



# **LOOKING BACK TO PLAN AHEAD:**

## **A 2018 Review and Forecast for 2019**

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# About Berkshire

- Delivering AAP solutions since 1983
- Headquartered in Columbia, MD and serve clients across the U.S.
- Experts in Affirmative Action, Compensation, Applicant Management, Workforce Planning, Professional Training
- Trusted advisor for ~ 1,600 clients
- Over 6,500 AAPs implemented annually
- Clients First Philosophy



# Agenda

- Looking back at 2018
  - Changes in OFCCP Leadership and Priorities
  - Summary of:
    - Enforcement Highlights
    - Audit and Compliance Reviews
  - 12 Directives Issued and the Impact to Contractors during Compliance Reviews
- Forecast for 2019

# 2018 Changes in Leadership at OFCCP

- Director Ondray Harris left the agency August 2018
- Craig Leen immediately became Acting Director, then Director
- Current Leadership Team
  - Marika Litras – Deputy Director
  - Kelley Smith – Chief of Staff
  - Harvey Fort – Acting Director of Policy & Programs Development
  - Tina Williams – Acting Director of Program Operations
  - Javaid Kaiser – Acting Director of Management & Admin Programs
  - Regional Directors



# 2018 Changes in Leadership at OFCCP

- Regional Directors
  - Diana Sen, Northeast
  - Michele Hodge, Mid-Atlantic
  - Sam Maiden, Southeast
  - Carmen Navarro (Acting), Midwest
  - Melissa Speer, Southwest & Rocky Mountain
  - Jane Suhr (Acting), Pacific



# OFCCP New Leadership Priorities

## The Four Pillars

- Transparency
- Certainty
- Efficiency
- Recognition



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# FY18 Compliance Review Activity

- OFCCP completed 812 compliance evaluations
  - 79.3% notice of compliance
  - 14.8% conciliation agreements
  - 5.9% financial agreement
- Financial Agreements
  - 35% indicated 'salary' issue
  - 58% indicated 'hiring' issue

DOL Enforcement Database - <https://enforcedata.dol.gov>

As of 1/24/2019



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# FY18 Notable Financial Settlements

- \$16.4 M across 58 discrimination cases (includes complaints)
  - Dell \$2.925M
  - Humana \$2.5M
  - CB&I (formerly Shaw) \$1.95M
  - Birds Eye Foods \$700K
  - Performance Food Group \$600K
  - Intertek \$465K



# Directives

More issued in 10 months than in the past 20 years *combined*

## **2018** (released Feb through Sept)

1. Use of Predetermination Notices (PDN)
2. TRICARE Subcontractor Enforcement Activities
3. Executive Order 11246 § 204(c), religious exemption
4. Focused reviews of contractor compliance [E.O.11246, Section 503, & VEVRAA]
5. Analysis of Contractor Compensation Practices During a Compliance Evaluation
6. Contractor Recognition Program

7. Affirmative Action Program Verification Initiative
8. Transparency in OFCCP Compliance Activities
9. OFCCP Ombud Service

## **2019** (released 11/30/2018)

1. Compliance Review Procedures (rescinds DIR 2011-01)
2. Early Resolution Procedures
3. Opinion Letters and Help Desk



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# Directives: 1 of 12



## DIRECTIVE (DIR) 2018-01

A Directive (DIR) is intended to provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. A DIR does not change the laws and regulations governing OFCCP's programs and does not establish any legally enforceable rights or obligations.

**Effective Date:** February 27, 2018

1. **SUBJECT:** Use of Predetermination Notices (PDN)
2. **PURPOSE:** To establish the consistent use of PDNs for discrimination cases, both individual and systemic.



