

What Federal Contractors Need to Know About OFCCP's New Audit Scheduling Letter

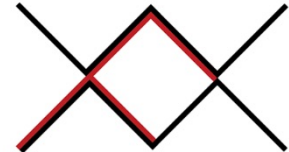
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AGENDA

- I. Background and Overview
- II. How to Respond to OFCCP's Document Requests

1. Background and Overview

We Work From General Concepts To The More Specific Ones



1. Background and Overview (con't)

OFCCP's August 24, 2023, Audit Scheduling Letter for Supply and Service ("ASLSS") contractors was the largest change in Audit Scheduling Letters in OFCCP's history.

- Does not affect OFCCP's recently published new audit Scheduling Letter for Construction contractors

1. Background and Overview (con't)

See our two DE Week In Review Stories:

[Friday, August 25, 2023: Here is What is New in OFCCP's Latest Audit Scheduling Letter for Supply & Service Contractors](#)

[OFCCP Published Its Expected Controversial Changes to its Greatly Expanded Supply and Service Scheduling Letter and Itemized Listing](#)

This is OFCCP's new [Audit Scheduling Letter for Supply and Service Contractors](#)

1. Background and Overview (con't)

OFCCP's ASLSS is NOT the CSAL ("Corporate Scheduling Announcement List")

- CSAL comes first, then the OFCCP Audit Scheduling Letter follows
- There has been a 45-day grace period between the date of publication of the CSAL and any audits of AAP Establishments listed in prior CSALs
- Uncertain re this new September 2023 CSAL

1. Background and Overview (con't)

This ASLSS, like all ASLSSs, has 2-parts:

- OFCCP **Audit Scheduling Letter** itself (“ASLSS”)
- Attached OFCCP “**Itemized Listing**” (“IL”) (i.e., an “interrogatory” and “document demand” by any other names)

1. Background and Overview (con't)

Bad News:

- The ASLSS, with attached “IL,” is now 6 single-spaced pages long
- The IL now has 26 paragraphs demanding “sets” of documents and some also requesting “information,” including 18 paras which have multiple subcomponent requests
- Collectively, over 100 document & information requests

1. Background and Overview (con't)

Bad News (con't):

–There are now 8 (dreaded) “six-month updates”:

#10, #11, #14, #15, #18, #20, #23, & #24

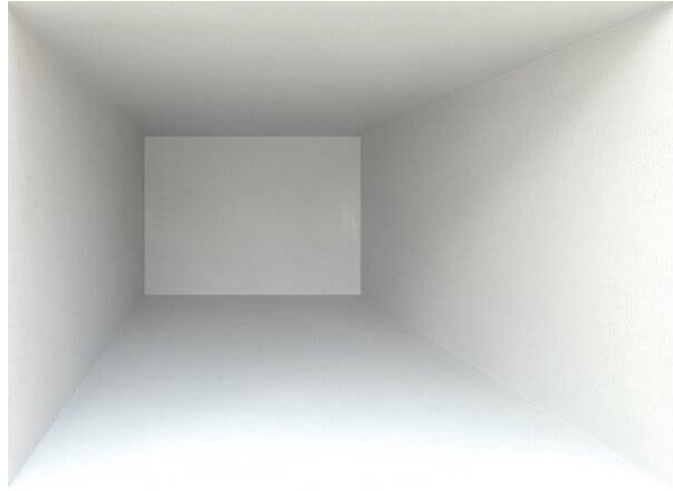
“If you are six months or more into your current AAP year on the date you receive this listing, provide the information **for at least** the first six months of the current AAP year” (emphases added)

1. Background and Overview (con't)

- OFCCP says your time for “evaluating” the instructions, “searching” for, “gathering,” “maintaining,” “completing” and “evaluating the collection of information” will be **37.5 hours**
- DE Members, however, have estimated **well over 100 hours** and many estimated several hundreds of hours
- The Scheduling Letter continues the tradition of allowing federal contractors only 30 calendar days to respond to its ASLSS. This is despite OFCCP’s admission that it was increasing by 25% the “burden hours” necessary for a contractor to comply. This is also despite DE’s Comments to OMB seeking more time to respond given the substantial increase in OFCCP document/information demands

1. Background and Overview (con't)

What happens bad if you deliver late to OFCCP?



NOTHINGNESS

1. Background and Overview (con't)

Good News:

- The ASLSS itself demands your 3 AAPs. The IL document requests ##1-7 duplicate that request, in part (so that reduces the 26 paragraphs of requests for document sets to only 19).
- COSTCO is selling Advil in bulk lots
- Nine (9) IL document requests are generic and applicable to any later OFCCP audit (so no need to gather and sort twice):

#9, #13, #16, #17, #18(c), #19(c), #21, #23 & #24

1. Background and Overview (con't)

Good News (con't):

Three (3) IL document sets could be generic and applicable to any later audit if the other audit(s) is(are) of the same kind of AAP Establishment:

#8, #12, #17

6 of the IL's new document set/information demands are very significant: #8, #12, #18, #19, #21, and #22

1. Background and Overview (con't)

General Observations

- **OFCCP is Frustrated that Required Contractor Evaluations of Data Are Often Too Thin:** OFCCP has continued many prior Itemized Listing document requests. But it has often added several sentences to selected IL requests to digest, sometimes with close adherence to what OFCCP's Rules actually say and at other times to stretch and create new Rules - without proper Rulemaking - as to what the required contractor "evaluation" or "assessment" actually requires pursuant to OFCCP's Rules
- OFCCP is signaling that it intends to give greater attention in audits to required contractor "evaluations" and "analyses"

1. Background and Overview (con't)

General Observations (con't)

- This “scout” obligation to “ensure” non-discrimination is one of the two PRIME DIFFERENCES between the EEOC and OFCCP programs and the “affirmative action” compliance obligations of federal contractors pursuant to EO 11246 (which augment their non-discrimination requirements) versus the nondiscrimination (only) obligations of “employers” pursuant to Title VII

