



2015 OFCCP Audit

Whitepaper

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With all the regulatory changes in 2014, it is no surprise 2015 is already proving to be a busy year for Office of Federal Contract Compliance Programs (OFCCP). As a result of the new **Protected Veteran (PV) and Individuals with Disabilities (IWD) regulations**, revised audit scheduling letter, and continued focus on compensation analysis, OFCCP is keeping the contractor community on its toes. Berkshire has identified trends in OFCCP audits that we believe will continue throughout the year as more contractors experience compliance reviews under the new regulations, scheduling letter, and agency priorities.

“ One hot topic for OFCCP in 2015 is the concept of steering. ”

OFCCP defines steering as an organization placing applicants or employees in certain groupings, which results in areas of concentration of minorities and women to certain job classifications. Take, for example, an organization that pays more for a packing job that requires the employee to work in the freezer section of the warehouse. The hiring manager for the warehouse positions doesn't think women would want to do that type of freezer work. So they continually hire female applicants to the lower paying packing jobs in the rest of the warehouse instead of the higher paying freezer jobs.



OFCCP's compensation directive and revised Federal Contractor Compliance Manual direct Compliance Officers (COs) to look for potential steering issues when completing their audits. COs are looking at things like adverse impact and compensation to try and determine if steering is occurring. With adverse impact, it's important to look at your results for all races and gender—not just the protected groups. For example, say your data shows that in your Operatives job group African Americans are adversely impacted, but in the Laborers group it's actually Whites that are impacted. OFCCP could look at those results together and question if African American applicants and employees are being steered into the lower paying laborer positions, while Whites are being placed into the higher paying operative roles.

COs are also taking this steering mindset when reviewing compensation, so contractors should be examining their compensation data through that same lens.

Another emerging audit trend is the evaluation of outreach efforts made to minority, female, PV, and IWD sources. Previously, COs would request proof of job postings— meaning a copy or email confirmation that jobs were posted online to various outreach sites. While this question is still being asked, under the new regulations that were effective March 24, 2014, and the new scheduling letter effective as of October 1, 2014, contractors now need to show how they are tracking these good faith efforts and evaluating their effectiveness. This means instead of a simple response to a CO's question about *where jobs are posted*, contractors now must track their recruitment efforts, target specific protected groups, and evaluate these sources on an annual basis.

Contractors now must be able to track certain activity types—i.e. job fairs, an onsite recruitment event, and outreach letters. They also need to track the source of such sites, the date attended or sent, and evaluate each of the activities. The evaluation piece consists of noting how many individuals applied, interviewed, attendance outcome, etc. Contractors should also categorize these efforts to label if they were geared towards minorities, IWD, etc. From there, contractors must review whether or not the activity was successful. If not, they must utilize a different approach and pick certain recruitment efforts that target certain areas of underutilization. Under audits, COs may request this documentation but they will keep the dialogue going—this could be numerous phone calls or email exchanges. OFCCP has stated contractors will not get cited for failing to meet a placement goal for job groups, however, the shift has now moved to getting cited for failure to *prove how* those good faith efforts are attracting and targeting protected groups.





OFCCP's increased scrutiny of contractor compensation is another trend we are seeing in 2015, thanks to the new scheduling letter being used for audits.



Under the previous scheduling letter, contractors would submit their compensation by grade, job title, or job group. Under the new scheduling letter contractors are required to submit a roster of their workforce as of the date of the AAP, which includes each employee's actual total compensation earned in the 12 months prior to the AAP roster date. **This shift to a focus on individual compensation requires more work for contractors**, as they are also required to submit additional compensation categories such as bonuses, commissions, locality pay, and merit increases. Since the first audits under the new scheduling letter are still in progress, it remains to be seen how this trend develops.

An additional change under the new scheduling letter is the requirement to submit personnel transaction data by each of the individual races—rather than by total minority.

It is critical contractors not just comply with this by revising their reports, but they should take the extra step to analyze adverse impact in their personnel transactions by individual races. Contractors should also not assume women and minorities are the protected groups in each selection decision. It is recommended contractors analyze these transactions by identifying the individual race with the highest selection rate, and comparing all other race selection rates to that group. This type of analysis will help contractors see what OFCCP might see in their data, and allow for additional time to review any potential issues before OFCCP starts asking about them.

Many contractors who are receiving audit letters are in progress of complying with the new regulations, but have not yet completed a full year under them. **Take, for example, those contractors whose AAP date falls after the March 24, 2014, new regulations effective date, but before the start of their full AAP year.** Let's say a contractor has an October 1, 2014 plan date and they receive a new scheduling letter in the middle of January 2015. Due to the new regulations, this contractor submits everything requested in the new scheduling letter, except the utilization reports and data collection for PV and IWD. The client notes this in the audit submission letter; however, the CO requests these items after the documents are submitted. Contractors must assume the responsibility of letting the CO know they do not need to submit these items just yet. In fact, per the regulations, contractors are not required to submit the new data collection documents until the first full twelve months after the March 24, 2014 effective date. Therefore, from the example above, contractors with an October 1 plan date will not be expected to submit the new data collection reports until the October 1, 2015, AAP.

Recent settlements with OFCCP have highlighted certain audit trends, including cases focusing on discrimination against specific minority groups, cases where women are favored over men, and cases involving professional level positions, as opposed to, entry level ones.

OFCCP has been increasing its focus on identifying discrimination based on "the numbers," including when the disfavored group is males or Caucasian employees.. A leading food company settled with OFCCP in 2014 for discriminating against over 2,000 men who were steered towards dumper/stacker positions while females were selected for other assembly positions. Because males were steered towards positions that had fewer hiring opportunities, they were disparately selected for positions, despite being qualified for the assembly jobs that women were favored for. In addition to a monetary settlement, the company agreed to make offers to original class members as positions are available.

As indicated by the revised scheduling letter, where data on individual race categories must be provided with the initial audit submission, OFCCP is focusing on investigating discrimination by specific race sub-category instead of minority versus non-minority groups.

A meat production company settled with OFCCP in January 2014 for discrimination in their hiring process. Three locations were identified in the agreement, and different race and gender groups were impacted at each location. At one facility, OFCCP found hiring practices discriminated against females, at another facility White and Hispanic applicants were affected, and at the third, White and African American applicants were affected by the discriminatory hiring processes.

This case shows the trend in OFCCP audits to examine the workforce by each race and gender sub-category to determine if there are any areas of discrimination.

Professional level positions have also been a focus of OFCCP, as is evidenced by the recent September 2014 settlement with a leading research corporation. OFCCP determined the company's selection procedures resulted in discrimination against minority applicants for professional level positions that included research analysts and programmer analysts. This case is also an example of the trend toward investigating discrimination against specific minority categories, as the settlement specifically applied to African American, Asian, and Hispanic applicants.

“ The year 2014 was an extremely busy one for OFCCP, and in turn, federal contractors. With the first audits under the new regulations and new scheduling letter, as well as an increased focus on compensation analyses and potential steering cases, 2015 is proving to be no different. ”

To learn more about surviving an OFCCP audit, read, **“Eight Ways to Survive an OFCCP Audit,”** or *contact* a Berkshire compliance expert at 800.882.8904.



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