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Your Partner in Human Resources and Affirmative Action



New Year New Compliance: What to Focus on in 2016

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Introduction:

The year 2015 proved to be a busy one for Office of Federal Contract Compliance (OFCCP), and in 2016 the agency shows no signs of slowing down. Between the first full year of compliance for most federal contractors

under the new Protected Veteran (PV) and Individuals with Disabilities (IWD) regulations, various proposed regulatory changes, an election year, and more in-depth audit activity, 2016 will be a year full of change for both OFCCP and contractors.

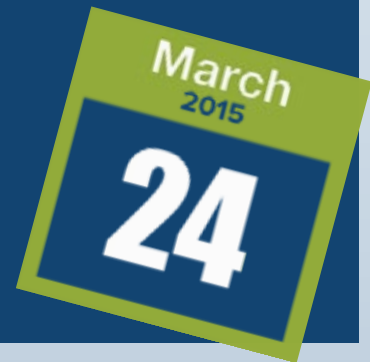


OFCCP's Expectations for IWD and Vets Compliance

January 2016 Affirmative Action Plans (AAPs) will be the first plans for many federal contractors that are subject to all requirements under the revised PV and IWD regulations. Both regulations became effective March 24, 2014. Contractors with affirmative action plan dates after that date, through March 2015, were considered in their **“transition year”** of compliance.

Any plan developed after March 24, 2015, must comply with all the new requirements, including:

- The applicant and hiring data collection for PV and IWD
- IWD utilization analysis
- Veteran hiring benchmark
- Annual written outreach and recruitment evaluation



As a result of the phased-in implementation schedule, OFCCP only recently began auditing contractors who are in the first full year of compliance.

As OFCCP is now expecting to see full compliance with the new regulations, contractors should focus on identifying areas of possible weakness, such as reviewing and evaluating outreach efforts and recruitment sources utilized.

A contractor must document outreach activities, and they must also prepare an annual written assessment of the effectiveness of each activity. When such efforts have been deemed unsuccessful, the contractor must be able to identify and implement new outreach ideas, job posting sites, or recruiting efforts.

One thing to consider is whether OFCCP will ramp up questions in audits around the new regulations, and how it will analyze compliance with the requirements contractors are completing for the first time. Through 2015, Berkshire saw OFCCP make a general cursory check in audits to ensure contractors are complying with the new regulations—but we have not seen much beyond that. In 2016, Berkshire anticipates a larger push by OFCCP to make sure contractors are not only in compliance at a basic level, but practices like targeted outreach towards IWD and PV are being implemented and examined.

The agency will most likely begin more substantive reviews of outreach efforts, including:

- Requests for lists of job fairs attended
- Websites where jobs were posted
- Specific outreach activities targeted to PV and IWD
- The contractor's written evaluation of the effectiveness of its efforts



Whether checked through written response or a phone discussion with contractors, necessary documentation must be retained to prove these efforts are being tracked, evaluated, and modified when deemed necessary.

OFCCP's Regulatory Agenda: What to Expect in 2016

While 2016 AAPs will be the first full plan year for many contractors under the new PV and IWD regulations, OFCCP shows no signs of slowing down their push for other regulatory changes. The Fall 2015 Regulatory Agenda sheds some light on the agency's plans for 2016. Each year, the U.S. Office of Management and Budget releases a Unified Agenda of Federal Regulatory and Deregulatory Actions. This publication is intended to provide the public with a sense of what different government agencies are working on, and what rules and regulations are currently being developed.

OFCCP has three items listed in the Fall 2015 Agenda, in varying stages of development.



OFCCP's revision to the **Sex Discrimination Guidelines** is currently in the Final Rule Stage, with a Final Rule date listed as December 2015 in the Fall 2015 Agenda. This rule would rescind the existing Sex Discrimination Guidelines, which have not been updated for over forty years, and aim to replace them with regulations that address current workplace issues. In the proposed rule, 'Guidelines' would be replaced with regulations about 'Discrimination on the Basis of Sex' to highlight the fact these requirements have the effect of law. These regulations would address various topics that include pay discrimination, sexual harassment, workplace accommodations, and family caregiving discrimination.

While the final rule is not yet published and in effect, contractors should prepare by familiarizing themselves with the proposed changes. While the potential revisions to the regulations sound overwhelming, most contractors are subject to Title VII or similar state laws, so they are already subject to many of the provisions of the potential regulations. A key area for contractors to be aware of is what the final regulations say about compensation discrimination based on gender.

Some fear OFCCP's final rule could potentially align OFCCP policies with California's new Fair Pay Act. That Act states companies may not pay employees less than those of the opposite sex for "substantially similar work," regardless of whether or not they have the same title or work location.



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A second regulatory update listed in the Fall 2015 Agenda is the **Equal Pay Report**, which is also currently in the Final Rule Stage. Resulting from an April 2014 memorandum from the President to the Secretary of Labor, this rule would have required contractors to submit an annual report to OFCCP of summary pay data by EEO-1 category for males and females by race/ethnicity. The Fall 2015 Agenda listed a final rule as expected in May 2016; however, on January 29, 2016, the Equal Employment Opportunity Commission (EEOC) announced it is proposing revisions to the EEO-1 Report that would require all federal contractors and private employers with 100 or more employees to report annual compensation data and total hours worked by race and gender using twelve salary bands.