1. Background and Overview (con't)

General Observations (con't)

- Employers under Title VII only play “defense” to respond to inbound Charges alleging unlawful discrimination. Federal Contractors under EO 11246 also must play “offense,” in addition to defense. Federal contractors must affirmatively go out and search their employment policies and practices to guard against (“ensure”) unlawful discrimination does not occur, and when it is found, to stop and remedy it

2. How to Respond to OFCCP's Document Requests

There are two important excerpts from the audit Scheduling Letter itself that frames your task:

First, OFCCP is broadening the geographic scope of its audits to include all AAP Establishments in “campus-like settings”:

“If you are a post-secondary institution or Federal contractor with a campus-like setting that maintains multiple AAPs, you must submit the information requested in the scheduling letter for all AAPs developed for campuses, schools, programs, buildings, departments, or other parts of your institution, or company, located in [city and state only].” (See p. 2 of the audit Scheduling Letter)

OFCCP nowhere defines what a “campus-like setting” is. You get to decide

2. How to Respond to OFCCP's Document Requests (con't)

There are two important excerpts from the audit Scheduling Letter that frames your task (con't):

Second, if you read the following passage, and then reflect upon the content of the new audit Scheduling Letter, you will realize that OFCCP is moving more of the second phase of audits to the first phase:

“The compliance review may progress in three phases: a desk audit, an on-site review, and an off-site analysis. OFCCP describes the phases of a compliance review in its regulations at 41 CFR Chapter 60. [fn omitted] For the desk audit, please submit the following information:

2. How to Respond to OFCCP's Document Requests (con't)

Here is an important excerpt from the ASLSS (con't):

1. a copy of your current Executive Order 11246 Affirmative Action Program (AAP) prepared in accordance with the requirements of 41 CFR §§ 60-1.40 and 60-2.1 through 60-2.17;
2. a copy of your current Section 503 AAP prepared in accordance with the requirements of 41 CFR §§ 60-741.40 through 60-741.47;
3. a copy of your current VEVRAA AAP prepared in accordance with the requirements of 41 CFR §§ 60-300.40 through 60-300.45;
4. the information, including the support data, specified in the enclosed Itemized Listing.”

2. How to Respond to OFCCP's Document Requests (con't)

You have four choices to respond to OFCCP's ASLSS:

1. Comply (and smile)
2. Try to negotiate a middle ground on some of the more burdensome demands
 - Not likely, absent concerted action across-the-board from contractors
3. Tell OFCCP to “pound sand” and politely refuse to respond to the burdensome demands forcing OFCCP to either:
 - a) do nothing (as has happened with the 50% of federal contractors that have refused to certify their AAPs in OFCCP's Contractor Portal), or
 - b) file an Administrative Complaint against your company to seek an injunction to force your compliance
 - Not likely: most of you are too afraid/litigation averse/cooperative to resist
4. Contact your trade associations to exert political pressure and/or sue OFCCP

2. How to Respond to OFCCP's Document Requests (con't)

COMMENT: So, the ASLSS requests all three of your Affirmative Action Programs (AAPs)... if your company is covered by all three of the programs OFCCP enforces

The ASLSS also requests the document sets identified in the 26 paragraphs of the “Itemized Listing” attached to the ASLSS

NOTE: There are NOT 26 sets of documents OFCCP is requesting. Eighteen (18) of the 26 IL paragraphs request multiple document sets and occasionally “information,” as noted above

OFCCP IL Document Request ## 1-7

“Executive Order 11246

1. An organizational display or workforce analysis prepared according to 41 CFR § 60-2.11.
2. The formation of job groups (covering all jobs) consistent with criteria given in 41 CFR § 60-2.12.
3. For each job group, a statement of the percentage of minority and female incumbents as described in 41 CFR § 60-2.13.
4. For each job group, a determination of minority and female availability pursuant to 41 CFR § 60-2.14.

OFCCP IL Document Request ## 1-7 (con't)

“Executive Order 11246 (con’t)

5. For each job group, the comparison of incumbency to availability as explained in 41 CFR § 60-2.15.
6. Placement goals for each job group in which the percentage of minorities or women employed is less than would be reasonably expected given their availability as described in 41 CFR § 60-2.16.
7. Pursuant to 41 CFR § 60-2.17(c), provide documentation demonstrating the development and execution of action-oriented programs designed to correct any problem areas identified pursuant to 41 CFR § 60-2.17(b). The documentation should cover action-oriented programs addressing problem areas identified for the immediately preceding AAP year.”

OFCCP IL Document Request ## 1-7 (con't)

COMMENTS ##1-7:

The ASLSS itself demands your 3 AAPs and the first seven IL document requests then, oddly, continue OFCCP's peculiar tradition to duplicate the Audit Scheduling Letter's request for your AAP for Minorities and Women by individually requesting in the IL seven (but not all) of the component parts of that AAP (so that reduces the 26 requests for document sets to really only 19, as noted above)

Even more oddly, OFCCP's IL does NOT follow the pattern of duplication as to your Section 503 and VEVRAA AAPs

OFCCP IL Document Request ## 1-7 (con't)

COMMENTS ##1-7 (con't):

OFCCP added a new para 7 (which then bumps all other IL para numbers below down by one number compared to the prior version until IL #17 which is deleted and gets the numbering back on track). New #7 (not in the prior IL) demands:

“7. Pursuant to 41 CFR § 60-2.17(c), provide documentation demonstrating the development and execution of action-oriented programs designed to correct any problem areas identified pursuant to 41 CFR § 60-2.17(b). The documentation should cover action-oriented programs addressing problem areas identified for the immediately preceding AAP year.”

