

What You Need to Know About the OFCCP: Part 1 – 2023 Year in Review

By K. Joy Chin & Matthew J. Camardella

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Details

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Transcript

Alitia Faccione:

Welcome to Jackson Lewis' podcast, We get work™™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable and inclusive workforce. Our podcast identifies issues that influence and impact the workplace, and its continuing evolution and helps answer the question on every employer's mind, how will my business be impacted?

In 2023, the OFCCP demonstrated renewed vigor in audits, recovering \$17.3 million from federal contractors for alleged hiring and compensation discrimination. It also was a year of churn, challenge, and change as the agency updated procedures for discrimination complaints, managed a massive FOIA request for EEO-1 reports and accompanying litigation, and rolled out a new scheduling letter requiring substantially more information from contractors at the outset of an audit.

As we kick off our AAP/OFCCP We get work™™ podcast series, we review the OFCCP's activities in 2023 and provide a glimpse into what employers can expect in 2024.

Today's hosts are Matt Camardella and Joy Chin, principals, and co-leaders of the Affirmative Action, OFCCP, and Government Contract Compliance practice group. In their shared role, Matt and Joy oversee the preparation of nearly 5,000 affirmative action plans annually, represent contractors in all phases of OFCCP audits, and provide counsel for complying with the myriad of

requirements under the federal affirmative action regulations.

Matt and Joy, the question on everyone's mind is, what should federal contractors know about the OFCCP's activities in 2023 and how will that impact my business in 2024?

Joy Chin:

Hi everyone. Thank you for joining us as we kick off our podcast series in which we'll tell you everything you always wanted to know about OFCCP Compliance, but were afraid to ask. I'm Joy Chin and I'm here with my very good friend, Matt Camardella. We are the co-leaders of Jackson Lewis's Affirmative Action, OFCCP and Government Contract Compliance Practice Group. In this first episode, Matt and I are going to take a little trip down memory lane for a retrospective of OFCCP's works in 2023. I don't know about you, Matt, but if I had to sum up OFCCP's 2023 in three words or less, I'd say it was a year of churn, challenge and change. What do you think? Can we say OFCCP churned out results? I hope so, because I just did.

Matt Camardella:

Hi, Joy, it is great to sit down with you again. To answer your question, I think we can safely say yes. As you know, OFCCP had a pretty lackluster fiscal year in 2022, so they were looking to have a bounce back year, and by enforcement statistic measures they did. According to OFCCP, the agency resolved 56 cases of alleged discrimination in fiscal year 2023. Of those, nine involved allegations of pay discrimination. Presumably the remainder involved hiring discrimination findings, but in total, the agency recovered \$17.3 million for class members. In contrast, back in 2022, OFCCP only resolved 34 cases, eight of which involved pay discrimination, and collected only \$11.8 million in relief. As you can see, Joy, OFCCP remains focused on remedying discrimination in hiring and compensation, and we'll look to improve on these results in 2024. Speaking of focus, Joy, what else was OFCCP focused on in 2023?

Joy Chin:

Construction contractors. With the passage of the Bipartisan Infrastructure Law expected to pour over a trillion dollars into the country's infrastructure system and create over two million jobs over the next 10 years, OFCCP refocused on the construction industry and launched its Mega Construction Project Program. And their efforts paid off. OFCCP went from, to borrow your phrase, Matt, a lackluster fiscal year 2022 to a construction contractor audit boom in '23. According to OFCCP enforcement statistics, in 2022, OFCCP completed 33 construction contractor audits with only four of those resulting in conciliation agreements or findings of violations. In 2023, OFCCP more than tripled those numbers. In that year, the agency completed 175 construction contractor audits, which resulted in 65 conciliation agreements, so don't be surprised to see continued scrutiny in this area in the future.