Berkshire believes the EEOC's proposal, developed in consultation with OFCCP, is likely to be finalized in 2016. If so, the first EEO-1 report with compensation data would be filed in 2017. In light of new OFCCP audit practices contractors should already be proactively analyzing employee-level compensation, and should continue to do this in preparation for the submission of compensation data to the government. EEOC's proposed revisions would require employers to report total W-2 earnings and total hours worked for the twelve-month period ending on the date of the payroll period used for the EEO-1 Report, so contractors may want to consider how this data would be gathered and verified for all relevant employees on an annual basis.



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The third and final item listed for OFCCP in the Fall 2015 Agenda is a **revision of construction contractors' affirmative action requirements**. This would update the regulations that govern affirmative action for construction federal contractors, which have not been updated since 1980. These updates are still in the Proposed Rule Stage, which means specifics around the changes have not been published in the Federal Register. While the regulatory agenda lists a date of May 2016 for the Notice of Proposed Rulemaking to be published, the construction contractor community might be waiting awhile for that to happen. These proposed changes to the regulations first appeared in OFCCP's Regulatory Agenda in Fall 2009 and have been included in each year's agenda since then with no specifics to what the updates might include.



Other Regulatory Changes to Watch

Federal contractors will want to keep an eye out for several other pending or recently-implemented regulatory changes in 2016.

- **Executive Order 13706: Paid Sick Leave**

Changes impacting required paid sick leave for federal contractor employees are scheduled to be finalized in 2016. Executive Order 13706 was signed in September 2015, and the Department of Labor's (DOL) Fall 2015 Regulatory Agenda

indicates the proposed regulation will be published in February 2016 with a goal of being finalized by September 30, 2016. If enacted in that timeframe, the rule would cover new contracts entered into on or after January 1, 2017. The Executive Order states the final regulations require covered federal contractors and subcontractors to provide employees a minimum of one hour of paid sick leave for every thirty hours worked, with a minimum of fifty-six hours of paid sick leave per year. Contractors would be required to provide employees with unlimited carryover of sick leave each year, as well as reinstate prior sick leave to employees rehired within twelve months of separation. The Executive Order also states accrued unused sick leave does not have to be paid out at termination. As this rule is still in the Proposed Rule Stage, contractors should be focused on providing comments and feedback once a proposed rule is published.



- **Executive Order 13673: Blacklisting Regulations**

Executive Order 13673, often referred to as the **“blacklisting regulations,”** requires federal contracting officials to consider self-reported federal and state labor law violations from the past three years when determining whether a bidder for federal contracts of \$500,000 or more **“has a satisfactory record of integrity and business ethics.”** The EO also requires federal

contractors and subcontractors provide workers on covered contracts with information each pay period about how their pay is calculated and to provide notice to those deemed independent contractors. Finally, contractors with covered contracts of \$1 million or more are banned from requiring workers to agree to mandatory, pre-dispute arbitration for claims under Title VII of the Civil Rights Act or torts relating to sexual harassment or assault.

In May 2015, the DOL issued proposed guidance, and the Federal Acquisition Regulatory (FAR) Council issued proposed rules to implement this EO. The public comment period on the proposals was extended twice, and the proposals remain in the proposed stage.

Contractors should familiarize themselves with the proposed requirements and consider how they will gather and maintain the required data if finalized as proposed. Contractors also should consider how the proposal impacts their risk management strategy regarding decisions about current enforcement activities that might have to be reported in future procurement bids.



• Executive Order 13762: Gender Identity

This EO, which amended EO 11246, went into effect in April 2015 and prohibits federal contractors from discriminating against applicants and employees on the basis of sexual orientation or gender identity. Contractors should ensure they are in compliance with these new nondiscrimination requirements as they head into 2016. EEO policies, and other documents that reference protected bases, should be updated to include “sexual orientation” and “gender identity.” A revised **“EEO is the Law”** poster will need to be posted, but until finalized by OFCCP and EEOC, contractors can comply with this notice requirement by using the supplement provided by OFCCP, which is available online at <http://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm>.



• Executive Order 13665: Pay Transparency



Besides the 2015 changes around sexual orientation and gender identity discrimination, regulations around pay transparency went into effect in early 2016. This rule implements EO 13665, which prohibits contractors from taking adverse action against certain employees because they inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant. The new requirements apply to covered federal contracts that are entered into or modified on or after January 11, 2016. Contractors should work with their sales, procurement, or supply chain departments to find out about current and pending federal contracts or subcontracts. They should determine when their contracts will be modified (this includes renewals or extensions) or if they have pending contracts that will be awarded after January 11, 2016.

