

# CLIENT UPDATE

ALISSA A. HORVITZ  
AND  
JOSHUA S. ROFFMAN

NOVEMBER 2018

## OFCCP ISSUES NEW DIRECTIVES IN 2018

The OFCCP has followed through on its commitment to contractors to provide greater transparency around how employers are selected for audits, the audit process itself, compensation analysis methodologies, as well as the promise of a new Ombud Service. This Client alert summarizes the nine (9) directives that OFCCP has issued since February 2018 and explains what, if anything, contractors should do in response or in preparation.

2018-01	Use of Predetermination Notices	February 27, 2018
2018-02	TRICARE Subcontractor Enforcement Activities	May 18, 2018
2018-03	Executive Order 11246 § 204(c), Religious Exemption	August 10, 2018
2018-04	Focused Reviews	August 10, 2018
2018-05	Analysis of Contractor Compensation Practices During a Compliance Review	August 24, 2018
2018-06	Contractor Recognition Program	August 24, 2018
2018-07	Affirmative Action Program Verification Initiative	August 24, 2018
2018-08	Transparency in OFCCP Compliance Activities	September 19, 2018
2018-09	OFCCP Ombud Service	September 19, 2018

## USE OF PREDETERMINATION NOTICES (PDNS)

At the conclusion of a compliance review, the OFCCP can determine either that the contractor is in full compliance with the laws and regulations that OFCCP enforces and issue a Notice of Compliance, or the OFCCP can conclude that the contractor is not in full compliance.

Under the Obama Administration, it was common for OFCCP to take several years to conclude an audit and to fail to communicate openly with the contractor in the interim. OFCCP would rely heavily on statistics, conduct its investigation by asking one-sided questions during interviews, ignore the contractor's evidence of legitimate, nondiscriminatory reasons, and then issue a Notice of Violations (NOV). Once OFCCP issued the NOV, it was extremely difficult to get OFCCP to consider alternative evidence, opposing opinions, or additional facts. If the violations were merely findings of technical non-compliance involving things like failing to preserve records, failing to engage in outreach, or failing to list jobs with the employment service delivery system, the conciliation agreement (CA) to resolve the NOV would include progress reports but no money remedies. If the violations included findings of discrimination, the CA would include monetary remedies to the affected victims, a preferential hiring list in hiring discrimination cases, and periodic progress reports so that OFCCP could assess whether the contractor was now in compliance with the law. Examples of conciliation agreements resolving findings of discrimination may be found here - <https://www.dol.gov/ofccp/foia/foialibrary/index.html>.

The significance of the OFCCP's first directive of 2018 is that OFCCP has committed to issuing a preliminary notice of its findings before reaching any final conclusions involving discrimination findings. The Predetermination Notice affords the contractor an earlier look into OFCCP's evidence and conclusions and affords the contractor an opportunity to respond. It restores contractor due process principles. The contractor will have 15 calendar days to respond to the notice, but in more complicated cases, the OFCCP has been flexible with modest extensions of the 15-day deadline.

PDNs typically do not contain legal analysis or citations to legal precedent. They are OFCCP's factual conclusions based on data analysis, review of documents, and interviews with applicants, employees, and decision-makers, as appropriate given the nature of the case.

In our opinion, it is important for the contractor to evaluate OFCCP's factual conclusions based on the data, documents, and interviews that were conducted, and raise as many issues at this procedural step as it can. OFCCP has been affording contractors more transparency, as evidenced by the totality of the Directives it has issued, and we think it will be perceived as disingenuous for contractors to withhold important arguments until the NOV phase. Just as the contractor community wants OFCCP to identify its facts and evidence, OFCCP wants the contractor to identify its facts and evidence in order to have a productive, meaningful discussion. To be clear, the failure to raise facts or arguments does not preclude the contractor from raising them in the NOV or Conciliation Phase.

