



Ellen Shong &  
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# 2018 OFCCP Developments

What Federal Contractors Need to Know  
for 2019



November 28, 2018

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# Today's Agenda

- Recently issued notices and updates
- Review of 2018 OFCCP Directives
- Possible upcoming changes (or not!)
- OFCCP activity and organizational changes
- Reminders for contractors



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# Recently Issued Notices and Reminders on Older Regulations

EO No.	Title	Effective Date	Comments
National Interest Exemption	Hurricane Florence National Interest Exemption	September 17, 2018 - December 17, 2018	Eligible contractors exempt from having to develop written affirmative action programs under EO 11246, VEVRAA and Section 503
National Interest Exemption	Hurricane Michael National Interest Exemption	October 11, 2018 - January 11, 2019	Eligible contractors exempt from having to develop written affirmative action programs under EO 11246, VEVRAA and Section 503
National Interest Exemption	California Wildfires National Interest Exemption	November 19, 2018 - February 19, 2019	Eligible contractors exempt from having to develop written affirmative action programs under EO 11246, VEVRAA and Section 503
13658	Establishing a Minimum Wage for Contractors (29 CFR 10) <ul style="list-style-type: none"> <li><i>Min. wage increases to \$10.60 and tipped employees min. cash wage of \$7.40, eff. 1/1/2019</i></li> </ul>	Contracts entered into/modified on or after 1/1/2015	<i>Limited to certain types of federal government contracts</i>
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>Limited to certain types of federal government contracts</i>

# Recently Issued Notices and Regulations

## National Interest Exemptions - Hurricanes

- Applicable to contracts for relief efforts due to hurricanes Florence and Michael
- Post-hurricane and for three months - 9/17/2018 to 12/17/2018 for Florence, and 10/11/18 to 1/11/19 for Michael
- Exemption applies to new service & supply and construction contracts solely and specifically to provide hurricane relief
- Contract must contain specific exemption language
- Exempted contractors remain subject to EO, VEVRAA and Rehab non-discrimination provisions, job listing, posting, recordkeeping requirements

FAQs:

<https://www.dol.gov/ofccp/regs/compliance/faqs/HurricaneMichaelFAQs.htm>

<https://www.dol.gov/ofccp/regs/compliance/faqs/NIE-FAQs.htm>



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# Recently Issued Notices and Regulations



## National Interest Exemptions - Wildfires

- Applicable to contracts for relief efforts due to California wildfires
- Effective for three months - 11/19/2018 to 2/19/2019
- Exemption applies to new service & supply and construction contracts solely and specifically to provide California wildfire relief
- Contract must contain specific exemption language
- Exempted contractors remain subject to EO, VEVRAA and Rehab non-discrimination provisions, job listing, posting, recordkeeping requirements

FAQs:

<https://www.dol.gov/ofccp/regs/compliance/faqs/CaliforniaWildfiresFAQs.htm>

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# 2018 OFCCP Directives

- 2018-01 - Use of Predetermination Notices
- 2018-02 - TRICARE Subcontractor Enforcement Activities
- 2018-03 - Executive Order 11246 § 204(c), religious exemption
- 2018-04 - Focused reviews of contractor compliance
- 2018-05 - Analysis of Contractor Compensation Practices During a Compliance Evaluation
- 2018-06 - Contractor Recognition Program
- 2018-07 - Affirmative Action Program Verification Initiative
- 2018-08 - Transparency in OFCCP Compliance Activities
- 2019-09 - OFCCP Ombud Service



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# 2018 OFCCP Directives

## 2018-01 - Use of Predetermination Notices

- Predetermination Notices (PDNs) are not new
- Informs contractor during a compliance review of OFCCP's preliminary findings of individual or systemic discrimination after OFCCP has concluded its investigation.
  - If OFCCP has provided earlier adequate explanations on findings, PDN may not be required.
- In the past, OFCCP limited the issuance of PDNs to systemic cases or combined them with a proposed Notice of Violation
- The PDN when properly used would
  - provide the contractor with information on the findings (not favorable to contractor)
  - provide an opportunity (15 calendar days) to rebut OFCCP's findings before NOV is issued