Once contractors become covered by these regulations, to comply, they must:

- Incorporate the specific nondiscrimination statement as prescribed by OFCCP into their employee handbooks
- Share the statement with employees and applicants through electronic or physical postings
- Post the “EEO is the Law” supplement
- Update their equal opportunity clause in subcontracts and purchase orders unless these documents incorporate the clause by referencing 41 CFR 60-1.4, in which case no change is required

The Impact of a New President

Besides various regulatory changes coming into effect, 2016 includes a presidential election that could be impactful for federal contractors. If the current administration wants any of its proposed rules finalized, conventional wisdom is these rules should be settled by the end of November 2016. Contractors can expect a flurry of activity as the current administration attempts to complete any remaining proposed regulations and rules before they leave office.

The Focus of Audits in 2016

With funding for OFCCP in 2016 less than received in 2015, contractors are hoping this will lead to fewer on-site audits and less arduous reviews in 2016. However, heading into the new year, existing and new audits continue to drag on with detailed requests regarding personnel and compensation data being common.

Berkshire is seeing less reliance by OFCCP on the laundry list of standardized technical compliance questions that were



being asked at the start of 2015, as Compliance Officers focus in more detail on personnel activity and compensation decisions that are likely to lead to financial settlements. During the beginning of 2015, many contractors being audited received a lengthy questionnaire focused on technical compliance that included questions about items like policies and postings. Toward the end of 2015, Berkshire's clients were receiving less of those types of questions and more detailed ones related to their specific personnel activity data. OFCCP continues to **“follow the numbers”** when looking at contractor personnel activity data—trying to identify and question any areas of adverse impact, including when males or non-minorities are the disadvantaged groups. Contractors should be prepared to explain any areas of statistically significant adverse impact in their AAPs.

Contractors also should continue to review their compensation to ensure they can explain how compensation decisions are made across their organization. Berkshire continues to see an uptick in requests to speak with Compensation Managers, or whoever is in charge of salary decisions both at the location under audit and for the organization as a whole.

Interviews with Compensation Managers will take place either over the phone or in conjunction with an on-site visit, and cover topics such as:

- Compensation policies
- Starting pay
- Other types of compensation such as bonuses, commissions, and overtime
- Merit increases
- Self-audits, salary surveys, or pay equity studies the contractor has conducted, and what adjustments were made as a result
- Factors that impact pay

Conclusion

With multiple regulatory changes going into effect or slated to be finalized, as well as a presidential election, 2016 promises to be an eventful year for OFCCP and federal contractors alike. With most contractors completing their first full compliance AAP under the new PV and IWD regulations, contractors should be prepared for more scrutiny from OFCCP as to how they are complying with these new requirements. Audits continue to focus on compensation and areas of adverse impact, so contractors should review their 2016 AAPs for any issues and be prepared to explain them. Staying up-to-date on audit trends, as well as keeping an eye out for changes in regulations, will ensure contractors are prepared for whatever comes their way in 2016.

For information on any of the regulatory updates or changes impacting compliance in 2016, please contact a Berkshire specialist at **800.882.8904** or bai@berkshireassociates.com.

Affirmative Action Support

Changes to affirmative action (AA) compliance and enforcement are never ending, which is why it's more important than ever for federal contractors to take the necessary steps to safeguard their companies. By partnering with an industry leader in AA, such as Berkshire Associates, you can do just that.

Berkshire specializes in service and technical solutions that use AA compliance to help companies shape their ideal, balanced workforce. Berkshire's wide range of AA solutions can be tailored to meet your company's specific compliance objectives.

Our services include:

- Full affirmative action plan preparation outsourcing
- Audit support services
- HRCI-approved professional training
- BALANCEaap—web-based plan preparation application

For assistance with your affirmative action program, and meeting the latest OFCCP requirements, please contact a [*Berkshire Compliance Expert*](#) at 800.882.8904 or bai@berkshireassociates.com.

Additional Resources

Click on a link below to view Berkshire's other resources on OFCCP and related compliance topics.

Webinars

[*The End of Pay Secrecy: Complying with OFCCP's Pay Transparency Rule in 2016*](#)

[*OFCCP Enforcement Trends and How to Survive an Audit*](#)

[*Lessons and Take-Aways from the 2015 ILG National Conference*](#)

[*One Year Older: How OFCCP is Enforcing the New 503 Section and VEVRAA Regulations*](#)

[*Big Company, Big Problems: Bridging the Gap Between Affirmative Action and Diversity*](#)

White Papers

[*OFCCP's Top Compliance Trends*](#)

[*OFCCP's VEVRAA and Section 503 Enforcement: What Federal Contractors Need to Know*](#)

[*2015 OFCCP Audit Trends*](#)

[*BIG Data & Recruitment*](#)

Blogs and Forums

[*BALANCEview HR and Affirmative Action News*](#)

[*HR Compliance & Management Forum*](#)

[*Applicant Tracking & Recruitment Forum*](#)

Training

[*Fundamentals of Affirmative Action Planning*](#)

[*Affirmative Action Boot Camp*](#)

[*Affirmative Action and EEO Laws eLearning Courses*](#)

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