The OFCCP's PDN Directive may be found here -

[https://www.dol.gov/ofccp/regs/compliance/directives/DIR\\_2018\\_01\\_Corr1ESQA508c.pdf](https://www.dol.gov/ofccp/regs/compliance/directives/DIR_2018_01_Corr1ESQA508c.pdf)

## **TRICARE MORATORIUM EXTENDED**

On May 18, 2018, the OFCCP issued Directive 2018-02: TRICARE Subcontractor Enforcement Activities. This directive extends the moratorium on the enforcement of affirmative action obligations of TRICARE subcontractors. Originally, on May 7, 2014, the OFCCP had issued a similar moratorium to allow time for the agency to clarify the affirmative action obligations of TRICARE providers, and the agency intended to use the time for outreach and technical assistance to the TRICARE community, but that did not happen. The original moratorium was set to expire in May 7, 2019, but the OFCCP extended it through May 7, 2021 to provide additional time for outreach and feedback.

Like the original moratorium, this moratorium applies to hospitals, medical equipment suppliers, and other subcontractors to TRICARE and who have no other separate government contract that would give OFCCP jurisdiction. For example, if a hospital has a direct contract with the Veterans Administration or the Federal Bureau of Prisons and subcontracts with TRICARE, it is not exempt from OFCCP's jurisdiction.

The OFCCP's TRICARE Directive may be found here -

[https://www.dol.gov/ofccp/regs/compliance/directives/dir2018\\_02\\_ESQA508c.pdf](https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_02_ESQA508c.pdf)

## **EXECUTIVE ORDER 11246, SECTION 204(C) RELIGIOUS EXEMPTION**

Recall that during the Obama Administration, President Obama issued an executive order extending the protections of Executive Order 11246 to nondiscrimination based on sexual orientation and gender identity (Executive Order 13672). Although there is disagreement among the federal courts regarding whether Title VII prohibits discrimination based on sexual orientation and gender identity, President Obama's Executive Order prohibits discrimination by federal contractors and subcontractors against applicants and employees based on those grounds. Consequently, instead of deferring individual complaints of sexual orientation or gender identity discrimination to the Equal Employment Opportunity Commission, the OFCCP retains these complaints and will investigate them.

The OFCCP's Religious Exemption Directive establishes OFCCP policy to afford individuals and organizations the ability to rely on recent legal precedent involving principles of religious liberty during complaint investigations or compliance reviews. The six policy statements directed at OFCCP staff are:

- They cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices and must proceed in a manner neutral toward and tolerant of religious beliefs (citing the Supreme Court's decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018));
- They cannot condition the availability of opportunities upon a recipient's willingness to surrender his or her religiously impelled status (citing *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017));
- A federal regulation's restriction on the activities of a for-profit closely held corporation must comply with the Religious Freedom Restoration Act (citing *Burwell v Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014));
- They must permit faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for federal contracts (citing Executive Order 13831, which was a May 3, 2018 order on the Establishment of a White House Faith and Opportunity Initiative); and
- They must respect the right of religious people and institutions to practice their faith without fear of discrimination or retaliation by the Federal Government (citing Executive Order 13798, which was a May 4, 2017 order Promoting Free Speech and Religious Liberty).

The OFCCP's Religious Exemption Directive may be found here -

<https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-03-ESQA508c.pdf>

## **FOCUSED REVIEWS OF CONTRACTOR COMPLIANCE WITH EO 11246**

Seeking a more efficient set of enforcement capabilities, the OFCCP has announced plans to shift to targeted compliance reviews which would focus on just one of the three regulations the agency is charged with administering (Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974). This shift, set to begin in fiscal year 2019 (October 1, 2018-September 30, 2019), would streamline OFCCP audits for both the agency and the contractor community.

This directive needs further explanation from OFCCP before contractors can understand its scope. We do not know:

- Whether the OFCCP will begin a focused review with an excerpt of the current Itemized Listings attached to the scheduling letter, and, if so which questions will apply to which type of review;
- Whether the OFCCP will seek approval to ask new or different questions of contractors in a focused review;

- What evidence, if any, would prompt the OFCCP to expand the scope of an initial focused review into a full-blown audit of all three laws and sets of regulations that OFCCP enforces.

Focused reviews of disability and veteran regulatory compliance may reduce the burden imposed during an audit if the contractor is not having to vet compensation data for pay equity analysis and transaction data for adverse impact analysis in response to a 30-day scheduling letter, but it remains to be determined whether this shift could result in some larger contractors with a greater nationwide footprint being selected more frequently than they have been in the past. (If the audits are smaller in scope, the OFCCP may be able to get through them faster).

