

# Managing Change: An Overview of Recent Updates Impacting Federal Contractors

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*Your Partner in Human Resources and Affirmative Action*

# About Berkshire Associates

For over 30 years Berkshire has offered services and software to overcome HR challenges.

## Affirmative Action

- Plan Preparation Services
  - OFCCP Audit Support
- Adverse Impact Analyses
  - BALANCE*aap* Software

## Applicant Management

- Compliance Assessment
- BALANCE*trak* Software

## Compensation

- Base Pay Structures
  - Market Analysis
- Salary Equity Analyses

## Training

- Affirmative Action
  - BALANCE*aap*
- Collaborative Plan Development
- Webinars & Private Training



# Agenda

- OFCCP's Spring 2016 Regulatory Agenda and additional updates
- Impact of election year on federal contractors
- Audit focuses for 2016



# OFCACP's Spring 2016 Regulatory Agenda

- OFCCP's revision to the Sex Discrimination Guidelines
- Revision to construction contractors' affirmative action requirements



# Sex Discrimination Guidelines

- Final Rule stage—released on June 14, 2016, and becomes effective on August 15, 2016
- New guidelines address current workplace issues such as pay discrimination, sexual harassment, workplace accommodations, and family caregiving discrimination
- Final Rule has “codified” pay discrimination concepts to allow for broader investigations, however, it was toned down from initial proposal



# Sex Discrimination Guidelines' Highlights

- Expanded definition of “sex” includes pregnancy, childbirth, or related medical conditions; gender identity; transgender status; and sex stereotyping
  - OFCCP did not include sexual orientation, noting it remains unsettled whether sexual orientation is encompassed within the word “sex” under Title VII, which is contrary to the position of the EEOC
  - Makes clear that men are also protected from sex discrimination



# Sex Discrimination Guidelines' Highlights

- Pregnancy, childbirth, or related medical conditions
  - Adopts the test from *Young vs. UPS* which requires contractors to provide pregnancy leave “on the same terms that medical or sick leave is provided for medical conditions that are similar in their effect on employees’ ability to work”
  - Provides examples of pregnancy discrimination

# Sex Discrimination Guidelines' Highlights

- Gender identity and transgender status
  - Contractors are required to allow employees to use the restrooms, changing rooms, showers, and similar facilities consistent with the gender with which each worker identifies
  - Requires coverage for healthcare services be made available “on the same terms for all individuals for whom the services are medically appropriate, regardless of sex assigned at birth, gender identity, or record gender”
    - Contractors cannot adopt insurance coverage that includes categorical exclusions regarding health services associated with gender dysphoria and gender transition



# Sex Discrimination Guidelines' Highlights

- Sex stereotyping
  - OFCCP recognizes four types of sex stereotyping claims:
    - Dress, appearance, and/or behavior
    - Gender identity or transgender status
    - Jobs, sectors, or industries
    - Caregiving roles



# Sex Discrimination Guidelines' Highlights

- Compensation Discrimination
  - Prohibits any “employment practice that discriminates in wages, benefits, or other forms of compensation”
  - Includes language similar to Directive 307 although there is no mention of “pay analysis groups”
  - Final rule removed prohibition of denying “equal wages” and replaced with prohibition against “discriminating in wages”



# Sex Discrimination Guidelines' Best Practices

- Review insurance coverages and exclusions
- Evaluate pregnancy and other leave policies for common issues
  - Insufficient leave
  - Different leave for men and women
- Review LGBT policies to ensure they provide for the protections defined in the guidelines
- Review OFCCP best practices in Appendix A and implement as appropriate
- Review and update policies and training related to how employees dress and/or carry themselves



# Construction Contractor Requirements

- Proposed Rule stage—expected to be published in August 2016
  - Don't hold your breath—these have been on the agenda since Fall 2009
- Have not been updated since 1980



# Proposed EEO-1 Report Revisions

- This proposal 'overrides' OFCCP's proposed Equal Pay report
  - EEOC is now taking the lead on this initiative—it has a broader reach and can gather this data from a larger pool of employers than OFCCP
- EEOC's proposed changes were published on 2/1/2016 and comments were due on 4/1/2016
  - Hearing was held in March
- EEOC sent final proposal to OMB on 7/14/16
  - 30 day comment period now in effect—due to OMB on 8/15/2016

# Proposed EEO-1 Report Revisions

- Revised data collection has two components:
  - **Component one** collects the same data that is gathered by the currently approved EEO-1: specifically, data about employees' ethnicity, race, and sex by job category
  - **Component two** collects data on employees' W-2 wages (Box 1) and total hours worked by 12 pay bands in each EEO-1 category
    - Will only be required for companies that have 100 or more employees



