcement authority of the EEOC and OFCCP have been created or modified to cover any gap in employment discrimination coverage for State highway employees that might have existed at the time FHWA's regulation was promulgated.

Given that other authorities at both the State and Federal level, provide coverage of employment discrimination charges that apply to State highway agencies, and given that Congress has not expressly directed FHWA to require State highway agencies to create and submit affirmative action plans from State highway agencies, FHWA is proposing to remove the regulatory requirements at 23 CFR Part 230, Subpart 230.

General Discussion of the Proposals

The FHWA seeks public comment on its proposal to eliminate its regulation at 23 CFR Part 230, Subpart C, in its entirety. To the extent that this subpart addresses Federal oversight of State highway agencies' internal EEO obligations, it is duplicative of EEOC requirements and DOJ enforcement authorities. To the extent that this subpart of FHWA's regulations addresses State highway agency contractor compliance on Federal-aid projects, FHWA retains oversight of such activities under 23 CFR Part 230, Subpart D, which sets forth equal opportunity compliance procedures for construction contracts. In addition, OFCCP retains EEO enforcement authority over Federal-aid contractors under EO 11246 and DOL regulations at 41 CFR Part 60. The FHWA's proposal to eliminate its regulation at 23 CFR Part 230, Subpart C, will reduce the reporting and compliance burdens on State highway agencies by eliminating duplicative requirements that will ultimately result in a cost savings to the State agencies and to FHWA, without diminishing Federal oversight of Federal EEO requirements.

Estimated cost savings are based on reduced staff functions at both the State highway agencies and FHWA by eliminating the oversight and reporting activities required under the existing regulation. Currently, each State highway agency is required by the regulation to have an external EEO coordinator and staff support to ensure that the contractor compliance component of its EEO Program is carried out according to this regulatory subpart. In addition, each State highway agency must have an internal EEO officer to develop and manage the internal affirmative action plan required by the regulation, including undertaking the workforce evaluation and collecting and reporting on required data. Multiple members of FHWA staff are also tasked with oversight and training of this regulatory subpart. Based on these considerations, FHWA estimates that elimination of this regulatory subpart will result in savings of approximately \$261,374 annually.

Rulemaking Analyses and Notices

All comments received before the close of business on the comment closing date indicated above will be considered and will be available for examination in the docket at the above address. Comments received after the comment closing date will be filed in the docket and will be considered to the extent practicable. In addition to late comments, FHWA may also continue to file relevant information in the docket as it becomes available after the comment period closing date, and interested persons should continue to examine the docket for new material. A final rule may be published at any time after close of the comment period.

Executive Order 12866 (Regulatory Planning and Review), Executive Order 13562 (Improving Regulation and Regulatory Review), Executive Order 13771 (Reducing Regulations and Controlling Regulatory Costs), and DOT Policies and Procedures for Rulemaking

The FHWA has determined preliminarily that this action would not be a significant regulatory action within the meaning of EO 12866 or would not be significant within the meaning of DOT policies and procedures for rulemaking. This action complies with EOs 12866, 13563, and 13771 to improve regulation. It is anticipated that the economic impact of this rulemaking would be minimal. This rulemaking proposes to eliminate required reporting and analysis that is currently required under the regulation; therefore, eliminating this portion of the regulation would achieve cost savings.

Although, FHWA has determined that the proposed rulemaking to revise 23 CFR Part 230, Subpart C would not be a significant regulatory action, it does generate cost savings that are applicable to offsetting the costs associated with other regulatory actions as required by EO 13771. The cost savings from this proposed regulatory action would result from reduced administrative burden associated with the efforts by the States and FHWA related to the collecting and analyzing of State internal employment data leading to creation of an affirmative action plan. The annualized cost savings are estimated to be

\$493,437 per year, measured in 2018 dollars. For the 20-year period from 2020 through 2039 the estimated cost savings are roughly \$5.2 million in net present value when discounted at 7 percent to 2018. A summary of the results of the analysis and the assumptions underlying the calculations are included in the docket for this rulemaking.

These proposed changes would not adversely affect, in a material way, any sector of the economy. In addition, these changes would not interfere with any action taken or planned by another agency and would not materially alter the budgetary impact of any entitlements, grants, user fees, or loan programs. Consequently, a full regulatory evaluation is not required.

Regulatory Flexibility Act

In compliance with the Regulatory Flexibility Act (Pub. L. 96-354, 5 U.S.C. 601-612), FHWA has evaluated the effects of this proposed action on small entities. Because the regulations are applicable primarily to States, FHWA has determined that the action is not anticipated to have a significant economic impact on a substantial number of small entities. States are not included in the definition of small entity set forth in 5 U.S.C. 601. Therefore, FHWA certifies that the action will not have a significant economic impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

This proposed rule would not impose unfunded mandates as defined by the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4, March 22, 1995, 109 Stat. 48). This proposed rule will not result in the expenditure by State, local, and Tribal governments, in the aggregate, or by the private sector, of \$155 million or more in any one year (2 U.S.C. 1532).

Executive Order 13132 (Federalism Assessment)

This proposed action has been analyzed in accordance with the principles and criteria contained in EO 13132. The FHWA has determined that this proposed action

would not have sufficient federalism implications to warrant the preparation of a federalism assessment. The FHWA has also determined that this proposed action would not preempt any State law or State regulation or affect the States' ability to discharge traditional State governmental functions.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501, et. seq.), Federal agencies must obtain approval from the Office of Management and Budget for each collection of information they conduct, sponsor, or require through regulations. The FHWA has determined that this proposal does not contain collection of information requirements for the purposes of the PRA and there was no PRA number associated with this regulation. However, the elimination of this regulatory section will alleviate current burdens imposed on the State by reducing the need to file a lengthy Affirmative Action Plan along with filing duplicative EEO-4 documents to FHWA.

National Environmental Policy Act

The Agency has analyzed this proposed action for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321) and has determined that it qualifies for a categorical exclusion under 23 CFR 771.117(c)(20), which applies to the promulgation of regulations, and that no unusual circumstances are present under 23 CFR 771.117(b). Categorically excluded actions meet the criteria for categorical exclusions under the Council on Environmental Quality regulations (40 CFR 1508.4) and under 23 CFR 771.117(a) and normally do not require any further NEPA approvals by FHWA.

Executive Order 13175 (Tribal Consultation)

The FHWA has analyzed this action under EO 13175 and believes that the proposed action would not have substantial direct effects on one or more Indian tribes; would not impose substantial direct compliance costs on Tribal governments; and, would not preempt Tribal law. Therefore, a Tribal summary impact statement is not required.

Executive Order 13211 (Energy Effects)

The FHWA has analyzed this proposed rule under EO 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use. We have determined that the rule will not constitute a significant energy action under that order because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 23 CFR Part 230

Federal-aid construction contracts; grant programs—transportation; highways and roads; equal employment opportunity; reporting and recordkeeping requirements.

Issued in Washington, DC, under authority delegated in 49 CFR Part 1.85(a)(1).

Nicole R. Nason
Administrator
Federal Highway Administration

In consideration of the foregoing, FHWA proposes to revise Title 23, Code of Federal Regulations, part 230, as set forth below:

PART 230—EXTERNAL PROGRAMS

1. The authority citation for Part 230 is revised to read as follows:

Authority: 23 U.S.C. 101, 140, and 315; 42 U.S.C. 2000d et seq.; and 49 CFR

1.81.

Subpart C—State Highway Agency Equal Employment Opportunity Programs

2. Remove and reserve Subpart C, consisting of §§ 230.301 through Appendix A to Subpart C of Part 230.

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