OFCCP IL Document Request ## 1-7 (con't)

COMMENTS ##1-7 (con't):

NOTE: No new substance here. This “documentation” is already (supposed to be) contained in your AAP for Minorities and Women pursuant to 41 CFR Section 60-2.17(c). (“Additional requirement elements of affirmative action programs. * * * *Action-Oriented Programs.*”)

OFCCP IL Document Request #8

“Section 503

Documentation of appropriate outreach and positive recruitment activities reasonably designed to effectively recruit qualified individuals with disabilities, and an assessment of the effectiveness of these efforts as provided in 41 CFR § 60-741.44(f). This includes documentation of all activities undertaken to comply with the obligations at 41 CFR § 60-741.44(f), the criteria used to evaluate the effectiveness of each effort, and whether you found each effort to be effective. The documentation should also indicate whether you believe the totality of your efforts were effective. In the event the totality of your efforts were not effective in identifying and recruiting qualified individuals with disabilities, provide detailed documentation describing your actions in implementing and identifying alternative efforts, as provided in 41 CFR § 60-741.44(f)(3).”

OFCCP IL Document Request #8 (con't)

COMMENT #8: This para is all (100%) new language, although the old para 8 was one sentence and requested just “the results” of your “Effectiveness Review” for your AAP for Individuals with Disabilities.

New is:

- (a) EFFECTIVENESS:** OFCCP requests the results of your Effectiveness Review as previously, but new is the regurgitation of portions of OFCCP’s Effectiveness Rule at [41 CFR Section 60-741-44\(f\)\(3\)](#)
- a. OFCCP has been disappointed in audits that it has to chase contractors to expand the detail in their Effectiveness Reviews which are often too generic
 - b. This addition of regulatory language to its IL is another trail sign that OFCCP is expecting more detail in “evaluations,” “assessments” and “reviews”

OFCCP IL Document Request #8 (con't)

COMMENT #8 (con't):

- b. **Customization:** OFCCP views Effectiveness Reviews as *customized* writings for each of the company's Section 503 AAPs and not a generic writing stapled into all of a contractor's Section 503 AAPs without change

OFCCP IL Document Request #8 (con't)

COMMENT #8 (con't):

- c. **OUTREACH and POSITIVE RECRUITMENT:** this new para requests documentation of the specific “outreach” and “positive recruitment activities” to recruit qualified individuals with disabilities over the past year during the operation of your AAP for Individuals with Disabilities per [41 CFR Section 60-741-44\(f\) \(1 & 2\)](#)
 - i. You may have to customize your response from one audit of a company AAP to a second audit of another AAP

OFCCP IL Document Request #8 (con't)

COMMENT #8 (con't):

c. OUTREACH and POSITIVE RECRUITMENT (con't):

- i. IMPORTANT: How are you going to document your outreach to be able to retrieve that history and report the specific “outreach” and “recruitment activities” you undertook a year or two ago?
 - i. ENTER THE DE “PRM” (“Partner Relationship Manager”) software tool
 - ii. Does the “listing” of your available jobs with the state job services count as “outreach” and/or “recruitment”?

OFCCP IL Document Request #8 (con't)

COMMENT #8 (con't):

c. **OUTREACH and POSITIVE RECRUITMENT: (con't)**

- iii. Does the “posting” of your available jobs with disability groups training the disabled for work (Easter Seals/Wounded Warriors/Goodwill/Lighthouse for the Blind, etc.) qualify as outreach and/or “recruitment”?

- 1. OFCCP has found DE Members to have effectively used the “posting” of the company’s jobs to enhance their outreach obligations in the DE syndicated alliances list around the United States (in addition to “listing” the Member company’s jobs with the state workforce agencies)

OFCCP IL Document Request #9

“9. Documentation of all actions taken to comply with the audit and reporting system requirements described in 41 CFR § 60-741.44(h).”

COMMENT #9:

There was no change here other than to renumber from old #8 to new #9

Quick Refresher: [41 CFR § 60-741.44\(h\)](#) requires the contractor to “... design and implement” a six-point “audit and reporting system that will:,,,” (the six points of the audit program follow in OFCCP’s Rule: see .44(h) for the details)

This “audit and reporting system” is already (supposed to be) contained in your AAP for Individuals with Disabilities pursuant to 41 CFR Section 60-741.44(h)

OFCCP IL Document Request #10

“10. Documentation of the computations or comparisons described in 41 CFR § 60-741.44(k) for the immediately preceding AAP year and, if you are six months or more into your current AAP year when you receive this listing, provide the information for at least the first six months of the current AAP year.”

OFCCP IL Document Request #10 (con't)

COMMENT #10:

There was no change here other than to renumber from old #9 to new #10

Quick Refresher: [41 CFR § 60-741.44\(k\)](#) requires contractors to annually undertake a “Data collection analysis” of five different data collections of applicant counts, jobs open and filled, and hires, more commonly called the “Data Metrics”

This “data collection” is already (supposed to be) contained in your AAP for Individuals with Disabilities pursuant to 41 CFR Section 60-741.44(k)

Please note that this is the first of eight coming (dreaded) OFCCP demands for a “**6-month update**” of the requested documents and data

OFCCP IL Document Request #11

“11. The utilization analysis evaluating the representation of individuals with disabilities in each job group, or, if appropriate, evaluating the representation of individuals with disabilities in the workforce as a whole, as provided in 41 CFR § 60-741.45. If any underutilization of individuals with disabilities is identified, provide a description of the steps taken to determine whether and where impediments for equal employment opportunity exist in accordance with 41 CFR § 60-741.45(e). Pursuant to 41 CFR § 60-741.45(e) and (f), this description shall include your assessment of personnel processes, the effectiveness of your outreach and recruitment efforts (if different than Item 8), the results of your affirmative action program audit, any other areas that might affect the success of the affirmative action program, and a description of action-oriented programs developed and executed to correct any identified problem areas.

OFCCP IL Document Request #11 (con't)

Provide this information for the immediately preceding AAP year. If you are six months or more into your current AAP year on the date you receive this listing, provide the information that reflects your progress for at least the first six months of the current AAP year.”

