

2023 OFCCP Developments

What Federal Contractors Need to Know for 2024

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Today's Agenda

- Recent Executive Orders
- Review of 2023 OFCCP Directives/Notices
- OFCCP activity in 2023
- Noteworthy Developments in 2023
- AAP Areas to Focus on in 2024
- What to Expect in 2024



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Recently Issued Executive Orders and Reminders on Older Regulations

EO No.	Title	Effective Date	Comments
13658	Establishing a Minimum Wage for Contractors <ul style="list-style-type: none"> • Min. wage increases to \$12.90 and tipped employees min. cash wage of \$9.05, <u>eff. 1/1/2024 per FR 9/28/2023 publication</u> 	Contracts entered into/modified on or after 1/1/2015	Applies only to certain types of federal government contracts; superseded 1/30/2022 by EO 14026 to extent inconsistent with 14026
14026	Increasing the Minimum Wage for Federal Contractors <ul style="list-style-type: none"> • Min. wage increases to \$17.20 for both non-tipped and tipped employees effective 1/1/2024 (per FR 9/28/2022). The distinction between non-tipped and tipped employee minimum wages was eliminated as of 2024. 	Contracts entered into/extended on or after 1/30/2022	Applies only to certain types of federal government contracts
14110	Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence <ul style="list-style-type: none"> • Requires federal agencies to undertake action regarding AI in areas such as safety and security standards, privacy protections, advancing equity and civil rights, supporting workers, etc. 	Published October 30, 2023 with various federal agencies given deadlines for specific activities within 30 to 270 days.	No immediate action required of contractors; US Department of Labor charged with tasks that later could impact employers

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2023 OFCCP Directives/Notices

OFCCP Directives issued in 2023:

- 2021-01 Revision 1: Extending the Scheduling Moratorium for Veterans Affairs Health Benefits Program (VAHBP) Providers - 5/1/2023 (Tricare providers moratorium)
- Rescind 2018-03, "Executive Order 11246 § 204(c), religious exemption" issued August 10, 2018. No replacement regulation—see below.
- Rescind 2018-01 "Use of Predetermination Notices (PDN)" issued February 27, 2018. Replaced by Final Rule below.



Regulatory changes:

- Rescinded Rule "Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption" originally effective January 2021
- Final Rule "Pre-Enforcement Notice and Conciliation Procedures" effective 9/5/2023

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Final Rule: Pre-Enforcement Notice and Conciliation Procedures

- OFCCP rescinds and replaces earlier 2020 directive and regulation that, before proceeding to take enforcement action, OFCCP was required to meet specific evidentiary requirements and disclose certain information to the contractor:
 - the specific theory of discrimination under which it was proceeding (disparate treatment v. disparate impact)
 - sufficient quantitative and qualitative evidence that was practically significant:
 - to support a finding of discriminatory intent in the case of disparate treatment
 - and, in the case of disparate impact, the specific policy or practice causing the adverse impact
- The 2023 Rule:
 - relieves OFCCP of the obligation to meet the above listed evidentiary standards and provide the information to the contractor
 - provides OFCCP with more flexibility in issuing pre-determination notices (PDNs) while the compliance review is ongoing
 - allows OFCCP to add additional violations in the formal Notice of Violation and Show Cause Notice without including them in the PDN
 - shortens the period of time in which the contractor has to respond to the PDN from 30-days to 15-days
- Unfavorable for contractors as it eliminates (or significantly diminishes) the OFCCP requirement to share evidence and reasoning for violations during enforcement proceedings and the conciliation process

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OFCCP 2023 Activity

Compliance Reviews (audits) for Supply and Service contractors still low

- **898** closed for most recent year, FY 2023 (10/1/2022 to 9/30/2023)
 - Compared to **866** in the prior fiscal year. Basically flat but ends recent decline.
- **122** Conciliation Agreements (CA) acknowledging violations signed
 - Approximately 13% of reviews ended with CA
 - Compared to 116 CAs in prior fiscal year (about half w/ discrimination)
- Additional 175 Construction Contractor audits closed in FY 2023
 - Compared to 33 in the prior fiscal year (not included in above S&S counts)



