

OFCCP: Everything You Need to Know for 2022

ACC-NCR

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Agenda

- Directive 2022-01: “Pay Equity Audits” - challenges to contractor claims of privilege as to pay equity analyses
- Directive 2022-02: “Effective Compliance Evaluations and Enforcement”
- NPRM: Modifying Procedures to Identify, Remedy Discrimination
- New AAP portal and certification requirements
- EEO-1 and state reporting requirements
- New census data requirements and their impact on AAPs
- How to address remote or hybrid workers in your AAPs
- How to address non-binary applicants and employees in your AAPs
- Shareholder demands for racial equity and civil rights audits



Recent OFCCP Directives/NPRM

Aggressive New Positions



OFCCP Compensation Directive 2022-01: Pay Equity Audits

- Issued March 15, 2022 – “Equal Pay Day”
- Backdrop
 - 41 C.F.R. Section 60-2.17 (b) – contractor “must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. At a minimum the contractor must evaluate: . . . **(3)** Compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities.”
 - Included in regulations since December 2000
 - Does not define how such an evaluation must be performed
 - Recent requests for pay equity studies during compliance evaluations



OFCCP Compensation Directive 2022-01: Pay Equity Audits

- Content - Agency Positions Set Forth in Directive
 - Where the Agency initially finds potential pay concerns, it “will request that the contractor provide a complete copy of the pay equity audit(s) conducted pursuant to [41 C.F.R. §] 2.17(b)(3) [including] all pay groupings that were evaluated, any variables used, and the results of the analyses, including any disparities found.”
 - “For compensation regression or statistical analysis results, OFCCP may request the model statistics (including b-coefficients, significance tests, R-squared, adjusted R-squared, F-tests, *etc.*) for all variables or comparisons in the model,” in addition to information relating to the frequency of pay equity audits, the communication to management, and how the results were used to rectify disparities based on gender, race and/or ethnicity.



OFCCP Compensation Directive 2022-01: Pay Equity Audits

- Content - Agency Positions Set Forth in Directive
 - Can seek analyses “covering a period beginning two years before the date the contractor received the Scheduling Letter.”
 - Anticipates and rejects potential assertion of privilege
 - Contractors **must** “maintain and make available” documentation of their compliance with OFCCP regulations
 - Contractors “cannot withhold these documents by invoking attorney-client privilege or the attorney work-product doctrine.”
 - Consequences – “Failure to provide the required pay equity audit will be considered by OFCCP as an admission of noncompliance with these regulatory requirements.”



OFCCP Compensation Directive 2022-01: Pay Equity Audits

- Current best practice – regular, privileged pay equity analyses, often not performed on AAP-establishment-basis
- Contractor alternatives
 - Capitulate and provide analyses – worst option
 - Stay the course – assert privilege as to pay equity studies – “kick the can down the road”
 - Conduct AAP-establishment-specific “evaluation” of compensation systems outside of attorney-client privilege
 - Expressly contemplated by Directive – will not seek “additional privileged analyses”
 - Qualitative analyses of base pay, merit increase, pay increase upon promotion, bonus programs, and stock award programs – made available without regard to sex, race, ethnicity
 - Quantitative analyses reflecting workforce at the AAP establishment
 - Headquarters and FAAP issues



OFCCP Directive 2022-02: Effective Compliance Evaluations and Enforcement

- Issued March 31, 2022 – “new sheriff in town” tone
- Rescinds and replaces four directives - DIR-2018-06, DIR 2018-08, DIR 2020-02, and DIR 2021-02
 - Eliminates automatic 30-day extension for response to Scheduling Letter – now due within 30 days; limited specified exceptions
 - Eliminates 45-day scheduling delay after issuance of CSAL
 - Eliminates “Contractor Recognition Program” and offers “compliance assistance”
- Establishes “strategic enforcement” approach
 - Claims OFCCP will provide “the basis” for supplemental information requests
 - Reiterates authority to seek data stretching back two years



