

# What to Expect from The Federal Employment Law Enforcement Agencies

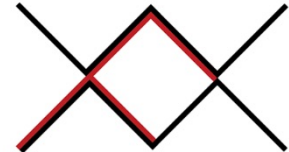
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DirectEmployers  
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# AGENDA

- I. Calendar 2022: OFCCP Review By The Numbers
- II. Calendar 2022: The Other Employment Agencies of Interest
  - a. EEOC
  - b. NLRB
  - c. Wage-Hour Division
- III. The OFCCP in Transition
  - a. Reduced Focus on Enforcement with Greater Focus on Instituting Legacy Enforcement Architecture
  - b. Concentration of power into Washington D.C. OFCCP National Office continues as to discrimination issues with OFCCP Regions now running audits at expense of shrinking OFCCP District Office structure and functions
  - c. OFCCP continues to be in budget trouble: big loser this year in budget wars
  - d. What to expect going forward?
  - e. The B-I-G Issue for federal contractors in audits: Will you fight or fold when OFCCP presses unauthorized and inappropriate requirements, demands, and interpretations
- IV. The coming SCOTUS Harvard/UNC case decisions will not harm OFCCP, although confusion will continue to reign as to what “affirmative action” is and means...and how it relates to what companies are calling DE&I initiatives

# I. Calendar 2022: OFCCP Review By The Numbers

## A. Benchmark: Audit Volume

	FY2022	FY2021	FY2020	FY2019
<b>Supply &amp; Service:</b>	<b>866</b> (down 23%)	<b>1,125</b> (down 15%)	<b>1,318</b> (down 1%)	<b>1,331</b>
<b>Construction</b>	<u><b>33</b></u> (down 70%)	<u><b>111</b></u> (data unstable)	<u><b>2</b></u>	<u><b>12</b></u>
<b>S&amp;S + Construction</b>	<b>899</b> (total for year)	<b>1,236</b> (total for year)	<b>1,320</b> (total for year)	<b>1,343</b> (total for year)

# I. Calendar 2022: OFCCP Review By The Numbers (con't)



## B. Violations: Number and Type

### Total Number of Alleged Violations\*

	FY2022	FY2021	FY2020	FY2019
<b>Supply &amp; Service:</b>	<b>116 CAs</b> (down 14%)	<b>124 CAs</b> <b>11 CDs</b> <b>135</b> (down 28%)	<b>187</b>	<b>173</b>
<b>Construction:</b>	<b>4</b>	<b>0</b> (data unstable)	<b>2</b>	<b>6</b>
<b>Failure to Hire:</b>	<b>13</b> (down 32%)  <b>\$5,804,992.70</b>	<b>19</b> (down 72%) <b>\$5,804,253.31</b>	<b>66</b> <b>\$22,722,007.93</b>	<b>58</b> <b>\$11,702,258.61</b>
<b>Compensation:</b>	<b>8</b> (down 66%)  <b>\$5,885,818.18</b>	<b>18</b> (down 28%) <b>\$6,540,199.75</b> (down 10%)	<b>25</b> <b>\$7,238,325.41</b>	<b>33</b> <b>\$22,059,662.06</b>
<b>Affirmative Action:</b>	<b>99</b> (83% of CAs)	<b>111</b> (90% of CAs)	<b>124</b> (66% of CAs)	<b>121</b> (70% of CAs)

# I. Calendar 2022: OFCCP Review By The Numbers (con't)

- OFCCP's 112 FY2022 Conciliated Settlements Were Fairly Evenly distributed across all 12 months of the Year
- With a B-I-G push at the end of fiscal year = 25% in August/September (as usual)

Sept. 2021	2
Oct. 2021	10
Nov. 2021	8
Dec. 2021	8
Jan. 2022	6
Feb. 2022	11
Mar. 2022	16
Apr. 2022	7
May 2022	6
Jun. 2022	9
Jul. 2022	2
Aug. 2022	14
Sep. 2022	16
<b>TOTAL</b>	<b>115</b>

OFCCP appears to have misreported the GF Machining Solutions, LLC Conciliation Agreement (which OFCCP reports as settled on 9/24/21) and the IFS North America, Inc. (which OFCCP reports as settled on 9/30/21) in FY 2022. Nonetheless, we report both CAs here in FY 2022 data to keep parallel with OFCCP's reporting of these two CAs in FY 2022 instead of (properly) in FY 2021 (which ended September 30, 2021).

