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2022 OFCCP Developments

What Federal Contractors Need to Know for 2023



December 7, 2022

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Today's Agenda



- Recently issued Executive Orders
- Review of 2022 OFCCP Directives/Notices
- OFCCP activity in 2022
- Noteworthy Developments
- AAP Areas to Focus On
- What to Expect from OFCCP in 2023

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"> <i>Min. wage increases to \$12.15 and tipped employees min. cash wage of \$8.50, <u>eff. 1/1/2023</u> per FR 9/30/2022 publication</i> 	Contracts entered into/modified on or after 1/1/2015	<i>Applies only to certain types of federal government contracts; superseded 1/30/2022 by EO 14026 to extent inconsistent with 14026</i>
14026	Increasing the Minimum Wage for Federal Contractors <ul style="list-style-type: none"> <i>Min. wage increases to \$16.20 and tipped employees min. cash wage of \$13.75 effective 1/1/2023 (per FR 9/30/2022)</i> <i>Annual increases based on inflation determined by DOL</i> 	Contracts entered into/extended on or after 1/30/2022	<i>Applies only to certain types of federal government contracts</i>
14069	Advancing Economy, Efficiency, and Effectiveness in Federal Contracting by Promoting Pay Equity and Transparency	Not specified	<i>Directed at FAR council initially which may later impact contractors</i>



E.O. 14069 Key Requirements

Requires Federal Acquisition Regulatory Council (“FAR Council”) to:

- “consider issuing proposed rules ... enhancing pay equity and transparency for job applicants and employees of Federal contractors and subcontractors.”
- “specifically consider whether any such rules should limit or prohibit Federal contractors and subcontractors from seeking and considering information about job applicants’ and employees’ existing or past compensation when making employment decisions,…”

No further developments; therefore, no action required of federal contractors

2022 OFCCP Directives/Notices



OFCCP Directives issued in 2022:

- 2022-01: Pay Equity Audits (superseded by Rev 1 below) - 3/15/2022
- 2022-01 Revision 1: Advancing Pay Equity Through Compensation Analysis - 8/18/2022
- 2022-02: Effective Compliance Evaluations and Enforcement - 3/31/2022
- 2013-01 Revision 3: Functional Affirmative Action Programs - 9/21/2022

Regulatory changes:

- Notice of Proposed Rulemaking for “Pre-Enforcement Notice and Conciliation Procedures” - 3/22/2022 but comment period ended 4/21/2022



2022-01 Revision 1: Advancing Pay Equity Through Compensation Analysis

Key points

- Annual “compensation analysis” required
- Sets out required documentation elements to satisfy analysis obligation
- Sets out required elements of action-oriented corrective action



2022-01 Revision 1: Advancing Pay Equity Through Compensation Analysis *(con't)*

Required documentation elements

- Date analysis completed
- # of employees included; # of employees and categories excluded
- Forms of compensation analyzed; how different forms were separated or combined
- Confirm analysis done by race, ethnicity and gender
- Method of analysis (e.g., multiple regression, cohort, etc.)



2022-01 Revision 1: Advancing Pay Equity Through Compensation Analysis *(con't)*

Required elements of action-oriented corrective action

- Nature and extent of pay disparities
- Whether reasons for disparities were investigated
- Confirmation that action-oriented programs have been instituted designed to correct identified problem areas
- Nature and scope of the program (e.g., jobs affected, policy changes, pay increases)
- How impact of program will be measured



2022-01 Revision 1: Advancing Pay Equity Through Compensation Analysis *(con't)*

Protecting Legal Privilege and Other Issues

- The regulation requires evaluation of compensation **system** to determine whether disparities exist, but does not mandate the elements set forth in the directive
- OFCCP will not require production of attorney privileged work product, but declining to provide documentation of the required elements of the compensation analysis and action-oriented corrective action will result in non-compliance



2022-01 Revision 1: Advancing Pay Equity Through Compensation Analysis *(con't)*

Options for Protecting Legal Privilege

- Provide OFCCP redacted version of full privileged analysis (must contain all required elements)
- Conduct analysis under privilege (not provided to OFCCP) and then conduct a separate analysis that does not contain privileged information to provide to OFCCP
- Provide OFCCP with an affidavit setting forth the required elements of the analysis and action-oriented corrective action



