Webinar Q&A: What Federal Contractors Need to Know About OFCCP's New Audit Scheduling Letter

September 13, 2023 • Presented by: Candee J. Chambers, DirectEmployers Association; John C. Fox & Jay J. Wang, Fox, Wang & Morgan P.C.

Q1: Does the new scheduling letter apply to the previous CSAL List?
A 1: Yes, the new OFCCP audit Scheduling Letter will apply to ALL audits OFCCP announced on its previous CSAL list for which OFCCP has not yet issued an audit Scheduling Letter. The new audit Scheduling Letter became effective as of August 24, 2023. The technical reason for the above conclusion is that when OMB approved OFCCP's new audit Scheduling Letter, it also revoked the prior OFCCP audit Scheduling Letter and replaced it with this new one. So, the only audit Scheduling Letter an OFCCP District Director has on his/her computer on and after August 24 is the new audit Scheduling Letter.

Q2: How long after the CSAL publication are scheduling letters being sent out these days?
A 2: It appears that OFCCP has eliminated the so-called "45-day grace period" OFCCP previously used to buffer the OFCCP National Office's publication of any new CSAL and an OFCCP District Office's subsequent issuance of an audit Scheduling Letter pursuant to any new CSAL. We knew OFCCP was internally debating the continued use of the "45-day grace period" before it published the new CSAL. OFCCP has written nothing about this issue, so we feared the worst. And now we have heard from one contractor that it has already received an email delivery of the new OFCCP audit Scheduling Letter starting an audit of an AAP Establishment on the new CSAL for Supply & Service.

Q3: Are temporary employees defined as those paid by the temp agency?
A 3: OFCCP's three enforcement programs (Executive Order 11246; Section 503 of The Rehabilitation Act of 1973, and VEVRAA) all vest OFCCP with jurisdiction to require certain actions from federal contractors pertaining to their "employees" … NOT as to any "Independent Contractors" ("IC")

whose services the contractor may contract to obtain. So, every federal contractor company must address the "employee/IC" issue, one by one, for each and every "worker" (neutral term) to determine whether s/he is an "employee" of the federal contractor company or an "independent contractor." So, if the worker is an "independent contractor," that worker is not covered by OFCCP's programs.

Q4: So if we don't have the temp data, then we don't have to provide it?
A 4: If you do not have "temp data," and the "temps" to whom you refer are "employees" of your company, you have an obligation to obtain the needed information (however, it is you who do that). This is because your staffing companies or vendors by whatever name are "agents" of your company. As a matter of agency law, "principals" (like your company) have constructive possession of and a right of access to all documents relative to the services your "agent" provides to your company as the "principal." Nonetheless, for two decades, I have recommended that ALL companies install in their contracts with their staffing agencies/vendors what I call "cooperation clauses." Such clauses require the staffing agency/vendor, by contract, to provide data necessary to your Affirmative Action planning, compliance, and defense of audit needs.

DE Members can contact their Member Engagement representative to obtain a copy of a "cooperation clause."

Q5: Do temporary workers include those outsourced?
A 5: See Answer to Q3, above. It is not important what name/label HR puts on the worker. You have to look at the "means and manner" in which the work is performed to parse "fish from fowl": "employee" or "independent contractor," as the law defines those terms. BTW, OFCCP uses the "common law" definition of the term "employee."

Q6: OFCCP training says, "The revised scheduling letter also clarifies that post-secondary institutions and contractors with 'campus-like settings,' in which the contractor maintains multiple AAPs for the same campus, must submit the requested information for all AAPs for that campus located in that city." But that seems to not align with the exact language in the scheduling letter. How do you interpret this?
A 6: This is an important question: You are correct. A very careful reading of the language in OFCCP's training materials for its new audit Scheduling Letter reveals that it is narrower than the very similar paragraph on page 2 of the OFCCP audit Scheduling Letter.

The training materials describe a situation in which OFCCP seeks only the AAPs in the city "for that campus" BUT NOT other AAP Establishments in the city not part of the "campus." The audit Scheduling Letter, by contrast, is broader than the training material language in that it seems to demand access to all AAP Establishments in the city identified in the Scheduling Letter with the view that they collectively constitute the "campus-like setting." The problem is that no one knows what we are talking about, including OFCCP, when discussing what a "campus-like setting" is since it remains undefined.