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OFCCP 2023 Activity: Financial Settlements

FY 2023 \$17.3 million v. FY 2022 \$11.7 million v. FY 2021 \$26.4 million

Some significant settlements in FY 2023

Hiring

- BNY Mellon \$1.9 million - females, African Americans, Hispanics
- Pitney Bowes \$1.6 million - various race groups
- Rosemount Aerospace Inc. \$712k - African Americans
- US Foods Inc. \$499k (and several other CAs) - females
- Navient \$700k - African Americans, Whites
- LabCorp Central Laboratory Services, LP \$525k - Asians, African Americans

Compensation

- Pfizer \$2 million - females
- Florida International University \$575k - females
- UniFirst Corporation \$226k - females
- Designed Metal Connections \$122k - females

Only 9 systemic pay discrimination settlements out of 56 discrimination cases which is trending lower over the years



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OFCCP 2023 Activity: Current and Future Audits

OFCCP issued multiple Corporate Scheduling Announcement List (CSAL) of contractor establishments to be audited

Supply and Service contractors:

- January 2023 CSAL issued with 500:
 - 452 establishment reviews, 24 FAAPs, 24 CMCE
- September 2023 CSAL issued with 1,000:
 - 922 establishment reviews, 36 FAAPs, 12 universities and 30 CMCE

Construction contractors:

- June 2023 CSAL issued for 250 construction contractors
- March 2023 designated 12 mega construction projects to work with and review contractors
- October 2023 designated additional 12 mega construction projects to work with and review contractors



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OFCCP 2023 Activity: Observations on Compliance Reviews

- OFCCP continues with detailed in-depth reviews
- OFCCP continues with many requests for data, documents and interviews
- As in the last several years, with current OFCCP staffing levels unchanged, there are limits as to how many reviews can be initiated and completed (probably less than 1,000 annually?)



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Noteworthy Developments - 2023

- OFCCP Director Jenny Wang resigned in March 2023
 - There is an acting director in place, but it is unlikely a new director will be appointed before end of current Biden administration. OFCCP unlikely to make any major policy or regulatory changes.
- 2023 was the second year of AAP certification
 - Significant numbers of contractors still did not register and certify, potentially putting them at higher risk of audit
- EEOC revised EEO-1 report forms
 - Multi-establishment employers file “establishment report” (replaces old Type 4 or 8) regardless of headcount, along with headquarters and/or consolidated report
 - Reminder deadline for EEO-1 filing is December 5th (today). But EEOC usually keeps filing website open for a limited time and notifies non-filers.
- OFCCP updated Protected Veterans hiring benchmark to 5.4% eff 3/31/2023



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Noteworthy Developments - 2023 (con't)

- EEOC and OFCCP continue to look at the use of Artificial Intelligence
 - OFCCP asking about AI in compliance review (see Scheduling Letter below)
 - EEOC continuing its efforts to examine more closely the use of AI and to provide guidance to employers
- OFCCP issued revised self-identification form for Individuals with Disabilities
 - Published in April and effective through April 2026
 - Minor revisions including modifications to suggested disability categories
- OFCCP issued revised Supply and Service compliance review scheduling letter (see more detail below)
- Supreme Court decision on UNC-Chapel Hill and Harvard admissions policy and impact on AAP compliance obligations and activity (see more detail below)



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Noteworthy Developments - 2023 (con't) Revised Scheduling Letter

OFCCP published revised scheduling letter for Supply and Service contractors

- Issued after OMB approval, August 2023. Effective immediately.
- More data and document requests required of contractors
- More burdensome for contractors
 - Will require more time for contractors to prepare their initial submission
 - Possibly 50 to 100% more time for contractors