2022-02 Effective Compliance Evaluations and Enforcement

Overview

- OFCCP rescinds and replaces several earlier directives from 2018 to 2021 affecting compliance review procedures
- moves towards less transparency in reviews
- limits extensions for submission of itemized listing requests
- sets out OFCCP's policy with regard to supplementary data requests and access to employees and others

Published and effective March 31, 2022

2022-02 Effective Compliance Evaluations and Enforcement *(con't)*

Rescinded four earlier directives

- 2018-06 Contractor Recognition Programs
 - Had provided for recognition of best practices by contractors
- 2018-08 Transparency in OFCCP Compliance Activities
 - Previously allowed for automatic 30-day extensions of submission of data in compliance review
 - Had provided for 45-day delay in OFCCP scheduling letters from CSAL publication date
 - Discussed procedures for different types of compliance reviews which are moved to internal manual (FCCM)
 - Committed to transparency in communications during compliance review stages especially if there were initial findings of issues such as potential discrimination

2022-02 Effective Compliance Evaluations and Enforcement *(con't)*

Rescinded four earlier directives (con't)

- 2020-02 *Efficiency in Compliance Evaluations*
 - Implemented requirements for agency to regularly communicate with contractors during audit and to internally monitor longer lasting compliance reviews
- 2021-02 *Certainty in OFCCP Policies and Practices*
 - Promised to adopt CERT principles on Certainty, Efficiency, Recognition and Transparency - more of a framework for how the agency operates and works/communicates with contractors

2022-02 Effective Compliance Evaluations and Enforcement *(con't)*

Strategic enforcement objectives

- “Conduct comprehensive compliance evaluations that foster consistent accountability avoid delay through timely submission of required information”
- Promote a proactive approach to compliance emphasizing active self-audits by contractors
- Implement coordinated cross-regional approach to conducting multi-establishment reviews
- Promote regular and open communication...transparent communication by all parties at all stages

Compliance Evaluation Scheduling

- Agency enhancing neutral scheduling procedures for selecting contractors for reviews... “to identify those with greater risk factors for non-compliance”
- Will continue to provide information on scheduling methodology as it does for CSALs
- Will continue to post CSAL to notify contractors they are on the list. But removes the 45-day delay between posting the CSAL and when the agency can initiate scheduling

2022-02 Effective Compliance Evaluations and Enforcement (cont.)

Timely Desk Audit Submissions and Extensions

- OFCCP requires contractors, upon notified for scheduling of compliance review, to submit all AAPs and itemized listing data within 30 days of receipt of letter
- Extensions granted for submission only for extraordinary circumstances such as:
 - *Extended medical absence of key personnel*
 - *Death in the immediate family of key personnel*
 - *Localized or company-specific disaster affecting records retrieval (flood, fire, or computer virus)*
 - *Unexpected military service absence of key personnel*
 - *Unexpected turnover or departure of key AA official*
- Raises question of situations such as
 - *Receiving scheduling letter days into the new AAP year and having to analyze applicant data so quickly*
 - *Receiving scheduling letter six months plus days after start of AAP year (requirement for supplemental data if into current AAP year six months or more)*

2022-02 Effective Compliance Evaluations and Enforcement (cont.)

Requests for Supplemental Information and data

- Reiterates agency's policy to request supplemental data, follow-up interviews and additional records information if submission is incomplete or they identify issues that warrant further analysis
- Will allow reasonable period of time to comply and provide a basis for the request
- If agency identifies potential indicators of discrimination, they may request AAPs, personnel activity, etc. to cover period beginning two years before date of scheduling letter receipt
- Notes other situations where OFCCP asserts its right to request additional information from contractors during a review

2022-02 Effective Compliance Evaluations and Enforcement (cont.)

