



2021 NATIONAL CONFERENCE

**STRIKE A CHORD
FOR EQUALITY AND COMPLIANCE**

RECENT SIGNIFICANT OFCCP DEVELOPMENTS

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John C. Fox, Esq. is the President of Fox, Wang & Morgan P.C. He represents companies and tries cases in state and federal courts throughout the United States. His advice and litigation work involve primarily wage-hour and employment discrimination class actions, properly structuring compensation analyses, properly structuring AAPs and statistical Disparity Analyses and Adverse Impact Analyses, defending and prosecuting trade secret claims, employment contract disputes, wrongful termination, corporate investigations, the use of statistics in employment matters and defending OFCCP audits and lawsuits. Mr. Fox also provides strategic advice to companies nationwide regarding their employment practices and helps build HR recruitment, selection and promotion systems to minimize legal risk. Mr. Fox was also previously Executive Assistant to the Director of OFCCP, where he was responsible for all enforcement and policy matters and OFCCP's contacts with the Congress, other federal agencies and The White House.

Agenda

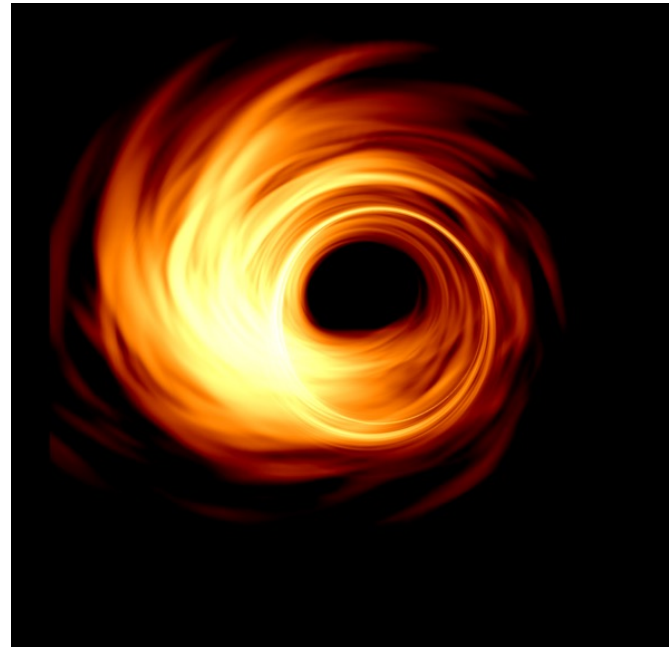
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Abbreviations

CA	Conciliation Agreement
CO	Compliance Officer
ER	Employer
FTE	Full Time Equivalent
FY	Fiscal Year
GC	General Counsel
KOR	Contractor
LE	Labor Economist
NO	National Office (of OFCCP) = HQ
QC	Quality Control
WFA	Work From Anywhere

A. OFCCP AT THE CROSS ROADS: WILL EITHER FALL FORWARD OR FALL BACK TO IRRELEVANCE

- The KOR Community is lucky Jenny Yang took on the OFCCP Director job
- OFCCP needs more budget, more training, strong management and a new operating structure
- At the same time, OFCCP has become a “Black Hole”



A. OFCCP AT THE CROSS ROADS: (Con't)

Let's talk candidly about the **elephant in the room**: Will the Wage-Hour/OSHA dominated USDOL take the chains off of Director Yang?

- OFCCP activity has reduced so much, the agency is losing relevance to KORs
- OFCCP now desperately needs a turn-around Manager
- More budget, alone, is not the answer...but a great start as I have advocated for almost 2 decades)
- The slides below catalogue the depth of despair about the the now aging OFCCP



(like watching giant glaciers we always took for granted slowly disappear from the North Pole)

A. OFCCP AT THE CROSS ROADS (Con't)

1) 10+ years of stagnant budgets

<u>OFCCP ANNUAL APPROVED BUDGETS</u>	
Fiscal Year	Appropriations (\$)
2011	\$105,386,000
2012	\$105,187,000
2013	\$ 99,685,000
2014	\$104,976,000
2015	\$106,476,000
2016	\$105,476,000
2017	\$104,476,000
2018	\$103,476,000
2019	\$103,476,000
2020	\$105,976,000
2021	\$105,976,000

- An even budget from the prior year typically forces a headcount reduction since expenses (typically increased pension contributions/COLA) go up about 2% per year = ~\$2M (translates to about 10 COs per \$1M)

A. OFCCP AT THE CROSS ROADS (Con't)

2) 10+ years of steadily declining headcount

My ask of you is to support OFCCP's budget request, and to also ask your company to support it

We would help an injured grizzly bear in trouble. It is no different here

<u>OFCCP FULL TIME EQUIVALENT (FTE)</u> <u>HEADCOUNT</u>	
Fiscal Year	FTE
2011	775
2012	755
2013	729
2014	683
2015	621
2016	615
2017	556
2018	514
2019	500
2020	472
2021	451

OFCCP Headcount now at an all time low

A. OFCCP AT THE CROSS ROADS (Con't)

3) OFCCP audit volume at all time low

a. COVID-19 Pandemic was hard on OFCCP productivity, which plummeted from historic lows to a new bottom

<u>ALL COMPLIANCE EVALUATIONS</u> <u>BY FISCAL YEAR</u>	
Fiscal Year	Evaluations OFCCP Completed
2011	4,014
2012	4,007
2013	4,110
2014	3,987
2015	2,718
2016	1,151
2017	1,142
2018	812
2019	1,343
2020	1,320
2021 (Q1-Q2)	525

- Underscoring OFCCP's productivity decline, in FY 2018, OFCCP moved away from full "regular" Compliance Reviews to two forms of "mini-audits": Focused Reviews involving FAR fewer investigative hours and also revived, in 2020, quick-in/quick-out Compliance Checks
- OFCCP also moved away from on-site reviews, shrinking down from about 5% of the time to about only 1%
- Audits before 1996 ALWAYS involved the on-site component and lasted days, typically attended by several OFCCP personnel

A. OFCCP AT THE CROSS ROADS (Con't)

3) OFCCP audit volume at all time low (con't)

b. What the heck happened in 2015 when OFCCP audits suddenly plummeted?