OFCCP IL Document Request #11 (con't)

COMMENT #11:

This new para 11 collects the same documents as its predecessor, although all of the language after the first sentence is new, including this second (dreaded) **“6-month update”** requirement

The new language merely repeats, however, the requirements of [41 CFR Section 60-741.44\(f\)](#) *“Identification of problem areas”*

By adding this digest, in effect, of what contractors are already supposed to have done in their AAP for Individuals with Disabilities, the agency is registering its dissatisfaction it has developed in audits that contractors have not provided in their AAPs sufficiently detailed and compliant descriptions of the problems the contractor either identified in its Section 503 AAP, or should have identified

OFCCP IL Document Request #12

“VEVRAA

12. Documentation of appropriate outreach and positive recruitment activities reasonably designed to effectively recruit qualified protected veterans, and an assessment of the effectiveness of these efforts as provided in 41 CFR § 60-300.44(f). This includes documentation of all activities undertaken to comply with the obligations at 41 CFR § 60-300.44(f), the criteria used to evaluate the effectiveness of each effort, and whether you found each effort to be effective. The documentation should also indicate whether you believe the totality of your efforts were effective. In the event the totality of your efforts were not effective in identifying and recruiting qualified protected veterans, provide detailed documentation describing your actions in implementing and identifying alternative efforts, as provided in 41 CFR § 60-300.44(f)(3).”

OFCCP IL Document Request #12 (con't)

COMMENT #12:

This OFCCP document request for “outreach” and “positive recruitment” documents as to “Protected Veterans” pursuant to [41 CFR Section 60-300.44\(f\)](#) is parallel to OFCCP’s Section 503’s request for “outreach” and “positive recruitment” documents as to Individuals with Disabilities (discussed above as to IL #8)

OFCCP now repeats here as to VEVRAA, verbatim, language the agency used above in IL #8 in pursuit of evidence of the contractor’s compliance with Section 503, but adapted in this IL #12 to the identical outreach and positive recruitment Rule as exists in parallel under Section 503

OFCCP IL Document Request #12 (con't)

COMMENT #12 (con't):

Please refer to the above Comment beneath IL #8, above, for a detailed discussion of OFCCP's document request as to a contractor's "outreach" and "positive recruitment"

Use your DirectEmployers' PRM tool to track your outreach and positive recruitment efforts of "Protected Veterans" in the same way you track your outreach and positive recruitment efforts for individuals with disabilities

OFCCP IL Document Request #13

“13. Documentation of all actions taken to comply with the audit and reporting system requirements described in 41 CFR § 60-300.44(h).”

OFCCP IL Document Request #13 (con't)

COMMENT #13:

There was no change here other than renumbering old #12 to new #13.

This is OFCCP's document request as to "Protected Veterans" pursuant to [41 CFR Section 60-300.44\(h\)](#) parallel to OFCCP's Section 503 request for documentation of the contractor's audit and reporting system of its AAP for Individuals with Disabilities (discussed above as to IL #9).

OFCCP now repeats here as to VEVRAA, verbatim, language the agency used above in IL #9 in pursuit of evidence of the contractor's compliance with Section 503 but adapted in this IL #13 to the identical documentation Rule as exists in parallel under Section 503

Please refer to the above Comment beneath IL #9, above, for the substantive details of OFCCP's document request as to a contractor's audit and reporting system

OFCCP IL Document Request #14

“14. Documentation of the computations or comparisons described in 41 CFR § 60-300.44(k) for the immediately preceding AAP year and, if you are six months or more into your current AAP year when you receive this listing, provide the information for at least the first six months of the current AAP year.”

OFCCP IL Document Request #14 (con't)

COMMENT #14:

There was no change here other than to renumber from old #13 to new #14

This is OFCCP's document request seeking "Data Metrics" analyses pursuant to [41 CFR Section 60-300.44\(k\)](#). This VERAA-related IL #14 seeks information as to Protected Veterans that OFCCP has written in parallel to its Data Metrics analyses requests as to Individuals with Disabilities in IL #10, above

Please refer to the Comment under IL #10, above, for substantive details of OFCCP's "Data Metrics" request

Please note that this is the third of the eight coming (dreaded) OFCCP demands for a "**6-month update**" of the requested documents and data

OFCCP IL Document Request #15

“15. Documentation of the hiring benchmark adopted, and the methodology used to establish it if using the five factors described in 41 CFR § 60-300.45(b)(2) for the current AAP year. If you are six months or more into your current AAP year on the date you receive this listing, please also submit current year hiring data to measure against your benchmark.”

OFCCP IL Document Request #15 (con't)

COMMENT #15:

OFCCP made no substantive change here.

However, please note that this is the fourth of the eight coming (dreaded) OFCCP demands for a “**6-month update**” of the requested documents and data

OFCCP IL Document Request #16

“Support Data

16. Copies of Component 1 of your Employer Information Report EEO-1 (Standard Form 100 Rev.) for the last three years. [\[footnote 7 omitted\]](#) If you are a post-secondary institution, submit copies of your Integrated Postsecondary Education Data System (IPEDS) Human Resources Survey Component data collection reports for the last three years.”

OFCCP IL Document Request #16 (con't)

COMMENT #16:

There is no substantive change here from the prior IL #15 as to those contractors that are not post-secondary school institutions of higher learning (colleges & universities)

What is new, however, is that OFCCP now has obtained authority from OMB to require the submission to it of university/college IPEDS (“Integrated Postsecondary Education Data System”) reports during OFCCP’s Desk Audit

What is unfortunate about this OFCCP request from a burden perspective is that OFCCP already has access to copies of EEO-1 and IPEDS reports. Why burden contractors to again provide these data?

OFCCP IL Document Request #16 (con't)

COMMENT #16 (con't):

There is case law holding that members of the public do not have to submit documents twice to the federal government. But all contractors have thus far chosen to play ball with OFCCP and help Compliance Officers do their jobs, despite the inefficiency and small impact on contractor time

OFCCP IL Document Request #17

“17. A copy of your collective bargaining agreement(s), if applicable. Include any other documents you prepared, such as policy statements, employee notices or handbooks, *etc.*, that implement, explain, or elaborate on the provisions of the collective bargaining agreement.”