OFCCP's FOIA Library reports only 115 CAs despite OFCCP's website reporting 120 CAs. See prior slide

# I. Calendar 2022: OFCCP Review By The Numbers (con't)

## A whopping 30 AAP VIOLATION TYPES

	Violation Description:	Regulatory Citation:	Total:
1.	Required contents of AAP	41 C.F.R. 60-300.44]	51
2.	Mandatory Job Listing	41 C.F.R. 60-300.5(a)2-6]	37
3.	ID in Problem Areas	41 C.F.R. 60-2.17(b)]	31
4.	Required contents of AAPs	41 C.F.R. 60-741.44]	29
5.	Record-Keeping	41 C.F.R. 60-1.12]	29
6.	Invitation to self-identify	41 C.F.R. 60-300.42]	25
7.	Audit-System	41 C.F.R. 60-2.17(d)]	24
8.	Info on impact	41 C.F.R. 60-3.4]	22
9.	Good Faith Efforts	41 C.F.R. 60-2.17(c)]	20
10.	Invitation to self-identify	41 C.F.R. 60-741.42]	17
11.	Doc. of impact and validity evidence	41 C.F.R. 60-3.15(a)]	16
12.	Applicability of the AAP Requirement	41 C.F.R. 60-300.40]	9
13.	Record Keeping	41 C.F.R. 60-300.80]	8
14.	Equal Opportunity Clause	41 C.F.R. 60-741.5]	7
15.	Utilization goals	41 C.F.R. 60-741.45]	7
16.	Scope and app.	41 C.F.R. 60-2.1]	6
17.	Placement goals	41 C.F.R. 60-2.16]	6
18.	Job group analysis	41 C.F.R. 60-2.12]	5
19.	Determine availability	41 C.F.R. 60-2.14]	4
20.	Record Keeping	41 C.F.R. 60-741.80]	4
21.	Publish of non discrimination provision	41 C.F.R. 60-1.35(c)]	4
22.	Placement of incumbents in job groups	41 C.F.R. 60-2.13]	3
23.	Failure to Provide Relevant Records	41 C.F.R. 60-1.43]	3
24.	Gen purpose & app. of the AAP Req.	41 C.F.R. 60-741.40]	3
25.	Prohibitions/discrimination	41 C.F.R. 60-741.21 (a)]	2
26.	Avail. of AAP	41 C.F.R. 60-741.41]	2
27.	Reports & other req. info	41 CFR § 60-1.7]	1
28.	Equal Opportunity Clause	41 C.F.R 60-4.3]	1
29.	Definition: Disability	41 C.F.R. 60-741.2(g)]	1
30.	Equal Employment Policy	41 C.F.R. 60-50.2]	1
<b>TOTAL:</b>			<b>378</b>

# I. Calendar 2022: OFCCP Review By The Numbers (con't)

## EO Order AAP Violation Types (ranked by Rule OFCCP cited)

1.	Recordkeeping	[41 C.F.R. 60-1.12]	29
2.	Dissemination of non-discrimination provision	[41 C.F.R. 60-1.35(c)]	4
3.	Failure to Provide Relevant Records	[41 C.F.R. 60-1.43]	3
4.	Scope and applicability	[41 C.F.R. 60-2.1]	6
5.	Job group analysis	[41 C.F.R. 60-2.12]	5
6.	Placement of incumbents in job groups	[41 C.F.R. 60-2.13]	3
7.	Determine availability	[41 C.F.R. 60-2.14]	4
8.	Placement goals	[41 C.F.R. 60-2.16]	6
9.	Identification of Problem Areas	[41 C.F.R. 60-2.17(b)]	31
10.	Audit-System	[41 C.F.R. 60-2.17(d)]	24
11.	Good Faith Efforts	[41 C.F.R. 60-2.17(c)]	20
12.	Documentation of impact and validity evidence	[41 C.F.R. 60-3.15(a)]	16
13.	Information on impact	[41 C.F.R. 60-3.4]	22
14.	Equal Employment Policy	[41 C.F.R. 60-50.2]	1
<b>TOTAL:</b>			<b>174</b>