I would use OFCCP's training materials as the vehicle to understand the Scheduling Letter. I would then use your judgment as to whether the AAP Establishment the Scheduling Letter identified is a part of a "campus-like setting" (using your determination of what that undefined phrase means). There are three reasons suggesting that the above is the correct way to understand OFCCP's highly ambiguous descriptions of its undefined "campus-like setting" language:

a) OFCCP wrote its training materials to accompany OMB's approval of the revised audit Scheduling Letter and to further interpret the Scheduling Letter for the almost 1,000 covered federal Government contractors that will soon have to respond to it;
b) If OFCCP wanted to audit all the AAP Establishments in a "city," it could have just as easily said that without any reference to whether the contractor's AAP Establishments comprised a "campus" or not: that language could have looked something like this: "Please send documents and information for all the company's AAP Establishments in the city of___ within the state of ____");
c) Under the federal Administrative Procedure Act (or what I call the "you gotta' write it down law") federal agencies cannot enforce vague or ambiguous regulatory terms (and this one is not even codified as a Rule). Moreover, contractors confronted with an ambiguous Rule may apply and make its interpretation stick (if that interpretation is one among several plausible interpretations of the at-issue Rule) since the agency has no clear enforceable Rule to the contrary. See ***Firestone Synthetic Rubber Latex Co. v. Marshall (OFCCP), 507 F.Supp. 1330 (E.D. Tex. 1981)*** (enjoining OFCCP from enforcing several ambiguous Rules describing the construction of AAPs for Minorities and Women).

Q7: Will this campus approach affect FAAPs? For example, if parts of two FAAPS are located in the same city?

A 7: FAAPS are just another type of AAP Establishment. Thus, the situation you have outlined is a city with portions of two AAP establishments physically located within that city. So, you would be able to at least analyze the situation as discussed above in Answer # 6. However, in the unique context of FAAP Establishments, your argument would undoubtedly ALSO be that the two FAAPs you identify are NOT part of a "campus-like setting." That is because the two FAAPs are built around separate lines of managerial control and mission (not an integrated "campus").

Your second argument, independent of the above argument, would be that OFCCP had specifically determined NOT to audit the FAAP Establishment not identified for audit in its audit Scheduling Letter. This is because OFCCP has approved each and every FAAP, has a list of them, has entered them all into its audit selection pool, AND THEN did not select that other FAAP for audit. (OFCCP cannot trust, to the same level of opportunity, to audit every AAP Establishment in "campus-like settings" of non-FAAP Establishments. This is because the contractor may not have filed any, or all, of its EEO-1 Establishment reports (from which OFCCP sources its audit targets). So, OFCCP does not necessarily have the confidence that it is picking and choosing non-FAAP AAP Establishments from a "full deck" as it has with FAAP Establishments.

Q8: There are some requirements not on the scheduling letter. Would these come up if it escalates to an onsite, or can they still request during desk audit? (Job listings, training, etc.)

A 8: This is a most interesting question because it gives meaning to the Webinar's discussion of the importance of OFCCP's audit Scheduling Letter's discussion (see p. 1, para 3) of the division of OFCCP audits into three parts (desk audit; on-site analysis; and off-site analysis) through which the audit "may" "progress." The short answer is that OFCCP may NOT – during the desk audit phase of the audit – request additional documents or information not demanded in OFCCP's audit Scheduling Letter and attached Itemized Listing. That is the point of OMB's approval of this letter. If not, why even have the audit Scheduling Letter? "Here is the language of the audit Scheduling Letter itself:

> "For the desk audit, please submit the following information: …." (See para 3 of the audit Scheduling Letter) [and then the Letter goes on to demand the contractor's three AAPs (if obligated to develop one or more of them) and compliance with the information and document requests contained in OFCCP's 26 paragraphs of requests contained in the attached Itemized Listing].