OFCCP IL Document Request #17 (con't)

COMMENT #17:

No substantive change here

Procedurally, this was the prior IL document request #16.

The important thing to remember about this issue for audits is that if your company's CBA(s) has(have) a bona fide seniority clause governing assignment, pay, and/or other conditions of employment, those transactions are NOT reviewable for unlawful discrimination once the agency concludes that the CBA's seniority clause governs the at-issue employment transaction (compensation, let's imagine) and it is bona fide

OFCCP IL Document Request #17 (con't)

COMMENT #17 (con't)

What that means is that the contractor would not supply OFCCP with compensation data as to employees subject to a bona fide CBA seniority provision governing compensation

Discretionary selections into and out of a unionized work unit are typically not subject to a bona fide seniority provision and thus would be subject to OFCCP's scrutiny to ensure that such selections are nondiscriminatory

OFCCP IL Document Request #18

“18. Data on your employment activity (applicants, hires, promotions, terminations, and” incumbency) for the immediately preceding AAP year. You should present this data by job group (as defined in your AAP) or by job title.
[fn 8 omitted]

- a. Applicants: For each job group or job title, this analysis must consist of the total number of applicants identified by gender and by race/ethnicity. [fn 9 omitted] For each job group or job title, applicants for whom race and/or gender is not known should be included in the data submitted. However, if some of your job groups or job titles (most commonly, entry-level) are filled from the same applicant pool, you may consolidate your applicant data for those job groups or titles. For example, where applicants expressly apply for or would qualify for a broad spectrum of jobs (such as “Production,” “Office,” *etc.*) that includes several job groups, you may consolidate applicant data.

OFCCP IL Document Request #18 (con't)

- b. Hires: For each job group or job title, this analysis must consist of the total number of hires identified by gender and race/ethnicity.
- c. Promotions: Provide documentation that includes established policies and describes practices related to promotions.
Additionally, for each job group or job title, provide the total number of promotions by gender and race/ethnicity. Where the contractor maintains data on whether the promotion is competitive or non-competitive, it may also provide this information in its submission.

OFCCP IL Document Request #18 (con't)

- d. Terminations: For each job group or job title, provide the total number of employee terminations by gender and race/ethnicity. When presenting terminations by job title, also include the department and job group from which the person(s) were terminated.
- e. For each job title or job group, provide the total number of employees, by gender and race/ethnicity, as of the start of the immediately preceding AAP year.

If you are six months or more into your current AAP year on the date you receive this listing, please also submit data for items (a) through (e), above, for at least the first six months of the current AAP year.”

OFCCP IL Document Request #18 (con't)

COMMENT #18:

Because OFCCP eliminated in its entirety prior IL #17 (progress towards goals), the numbering of the IL returns at this point to its prior numbering sequence just in time for the ILs which really count for unlawful discrimination purposes: failure-to-hire and compensation

Five things to observe here:

1. Added Incumbency data: In addition to the employment transactions data that OFCCP uses for discrimination analyses (applicants, hires, promotions, and terminations...meaning involuntary terminations...since one needs “adverse action” for any discrimination analysis), OFCCP has now added “incumbency” data. Why?

OFCCP IL Document Request #18 (con't)

COMMENT #18 (con't):

2. Added promotion policy documents/practices description: OFCCP added “promotion policy documents” to OFCCP’s demand in addition to also newly demanding that you “describe practices related to promotion”
 - a. OFCCP thus broadened its demand beyond its prior IL #18 which demanded to know only your definition(s) of promotion
 - b. OFCCP also added an invitation that you may decline to characterize which promotions are “competitive” or “non-competitive.” (OMB refused to allow OFCCP to ask this question, so unbowed, OFCCP converted the requested “demand” to a “request.” So, you may choose to parse your promotions in this fashion, or not)

OFCCP IL Document Request #18 (con't)

COMMENT #18 (con't):

3. Routine 2-year discrimination analyses: In requesting two data points (“snap shot dates”) for all five listed employment transactions data (applicants, hires, promotions, involuntary terminations, and incumbency) spanning two years’ time (“...provide the total number of employees...as of the start of the immediately preceding AAP year”), OFCCP is now routinely going back two years as part of its Desk Audit to hunt for patterns of unlawful discrimination

EXAMPLE: Assume your AAP year starts January 1, 2023 (and thus your employment transactions data within that AAP will examine all employment transactions that occurred in calendar 2022. The January 1, 2022, AAP will then look back to employment transactions that occurred in calendar 2021

OFCCP IL Document Request #18 (con't)

COMMENT #18 (con't):

- a. Previously, OFCCP's practice, for 50 years, has been to look at the employment transaction data to undertake discrimination analyses during the year prior to the AAP, and during the AAP Year

Then, OFCCP would request another prior year's data to allow the agency to crawl back to a full two-year look-back before the date of the Audit Scheduling Letter IF, but only if, OFCCP's analysis of the employment transaction data for the year immediately preceding the AAP Year created a preliminary suspicion of unlawful discrimination

In that case, OFCCP wanted to follow the "blood trail" back another year to the full limit of its two-year statute of limitations period

OFCCP IL Document Request #18 (con't)

COMMENT #18 (con't):

- b. This new practice of now routinely analyzing two years of employment transaction data before the date of the AAP at-issue in the audit, coming at a time that there are many new entrants to federal government contracting, will put OFCCP in the position of occasionally requesting data for a period of time before the newbie federal contractor company was a federal contractor...before OFCCP had jurisdiction over the company as a “covered federal Government contractor”

In that case, the company will not have to comply with OFCCP data requests for employment transactions that occurred prior to the legally effective date of the company’s federal contract or “subcontract”

OFCCP IL Document Request #18 (con't)

COMMENT #18 (con't):

4. 6-month update: This IL#18 now adds your fifth “six-month update” demand (as was previously the case)...so you could be looking at collecting employment transactions data for a 2 ½ year period of time (2 years before the date of the current AAP and 6 months forward into the new AAP year.)