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## 1 of 12: Use of Predetermination Notices (PDN)

- Changes use of this notice type – now informative rather than reserved for specific systemic discrimination cases
- Effort to increase transparency of preliminary findings and to ensure consistency across offices and meant to encourage communication between agency and contractor
- Establishes protocol to institute a uniform approach for the agency to use when evaluations are indicating possible discrimination
- Interim guidance until the FCCM is revised



# Directives: 2 of 12



## DIRECTIVE (DIR) 2018-02

Directives (DIRs) provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. Directives do not change the laws and regulations governing OFCCP's programs and do not establish any legally enforceable rights or obligations.

**Effective Date:** May 18, 2018

1. **SUBJECT:** TRICARE Subcontractor Enforcement Activities
2. **PURPOSE:** To extend the moratorium on enforcement of the affirmative obligations required of TRICARE subcontractors.<sup>1</sup>



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## 2 of 12: TRICARE Subcontractor Enforcement Activities

- Extends the enforcement moratorium related to AA obligations of TRICARE and VAHBP providers for 2 years. Now expires May 7, 2021.
- Exemption cannot be claimed if contractor has other covered government contracts in addition to those related to TRICARE and/or VAHBP. Contractor must review all contracts with care.
- Extension is intended to provide the agency time to solicit feedback and to evaluate legislation that may be enacted to make the exemption more permanent.



# Directive 3 of 12



## DIRECTIVE (DIR) 2018-03

Directives (DIRs) provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. Directives do not change the laws and regulations governing OFCCP's programs and do not establish any legally enforceable rights or obligations.

**Effective Date:** August 10, 2018

1. **SUBJECT:** Executive Order 11246 § 204(c), religious exemption.
2. **PURPOSE:** To incorporate recent developments in the law regarding religion-exercising organizations and individuals.



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### 3 of 12: Executive Order 11246 § 204(c), religious exemption

- Focused on protecting religious organizations covered by Executive Order 11246, not on individuals' personal religious beliefs
- Does not overturn Obama order that contractors not discriminate on the basis of sexual orientation or gender identity
- OFCCP continues to look at contractors' religious accommodation requests during compliance reviews





# Directive 4 of 12



## DIRECTIVE (DIR) 2018-04

Directives (DIRs) provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. Directives do not change the laws and regulations governing OFCCP's programs and do not establish any legally enforceable rights or obligations.

**Effective Date:** August 10, 2018

1. **SUBJECT:** Focused reviews of contractor compliance with Executive Order 11246 (E.O.), as amended; Section 503 of the Rehabilitation Act of 1973 (Section 503), as amended; and Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended.
2. **PURPOSE:** To direct that a portion of future scheduling lists include focused reviews as to each of the three authorities that the Office of Federal Contract Compliance Programs enforces – the E.O., Section 503, and VEVRAA – as described in 41 C.F.R. § 60-1.20, 41 C.F.R. § 60-300.60; 41 C.F.R. § 60-741.60; and the Federal Contractor Compliance Manual (FCCM) at 1A00.



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## 4 of 12: Focused Reviews of Contractor Compliance

- Starting with fiscal year 2019, OFCCP's future scheduling lists will include focused reviews covering E.O. 11246, Section 503 and VEVRAA and selection will issue from the same neutral Federal Contractor Selection System (FCSS) used to identify contractors for supply and service evaluations.
- Focused review is *part of* a compliance evaluation which means the contractor can expect a more intense investigation of certain aspects of compliance.
- OFCCP will begin developing staff training to conduct these reviews.
- OFCCP will work to develop assistance and guidance for contractors regarding focused reviews.
- On-site reviews are anticipated as OFCCP seeks to conduct a focused review of the targeted issue(s).