## Section 503 AAP Violation Types (ranked by Rule OFCCP cited)

1.	Required contents of AAP	[41 C.F.R. 60-741.44]	29
2.	Definition of Disability	[41 C.F.R. 60-741.2(g)]	1
3.	Prohibitions/discrimination	[41 C.F.R. 60-741.21 (a)]	2
4.	Gen purpose & applicability of the AAP Req.	[41 C.F.R. 60-741.40]	3
5.	Availability of AAP	[41 C.F.R. 60-741.41]	2
6.	Invitation to self-identify	[41 C.F.R. 60-741.42]	17
7.	Utilization goals	[41 C.F.R. 60-741.45]	7
8.	Equal Opportunity Clause	[41 C.F.R. 60-741.5]	7
9.	Recordkeeping	[41 C.F.R. 60-741.80]	4
<b>TOTAL:</b>			<b>72</b>

## VEVRAA AAP Violation Types (ranked by Rule OFCCP cited)

1.	Invitation to self-identify	[41 C.F.R. 60-300.42]	25
2.	Required contents of AAP	[41 C.F.R. 60-300.44]	51
3.	Mandatory Job Listing	[41 C.F.R. 60-300.5(a)2-6]	37
4.	Recordkeeping	[41 C.F.R. 60-300.80]	8
5.	Applicability of the AAP Requirement	[41 C.F.R. 60-300-40]	9
<b>TOTAL:</b>			<b>130</b>

# I. Calendar 2022: OFCCP Review By The Numbers (con't)

- Below are four OFCCP enforcement data CHARTS we have extracted from OFCCP's Enforcement Database for FY2022 and (separately) for FY2023-Q1 Conciliation Agreements (CA's) and displayed as follows:
- **CHART 1:** OFCCP FY2022 CAs (Compensation & Failure to Hire displayed at top))
- **CHART 2:** OFCCP FY2022 CAs (By date of settlement)
- **CHART 3:** OFCCP FY2022 CAs (Ranked lowest backpay to highest)
- **CHART 4:** OFCCP FY2023-Q1 CAs



## II. Calendar 2022: The Other Employment Agencies of Interest

### a. EEOC

- Big (~13%) Budget increase
- No EEOC Rulemaking On the Horizon
  - No EEO-1 Component 2 Hours Worked/Pay Data reporting coming until 2024 or 2025
- Commission first stalemated at 3 (Republicans) vs 2 (Democrats) and now deadlocked at 2-2
- President Biden Formally Re-Nominated Gilbride (EEOC Counsel) & Kotagal (EEOC Commissioner)

## II. Calendar 2022: The Other Employment Agencies of Interest (con't)

### b. NLRB

#### i. [Got a Big \(~9%\) Budget Increase](#)

ii. General Counsel Jennifer Abruzzo and Democrat Majority Board now on a tear

#### 1. Reversing Trump

a. [Political Flip Continued at U.S. NLRB with Publication of Proposed Union Election Protection Rule That Would Rescind Current Trump-Era Rule](#)

b. [U.S. Appellate Court for D.C. Circuit Blocked Key Aspects of Trump-Era NLRB Union Election Rule](#)

c. [NLRB anticipates publishing its Final Joint Employer Rule in August 2023](#)

d. [NLRB Overturns Another Trump Era Rule, Reinstating Broader Access to Property for Contract Workers Staging Labor Protests](#)

