

2016 OFCCP DEVELOPMENTS

What Federal Contractors Need to Know for 2017

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Today's Agenda

- Recently issued regulations and changes effective in 2016
- Future regulations and changes
- OFCCP activity
- Post-election

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Recently Issued Regulations

EO No.	Title	Status	Effective Date	Comments
n/a	Update to Sex Discrimination Guidelines	<u>Final regulations</u> issued 6/14/2016	<u>8/15/2016</u>	Single contract, or contracts with combined total in any 12-month period, in excess of \$10,000; gov't bills of lading, federal funds depository, US savings bonds/notes in any amount
13673	Fair Pay and Safe Workplaces (Blacklisting)	<u>Final regulations</u> issued 8/25/2016	<u>10/25/2016</u> (phased); but court injunction 10/24/16	Certification by certain contractors of labor law compliance; paycheck transparency; pre-dispute arbitration limitations
13706	Establishing Paid Sick Leave for Federal Contractors	<u>Final regulations</u> issued 9/30/2016	Solicitations on or after <u>1/1/2017</u>	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

Sex Discrimination Final Rule

- Promulgated in the 1970's...

“OFCCP brings guidelines from the “Mad Men” era to the modern era.”

OFCCP's Sex Discrimination Final Rule Fact Sheet

- Updates are generally in line with current Title VII requirements, so nothing really new for contractors

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Sex Discrimination Final Rule

- Prohibits compensation discrimination
 - Contractors may not pay similarly situated employees differently because of their sex
 - Contractors may not deny opportunities for overtime work, training or assignments that may lead to advancement, or higher-paying shifts or positions because of a worker's sex
 - Employees may recover lost wages any time a contractor pays compensation that is the result of discrimination, not just when pay decision is first made

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Sex Discrimination Final Rule

- Prohibits discrimination on the basis of pregnancy, childbirth or related medical conditions
- Unlawful discrimination includes:
 - Not hiring woman because she is pregnant or of childbearing capacity
 - Firing or requiring a woman to go on leave because she is pregnant
 - Limiting a pregnant employee's job duties solely because she is pregnant or requiring her to provide a doctor's note to continue working

Sex Discrimination Final Rule

- Requires workplace accommodations, such as:
 - extra bathroom breaks and light-duty assignments, to an employee who needs such accommodations because of pregnancy, childbirth, or related medical conditions,
 - in certain circumstances where comparable accommodations are made to other workers, such as those with disabilities or occupational injuries.

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Sex Discrimination Final Rule

- Denial of workplace accommodations unlawful where:
 - accommodations are denied only to employees affected by pregnancy, childbirth, or related conditions
 - accommodations are provided to other employees whose ability or inability to perform their job duties is similarly affected, the denial of accommodations to employees affected by pregnancy, childbirth, or related medical conditions imposes a significant burden on those employees, and the contractor's asserted reasons for denying accommodations do not justify that burden or
 - an intent to discriminate is otherwise shown, for example, by evidence of discriminatory statements made by managers when denying requested accommodations

Sex Discrimination Final Rule

- Denial of workplace accommodations unlawful where:
 - Denial of accommodations to employees who are unable to perform some of their job duties because of pregnancy, childbirth, or related medical conditions has adverse effect on women and the policy is not shown to be job-related and consistent with business necessity.

For example, where policy of offering light duty only to employees with on-the-job injuries results in men being offered accommodations when they cannot perform their duties, but women affected by pregnancy, childbirth, or related medical conditions not being accorded accommodations, the policy would be impermissible unless the contractor could show that limiting accommodations in this way was job-related and consistent with business necessity.