Contractors still implementing the 2014 OFCCP regulatory changes arising out of Section 503 of the Rehabilitation Act and VEVRAA will need to ensure these regulatory requirements receive equal attention in their annual plans and outreach efforts. Remember: the regulations require the contractor to track *each* outreach initiative and prepare a written assessment of the effectiveness of each initiative.

The OFCCP released the methodology - <https://www.dol.gov/ofccp/scheduling/Methodology-SL18R1-SupESQA508c.pdf> - it used to identify contractors who will be audited in the first six months of FY 2019. Neither that methodology document nor the Focused Review directive explains what percentage of audits will be focused reviews versus comprehensive reviews.

The Focused Review Directive may be found here -

<https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-04-ESQA508c.pdf>

## COMPENSATION DIRECTIVE

Over the years the OFCCP has struggled to articulate how it evaluated contractor compensation during a compliance review. On August 24th, the agency published Directive 2018-05: Analysis of Contractor Compensation Practices During a Compliance Evaluation. Directive 2018-05 supersedes Directive 2013-03 (otherwise known as Directive 307) with the goal of (1) providing more transparency to contractors in compensation evaluations, (2) encouraging proactive compensation compliance and self-evaluation, and (3) improving consistency and efficiency of compensation analysis during compliance evaluations.

Although some experts are going to agree to disagree with how the OFCCP wants certain variables to be used in constructing regression equations, now that the OFCCP has released its directive, contractors should be undertaking privileged pay equity analyses in a manner that tries to replicate OFCCP's methodology, and should not be waiting to see if the organization is on the CSAL heads up list before doing these analyses. Do them now. If they are done right, they need to be done in stages. If they are done right, it is highly unlikely that the organization has all

of the variables neatly contained in a pre-existing database. Contractors need time to develop additional components of the database or research the basis for differences, and statisticians and lawyers need time to construct models.

The OFCCP uses the term “Pay Analysis Group,” and the development of these groups are factually and legally important. “OFCCP’s objective is to use PAGs that mirror a contractor’s compensation system. If a contractor provides its compensation hierarchy and job structure in the submission to the Itemized Listing, OFCCP will attempt to design its analysis based on that structure. Nevertheless, this assumes that the structure provided is reasonable, that OFCCP can verify the structure as reflected in the contractor[’s] compensation policies, if necessary, and that the analytical groupings are of sufficient size to conduct a meaningful systemic analysis.”

There is no bright line count of employees that would comprise a PAG.

The directive dedicates a lot of attention to a technical discussion of the means by which similarly situated employees are determined, how pay analysis groups are constructed, the types of regressions to be used, and how different variables will be controlled for in the analysis, but the overarching theme is the importance of both statistical data and empirical evidence in agency investigations. At its core, the directive should be viewed as an attempt by the agency to put the two evidentiary methods on a more equal footing, stating that OFCCP will evaluate both the quantitative and qualitative, and typically not pursue investigations unless the statistical evidence cannot be mitigated by anecdotal information supplied by the contractor, or where the former is exceptionally compelling.

OFCCP is hoping that providing more detailed guidance will prompt the contracting community to conduct more proactive, effective self-auditing. As noted above, contractors who develop and maintain compensation hierarchy information will realize an advantage in the compliance process: the directive makes clear that OFCCP investigations will use contractor provided hierarchy information in statistical analysis so long as the compensation structure provided is reasonable. Those employers without defined compensation hierarchies will see their data analyzed either by EEO categories, AAP job groups, or other ad hoc classifications that the OFCCP detects (i.e. job titles or functions), thus losing a degree of control and the ability to demonstrate good faith factors driving pay disparities.

The Compensation Directive may be found here -

<https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-05-ESQA508c.pdf>

## **CONTRACTOR RECOGNITION PROGRAM**

In an effort to highlight innovative approaches to diversity hiring and compliance undertaken by the contractor community the OFCCP has announced the creation of a contractor recognition

program (CRP). In addition to celebrating superlative efforts, the agency hopes that such recognition will lead to more peer-to-peer collaboration, ultimately driving better equal employment outcomes. This will be especially welcomed by a contractor community constantly searching for innovative ways to meet hiring goals in areas with fixed requirements such as disability recruiting. Enhanced data sharing regarding which outreach efforts have borne fruit in a particular region or industry should help contractors find new ways of broadening their appeal to all potential applicants.

