

**JacksonLewis**

# **Virtual Mini MCLE La-Law-palooza: Spring Employment Law Update**

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# Wage & Hour: Independent Contractors to COVID-19 Considerations for 2021

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- Independent Contractors
  - Key California Supreme Court Cases
  - COVID consideration

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# Independent Contractors

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# How did we get here?

1989

The California Supreme Court adopts the *Borello* factor test in *Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989).

2018

The California Supreme Court adopts the “ABC Test” in *Dynamex Operations West, Inc. v. Superior Court*, 4 Cal.4th 903 (2018).

2019

The California State Legislature passes a law, AB 5, which codified the holding in *Dynamex*, adding California Labor Code § 2750.3.

# The ABC Test

The hiring entity has the burden of proving **ALL THREE** of the following elements:

- A: The work must be **free from the control and direction of the company** in connection with the performance of the work, both under the contract for performance of the work and in fact; and
- B: The worker performs work that is **outside the usual course of the company's business**; and
- C: The worker is customarily engaged in an **independently established trade, occupation or business** of the same nature as that involved in the work performed.

# Amendment to AB 5 Assembly Bill 2257

- Signed in September
- Went into effect immediately.
- Codifies additional exemptions from ABC Test.



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## Exemptions for Certain Occupations

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- Landscape architects
- Manufactured housing salespersons
- Competition judges
- Performance artists
- Professional Services
  - Photographers
  - Photojournalists
  - Videographers
  - Master class Instructors
  - Home Inspectors





# Proposition 22

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- Classification of app-based transportation services as independent contractor
- Workers must be provided:
  - Minimum compensation levels
  - Health insurance subsidies
  - Medical costs for on-the-job injuries
- Workers are prohibited from working more than 12 hours in a 24-hour period for a single company.
- Companies must develop sexual harassment policies, conduct background checks, and require safety training for drivers.



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# Key California Supreme Court Cases in 2021

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# *Vazquez v. Jan-Pro Franchising International*

- **Question Presented:** Does the decision in *Dynamex* apply retroactively?
- On January 14, 2021, the Court held that the ABC Test must be applied retroactively. The Court stated that *Dynamex* was a case of first impression and did not change a settled rule on which the parties below had relied. Therefore, the Court saw no reason to depart from the general rule that judicial decisions are given retroactive effect.

# ***Donohue v. AMN Services***

- **Question Presented**: Can employers utilize practices upheld in the overtime pay context to round employees' time to shorten or delay meal periods?
- On February 25, 2021, the Court issued a ruling, holding that employers may not round time punches to the nearest preset time increment in the meal period context. The Court stated that the meal period requirements are designed to prevent even minor infringements on meal period requirements, and “rounding” is incompatible with that objective.
- The Court also held that noncompliant time records raise a rebuttable presumption of meal period violations, including at the summary judgment stage of litigation



# *Ferra v. Lowes Hollywood*

- **Question Presented:** Did the Legislature intend the term "regular rate of compensation" in Labor Code section 226.7, which requires employers to pay a wage premium if they fail to provide a legally compliant meal period or rest break, to have the same meaning and require the same calculations as the term "regular rate of pay" in Labor Code section 510(a), which requires employers to pay a wage premium for each overtime hour?

# COVID-19 Wage & Hour Litigation

- Compensable Time
  - Temperature and Symptom Checks
  - Reporting time
  - Overtime by Remote Employees
- Meal and Rest Period Issues
  - Remote Employees
  - Dispersed breaks due to social distancing
- Business Expense Reimbursement
  - On-site employees – PPE, hand sanitizer
  - Remote employees – cell phones, internet, other?



# Timekeeping

- Provide non-exempt employees with ways to track and enter time.
- Remind non-exempt employees of overtime policies, including if authorization is required.
- If employees working remotely violate overtime policies, it is important to counsel the employee and document the issue.



# Meal and Rest Period Issues

- (Remote employees): Ensure non-exempt employees are aware and acknowledge they need and do take meal and rest periods as appropriate.
- Dispersed breaks - Must still be timely
- Break rooms farther away - Breaks must be of sufficient duration





# Compensation for Medical Inquiries

- Compensation for undergoing medical inquiries or temperature checks.
- Reevaluate timekeeping protocols.
- Reporting time pay for employees sent home after medical inquiries or temperature checks.