Sex Discrimination Final Rule

- Leave
 - Job-guaranteed medical leave, including paid sick leave, must be provided to pregnancy, childbirth or related medical conditions on same terms as provided for medical conditions that are similar in their effect on employees' ability to work
 - Job-guaranteed family leave, including any paid leave, must be provided to male employees on the same terms as it is provided to female employees

Sex Discrimination Final Rule

- Protects fringe benefits
 - Discrimination on the basis of sex (regardless of greater cost to one sex) is prohibited with regard to fringe benefits such as:
 - medical, hospital, accident, life insurance, and retirement benefits
 - profit-sharing and bonus plans
 - leave
 - other terms, conditions, and privileges of employment

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Sex Discrimination Final Rule

- **Prohibits employment decisions made on the basis of sex-based stereotypes**
 - Contractors may not treat female or male employees or applicants differently based on the stereotypical assumption that women are more likely to have caregiving responsibilities
 - Mothers may not be denied employment opportunities that are available to fathers based on the faulty assumption that mothers' childcare responsibilities will conflict with their job performance
 - Fathers may not be denied flexible workplace arrangements that are available to mothers based on the faulty assumption that men do not have and do not assume childcare responsibilities

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Sex Discrimination Final Rule

- **Prohibits employment decisions made on the basis of sex-based stereotypes**
 - Employees or applicants may not be treated adversely because they fail to comply with expectations about
 - how women and men should look or act or
 - what kinds of jobs they should do

Sex Discrimination Final Rule

- **Prohibits harassment and hostile work environment**
 - Unwelcome sexual advances, requests for sexual favors, offensive remarks about a person's sex, and other verbal or physical conduct of a sexual nature when such conduct:
 - unreasonably interferes with an individual's work performance
 - becomes the basis for employment decisions or
 - creates a hostile working environment

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Sex Discrimination Final Rule

- **Protects transgender workers**
- Sex discrimination includes discrimination because of an employee's gender identity
 - Contractors must allow workers to use bathrooms, changing rooms, showers, and similar facilities consistent with the gender with which the workers identify
 - An explicit, categorical exclusion of coverage for all care related to gender dysphoria or gender transition is facially discriminatory because such an exclusion singles out services and treatments for individuals on the basis of their gender identity or transgender status

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Sex Discrimination Final Rule

- Final Rule has Best Practices Appendix
 - Contractors are not required to adopt the best practices

For additional information go to the OFCCP's website at www.dol.gov/ofccp/sexdiscrimination.html

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Fair Pay and Safe Workplaces

- Requires employers seeking contracts of \$500,000+ to disclose any “merits determination, arbitral award or decision, or civil judgement, as defined in the DOL Guidance, rendered against the” contractor within the preceding three years for violations of 14 labor laws
 - State law equivalents to be subject to follow on rulemaking and guidance
- Serious, Willful, Repeated, and Pervasive (SRWP) violation

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Fair Pay and Safe Workplaces

Federal Labor Law Reportable Violations

DOL Wage and Hour Division

- Fair Labor Standards Act
- Migrant and Seasonal Agricultural Worker Protection Act
- Davis-Bacon Act
- Service Contract Act
- Family and Medical Leave Act
- E.O. 13658 (Establishing a Minimum Wage for Contractors)

DOL Occupational Safety and Health Administration (OSHA)

- Occupational Safety and Health Act of 1970
- OSHA-approved State Plans

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Fair Pay and Safe Workplaces

Federal Labor Law Reportable Violations

DOL Office of Federal Contract Compliance Programs

- Section 503 of the Rehabilitation Act of 1973
- The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974
- E.O. 11246

National Labor Relations Board

- National Labor Relations Act

Equal Employment Opportunity Commission

- Title VII of the Civil Rights Act of 1964
- Americans with Disabilities Act of 1990
- Age Discrimination in Employment Act of 1967
- Equal Pay Act

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Fair Pay and Safe Workplaces DOL Guidance

- Describes the role of Agency Labor Compliance Advisors (ALCAs) who will assist contracting officers with reviewing and making determinations about disclosed labor violations, as well as helping contractors take steps to come into compliance
- Explains how ALCAs will make an assessment to the contracting officer regarding a contractor's record of labor law compliance
- ALCAs classify violations, weigh those violations with mitigating factors presented by the contractor, and make recommendations to the contracting officer as to whether the contractor has satisfactory integrity and business ethics
- Appendices show examples of SRWP violations for each applicable labor law