NPRM: Modifying Procedures to Identify, Remedy Discrimination

- Issued March 21, 2022 for public comment – due April 21, 2022
- Proposes Wholesale Revisions to Contractor-Friendly Elements of December 10, 2020 Final Rule
 - Reduces from 30 to 15 days time period for contractor response to “Predetermination Notice” (PDN)
 - Eliminates definition of “quantitative evidence” and “qualitative evidence” necessary to support PDN or Notice of Violation (NOV)
 - Claimed risk that contractor determines identity of employees who provide evidence and resultant “chilling effect”
 - Eliminates requirement that OFCCP demonstrate “practical significance” to support PDN/NOV and eliminates thresholds identified



AAP Portal

New Certification Requirements



OFCCP AAP Portal

- Established in response to GAO Report determining OFCCP did not have sufficient process for ensuring contractors/subcontractors are preparing AAPs
- Applicability: All supply and service contractors with 50 or more U.S. employees and a contract of \$50,000 or more
 - Not currently applicable to construction contractors
- Covered contractors/subcontractors must register on the portal and must certify AAP compliance for each establishment/functional unit
 - AAP preparation and compliance certification on annual basis
 - New contractors have 120 days to develop AAPs, register, and certify compliance



OFCCP Portal – Registration and Certification of AAPs

- Registration Opened February 1, 2022
 - Register using 2018 EEO-1 identifiers
 - If no 2018 EEO-1 report, use Employer Identification Number (EIN) and “Identifiers Not Known Path.”
- Ability to certify AAP compliance began March 31, 2022
- All covered contractors/subcontractors must certify by June 30, 2022
 - Time certification to coincide with AAP year



OFCCP Portal – Certification statement

- Certification Options
 - Entity has developed and maintained affirmative action programs at each establishment, as applicable, and/or for each functional or business unit;
 - Entity has been party to a qualifying federal contract or subcontract for 120 days or more and has not developed and maintained affirmative action programs at each establishment, as applicable; or
 - Entity became a covered federal contractor or subcontractor within the past 120 days and therefore has not yet developed applicable affirmative action programs.
- False attestation subject to penalties under 18 U.S.C. 1001



OFCCP Portal – Scope of Certification

- OFCCP FAQ

- Must certify that the contractor “has developed and maintained” all “Executive Order 11246 contents, **including required annual analyses**” described in the regulations
- Would extend to applicant, hires, promotions, and terminations analyses
- Same scope as to VEVRAA AAP and Section 503 AAP



EEO-1 and State Reporting Obligations

The Patchwork Begins to Develop



EEO-1 Report Basics

- All employers with 100 or more employees and government contractors/first-tier subcontractors with 50 or more employees must file
- Locations in 50 states and DC, not Puerto Rico, the Virgin Islands, or other American Protectorates
- Current deadline – May 17, 2022
- Demographic data of full and part-time employees by race/ethnicity, gender, job categories
- Based on a workforce snapshot payroll period between October 1, 2021, and December 31, 2021
- New rules for third-party human resource organizations



EEO-1 Report – Race and Gender

- Self-identification of race/ethnicity and gender preferred
 - “If an employee declines to self-identify his or her race and/or ethnicity, employment records or observer identification may be used.”
- Reporting non-binary employees
 - Provide information in comments box on the certification page
 - Example: “Additional Employee Data: 1 non-binary gender employee in Job Category Administrative Support Workers; Race/Ethnicity: White (Not Hispanic or Latino).”



EEO-1 Report Remote Employees

- Remote employees
 - If assigned to or report to a physical location, should be included in the report for the location to which they are assigned or report.
 - If doesn't report to physical location, should be included in the report for the location to which the employee's manager reports or is assigned.
 - If manager also does not report to an establishment, both employee and manager should be included in the Headquarters report.
 - If there is no headquarters location, report the address where the business is legally registered



State Pay Reporting Requirements

- California Pay Data Report
 - Similar to prior EEO-1 Component 2
 - Employers with 100 or more employees in the U.S.
 - File annually by March 31st
 - Must include all employees assigned to California establishments and/or working within California; may include other employees
 - Includes reporting for non-binary employees
 - Guidance states that “If an employee declines to state their race/ethnicity, employers must still report the employee according to one of the seven race/ethnicity categories, using — in this order — current employment records, other reliable records or information, or observer perception.”