Here is information from my October 2015 annual NELI conference where I explained it:

- “OFCCP audit starts are at record lows
- OFCCP should be starting about 320 Supply & Service (i.e. non-construction) Compliance Reviews per month ($3,800/\text{yr} \div 12$)
- OFCCP is currently starting fewer than 110 Supply & Service Compliance Reviews per month (2,500 CSAL audit targets announced Nov. 11, 2014 \div 23 months, to date)
- OFCCP District Directors report compensation analyses are strangling them and consuming the majority of their resources: Gridlock. Also: no audit deadlines. Cannot get timely direction from supervisors. Also: OFCCP audit files no longer in DD's control
- These low audit starts/closures will depress OFCCP back pay collections for 3-4 years to come”

A. OFCCP AT THE CROSS ROADS (Con't)

3) OFCCP audit volume at all time low (con't)

b. What the heck happened in 2015 (con't)

- “Will this audit pace change in FY 2016?
 - Yes. OFCCP audit pace WILL GET SLOWER, as we are observing, until a new Director arrives
- OFCCP Budget Justification for 2017 at p.28
 - ‘In FY 2016, OFCCP is entirely eliminating case closure targets (including functional affirmative action program compliance evaluations) (emphasis added) and will replace these closure targets with measures that demonstrate implementations of OFCCP enforcement priorities of complex systemic compensation and high impact construction while maintaining high quality. In FY 2017, OFCCP will again continue this new strategy in order to maximize case quality and prioritize larger systemic discrimination cases with the potential for helping more workers and thereby realizing even larger total back pay recovery amounts.’”

A. OFCCP AT THE CROSS ROADS (Con't)

3) OFCCP audit volume at all time low (con't)

b. What the heck happened in 2015 (con't)

- “Note: Does a “Deeper Dig” mean more back pay?
 - No. Not historically. Shirley Wilcher (Clinton Administration) proved that:
 - OFCCP averages 1-2% discrimination findings year-in and year-out since the 1970s (when recordkeeping began)
 - A higher volume of audits increases back pay”

A. OFCCP AT THE CROSS ROADS (Con't)

3) OFCCP audit volume at all time low (con't)

- c. Efficiency Context: Historically, before 1996, one OFCCP CO completed over 7 full (“Regular”) Compliance Reviews per year (even with grueling multi-day on-sites)

OFCCP “COMPLIANCE EVALUATION” CHART		
Audit Completions Per Fiscal Year	OFCCP FTEs	Audits per FTE
2011: 4,014	775	5.2
2012: 4,007	755	5.3
2013: 4,110 target: 4,530	729	5.6
2014: 3,987 target: 4,290	683	5.8
2015: 2,718	621	4.3
2016: 1,151	615	1.8
2017: 1,142	556	2
2018: 812	514	1.6
2019: 1,343	500	2.7
2020: 1,320	472	2.7
2021: 525 (thru Q2)	451	2.3

- Today, not all audits are equal
- Full “regular” Compliance Reviews, with on-sites (~160 OFCCP hours)
- Compliance Checks (~20 minutes on-site, but 8 OFCCP hours, on average)
- Focused Reviews (~25 OFCCP hours)

After 2018, many of these audits were not full “regular” Compliance Reviews, but were one of various forms of “mini-audits” (Compliance Checks; Focused Reviews)

A. OFCCP AT THE CROSS ROADS (Con't)

4) OFCCP in a Litigation Slump

- OFCCP has lost 3 of its 4 most recent major lawsuits, and the 4th is on appeal
 - a) *OFCCP vs. Baker, DC* ([“Federal Court Decision”](#))
 - b) *OFCCP vs. Analogic, Corp.* ([“Final ALJ Decision and Order”](#))
 - c) *OFCCP vs. Oracle America, Inc.* ([“Final ALJ Decision and Order”](#))
 - d) *OFCCP vs. Enterprise Rent-A-Car* (pending appeal to ARB)

5) Old (“Aged”) Audits from Obama OFCCP still plaguing OFCCP (the vampire which won’t die)

- One of the great embarrassments of OFCCP’s otherwise vaunted history
- Aged audits docket still not eliminated
- NOTE: Until 1996, OFCCP’s Rules required audits to be completed within 60 days
- Time to reinstate deadlines on all employees and tasks within OFCCP

A. OFCCP AT THE CROSS ROADS (Con't)

6) Conciliation Agreements grew in Trump-era, but because of double-dip of old Obama audits

CONCILIATION AGREEMENTS (Financial <u>only</u>)				
Fiscal Year "FY"	Total # of Conciliation Agreements	# of Failure to Hire	# of Compensation	Other Terms & Conditions
2010	15	2	12	1
2011	28	1	25	2
2012	34	3	29	2
2013	21	1	20	0
2014	15	4	9	2
2015	43	29	5	9
2016	28	19	5	4
2017	42	25	16	1
2018	46	30	10	6
2019	46	32	14	0
2020	44	29	13*	2
2021 (Q1-Q2)	13	8	5	0

The Trump-era numbers are also actually understated since the Trump OFCCP often bundled numerous audit resolutions into one Conciliation Agreement

At the same time, the Trump-era CA numbers are perhaps unfairly high because the Trump OFCCP was closing thousands of audits the Obama OFCCP started but did not finish...all the way back to 2009

*NOTE: OFCCP continues to retroactively revise its enforcement data

A. OFCCP AT THE CROSS ROADS (Con't)

7) Trump-Era Large Backpay Collections Not Sustainable

A few large settlements have skewed OFCCP's backpay collection figures in recent years

- 2019: Compensation: ~\$17M (77%) of the ~\$22M in OFCCP backpay collections was two companies (Goldman Sachs and Dell)
- 2019: Failure to Hire: ~1/4th of all OFCCP backpay was 1 company (Bank of America)
- 2020: Failure to Hire: ~\$6.5M (28%) of the ~\$23M in OFCCP backpay collections was 2 companies (Microsoft & Newport News Shipbuilding)

Repeatable? (Only with the return of “Gang Tackle” audits of single corporations (unconstitutional) AND 6 to 10-year-long audits, which should never happen)

OFCCP backpay collections will fall precipitously in coming years

No audit pipeline of older audits or the usual volume of problematic audits from 2018 to 2021

A. OFCCP AT THE CROSS ROADS (Con't)

- 8) Distracted Resource Allocation: OFCCP has yet to convince compensation professionals that Compensation Discrimination is “widespread” as the Obama OFCCP *initially* claimed

Compensation violations are not ramping after 30 years of OFCCP Compensation Investigations (still only a VERY small blip on the radar screen)

- OFCCP Director Carl Dominguez (Bush Administration – the Father - #41) instituted “Glass Ceiling audits” in 1991 (30 years ago) **featuring** compensation investigations
- OFCCP Director Shirley Wilcher (Clinton Administration) made compensation investigations an integral and significant part of every OFCCP audit, **over 100,000 OFCCP audits ago**
- The Obama OFCCP’s lead compensation advocate admitted OFCCP found no evidence that systemic pay discrimination was “widespread” during the Obama Administration

A. OFCCP AT THE CROSS ROADS (Con't)

8) Distracted Resource Allocation (con't)

- Classic SNARK Hunt

- FY2019: Only 14 companies paid backpay for alleged compensation discrimination among federal government KORs nationwide (less than 1/5 of 1% of those companies audited)
- FY2020: Only 13 companies paid backpay for alleged compensation discrimination among federal government KORs nationwide (less than 1/5 of 1% of those companies audited)
- FY2021: Only 10 companies paid backpay for alleged compensation discrimination among federal government KORs nationwide through the end of 2nd Quarter FY 2021, says OFCCP (ending March 31, 2021) (less than 2% of those companies audited)...*however we can find only 7 Cas*
 - OFCCP Q3 data still not yet published