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# 2018 OFCCP Directives

## 2018-02 - TRICARE Subcontractor Enforcement Activities

- Only affects federal government subcontractors related to TRICARE (healthcare) community
- Extends the five-year moratorium established in 2014 in Directive 2014-01 by two years so it now is effective until May 7, 2021
- Continues to place on hold OFCCP's jurisdiction and oversight over federal subcontractors with TRICARE contracts while the agency and Congress address this matter legislatively
- The moratorium was also amended to include "Veterans Affairs Health Benefits Program Providers" in addition to TRICARE subcontractors



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# 2018 OFCCP Directives

## 2018-03 - Executive Order 11246 §204(c), religious exemption

- Recognizes recent legal developments regarding “freedoms and anti-discrimination protections” for religion-exercising organizations (such as Masterpiece Cakeshop or Hobby Lobby cases)
- Issued to ensure OFCCP staff take these developments into account when enforcing EO 11246
  - “cannot act in a manner that passes judgement upon or presupposes the illegitimacy of religious beliefs and practices” and must “proceed in a manner neutral toward and tolerant of ... religious beliefs”
  - Cannot “condition the availability of [opportunities] upon a recipient’s willingness to surrender his [or her] religiously impelled status
  - Must permit “faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for ... [Federal] contracts.”
  - Must respect the right of “religious people and institutions... to practice their faith without fear of discrimination or retaliation by the Federal Government.”
- In force until future rulemaking (with public comment opportunity)



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# 2018 OFCCP Directives

## 2018-04 - Focused reviews of contractor compliance

- Currently, a compliance review (audit) is conducted by OFCCP to review compliance under all three programs per EO 11246 (Women/Minorities), Section 503 (Individuals with Disabilities), and VEVRAA (Protected Veterans)
- Going forward, OFCCP will conduct a portion of compliance reviews focusing on just one of the three programs
- A focused review will include an onsite comprehensive review with interviews of managers responsible for EEO and AA compliance and employees



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# 2018 OFCCP Directives

## 2018-05 - Analysis of Contractor Compensation Practices During a Compliance Evaluation

- Replaces OFCCP Directive 2013-03 (aka Directive 307)
- Provides OFCCP staff with standard procedures for reviewing compensation during a compliance review and seeks to encourage contractor self-audit
- Provides information about how OFCCP will analyze compensation data, including identifying similarly situated employees, creating pay analysis groups, statistical analysis and modeling



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# 2018 OFCCP Directives

## 2018-05 - Contractor Comp (cont.)

- **Use of Statistical and Other Evidence**
  - OFCCP uses statistical analyses for pay analyses and seeks non-statistical anecdotal evidence from review of documents and interviews
  - OFCCP “will be less likely to pursue a matter where statistical data are not corroborated by non-statistical evidence of discrimination unless the statistical evidence is exceptionally strong”



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# 2018 OFCCP Directives

## 2018-05 - Contractor Comp (cont.)

### ▪ Data Request and Review Procedures

- OFCCP gets the data for its analyses from the employee level data required to be submitted by the contractor in the scheduling letter (Item 19)
- “Data the contractor maintains in electronic format must be submitted in complete, readable and useable electronic format upon request.”
  - Many contractors do not have all data in electronic format. No obligation exists to create and submit to the agency in electronic format.

For example, information on prior experience typically is found in the application or resume at the time of hire but not as discrete data elements. However, at some point if this information is able to explain the difference, it will need to be taken into account.