Here's the analogy (happily not a dreaded sports metaphor!): The audit Scheduling Letter is a "fishing license" for OFCCP, but only in the south end of the lake (desk audit), but not in the northern end (on-site). At the conclusion of the desk audit, OFCCP needs to come on-site if it wants to continue the audit and obtain more documents and information. And different rules now attach before OFCCP may come on-site (see the 4th Amendment to the U.S. Constitution's guarantee against "unreasonable search and seizure"). Once properly on-site, OFCCP's Rules then issue OFCCP a different "fishing license" now severely limited to only "material" that is "relevant" and "pertinent" "to the matter under investigation" (meaning OFCCP's on-site document and information requests must flow from a finding of a *prima facie* violation of one or more of OFCCP Rule(s): see **41 CFR Section 60-1.43**. See also **41 CFR Section 60-1.20(a)(1)(ii)** "*Compliance evaluations*": "An on-site review, conducted at the contractor's establishment to investigate unresolved problem areas identified in the AAP and supporting documentation during the desk audit… ." Note: No mention is made of authority to conduct interviews…only to "… permit the inspecting and copying of records…" (41 CFR Section 60-1.43: second sentence)

Q9: How long is this CSAL good for (before we can expect a new CSAL)?

A 9: Here is what we wrote in the DirectEmployers Week in Review for September 11, 2023, in a story titled **"1,000 Compliance Evaluations Slated in Second FY 2023 Corporate Scheduling Announcement List":**

> **"**We estimate that this CSAL will supply enough Supply & Service audit targets at OFCCP's current level of staffing to carry OFCCP through for about 12 months to about the beginning of FY 2025 (beginning October 1, 2024). We wrote about OFCCP's January first CSAL Release for 500 S&S contractors in 2023 estimating that OFCCP's then CSAL would carry it through to about the beginning of OFCCP's new Fiscal Year (beginning in about three weeks on October 1, 2023).

OFCCP was thus successful this year in wrenching its CSAL for S&S contractors to coincide, approximately, with OFCCP's Fiscal Year. Fiscal Year coincidence with OFCCP's publication of its

coming audit list had been the tradition soon after OFCCP first began publication of its CSALs in the second-term Bush (the son) OFCCP Administration under OFCCP Director Charles James."

Q10: Our "competitive" promotions are often because internal candidates are applying for a job opening and competing with external candidates. Would you still consider this a "competitive promotion"?

A 10: To answer your specific question, you have not given us enough facts to answer this age-old conundrum question about which contractors have been begging OFCCP for over two decades to answer via Rulemaking. The situation you describe is certainly a "competitive" event since the selection at issue positions an incumbent employee to compete with outside Applicants for hire. It is certainly not a "promotion in place" with no other candidates being considered for the "promotion." Whether one characterizes the situation you describe as a "promotion" or a "hiring" transaction is the conundrum since it is both, depending upon the point of view of the incumbent or that of the outside Applicants: it is a "promotion" PERHAPS (this is where we need more information, see below) from the perspective of the incumbent, but it is a hiring decision from the perspective of the outside applicants.

But we need more facts from you to determine whether it is indeed a "promotion" at all, as the law defines that term. Depending on the facts, it could be a "transfer" (no increase in pay, benefits, or opportunity for upward mobility) or it could be, perhaps, a "demotion" (the employee might be looking for reduced responsibilities). But if you were to conclude that the transaction is not either a transfer or a demotion, I would conclude it is a "competitive promotion" AS TO OTHER INCUMBENT EMPLOYEES WHO MAY HAVE ALSO APPLIED. I would not, however, include those "promotion decisions" in the pool of data to analyze with the outside applicants in a "hires" analysis.

For those outside applicants, I must undertake "hiring" analyses. So, among the many options that also might be correct, I have decided (years ago) that the labels for "hires" and "promotions" which occur simultaneously in the same employment transaction are not relevant to what discrimination analyses seek to ensure: lawful treatment of applicants and employees. So, I keep one pool (of the incumbents seeking promotion or demotion, or transfer and include them with the external Applicants for Hire, and then I call it a "Selection Analysis," rather than a "Promotion Analysis" or a Hiring Analysis." In that way, I can test whether the company selected employees on a non-discriminatory basis, as it occurred in fact with candidates coming to the job vacancy from various positions within and outside the selecting company.

I am not sure about this conclusion, though, since there is no case law I can find on the point and there are no regulations governing the issue. So, what do you do in an audit? Since it is unclear whether the architecture of any "Selection Analysis" is an appropriate resolution of the "incumbent"/"outside applicant" conundrum, I have always found that transparency is the best way forward: tell OFCCP that there is a conundrum, and this is how you have resolved it. I recommend you lay out your math in detail for OFCCP to see and accept, or as to which to take umbrage. Now, let me tell you why your resolution of the conundrum will win, regardless of what OFCCP determines.