A. OFCCP AT THE CROSS ROADS (Con't)

9) RECENT CONCILIATION AGREEMENTS = FY2021 (to 3/30/21 [i.e. thru Q2])

Company Name	Claim	Type	# of Alleged Victims	Money Involved	Date Range	Date of Agreement/ Settlement (month/year)
<u>FAILURE TO HIRE</u>						
Baker & Taylor, LLC	Male/Black	Applicants	19	\$127,375.00	1/1/2016 - 6/30/2017	12/3/2020
Blue Cross and Blue Shield	Hispanic/Asian/Black, etc.	Applicants	117	\$226,484.00	9/1/2015 - 8/31/2016	7/19/2021
BSN Sports, LLC	Male/Black/White	Applicants	3598	\$600,000.00	1/14/2017 - 12/10/2018	12/11/2020
Conduent, Inc. - Yukon	Black/Asian/Hawaiian	Applicants	1,624	\$395,000.00	3/25/2013 - 3/24/2015	5/4/2021
Crothall Healthcare Inc.	Male	Applicants	230	\$120,000.00	4/1/2015 - 3/31/2016	12/10/2020
Express Scripts, Inc.	Female	Applicants	8	\$110,000.00	1/1/2018 - 12/31/2018	12/16/2020
Goodwill Ind. of S. Florida, Inc.	Black/Medical Rest.	Applicants	103	\$104,451.95	9/1/2016 - 8/31/2019	11/16/2020
Life Ins. Co. of North America	Hispanic/Black	Applicants	35	\$650,000.00	3/30/2011 - 4/23/2013	11/30/2020
Lockheed Martin Corp.	Hispanic/Asian/Black	Applicants	616	\$700,000.00	1/1/2017 - 6/30/2018	12/8/2020
Teradyne, Inc.	Asian/Hispanic	Applicants	25	\$125,000.00	6/30/2014 - 6/30/2016	10/5/2020
U.S. Foods, Inc. (Alabama)	Female/Black	Applicants	131	\$167,125.00	1/1/2018 - 6/30/2019	3/11/2021
U.S. Foods, Inc. (Illinois)	Female/Black	Applicants	114	\$159,549.00	1/1/2018 - 6/30/2019	6/15/2021
<u>COMPENSATION</u>						
Air Industries Company	Female Emp.	Compensation	72	\$117,147.00	1/1/2013 - 12/31/2013	12/10/2020
Bechtel Oil, Gas & Chemicals	Female Emp.	Compensation	22	\$200,000.00	As of 4/1/2013	4/30/2021
CH2M Hill Plateau Remediation Co.	Female Emp.	Compensation	214	\$450,124.59	1/1/2016 - 10/31/2017	12/14/2020
Deloitte Services LP	Female Emp.	Compensation	34	\$205,000.00	As of 8/31/2012	10/28/2020
DXC Technology Co.	Female Emp.	Compensation	206	\$650,000.00	11/1/2012	10/5/2020
SKF USA, Inc.	Female Emp.	Compensation	50	\$195,000.00	As of 7/1/2014	11/25/2020
Worley Group	Female/Black/Hispanic Emp.	Compensation	42	\$500,000.00	Data from 12/31/2016	6/15/2021

A. OFCCP AT THE CROSS ROADS (Con't)

10) Few new policies/practices thus far in the Biden OFCCP

- Compare Obama and Trump Administrations where we could barely keep up with our reading about changes to policy and enforcement procedures
- The Trump OFCCP became a publishing house (Republicans love “technical assistance” to regulated companies)
- But exiting Trump Republicans copycatted across all federal Executive Branch agencies for the first time an old political trick of an outgoing administration disdainful of its triumphant incoming replacements

- Littering the road ahead of the incoming Administration with broken glass and nails to slow the new Administration down



A. OFCCP AT THE CROSS ROADS (Con't)

10) Few new policies/practices thus far in the Biden OFCCP (con't)

A new OFCCP Director makes policy two ways:

By “Rescinding,” and by “Building” Something New

“RECISSION”



“BUILDING”



A. OFCCP AT THE CROSS ROADS (Con't)

10) Few new policies/practices thus far in the Biden OFCCP (con't)

Let's review the record:

➤ **“RECISSIONS” OF PRIOR POLICY DECISIONS***

- 1) No more Focused Reviews (March 2, 2021): See [The Queen's Gambit: New OFCCP Director Jenny Yang Signals She is Going to Make Bold Moves at OFCCP as She Scrapped 1,750 Upcoming Audits and May Be Discontinuing the Focused Review Style of Audit](#)
- 2) Scrapped 1750 announced (but not scheduled) OFCCP audits (March 2, 2021): See [The Queen's Gambit: New OFCCP Director Jenny Yang Signals She is Going to Make Bold Moves at OFCCP as She Scrapped 1,750 Upcoming Audits and May Be Discontinuing the Focused Review Style of Audit](#)

➤ **NO NEW POLICY DECISIONS***

- No new OFCCP Directives
- No new OFCCP Rules

*As sculpted out of the “DIRECTEMPLOYERS ASSOCIATION WEEK-IN REVIEW” stories cataloguing each week's OFCCP developments (for the period since January 20, 2021 to Friday, July 23, 2021)

A. OFCCP AT THE CROSS ROADS (Con't)

10) Few new policies/practices thus far in the Biden OFCCP (con't)

➤ “BUILDING” NEW ENFORCEMENT DECISIONS*

- 1) OFCCP Audit Methodology Transparency Letter to Continue (April 26, 2021): [OFCCP Director Sets The Stage For What's To Come: CSALS and OFCCP Audit Selection Methodology to Continue](#)
- 2) OFCCP Budget Increase sought (May 28, 2021): [OFCCP Seeks Unprecedented 33% Budget Increase: Focus is on Rebuilding OFCCP; Not Audit Enforcement](#)
- 3) New Audit List (July 1, 2021): [750 OFCCP Audits Will Tap 276 Federal Government Contractors Out of an Estimated 25,000: Many Contractors Experience the Return of Multiple Audits](#)

- That is 3/10 of 1% of the KOR universe (OFCCP estimates at ~25,000) and only 4/1,000th of 1% of AAP establishments (OFCCP estimates at ~177,000). NOTE: OSHA and Wage-Hour currently ramping up the number of audits, and on-site audits

*As sculpted out of the “DIRECTEMPLOYERS ASSOCIATION WEEK-IN REVIEW” stories cataloguing each week OFCCP developments (for the period since January 20, 2021 to Friday, July 23, 2021)