OFCCP IL Document Request #18 (con't)

COMMENT #18 (con't):

5. “Job Groups” are almost always an improper foundation for any discrimination analysis. Discrimination law rigidly requires all unlawful discrimination analyses to compare the treatment of and effects on “similarly situated” employees.
 - BTW, the EEOC, the federal government’s lead agency responsible for discrimination law policy & enforcement, has no idea what a “Job Group” is

“Job Groups,” and even “job titles” (especially in tech companies), are often “hybrids” collecting together employees lacking identical essential elements of their jobs (cats & dogs; kangaroos & elephants, etc.)

OFCCP IL Document Request #19

“19. Employee level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, and temporary employees) as of (1) the date of the organizational display or workforce analysis and (2) as of the date of the prior year’s organizational display or workforce analysis. For each snapshot, provide a single file that contains for each employee, at a minimum, employee name or numerical ID, gender, race/ethnicity, hire date, job title, EEO-1 Category and job group.[\[10\]](#) If the requested data is maintained in an accessible electronic format, please provide it electronically.

Additionally, for each employee, provide the following information, as applicable. If the contractor does not maintain any of these items, please notate that in your submission:

OFCCP IL Document Request #19 (con't)

- a. Base salary and/or wage rate, annualized base compensation, and hours worked in a typical workweek. Other compensation or adjustments to salary such as, but not limited to, bonuses, incentives, commissions, merit increases, locality pay or overtime shall also be identified separately for each employee.
- b. Provide relevant data on the factors used to determine employee compensation such as education, experience, time in current position, duty location, geographical differentials, performance ratings, department or function, job families and/or subfamilies, and salary level/band/range/grade.

OFCCP IL Document Request #19 (con't)

- c. Provide documentation and policies related to the contractor's compensation practices, including those that explain the factors and reasoning used to determine compensation (e.g., policies, guidance, or trainings regarding initial compensation decisions, compensation adjustments, the use of salary history in setting pay, job architecture, salary calibration, salary benchmarking, compensation review and approval, etc.)."

OFCCP IL Document Request #19 (con't)

COMMENT #19:

1. This is the first and the most important of OFCCP's two compensation IL demands. It modifies and expands the prior IL #19 compensation data request
2. In one of the two most significant changes in this IL, OFCCP follows the lead announced in its IL #18 data request for failure-to-hire data: to now obtain employee compensation on two snapshot dates: as of the date of the Workforce Analysis or Organizational Display of (a) let's call it **Period 1**: the most recent AAP for Minorities and Women; and (b) let's call it **Period 2**: the prior year's AAP
 - a. There is no (dreaded) "6-month update" requirement contained in this IL #19
 - b. OFCCP is not necessarily seeking the data as of the date on the cover of each AAP, but rather as of the dates you used to develop the respective two Workforce Analyses/Organizational displays on which you built each of the two years' AAPs for Minorities and Women

OFCCP IL Document Request #19 (con't)

COMMENT #19 (con't):

3. IMPORTANT: OFCCP is not asking you to generate a compensation report. No “pay equity” analysis is required. Rather, OFCCP is seeking only “information” (i.e. “data”), BUT ONLY IF you already “maintain” any of the items of compensation data OFCCP requests in para a
 - a. OFCCP is NOT asking you to create reports of data or to provide data you do not maintain that OFCCP requests (i.e., “Base salary and or wage rate, annualized base compensation, and hours worked in a typical workweek” and “other compensation.” See para a)
 - b. If you do not maintain the data, OFCCP demands that you simply so “notate” that fact. See the last sentence *before* para a

OFCCP IL Document Request #19 (con't)

COMMENT #19 (con't):

- i. OFCCP will then determine whether it can even do a proper compensation analysis, and if not whether it wants to develop the missing information using its resources (not yours)
 - 1. Remember: OFCCP must first know and then have in its possession data for all the "major factors" that affect pay *BEFORE* undertaking a proper pay analysis, whether on an individual basis or whether for "systemic" statistical analyses (typically involving 30 or more "similarly situated" employees), or it must simply stop
 - 2. OFCCP seeks to know the "major factor(s)" that affect pay in paras b and c of this IL

OFCCP IL Document Request #19 (con't)

COMMENT #19 (con't):

4. Knowing the “pay amount” (\$20/hour or \$150,000/yr) is not relevant, of course, to a compensation analysis under Executive Order 11246 (or Title VII). Rather, both EO 11246 and Title VII require that:
 - a. pay analysts examine “pay decisions” (not the value of the pay), and
 - b. do so, in the case of Executive Order 11246 analyses, during the at-issue statute of limitations period: within 180 days of an employee filing a Complaint with OFCCP or within two years of the date on OFCCP’s Audit Scheduling Letter in the case of an OFCCP Compliance Review. This might include any “initial pay decisions,” for example, which occurred during the statute of limitations period: comparing the initial starting pay of White John to Black John, for example. It may include any decision to pay a discretionary or contractually-based bonus to an employee if the pay decision occurred during the statute of limitations period

OFCCP IL Document Request #19 (con't)

COMMENT #19 (con't):

- c. So, you are put to a decision whether to contest as irrelevant compensation data OFCCP may request which does not further OFCCP's ability to undertake a proper compensation analysis. Alternatively, you could give OFCCP the irrelevant data/policy it demands and then contest any erroneous application of the data/policy OFCCP may later accomplish pursuant to EO 11246 based on the information/policies you have provided
- d. But the heartening development here is that OFCCP is now requesting data for two snapshot dates (i.e., pay decision dates) for Period1 and Period 2. These snapshots are sufficient to compare the pay decision(s) you made as to various Protected Groups during OFCCP's relevant statute of limitations period...if that is how OFCCP constructs its pay analyses (as it now should). HOORAY! FINALLY!