Fair Pay and Safe Workplaces FAR Rule

- As directed by the Executive Order, the FAR regulations build on DOL's Guidance and existing federal procurement policies and practices
- In accordance with the FAR Rule:
 - Prospective contractors interested in submitting for a specific federal acquisition will be required to disclose in GSA's System for Award Management whether there "have been" or "have not been" violations of the 14 federal labor laws rendered against them
 - If a contractor indicates that it had labor violations during the reporting period and the contracting officer initiates a responsibility determination, the contractor will be asked to provide more information about the violation and will be given the opportunity to provide any mitigating factors and remedial measures taken to address the violations
 - Subcontractors will disclose details regarding their labor violations, mitigating factors, and remedial actions directly to DOL

Fair Pay and Safe Workplaces

Pay transparency

- Covered contractors and subcontractors are required to give their workers wage statements (i.e., information concerning hours worked, overtime hours, gross pay and rate of pay, and any additions to or deductions made from their pay)
- Workers who are treated as independent contractors are required to receive a notice informing them of their independent contractor status
- Contractors and subcontractors must also provide written notice to inform workers if they are exempt from overtime pay

Pre-dispute Arbitration

- Limits (sub)contractors' (contracts of \$1 million or more) ability to use pre-dispute arbitration agreements for claims arising under Title VII or any tort related to or arising out of sexual assault or harassment
- Does not apply to employees who are covered by collective bargaining agreements or employee consents that occurred prior to government contract bid

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Effective Dates

Preliminary Injunction granted on October 25, 2016 blocking all but the paycheck transparency clause

- October 25, 2016: The FAR Rule takes effect and disclosure requirements and assessment begin for contracts greater than or equal to \$50 million.
- January 1, 2017: Paycheck transparency clause takes effect
- April 25, 2017: Disclosure requirement and assessment threshold is reduced to \$500,000
- October 25, 2017: Mandatory disclosure to DOL and assessment begins for all subcontractors and subcontracts that exceed \$500,000

Fair Pay and Safe Workplaces

For additional information go to the Department of Labor's website:

www.dol.gov/asp/fairpayandsafeworkplaces

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Paid Sick Leave

- Coverage: Only certain contracts entered into or modified on or after January 1, 2017:
 - Construction contract covered by Davis-Bacon Act
 - www.dol.gov/whd/govcontracts/dbra.htm
 - Services contract covered by the Service Contract Act
 - www.dol.gov/whd/govcontracts/sca.htm
 - Concessions contract (right to use federal property for providing services)
 - Contract in connection with Federal property or lands and related offering services for Federal employees, their dependents, or the general public
- Same contracts as covered by EO 13658 (Min Wage) plus some USPS contracts; some exceptions apply; subcontracts covered too*
- In general, most contractors are not impacted

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Paid Sick Leave Accrual

- Accrual
 - One hour of paid sick leave for every 30 hours ***worked on or in connection with a covered contract***
 - Calculate no less frequently than at conclusion of each pay period or each month, which interval shorter
 - No requirement to accrue in increments of less than one hour. But any fraction to be added to hours worked in subsequent pay periods
 - Hours worked (Exempt – assume either 40 hours or track actual hours)
 - Some exceptions for certain Collective Bargaining Agreements (CBA's)

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Paid Sick Leave Accrual Notification

- Notification
 - Notify employees in writing of amount of paid sick leave accrued but not used
 - No less frequently than at conclusion of each pay period or each month, which interval shorter
 - Upon termination
 - Upon reinstatement
 - Existing procedure for informing employees of available leave such as paycheck can be used to satisfy if written (including electronically)

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Paid Sick Leave Frontload Option