## Focused Reviews: Now What?

- Section 503 focused reviews anticipated to start with new CSAL list expected in February 2019 (500 reviews, corporate HQs, on-site)
- OFCCP has received approval for its review letter. It contains the following 12 items which are also found on the standard compliance review letter:
  - Copy of your EO 11246 AAP (Minorities and Women)
  - Copy of your Section 503 AAP (Individuals with Disabilities)
  - Job group analysis
  - IWD outreach and recruitment assessment
  - Documentation of audit and reporting system requirement compliance for IWDs





## Focused Reviews: Now What?

- Section 503 focused review letter (continued)
  - IWD applicant/hire computations
  - IWD Utilization Analysis
  - EEO-1 report for last 3 years
  - Copy of collective bargaining unit agreement
  - Copies of reasonable accommodation policies and requests
  - Most recent assessment of personnel processes (date of assessment, actions taken, and date of next scheduled assessment)
  - Most recent assessment of physical and mental qualifications (date of assessment, actions taken, and date of next scheduled assessment)



# Focused Reviews Now What?

- Confirm compliance with Section 503 requirements
  - Anticipating that 'boilerplate' language may not be enough; expect requests for documentation
- Review data metrics over multiple year period
- Review policies that may impact IWD
- Accommodation process and training



# Directives: 5 of 12



## DIRECTIVE (DIR) 2018-05

**A Directive (DIR) is intended to provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. A DIR does not change the laws and regulations governing OFCCP's programs and does not establish any legally enforceable rights or obligations.**

**Effective Date:** August 24, 2018

1. **SUBJECT**: Analysis of Contractor Compensation Practices During a Compliance Evaluation
2. **PURPOSE**: To outline standard procedures for reviewing contractor compensation practices during a compliance evaluation and emphasize OFCCP's priority of eliminating pay discrimination through enforcement by OFCCP and compliance by contractors through proactive self-auditing.



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## 5 of 12: Analysis of Contractor Compensation Practices During a Compliance Evaluation (“Compensation Directive”)

Guidance with specific procedures outlined in 5-page attachment

- Directive objectives are to:
  1. Clarify the agency’s analytical process in a transparent manner;
  2. Help contractors to conduct self-analyses the same as the agency; and
  3. Make the compensation evaluation process more consistent and efficient.
- Procedures outline the agency’s practices and approaches to:
  - Determining similarly-situated employees,
  - Creating pay analysis groups,
  - Conducting statistical analysis and modeling, and
  - Other analytical matters relevant to conducting compensation compliance evaluations and the review of contractors’ self-audits.



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# Compensation Directive: Now What?

- Already seeing impact in compliance reviews
- Review your job structures and compensation hierarchies to determine if OFCCP will accept them as reasonable pay groupings
- Update written policies to make sure your job pay system can be verified by the OFCCP
- Proactive pay analyses critically important





# Directives: 6 of 12



## DIRECTIVE (DIR) 2018-06

Directives (DIRs) provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. Directives do not change the laws and regulations governing OFCCP's programs and do not establish any legally enforceable rights or obligations.

**Effective Date:** August 24, 2018

1. **SUBJECT:** Contractor Recognition Program
2. **PURPOSE:** To recognize contractors with high-quality and high-performing compliance programs and initiatives. These programs should have a record of accomplishment related to nondiscrimination and providing applicants and employees with equal employment opportunity under the laws enforced by the Office of Federal Contract Compliance Programs (OFCCP). To highlight specific contractor programs and initiatives that are innovative, have achieved demonstrable results, and that could be taught or incorporated into contractor peer mentoring programs.



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## 6 of 12: Contractor Recognition Program

- Notes that the OFCCP believes it can best protect workers from discrimination by a dual approach which utilizes enforcement as well as compliance assistance.
- Does not include a specific timetable for introduction of the program but notes that the agency is developing a “contractor recognition program that highlights implementable best or model contractor practices, a contractor mentoring program that uses contractors to help their peers improve compliance, and other initiatives that provide opportunities for contractors to collaborate or provide feedback to OFCCP on its compliance assistance efforts.”



# Directives: 7 of 12



## DIRECTIVE (DIR) 2018-07

Directives (DIRs) provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. Directives do not change the laws and regulations governing OFCCP's programs and do not establish any legally enforceable rights or obligations.