# Issues with Proposal—W2 Wages

- Box 1 of W2 reports 'taxable' income and therefore excludes an employees:
  - 401K/403b contributions, medical premiums, flexible spending (FSA), and dependent care accounts (DCA)
- Scenario: Jack and Jill are both Accountants who worked the entire year. They were both paid an annual salary of \$75,000 and received a \$5,000 bonus but their W2 wages are very different.
  - W2 wages for Jack = \$80,000 (\$0 non taxable income)
  - W2 wages for Jill = \$55,800 (\$24,200 non taxable income— \$14,500 401K, \$3,200 medical premiums, \$1,500 FSA, and \$5,000 DCA)



# Proposed EEO-1 Report Revisions

- Change in reporting period
  - Starting in 2017, the 'workforce snapshot' will be a pay period between October 1 and December 31 of the reporting year however W2/Hours Worked data MUST be as of December 31
  - Filing will need to be completed by March 31 of the following year
  - 2017 Example
    - Snapshot on date between October 1, 2017, and December 31, 2017; W2 wages and Hours Worked as of December 31, 2017
    - Report due to EEOC Joint Reporting Committee by March 31, 2018

# Issues with Proposal – Reporting Period

- Regardless of which snapshot date you choose you will still need to pull W2 wages and Hours Worked as of December 31
- Reporting cycle is now different from VETS-4212
  - Footnote on page 22 alludes to possibility contractors could use the same December 31 snapshot for VETS-4212







# Hours Worked

- Hours Worked Definition—same as FLSA
- Reporting Hours Worked
  - Non-exempt
    - Based on actual hours worked since employers are required to maintain this information already
  - Exempt
    - Report a proxy of 40 hours per week for full-time exempt employees and 20 hours per week for part-time employees multiplied by the number of weeks the individuals were employed during the EEO-1 reporting year; or
    - Provide actual hours of work by exempt employees during the EEO-1 reporting year if the employer already maintains accurate records of this information

# Issues with Proposal—Hours Worked

- Is your timekeeping system tied to your HRIS so you can extrapolate that data?
- How do we handle exempt part-time employees who have a schedule other than 20 hours per week?
  - Only option presented is to report them as 20 hours or actual hours worked



# Burden Hours/Costs

- Original proposal changed the way hours/costs were calculated from “per report” to “per filer” and were woefully under reported at 6.6 hours per filer
- Final proposal uses a “hybrid” approach—15.2 hours at the firm level plus an additional 1.9 hours per individual report for establishment-level functions
  - 1.9 hours are only calculated for firms NOT using the data upload



# Political Observations

- Given the political climate, OMB will likely approve
- Republicans in Congress are trying to block it
  - S.2693 – EEOC Reform Act
  - House and Senate appropriations – disallow EEOC from using money to implement the new form

# Executive Order 13706: Paid Sick Leave

- Proposed Rule stage—published in February with a goal of being finalized in September
- Covered Employers—employers entering into new contracts (meaning the solicitation was issued or contract was awarded on or after Jan. 1, 2017) covered by the Service Contract Act or the Davis-Bacon Act, concessions contracts, and service contracts in connection with federal property or lands
- Requires 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



# Executive Order 13706: Paid Sick Leave

- Employees could use paid sick leave for:
  - Their own illnesses or other healthcare needs, including preventative care;
  - The care of a family member or loved one who is ill or needs healthcare, including preventive care; or
  - Purposes resulting from being the victim of domestic violence, sexual assault, or stalking—or to assist a family member or loved one who is such a victim

# Executive Order 13673: Blacklisting Regulations

- Proposed Rule stage—On May 27, 2015, DOL proposed guidance and the Federal Acquisition Regulatory (FAR) Council issued proposed rules; Final rule slated for release in August
  - In the FY16 budget, DOL asked for \$\$ to create a new office to assist with implementing this regulation—it was denied by Congress along with provisions that money could NOT be reallocated to cover these activities



# Executive Order 13673: Blacklisting Regulations *cont.*

- 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”
  - Also requires federal contractors and subcontractors provide workers on covered contracts with information each pay period about how their pay is calculated and notice to those deemed independent contractors
  - 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



# Executive Order 13762: Gender Identity

- Went into effect on April 8, 2015
  - Prohibits federal contractors from discriminating against employees on the basis of sexual orientation or gender identity
- EEO policies, and other documents that reference protected bases, should be updated to include “sexual orientation” and “gender identity”
- Contractors need to ensure they have posted the OFCCP supplement to the “EEO is the Law” poster