A. OFCCP AT THE CROSS ROADS (Con't)

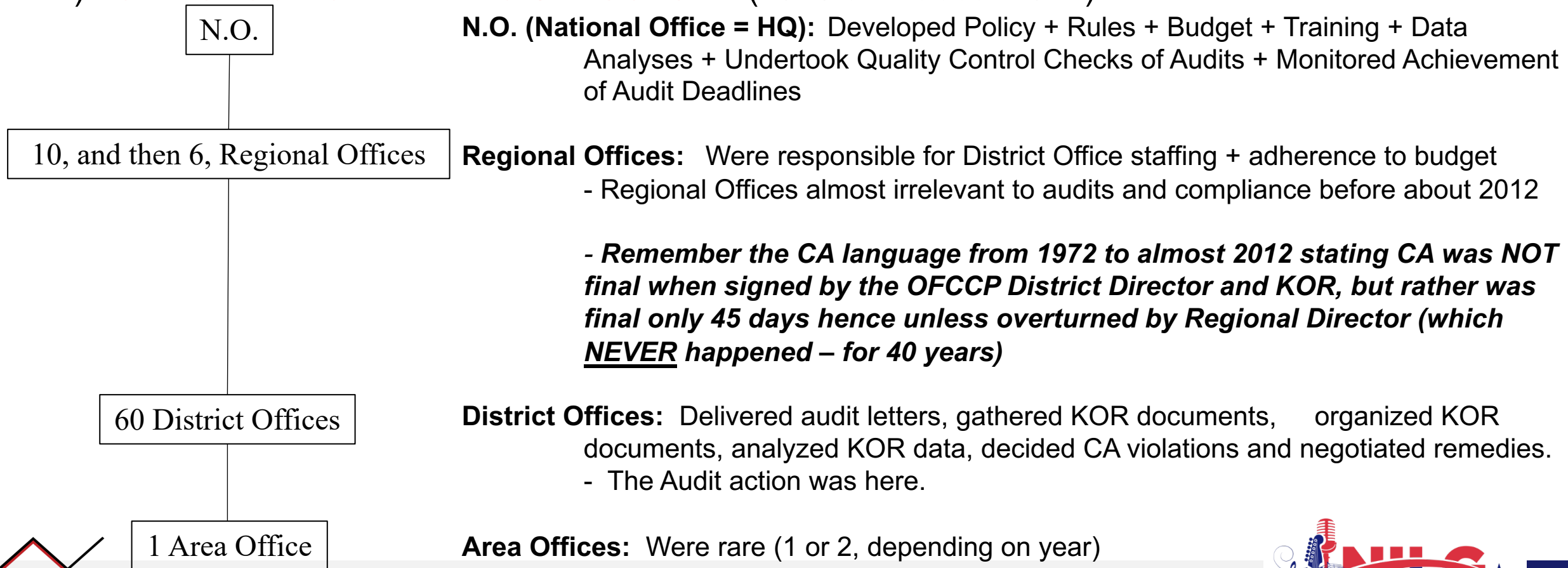
11) Three recent GAO Reports suggest Special Congressional concern about OFCCP

- Three GAO Reports on an agency, almost annually (2016, 2017, and 2019), is unusual
 - 6 GAO recommendations to OFCCP in 2016
 - ✓ (“[Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance](#)”)
 - 5 GAO recommendations to OFCCP in 2017
 - ✓ (“[Federal Agencies Could Improve Oversight of Equal Employment Opportunity Requirements](#)”)
 - **OFCCP has now completed only 1 of GAO’s 11 recommendations** (September 19, 2019)
 - ✓ (“[Progress Made on GAO Recommendations to Improve Nondiscrimination Oversight, but Challenges Remain](#),” at p.13)

B. OFCCP NEEDS TO RISE LIKE LAZARUS, RE-SET AND RE-MAKE ITSELF

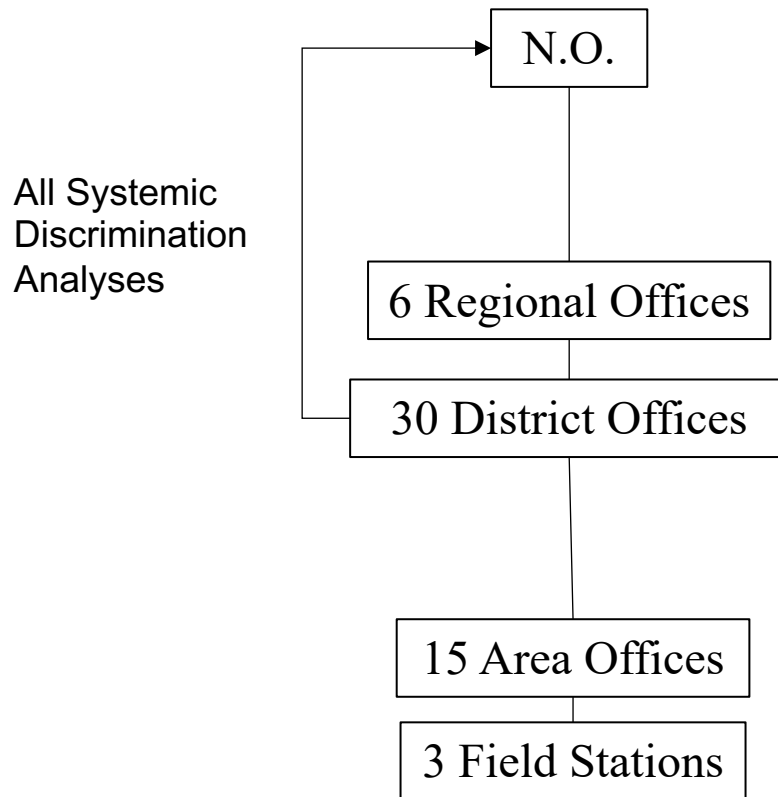
1) OFCCP's decade+ long tumble now proves the need for immediate, aggressive and smart change

2) **OLD OFCCP OPERATING STRUCTURE** (1978 until about 2012)