**Effective Date:** August 24, 2018

1. **SUBJECT:** Affirmative Action Program Verification Initiative
2. **PURPOSE:** To implement a verification process with the objective of ensuring that all covered federal contractors are meeting the most basic equal employment opportunity (EEO) regulatory requirement, namely, the preparation of a written affirmative action program (AAP) and annual updates to that program. This will help American workers by ensuring that all covered federal contractors have AAPs, which will result in enhanced equal employment opportunity, more contractor outreach to available workers, and a more diverse workforce.



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## 7 of 12: Affirmative Action Program Verification Initiative

- Notes that OFCCP can only conduct compliance evaluations for a small portion of the 120,000 contractor establishments governed by its regulations. The Verification Initiative is a way for OFCCP “to expand its compliance reach.”
- OFCCP seeking way to verify that all covered contractors are preparing timely annual AAPs
- Would use data to schedule contractors for audits
- May eventually include annual certification requirement



# AAP Verification Program: Now What?

- Develop a plan to more timely complete annual AAPs
- Confirm all required entities are preparing AAPs
- Check System for Award Management (SAM) certification

[FAR 52.222-25: Affirmative Action Compliance](#)

**The offeror represents that-**

- (i) It ☒ has developed and has on file, It ☐ has not developed and does not have on file, at each establishment, affirmative action programs required by rules and regulations of the Secretary of Labor (41 CFR parts 60-1 and 60-2), or
- (ii) It ☐ has not previously had contracts subject to the written affirmative action programs requirement of the rules and regulations of the Secretary of Labor.



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# Directives: 8 of 12



## DIRECTIVE (DIR) 2018-08

**A Directive (DIR) is intended to provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. A DIR does not change the laws and regulations governing OFCCP's programs and does not establish any legally enforceable rights or obligations.**

**Effective Date:** September 19, 2018

1. **SUBJECT:** Transparency in OFCCP Compliance Activities
2. **PURPOSE:** To ensure transparency in all stages of OFCCP compliance activities to help contractors comply with their obligations and know what to expect during a compliance evaluation, and to protect workers from discrimination through the consistent enforcement of OFCCP legal authorities.



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## 8 of 12: Transparency in OFCCP Compliance Activities

- Detailed summary of how compliance reviews should proceed
  - Contact contractor within 15 days of sending Scheduling Letter
  - Begin review in five days; close most desk audits in 45 days
  - Only ask for more information to “fulfill or clarify” data requested by Scheduling Letter during desk audit
  - Supplemental data requests must include basis for the request, be reasonably tailored, and allow for a reasonable response time
  - Share more information with contractors during conciliation



# Directives: 9 of 12



## DIRECTIVE (DIR) 2018-09

**Directives (DIRs) provide guidance to OFCCP staff, general contractors or other external stakeholders on enforcement and compliance policy or procedures. Directives do not change the laws and regulations governing OFCCP's programs and do not establish any legally enforceable rights or obligations.**

**Effective Date:** September 19, 2018

1. **SUBJECT:** OFCCP Ombud Service
2. **PURPOSE:** To announce planned implementation of an Ombud Service in the national office to facilitate the fair and equitable resolution of specific types of concerns raised by OFCCP external stakeholders in coordination with regional and district offices.



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## 9 of 12: OFCCP Ombud Service

- Continued commitment to responding to concerns raised in GAO report and Town Hall Meetings
- Career Ombud will report to Career Deputy Director in National Office
- Expectation is that contractors will still raise complaints through chain of command in most cases
- Application window closed 1/18/19





# Directives: 10 of 12



## DIRECTIVE (DIR) 2019-01

**A Directive (DIR) is intended to provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. A DIR does not change the laws and regulations governing OFCCP's programs and does not establish any legally enforceable rights or obligations.**

**Effective Date:** November 30, 2018

1. **SUBJECT:** Compliance Review Procedures (rescinds DIR 2011-01)
2. **PURPOSE:** To provide notice that OFCCP will conduct compliance reviews in accordance with the Federal Contract Compliance Manual and recent directives, and is rescinding DIR 2011-01, *Active Case Enforcement (ACE) Procedures*.