- Option to provide leave hours up front
 - Can choose to provide 56 hours at beginning of year
 - For new hires (or new to contract) can grant prorated number of hours at beginning of work on contract
 - Contractor is free from having to do calculations on accruals

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Paid Sick Leave Accrual

- Maximum accrual, carryover, reinstatement
 - May limit accrual to 56 hours per accrual year
 - Paid sick leave carries over from one accrual year to the next but accrual may be capped so that employee does not have more than 56 hours accrued at any given time
 - Carryover hours cannot count towards the limit of hours for the current accrual year
 - Accrual cap does not apply to frontloading method
 - Paid sick leave to be reinstated for employees hired by the same contractor within 12 months after a job separation
 - No requirement for contractor to pay employee for unused paid sick leave upon termination
 - If contractor does pay for such, no longer obligated to reinstate hours upon rehire

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Paid Sick Leave Use

- Use of Paid Sick leave
 - Due to
 - Physical or mental illness, injury or medical condition of employee
 - Obtaining diagnosis, care or preventive care from health care provider by the employee
 - Caring for the employee's child, parent, spouse, domestic partner, or any other individual related by blood or affinity...
 - Domestic violence, sexual assault, or stalking...
 - Account in increments of no greater than one hour
 - Same benefits and pay must be provided employee when using paid sick leave
 - May not limit amount of paid sick leave employee uses other than available amount
 - Employee encouraged to make reasonable effort to schedule use but contractor may not make use of leave contingent on employee finding replacement or on fulfillment of operational needs

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Paid Sick Leave Requests

- Request for leave
 - Employee must make oral or written request that includes information sufficient to inform the contractor
 - Reason for absence per those defined in these regulations
 - Not required to provide extensive or detailed information
 - To the extent reasonably possible, the anticipated duration of absence
 - But could be shorter or longer
 - If need is foreseeable, employee's request should be made at least 7 calendar days in advance
 - But if unable, make request as soon as practicable
 - Employer may communicate grant of leave request orally or in writing (including electronically)
 - Denial including reason for denial must be communicated in writing (including electronically)

Paid Sick Leave Certification

- Certification or documentation for leave of three or more consecutive full workdays
 - Contractor may require certificate from health care provider or appropriate individual or organization (depending on reason)
 - Contractor may require documentation in form of statement such as for preventive care, domestic violence, etc. that is **minimally necessary to establish covered reason for absence**
 - Contractor may require documentation only if contractor informs employee **prior to return** from an absence of three days or more
 - Minimum of 30 day period for employee to provide
 - Limitation on contractor contact with health care provider providing certification or documentation

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Paid Sick Leave

Existing PTO Policies

- An existing PTO policy can fulfill the paid sick leave requirements if employees have at least the same rights and benefits as the rule requires
 - If a contractor provides 56 hours of PTO that meets the requirements employees can use the leave for any purpose, the contractor does not have to provide separate paid sick leave even if an employee uses all of the time for vacation or any other non-sick leave purpose.
- Contractors with PTO policies that provide more than 56 hours of leave may choose to either
 - provide all PTO used for the purposes described in the law in compliance with its requirements or
 - track, and make and maintain records reflecting, the amount of PTO an employee uses for the purposes required by the law, in which case only up to 56 hours of PTO with all of the EO's protections, such as documentation, certification, and recordkeeping, for each accrual year is required.

Paid Sick Leave Notice and Recordkeeping

- Contractors must insert a clause regarding the paid sick leave requirements into any covered lower-tier contracts and ensure that lower-tier contractors comply with them.
- Contractors must make and maintain for three years from completion of contract records, including:
 - copies of notifications to employees of the amount of paid sick leave accrued;
 - denials of employees' requests to use paid sick leave;
 - dates and amounts of paid sick leave employees use; and
 - other records showing the tracking of employees' accrual and use of paid sick leave.
- Employees' medical records, as well as records relating to domestic violence, sexual assault, and stalking, must be kept separate from other records and confidential.
- Notice to employees of the paid sick leave requirements must be given by posting DOL notice (same posting requirements as other DOL posters).