<http://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm>



# Executive Order 13665: Pay Transparency

- Went into effect on January 11, 2016, (applies to covered federal contracts that are entered into or modified on or after that date)
  - 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
- Inquiries, discussions, or disclosures of compensation information that employees obtain through their “essential job functions” are not protected



# Executive Orders and Regulations

Once contractors become covered by these regulations 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; if the EEO clause is incorporated by reference to 41 CFR 60-1.4, no change is required

# Additional Update

- **Adjustments to Dollar Coverage Threshold for VEVRAA and Section 503**
  - In 2010, the Federal Acquisition Regulation Council (FAR Council) implemented an inflationary adjustment for Section 503, changing the threshold amount from \$10,000 to \$15,000
  - In 2015, a similar adjustment to the VEVRAA threshold was made, increasing it from \$100,000 to \$150,000
  - OFCCP adopted the FAR Council's adjusted thresholds for determining whether a contractor is covered by Section 503 and VEVRAA regulatory requirements



# Impact of Election Year on Federal Contractors

- Changes in office could greatly impact federal contractors
- Current administration should finalize any of its proposed rules by the end of November 2016
- Expect activity as current administration attempts to complete outstanding proposed regulations and rules



# Audit Focuses for 2016

- Compensation continues to be the primary focus
  - Compensation policy review
  - Compensation Manager interviews
  - Starting pay
  - Other types of compensation such as bonuses, commissions, and overtime
- Continued focus on personnel activity
- Less reliance on standardized technical questions that were being asked regularly in the first part of 2015
- Uptick in review of compliance with PV and IWD requirements

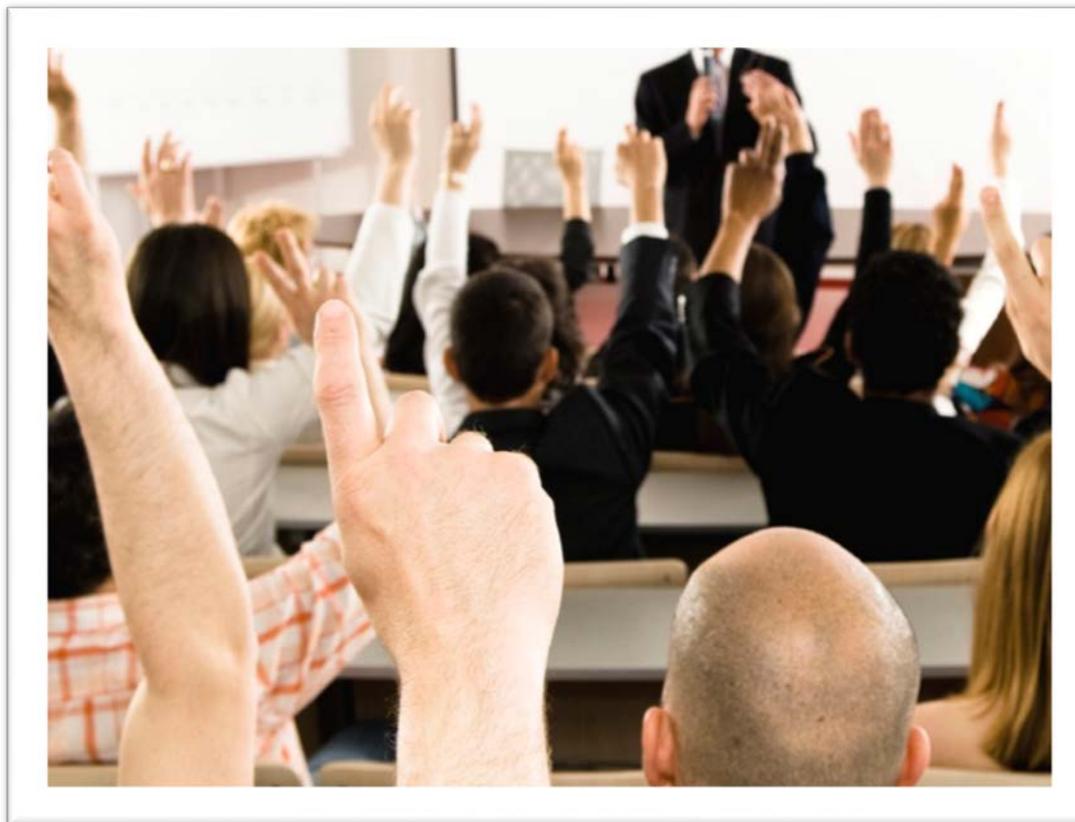


# Conclusion

- OFCCP is reaching settlements and/or pursuing lawsuits at a faster pace as they look to close out FY16
- 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



# QUESTIONS?



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