

Podcast

The Year Ahead 2024: AAP/OFCCP

By Stacey A. Bastone & Alyssa J. Calabrese

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Meet the Authors



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Affirmative Action, OFCCP and
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Transcript

Alitia Faccone:

Welcome to We get work™ and The Year Ahead 2024 podcast series. Covering workplace issues from both subject matter and industry perspectives, the 19 episodes in our series provide both big picture trends and detailed tactics that can help employers achieve their workplace ideal, while remaining real about regulations, compliance challenges, and more in 2024. Jackson Lewis invites you and others at your organization to experience the report's legislative, regulatory, and litigation insights in full at our website, JacksonLewis.com, or listen to the podcast series on whichever platform you turn to for compelling content.

Stacey Bastone:

Hello, and thank you for joining us today. I can't believe it's 2024, but what better time to talk about what to expect from OFCCP than the beginning of a new year. I'm Stacey Bastone. I'm here with my colleague, Alyssa Calabrese, and we are both attorneys at Jackson Lewis. We practice in the firm's Affirmative Action, OFCCP, and Government Contract Compliance Practice Group. And what that means is that we spend a lot of our time working with federal contractors on their compliance programs, preparing annual Affirmative Action Plans, defending AAPs when our clients are audited by the federal government. And providing advice and counsel regarding complying with the AAP regulations. What we also spend a lot of our time doing is working with our clients on their pay equity analysis. This includes proactive pay equity analysis, annual analysis to comply with the Affirmative Action obligations, and analysis conducted as part of the AAP audit preparation process.

So not surprisingly, we both closely follow developments from the OFCCP. And something we've been following for some time are the changes to the OFCCP supply and service scheduling letter. So for just a little bit of background, one of the ways that the OFCCP monitors compliance with the Affirmative Action regulations is by conducting compliance reviews, also known as audits. And so when a contractor is audited, it has to turn over its AAPs and additional requested information that is subjected to intense scrutiny by the agency. And it's the scheduling letter that outlines the information that the OFCCP is entitled to as part of the compliance review. So not surprisingly, the updates to the scheduling letter were heavily anticipated. They went through a few rounds of revisions

before they were finalized. And they finally went to effect this past August and applies to any compliance evaluation that was scheduled on or after August 24th. So with this background, Aly, what do you think are some of the biggest changes in the new scheduling letter?

Alyssa Calabrese:

Yeah, so I think there are a lot of interesting changes in this new scheduling letter for sure. But I think without of doubt, the biggest substantive change has got to be the compensation component. There are several new asks related to compensation that contractors need to pay attention to going forward. First, there's the scope of the data that's requested in the new item 19 of the scheduling letter. Previously, employers only needed to submit compensation data in scope for employees on their current year workforce, which included things like base salary, bonus, commissions, incentives, et cetera. But now, employers need to turn over that same information for employees from their prior year workforce. So right off the bat, OFCCP has double the amount of compensation data it typically receives for every single compliance review.

Stacey Bastone:

Wow. That's a lot of information.

Alyssa Calabrese:

Yeah. And you also need to provide policies and documentation on your compensation practices, as well as relevant data on the factors you use to determine compensation. So things like education, time and position, location, differentials, performance ratings. There's a lot of information that may need to be turned over to OFCCP. So Stacey, I'm sure you agree that there's a lot OFCCP can do with this. What do you think contractors should expect?

Stacey Bastone:

Yeah, this is definitely a treasure trove of data and documentation. And I think that we can expect OFCCP to conduct a much deeper dive into compensation practices. And considering how deep of a dive they've been doing over the last few years, this is saying a lot. I think with this additional year of compensation data, we could likely see the agency conduct new analysis that attempt to combine two years' worth of compensation data and incorporating potential explanatory variables into regression analysis much earlier in the process than we've seen before. I also think this will mean a lot more requests for information from contractors and potentially longer audits because it's going to take time for OFCCP to review all of this data and documentation.

Alyssa Calabrese:

Yeah, absolutely. I think we're going to see longer audits going on for sure. That's not the only piece related to compensation. There's also an item 22 request, and that's for documentation that a contractor has satisfied its obligation to evaluate its compensation systems. So for this one, the obligation here hasn't changed. Contractors were always required to evaluate their compensation systems. But

really what's changed and what contractors need to be asking themselves is how are you going to prove it to OFCCP? What documentation do you need to provide to substantiate that you actually evaluated your compensation systems? And that can range from a full copy of non-privileged analysis to a redacted copy of privilege analysis or an affidavit that summarizes what you did in a privileged analysis.

