



Ellen Shong &
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2017 OFCCP Developments

What Federal Contractors Need to Know
for 2018



November 14, 2017

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Today's Agenda

- Status of Obama-era Executive Order and regulations
- Recently issued regulations and notices
- EEO-1 Reporting
- OFCCP activity
- OFCCP organizational changes
- Issues to consider



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Status of Obama-era Executive Orders and Regulations

EO No.	Title	Effective Date	Status
13494	Economy in Government Contracting (persuader activities non-reimbursable under government contract)	1/10/2009 (final rule eff. 12/2/11)	<i>Unchanged</i>
13495	Nondisplacement of Qualified Workers Under Service Contracts	8/29/2011 (final rule eff.)	<i>Unchanged</i>
13496	Notification of Employee Rights Under Federal Labor Laws	1/30/2009 (final rule eff. 6/21/2010)	<i>Unchanged</i>
	Defense Appropriations Act (Franken Amendment prohibiting mandatory arbitration provisions for certain employee/workers claims; contracts exceeding \$1mil)	12/8/2010 (final rule eff.)	<i>Unchanged</i>
	VEVRAA regulations revised (41 CFR 60-300)	3/24/2014	<i>Unchanged</i>

Status of Obama-era Executive Orders and Regulations

EO No.	Title	Effective Date	Status
	Section 503 (Rehab Act) regulations revised (41 CFR 60-741)	3/24/2014	<i>Unchanged</i>
13658	Establishing a Minimum Wage for Contractors (29 CFR 10) <ul style="list-style-type: none"><i>Min. wage increases to \$10.35 eff. 1/1/2018</i>	Contracts entered into/modified on or after 1/1/2015	<i>Unchanged</i>
	Presidential Memorandum directing OFCCP to issue compensation data collection tool (EEOC took over and issued modifications to EEO-1 report to require compensation data to be submitted)	By 3/31/2018	EEO-1 compensation data submission stayed eff. 8/29/2017
13665	Non-Retaliation from Disclosure of Compensation Information (regulations titled “Prohibitions Against Pay Secrecy Policies and Actions”)	Contracts entered into/modified on or after 1/11/2016	<i>Unchanged</i>

Status of Obama-era Executive Orders and Regulations

EO No.	Title	Effective Date	Status
13672	Further Amendments to Executive Order 11478, EEO in the Federal Government, and Executive Order 11246, EEO (LGBT)	Contracts entered into/modified on or after 4/8/2015	<i>Unchanged</i>
13673	Fair Pay and Safe Workplace (Blacklisting)	10/25/2016 (phased); court injunction eff. 10/24/16	Revoked eff. 3/27/2017
13706	Establishing Paid Sick Leave for Federal Contractors (applies only to certain contractors (generally same as EO 13658 Minimum Wage, some exceptions apply); accrual of up to 56 hours of paid sick leave per year	Solicitations on or after 1/1/2017	<i>Unchanged</i>
	Update to Sex Discrimination Guidelines	8/15/2016	<i>Unchanged</i>

Recently Issued Notices and Regulations

- National Interest Exemptions (Three)
 - Applicable to contracts for relief efforts due to hurricanes Harvey, Irma and Maria
 - Post-hurricane and for three months - 9/1/2017 to 12/1/2017
 - Waivers not applicable to contractors in impacted areas unless new contracts signed
 - OFCCP also instituted moratorium on scheduling new compliance reviews in impacted hurricane areas for three months starting 9/1/2017



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Recently Issued Notices and Regulations

- Minimum wage for contractors covered under EO 13658
 - Applicable to small number of contractors
 - As of January 1, 2018 minimum hourly wage increases to \$10.35 (from \$10.20) per Federal Register Notice 9/15/2017
- Modification to Pay Transparency Notice for EO 13665
 - Revised notification issued by OFCCP in December 2016 requiring the addition of “41 CFR 60-1.35(c)” at end of policy and posted notice



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EEO-1 Report A Recent History