B. OFCCP NEEDS TO RE-SET AND RE-MAKE ITSELF (Con't)

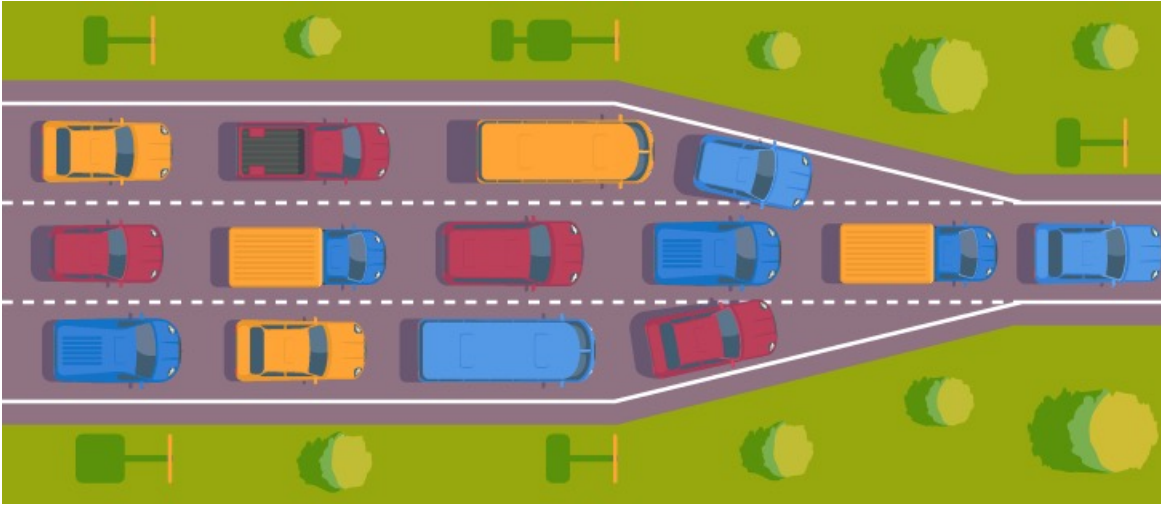
3) CURRENT OFCCP OPERATING STRUCTURE (since about 2012)



- N.O. now takes on all systemic discrimination analyses
 - District Office staff became paralegals to gather, sort, organize and deliver to N.O. Statistical Analysis Unit (now “Branch of Expert Services”) all data to support systemic discrimination analyses
- Regional Office now driving Affirmative Action audits – new role for RDs
- District Offices left to make Affirmative Action Plan and AA compliance determinations, and to gather, organize and forward to N.O. all systemic discrimination data (hiring/compensation) and try to argue discrimination remedies with KORs based on Expert Services analyses/conclusions
- Area Offices are now proliferating
- Field Stations emerge and are growing, a bit, in number

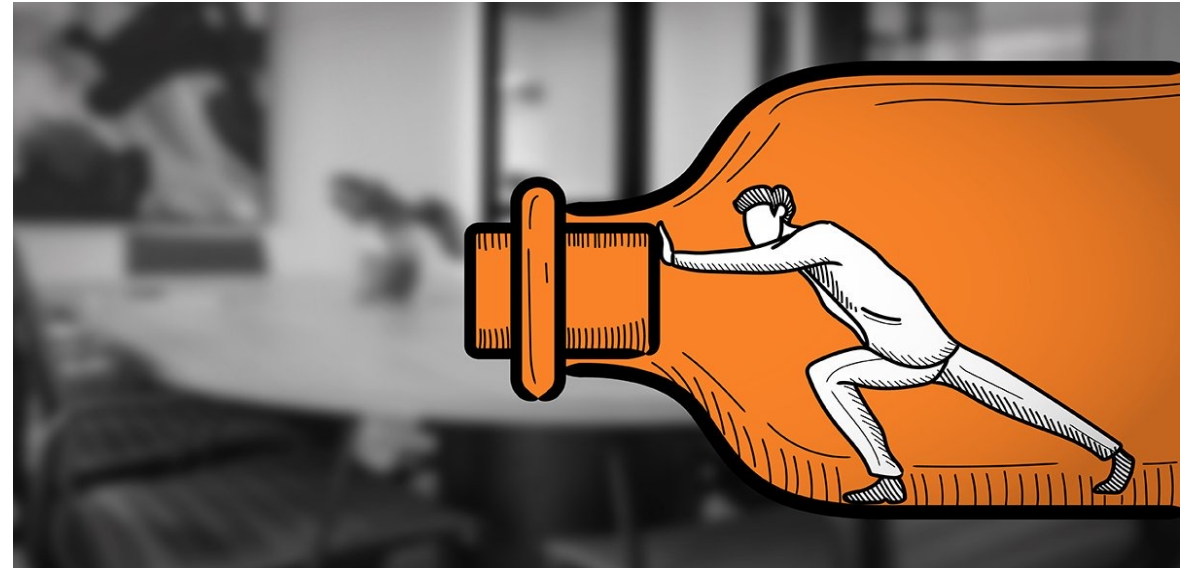
B. OFCCP NEEDS TO RE-SET AND RE-MAKE ITSELF (Con't)

3) Current Operating Structure (con't) – [how the “bottleneck” occurs]



Running all systemic discrimination analyses from almost 50 OFCCP offices thru one small Expert Services Unit has created massive congestion throughout OFCCP's nationwide system

- Splintering audits in search of specialization has left no one in charge of any particular audit AND has created an unwieldy audit architecture in which COs argue with KORs about work product which is not theirs and the COs do not understand
- Everyone is in charge; no one is in charge
- Adds to tremendous inefficiency as communications from the District Office “ride the elevator” up and down the chain of command



B. OFCCP NEEDS TO RE-SET AND RE-MAKE ITSELF (Con't)

- 4) Needed Operating Structure (to leverage technology and shed antique operating architecture)
 - Let form follow function:
 - OFCCP needs only three kinds of work units operating from 8 (or 3) physical offices:

N.O.

Washington D.C.