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# 2018 OFCCP Directives

## 2018-05 - Contractor Comp (cont.)

- **Similarly Situated Analysis Groupings**
  - OFCCP must compare employees for analytical purposes and group them somehow
  - OFCCP defines similarly situated employees as “those who would be expected to be paid the same based on: (a) job similarity (e.g., tasks performed, skills required, effort, responsibility, working conditions and complexity); and (b) other objective factors such as minimum qualifications or certifications.”
  - OFCCP compares similarly situated employees by:
    - (1) developing pay analysis groupings (PAGs) of comparable employees; and then
    - (2) statistically controlling for further structural differences among members of the PAG (e.g., division, business unit, product line, location) and individual employee characteristics related to the contractor’s pay determinations (e.g., company tenure, prior experience, education, grade level)



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# 2018 OFCCP Directives

## 2018-05 - Contractor Comp (cont.)

- **Similarly Situated Analysis Groupings (cont.)**
  - OFCCP objective is “use PAGs that mirror a contractor's compensation system. If a contractor provides its compensation hierarchy and job structure ... OFCCP will attempt to design its analysis based on that structure.”
  - “Nevertheless, this assumes that the structure provided is reasonable, that OFCCP can verify the structure as reflected in the contractor compensation policies, if necessary, and that the analytical groupings are of sufficient size to conduct a meaningful systemic statistical analysis.”
    - Reasonableness: “OFCCP may review whether employees within each job group are under a similar compensation system and have a similar job function.”
    - Sufficient size: “There is no bright-line rule, and professionals may disagree, about what constitutes sufficient size for a meaningful systemic statistical analysis of an employer's compensation system. In its preliminary analysis, OFCCP generally seeks to evaluate groups containing employees under a similar pay system performing broadly similar job functions, regardless of group size.”
      - “OFCCP’s approach, however, is to first review each of the pay analysis groups to evaluate whether they contain at least 30 employees under a similar pay system performing broadly similar job functions. OFCCP then additionally tries to ensure that there are at least 10 observations (or employees) per control variables to be able to conduct a sound statistical analysis.”



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# 2018 OFCCP Directives

## 2018-05 - Contractor Comp (cont.)

- **Similarly Situated Analysis Groupings (cont.)**
  - “In the absence of information about a contractor's compensation system, OFCCP will conduct its preliminary desk audit analysis using either EEO-1 or AAP job groups, provided they are reasonable, meet the requirements of 41 C.F.R. § 60-2.12, and are of a sufficient size to conduct a meaningful systemic statistical analysis.”



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# 2018 OFCCP Directives

## 2018-05 - Contractor Comp (cont.)

- **Similarly Situated Analysis Groupings (cont.)**
  - Request for additional information
    - “If the desk audit results warrant further review of a contractor's compensation practices, OFCCP will seek additional information to understand the contractor's compensation system, elements that drive compensation decisions, and job structure.”
    - “Based on these facts, OFCCP may broaden or narrow its preliminary PAGs and subsequent data requests to conform its analysis most closely to the contractor's compensation system and practices, where appropriate”



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# 2018 OFCCP Directives

## 2018-05 - Contractor Comp (cont.)

- **Statistical Methodology and Modeling**
  - OFCCP principles on statistical analysis
    - Use multiple linear regression analysis
    - Separately analyze base pay and total compensation, and, if necessary, components of compensation (e.g., bonus, commission, overtime, shift differentials)
    - Analyze statistical outliers for indicators of potentially inappropriate pay analysis groupings



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# 2018 OFCCP Directives

## 2018-05 - Contractor Comp (cont.)

- **Statistical Methodology and Modeling**
  - Variables or factors that might be used in the statistical analysis
    - Sex
    - Race/ethnicity (evaluate effect of sex or race in separate regression models)
    - Tenure
    - Education
    - Age (as a proxy for prior experience in the desk audit only)
    - Job level or grade
    - Market salary surveys
    - Performance ratings or rankings, where feasible
    - “Test all variables for neutrality, and omit any variables that it determines from its evaluation are tainted by discrimination.”