Access to Employees, Applicants and other Witnesses

- *OFCCP may contact employees, former employees, applicants or other witnesses during compliance review investigation*
- *As part of this effort OFCCP will request unredacted contact information including telephone numbers, mailing addresses, email addresses and social security numbers*
- *Reminds contractors:*
 - *For interviews with upper level managers and directors in management (not just management employees as typical in the past), contractor can have attorney or other representative present*
 - *For interviews with non-management employees, contractors do not have the right to have an a representative available*
 - *Interviewee may request a personal representative attend but the agency will discuss this with interviewee to evaluate potential conflict of interest*
 - *For former employees, OFCCP will request best available contact similar to the above contact information. OFCCP asserts contractors do not have right to have a representative present with limited exceptions.*

OFCCP 2022 Activity



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

- 866 reported closed for most recent year, Fiscal Year 2022 (10/1/2021 to 9/30/2022). In the prior year there were 1,125 closed reviews.
 - This is a 23% decrease
 - 116 Conciliation Agreements acknowledging violations signed
 - Additional 33 Construction Contractor audits closed in FY 2022 as compared to 111 in the prior FY (not included in above counts)

Significant downward trend in closed compliance reviews continues

- In last five years, this is only greater than 713 closed in FY 2018
- OFCCP in distant past has closed as many as 5,000 to 6,000 annually

OFCCP 2022 Activity: Current and Future Audits

OFCCP typically issues two Corporate Scheduling Announcement List (CSAL) annually of contractor establishments to be audited



- May 2022 CSAL issued:
 - 400 supply and service contractors consisting of 376 establishment reviews, 12 FAAPs, 12 CMCE
- No fall 2022 CSAL issued yet

OFCCP 2022 Activity: Observations on Compliance Reviews



- OFCCP continues to spend more time on full-blown and detailed in-depth reviews
- OFCCP issuing many requests for data, documents and interviews
- OFCCP appears to be moving back to physical onsites
- 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

OFCCP 2022 Activity: Financial Settlements

FY 2022 \$11.8 million v. FY 2021 \$26.4 million v. FY 2020 \$35.6 million

Some significant settlements in FY 2022

Hiring

- Cerner \$1.8 million - Asians, African Americans
- Becton, Dickinson \$499k - females
- Gaylord Opryland \$630k - Asians, African Americans, females
- Rockland Bakery \$850k - Asians, African Americans, females

Compensation

- LinkedIn \$1.8 million - females
- ESRI \$2.3 million - females
- AlliedBarton Security Services \$1.1 million - Am Indians, Afr Americans, females



Noteworthy Developments - 2022

- OFCCP working with EEOC on initiatives on recruiting and hiring issues
 - Including the impact of technology (AI) on recruitment and hiring
- New “Know Your Rights” (formerly “EEO is the Law”) poster issued that includes OFCCP’s supplemental poster. See www.dol.gov/agencies/ofccp/posters
- AAP certification went live. Indications are that a number of contractors still did not register and certify, potentially putting them at higher risk of audit.
- Contractors were required to use more current 2014-2018 Census occupational data when developing AAPs starting in 2022
- Objection opportunity for EEO-1 Type 2 reports FOIA request
 - Type 2 reports filed by multi-establishment employers
 - Not applicable to all contractors especially if single reporting establishment
 - OFCCP appears to be notifying non-objecting contractors about January release



Noteworthy Developments - 2022 (con't)

- EEOC proposed EEO-1 report revisions
 - Published on 11/10/2022 for public comment (due by 1/9/2023)
 - Eliminating and replacing Type 4 and 8 reports
 - Employers would file “establishment report” (old Type 4 or 8) regardless of headcount, headquarters and/or consolidated report
- OFCCP published proposed revised self-identification form for Individuals with Disabilities
 - Published 11/16/2022, comments due by 1/17/2023
 - Minor revisions including modifications to suggested disability categories
 - Draft version at <https://www.regulations.gov/document/OFCCP-2022-0003-0003>
 - Will replace current self-id form that expires 5/31/2023
- OFCCP updated Protected Veterans hiring benchmark to 5.5% effective March 31, 2022
- Revamped process for the reporting of construction contract awards
 - Portal to submit a notice to OFCCP within 10 working days of an award of a federal or federally assisted construction contract or subcontract in excess of \$10,000
 - FAQs at <https://www.dol.gov/agencies/ofccp/ncap>



