

OFCCP's Proposed New Scheduling Letter May Fundamentally Change Audits for Contractors

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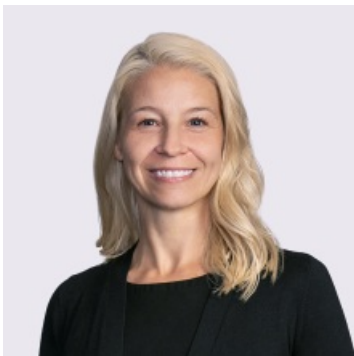
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The Office of Federal Contract Compliance Programs (OFCCP) has proposed changes to the notice, or Scheduling Letter and Itemized Listing, it issues to federal contractors and subcontractors selected for annual compliance evaluations. The Scheduling Letter requests the contractor's affirmative action plan and supporting data. The proposed changes would significantly expand the number of documents and amount of data OFCCP requires federal contractors submit at the outset of an audit.

The proposed changes, if approved by the Office of Management and Budget (OMB) in its current form, will dramatically increase the burden associated with responding to the Scheduling Letter. They also will fundamentally alter how contractors prepare for an audit.

Some of the most significant changes are discussed below.

Impact on University, Corporate Campus AAPs

OFCCP claims in the standard Scheduling Letter that it is entitled to audit all affirmative action plans (AAPs) associated with a campus if the contractor has a "campus-like setting that maintains multiple AAPs," regardless of which AAP is selected for audit. The Scheduling Letter states:

If you are a post-secondary institution or federal contractor with a campus-like setting that maintains multiple AAPs, you must submit the information requested in this scheduling letter for all AAPs developed for campuses, schools, programs, buildings, departments, or other parts of your institution or company located in [city and state only].

Absent a Functional Affirmative Action Plan (FAAP) agreement with OFCCP, the regulations require contractors to prepare separate affirmative action programs for each establishment at which at least 50 employees work. *See* 41 CFR 60-2.1(b). Nevertheless, historically, OFCCP has expected both universities and corporations to develop a single AAP to cover multiple buildings on the same campus, provided they operated as a single enterprise. In October 2019, OFCCP issued a Technical Assistance Guide for universities that set out the circumstances in which a university could prepare multiple AAPs for a single campus.

Ordinarily, OFCCP audits each contractor establishment independently and pursuant to a separately issued Scheduling Letter. However, starting in September 2020, in its published methodology for the selection of contractor establishments for audit, OFCCP asserted that it considered the various buildings making up a higher education institution's campus as subject to a single audit, regardless of whether the institution prepared one or more AAPs within the campus. Accordingly, OFCCP

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expected a university to submit all AAPs covering the campus where it issued a Scheduling Letter.

OFCCP proposes to enshrine this assertion and, potentially more troubling, expand the concept to all types of contractors who maintain campuses with multiple facilities, not just higher education institutions.

OFCCP has expressed intentions to broaden the scope of its audits. While the scheduling methodology and the Scheduling Letter do not create legal obligations for a contractor, OFCCP is clarifying that it believes it has the right to access data for establishments beyond the physical address it selected for audit.

If this direction makes it into the final version of the revised Scheduling Letter, contractors that prepare multiple AAPs for a single campus should revisit their approach.

Artificial Intelligence Tools

OFCCP proposes to require in Itemized Listing # 19 a description of a contractor's artificial intelligence, algorithms, or other automated systems used in the selection process.

OFCCP and the Equal Employment Opportunity Commission (EEOC) have worked for years toward understanding the impact of, and providing guidance on, the use of automated tools for testing and other selection procedures. EEOC launched an initiative on artificial intelligence fairness in October 2021 and, in May 2022, published its technical assistance guide on artificial intelligence as it relates to disability law: "[The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees.](#)"

In September 2022, EEOC and OFCCP cohosted an event on the use of artificial intelligence in recruiting and hiring decisions. EEOC Chair Charlotte Burrows and OFCCP Director Jenny Yang emphasized the need for employers to carefully consider what factors automated employment decision tools (AEDT) are evaluating and analyze for disparate impact. OFCCP urged employers to assess their job openings and determine whether the factors used by the AEDT are tailored to the skills required by the specific job. Both EEOC and OFCCP appear to share concerns about the potential for automated decision-making tools to "screen out" applicants with disabilities based on underlying factors baked into the algorithm, as well as potential issues with applicants failing to receive a reasonable accommodation to ensure the tool is assessing them fairly.