# Reimbursements

- What does the Company have to reimburse if the Company implements a mandatory work from home arrangement?
- The general rule in California is that an employer is required to indemnify an employee for necessary expenditures incurred on the employer's behalf (Labor Code section 2802). For a remote worker this may include telephone and internet service.
- What is “reasonable reimbursement” for phone/internet charges?
- No definitive answer. Recommend providing a flat rate (stipend), but also allow for employees to request more if actual costs exceed the flat rate amount.

# Reimbursements

- Face coverings & masks – yes
- Other safety items
- Is it needed to perform the employee's job duties?

# Corporate Efforts to Combat Systemic Racism: Mitigating Risks and Unintended Consequences



# Corporate Efforts To Combat Systemic Racism

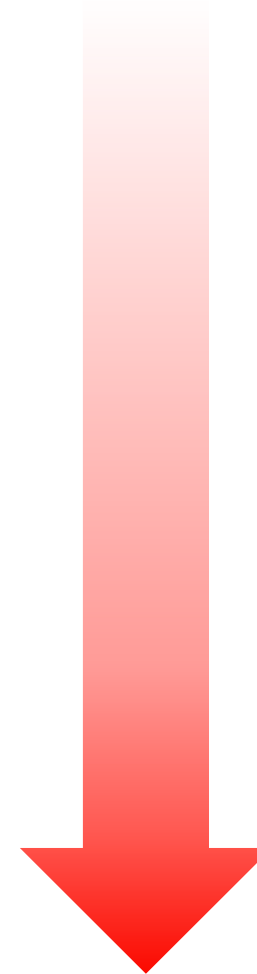
## Options include...

- **Affirmative Action Efforts**

- Affirmative Action Plans
- Sourcing and Outreach

- **Enhanced Efforts**

- Pay Equity Analysis
- Unconscious Bias, Anti-Racism Trainings
- Diversity Analytics
- Corporate Representation Goals
- Public Commitments
- Targeted Developmental Opportunities
- Tying Pay to Achieving Diversity Goals
- Conscious Employment Decisions



# Pay Equity Analyses



**Identify unintended race-  
and gender-based pay differences**



**Mitigate legal risk**



**“Do the right thing”**

# Bias Trainings

## Lower Risk

1. People have unconscious bias
2. Racism exists and we don't tolerate it
3. We treat all employees fairly
4. Anyone can be racist; it is not that White people are more likely to be racist
5. Some people believe that White people are privileged
6. We strive for equal opportunity and continue to work on ending discrimination in its many forms
7. US History has a dark period where White people enslaved Black people and we recognize that as wrong

## Higher Risk

8. White people are now responsible to right the wrongs of the past
9. White people are racist – whether they know it or not
10. Men are unconsciously biased against women
11. Because you are white, you have a responsibility to admit you are privileged and confront your guilt and defensiveness about it
12. Society is structured to oppress Black people

# Bias Trainings



**Review training content**



**Consider “disclaimer” language**



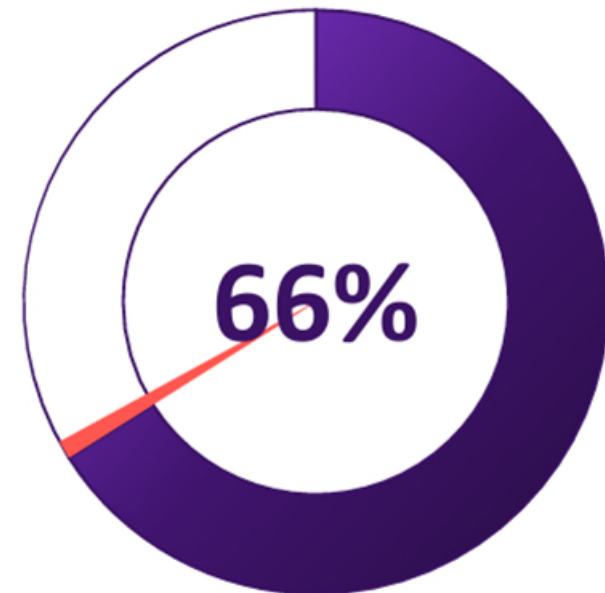
**Train trainers**



# Diversity Metrics

- **Different from affirmative action planning**
  - AAPs tied to/limited by “Job Groups”
  - Focus on company-specific career levels and or functional groups
- **Statistical analysis of “how we’re doing”**
  - Custom Labor Market
  - Comparison to Current Workforce
  - Can be performed at various groupings
    - *e.g. level, job family*
  - Simple messages