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## 10 of 12: Compliance Review Procedures

- Emphasizes that, from now on, all compliance reviews will be conducted in accordance with the FCCM and the recent guidance to shorten full desk audits and conciliate violations more efficiently
- Maximizes OFCCP resources
- Clarifies that contractors can expect not to be audited again for 24 months after a closure of a compliance evaluation or acceptance of a progress report under a conciliation agreement





# Directives: 11 of 12



## DIRECTIVE (DIR) 2019-02

**A Directive (DIR) is intended to provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. A DIR does not change the laws and regulations governing OFCCP's programs and does not establish any legally enforceable rights or obligations.**

**Effective Date:** November 30, 2018

1. **SUBJECT:** Early Resolution Procedures
2. **PURPOSE:** To promote early and efficient supply-and-service compliance.



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## 11 of 12: Early Resolution Procedures

- Goals:
  1. Resolution of compliance evaluations at the earliest stage with corporate-wide impact,
  2. To help contractors achieve EEO, and
  3. Reduce the length of compliance evaluations by resolving problems expeditiously.
- Clarifies the new procedures to be used when investigating and resolving “material” discrimination violations.
- Successful ERP utilization could keep the establishment from being audited for 5 years from the date of the Early Resolution Agreement with Corporate-Wide Corrective Action (ERCA)



# Directives: 12 of 12



## DIRECTIVE (DIR) 2019-03

**A Directive (DIR) is intended to provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. A DIR does not change the laws and regulations governing OFCCP's programs and does not establish any legally enforceable rights or obligations.**

**Effective Date:** November 30, 2018

1. **SUBJECT:** Opinion Letters and Help Desk
2. **PURPOSE:** To provide additional compliance assistance and guidance regarding OFCCP's laws and regulations in a manner that employees and employers can easily access and reasonably rely upon, as they seek to understand their rights and obligations under the law.



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## 12 of 12: Opinion Letters and Help Desk

- Makes certain Help Desk inquiries and responses dynamically available and searchable as a self-service option on OFCCP's website
- Efficiency and transparency initiative
- Plans to incorporate opinion letters as part of its guidance to employers, employees, and the public
- Email sent out on 1/24 asking for 'suggestions for issues that you would like to see addressed in specific Opinion Letters'

# New Policy on Extension Requests

- Extensions for basic AAPs will only be granted in extraordinary circumstances
- 30–day extension for supporting data if extension is requested prior to the initial 30–day due date and contractor timely submits “basic AAPs”
- Failure to timely submit AAPs and/or supporting data will result in an immediate Notice to Show Cause
- Applies to compliance reviews scheduled on or after September 7, 2018



# How is all of this change playing out in compliance reviews . . .

- Focus on efforts to meet placement goals
- Technical compliance questions continue – trend towards more paper
- Still focused on understanding adverse impact indicators, but requests are not as broad
- Not as much change as contractors hoped in the compensation discrimination area





# How is all of this change playing out in compliance reviews . . .

- Compliance reviews are generally moving faster
- Initial questions are generally limited to Scheduling Letter clarifications
- More transparency about requests for additional information by agency



# 2019 Forecast

- New CSAL list expected to be released in February
- Use of focused reviews starting with the February list
- Overall increase in number of audits ~ 3,500
- Long awaited guidance for colleges and universities



# 2019 Forecast

- Increased focus on outreach efforts and metrics that contributed to placement goals
- Continued focus on adverse impact indicators, but requests will not be as broad
- Compensation discrimination success for OFCCP where contractors failed to self-evaluate pay systems and/or address wage differences which cannot be explained by legitimate factors



# Questions?

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