We will await OFCCP's further guidance on what a contractor will have to submit to self-nominate for this recognition, and what reward OFCCP will offer to those who are selected.

The Contractor Recognition Program Directive may be found here -

<https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-06-ESQA508c.pdf>

## **AFFIRMATIVE ACTION PROGRAM VERIFICATION INITIATIVE**

OFCCP has historically audited approximately 2-3% of government contractor establishments each fiscal year, leaving approximately 97-98% of facilities to be completely on the honor system. Although there are penalties and other consequences for executives and procurement officials who certify falsely about the status of their annual AAP compliance obligations when they register to do business with the government or submit responses to requests for proposals, the reality is that OFCCP cannot possibly ensure compliance by every government contractor and subcontractor.

OFCCP is proposing to implement an annual contractor verification process, but the details of this initiative have not been revealed yet. We hope that OFCCP will engage the contractor community in some Town Halls or Listening Sessions before putting this directive into operation. Although it certainly is OFCCP's prerogative to issue this proclamation as a Directive and not as a Proposed Rule for Notice and Comment, it would seem that this directive more so than the others would benefit from additional contractor input.

- We do not know whether the certification will be for only direct contractors or will extend to subcontractors, too.
  - o Subcontractors are not visible in the Federal Procurement Data System
  - o Will this certification "expose" subcontractors to greater audit visibility than they had in the past?
- We do not know whether contractors all will be required to certify by a common submission date, like they used to have to certify under the old 2000 Equal Opportunity Survey (rescinded long ago), or whether OFCCP will afford contractors flexibility in certifying a certain number of days after their AAP cycle starts again.

- o When there was a common certification date, it prompted a lot of contractors to alter their AAP cycles so that they could ensure that all of their AAPs were done by the certification date. The old EO Survey had separate questions that read, “What is the expiration date of your current AAP for Women & Minorities?” “What is the expiration date of your current AAP for Veterans?” and “What is the expiration date of your current AAP for Individuals with Disabilities?”
- o No executive wanted to submit a report to OFCCP that had an expired date.
- o That meant that all of the contractors’ AAPs had to be current and complete.
- o That is sometimes a herculean task for larger contractors with hundreds of individual establishment AAPs.
- We do not know the level or job title of the person who will need to certify.
- We do not know whether parent companies certify for wholly-owned subsidiaries (like the EEO-1 submission) or separate legal entities will certify their own compliance posture.
  - o What if sister subsidiaries or a parent takes the position that it does not have government contracts and is not a single entity with a subsidiary that holds contracts?
  - o What’s the “objection” process if no certification is required of a subsidiary?
  - o Does the “objection” process trigger a single entity analysis?

The current directive provides good news for those contractors that already comply with annual plan production requirements: the audit scheduling process will reflect the new certification procedure, hopefully reducing the number of audits of law-abiding contractors who produce plans in a timely fashion each year.

The Verification Initiative Directive may be found here -

<https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-07-ESQA508c.pdf>

## **TRANSPARENCY IN OFCCP COMPLIANCE ACTIVITIES**

This directive sets out the obligation of the various levels of OFCCP officials (Regional and Field Managers, Regional and Field Staff, and National Office) in providing contractors the information they need throughout the lifecycle of a compliance review.

The Policy and Procedures section of the Directive is divided into six topics:

- Scheduling the contractor for a compliance review

- Pre-desk audit submission contact with the contractor
- Desk audit analysis of the contractor's submission
- Pre-Onsite communications
- Offsite analysis
- Conciliation

Within each of the topics are directions to the OFCCP staff to handle certain processes in a transparent and open way. For example, under the scheduling topic, OFCCP directs the district offices to wait 45 days from the issuance of the Corporate Scheduling Announcement Letter mailing to afford contractors an opportunity to request compliance assistance and requires that the national office publish the methodology that OFCCP used to arrive at the audit list for the next round of scheduling letters so that contractors will know how and why they were selected for an audit.