That's a good segue to the challenging part of OFCCP's 2023. The FOIA request, Freedom of Information Act request, for EEO-1 reports. I mean, who

knows, had OFCCP not had to contend with the challenge of a FOIA request for a massive amount of data, there's no telling how much higher OFCCP's enforcement statistics could have been. To give a bit of background, between 2019 and 2022, the Center for Investigative Reporting, the CIR, submitted FOIA requests to OFCCP asking for all Type 2 Consolidated EEO-1 Reports filed by federal contractors and their first-tier subcontractors from 2016 to 2020. Those Type 2 Consolidated EEO-1 Reports reflect employee demographics, that includes race, ethnicity, and sex, broken out by job categories for an entire organization. It's a lot of data. In response, OFCCP notified contractors of the request and the opportunity to object to the release of their EEO-1 reports, and that would give the agency a basis to withhold the information.

OFCCP gave contractors until October of 2022 to object. Apparently unhappy with the pace at which OFCCP was moving, the CIR in November of 2022 filed a complaint in federal court seeking release of the EEO-1 reports. And that put pressure on OFCCP in the first half of 2023 to try to wrap their arms around who had objected, and whose data would be withheld, and who hadn't objected, and whose data would be released, while at the same time responding to the lawsuit itself. Matt, did their efforts pay off?

Matt Camardella:

Well, kind of, depends on how you look at it. In December 2023, the district court granted CIR's motion for summary judgment to compel the release of those EEO-1 reports. The decision focused on three arguments put forth by the OFCCP. First, the court found that EEO-1 reports are non-commercial because they broadly cover workforce data and do not provide insight into operational or financial details of a business. Second, the court found that EEO-1 reports are not covered by the Trade Secrets Act. Relying on the same rationale and rejecting the first argument, the decision stated that EEO-1 reports do not qualify as trade secrets or confidential information. Finally, the court found no evidence of demonstrated harm from disclosure. Once again, since the court found the reports are not commercial, do not constitute trade secrets, and are not confidential, it did not see how their release could cause any harm.

Now, Joy, we could both make strong arguments for why the district court was wrong in its reasoning and how it missed the big picture of why FOIA exists in the first place, namely, to allow citizens to know what their government is up to, not to allow for discovery of a business's private information. The decision is what the decision is. That being said, OFCCP has not yet conceded defeat. The agency filed a notice of appeal on February 15th and asked the court to stay the ruling pending the appeal, so stay tuned.

Okay, now that we've looked at some churn and challenge, let's take a look at some of the changes OFCCP made last year. In February 2023, OFCCP rescinded a rule issued under the Trump Administration that addressed the scope and extent of Executive Order 11246's religious exemption. Joy, to understand this development, I need to tell you a story.

I call it the tale of the four administrations. Now, I know I have a terrible sense

of humor, but bear with me. Anyways, back in 2012, during the George W. Bush Administration, the executive order was amended to include a religious exemption that was designed to allow religious organizations to express an employment preference for individuals who ascribe to the tenets of a specific religion. Think of a Catholic high school wanting to hire only Catholics to teach religion in that school. That exemption was meant to protect certain religious freedoms for that small segment of government contractors who are religious organizations. It was not meant to relieve such organizations of the obligations to ensure equal employment opportunity and non-discrimination on other bases protected by the executive order, such as a person's race or gender. Fast-forward to the Obama Administration, the executive order was amended to expand its protection to sexual orientation and gender identity, thereby broadening the executive order's coverage.

Thereafter, during the Trump Administration, the exemption was expanded to broaden which organizations might be considered religious, and according to many critics, would've allowed discrimination on other bases, such as sexual orientation or gender identity, as expanded for under the Obama Administration. Anyways, this story concludes, or maybe it's just the next chapter, with the Biden Administration, rescinding the Trump era rule and returning things to the way they were before. While the religious exemption remains, its reach is limited to the way it was originally implemented under the George W. Bush Administration. Now Joy, since we have entered story time, do you have any tales to regale us with, perhaps stories of swashbuckling OFCCP characters?

Joy Chin:

I don't know if I'd refer to it as swashbuckling, but we did see a few changes in the OFCCP cast last year. In March, Jenny Yang left her position as director of OFCCP after a little more than two years in the position. She left to take over as Deputy Assistant for Racial Justice and Equity on the White House Domestic Policy Council. With Ms. Yang's departure, Michele Hodge became acting director of OFCCP.

