

CLIENT UPDATE

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This update addresses six topics:

1. OFCCP's Revised New Scheduling Letter
2. California Pay Data Contractor Employee Reporting and May 10, 2023 Reporting Deadline
3. OFCCP Sets Contractor Portal Certification Deadline of June 29, 2023
4. OFCCP Publishes Its Updated Veteran Hiring Benchmark
5. OFCCP Releases EEO-1 Data for Organizations that Did Not Object to Disclosure
6. OFCCP Poised to Rescind Pre-Determination Notice Regulations

1. OFCCP'S PROPOSED SCHEDULING LETTER WILL IMPOSE SIGNIFICANT NEW BURDENS ON CONTRACTORS IN AUDITS

In November 2022, OFCCP published a proposed new scheduling letter and invited employer

comments until January 20, 2023. On April 17, 2023, OFCCP announced its final version of the letter, and it is giving employers 30 additional days (until May 17) to comment on this version of the new audit scheduling letter.

OFCCP left unchanged most of what it proposed in November including:

- Notifying employers about the start of the audit by email, not USPS
- Allowing employers to email their submissions to OFCCP or upload them into the Contractor Portal
- Requiring employers that prepare multiple AAPs for their campus-like settings to submit every AAP they prepare for that campus, all at once, when the campus is selected for an audit
- Requiring documentation demonstrating the development and execution of action-oriented programs designed to correct any problem areas identified pursuant to 2.17(b).
- Requiring more documentation regarding employers' assessment of their veteran and disability outreach, including an assessment of the totality of the effectiveness of these efforts
- Regarding disability utilization: for each job group that does not exceed the OFCCP's 7% disability utilization goal, the employer will need to
 - o Provide a description of the steps taken to determine whether and where impediments for equal opportunity exist;
 - o Identify problem areas, including an assessment of its personnel processes, the effectiveness of its outreach and recruitment efforts, the results of its affirmative action program audit, and any other areas that might affect the success of the affirmative action program; and
 - o Develop and execute action-oriented programs designed to correct the problem areas
- Requiring universities to provide their IPEDS forms for the last three (3) years (to parallel the same type of submission that non-universities supply with 3 years of EEO-1 forms)
- Requiring employers 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
- Providing the number of employees at the start of the prior AAP year by race, not just by minority/nonminority status
- Providing two compensation data snapshots instead of just one year
- Supplying compensation data on temporary employees and individuals provided by staffing agencies

- Providing the factors that affect compensation
- Providing documentation and policies related to compensation
- Submitting documentation that the contractor has satisfied its obligation to evaluate its compensation systems, including
 - o When the compensation analysis was performed
 - o The number of employees the compensation analysis included and the number and categories of employees the compensation analysis excluded
 - o Which forms of compensation were analyzed and how the different forms of compensation were separated or combined for analysis
 - o That compensation was analyzed by gender, race, and ethnicity
 - o The method of analysis employed by the contractor
- Supplying copies of EEO policies, including antiharassment policies, policies on EEO complaint procedures, and policies on employment agreements that impact employees' equal opportunity rights and complaint processes (e.g., policies on arbitration agreements)
- OFCCP agreed to remove from its November proposal:
- The requirement for contractors to identify promotions as noncompetitive or competitive
- The request for information on the previous supervisor, current supervisor, previous compensation, current compensation, department, job group and job title from which and to which individuals were promoted
- The request for information on specific reasons for termination at the desk audit stage
- Roffman Horvitz will be scheduling complimentary web seminars once the revised letter becomes final to explain how these changes to the OFCCP's scheduling letter impact employer record keeping and compliance obligations.

2. CALIFORNIA PAY DATA REPORTING OBLIGATIONS – LABOR CONTRACTOR EMPLOYEE REPORTING REQUIREMENT AND UPCOMING MAY 10, 2023 REPORTING DEADLINE

The California Pay Data reporting deadline is May 10, 2023 for certain employers to report their employee and labor contractor pay data information to California. Although some organizations still may have questions about whether they have to file reports for their employees, we feel like those questions are diminishing rapidly, but we are still fielding many questions about the labor contractor reports.

If your organization either:

- Regularly employed 100 or more labor contractor employees, or employed 100 or more labor contractor employees during the selected payroll snapshot in the United States (both inside and outside California) OR
- Had at least 1 labor contractor employee reporting to and/or working in California

you are required to file a labor contractor report, in addition to any employee reports.

Roffman Horvitz has developed a series of materials that are designed to aid our clients in obtaining the information needed for this filing. They include:

- A Labor Contractor Employee Report Overview (PDF)
- A Labor Contractor Employee Reporting Checklist (PDF)
- A Labor Contractor Data Request Template (XLSX)
- A Labor Contractor Employee Pay Reporting Template (XLSX)
- A transmittal email message from your organization to the labor contractor vendors

If you are still struggling with the CA Pay Data Reporting obligations (either for your employees or your labor contractor employees), please contact James McCauley:

jmccauley@roffmanhorvitz.com

3. OFCCP CONTRACTOR PORTAL – CERTIFICATION DEADLINE IS JUNE 29, 2023, BUT WHAT DO I DO IF I DON'T HAVE AN EEOC-ISSUED COMPANY NUMBER OR UNIT NUMBER FOR NEW ESTABLISHMENTS?