Under the Pre-Desk audit topic, the compliance officers are encouraged to contact the contractor within 15 days of sending the scheduling letter, make sure the contractor received the letter, ask if the contractor needs assistance, and explain how the compliance review process works. Regarding extension requests:

- OFCCP will provide a 30-day extension for contractors to provide supporting data provided that the contractor
  - Requests the extension any time prior to the initial 30-day due date for the AAPs and
  - Timely submits the basic AAPs for Women and Minorities, Protected Veterans, and Individuals with Disabilities within the initial 30 day period after receiving the Scheduling Letter and Itemized Listing.
- OFCCP generally will not allow extensions for submission of the basic AAPs, or allow extensions for the supporting data if requested after the submission date for the AAPs has passed.
- Failure to submit AAPs or supporting data timely, with approved extensions, will result in immediate issuance of a Notice to Show Cause. The contractor will have an additional 30 days to provide the AAPs and supporting data.
- OFCCP is no longer requiring the audit to conclude with a conciliation agreement simply because a procedural show cause notice has been issued. If the contractor provides the AAPs and supporting data, and the desk audit was completed with no other outstanding violations, the issuance of the Show Cause Notice just needs to be documented in the closure letter.

Under the desk audit section, OFCCP explains that the compliance office should contact the contractor to request follow-up information at the desk audit “only to fulfill, and if necessary, clarify, the data requests required by the Scheduling Letter and itemized Listing. Requests for information that go beyond the requirements of the Scheduling Letter and Itemized Listing (e.g., data for indicator refinements, applications, manager interviews, etc) should only occur after

the desk audit has been completed and the conclusion of the desk audit has been recorded in OFCCP's case management system." The directive further states that compliance officers should work to close reviews quickly if there are no indicators of discrimination, and ideally, within 45 days of receiving complete and acceptable AAPs.

Pre-onsite communication letters or supplemental information requests must include the basis for the request, be reasonably tailored to the areas of concern, and allow for a reasonable time to respond. Pre-onsite letters must include a high-level summary of any preliminary indicators of discrimination.

During the post-onsite phase, the compliance officer is encouraged to communicate every 30 days with the contractor to keep it informed of the status of the evaluation.

In conciliation, OFCCP will:

- Take a collaborative approach with contractors during the exchange of information
- Share information and essential source data in electronic format to assist the contractor in understanding and replicating OFCCP's findings, sharing factors used to calculate back pay, providing an overview or summary of anecdotal evidence or non-statistical findings to add context to the statistical results, and including the Branch of Expert Services (BES) or the Solicitor's Office, to support conciliation.

The totality of these changes is most certainly a welcome transformation of the agency.

The Transparency in Compliance Activities Directive may be found here -

<https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-08-ESQA508c.pdf>

## **OFCCP OMBUD SERVICE**

OFCCP is going to create an Ombud office to facilitate avenues of communication from the contractor community to the national office in response to the General Accounting Office's report that there was no independent mechanism through which external stakeholders, after having exhausted district and regional channels, can share their concerns with OFCCP about a particular open matter or provide general feedback and recommendation to improve the administration of the agency.

The Ombud will:

- Listen to external stakeholder concerns about OFCCP matters and suggestions

- for improvements;
- Promote and facilitate resolution of OFCCP matters at the district and region office level;
- Work with OFCCP district and regional offices as a liaison to resolve certain issues after stakeholders have exhausted district and regional office channels;
- Refer stakeholders to the OFCCP Help Desk for routine compliance and technical assistance inquiries;
- Accept and review matters referred directly by the national office; and
- Have the discretion to reject a referral in appropriate circumstances.

The Ombud Service will not:

- Advocate for either side of a dispute;
- Give legal advice, analysis, opinions, or conclusions;
- Conduct compliance evaluations, complaint investigations or participate in conciliation agreement negotiations; and
- Have any role in conduct or discipline issues regarding OFCCP staff.

The timing of when this office will be created was not announced in the Directive.

The Ombud Directive may be found here -

<https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-09-ESQA508c.pdf>

**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.

**About Alissa 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.

**About Josh 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.