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Noteworthy Developments - 2023 (con't) Revisions to Scheduling Letter

- OFCCP can email scheduling letter with return receipt request rather than mailing via USPS
- Expands potential scope of sites being reviewed and what is to be submitted
 - ‘...post-secondary institutions and contractors with “campus-like settings” in which the contractor maintains multiple AAPs for the same campus, must submit the requested information for all AAPs for that campus located in that city.’
- Requests contractors to submit their AAPs and itemized listing documents electronically to an OFCCP supplied email address
- Clarifies that OFCCP may initiate enforcement proceedings if the requested information is not provided within 30 days of contractor receipt of scheduling letter. Consistent with Directive 2022-02 issued last year where limited extensions allowed.



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Noteworthy Developments - 2023 (con't) Key Revisions to Scheduling Letter



- **Item 7 (new)** adds requirement for Women/Minorities AAP to provide “documentation demonstrating the development and execution of action-oriented programs designed to correct any problem areas identified pursuant to 41 CFR § 60-2.17(b).”
 - Impacted areas include utilization goals for women or minorities, personnel activity (applicant selections), compensation, etc.

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Noteworthy Developments - 2023 (con't) Key Revisions to Scheduling Letter



- Section 503 (Individuals with Disabilities) - **Item 8** expands documentation requirements to be submitted by contractor regarding outreach and positive recruitment efforts
 - Includes requirement to “indicate whether you believe the totality of your efforts were effective”
 - If not considered effective, provide detailed documentation describing your efforts in implementing and identifying alternative efforts...
- Section 503 - **Item 11** expands documentation for Individuals with Disabilities utilization analysis (7% representation goal)
 - Greatly expands what contractor must provide. For example, “if any underutilization of individuals with disabilities is identified provide a description of the steps taken to determine whether and where impediments for equal opportunity exist... action oriented programs...”

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Noteworthy Developments - 2023 (con't) Key Revisions to Scheduling Letter



- VEVRAA (Protected Veterans) - **Item 12** expands documentation requirements to be submitted regarding outreach and positive recruitment efforts
 - Again includes requirement to “indicate whether you believe the totality of your efforts were effective”

- EEO-1 report section - **Item 16** adds request for post-secondary institutions to submit copy of IPEDS HR Survey component data for last three years

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Noteworthy Developments - 2023 (con't) Key Revisions to Scheduling Letter



- **Item 18** the request for employment activity has a number of changes:
 - Requests documentation of established policies and practices related to promotions
 - If contractor maintains data on whether promotions are “competitive” or “non-competitive” they may provide that in the submission
 - Adds request to provide “For each job title or job group, provide the total number of employees, by gender and race/ethnicity, as of the start of the immediately preceding AAP year.” In the past, only the Job Group demographics information was required for the Progress Towards Goals section.

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Noteworthy Developments - 2023 (con't) Key Revisions to Scheduling Letter



Employee level compensation data in **Item 19**:

- Requires two sets of snapshot data for employees (compared to prior scheduling letter with just one set of data required):
 - As of date of current AAP's Workforce Analysis or Organizational Display
 - As of date of prior year's Workforce Analysis or Organizational Display
- Change to mandate submission of additional data on compensation factors, and compensation documentation and policies. Previously this was optional or suggested.

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Noteworthy Developments - 2023 (con't) Key Revisions to Scheduling Letter



- **Item 21 (new)** requires contractors to “identify and provide information and documentation of policies and practices, or systems used to recruit, screen and hired, including the use of artificial intelligence, algorithms, automated systems or other technology-based selection procedures.”