Affirmative Action
Investigations Unit

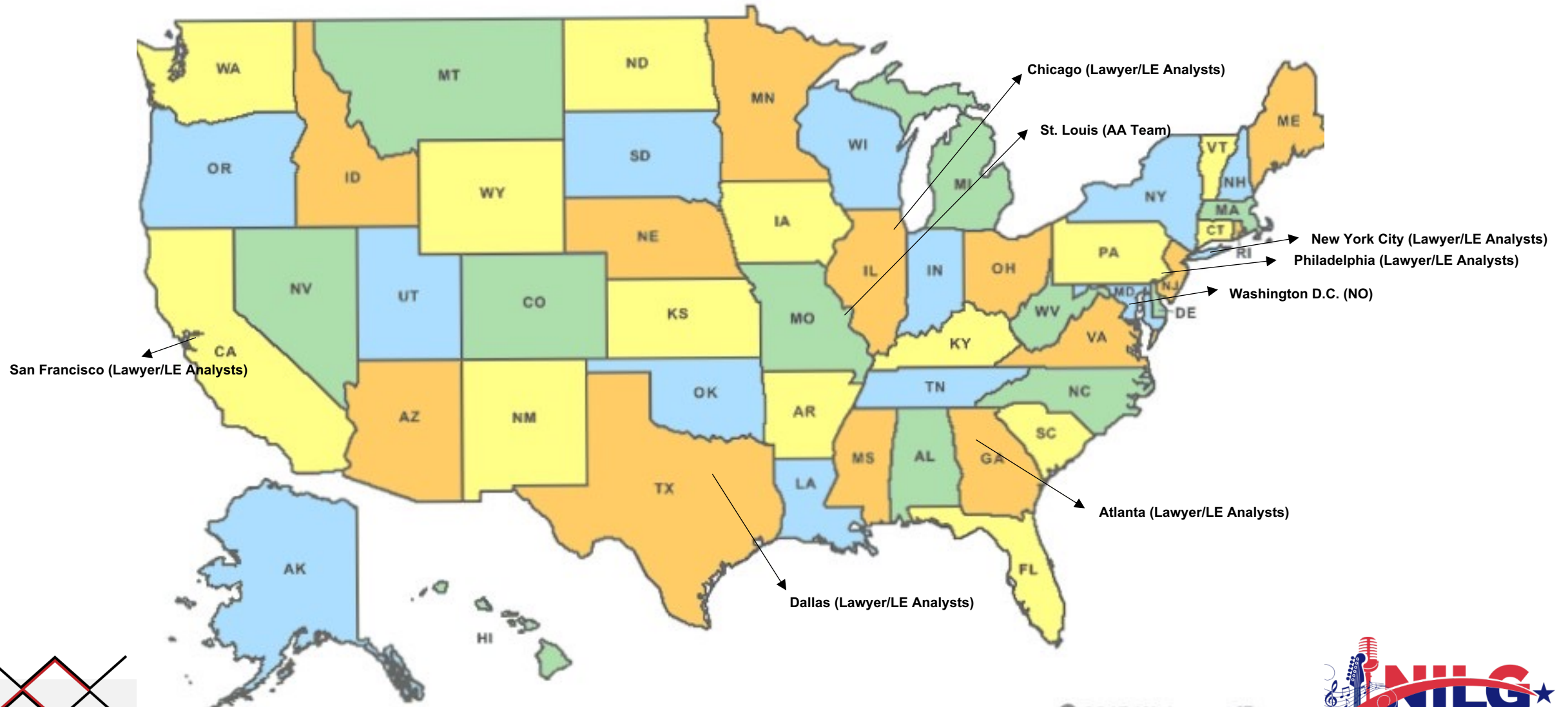
Working from one low-cost centralized location (St. Louis?/ Indianapolis/Louisville?)
- i.e.: close ALL OFCCP District Offices ASAP

Non-Discrimination
Investigations Unit

Staffed exclusively by non-litigating lawyers (FBI model) and Labor Economists in each of (currently) 6 Regional OFCCP Offices
- i.e.: close ALL OFCCP Regional Offices, as we know them ASAP

B. OFCCP NEEDS TO RE-SET AND RE-MAKE ITSELF (Con't)

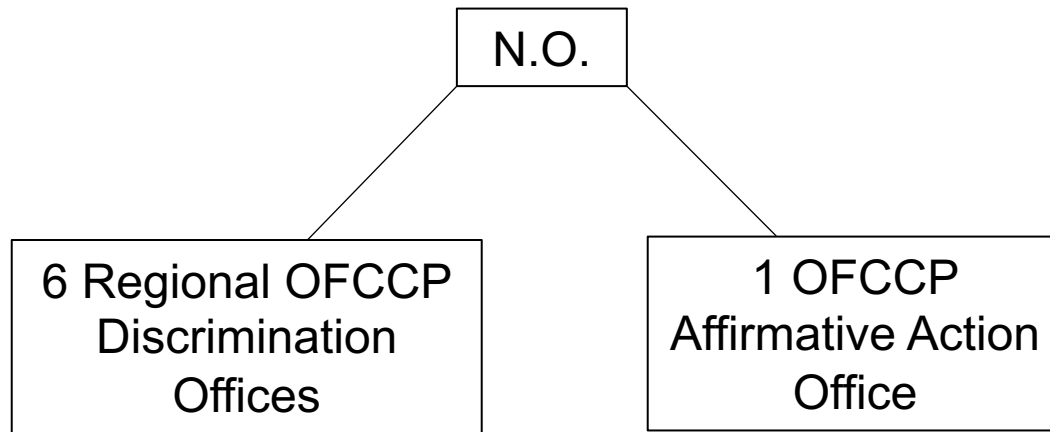
4) Needed Operating Structure (Con't)



B. OFCCP NEEDS TO RE-SET AND RE-MAKE ITSELF (Con't)

4) Needed Operating Structure (Con't)

8 Office Structure



N.O. = Budget + Staffing + Policy + Rules + QC

6 Regional OFCCP Offices staffed primarily by non-litigating lawyers to undertake discrimination analyses with attached Labor Economist supporting staff

1 centrally located OFCCP Affirmative Action Office to undertake reviews of AAPs for minorities/women, for Protected Veterans and for Individuals with Disabilities

B. OFCCP NEEDS TO RE-SET AND RE-MAKE ITSELF (Con't)

4) Needed Operating Structure (con't)

- Structure Re-Set: Labor Economists should make no litigation or statistics design decisions
- LEs are support professionals to lawyers (should decide what statistical analyses to supply for the data sets and types of systemic analyses SOL has identified)
- Lawyers need to first frame the LEs systemic discrimination analyses
 - LEs need to undertake their analyses within the Title VII framework the lawyer analyst will lay down for each audit
- **OFCCP lost the Analogic and Oracle cases because it did not properly frame the statistics in either case to Title VII standards (not even close): A lawyer needs to own the design of the statistics FOR EACH AUDIT; the LEs then need to run their analyses within the lawyer's blueprint...like architect and builder of a house**

B. OFCCP NEEDS TO RE-SET AND RE-MAKE ITSELF (Con't)

4) Needed Operating Structure (con't)

NOTE: Given that OFCCP litigates on average only about 5 cases per year, and only about 1 per year which alleges substantive discrimination law violations, an alternative very viable model would be to house all OFCCP law trained discrimination analysts and Labor Economists in one central office located in a low cost area (like St. Louis, Omaha, Indianapolis, Louisville, etc.) since this work is highly susceptible to remote work about 99% of the time

And almost everyone has to travel to trial anyway since ALJs are not omni-present and ALJs will (properly) attempt to find a courtroom nearest to the establishment where the employee witnesses work(ed)

Cheaper to put a few analysts on a plane a few times per year, if need be, than to hire LEs in congested and expensive big cities

B. OFCCP NEEDS TO RE-SET AND RE-MAKE ITSELF (Con't)

4) Needed Operating Structure (con't)

- OFCCP's historic District Office structure (driven in 1978 (Carter Administration) by locations near contractor establishments to accomplish on-site audits) is now shattered by:
 - a) elimination of almost all on-site investigations following Rule & practice change (both) in 1996, and
 - b) technology changes in the 2010s which made remote investigation of distant KOR establishments feasible from OFCCP offices located anywhere, and
 - c) COVID-19 pandemic which taught us remote work technology was in fact available
- **THUS, no need any longer for OFCCP offices near KOR establishment to audit on-site**
- NOTE: OFCCP efficiency/productivity is so low, OFCCP needs time to gather itself and train together. OFCCP is not ready to work outside the office even while conducting remote investigations. Also, OFCCP's WFA COVID-19 efficiency does not bode well for an OFCCP WFA policy