Stacey Bastone:

Contractors need to think critically about what they're going to provide to the agency in response to this itemized listing. And they shouldn't wait until they're audited. By the time they receive a scheduling letter, it's going to be too late to start focusing on this aspect of the compliance review. They really need to think about this now as part of their annual plan preparation. Another thing that contractors need to think about now is item number 21. So this is a brand new request. And what it's asking from contractors is for them to identify and provide information and documentation of policies, practices, or systems used to recruit, screen, and hire. Including the use of artificial intelligence, algorithms, automated systems, or other technology-based selection procedures. So if you're asking yourself what that means, you're not alone. For starters, this is a very broad request and it's confusing.

On its face, it can include almost anything related to a contractor's policies and practices. And we've already started to see requests for detailed information relating to contractors' hiring practices and can expect more. But what's really important about this and what's quite frankly not surprising is that this includes a request for information related to a contractor's use of artificial intelligence and algorithms. And this is something that not just the OFCCP is focused on, we've seen states focusing on this as well. But we know that OFCCP has taken a keen interest in this and in the civil rights implications of the use of AI and the concerns around it. Traditionally, OFCCP has only investigated employment tests or other discrete steps in the application or promotion processes if they've identified adverse impacts. But now, employers will have to provide information to the agency as part of its initial plan submission. So employers need to identify what, if any, automated systems or AI technology is being used, how it's being used, why it's being used, and whether or not it needs to be validated. These are not easy questions.

Alyssa Calabrese:

Yeah. And I think also at this point, we're going to see a lot of varying approaches from OFCCP depending on the district because let's not forget this is new to them too. So for any contractors out there, lucky enough to have maybe multiple audits going on in different regions of the country, you might find that what satisfies one compliance officer for item 21 might not be sufficient in a different region. So I think it will be really interesting to see how the agency tackles some of those inconsistent practices that might stem from the new scheduling letter because we're already seeing it in initial audits that were submitted over the past few months. So I think we've hit on some of the big scheduling letter changes here. But Stacey, what else do you think contractors should be thinking about?

Stacey Bastone:

So there are also several either new requests or updated requests that's going to require contractors to provide a lot more information and documentation to support their outreach efforts, the assessment of those outreach efforts, and their overall assessment of personnel processes. These are all things that the agency was already looking at and, in some ways, already requesting. But contractors should be prepared to provide a lot more information to support what they've been doing to comply with the Affirmative Action regulations. Hey, Aly, before we wrap up, anything else you think we should point out for our listeners?

Alyssa Calabrese:

Yeah. So one last thing that's new to the scheduling letter is that contractors with campus-like settings. So think of universities, hospitals, tech companies. They now, under the new scheduling letter, must produce all Affirmative Action Plans for the campus buildings located in the same city where the establishment selected for audit is located.

Stacey Bastone:

But that's the big change, wouldn't you say?

Alyssa Calabrese:

Yeah, absolutely.

Stacey Bastone:

So just to break this down for a minute. So what this is saying is that if you are a contractor that operates on a campus setting, if one of your buildings is audited, the OFCCP is going to expect to receive Affirmative Action Plans. If you prepare them individually, they're going to expect to receive Affirmative Action Plans for each location on that campus. This is a big development. I think that it's something that OFCCP has been trying to enforce over the last year or two, but now they've operationalized it and formalized it in their scheduling letter. And so contractors and in particular, this will affect higher ed institutions the most, I think. This will likely mean that the OFCCP will aggregate data across plans, and this could affect outcomes of goals, adverse impact analysis, compensation analysis.

So contractors really need to think critically about how they're structured. Whether that structure makes sense, whether they should continue preparing multiple Affirmative Action Plans, or potentially create a single plan for the entire campus. And whether after the plans are completed, whether they need to evaluate and implement their plans differently, knowing that the OFCCP is going to get all this information in one shot and potentially aggregate it on their end. So there's a lot to unpack in this new requirement around campus-like settings.

Alyssa Calabrese:

Wow. So that was a lot. I think there's a lot of information here that contractors are really going to need to focus on for 2024.

Stacey Bastone:

It is a lot. And really too much to cover in detail on a podcast. So feel free to check out our Affirmative Action Law Advisor blog or reach out to Aly or I with any questions. Thanks for joining.

Alitia Faccone:

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