State Pay Reporting Requirements

- Illinois Equal Pay Certificate
 - Employers with 100 or more employees in Illinois
 - Must apply for an equal pay registration certificate between March 24, 2022 and March 23, 2024
 - IDOL notifying businesses of reporting deadlines
 - If not notified, must still comply
 - Must recertify every two years
 - Must submit individualized compensation data for each employee
 - Must provide name, SSN, race, ethnicity, gender, total wages, hire date, termination date, job classification, job title, county
 - Must certify compliance with equal pay obligations



Affirmative Action Plans – Latest Developments

Considerations Based on Remote Working Revolution



New Census Data

- As of January 1, 2022, all AAPs must use the 2014 – 2018 Census EEO Tabulation to determine availability
- Occupational Census Codes decreased from 488 in the 2006-2010 EEO Tabulation to 237 in the 2014-2018 EEO Tabulation.
 - Crosswalk available to map to new codes
- Some geographic areas condensed
- “Balance of Not Hispanic or Latino” racial category



Assigning Remote Workers

- All U.S. employees must be included in an AAP
- Options for assigning remote workers
 - Include a remote or telework employee in the AAP that covers the management to whom they report; or
 - Include a remote or telework employee in the AAP of the establishment where his or her selection decision was made; or
 - Include a remote or telework employee in the AAP that covers the location of the personnel function that supports the employee



Racial Equity and Civil Rights Audits

The Next Frontier



Racial Equity Audits and Civil Rights Audits - Background

- 2021
 - Proposals from Activist Shareholder Groups – tie into ESG and “human capital disclosure” requirements
 - Following the Pay Equity Playbook
 - Initial Focus on Financial Services and Amazon
 - JP Morgan, Goldman Sachs, CitiGroup, State Street
 - Proposals garnered 26% to 41% of the vote
- 2022
 - New Round of Shareholder Proposals
 - Extending beyond Financial Services
 - More focused on Civil Rights Audits than More Limited Racial Equity Audits
 - Apple proposal passed March 2022; Citi and Amazon agree to conduct in 2022



Racial Equity Audits and Civil Rights Audits

- Proposals are Broad and Ambiguous – which has its advantages
- Sample language – Goldman (2021)
 - “Shareholders of Goldman Sachs Group Inc. (“Goldman”) urge the Board of Directors to oversee a racial equity audit analyzing Goldman’s impacts on nonwhite stakeholders and communities of color. Input from civil rights organizations, employees, and customers should be considered in determining the specific matters to be analyzed. A report on the audit, prepared at reasonable cost and omitting confidential and proprietary information, should be publicly disclosed on Goldman’s website.”



Racial Equity Audits and Civil Rights Audits

- Sample language – to Apple from SOC Investment Group – passed in March 2022
 - **Resolved:** That shareholders of Apple Inc. (“Apple”) urge the Board of Directors to oversee a third-party audit analyzing the adverse impact of Apple’s policies and practices on the civil rights of company stakeholders, above and beyond legal and regulatory matters, and to provide recommendations for improving the company’s civil rights impact. Input from civil rights organizations, employees, and customers should be considered in determining the specific matters to be analyzed. A report on the audit, prepared at reasonable cost and omitting confidential or proprietary information, should be publicly disclosed on Apple’s website.



Responses

- Board-Level Issue “Menu” approach – tailored to each client
 - Privileged audits to assess position in advance of receiving proposal
 - Quantitative analyses – full spectrum of employment actions
 - Qualitative analyses – policy/process review, complaint history/resolution, ESG statements
 - Third party stakeholders – consumers and Civil Rights Organizations
 - Responses to pending proposal
 - Scope
 - Third party to perform assessment



Questions?

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Thank you