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# 2018 OFCCP Directives

## 2018-05 - Contractor Comp (cont.)

- **Findings, Transparency and Conciliation (OFCCP promises significant changes from past practices)**
  - “At the conclusion of the desk audit, OFCCP will notify the contractor in writing of the general nature of any preliminary compensation disparities that warrant further information requests or onsite review.”
    - The OFCCP does not consider the outcome of desk audit as final indicator of discrimination though in the past OFCCP compliance officers routinely did consider this final.
  - “OFCCP will attach to any Pre-Determination Notice (PDN) for preliminary discrimination findings ... the individual-level data necessary for the contractor to replicate the PAGs and regression results. The PDN provides the contractor a formal opportunity to offer a non-discriminatory explanation for OFCCP’s preliminary findings prior to a finding of a violation. The PDN and the response will be reviewed by the national office.”
  - “OFCCP will include representatives from OFCCP’s Branch of Expert Services (professional labor economists or statisticians) in the conciliation process, as necessary, to clarify OFCCP variable coding, statistical methods and findings, or answer appropriate questions about the process and assumptions used in calculating back pay.”



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# 2018 OFCCP Directives

## 2018-05 - Contractor Comp (cont.)

### ■ What is a contractor to do?

- Have good compensation policies
- Have a consistent process for establishing salaries
- Document and be able to support/explain initial salary and/or increases in salary
- Compensation analysis or not?
  - Full blown analysis: Requires a lot of data and ability to account for all factors that impact the setting of compensation
  - Cohort analysis: Form cohorts of similarly situated employees and identify outliers based on simple calculations and limited factors (hire date, job date)
  - Review starting salaries of new hires each year
  - Issues
    - Must be willing to research disparities to determine cause
    - Conduct under attorney/client privilege
    - Are you willing to make adjustments where justified based on research?



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# 2018 OFCCP Directives

## 2018-06 - Contractor Recognition Program

- A return to the “carrot” approach used by the OFCCP in the past to encourage contractors through voluntary efforts rather than strictly through enforcement (“stick”) approach
- Program “to recognize contractors with high-quality and high-performing compliance programs and initiatives”
  - With hopes that these can be shared with other contractors
- OFCCP recognizes it cannot evaluate each contractor and therefore is looking for ways to encourage and promote self-compliance
- Program is “under development” and will offer certain incentives to contractors recognized in this program to encourage them to apply



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# 2018 OFCCP Directives

## 2018-07 - Affirmative Action Program Verification Initiative

- OFCCP initiative to develop a program to verify annually that contractors are complying with AAP obligations
  - Currently, verification relies on compliance reviews of a very small percentage of the contractor universe due to limits on OFCCP resources
- Program to include:
  - Annual compliance certification
  - Failure to annually certify increases likelihood of selection for audit
  - Compliance checks to verify compliance
  - AAP submission required at time request for extension of time to submit support data is made
  - Technology to facilitate annual collection of AAPs for OFCCP review



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# 2018 OFCCP Directives

## 2018-08 - Transparency in OFCCP Compliance Activities

- Current Acting Director Craig Leen is very serious about ensuring that OFCCP improves its transparency in dealing with contractors during compliance reviews
- Sets out OFCCP's expectations for contractors during compliance reviews in terms of what they are expected to submit and when
- instructs OFCCP staff on their expectations in terms of the process, timeline and communications in dealing with the contractor
- Some highlights:
  - Contractors expected to submit the written AAP within 30 days of receipt of scheduling letter. A Notice to Show Cause will be issued for failure to submit.
  - Provision for a 30 day extension on the supporting data (applicants, compensation, etc.)
  - OFCCP is attempting to ideally complete a typical desk audit within 45 days where there are no indications of discrimination or other evidence of violations
  - OFCCP staff are expected to maintain regular contact with the contractor, ideally at least once every 30 days
  - Take a collaborative approach during conciliation efforts (for discrimination and major violations). This would include sharing of information and non-statistical findings (significant change here if this is followed by staff).