B. OFCCP NEEDS TO RE-SET AND RE-MAKE ITSELF (Con't)

4) Needed Operating Structure (con't)

Regional OFCCP Offices should house only non-litigating lawyers and supporting Labor Economists so they may ideally “walk the files” over to Regional Solicitors Offices and explain those files when OFCCP reaches impasse in litigation-worthy audits

OFCCP is best served by Labor Economists located on-site with the discrimination analysts and Solicitors in the Regions. Washington D.C. location is neither necessary nor useful

Labor Economists should be dispersed to the 6 OFCCP Regions, per OFCCP Director Charles James' original hiring design for LEs (or housed in one centrally-located office)

B. OFCCP NEEDS TO RE-SET AND RE-MAKE ITSELF (Con't)

4) Needed Operating Structure (con't)

Affirmative Action Audits may now be done remote

- But, to improve OFCCP's efficiency, uniformity and professionalism, COs should report to work at their OFCCP office...no-work-from-home for OFCCP investigators
 - On-site component of OFCCP audits are a thing (largely) of the past
 - On-site component of audits almost never undertaken as to AA issues, at any rate
- Going forward, hire COs only into the central location (i.e. St. Louis or Indianapolis or Louisville, etc.) and as OFCCP employees attrit elsewhere, replace them with new hires in the central location
 - Begin wind-down now of those 5 OFCCP District Offices without managers
 - Close all OFCCP Area Offices and Field Stations ASAP
 - Lots of negotiations needed with OFCCP's union and political representatives of locations to be closed

C. EMPLOYERS AND FEDERAL CONTRACTORS HAVE LOST THE TRANSPARENCY BATTLE

1) What Has Happened?

- EEOC and OFCCP had moved in parallel in the Trump Administration to require transparency to employers/federal KORs in agency discrimination settlement negotiations. Biden EEOC Chair/OFCCP are sponsoring reversal of transparency policies. Very unfortunate for all involved. Lose. Lose. Lose.
 - EEOC: Transparency Rule: See DE WIR story: [“Thursday, June 24, 2021: In Blow to Federal Agency Transparency, Congress Overturns New \(Trump era\) EEOC Conciliation Process”](#)
 - OFCCP:
 - PDN Rule: See DE WIR story: [“Tuesday, November 10, 2020: OFCCP Final “PDN Rule” Now Final”](#)
 - Transparency Directive: See DE WIR story: [“Thursday, September 20, 2018: OFCCP Directive Issued on Transparency”](#)
- Surprisingly and unfortunately, this straight-forward common sense administrative issue has now become a Democrat-Republican political issue
- OFCCP Status: OFCCP has signaled its intent to withdraw its PDN Rule (presumably, including the transparency in settlements component): See DE WIR story: [“Friday, June 11, 2021: HERE IT COMES: OFCCP Plans to Modify Its PDN And Religious Exemption Rules”](#)
 - No word yet from OFCCP as to its plans for its Transparency Directive
 - In the meantime, OFCCP is wantonly ignoring & violating its PDN Rule & its Directive in audits

C. EMPLOYERS AND FEDERAL CONTRACTORS HAVE LOST THE TRANSPARENCY BATTLE (Con't)

- 2) EEOC STATUS: It's over (get over it: it is now a political issue which will change with political administrations)
- The Congress, on a party-line majority vote, used the Congressional Review Act to disapprove the EEOC's Transparency Rule. See DE WIR story: ["Thursday, June 24, 2021: In Blow to Federal Agency Transparency, Congress Overturns New \(Trump era\) EEOC Conciliation Process"](#)
 - What is the Rule currently at the EEOC?
 - [Mach Mining LLC v. EEOC](#), 135 S.Ct. 1645 (2015). "The statute demands...that the EEOC communicate in some way (through "conference, conciliation, and persuasion") about an "alleged unlawful employment practice" in an "endeavor" to achieve an employer's voluntary compliance. §2000e-5(b). That means the EEOC must inform the employer about the specific allegation, as the Commission typically does in a letter announcing its determination of "reasonable cause." *Ibid*. Such notice properly describes both what the employer has done and which employees (or what class of employees) have suffered as a result." (con't on next slide)

C. EMPLOYERS AND FEDERAL CONTRACTORS HAVE LOST THE TRANSPARENCY BATTLE (Con't)

2) EEOC STATUS: It's over (con't)

“And the EEOC must try to engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to remedy the allegedly discriminatory practice. (Judicial review of those requirements (and nothing else) ensures that the Commission complies with the statute. At the same time, that relatively barebones review allows the EEOC to exercise all the expansive discretion Title VII gives it to decide how to conduct conciliation efforts and when to end them.) (emphasis added) And such review can occur consistent with the statute’s non-disclosure provision, because a court looks only to whether the EEOC attempted to confer about a charge, and not to what happened (*i.e.*, statements made or positions taken) during those discussions.”

- So, the EEOC may exercise “its discretion” to decide how “to conduct conciliation efforts.” The Commission’s hands are not tied by Title VII.

C. EMPLOYERS AND FEDERAL CONTRACTORS HAVE LOST THE TRANSPARENCY BATTLE (Con't)

2) EEOC STATUS: It's over (con't)

- What is the issue?

The issue is not what minimum conciliation efforts Title VII (or EO 11246) requires.

The question is rather what makes good operational sense to help the parties settle an audit or a Charge. Title VII gave the EEOC wide latitude to decide how to conduct a proper conciliation negotiation.

Why would EEOC/OFCCP want to hide its evidence of liability and damages if it really has it and thereby thwart settlements which are typically borne of more perfect knowledge of what a company's legal risks and damages are likely to be...which evidence is going to come out, at any rate if it truly exists, in any ensuing litigation

C. EMPLOYERS AND FEDERAL CONTRACTORS HAVE LOST THE TRANSPARENCY BATTLE (Con't)

3) OFCCP STATUS: It's over (by executive fiat)

- What is the operating reality currently at OFCCP?

OFCCP is shielding KORs from the details of its alleged discrimination cases in audits. OFCCP argues it holding a “hand full of Aces.” OFCCP’s argument in conciliation is often, these days: “Trust me. We have lots of evidence. It is too bad you cannot replicate either or both our liability and/or damages analyses. We do not have to show you our analyses which you say don’t add up and do not follow the facts in the audit. Go ahead, call our bluff. We are not budging. Just write the check.”

OFCCP is currently operating at its legal peril, however, because unlike the EEOC, the OFCCP is currently defying and ignoring its own rules of practice contained in both its Transparency Directive and in its PDN Rule. Courts will more likely than not hold OFCCP to its self-stated Rules.

This procedural issue will continue to be very frustrating to many well-intentioned contractors which believe in fair and thorough processes. OFCCP is unaware how this issue is eroding its brand for professionalism among federal Government KORs and on Capitol Hill

C. EMPLOYERS AND FEDERAL CONTRACTORS HAVE LOST THE TRANSPARENCY BATTLE (Con't)

- What Does the Future Hold?

