

CLIENT UPDATE

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FALL 2021 OFCCP DEVELOPMENTS

President Biden announced his administration's regulatory agenda recently, and there are six items that pertain to OFCCP. The majority of the items will be published in The Federal Register next year, and several of them need to be on government contractors' radar. The four proposed rules on which OFCCP intends to invite comments are:

- 1. ACCESS TO RECORDS REGULATORY UPDATES** – RIN 1250-AA12 (<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1250-AA12>) – OFCCP intends to update 40 CFR 60-1 and 60-40 to bring OFCCPs Freedom of Information Act (FOIA) regulations “in line with relevant legal authorities and case precedent.” (*Proposed rule expected September 2022*)
 - Depending on what the OFCCP proposes, this proposal could impact the ability of requestors to obtain EEO-1 information and the ability of government contractors to shield it.
- 2. MODERNIZING AFFIRMATIVE ACTION PROGRAMS, RECORDKEEPING, AND OTHER COMPONENTS OF THE EXECUTIVE ORDER 11246 SUPPLY AND SERVICE OBLIGATIONS FOR FEDERAL CONTRACTORS AND SUBCONTRACTORS** – RIN 1250-

AA13 (<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1250-AA13>) – OFCCP intends to “modernize the compliance program for federal supply and service contractors including updates to recordkeeping obligations and updates based on Executive Order 13988 (<https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>), Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation.” (*Proposed rule expected September 2022*)

- If the OFCCP simply wants to include gender identity and sexual orientation as protected categories, the regulation may have little practical impact since most government contractor organizations updated their EEO policies long ago to include those protected categories. If the OFCCP wants to propose that contractors prepare their utilization or goal analyses on a race-by-race basis, however, this proposal could have far-reaching consequences.

3. MODIFICATION OF PROCEDURES TO RESOLVE POTENTIAL EMPLOYMENT

DISCRIMINATION – RIN 1250-AA14 (<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1250-AA14>) – The OFCCP intends to modify the regulations and related procedures for pre-enforcement notices and conciliation agreements. (*Proposed rule expected February 2022*)

- Contractors praised the Pre-Determination Notice procedures that OFCCP codified in 2020 during the Trump Administration (at 41 CFR Section 60-1.33) because these procedures afforded them additional due process rights. If the OFCCP wants to allege discrimination, it needs to show the employer its evidence and afford the employer an opportunity to object or present new or additional evidence to rebut the allegation before the OFCCP issues an official Notice of Violation. If the OFCCP tries to walk back contractors’ due process protections, contractors will have to watch this regulatory proposal closely and be prepared to comment.

4. NOTIFICATION OF SUPPLY AND SERVICE SUBCONTRACT AWARDS – RIN 1250-AA15

(<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1250-AA15>) – To add provisions to the regulations that would require contractors to notify OFCCP of subcontract awards so that OFCCP can schedule subcontractors for compliance reviews. (*Proposed rule expected April 2022*)

- This is the most complicated of the four regulations that OFCCP intends to propose.
- It is relatively easy for a prime construction employer to identify its subcontractors, and it is somewhat straightforward for a contractor whose contract is subject to the Federal Acquisition Regulations to identify its

subcontractors, but there are thousands of employers who are not going to be able to identify which vendors and suppliers are providing a good or service “necessary to the performance of the government contract.”

- Moreover, when a long-time commercial supplier finds out that the purchaser just supplied its company’s name and information to the OFCCP for audits, many suppliers are going to stop supplying the good or service instead of incurring the compliance costs.

A fifth item already was published in The Federal Register on November 9, 2021 at 86 FR 62115 (<https://www.govinfo.gov/app/details/FR-2021-11-09/2021-24376/summary>), and the period to submit comments closed on December 9, 2021. OFCCP intends to rescind the regulation it promulgated during the Trump Administration that modified the religious exemption to nondiscrimination:

- 5. PROPOSAL TO RESCIND IMPLEMENTING LEGAL REQUIREMENTS REGARDING THE EQUAL OPPORTUNITY CLAUSE’S RELIGIOUS EXEMPTION** – RIN 1250-AA09 (<https://www.govinfo.gov/content/pkg/FR-2021-11-09/pdf/2021-24376.pdf>) – To rescind the 2020 final rule “Implementing Legal Requirements Regarding the Equal Opportunity Clause’s Religious Exemption” (85 FR 79324 - <https://www.govinfo.gov/content/pkg/FR-2020-12-09/pdf/2020-26418.pdf>). This rescission will return the regulations implementing the religious exemption in Executive Order 11246 to the narrower pre-Trump administration interpretation of the exemption applying Title VII principles and applicable case law. *(No date currently predicted for final rescission or additional comment period)*

The final OFCCP item on the Unified Agenda contains only technical amendments and will be published as a final rule in 2022:

- 6. TECHNICAL AMENDMENTS TO OFCCP REGULATIONS** – RIN 1250-AA16 (<https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=1250-AA16>) – To update the jurisdictional thresholds for section 503 and VEVRAA in the regulations to reflect current inflation adjusted thresholds (\$15,000 and \$150,000 respectively).
- The updates will not change the thresholds, as the current inflation adjusted amounts have been effective since the 2004 enactment of Section 807 of the Ronald Reagan National Defense Authorization Act, codified at 41 U.S.C. § 1908, but the technical corrections will update the regulations to reflect the current amounts. The amendments also will correct OMB control number references and remove gender assumptive pronouns from the regulations. *(Final rule expected February 2022)*

We hope you enjoy your holiday season and wish you a happy new year. Please keep an eye out for more Client Alerts in 2022, and if you have any questions or comments about these initiatives, please reach out for any of the Roffman Horvitz attorneys.

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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.



Alissa A. Horvitz

Alissa Horvitz is a Member Attorney in the firm she co-founded with Josh Roffman. Alissa focuses her practice on representing clients in various matters before the OFCCP, preparing for and defending OFCCP audits and onsite visits, responding to OFCCP information requests, and conducting live and in-person training seminars on OFCCP compliance.



Joshua S. Roffman

Joshua Roffman focuses his practice primarily on advising and overseeing the preparation of affirmative action plans, conducting privileged pay equity analyses, and representing clients in various matters before the Office of Federal Contract Compliance Programs (OFCCP) in all six OFCCP regions, preparing for and defending OFCCP audits and onsite visits, responding to OFCCP information requests, evaluating single entity claims, opposing OFCCP jurisdictional claims for companies without government contracts, petitioning OFCCP for separate facility exemptions, evaluating compliance with the Uniform Guidelines on Employee Selection Procedures, and facilitating the identification of Internet applicants per OFCCP regulations.



Nora K.S. Evans

Nora Evans's practice focuses on the preparation and review of affirmative action plans for federal contractors. She also assists clients in compliance reviews and uses regression analysis to evaluate compensation disparities and pay equity.



James M. McCauley

James McCauley is an Associate Attorney with Roffman Horvitz. His primary focus is assisting in the preparation of affirmative action plans for federal government contractors. James's experience includes creation and review of affirmative action plans, preparation of EEO-1 employment data, and analysis of applicant and hire records to address potential claims of hiring disparities.



Christopher J. Laudenbach

Christopher Laudenbach is a first-year Associate Attorney at Roffman Horvitz. He assists in the preparation and review of affirmative action plans for federal government contractors.