Paid Sick Leave

For additional information go to the Department of Labor's Wage and Hour Division:

www.dol.gov/whd/govcontracts/eo13706

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Recently Issued Regulations (cont.)

EO No.	Title	Status	Effective Date	Comments
13658	Establishing a Minimum Wage for Contractors	Annual adjustment for 2017 issued 9/20/2016	For 2017 minimum wage adjustment, contracts entered into/ modified on or after 1/1/2017	\$10.20 (tipped \$6.80) per hour
13665	Non-Retaliation for Disclosure of Compensation Information	<u>Final Regulations</u> issued 9/11/2015	Contracts entered into/ modified on or 1/11/2016	Regulations titled "Prohibitions Against Pay Secrecy Policies and Actions"

Upcoming Changes

EO No.	Title	Status	Effective Date	Comments
n/a	Presidential Memorandum directing OFCCP to issue compensation data collection tool (Compensation data collection)	OFCCP replaced by EEOC; EEOC issued press release September 29, 2016 with details	By March 31, 2018	Revised EEO-1 Report includes requirement to provide compensation related data
n/a	Update to construction contractor affirmative action regulations	Dead	n/a	Existing regulations have not been updated for many decades

Revised EEO-1 Report

- A Presidential Memorandum issued in 2014 directed the Secretary of Labor to propose a rule requiring federal contractors and subcontractors submit summary compensation data to the DOL
- OFCCP given responsibility; but moved to EEOC earlier in 2016
- 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)
 - Gave employers and contractors 30 days to provide comments to EEOC.
- EEOC issued a **press release** on September 29, 2016 announcing a revised EEO-1 Report
- No publication on this revision in the Federal Register 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 PRA

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Revised EEO-1 Report

Who has to file:

- Private employers and federal contractors/subcontractors with 100 or more employees
 - Must file revised EEO-1 report with pay data
- Federal contractors/subcontractors with 50 to 99 employees
 - Must file revised EEO-1 report but **no** pay data
- Private employers with less than 100 employees and federal contractors/subcontractors with less than 50 employees
 - Not required to file EEO-1 report

Revised EEO-1 Report

What is the filing deadline:

- March 31st annually (was September 30)
- First revised report will be due by March 31, 2018
 - Report can be filed anytime from January 1 to March 31, 2018
- No EEO-1 report required to be filed in 2017
- Note that VETS-4212 at this time is still due by September 30th annually

Revised EEO-1 Report

What is time period for counting employees to report:

- Workforce snapshot period will be the fourth quarter of each year. Employer can select any pay period during this timeframe.
 - For example, the first revised EEO-1 report can be based on workforce data for any pay period from October 1 to December 31, 2017

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Revised EEO-1 Report

What are the revisions on the EEO-1 report?

- Summary pay data
 - Must report the **total number of employees** in each **EEO-1 job category**, within each of **12 pay bands** and by **race/ethnicity** and **gender**
- Aggregate hours
 - Must report the **total number of hours worked** during the report year by the reported employees in each **EEO-1 job category**, within each of **12 pay bands** and by **race/ethnicity** and **gender**
 - Hours should correspond to W-2 pay earnings

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Revised EEO-1 Report

What are the Pay Bands:

- \$19,239 and under
- \$19,240 - \$24,439
- \$24,440 - \$30,679
- \$30,680 - \$38,999
- \$39,000 - \$49,919
- \$49,920 - \$62,919
- \$62,920 - \$80,079
- \$80,080 - \$101,919
- \$101,920 - \$128,959
- \$128,960 - \$163,799
- \$163,800 - \$207,999
- \$208,000 and over

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Revised EEO-1 Report

What is measure of income (what pay data):