## II. Calendar 2022: The Other Employment Agencies of Interest (con't)

### b. NLRB (con't)

#### 2. Union preferential policies abounding

- a. [U.S. NLRB Modified the Appropriate Bargaining Unit Standard](#)
- b. [U.S. NLRB Reaffirmed Limits on Employers' Questioning of Workers for ULP Investigations](#)
- c. [NLRB General Counsel Pushed Interim Settlements of ULP Claims, Instead of 10\(j\) Injunctions, While Underlying Case Is Pending](#)
- d. [The NLRB Reported July 15, 2022 Union Election Petitions Are Up 58% Through Q3, Exceeding Already All FY21 Petitions Filed](#)
  - i. But forgot to report at end of year that union percentage of civilian labor force shrunk yet again
- e. [NLRB Counsel Announced Intent to Urge the Board That "Captive-Audience" Anti-Union Meetings for Employees Are Unlawful](#)
- f. <https://directemployers.org/2022/02/07/ofccp-week-in-review-february-7-2022/#nlrb-union-support>

## II. Calendar 2022: The Other Employment Agencies of Interest (con't)

### c. Wage-Hour Division

#### i. Three NPRMs launched

1. Independent Contractor Final Rule Slated for May 2023
2. Nondisplacement of Qualified Workers Under Service Contracts Final Rule (publication date before 06/31/23)
3. Updating the Davis-Bacon and Related Acts Regulations Final Rule Expected in February 2023

#### ii. Wage & Hour Enforcement Tops USDOL Equity Action Plan

#### iii. WHD Tip Rule Proposal Seeks to Rescind Trump Rule

#### iv. Looman Nomination to be WHD Administrator stalled

### III. The OFCCP in Transition

a. Reduced Focus on Enforcement with Greater Focus on Instituting Legacy Enforcement Architecture

i. Five OFCCP regulatory initiatives pending

1. OFCCP set April 2023 for NPRM to “Modernize” Supply & Service Contractor Regulations
2. March 2023 Now Anticipated Date for NPRM to Require Reporting of Subcontractors
3. Final Rule on Rescinding Trump-era Religious Exemption Now Two Months Overdue
4. OFCCP Expects PDN Final Rule Publication Two Months Ahead of Previous Schedule (now March 2023)
5. March 2023 Set for Final “Technical Amendments” to Update Jurisdictional Thresholds & Remove Gender Assumptive Pronouns

### III. The OFCCP in Transition (con't)

- ii. OMB's review of OFCCP's very controversial proposal to substantially expand its audit Scheduling Letter and attached Itemized Listing for Supply & Service contractors is pending

- Public Comments on Paperwork Reduction Act considerations closed last Friday (23-1-20)

- OMB Timeline: OFCCP hopes OMB will approve before May

- b. Concentration of power into Washington D.C. OFCCP National Office continues as to discrimination issues with OFCCP Regions now running audits at expense of shrinking OFCCP District Office structure and functions

### III. The OFCCP in Transition (con't)

- c. OFCCP continues to be in budget trouble: big loser this year in budget wars only a 4+% budget increase
  - i. Now budgeted for 420 employees: steady-state budget
  - ii. More audits can/should occur through more disciplined management of the field, getting employees back to work (whether remote or in the office), improving morale to reduce wracking high turnover of new hires (currently needs to hire 4 to keep 3), and removing National Office bottleneck reviewing and processing all discrimination cases

### III. The OFCCP in Transition (con't)

#### d. What to expect going forward?

- i. OFCCP Failure to Hire Continues to be/will continue to be OFCCP's most frequent discrimination claim
- ii. OFCCP Compensation audits are fewer in number than FTH, but with 1 or 2 bigger number settlements (vs financial institutions)
- iii. OFCCP's revived Construction program again went unconscious



### III. The OFCCP in Transition (con't)

- e. The B-I-G Issue for federal contractors in audits: Will you fight or fold when OFCCP pursues unauthorized and inappropriate requirements, demands, and interpretations:
  - i. Rollover/"write the check"?
  - ii. Stand and push back in an appropriate, but firm, way?

IV. The coming SCOTUS Harvard/UNC case decisions will not harm OFCCP, although confusion will continue to reign as to what “affirmative action” is and means...and how it relates to what companies are calling DE&I initiatives

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# THANK YOU

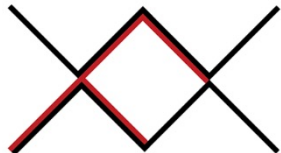
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