- 2014 - Presidential Memorandum issued directing Secretary of Labor to propose a rule requiring federal contractors and subcontractors submit summary compensation data to DOL
- Early 2016 - Responsibility for collecting compensation data was moved from OFCCP to EEOC



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EEO-1 Report A Recent History

- July 14, 2016 - EEOC published in the Federal Register a notice it was submitting to the Office of Management and Budget (OMB) a request for three year approval of a revised the EEO-1 Report for data collection under the Paperwork Reduction Act (PRA)
- September 29, 2016 - EEOC issued a **press release** announcing a revised EEO-1 Report adding a new section requiring contractors to provide summarized compensation data
 - No Federal Register publication of this change as a regulation or rule. It was treated as a revision to an existing data collection form subject to review only by OMB under the Paperwork Reduction Act



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EEO-1 Report A Recent History

- Summer 2017 - EEOC acting chair, Victoria Lipnic, makes public comments suggesting EEOC will review the EEO-1 report compensation reporting obligations
- August 29, 2017 - OMB informed EEOC that
 - “it is initiating a review and immediate stay of the effectiveness of the pay data collection aspects of the EEO-1 form that was revised on September 29, 2016, in accordance with its authority under the Paperwork Reduction Act (PRA).”



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Revised EEO-1 Report

Where does that leave contractors?

- No EEO-1 report is required to be filed in 2017
- 2017 EEO-1 report is still due by March 31, 2018
 - Report can be filed anytime from January 1 to March 31, 2018
- VETS-4212 is unaffected at this time
 - Still due by September 30th annually
 - Filing deadline was extended until November 15th to allow those affected by the recent hurricanes more time, but it appears all contractors benefitted



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Revised EEO-1 Report

Some basics:

- The report is still to be based on employee data for
 - Any pay period in the 4th Quarter of 2017
 - Examples:
 - Pay period ending 10/31/2017
 - Pay period ending 12/31/2017



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Revised EEO-1 Report

- Data required for reporting is same as the 2016 EEO-1 report
 - Counts of current employees reported by
 - 10 EEO-1 categories, and
 - Race/ethnicity and gender



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Revised EEO-1 Report

Some suggestions:

- U.S. Department of Labor's Veterans' Employment and Training Service (VETS) July 2017 guidance allows for some contractor efficiencies in preparing the next EEO-1 and VETS-4212 reports:
 - Contractors are allowed to use the same employee data for preparing the EEO-1 Report and the VETS-4212
 - Only one extract needed and, for calendar year AAPs, could be the same used for AAP update
 - Contractor can pull employee extract for 12/31/2017 pay period for preparing the EEO-1 report due by March 31, 2018
 - Contractor can use the same data for preparing the next VETS-4212 due by September 30, 2018
 - Would also need to supplement employee data with the hires data for the previous 12 months to 12/31/2017



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Revised EEO-1 Report

- Filing date for the VETS-4212 remains September 30th annually
- In the future, the VETS-4212 deadline might be revised to coincide with EEO-1 deadline (March 31st) or perhaps the EEO-1 report deadline might revert to September 30th



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Revised EEO-1 Report

Some suggestions :

- Pull employee data as of pay period closest to 12/31/2017
- All contractors: use this to prepare EEO-1 report
 - File EEO-1 by March 31, 2018
 - For contractors with calendar year AAPs, it can also be used for the annual AAP update of numerics



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Revised EEO-1 Report

Some suggestions:

- Pull hires data for prior 12 months (1/1/2017 to 12/31/17). Use this for the calendar year AAP update and later for VETS-4212.
- Summer/fall 2018 - prepare VETS-4212 using the employee data pulled for the EEO-1 as of 12/31/2017
 - File VETS-4212 by September 30, 2018



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Revised EEO-1 Report

Going forward:

- OMB raised concerns in its memo staying the EEO-1 Report
 - “some aspects of the revised collection of information lack practical utility, are unnecessarily burdensome, and do not adequately address privacy and confidentiality issues”
- OMB directed EEOC to submit a new information packet which would most likely include revised burden estimates of time to prepare the revised EEO-1 report



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Revised EEO-1 Report

Going forward:

- EEOC indicated it will review OMB's order and its options
 - Two EEOC Commissioner nominees agreed in recent hearings to continue to pursue compensation though it could be through the use of different tools or methodology
 - If EEOC either decides not to or fails to submit a new information packet, this inaction could effectively kill the compensation section. OMB must reapprove the revised EEO-1 to allow collection of compensation data.