OFCCP IL Document Request #19 (con't)

COMMENT #19 (con't):

- i. NOTE: You will RARELY, and some of you will NEVER, have a sufficient number of “similarly situated” employees for you or OFCCP to undertake statistically-based pay analyses (i.e., often called “systemic” discrimination analyses)

Whether OFCCP will drop back and undertake “cohort” analysis (comparing Harry’s pay vs Sally’s pay) as in the past is a decision left to OFCCP

- ii. IMPORTANT: If your data are not sufficiently large enough to allow for meaningful statistical analyses, you should so advise OFCCP in writing when you tender the data.

OFCCP IL Document Request #19 (con't)

COMMENT #19 (con't):

- iii. IMPORTANT: If you do not know or maintain all the factors that affect a pay decision, so advise OFCCP so it may either stop its analysis, or determine if it wants to spend its money to try to identify and gather the raw data to fuel a proper systemic compensation analysis (all those exotic-sounding “methods of (statistical) analyses” set out in IL # 22, below, at para 22 e which either *never* or *almost never* come into play in your company

OFCCP IL Document Request #19 (con't)

COMMENT #19 (con't):

- e. While OFCCP does not ask about it (it should), you should both:
 - i. draw OFCCP's attention to the fact, where it is true, that you pay any unionized employee(s) in question pursuant to a bona fide seniority clause embedded in an applicable Collective Bargaining Agreement ("CBA"), and
 - ii. not deliver any pay information to OFCCP relating to pay made pursuant to such a bona fide CBA. Title VII specifically and by name renders these particular pay decisions exempt from the possibility of unlawful discrimination. See section [703\(h\) of Title VII](#).

OFCCP's only relevant investigatory activity is to confirm that a bona fide seniority agreement exists, was applied (ask the company; and/or ask the union; and/or ask an employee), and move on

OFCCP IL Document Request #20

“20. Information on your E.O. 11246 affirmative action goals for the immediately preceding AAP year. This report must include information that reflects:

- a. job group representation at the start of the AAP year (i.e., total incumbents, total minority incumbents, and total female incumbents);
- b. the placement goals established for minorities and women at the start of the AAP year; and

OFCCP IL Document Request #20 (con't)

c. the actual number of placements (hires plus promotions) made during the AAP year into each job group with goals (i.e., total placements, total minority placements, and total female placements). For all placement goals not attained, describe the specific good faith efforts made to remove identified barriers, expand equal employment opportunity, and produce measurable results.

If you are six months or more into your current AAP year on the date you receive this listing, please also submit information that reflects progress on goals established in your current AAP year and describe your implementation of action-oriented programs designed to achieve these goals.” [\[Footnote 11 omitted\]](#)

OFCCP IL Document Request #20 (con't)

COMMENT #20:

1. This is the old IL #17 “Progress against Goals Report.”
2. OFCCP has simply renumbered it without substantive change.
3. Please note that this is the sixth (dreaded) OFCCP “**6-month update**” requirement

OFCCP IL Document Request #21

“21. Identify and provide information and documentation of policies, practices, or systems used to recruit, screen, and hire, including the use of artificial intelligence, algorithms, automated systems or other technology-based selection procedures.”

OFCCP IL Document Request #21 (con't)

COMMENT #21:

1. This IL demand is entirely new. It is a good example of how OFCCP is now seeking to use the IL to obtain both documents and “information.” There is no definition in this IL demand of the term “information” and its meaning seems rather vacuous in the context of this IL demand
2. The request for “information” in this IL is thus meaningless since it poses no examples, no questions, and does not specify what “information.” Two different people could understand this demand entirely differently

OFCCP IL Document Request #21 (con't)

COMMENT #21 (con't):

3. Please note, too, that there is no OFCCP Rule requiring an investigation of a company's usage of "artificial intelligence." That would require an extensive Rule pursuant to the Administrative Procedure Act and also a rigorous cost burden calculation for the purposes of the Paperwork Reduction Act. Moreover, this IL does not define what AI is (and numerous informal definitions exist throughout both technology companies touting AI solutions and Human Resources circles)
4. OFCCP will have to settle for whatever written policies your company has off-the-shelf. Note that you are already collecting those generally for all "EEO policies" in IL #24, discussed below

OFCCP IL Document Request #22

“22. Documentation that the contractor has satisfied its obligation to evaluate its “compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities,” as part of the contractor’s “in-depth analyses of its total employment process” required by 41 CFR 60-2.17(b)(3). Include documentation that demonstrates at least the following:

- a. When the compensation analysis was completed;
- b. The number of employees the compensation analysis included and the number and categories of employees the compensation analysis excluded;

OFCCP IL Document Request #22 (con't)

- c. Which forms of compensation were analyzed and, where applicable, how the different forms of compensation were separated or combined for analysis (e.g., base pay alone, base pay combined with bonuses, etc.);
- d. That compensation was analyzed by gender, race, and ethnicity; and
- e. The method of analysis employed by the contractor (e.g., multiple regression analysis, decomposition regression analysis, meta-analytic tests of z-scores, compa-ratio regression analysis, rank-sums tests, career-stall analysis, average pay ratio, cohort analysis, etc.).”