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# 2018 OFCCP Directives

## 2019-09 - OFCCP Ombud Service

- Provides for Ombudperson in the OFCCP National Office (reports to the Deputy Director)
- Part of effort to be more transparent and improve communication
- Responsibility to facilitate “fair and equitable resolution of specific types of concerns raised by OFCCP external stakeholders in coordination with regional and district offices”
- Allows contractors to have an independent mechanism to share concerns about OFCCP after exhausting normal district and regional office channels
- Ombud service works to bring the parties together and provide an impartial and independent perspective to help facilitate possible resolution
- Ombud service will not:
  - Advocate for either side
  - Give legal advice, etc.
  - Conduct compliance evaluations, complaint investigations or participate in negotiations
  - Have any role in conduct or discipline issues regarding OFCCP staff



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# Possible Upcoming Changes

- 2018 EEO-1 report - No further developments regarding deleted compensation requirements or realigning report with dates with the VETS-4212 report
  - Reminder: Report due by March 31, 2019
    - Employee data for any pay period in the 4<sup>th</sup> Quarter 2018
      - NOTE: If use 12/31/2018 snapshot for EEO-1 reporting, also can use same for the VETS-4212 to be filed in 2019.
      - Calendar AAP (1/1/2019 anniversary date) year contractors can also use this for their AAP.
  - 2019 VETS-4212 due by September 30, 2019
- Functional AAP regulations undergoing changes, among proposed changes
  - Renewal every 5 years (up from 3)
  - Eliminate requirement to undergo at least one compliance review during term
  - Remove requirement of annual update regarding FAAP structure



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# OFCCP Activity

- **Audit activity down**
  - 812 compliance reviews reported for the past Fiscal Year 2018 (10/1/2017 to 9/30/2018). This is the lowest in many years.
  - 1,142 compliance reviews reported in prior Fiscal Year 2017 and that was considered low
    - In the distant past, the high was over 5,000 reviews annually
  - Next OFCCP Director will need to increase this activity level - possibly over 3,000 reviews
- **OFCCP Director**
  - Ondray Harris was Director for only 8 months
  - Craig Leen named in July 2018 as acting Director



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# OFCCP Activity

- **In the past, compliance review observations:**
  - Length of compliance reviews is long
    - 1 to 2 years not unusual
  - Likely to have non-local offices involved in initial phase (desk audit)
  - Phone interviews prior to onsite especially about compensation
  - Compensation analysis undertaken at National office
  - Many data requests
- **Town hall meetings conducted by OFCCP, resulted in some changes spelled out in new Directives especially regarding transparency**



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# OFCCP Activity

- Financial settlements in FY 2018 are estimated at \$16 million+ (FY 2017 was \$24 million). Some significant settlements:

- Dell-EMC \$2.9 million - compensation
- Humana \$2.5 million - compensation
- General Electric \$325k - compensation
- Omnicare of Northern Illinois \$300k - compensation
- Parker Hannefin Corp \$222k - compensation
- Performance Food Group (4 locations) \$600k - hiring
- Roche Diagnostics \$262k - hiring

So far for FY 2019:

- JBS USA \$4 million - hiring (12,625 class members)
- A'viands Food & Service Management \$399k - compensation
- Waste Connections of Missouri \$246k - hiring
- Crothall Laundry \$72k - hiring



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# OFCCP Organizational Changes

- **EEOC/OFCCP consolidation - appears dead**
- **OFCCP so far has escaped severe budget cuts**
  - FY 2018 budget \$105 million despite efforts for significant cuts
  - FY 2019 (began 10/1/2018) budget is \$104 million
  - FY 2020 - talks about requesting 5% cut for most agencies
- **Potential impact of a lower budget (or even flat 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
  - Less money for new systems (such as the AAP certification system)



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# Issues to Consider

- Independent Contractors v Employees
  
- Compensation
  - OFCCP focus continues (inertia)
  - Significant recoveries in FY 2018
  - New Compensation Directive



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# Focus Reminders

- **Protected Veterans and Individuals with Disabilities**
  - Review outreach efforts and complete assessment annually
  - Consequences of failing to meet:
    - Hiring goal for Protected Veterans of 6.4% (3/31/2018)
    - Utilization goal for Individuals with Disabilities of 7%
  - Disability status survey of employees
    - Most need to conduct interim notification to revise status
    - In 2019/2020 (depending on AAP date) need to resurvey all employees
  - Other aspects - reminder of upcoming focused reviews
- **Good faith efforts/outreach for women/minorities**
  - If contractor fails to meet Job Group goal, OFCCP expects (especially during a compliance review) 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](http://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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