Another familiar presence left OFCCP last year, Melissa Speer retired as regional director, RD, of the Southwest and Rocky Mountain, or SWARM, Region after 30 years with OFCCP. Ronny Sullivan, who had been SWARM's deputy regional director, was appointed RD at the beginning of this year.

But wait, Matt, there's more. Diana Sen, RD of OFCCP's Northeast Region for the past 10 years, is doing a stint with the DOJ as a senior counselor in their Civil Rights Division. Konrad Batog, Deputy RD of the Northeast Region, is holding down the fort until she returns, with an assist from Sam Maiden, RD of the Mid-Atlantic Region. That's it for the cast of players, Matt. What did we see in terms of the playbook? Do you like how I switched metaphors on you?

Matt Camardella:

Good one, Joy. I am heartened to know that I am not the only lawyer who can make bad puns. Speaking of more awkward humor, Groundhog Day was just a

few weeks ago, and here we are again, fast approaching the opening of the contractor portal for 2024. As far as 2023 goes, contractor use of the portal to certify the development of their AAPs seemed to go smoother than in 2022, the first year OFCCP required certifications, but it certainly was not without its bumps. Substantively, we saw only one notable change for 2023. Contractors had to include the AAP year in their certification. While seemingly innocuous, OFCCP can use this information when scheduling audits, specifically the agency can reference the portal prior to issuing a scheduling letter so it knows exactly what plan year to expect from a contractor, and if that year differs from what's submitted, the agency can ask as to why. Now, Joy, I heard something about OFCCP changing the way it initiates findings of discrimination. Is that true?

Joy Chin:

Technically yes, but mostly on paper, not necessarily in practice. OFCCP's final pre-enforcement notice and conciliation procedures, in short, the PDN rule, went into effect in September. The final PDN rule modified the procedures published in 2020, which were intended to create greater certainty for contractors. The new rule largely restores greater flexibility for OFCCP and how it investigates and pursues cases by eliminating hurdles, such as OFCCP having to provide factual evidence to support a finding of discrimination, or OFCCP providing the model and variables the agency may have used in any statistical analysis, or providing an explanation as to why the agency excluded any contractor proposed variable.

The new PDN rule also creates shortcuts for OFCCP, such as cutting in half the time for contractors to respond to a PDN from 30 days to 15. It allows OFCCP to add violations in a subsequent NOV or show cause notice without first amending the PDN or the NOV, and allowing OFCCP to skip the PDN or NOV entirely and go straight to a show cause notice when a contractor denies access to facilities or refuses to provide information during an audit. It's safe to say the new PDN rule reflects OFCCP's commitment to increased enforcement under this administration. Matt, what other changes to OFCCP's playbook did we see?

Matt Camardella:

Well, Joy, OFCCP updated its procedures for processing complaints of discrimination. Like EEOC, OFCCP has the authority to investigate claims of discrimination levied against contractors. But unlike EEOC, OFCCP procedures require a full investigation, including an onsite of all appropriately filed complaints. Moreover, those complaints can also trigger an audit of a contractor's compliance with the affirmative action regulations more broadly. The new process involve two steps, which are designed to avoid spending resources, responding to complaints that OFCCP cannot or should not investigate.

First, a complaining party should file a pre-complaint inquiry that provides basic information about the circumstances giving rise to the complaint. OFCCP then will review the inquiry to confirm it has jurisdiction to investigate the

complaint. For example, is the employer a government contractor? Does the complaint alleged discrimination on the basis of a protected characteristic? Is the complaint filed timely? Should another agency, like EEOC, investigate the claim instead of OFCCP? Second, if OFCCP concludes it should take the complaint, it will notify the party to file a formal complaint. If not, the agency will notify the party as to why it will not accept the complaint. Now, Joy, I find two aspects of this new process curious. First, a party is not required to submit a pre-complaint inquiry. Second, even if OFCCP does not think it can investigate a complaint, the party can still file the complaint. These features seem to undermine the whole point of the revised process, but who am I to judge?

Joy Chin:

We're not judging, Matt, we're just assessing. Which leads me to the next topic we're assessing. What about the new scheduling letter that went into effect for any audits scheduled on or after August 24th, which happened to be one day before OFCCP announced release of the updated letter? The new scheduling letter asks contractors to submit a lot of new additional information, right?