OFCCP IL Document Request #22 (con't)

COMMENT #22:

1. This IL is entirely new and is the second of OFCCP's compensation-related IL information demands
2. This IL purports to require the contractor to create new "documentation" to prove to OFCCP that the contractor has undertaken the "evaluation" of compensation an Executive Order 11246 Rule requires (at [41 CFR Section 60-3.17\(b\)\(3\)](#))
3. But following its approach of trying to limit contractor discretion in its "evaluations", "assessments", and "reviews", OFCCP sought to supplement and expand its existing Executive Order 11246 Rule requiring an "evaluation" of your compensation system(s) through the device of this IL

OFCCP IL Document Request #22 (con't)

COMMENT #22 (con't):

However, OFCCP sidestepped formal Administrative Procedure Act Rulemaking by attempting here to put “meat on the bones” after-the-fact of its regulatorily required “evaluation” by enumerating additional minimum elements the contractor’s “evaluation” must include, in OFCCP’s judgment

However, none of these “minimum requirements” appear in OFCCP’s formal Rule, as the Administrative Procedure Act requires. Moreover, OFCCP’s Rule also already specifies the “minimum requirements” a contractor must have in its “evaluation” to satisfy the Rule’s requirement of an “in-depth analysis” of the contractor’s “total employment process”

OFCCP IL Document Request #22 (con't)

COMMENT #22 (con't):

4. OFCCP also purports to require reporting based on “ethnicity.” However, that term is not defined and has no definition, in fact, in law. It is undefined street jargon. What OFCCP means is that the contractor must report based on “national origin” characteristics (different from “race” = Black or White, different from “sex” = Male, Female or some other Gender Identity, and different from either “Color” or “Religion.”) Rather “national origin” under Executive Order 11246 = Hispanic or Asian

OFCCP IL Document Request #23

“23. Copies of reasonable accommodation policies, and documentation of any accommodation requests received and their resolution, if any, for the immediately preceding AAP year. If you are six months or more into your current AAP year when you receive this listing, provide this information for at least the first six months of the current AAP year.”

OFCCP IL Document Request #23 (con't)

COMMENT #23:

1. This IL carries over the prior IL demand for copies of reasonable accommodation policies and documentation of any accommodation requests received and their resolution
2. What's new is that this IL adds the seventh of the eight OFCCP (dreaded) **“6-month update”** requirements

OFCCP IL Document Request #24

“24. Copies of equal employment opportunity (EEO) policies, including antiharassment policies, policies on EEO complaint procedures, and policies on employment agreements that impact employees’ equal opportunity rights and complaint processes (e.g., policies on arbitration agreements). Please provide this information for policies in place for the immediately preceding AAP year. If you are six months or more into your current AAP year when you receive this listing, provide this information for at least the first six months of the current AAP year.”

OFCCP IL Document Request #24 (con't)

COMMENT #24:

1. This is a new requirement not found in the prior 2020 IL. It calls for the contractor to deliver to OFCCP all EEO policies, including several OFCCP specifically calls out: antiharassment, company EEO Complaint procedures, and policies on the use of arbitration agreements
2. Please note that this IL imposes the last of OFCCP's eight "**6-month update**" requirements

OFCCP IL Document Request #25

“25. The contractor’s most recent assessment of its personnel processes, as required by 41 CFR §§ 60-300.44(b) and 60-741.44(b). This assessment shall include, at a minimum, a description of the assessment, any impediments to equal employment opportunity identified through the assessment, and any actions taken, including modifications made or new processes added, as a result of the assessment.”

OFCCP IL Document Request #25 (con't)

COMMENT #25:

1. OFCCP continued its prior IL (old #21) demands that the Contractor produce to OFCCP its “assessment of its personnel processes” as required by OFCCP’s Section 503 and VEVRAA Rules

OFCCP IL Document Request #25 (con't)

COMMENT #25 (con't):

2. But following its approach of trying to limit contractor discretion in its “assessments,” OFCCP sought to supplement and expand its existing Section 503 and VEVRAA Rules requiring these “assessments” through the device of the IL. However, OFCCP is seeking to inappropriately sidestep formal Administrative Procedure Act Rulemaking by putting “meat on the bones” of its regulatorily required “assessments” by enumerating the minimum elements the contractor’s assessment must include, in its judgment, in this IL. None of these “minimum requirements,” however, appear in OFCCP’s formal Rules, as the Administrative Procedure Act requires

OFCCP IL Document Request #25 (con't)

COMMENT #25 (con't):

3. OFCCP thus fashioned out of “whole cloth,” that the required “assessments” must include “any impediments to equal employment opportunity identified through the assessment” (sic) or “modifications” made or “new processes added” as a result of the required assessments

OFCCP IL Document Request #25 (con't)

COMMENT #25 (con't):

4. Please note that OFCCP's prior IL requirement, as continued in this IL, also purports to require the contractor to report to OFCCP any "actions taken or changes made as a result of the assessment." Not only does this requirement to report a change(s) not appear in either OFCCP's Section 503 or VEVRAA Rules, but OFCCP's demand may in some circumstances intrude on the contractor's attorney-client privilege and work product doctrine protections of legal advice and work product delivered to the contractor

OFCCP IL Document Request #25 (con't)

COMMENT #25 (con't):

Rather, OFCCP's Rules merely require the contractor make any unlawful personnel processes lawful without reporting the fact of a change in the company's processes

OFCCP IL Document Request #26

“26. The contractor’s most recent assessment of its physical and mental qualifications, as required by 41 CFR §§ 60-300.44(c) and 60-741.44(c), including the schedule of the assessment and any actions taken or changes made as a result of the assessment.”

OFCCP IL Document Request #26 (con't)

COMMENT #26:

1. OFCCP made no substantive changes to this IL. Rather, it simply changed the IL number from #22 to #26 and made grammatical changes to its demand for the contractor's "most recent assessment of its physical and mental qualifications" as OFCCP's Section 503 and VEVRAA Rules require along with a report of the schedule of the assessments

OFCCP IL Document Request #26 (con't)

COMMENT #26 (con't):

2. Please note that OFCCP's prior IL requirement, as continued in this IL, also purports to require the contractor to report to OFCCP any "actions taken or changes made as a result of the assessment." Not only does this requirement to report a change(s) not appear in either OFCCP's Section 503 or VEVRAA Rules, but OFCCP's demand may in some circumstances intrude on the contractor's attorney-client privilege and work product doctrine protections of legal advice and work product delivered to the contractor

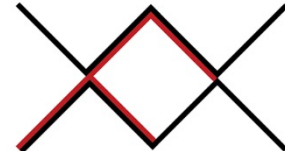
Rather, OFCCP's Rules merely require the contractor make any unlawful mental or physical requirements lawful without reporting the fact of a change in the company's requirements

THANK YOU!



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