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Noteworthy Developments - 2023 (con't) Key Revisions to Scheduling Letter

- Evaluation of compensation system - **Item 22 (new)**
 - Requires contractor submit representation that it has satisfied obligation to evaluate “compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities,” as part of its “in-depth analyses of its total employment process” required by 41 CFR 60-2.17(b)(3)
 - The following information must be included:
 - Date compensation analysis was completed
 - Number of employees the analysis included and the number and categories of employees the analysis excluded
 - Which forms of compensation were analyzed and, where applicable, how the different forms of compensation were separated or combined for analysis (e.g., base pay alone, base pay combined with bonuses, etc.)
 - That compensation was analyzed by gender, race, and ethnicity
 - Method of analysis used (e.g., multiple regression analysis, decomposition regression analysis, meta-analytic tests of z-scores, compa-ratio regression analysis, rank-sums tests, career-stall analysis, average pay ratio, cohort analysis, etc.)



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Noteworthy Developments - 2023 (con't) Key Revisions to Scheduling Letter

- EEO policies - **Item 24 (new)** adds request for “equal employment opportunity (EEO) policies, including antiharassment policies, policies on EEO complaint procedures, and policies on employment agreements that impact employees’ equal opportunity rights and complaint processes (e.g., policies on arbitration agreements).”
- Personnel process assessment - **Item 25** expands request for documentation as follows:
 - “This assessment shall include, at a minimum, a description of the assessment, any impediments to equal employment opportunity identified through the assessment, and any actions taken, including modifications made or new processes added, as a result of the assessment...”



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Noteworthy Developments - 2023 (con't) Harvard/UNC Supreme Court Decisions Using Race in College Admission Decisions

UNC/Harvard admissions policies permitted a student applicant's race to be considered as part of an overall "holistic" assessment of the individual, along with things like grades, references, and extracurricular activities

- UNC case alleged discrimination against White and Asian American students in violation of the *Equal Protection Clause of the 14th Amendment*
- Harvard case alleged discrimination against Asian Americans in violation of *Title VI of the Civil Rights Act of 1964* (prohibits discrimination on the basis of race, color or national origin by federally funded programs)

HOLDING: Colleges and universities may no longer consider race as part of the college admissions process

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Noteworthy Developments - 2023 (con't) Harvard/UNC Supreme Court Decisions Using Race in College Admission Decisions

Harvard/UNC Decision:

- was not an employment case and has no direct impact on employers
- has NO impact on federal contractor affirmative action obligations under EO 11246, Rehab Act or VEVRAA.

Covered federal contractors **REMAIN REQUIRED** to:

- make *targeted recruiting efforts (OUTREACH)* aimed at increasing the diversity of applicant pools and pipelines and
- set *placement goals* for hiring and promotion of women and minorities;
- utilization goal for IWDs; and,
- hiring benchmark for covered veterans

BUT ARE STRICTLY PROHIBITED from:

- Using **quotas** or **set asides**, or giving **preferences**

REMEMBER 41 CFR 60-2.16(e)!!

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Noteworthy Developments - 2023 (con't) Harvard/UNC Supreme Court Decisions Using Race in College Admission Decisions

- 41 CFR 60-2.16: In establishing placement goals, the following principles also apply:
- (1) Placement goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. **Quotas are expressly forbidden.**
 - (2) In all employment decisions, the contractor must make selections in a nondiscriminatory manner. **Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's race, color, religion, sex, sexual orientation, gender identity, or national origin.**
 - (3) **Placement goals do not create set-asides for specific groups,** nor are they intended to achieve proportional representation or equal results.
 - (4) **Placement goals may not be used to supersede merit selection principles.** Affirmative action programs prescribed by the regulations in this part do not require a contractor to hire a person who lacks qualifications to perform the job successfully, or hire a less qualified person in preference to a more qualified one.