A "competitive promotion" is not a legal term. It is an HR term with a vacuous and uncertain definition that varies from one company to the next. Why OFCCP throws down undefined terms willy-nilly is a mystery to me, particularly as to discrimination law issues. There is a lot potentially at

stake. Again, you are thrice saved and OFCCP has given you much liberty to decide how to respond to its request (not demand) that you supply "competitive promotion" information. Contractors should feel liberated for three reasons:

a) OFCCP makes it elective with the contractor whether to parse and supply this information at all to OFCCP;
b) OFCCP has not defined its terms, thus leaving it to you to supply your own definition; and
c) Because OFCCP has not supplied a definition for the term "competitive" (or "noncompetitive") "promotion" at all, let alone in the proper way through Administrative Procedure Act Rulemaking, OFCCP cannot object to any definition you use to parse promotions. See above Answer # A 6 c).

Great question.

Q11: Does temp workers mean through a 3rd party staffing company or those that are temporary employees on payroll?
A 11: Ah, you too are wrestling with the basic question of whether the "worker" (neutral term) is a common law "employee" (covered by OFCCP's three enforcement programs) or an "independent contractor" (not covered by OFCCP's program authorities), or is perhaps a "volunteer": very rare, also not covered by OFCCP's program authorities).

See above answers to questions #3, #4, & #5.

Q12: Do you suggest keeping contractor and temp compensation reports separate from RFT/RPT?
A 12: Assuming the "contractor" and "temp" workers you reference are "common law employees" (and not independent contractors unto your company), your compensation reports would, of course, adjust for any differing terms and conditions of employment. If the at-issue "employees" are "similarly situated," you would include both groups in a single analysis. If you have two groups of employees who are NOT "similarly situated" (even though they might even have the same job titles), do not put them in the same pool to analyze. So, compare "hippopotamuses" to "similarly situated hippopotamuses" and "part-time hippopotamuses" to "similarly situated part-time hippopotamuses."

Q13: Just confirming - when OFCCP asks for third party/subcontractor compensation data, a contractor can answer that we do not have that information (assuming we don't)?
A 13: OK, here we are again with ambiguous HR terms. We have to get back to legal descriptions of "workers" (neutral term) to make sure we are discussing "common law employees" over whom OFCCP's three enforcement statutes grant the agency jurisdiction. But, assuming your reference to "third party/subcontractor compensation data" is a reference to independent contractors supporting your company, OFCCP lacks jurisdiction over those workers who are not your company's "employees." So, you would not give OFCCP any information, even if you had it in your possession, about these Independent Contractors. OFCCP simply lacks jurisdiction. Think about it like this: what would you do if OFCCP sought information and documents, even if they were in your possession and

control, which went beyond OFCCP's jurisdiction? Let's assume OFCCP asked you for your Securities and Exchange Commission filings, or about your company's environmental certifications. When they are out of bounds, OFCCP does not get to play. The whistle blows. Play stops.

Q14: What is the best way to understand the "contractor" (Vendor like Kelly Services) provided employees that should be included in the comp analysis? If the contracted employee sits at the site, that is easy, but there are so many that remotely support.
A 14: OK, this "employee/independent contractor" dichotomy is causing a great deal of frustration! Candee Chambers nailed this subject down at a National Employment Law Institute ("NELI") seminar series across the U.S. when she was a NELI Faculty Member. She and the other instructor, Rosemarie Falcone of Entergy, prepared the best set of descriptive and practical PowerPoints on the topic of what workers are "common law employees" I have ever seen. So, we are going to suggest to Candee that she reprise her "When is it an Employee and When is it an Independent Contractor?" presentation in the coming months.

The short answer to your question is that if they are "common law employees" of your company, you will analyze their compensation. If they are independent contractors unto your company, you will not analyze their compensation. BTW, all Kelly workers Kelly supplies to companies are common law employees of Kelly. However, BE CAREFUL: your company might ALSO be that Kelly employee's employer if the worker is "co-employed" by both companies. But that is the advanced class on EEs vs. ICs. (Candee teaches that one, too, so we will add it to our suggestion list for her.)

Q15: Do temps and contractors need to be in the workforce analysis?
A 15: Yes…IF what you call "temps and contractors" are "common law employees" of your company. See Answers 3,4,5,13, & 14.

