



Ellen Shong &
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2020 OFCCP Developments

What Federal Contractors Need to Know
for 2021



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Today's Agenda

- Recently issued notices and updates
- Review of 2020 OFCCP Directives
- OFCCP activity in 2020
- Compensation
- Upcoming Developments
- Issues to Consider
- What to Expect in the Biden Administration



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Recently Issued Notices and Reminders on Older Regulations

EO No.	Title	Effective Date	Comments
13658	Establishing a Minimum Wage for Contractors <ul style="list-style-type: none"> <i>Min. wage increases to \$10.95 and tipped employees min. cash wage of \$7.65, eff. 1/1/2021</i> 	Contracts entered into/modified on or after 1/1/2015	<i>Applies only to certain types of federal government contracts</i>
13706	Establishing Paid Sick Leave for Federal Contractors <ul style="list-style-type: none"> <i>Accrual of up to 56 hours of paid sick leave per year</i> 	Solicitations on or after 1/1/2017	<i>Applies only to certain types of federal government contracts</i>
13950	Combating Race and Sex Stereotyping <ul style="list-style-type: none"> <i>To combat offensive and anti-American race and sex stereotyping and scapegoating</i> 	Contracts entered into/modified on or after 11/22/2020	
n/a	Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination <ul style="list-style-type: none"> <i>To codify procedures that OFCCP uses to resolve potential discrimination and other material violations of regulations by contractors</i> 	12/10/2020	<i>Regulation initiated by OFCCP without EO</i>

EO 13950

Combating Race and Sex Stereotyping

- Prohibits federal agencies, **federal contractors**, and federal grant recipients from providing workplace training to their employees that “inculcates” any form of race or sex scapegoating or stereotyping (“blame-focused training”)
- Blame-focused training serves to “reinforce biases and decrease opportunities for minorities”
- Goal is to end the perpetuation of “racial stereotypes and division” in the workplace



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EO 13950 (cont.)

EO Action Items

Covered Contracts

- Federal contracts will have specific EO language
- Contractors required to post a notice (to be provided) for all employees and applicants to view

All Contractors

- OFCCP telephone hotline and email address for individuals to register complaints that a contractor's materials violate the EO
 - Per OFCCP, calls are coming in and contractors are being investigated
- OFCCP has invited, via Request for Information, contractors and their employees to submit their diversity and inclusion training materials for review for prohibited stereotyping and scapegoating content

FAQ and more information on OFCCP website

- www.dol.gov/agencies/ofccp/executive-order-13950

Biden administration may rescind EO



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Nondiscrimination Obligations of Federal Contractors and Subcontractors

- Seeks to increase the number of evaluations conducted and focus OFCCP on stronger cases
- New evidentiary standards generally require **significant statistical evidence, non-statistical evidence, and practical significance** to issue a Predetermination Notice (PDN)
 - Disparate treatment cases require: (1) quantitative evidence (defined in rule); (2) unexplained disparities are “practically significant;” and (3) qualitative evidence (defined in rule) that in combination with other evidence supports a finding of discriminatory intent
 - Disparate impact cases require: (1) quantitative evidence (defined in rule); (2) unexplained disparity is “practically significant;” and (3) identity of the specific policy or practice causing the adverse impact
- Covers Predetermination notices, Notice of Violations, Conciliation Agreements, and Expedited Conciliation Option
- FAQs and more information:
www.dol.gov/agencies/ofccp/faqs/resolution-procedures



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2020 OFCCP Directives

2020-01 - Spouses of Protected Veterans

- Ensures non-discrimination against spouses of protected veterans and provides compliance assistance during compliance evaluations on how contractors can support the families of protected veterans

2020-02 - Efficiency in Compliance Evaluations

- Operational initiatives to keep aged cases below 15 percent of OFCCP's total caseload

2020-03 - Pre-Referral Mediation Program

- Establishes mediation program to resolve findings of discrimination violations before case referrals to the Office of the Solicitor for enforcement

2020-04 - Ombuds Service Supplement

- Supplements Directive 2018-09 with additional programmatic details

2021-01 - Extending the Scheduling Moratorium for Veterans Affairs Health Benefits Program (VAHBP) Providers (TRICARE)



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OFCCP 2020 Activity

Review activity still down

- 1,318 compliance reviews (audits) reported closed for Fiscal Year 2020 (10/1/2019 to 9/30/2020)
 - Includes 163 Conciliation Agreements (violations)
- 1,343 compliance reviews (1,019 originally) reported closed in prior Fiscal Year 2019 (10/1/2018 to 9/30/2019)
- Still below OFCCP distant past performance (4,000 to 5,000 reviews annually)
- OFCCP needs to increase to 2,500 to 3,000 reviews closed annually