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Revised EEO-1 Report

For more information, visit the EEOC's website for:

- Acting Chair Victoria Lipnic's statement:
 - www.eeoc.gov/eeoc/newsroom/wysk/eeo1-pay-data.cfm
- Latest information on the EEO-1 report:
 - www.eeoc.gov/employers/eeo1survey/index.cfm



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OFCCP Activity

- **Audit activity down**
 - 1,142 compliance reviews reported for the past Fiscal Year 2017 (10/1/2016 to 9/30/2017). This is the lowest in many years.
 - 1,695 compliance reviews reported in prior Fiscal Year 2016
 - The next OFCCP Director will need to increase this activity level
- **OFCCP Director**
 - Craig Leen named new Director



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OFCCP Activity

- **As in past, compliance review observations:**
 - Length of compliance reviews (audits) continues to be long. 1 to 2 years is not unusual.
 - Likely to have non-local offices involved in initial phase (desk audit)
 - Phone interviews prior to onsite especially about compensation topics
 - Compensation calculations undertaken at the National office
 - Countless data requests
- **Town hall meetings being conducted by OFCCP**



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OFCCP Activity

- Financial settlements in FY 2016-2017 are estimated at \$23 million and in calendar year 2017 (partial list):
 - American Ordnance \$50k - disability (accommodations)
 - Bank of America (Nationsbank) \$1.0 million - hiring
 - B&H Foto \$3.2 million - hiring, promotion, harassment, compensation
 - International Paper \$3.5 million - hiring
 - KPMG \$420k - hiring
 - LexisNexis Risk Solutions \$1.2 million - compensation
 - Palantir \$1.6 million - hiring
 - State Street \$5 million - compensation



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OFCCP Activity

- **Litigation initiated by Department of Labor Solicitor's Office in calendar year 2017 (from OFCCP website)**
 - JPMorgan Chase - compensation
 - Oracle - compensation, hiring
 - Google - compensation



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OFCCP Organizational Changes

- EEOC/OFCCP consolidation - dead for the coming year
- Budget for Fiscal Year 2018 (10/2017-9/2018)
 - Current budget \$105 million
 - Proposed budgets range from \$88 million to \$103 million
- Potential impact of a lower budget
 - Fewer compliance officers = fewer audits, shorter audits or both
 - Fewer bricks and mortar offices = increased likelihood of centralization
 - Continued lack of training due to limited funds = less knowledgeable staff making for more challenges in compliance reviews
 - Buyouts and retirements to get total compensation down = less experienced staff



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Issues to Consider

- Independent Contractors v Employees
- Compensation
 - OFCCP focus continues (inertia)
 - Google litigation
 - Concerns and impact on all contractors
 - Lessons learned



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Key Focus Reminders

- **Applicant Recordkeeping**
 - Dispositions are critical in being able to analyze your data
 - Review periodically: disposition choices and how they are being used
 - Evergreen (always open or for extended period) requisitions



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Key Focus Reminders

- **Protected Veterans and Individuals with Disabilities**
 - Outreach efforts
 - Consequences of failing to meet:
 - Hiring goal for Protected Veterans of 6.7% (varies by year)
 - Utilization goal for Individuals with Disabilities of 7%
- **Good faith efforts/outreach for women and minorities**
 - If failed to meet a Job Group goal, OFCCP expects (in an audit) an explanation of good faith efforts/outreach undertaken



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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/Webinar 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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