OFCCP's Contractor Portal is open for employers to certify compliance by June 29, 2023. The certification process is the same as last year, except that employers will be prompted to enter the start date of their AAP data cycle. The portal will auto-populate the end date.

Some employers are encountering problems with their establishment lists, though, because they don't have an EEOC Company ID number or an establishment Unit ID as a result of mergers, acquisitions, spin-offs, new facilities, or new contracts.

OFCCP's Technical Assistance Unit is advising employers to certify the list of establishments for which you have a company ID and a unit ID on or before June 29, 2023 and supplement your certification once you receive EEOC issued ID numbers later this summer.

--What is the issue that some employers are encountering?

Employers that have not previously filed an EEO-1 report need the Equal Employment Opportunity Commission to assign the company ID, and EEOC is not scheduled to open its employer portal until July 2023, after OFCCP's June 29 deadline. Relatedly, Employers that have previously filed EEO-1 reports, but have new establishments since the previous filing, will not have EEO-1 unit IDs for the establishments and will be unable to add them to the OFCCP portal prior to June 29.

For any employer that needs a company ID and doesn't have one because the EEOC's portal isn't open yet, you can certify in OFCCP's portal once you receive the company ID. OFCCP is not prioritizing companies for compliance reviews because they didn't have an EEOC unit number prior to June 29, 2023.

If you have a company ID, but the list of establishments in OFCCP's contractor portal is missing newer locations, for which you do not have a Unit ID, certify the establishments in OFCCP's list by June 29. Once EEOC issues you a unit ID for the establishment, you can add the establishment and certify it, even after the deadline.

--By way of reminder:

- If you prepare AAPs for locations with fewer than 50 employees, and OFCCP did not import those small establishments from its 2018 EEO-1 upload, you may need to add them to your establishment list. All employers were required to file small locations as type 8 reports last year, so small locations filed for in the 2021 EEO-1 report should have received unit IDs even if they did not previously have any.
 - o We are NOT saying that employers have to prepare AAPs for locations with fewer than 50 employees
 - o SOME employers choose to prepare an AAP for an outlying location rather than combining that smaller location with another location that has more than 50 employees
 - o For those employers that choose to prepare an AAP for one of their smaller locations, OFCCP is expecting you to include it in your establishment list.
- If you no longer prepare an AAP for a location that is in the portal establishment list, close it.

If you have other portal certification questions, the attorneys at Roffman Horvitz would be happy to assist.

4. OFCCP PROTECTED VETERAN HIRING BENCHMARK

OFCCP announced that the Protected Veteran Hiring Benchmark is 5.4% for AAPs that begin on March 31, 2023 and thereafter. For calendar year AAP cycles that began on January 1, 2023, or for plans that commenced before March 31, 2023, the veteran hiring benchmark is 5.5%.

5. OFCCP RELEASED CONTRACTOR EEO-1 DATA FOR ORGANIZATIONS THAT DID NOT OBJECT TO DISCLOSURE

On April 17, 2023, OFCCP uploaded to its FOIA website a database link to the EEO-1 data that it released in response to a Freedom of Information Act request. You can find the data release here:

<https://www.dol.gov/agencies/ofccp/foia/library/Employment-Information-Reports>

Scroll down to the topic, "Second Release," and download the Excel database labeled Data Set 1.

There were two other releases of EEO-1 data for organizations that affirmatively authorized release: one prior release labeled "First Release," and Data set 2 on April 1.

If your organization objected to disclosure but your data was released in Data Set 1, please let us know.

We do not know the status of OFCCP's evaluation of the objections or what the Center for Investigative Reporting will do next regarding the data that was withheld from disclosure in response to employers' objections.

6. OFCCP POISED TO RESCIND TRUMP ERA PRE-DETERMINATION NOTICE (PDN) PROVISIONS

During the Trump Administration, OFCCP promulgated new regulations that afforded employers more due process before OFCCP could accuse the employer of discrimination. If OFCCP was set to conclude its compliance evaluation by alleging that the employer discriminated in hiring, promotions, terminations, or compensation, it had to issue a Pre-Determination Notice (PDN) and accompany that notice with data and/or documents in support of that preliminary conclusion. Moreover, OFCCP had to afford the employer an opportunity to respond and rebut

OFCCP's allegations. The regulation was designed to codify an earlier PDN Directive giving employers this additional due process protection, but a Directive is more easily rescinded from administration to administration while a regulation takes a lot longer to rescind.

The Biden Administration OFCCP took steps to rescind that regulation, arguing that the Trump era regulation made it impossible for them to allege discrimination. The Biden Administration OFCCP asserted that it forced them to be "trial ready" in order to allege discrimination.

The rescission was procedurally approved by the White House on April 5, 2023. It's only a matter of time before the official rescission notice appears in The Federal Register. This rescission, coupled with the rescission of other Trump era OFCCP Directives, such as 2018-08 Transparency in OFCCP Compliance Activities, means that OFCCP will be significantly less transparent with employers when alleging discrimination at the end of compliance reviews. We fear a return to practices that were common during the Obama Administration – where OFCCP could lie dormant for years, and then out of the blue, issue a notice of violations alleging discrimination, without affording the employer any meaningful opportunity to rebut the conclusions.

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About Roffman Horvitz

Roffman Horvitz, PLC was built from the ground up to provide a best-in-class outside counsel option for federal contractor employers in the areas of OFCCP compliance, affirmative action plan preparation and design, and employment data analytics.