FY 2021 goal is 3,000 reviews which is twice the level in prior two years



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OFCCP 2020 Activity

Current Audit Activity

- Currently OFCCP wrapping up the March 2019 Corporate Scheduling Announcement Lists (CSAL) of 3,500 contractor establishments to be reviewed
 - Section 503 Reviews almost done
- November 2019, OFCCP published a supplemental list of contractors
 - 500 Focused VEVRAA reviews (Protected Veterans)
 - Scheduling letters initially sent out late summer/fall 2020

Future Audit Activity

- September 2020, two CSALs released which include 2,450 establishments:
 - 402 establishment reviews for EO 11246 (Minorities, Women), Section 503 (IWD) and VEVRAA (Veterans)
 - 67 Corporate Management reviews (CMCE)
 - 500 Compliance check reviews
 - 31 Functional AAP (FAAP) reviews
 - 250 Focused reviews for Section 503 AAPs (IWD)
 - 500 Accommodation reviews (new type of review)
 - 500 Promotion reviews (new type of review)
 - 200 construction contractor reviews (on 2nd and separate list)



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OFCCP 2020 Activity

Observations on compliance review activity

- Just beginning working the November 2019 list for Protected Veterans Focused Reviews
 - Expect this list plus the September 2020 CSALs to last for 18 to 24 months
- Efforts continue to decrease time to complete reviews since emphasis is on focused reviews
 - FY2021 budget request noted that time to complete reviews without discrimination claims went from about 10 months to 6 months
- Number of data requests varies, but even for focused reviews could be numerous
- Still likely to have non-local offices assigned to review as OFCCP balances loads
- Phone interviews prior to onsite (if necessary) especially about compensation
- With COVID-19, onsite visits shifted to virtual onsites conducted by telephone
- Spreading out reviews among many different types with use of more focused (and hopefully shorter) reviews
 - Of the 2,450 on the September 2020 two CSALs, 1,950 or 87% are either focused reviews or compliance checks
 - Should allow OFCCP to complete reviews faster as most take less time

Much of focus appears to be make more efficient use of limited OFCCP resources to increase number of contractors coming under review

- OFCCP headcount remains just about 500 employees agency-wide



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OFCCP 2020 Activity

Financial settlements: FY 2020 \$35.6 million v. FY 2019 \$40.6 million

Some significant settlements

Hiring

- Wells Fargo \$7.8 million - African Americans, females
- Microsoft \$3 million - Asians
- Shamrock Foods \$858k - African Americans, females, **Whites**
- Time Warner Cable \$745k - African Americans, females
- TTI \$650k - African Americans, **males**

Compensation

- Intel \$5 million - females, African American, Hispanics
- Cisco \$4.7 million - females, Blacks, Hispanics
- WMS Solutions \$960k - hiring non-Hispanic (including Whites); compensation females

For FY 2021 (10/1/2020 and later)

- JP Morgan Chase \$9.8 million - compensation females
- Hewlett Packard \$1.4 million- compensation females
- Princeton University \$1.2 million - compensation female professors



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OFCCP 2020 Activity

Resources to assist contractors

- Technical Assistance Guides for Service and Supply Contractors (vast majority of contractors) and for Small Contractors (just released)
- Opinion letters on contractor raised issues - not much significant currently
- Efforts to encourage contractors to use outreach within Historically Black Colleges and Universities, and Hispanic Association of Colleges and Universities, etc.



OFCCP still trying to use the carrot

- Various recognition programs for disability inclusion, Functional AAPs, etc.

OFCCP FY 2021 budget request essentially flat

- Allows maintenance of current workforce of approximately 500 employees
- Slight increase of 0.5% requested to take care of cost of pay adjustments
- Funds allocated to continue data centralization effort which is modernization of their internal IT systems which house information on cases, contractors and assist in review process

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Compensation

- OFCCP still focusing on compensation during reviews
- Several large financial settlements in FY 2020 and FY 2021 but still relatively few compensation cases
 - Many of these are from the Obama administration over four years ago
- Ongoing **Google** review; OFCCP unable (and gave up February 2019) to get all of the historical data it demanded earlier
- OFCCP lost the **Oracle** litigation before Administrative Law Judge (OFCCP declines to appeal)
- Last year, we discussed OFCCP's significant loss in the **Analogic** case



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Compensation

Use of EEO-1 2018/2017 Component 2

- OFCCP and EEOC not planning to make use of compensation Component 2 data submitted
- California has instituted a report very similar to the Component 2 report
- Various groups are suing to get access to the Component 2 data



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Upcoming Developments

2019 and 2020 EEO-1 report

- COVID-19 has delayed reporting deadlines for 2019 and 2020 reports; expected deadline is March 2021
- **2019 Report**
 - Only Component 1 (employee counts by race and gender within EEO-1 categories). Component 2 (pay) currently not required.
 - Employee data for any pay period in the 4th Quarter 2019
- **2020 Report**
 - Employee counts for any pay period in the 4th Quarter 2020
 - NOTE: If use 12/31/2020 snapshot for EEO-1 reporting, you can use the same data for the VETS-4212 to be filed in Fall 2021
 - Calendar AAP (1/1/2021 anniversary date) year contractors can also use 12/31/2020 for their AAP