Traditionally, OFCCP investigated assessment tools only where a statistical indicator in the hiring process existed and the resulting stage analysis showed adverse impact at the assessment level. If OFCCP obtains information on employers' assessment tools at the outset of the audit, more targeted investigations of these tools, as well as more artificial intelligence-based enforcement actions, can be expected. Employers should evaluate the potential risks of using artificial intelligence as part of the selection process, review their accommodations processes, and consult with their artificial intelligence tool vendors to understand exactly what information is being gathered and how it is being used by the tool.

Promotions Data

OFCCP proposes to require submission of employee-level promotions data (including details on the job title, supervisor, and department promoted from and to) and whether the promotion is competitive. OFCCP often requests the competitive nature of promotions, as well as employee-level data, when it identifies statistical indicators in the promotions data at the desk audit phase. Unfortunately, many contractors simply do not have such detailed data readily available in their human resources information systems (HRIS). Therefore, gathering these details often will involve a manual and lengthy process. Moreover, contractors will need to analyze competitive and non-competitive promotions separately for adverse impact prior to submission of such data to OFCCP.

Compensation Data

In its proposal, OFCCP has revamped the information sought to review a contractor's compensation practices. OFCCP proposes submission of two snapshots of employee-level compensation data, one for the current plan year and one for the prior plan year. While OFCCP occasionally would request a second compensation report during an audit, such requests were limited to instances where the agency identified initial issues with the one snapshot it received. With this proposed change, OFCCP will obtain two years of compensation data as a matter of course, rather than articulating a basis for the additional data. If OMB approves the Itemized Listing as written, employers undergoing an audit will need to thoroughly vet the data for not one but two snapshots of the entire audited workforce. Moreover, the additional data will provide OFCCP greater opportunity to identify issues for investigation and increase the likelihood of a discrimination finding.

The proposed Scheduling Letter further seeks information on the factors used to determine employee compensation (such as education, experience, and time in position) and requests contractors provide this information unless the data are not available. As with the competitive nature of promotions, most contractors simply do not maintain such data in their HRIS.

Non-Employee Compensation Data

Though the agency offers no justification for such authority, OFCCP proposes to require a contractor to submit compensation data not only on its employees, but also anyone assigned to it through a staffing agency. In its Supporting Statement, the agency states that, because it requests compensation data on temporary employees in the current Scheduling Letter, it is simply clarifying that the term includes those assigned through a staffing agency. Although the contractor does not set pay for these individuals, the proposal seeks information on the factors used to determine pay of staffing agencies' employees as well.

Compensation Evaluation Documentation

Another major addition to the proposed Itemized Listing is documentation of the contractor's evaluation of its compensation system. In Directive 2022-01 Revision 1, published in August 2022, OFCCP makes clear that it believes contractors must perform a formal analysis of compensation to comply with 41 CFR § 60-2.17(b)(3). While the Directive identified circumstances where the agency might request evidence of such an analysis, the proposed Scheduling Letter would require the

submission of such evidence at the outset of an audit. That evidence can take the form of:

1. The analysis itself;
2. A redacted version of its compensation analysis;
3. An unredacted analysis from the relevant review period that will not be protected by the attorney-client privilege in any way; or
4. A detailed affidavit.

Regardless of the option selected, the evidence must show when the analysis was completed, the number of included and excluded employees, the types of compensation analyzed, and the method of analysis, as well as a confirmation that race, gender, and ethnicity were analyzed.

Contractors Still Have Time to Submit Comments

One comment submitted to OFCCP so far has noted the hefty underestimation of time required of contractors to comply with the additional requests in the Itemized Listing. Many of the items being requested are not actually required as part of an affirmative action plan. To conduct the required vetting and validation of data and gather requested information will almost certainly require more than 30 calendar days. Another commenter requested OFCCP extend the notice-and-comment period due to the comment period falling in the middle of the holidays and the volume of changes proposed. Public comment is currently open until January 20, 2023. OFCCP's current audit Scheduling Letter expires on April 20, 2023. Any finalized changes will be implemented after that.

Please contact a Jackson Lewis attorney with any questions.

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