Female  
Representation to Benchmark



# Corporate Commitments

***Doubling African American Representation!***

***50% Women in Leadership by 2030!***

## **Caution!**

- **Public statements will be scrutinized by applicants, employees, plaintiffs and government agencies**

# Corporate Commitments

## Example

*Over the next two years, we've committed to hiring more than 1,000 new employees to our technology team. These new team members will include product managers, engineers, data scientists and user experience designers. All of them will help create incredible experiences for our customers every day.*

*And we're not stopping there. It's incredibly important to us that our workforce better represents the communities around us, which is why we've **committed that 30 percent of these new hires will be diverse** — specifically Black, Latinx, Indigenous, and women.*

## Better Example

*We are **committed to outreach and other diversity efforts we believe will result in 30 percent of our new hires being diverse**. Those efforts will include....but we will always seek out and hire the best qualified candidates.*

# Increasing Representation

## Targeted Sourcing & AAP (Fed Contractors)

- Targeted diversity sourcing is permissible (required for AAPs) – EEO still required
- Least risk

## Interviewing

- Diverse Slate Requirements (e.g., “Rooney Rule” or “Mansfield Rule”)
- “Plus Factor”

## Selection

- High risk activity

# Increasing Representation

## Recommendations to Increase Representation



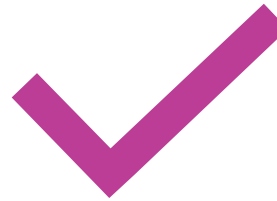
**Aspirational  
goals only**



**Anchored in  
reality**



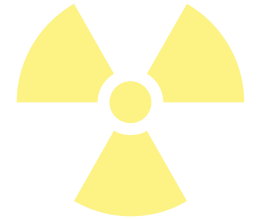
**Prepare for  
challenges**



**Enhance  
trainings**



**Document,  
document,  
document**



**Know your risk  
profile**



# Targeted Talent Management

**“Employment decision” includes an employer’s selection for training or development program. 41 C.F.R. §§ 60-3.2, 3.16**

- Employee development programs or cross training opportunities limited to African American employees

**Options include:**



**Exclusivity**



**“Separate but equal”**



**Groups and allies**



**Focused invitations**



**“Demonstrated  
commitment to  
diversity”**

# Can you Say That? Limitations on Speech in the Workplace

Tips for Managing Sensitive Topics

# What Kinds of Political Expression Might Come Up in the Workplace?

**Trump Said...**

Athletes Kneel During the National Anthem

Day Without Immigrants Protests

Tightened Border Control

Black Lives Matter

Workplace Disputes Over COVID Restrictions

**Biden Said...**



# One Simple Approach – No EASY Button Required

- An employee's focus at work should be job-related.
- If you are engaging in political dialogue or activities at work that are keeping you or your co-workers from performing your job duties or distracting you from your job duties --- you will be subject to disciplinary action.

# Why Is This Important?

- Preserving harmony, inclusiveness, and efficiency in the workplace.
- Avoiding potential harassment/discrimination issues.
- Avoiding free speech issues under federal or state constitutions or statutes.
- Applicability of other statutes that may concern certain topics employees may address during an election season.

# FREEDOM OF SPEECH?

- Contrary to popular belief, there is no blanket right of “free speech” in a private workplace.

*‘Employees may have a constitutional right to talk politics, but they have no constitutional right to be employed.’*

-- Oliver Wendell Holmes, Jr., 1891 (paraphrased)



# Freedom of Speech

**“It’s a free country, I can say what I want.” Right?**

- First Amendment limits only the *government’s* ability to suppress speech.
- Only individuals employed by the government have First Amendment protections at work.
- Private-sector employees generally do not have First Amendment protections in the workplace.
- No federal protection for private-sector employees’ political speech.



# State Law Protections

- Many states, including California, and local governments have laws protecting employee political speech or activities. Examples of other jurisdictions include:
  - Colorado, Connecticut, Georgia, Illinois, Iowa, Louisiana, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Dakota, Ohio, Oregon, South Carolina, Utah, Washington, West Virginia, Broward County (Florida), Seattle (Washington), and Madison (Wisconsin)
- Scope of protections vary greatly among states' laws, so consult with counsel for the state before taking action.
  - “Political opinions”
  - “Political activities”
  - “Election-related speech”
  - “Affiliating with a Political Party”

# California Laws

## Labor Code section 1101. **Political activities of employees; prohibition of prevention or control by employer**

No employer shall make, adopt, or enforce any rule, regulation, or policy:

- (a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.
- (b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees.

