

Labor & Employment Challenges for Government Contractors

Presented by:

**Ogletree
Deakins**

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Presenters



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Federal Contractor Legal Overview

1. E.O. 11246

- › Non-discrimination and affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity or national origin.

2. Section 503 of the Rehabilitation Act of 1973

- › Non-discrimination and affirmative action for disabilities.
- › Reasonable accommodations

3. Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. § 4212 (VEVRAA)

- › Non- discrimination and affirmative action for protected veterans.



OFCCP Agency Updates

- Internal agency updates
- Initiatives of the Biden administration
- Scheduling lists
- Audit trends
 - Hiring
 - Compensation

Leadership Changes

Director Jenny Yang

- Chair of EEOC (2014-2017)
- Pay & Hiring Enforcement Priorities
- Staffing Increases
- Biden Administration proposed budget requests that OFCCP receive a 33% increase



Changes in the Biden Administration

Audit changes

Rescinded compliance checks and most of the focused audits (promotions and accommodations)

Rescission of Trump era EOs

EO 13950 – Combating Race & Sex Stereotyping

Will this administration move in the opposite direction?

Desk Audit Submission Time

No more pandemic extension, that allowed up to 90 days
60 days maximum, and seeing more pushback

Signals of more reporting

EEO-I Component 2

AAP Verification Initiative (AAP-VI)

Areas to watch – where will they focus?

Diversity & Inclusion

- Push of guidance or regulation toward more D&I?

Compensation litigation

- Following losses against Analogic and Oracle, how will this administration move compensation litigation and investigation forward?

Pay & Data Transparency

- EEO-I Component 2
- Another OFCCP report?
- FOIA issues

Artificial Intelligence

- Is it used in the recruiting process?
- In the hiring process?

Affirmative Action Verification Initiative

Directive (DIR) 2018-07



This initiative will also help ensure there are no ‘free riders’ that benefit from participating in the federal procurement process while not bearing the corresponding costs of AAP compliance based on the current high likelihood they will not be listed (and potentially receiving an inequitable advantage over law abiding contractors).

Verification Initiative (AAP-VI)



Coming Soon

Affirmative Action Program Verification Interface (AAP-VI) is a secure web based interface created to improve communication and the transfer of Affirmative Action Program data, between Federal Contractors and the Office of Federal Contract Compliance Programs.

Is your company ready?

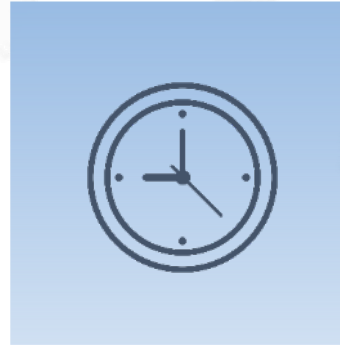
- › August 31, 2021, the Office of Management and Budget (OMB) approved the new system that the Office of Federal Contract Compliance Programs (OFCCP) developed for federal contractors to submit affirmative action programs (AAPs)
- › Additional annual reporting obligations are expected to be part of the system, but the immediate scope is not clear
- › Long term risk → significant reporting and filing burdens

Corporate Scheduling Announcement List (CSAL)



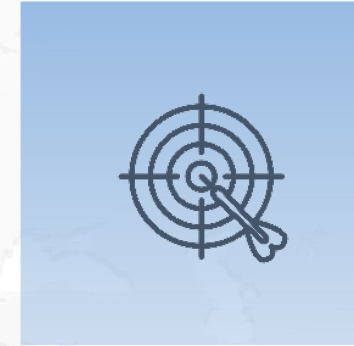
What?

A courtesy notification to an entity selected to undergo a Compliance Review, including notification of type of review/audit



When?

Before the scheduling letter actually arrives, providing a minimum of 45 days notice pre-audit



How to plan?

Check the CSALs, and for any entity identified on the list begin preparing for a desk audit

Compliance Evaluations / Audits

- Less Compliance Assistance
 - Contractor Assistance Portal Closed March 2021
- Expect More Litigation from OFCCP
 - Only 3 Enforcement Actions and Compensation Defeat during Trump Administration
 - Litigation Priorities?
 - Disparate Treatment
 - Disparate Impact
- Continued “Virtual” Onsite Visits?
- Jurisdiction disputes?

Audit considerations

Compensation

- How Will Biden Administration Enforce Pay Cases?
 - Aggressive compensation focus in audits
 - OFCCP ignores contractor pay structures
 - Compensation interviews

Hiring

- Likely Focus Areas
 - Bread and Butter of OFCCP – Low-Skilled, High Turnover Jobs
 - Entry Level Positions
- Steering Claims
- Tests/Assessments
- Beware of Artificial Intelligence (AI) in Selections

Compensation

- › A/C privilege
 - › Stay apprised of what non-legal may do in this space
- › How often to run?
 - › Compliance versus deeper auditing
- › What groupings to analyze?
 - › Usefulness of various groupings i.e. job title
- › Applicable control factors?
 - › Awareness of what is relevant
 - › Is it captured?
 - › Risk of taint?
- › Base? Bonuses? Total Comp?