- Income
 - Use **calendar W-2 income** from Box 1
 - No adjustments necessary for wages earned in the end of December but paid in the following January as part of pay period spanning two years
 - For example, for the first report filed in March 2018 the calendar year **2017** W-2 income must be used for reporting
 - Will only use the income data for those employees on the fourth quarter snapshot discussed earlier

Revised EEO-1 Report

What is measure of hours:

- Hours

- Non-exempt employees
 - Use recorded hours worked
- Exempt employees
 - Use either
 - 20 hours for part-time employees and 40 hours for full-time employees, or
 - Report actual hours worked

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Revised EEO-1 Report

Confidentiality/Privacy/Data Security

- EEOC has made assurances regarding
 - FOIA/Trade Secrets Act
 - Data safeguards/security
- Note that no individual data is provided to OFCCP as data reported in bands. But with sparse cells of only one or two people individual compensation obvious
- EEOC published only large scale aggregated reports

Revised EEO-1 Report

Sample EEO-1 Revised Report Form

Job Categories	Annual Salary in Thousands	Number of Employees (Report employees)							
		Race/Ethnicity							
		Hispanic or Latino		Non-Hispanic					
				Male					
		Male	Female	White	Black or African American	Native Hawaiian or Pacific Islander	Asian	Native American or Alaska Native	Two or More races
A	B	C	D	E	F	G	H		
Executive/Senior Level Officials and Managers 1.1	1. \$19,239 and under								
	2. \$19,240 - \$24,439								
	3. \$24,440 - \$30,679								
	4. \$30,680 - \$38,999								
	5. \$39,000 - \$49,919								
	6. \$49,920 - \$62,919								
	7. \$62,920 - \$80,079								
	8. \$80,080 - \$101,919								
	9. \$101,920 - \$128,959								
	10. \$128,960 - \$163,799								
	11. \$163,800 - \$207,999								
	12. \$208,000 and over								

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Revised EEO-1 Report

For more information visit the EEOC's website for the revised EEO-1 report:

www.eeoc.gov/employers/eeo1survey/2017survey.cfm

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OFCCP Activity

▪ Audit activity down

- 1,695 compliance reviews reported for Fiscal Year 2016 (10/1/2015 to 9/30/2016). The lowest in many many years.
- 2,603 compliance reviews reported in prior Fiscal Year. (3,800 reviews promised)
- Length of compliance reviews (audits) continues to be long. 1 to 2 years is not unusual.

▪ Budget decrease

- OFCCP facing between \$1M and \$5M budget decrease which will translate into fewer compliance officers

▪ Compensation discrimination

- OFCCP continues to be unable to find significant pay discrimination (measured in \$'s recovered) despite tens of thousands of compliance reviews over past years

▪ Shift in how compliance reviews handled

- More likely to have non-local offices involved in initial phase (desk audit)
- Phone interviews prior to onsite
- Compensation calculations undertaken typically at National office
- Countless data requests

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OFCCP Activity (cont.)

- **Conciliation Agreements in 2016 (sample)**
 - Chemonics Int'l **\$428K** – hiring of African American professionals
 - Tyson Foods **\$1.6 million** – hiring of male, female, African American, White, Hispanic, Asian and American Indian/Alaska Native laborers
 - Genlyte Thomas **\$275K** – compensation for female professionals
 - Hewlett Packard **\$750K** – hiring of African American, Hispanic, Asian, American Indian/Alaska Native, and Native Hawaiian/Pacific Islander sales employees
 - Colonial Parking **\$180K** – hiring of African Americans managers and service workers

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OFCCP Activity (cont.)

- **Litigation initiated by Department of Labor Solicitor's Office in 2016 (from OFCCP website)**
 - B&H Foto – hiring
 - Pilgrim's Pride – hiring
 - Enterprise Rent-A-Car – hiring
 - Potomac Abatement – hiring
 - Palantir Technologies – hiring
 - Analogic Corporation – compensation

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Post-Election

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Thank you for attending today's webinar!

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