“Political Activity” has been defined very broadly.

# California Laws (continued)

## Labor Code section 1102. **Coercion or influence of political activities of employees**

No employer shall coerce or influence or attempt to coerce or influence its employees through or by means of threats of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.

Labor Code section 1102.5 provides “whistleblower” protection and institutes a civil penalty of up to \$10,000.

Labor Code section 1102.6 provides that once a claim under 1102.5 has been proven by a preponderance of evidence, the employer has the burden to prove by clear and convincing evidence that the adverse employment action would have occurred for legitimate business reasons.

# California – Lawful Off-Duty Conduct

Labor Code section 96(k) provides that upon the filing of a Charge, the California Labor Commissioner may take assignment of a claim for “loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer’s premises.”

Labor Code section 98.6(a) provides in pertinent part:

A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in conduct . . . described in subdivision (k) of Section 96 . . .

# Union vs. Non-Union

- Union collective bargaining agreements (“CBAs”) often limit an employer’s ability to terminate workers without a performance-related reason
- Some CBAs include an anti-retaliation provision, which may address political activity
- **Check the CBA before taking action**



# Other Considerations - Policies

- Social Media and Electronic Communications
  - Remind employees of policies regulating Internet and email usage in the workplace
- Be mindful of the NLRA:
  - An electronic communications or social media policy that prohibits an employee from (for example) criticizing or disparaging or making false or offensive or injurious or negative statements about his/her employer or supervisor electronically, including on social media, etc. is illegal



# Best Practices

- Establish and communicate clear expectations as to your company's policy on political expression, and the sound reasons for it.
- Train supervisors and managers on the company's policy, which may include:
  - Steps to take if they observe inappropriate conduct
  - Avoiding engaging in inappropriate conduct themselves (e.g., favoritism toward certain employees based on political affiliation or views)
- Restrict access to bulletin boards or e-mail systems for political purposes.
- Do not allow third-party political activity on the premises.

# OFCCP Has Been Busy – What's New, What's Coming, and How to Prepare

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# What's New?