Common DEI Activities

Permissible	Uncertain/Caution	High Risk	Impermissible
<ul style="list-style-type: none"> Recruiting using affinity-based job fairs, diverse media, HBCUs, and similar organizations Equal employment opportunity to all employees and applicants Defining "diversity" broadly (not limited to protected classes only) Providing disability accommodations for applicants and reviewing job descriptions for accessibility Trainings on anti-harassment, implicit bias, and anti-discrimination Maintaining demographic data for EEO-1 forms and assessment of selection processes (with proper storage and appropriate access) Mandatory (under EO 11246 and OFFCP regulations) and Voluntary Affirmative Action programs (compliant with Title VII and EEOC guidance) Factoring in compliance with the EEO policy and Affirmative Action policies with compensation For suppliers - fostering relationships with organizations that provide diverse business accreditation; asking vendors to describe their DEI programs/commitments 	<ul style="list-style-type: none"> Pipeline, mentorship, training, and sponsorship programs for individuals based on protected classes (consider opening to all employees to opt-in) Statements discussing DEI goals (should be vetted by counsel to ensure not to inadvertently say anything impermissible or something that could be used as evidence of reverse discrimination) Employee Resource Groups (should be open to all employees in and outside of the unifying protected class) Aspirational goals for diversity of a workplace (allowed but careful not to be a quota; how goals are achieved matters) Consideration of a diverse slate of qualified applicants Practices that may be interpreted as employment decisions based on the employee's or applicant's protected class; Facially neutral policies/practices that may have adverse impact Engaging suppliers based on diverse ownership The use of self-identification surveys requesting more demographic information than required (permissible with proper procedures in place) 	<ul style="list-style-type: none"> Allowing those with hiring decision-making power to have access to demographic information creates a presumption that information was used in the decision-making process Commitment to a certain dollar number to racially diverse suppliers (challenged under Section 1981 and various state law); a points-based system awarded to diverse vendors Tying in compensation with certain diversity hiring targets 	<ul style="list-style-type: none"> Protected class quotas Job openings, scholarships, and internships limited only to those of a certain protected class Employment decisions based on the individual's protected class

AAP Areas to Focus on in 2024

Compensation

- Contractors need to undertake a review of their compensation “system”
- But sophisticated statistical analysis may not be always be necessary or appropriate
 - Consider review of compensation system (non-quantitative)
 - Cohort analysis or more limited calculations
- Can you answer questions on the Scheduling Letter regarding compensation review?



Outreach efforts

- **Protected Veterans and Individuals with Disabilities**
 - Need to review results of hiring benchmark goal for Protected Veterans and utilization goal for Individuals with Disabilities
 - Engage with local outreach partners. Just posting jobs with outreach agencies is not sufficient under the regulations.
 - Complete assessment of outreach efforts annually to evaluate effectiveness
- **Women and Minorities**
 - What are your efforts to make good faith efforts for any goals established? Document

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What to Expect in 2024

- OFCCP continues to ask for a large increase in their budget to add staff
- OFCCP indicated in past they plan to issue proposed changes to modernize regulations in Spring 2023 but did not happen yet for
 - Executive Order 11246 (women/minorities)
 - VEVRAA (veterans) and Section 503 (disabled)
- Possible return of EEO-1 Component 2 requirement for compensation data could be reinstated given Democratic control of EEOC Commission. But probably unlikely before 2024 reporting cycle.
- Compensation remains a priority during compliance reviews, especially with recent changes to the Supply and Service scheduling letter
- OMB considering modifying categories for race and ethnicity surveys:
 - Adding category for Middle Eastern and North African, separating from White category



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What to Expect in 2024

- Low numbers of compliance reviews
 - Still under 1,000 given OFCCP's similar headcount and spending longer on each review
- If selected for a compliance review (audit)
 - Contractors will spend time on the initial submission
 - Probably more data, document and interview requests during review
 - Longer reviews
 - Continued focus on compensation and hiring
 - Less transparency in reviews and reluctance by OFCCP to share basis of findings
- Continued AAP certification requirement and consequences for not certifying



Questions?

PRESENTATION AVAILABLE FOR VIEWING

Don't forget...

- Today's PowerPoint presentation and recording will be available by Friday on www.smithlaw.com/newsroom/events 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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