Noteworthy Developments - 2022 (con't) Proposed Revisions to Scheduling Letter



OFCCP published proposed revisions to the compliance review (audit) scheduling letter for Supply and Service contractors

- Publication date of 11/21/22
- Public comments due 1/20/2023
- OFCCP will then review comments and make revisions
- Difficult to predict what changes will be made to original proposed regulations
- OFCCP will then need to get the revised version approved by OMB
- Process to get finalized regulations could last well into late 2023 given prior timelines
 - Current scheduling letter only approved through April 2023

Noteworthy Developments - 2022 (con't) Proposed Revisions to Scheduling Letter

Proposed changes are significant and will place a greater time and resources burden on contractors



- OFCCP's expected burden hours per contractor is only 39 hours per review for assembling and submitting this
- OFCCP references expected average number of reviews as 1,258 annually and states this is down from 2,500 used in 2019

Noteworthy Developments - 2022 (con't) Proposed Revisions to Scheduling Letter

- Option for OFCCP to 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. Option to send via USPS or other delivery service.
- 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 discussed above where limited extensions provided.



Noteworthy Developments - 2022 (con't)

Proposed Revisions to Scheduling Letter



Proposed changes to Itemized Listing

- Item 4 expands scope of “determination of minority and female availability pursuant to 41 CFR 60-2.14.”
 - This is to allow the OFCCP to verify assumptions and data used are appropriate and current.
- Item 7 (new) adds requirement to provide “a list identifying all action-oriented programs designed to correct any problem areas identified pursuant to 41 CFR § 60-2.17(b).”
 - Impacted areas include utilization goals, personnel activity, compensation, etc.

Noteworthy Developments - 2022 (con't)

Proposed Revisions to Scheduling Letter



Proposed changes to Itemized Listing

- Section 503 - Item 8 (previous Item 7) 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”
- Section 503 - Item 11 (previous Item 10) 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...”

Noteworthy Developments - 2022 (con't)

Proposed Revisions to Scheduling Letter



Proposed changes to Itemized Listing

- VEVRAA - Item 12 (previous Item 11) expands documentation requirements to be submitted by contractor regarding outreach and positive recruitment efforts.
 - Again includes requirement to “indicate whether you believe the totality of your efforts were effective”
- VEVRAA - Item 15 (previous Item 14) includes clarification on information OFCCP seeks on VEVRAA hiring benchmark.
 - One of few changes that has minimal impact or concern

Noteworthy Developments - 2022 (con't)

Proposed Revisions to Scheduling Letter



Proposed changes to Itemized Listing

- Item 16 (previously Item 15) the EEO-1 report section, adds request for post-secondary institutions to submit copy of IPEDS HR Survey component data for last three years
- Item 18 (previously Item 17) proposes minor changes regarding AAP period
- Item 19 (new) requests documentation of contractor’s “policies and practices regarding all employment recruiting, screening, and hiring mechanisms, including the use of artificial intelligence, algorithms, automated systems or other technology-based selection procedures.”

Noteworthy Developments - 2022 (con't)

Proposed Revisions to Scheduling Letter



Proposed changes to Itemized Listing

- Item 20 (previously Item 18) the request for employment activity has a number of changes:
 - Requires contractors to identify promotions as “competitive” or “non-competitive” and provide previous and current supervisor as well as previous and current compensation
 - Requests documentation of established policies and practices related to promotions
 - Modifies requests for terminations to provide by termination reasons
 - 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.”

Noteworthy Developments - 2022 (con't) Proposed Revisions to Scheduling Letter

Proposed changes to Itemized Listing Item 21 (previously Item 19), request for employee level compensation data:

- Clarifies that “temporary employees” for which data requested includes those provided by staffing agencies
- Requires two sets of snapshot data for employees (compared to just one now):
 - As of date of current AAP’s Workforce Analysis or Organizational Display
 - As of date of prior year’s Workforce Analysis or Organizational Display



Noteworthy Developments - 2022 (con't) Proposed Revisions to Scheduling Letter

(con't from prior page)

Proposed changes to Itemized Listing Item 21 (previously Item 19), request for employee level compensation data:



- Requires submission of information on compensation factors and adds additional possible factors as examples
- Requires submission of “documentation and policies related to the contractor’s compensation practices, including those that explain the factors and reasoning used to determine compensation (e.g., policies, guidance, or trainings regarding initial compensation decisions, compensation adjustments,...”)