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Upcoming Developments *(cont.)*

AAP Verification Program

- Would require annual certification or other action by contractor representing basic AAP compliance to OFCCP
- OFCCP issued a Request for Comments about this on September 14, 2020
- No funds or major mention in the FY 2021 OFCCP budget request
- Director Craig Leen continues to talk about this on an on-going basis and the need for this as a compliance tool



Revised disability survey form issued

- OFCCP released a revised one-page Individuals with Disability survey form for applicants and employees in April 2020
- Required to be implemented by August 4, 2020 - be sure you use this revised form

OFCCP review of D&I efforts

- Microsoft and Wells Fargo being investigated for comments senior executives made on affirmative action and outreach efforts and goals

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Upcoming Developments *(cont.)*

Fair Chance Act - “Ban the box”

- Prohibits federal contractors from inquiring about job applicant’s criminal background in hiring process until after conditional job offer made
- Adds to other state and local regulations that contractor may have to comply with
- For job openings related to federal contract work (similar to applicability of minimum wage and paid leave?)
- Certain exceptions specified plus others to be added during regulation writing
- Regulations to be issued by April 2021 and effective December 20, 2021
- Act as a result of the National Defense Authorization Act on December 20, 2019
- Various states and local jurisdictions have also enacted similar legislation



Non-binary gender and your reporting/AAP

- EEOC issued guidance for EEO-1 report Component 2
- OFCCP has FAQs suggesting options - but regulations haven’t changed!

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Issues to Consider

Protected Veterans and Individuals with Disabilities

- Review outreach efforts
 - Many contractors failing to engage with local outreach partners. Just posting jobs with outreach agencies is not sufficient.
 - Complete documented assessment of outreach efforts annually
- Conduct and document self-audit of compliance obligations
- Goals/targets
 - Hiring goal for Protected Veterans of 5.7% (3/31/2020)
 - Utilization goal for Individuals with Disabilities of 7%
- Disability status survey of employees
 - Most contractors must conduct resurvey of disability status for all employees
 - When required depends on when employees last surveyed as this must be conducted every 5 years with a reminder in the interim period



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Issues to Consider *(cont.)*

Reminder of ongoing focused reviews or checks by OFCCP

- Section 503 Individuals with Disabilities
 - OFCCP to publish a report on the results of its findings from the initial group of focused reviews just about completed
- VEVRAA Protected Veterans
 - Reviews just starting up
- Accommodations **(new)**
- Promotions **(new)**
 - What is the definition of a promotion?
- Compliance checks
- Construction contractors compliance checks

Review of compensation



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What to Expect in the Biden Administration

Much depends on the composition of the US Senate

- Outcome of the Georgia Senate races will determine who has control of the U.S. Senate after January 2021
 - This in turn will effect how cabinet and other administration officials are confirmed for their positions including the US Department of Labor and the agency head subject to Advice and Consent
 - It appears Director of the OFCCP may be subject to Advice and Consent which could slow down the approval of new OFCCP Director
- As of January 20, 2021 or earlier, OFCCP will be run by the Deputy Director who is a career official
 - This interim role could last from two to ten months (or longer) after inauguration depending on when a new Director is named



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What to Expect in the Biden Administration

Agenda of the Agency will be same for probably next 12 months

- No major policy changes or regulations likely until new OFCCP Director is in place
- OFCCP has pipeline of approximately 2950 compliance reviews
- Training and education of OFCCP staff for new types of focused reviews need to be completed for Accommodations and Promotions
- OFCCP will continue to review compensation in the major compliance reviews and pursue existing cases. They haven't been that successful given the number of employees reviewed.
- Unlikely EEOC will reinstitute the EEO-1 Component 2 (compensation) for several years given the makeup of EEOC (Republican majority)



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What to Expect in the Biden Administration

Executive Orders possible

- Reinstigate Fair Pay and Safe Workplaces regulations from EO 13673 rescinded March 2017
- Likely to rescind EO 13950 (Combating Race and Sex Stereotyping)
- Others?
- Again given the US Senate balance of powers, Executive Orders could be used to create new regulations if Congress doesn't pass Biden proposed regulations



Return to pursuing various issues impacting women especially compensation and protection of civil rights

- OFCCP can be used as one of the major enforcement agencies given its mission and oversight over much of the US labor force
- But it still has not been effective in identifying systemic compensation discrimination across all employers which it originally believed it would

Most likely 12 to 18 months before we see major shifts

- The choice of the Secretary of Labor will be significant

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PRESENTATION AVAILABLE FOR VIEWING

Don't forget...

- Today's PowerPoint presentation and recording will be available by Friday on www.smithlaw.com/resources-webinars and all past recorded webinars are available to view and download too

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Thank you for attending today's webinar!

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