Q16: Can John repeat the regulation that exempts union employees from comp data submission?
A 16: **Section 703(h) of Title VII** removes from the definition of what is unlawful employment discrimination all employment decisions, including compensation decisions, based on a bona fide seniority provision contained in a collective bargaining agreement between a company and a union:

> **"**(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions.
>
> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin,… ."

So, if your company's CBA requires the company to pay based on the employee's seniority, the pay decision is off-limits to OFCCP.

Q17: What happens when past AAP data is required but you've changed AAP structure from past year, e.g. went from establishment to FAAP, or new establishment plan that didn't exist in past years?
A 17: OFCCP has no Rule or even informal guidance describing a contractor's responsibilities when its AAP structure changes in a way forbidding a tracing of the contractor's prior affirmative action efforts with spillover into the new AAP Year (for example: progress towards goals; "good faith efforts" to achieve goals; recruitment Effectiveness Reviews; etc.). Nonetheless, we have never found OFCCP to care, in dozens of audits we have defended, when the structure of the AAP has changed radically from the prior year.

And how should OFCCP's lawyers analyze this issue? Under the federal Administrative Procedure Act (the, "you gotta' write it down law"), OFCCP cannot find noncompliant a contractor's interpretation of an ambiguous Rule. Nor can OFCCP enforce a non-existent Rule by just making up an answer. See Answer A 6 c), above.

Q18: Hello my little cupcakes! See Scheduling Letter FAQs, re: email notification, #2: 2. I received my Scheduling Letter and Itemized Listing by email, return receipt. Is this the official notification? Will I receive a hard copy in the mail?
A 18: Cupcakes, is it? Sounds delicious! Well, you have heard about Paul Revere's famous Ride during which he arranged to be notified by a light signal as to the route invading British troops were taking to proceed to Concord where the American War of Independence would break out: "One if by land, two if by sea." OFCCP continues to follow its recent procedure to deliver its audit Scheduling Letter to a contractor to announce their "invasion" of the contractor in two different ways: one electronically via email, and the other via U.S. Certified Mail. Here is the salutation legend at the top of every OFCCP audit Scheduling Letter:

> **"**VIA [**INSERT** CERTIFIED MAIL (TRACKING NUMBER) RETURN RECEIPT REQUESTED, EMAIL (EMAIL ADDRESS) READ RECEIPT REQUESTED]"

So, to its credit, OFCCP is going to deliver its audit Scheduling Letter to your company both via email and via certified mail through the U.S. Postal Service.

Practice Tip #1: To ensure OFCCP's audit Scheduling Letter does not go awry, in the days after OFCCP publishes its CSAL, you may wish to reach out to the OFCCP District Office which is going to (eventually) conduct the audit of your company to provide the OFCCP District Director with the proper, updated contact information of the person(s) to whom your company wishes OFCCP to send the audit Scheduling Letter. You should also contact the highest ranking official at the establishment being audited in case the Scheduling Letter and Itemized Listing are delivered directly to the facility prior to you reaching out to the OFCCP.

Practice Tip #2: OFCCP's eight "6-month update" demands of your data trigger the update obligation only if you are more than 6-months into your current AAP year when the contractor

"receives" OFCCP's audit Scheduling Letter (whether you open the email or not or open it but do not read it). You may therefore be joyful that OFCCP sent an email if your AAP is on the cusp of its 6-month anniversary. This is because emails provide almost instantaneous (electronic) delivery (i.e., contractor receipt). U.S. "snail mail," by contrast, may take days or even weeks before the contractor receives it (indeed, some federal government buildings do not dispatch outbound mail every day.) So, imagine if your AAP's 6-month anniversary is "on the cusp," like this example:

- January 1 to December 31 = AAP year date
- OFCCP emails its audit Scheduling Letter to the contractor on June 29th
- Simultaneously, OFCCP mails its audit Scheduling Letter via U.S. certified return receipt requested mail which delivers it to the contractor on July 5th

CONCLUSION: The contractor does not owe any "6-month updates" since the contractor's email receipt occurred before the contractor's 6-month AAP anniversary. Here is OFCCP's 6-month update language to refresh your recollection of OFCCP's "6-month update" trigger:

> "…and, if you are six months or more into your current AAP year ***when you receive this listing,*** *(emphasis added)* provide the information for at least the first six months of the current AAP year."