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# OFCCP

**On January 19, 2021**

**Staffing:** Small footprint

**Track Record:** *All time highs!*

FY19 - \$40.6 million

FY20 - \$35.6 million

**Audits:** Still initiating audits from Spring and Fall 2019 lists

**Priorities:**

Certainty

Efficiency

Recognition

Transparency

**Focus:** Focused Reviews

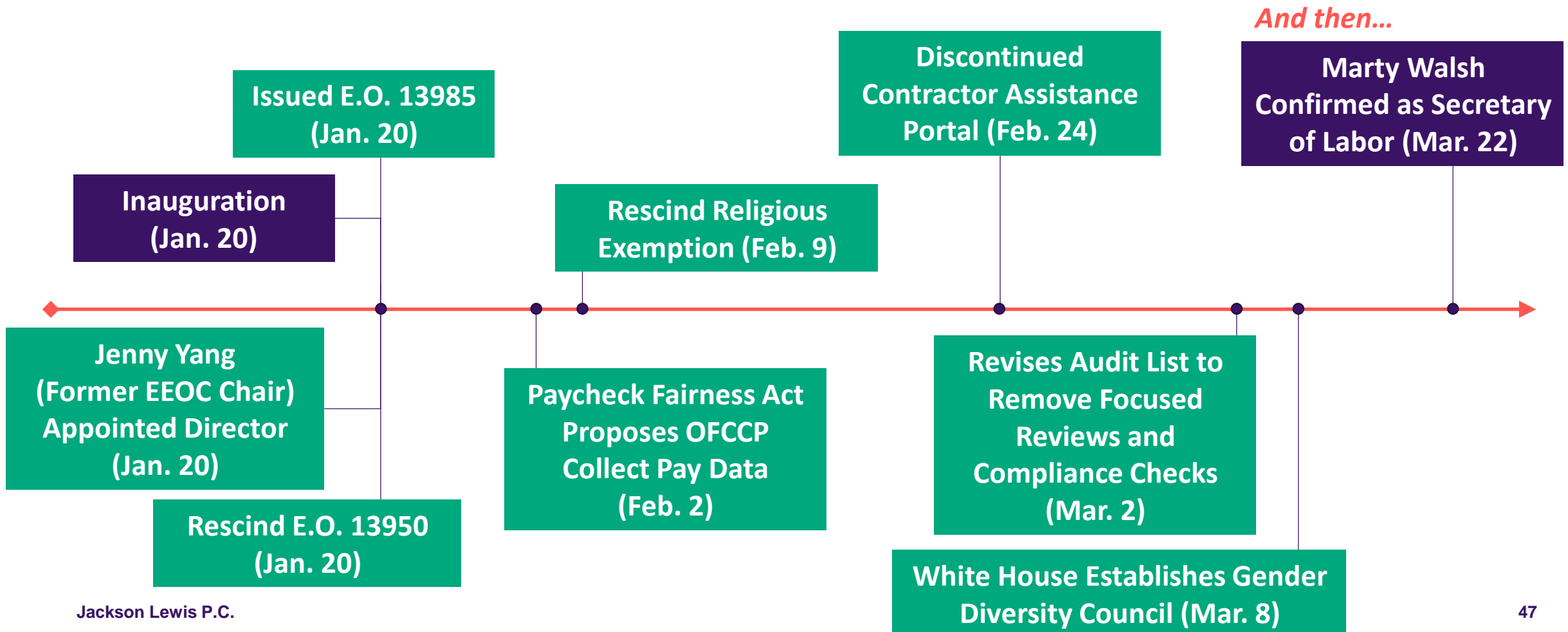
Section 503

VEVRAA

Promotions

Accommodations

# OFCCP 2021 Timeline



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# What's Coming?

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# OFCCP Priorities

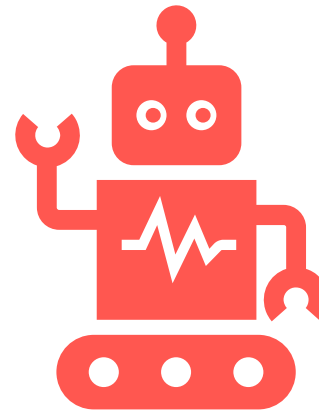


**Primary Tool  
For Biden Priorities**



**Pay Discrimination &  
Reporting**

Paycheck Fairness Act  
Pay Data Reporting

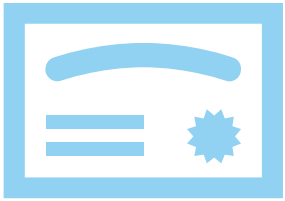


**Artificial  
Intelligence**



**Gender Identify,  
Sexual Orientation Protections**

# Predictions



AAP Certification/  
Verification



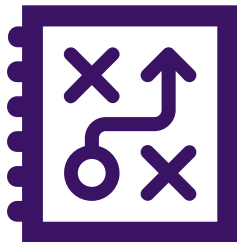
Return to Active  
Case Enforcement



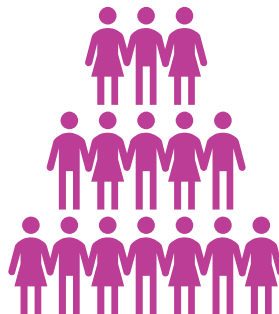
Replace  
CERT Directives



Revised Compensation  
Approach



Strategic Resource  
Allocation



Increased  
Headcount



Shift View of  
ERP Settlements



2021 Audit List  
Before Summer

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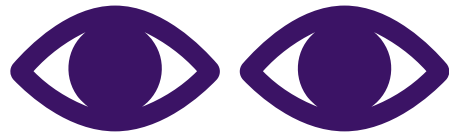
# How to Prepare

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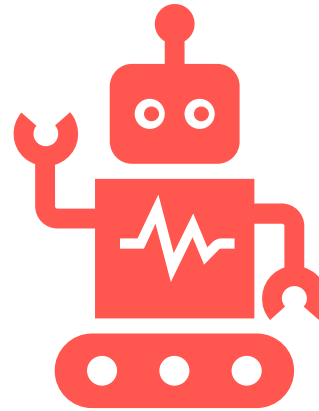
# How to Prepare



**Timely Prepare  
AAPs**



**Monitor  
Developments**



**Evaluate Tests that  
may Cause Adverse Impact**  
Degree requirements  
Personality and other tests  
Artificial intelligence tools



**“Evaluate”  
Compensation  
Systems**  
(and Understand Privilege)

**(b) *Identification of problem areas.*** The 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.*

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Thank **you.**