Noteworthy Developments - 2022 (con't)

Proposed Revisions to Scheduling Letter



Proposed changes to Itemized Listing

- Item 22 (new) - compensation system review
 - Requires contractors submit representation that they have satisfied obligation to evaluate its “compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities,” as part of the contractor’s “in-depth analyses of its total employment process” required by 41 CFR 60-2.17(b)(3)
 - Specifically:
 - When the compensation analysis was completed;
 - The number of employees the compensation analysis included and the number and categories of employees the compensation 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; and
 - The method of analysis employed by the contractor (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.)

Noteworthy Developments - 2022 (con't)

Proposed Revisions to Scheduling Letter



Proposed changes to Itemized Listing

- Item 23 (previously Item 20) clarifies accommodation time period, etc.
- Item 24 (new) adds request for “copies of existing written employment policies concerning equal opportunity, including antiharassment policies, EEO complaint procedures, and employment agreements, such as arbitration agreements, that impact employees’ equal opportunity rights and complaint processes in place for the immediately preceding AAP year.”
- Item 25 (previously Item 21) expands request for documentation about the personnel process assessment 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..”

Noteworthy Developments - Looking Ahead

- OFCCP continues to ask for a large increase in their budget (40% for FY 2023).
 - Most of the increase is allocated to hiring additional staff in order to conduct more reviews especially for expected increase in the number of contracts related to the Infrastructure law..
 - Given the outcome of the midterm elections and past history, it seems unlikely the OFCCP will get an increase of this magnitude.
- OFCCP plans to issue proposed changes to regulations in 2023.
 - Revisions to construction contractor regulations are likely.
- There is a possibility that the EEO-1 Component 2 requirement for compensation data could be reinstated given expected Democratic control of EEOC Commission. But probably unlikely before 2024 reporting cycle.
- Compensation continues to be a major priority during compliance reviews as evidenced by the Directive 2022-01 and proposed changes to the Supply and Service compliance review scheduling letter.



Noteworthy Developments - Looking Ahead (cont.)

- OFCCP indicated that in 2023 it will be issuing a proposal to require prime contractors to notify OFCCP when awarding Supply and Service subcontracts
- OFCCP has indicated for the future:
 - Evaluating employment practices at multiple sites and on enterprise-wide approach) for larger contractors
 - Increasing compliance evaluations for construction contractors
 - Especially at “Mega Construction Project” sites
 - Increased numbers of compliance reviews of construction contractors have been initiated and will use the revised scheduling letter issued in mid-2021
 - The agency had released a CSAL with 400 construction contractors in September 2021 of which many are still undergoing or still to be schedule for review



AAP Areas to Focus On

Compensation

- With the new Directive OFCCP has outlined what is expected in terms of documentation
- But sophisticated statistical analysis may not be appropriate or worthwhile
 - Consider review of compensation system (non-quantitative)
 - Cohort analysis or more limited calculations

Outreach efforts

- **Protected Veterans and 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

Individuals with Disabilities self-identification

- Continue to encourage employees to self-identify

Conduct and document self-audit of compliance obligations

- Especially for Protected Veterans and Individuals with Disabilities



What to Expect from the OFCCP in 2023

- Low numbers of compliance reviews in calendar 2023
 - Still under 1,000 if they have similar headcount and continue to spend longer on each review
- If selected, longer reviews with more data, document and interview requests
- Continued focus on compensation (in addition to hiring as always)
- Less transparency in reviews and reluctance by OFCCP to share findings basis
- Return to onsites during compliance review and more interviews
- Continued AAP certification requirement and consequences for not certifying
- Another year without EEO-1 Component 2 collection
- New regulations issued for comment, especially for construction contractors and possibly supply and service contractors
- Revised scheduling letter for supply and service contractors





Questions?



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



***Thank you for attending
today's webinar!***

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