Many head-knocking exercises with EEOC/OFCCP lie immediately ahead as the agencies now again adopt “[pig-in-a-poke](#)” “take it or leave it” bargaining positions

- Return to the Future!

GCs/CEOs will have a very hard time accepting the position of the agencies. GCs/CEOs typically view such agency demands as untrustworthy, unprofessional, uncollaborative and a sign of agency weakness...usually dismissed out-of-hand as inappropriate attempted bullying

Downside of the issue having gone “political”: Since the issue is now political, there is no use “breaking your pick” arguing with OFCCP/EEOC other than to document for the record OFCCP’s failure of compliance with its transparency Rule/Directive. (Why unnecessarily bloody your knuckles on a door which is shut & locked)? ERs/KORs will unfortunately now have to await a Republican White House to again return to transparency. *Again, it is now a political issue*

D. DirectEmployers Week In Review Reports of Everything Biden OFCCP

OFCCP WIR Stories since January 20, 2021 re: “Biden Administration”

- [Day One for President Biden Included, Among Many Actions, Revoking EO 13950](#)
- [Several New Appointees \(and a Termination\) in the Labor World](#)
- [Jenny Yang on the Job For Less Than 24 Hours Before Sued to Stop OFCCP’s Religious Discrimination Final Rule](#)
- [The Paycheck Fairness Act Surfaces...Again](#)
- [OFCCP's New Chief of Staff](#)
- [OFCCP's Commitment to Racial Equality](#)
- [OFCCP Director Yang Addressed the Contractor Community](#)
- [OFCCP Contractor Assistance Portal Closed](#)
- [NEW: The “Flip-Flop Report” – Scorecard of the Biden Administration Executive Actions](#)
- [Biden Creates a White House Gender Policy Council](#)
- [Affirmative Action Plan Verification...Coming Soon?](#)
- [The “Flip-Flop Report” – Scorecard of the Biden Administration Executive Actions](#)
- [Recognition of Equal Pay Day](#)
- [Spoiler Alert: Religious Exemption Changes For Federal Contractors On The Horizon](#)
- [The Queen’s Gambit: New OFCCP Director Jenny Yang Signals She is Going to Make Bold Moves at OFCCP as She Scrapped 1,750 Upcoming Audits and May Be Discontinuing the Focused Review Style of Audit](#)
- [EO 13950 Gone For Good](#)
- [The “Flip-Flop Report” – Scorecard of the Biden Administration Executive Actions](#)
- [How Ten Organizations Rocked Their Section 503 Compliance Reviews](#)

D. DirectEmployers Week In Review Reports of Everything Biden OFCCP (Con't)

BONUS BLOG:

- [The Queen's Gambit: New OFCCP Director Jenny Yang Signals She is Going to Make Bold Moves at OFCCP as She Scrapped 1,750 Upcoming Audits and May Be Discontinuing the Focused Review Style of Audit](#)
- [VEVRAA Benchmark for Hiring Dropped to 5.6%](#)
- [DirectEmployers Announces OFCCP Director Jenny Yang as a Keynote Speaking "Live" at its Annual Member Meeting DEAMcon21](#)
- [ODEP, OFCCP, and Women's Bureau To Host National Dialogue Seeking Equity in Employment for Historically Underserved Individuals with Disabilities](#)
- [President Biden's Budget to Enforce Federal Contractor Obligations](#)
- [Paycheck Fairness Act Passed House](#)
- [Upcoming OFCCP Event: Construction Compliance Checks](#)
- [OFCCP Wants Your Comments on Construction Compliance Reviews](#)
- [OFCCP Director Sets The Stage For What's To Come: CSALS and OFCCP Audit Selection Methodology to Continue](#)
- [OFCCP Announced A New Course – But You May Want To Wait](#)
- [Is The Cost Of 13 Keystrokes An Accurate "Burden" Of The Uniformed Guidelines on Employee Selection Procedures?](#)

D. DirectEmployers Week In Review Reports of Everything Biden OFCCP (Con't)

- [President Biden and the OFCCP Acknowledge Asian American and Native Hawaiian/Pacific Islander Heritage Month](#)
- [OFCCP Seeks Unprecedented 33% Budget Increase: Focus is on Rebuilding OFCCP; Not Audit Enforcement](#)
- [OFCCP Event This Week](#)
- [OFCCP Director Yang Fills Her Regional Director Posse: It's Aida Collins for RD for the Southeast Region \(Atlanta\)](#)
- [Paycheck Fairness Act Fails in Senate...Again](#)
- [HERE IT COMES: OFCCP Plans to Modify Its PDN And Religious Exemption Rules](#)
- [OFCCP Issues Statement Commemorating One Year Anniversary of Bostock Decision](#)
- [USDOL Opens National Online Dialogue: Women and Work: Reinvestment, Return, and Recovery](#)
- [OFCCP Continues Its Climb in Best Places to Work](#)
- [750 OFCCP Audits Will Tap 276 Federal Government Contractors Out of an Estimated 25,000: Many Contractors Experience the Return of Multiple Audits](#)
- [U.S. House of Representatives Appropriations Committee Approves Biggest Budget Ever for OFCCP](#)

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E. Contractors' Strategic Plan For The Next 12 Months

- 1) Support OFCCP's Plan to Increase its Budget and FTE
- 2) Work with OFCCP to convince it to return completely to full "regular" Compliance Evaluations (to help restore OFCCP's integrity/brand for serious professional work)
- 3) Work with OFCCP to convince it to triple its Compliance Evaluation closure rates to return over the next two years to 5 to 7 Compliance Review closures per year per FTE to return it to a credible enforcement agency and make it again relevant
- 4) Work with OFCCP to get political considerations out of OFCCP
 - While you may think this Pollyanna thinking, I assure you a true enforcement agency can and does resist political pressures: It just has to learn how
- 5) Work with OFCCP to resist the temptation to become fascinated with shiny objects, like compensation discrimination. There is little money in it as four Republican (Reagan, Bush 41, Bush 43 and Trump) and two Democrat Administrations (Clinton and Obama) have proven in over **200,000 audits to date**
 - Help OFCCP become more responsible and use its resources better for the taxpayer and the many victims of unlawful hiring discrimination, disability discrimination, and gender identity and sexual orientation discrimination all in dire need of OFCCP's services

E. Contractors' Strategic Plan For The Next 12 Months (Con't)

It is time to rise and fight for what you believe in and cherish

If you believe in non-discrimination and believe OFCCP should be saved and returned to its former glory to carry the fight on behalf of affirmative action, then rise up and fight to make that happen!

This agency's back is against the wall...don't let that wall crumble and fall down on OFCCP. Fight for what you believe in!

And don't look back a year or two from now wishing you had climbed down into the pit and gotten into the fray. Live a life without regret!

FIGHT!

FIGHT!

FIGHT!

THANK YOU!

QUESTIONS?

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