Factors – unique to employer and position

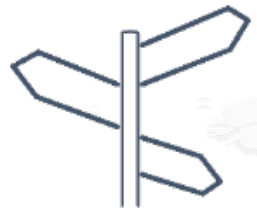
- Education
- Years of experience
- Licensure
- Type of prior experience
- Business unit/department/etc.
- Performance
- Talk to hiring managers and HR
 - Examples
 - clearance level
 - number of foreign languages spoken

Compensation

Many angles to consider

- › OFCCP compliance
- › Pay equity
- › State laws
 - › Beyond the scope of this discussion
- › EEOC litigation and component 2
- › Cultural movements
 - › Press
 - › Employees/public
 - › Board/management pressures





Intersection of DEI, Compliance, and boardroom interests

- Are DEI decisions made with a compliance focus?
- Is compliance used to enhance DEI?
- What are management interests/concerns?

Sample settlements – ensure management understands the risks

FY2015	Manufacturing	\$1.25 M
FY2016	Food Service	\$1.85 M
FY2017	Manufacturing	\$3.48 M
FY2019	Financial Svcs	\$9.95 M
FY2019	Technology	\$7.0 M
FY2019	Financial Svcs	\$4.2 M

Executive Order 14042 on Ensuring Adequate COVID Safety Protocols for Federal Contractors

- The new EO eliminates the testing option and expands the vaccine requirement to all federal contractors working qualifying contracts. This is not limited to employees working on federal property. This presumably would include remote employees if they work on qualifying contracts.
- The new rules will apply to any new contract or new contract-like instrument, including a new solicitation, extension, or renewal or exercise of an option, provided it is:
 - a procurement contract for services, construction, or a leasehold in real property;
 - a contract covered by the Service Contract Act (SCA);
 - a contract for concessions, including concessions excluded generally under the SCA; or
 - a contract in connection with federal property or lands offering services for federal employees, dependents, or the general public.

Contracts that are exempted:

- grants
- Indian Tribes contracts or contract-like instruments
- those with a value equal to or less than the FAR simplified acquisition threshold (currently \$250,000 per FAR 2.101)
- agreements involving employees performing work outside the United States
- subcontracts solely for the provision of products

Caveat: The Safer Workforce Taskforce (Task Force) released FAQ:

- Q: Can agencies incorporate vaccination requirements into contracts that are not covered by Executive Order 14042 (Ensuring Adequate COVID Safety Protocols for Contractors)?
- A: Yes. Agencies are strongly encouraged to incorporate vaccination requirements into contracts that are not covered by Executive Order 14042, consistent with applicable law. This might include, for example, incorporating vaccination requirements into contracts in advance of when they are otherwise required by the Executive Order *or incorporating requirements into contracts that are not covered by the Executive Order*, such as contracts under the Simplified Acquisition Threshold. Implementation of such additional requirements should generally follow the Safer Federal Workforce Task Force's guidance for implementing the vaccination requirement in Executive Order 14042.

Action Items

- Track down original contracts or contract-like instrument and review
 - Pay special attention to Service Contract Act language and Davis-Bacon
- Review language for any new contract or contract-like instrument carefully and consider strategic decisions
- Pay attention to any new guidance (posted to saferfederalworkforce.gov)
- Know the rules for vaccinations, masking, flow down requirements, etc.
 - Must designate a person or persons to coordinate implementation of and compliance with this Guidance and the workplace safety protocols
- Assemble a team to handle legal issues:
 - Identification of contracts
 - Identification of covered employees “on or in connection with” and “covered workplace”
 - Accommodations requests
 - Vaccination status tracking system
- OSHA Emergency Temporary Standards
 - <https://www.whitehouse.gov/covidplan/#vaccinate>

For more information

- EO 14042 FAQs
 - <https://www.saferfederalworkforce.gov/faq/vaccinations/>
- EO 14042 Guidance
 - https://www.saferfederalworkforce.gov/downloads/Draft%20contractor%20guidance%20doc_20210922.pdf
- EEOC Guidance on religious accommodations
 - <https://www.eeoc.gov/laws/guidance/what-you-should-know-workplace-religious-accommodation>
- EEOC Guidance on COVID-19
 - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
 - Watch for long-Covid / disability issues



Notice: September 9, 2021

The EEOC recognizes that “long COVID” may be a disability under the Americans with Disabilities Act (ADA) and Section 501 of the Rehabilitation Act in certain circumstances. The EEOC agrees with the analysis of “long COVID”

Executive Order 14026

- “Increasing the Minimum Wage for Federal Contractors.” This Executive order explains that increasing the hourly minimum wage paid to workers performing on or in connection with covered Federal contracts to \$15.00 beginning January 30, 2022 will “bolster economy and efficiency in Federal procurement.”
- Significant nuance and detail to the coverage.
- Waiting on final rule – **by November 24, 2021**

Action Items

- › Ask the compliance teams about ability to comply with the AAP-VI
- › Check the CSAL lists for potential audits
 - › <https://www.dol.gov/agencies/ofccp/foia/library>
 - › Get to work immediately on CSAL desk audits
- › Compensation equity analyses
 - › Privilege
- › Talk to DEI and management about sharing/usage of demographic information
 - › Allocate resources to outreach and recruitment
 - › <https://www.dol.gov/agencies/ofccp/compliance-assistance/outreach/hbcu-initiative/recruitment-strategies>
- › Ensure appropriate follow-up on AAP results annually
- › Assess the hiring system annually
- › Watch E.O. information on minimum wage and vaccine requirements



Thank you

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