Matt Camardella:

Oh yeah, everyone is grumbling about how much more information must be submitted at the outset of an audit. Look, one of the justifications for this significant expansion is the additional information will make the audit process more efficient. Specifically, the agency has argued that the additional information will help OFCCP review for technical compliance and understand the data it has received, thereby avoiding the need for follow-up requests to the contractor. Now, while we can quibble whether such a justification makes sense or is actually being achieved through the new scheduling letter, the end result is OFCCP now seeks a number of additional items that provide more color about a contractor's practices at the outset of an audit.

Joy Chin:

Matt, you had me at significant expansion, but can you give us an example?

Matt Camardella:

Sure, happy to. Take items 19 B and C of the itemized listing as part of this section where OFCCP asks for compensation data, the agency now requests information on the factors that influence pay and for any relevant policy documents that are related to compensation. Why? It will help OFCCP figure out how it will analyze the data and what additional information might be needed to perform its analysis, such as information on the use of salary grades, or time and position. Clearly, OFCCP feels the need to get this information upfront, thus the expansion. Joy, why would that be, and how does that fit with OFCCP's enforcement priorities?

Joy Chin:

The new scheduling letter clearly aligns with OFCCP's commitment to

increased enforcement, especially the agency's continued focus on compensation. As you said, Matt, one reason for the scheduling letter changes is to help OFCCP understand the data it receives, but getting the information upfront also gives OFCCP a heads-up as to how a contractor may defend its compensation or selection processes. OFCCP is essentially getting free discovery without contractors having the benefit of knowing what they're being accused of, like they would in a litigation. Look at the additional year of compensation data that contractors now have to submit at the outset of an audit. OFCCP is requiring two years' worth of comp data to test the contractor's responses as to what factors influence pay, and to conduct their own robust analysis. It puts pressure on contractors to understand and know what their data is saying before they submit to OFCCP.

All right, Matt, it's time to turn to the future and break out our crystal ball. What are you expecting in 2024?

Matt Camardella:

Well, Joy, I retired my crystal ball a few years ago, so this thing may not be working correctly, but I did put a fresh set of batteries in it, so let's see what this thing can do. All right, hold on, something is coming into focus. Got it. Since the decision in the Harvard case where the Supreme Court found it unlawful to consider race in college admission decisions, we have seen a significant uptick of challenges to DEI initiatives in the private sector. Invoking the Supreme Court ruling, those challenges have sought to cast DEI programs, especially those involving aspirational goals, as unlawful.

Interestingly, some of those challenges have involved the OFCCP in the form of letters to the agency from private interest groups claiming that certain contractors are actually violating Executive Order 11246 with their diversity programs and asking the OFCCP to intervene and investigate. We have also fielded numerous questions about whether the executive order itself could be challenged, following the Supreme Court ruling. So we expect OFCCP to keep getting dragged into this issue, and the agency will need to address how it will handle such challenges, especially when contractors undertake many of the initiatives being challenged in order to improve diverse representation pursuant to issues identified in their AAPs. What about you, Joy, how is your crystal ball working these days?

Joy Chin:

Apparently not too well, Matt, since I still haven't won the lottery, but I have fed a lot of information about our experiences with OFCCP into the computer. And based on the computer-generated intelligence, I think we can expect to see OFCCP continue to embrace the use of technology as well as focus on it from an enforcement perspective. We've already seen OFCCP begin to embrace the use of technology, for the portal certifications, audit submissions, even submission of the FOIA objections. So expect to see OFCCP continue to bring its processes into the 21st century to facilitate its collection and review of information.

At the same time, with the revised scheduling letter, contractors have to submit upfront information about AI systems and technologies used in recruiting and hiring. So expect OFCCP to drill down and closely examine contractors' use of those technologies. Be prepared to see more violations and potential discrimination claims from OFCCP based on the use of discriminatory AI tools in the selection process.

Well, Matt, it was great catching up with you today, I'm really interested to see how 2024 unfolds with OFCCP. Why don't we do this again next year?

Matt Camardella:

Well, Joy, thanks for including me, I would not miss it. See you soon.

Alitia Faccione:

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