

The OFCCP Horizon— Federal Contractors' Guide to Affirmative Action Policy Updates in 2015



By: Lynn A. Clements
Director, Regulatory Affairs



New Scheduling Letter

The most important change that will impact compliance reviews in 2015 is OFCCP's newly approved Scheduling Letter and Itemized Listing. The new scheduling documents, which will be used for any compliance review initiated after October 1, 2014, make significant changes to the information each federal contractor is required to submit to the agency in every compliance review.

First, the new scheduling documents require that personnel activity data be reported by individual race category, rather than total minority. Given this change, all federal contractors should evaluate personnel actions by each individual race category before submission—using a favored group analysis. The new letter also includes a major change to how compensation data is reported, requiring federal contractors submit employee-level compensation data, including base salary and other compensation, such as overtime pay and bonuses. Base pay or wage rate information must be submitted as of the date of the workforce analyses. According to a frequently asked question posted by OFCCP, federal contractors should separately identify actual other compensation paid to each employee during the twelve month period prior to the date of the workforce analyses. Finally, the revised scheduling documents add several new submission requirements related to the new affirmative action obligations for Individuals with Disabilities (IWD) and Protected Veterans (PV).

We are already seeing the impact of the new scheduling documents in audits. Now is the time for federal contractors to review the items that must be submitted in every compliance review. Many federal contractors may be surprised at the detailed information that is now expected. To learn more, [click here](#).



Steering

If there was an OFCCP enforcement buzz word for 2014, that word might be “steering.” Steering is a placement practice, whereby intentionally or otherwise, particular genders or minorities are placed, or “steered,” into certain jobs or career paths, leading to lower overall pay and opportunity. OFCCP considers steering as a compensation discrimination issue, but most practitioners consider it a placement issue. Regardless of how you characterize it, we expect the agency’s focus on this issue will continue in 2015.

Contractors need to think about this issue broadly. It is important to realize there could be a potential steering issue even if a contractor’s placement analysis does not show underutilization, and there is no identified adverse impact in any personnel activity.

OFCCP has indicated it will examine the following issues in a compliance review to evaluate potential steering issues:

- Review of impact ratio analyses (IRAs) to determine if one race or gender is being adversely impacted in a particular job group
- Review of workforce analyses for centralization of particular genders or races in specific departments
- Overrepresentation by gender or race in a particular job group or title (*e.g. external availability for women is 40% but the job group is filled by 90% women*)
- Review of applicants to hires data for disproportional representation or placement in particular roles
- Visual review of workforce concentrations during facility tours

OFCCP also has made clear it is looking at this issue beyond the job group level. If your organization has multiple audits open at once, you should consider what the big picture looks like. Auditors are comparing results and talking across regions to look for systemic issues.

The issue of steering seems particularly likely to arise for sales and account management positions with territory assignments, low level laborer positions with different rates of pay based on shifts, amount of manual labor, etc., and other entry level or junior level positions. Contractors should examine these issues now, before receiving an audit letter.





Compensation Discrimination

The Administration has made clear “fair pay” is its number one civil rights enforcement priority, and OFCCP has clearly been placed in the driver’s seat on this issue. With the revised scheduling documents requiring the submission of individual employee-level compensation data, including base pay and detailed other compensation such as bonuses and overtime pay, expect OFCCP to spend even more time evaluating your compensation practices during audits. We are already seeing the impact of these new submission requirements in current audits.

The agency is asking detailed questions regarding a contractor’s compensation practices, including:

- Regular requests for compensation policies;
- The factors that influence pay decisions;
- Explanations for disparities in base pay between men and women or minorities and non-minorities—often at a job group level;
- The eligibility factors for overtime, bonus, and other incentive payments;
- The assignment of particular territories or markets.

Contractors should keep in mind the regulations require an annual self-evaluation of compensation practices. As part of that process in 2015, contractors would be wise to consider the types of records your organization maintains regarding pay decisions and to evaluate proactively the factors that actually influence pay at your organization.



Section 503 and VEVRAA Regulations

With the revised Section 503 and VEVRAA regulations only becoming effective March 24, 2014, the agency has just begun to review affirmative action plans (AAPs) that are subject to the revised requirements. As promised, the agency's focus in current audits has been on understanding the progress contractors have made in complying with some of the paperwork components of the revised regulations.

For example, during recent compliance reviews, contractors were asked about:

- The forms used to collect disability and Veteran status information
- The date the workforce survey for disability status was conducted or planned
- The review schedule for physical and mental job qualifications standards and documentation to demonstrate the contractor adhered to the schedule
- A summary of the steps the contractor has taken, or plans to take, to come into compliance with the review and assessment of its outreach and recruitment efforts
- A summary of the steps the contractor has taken, or plans to take, to come into compliance with the data collection requirements set forth in 60-741.44(k) and 60-300.44(k)
- Documentation to show the "EEO is the Law" poster was made available to applicants, including in electronic format
- A statement on any online application system explaining how an applicant may request reasonable accommodation
- Documentation to show the required Equal Opportunity (EO) clauses were incorporated into subcontracts and purchase orders

OFCCP also is expected to continue to focus on a contractor's outreach and recruitment efforts during compliance reviews, particularly for (IWD) and (PV). In recent audits, OFCCP has asked contractors to produce evidence beyond a listing of diversity websites used by the contractor, which suggests the agency may be beginning to more heavily scrutinize contractor outreach efforts. OFCCP also is consistently checking to confirm whether a contractor listed all required job vacancies with the appropriate employment service delivery system or state job bank. While contractors previously were able to satisfy this requirement by providing several examples, the agency is more consistently checking to see if there is a listing for every hire listed in the AAP.

The revised scheduling documents also add a number of new submission requirements that correspond to specific provisions of the revised Section 503 and VEVRAA regulations. For example, the new scheduling documents request a contractor's reasonable accommodation policies and information regarding how a federal contractor has responded to requests for reasonable accommodation made during the period under review. Federal contractors also must provide detailed information regarding their review of personnel processes and mental and physical job qualifications, including the date of the last review, any actions taken, and date of the next scheduled assessment. OFCCP is expecting federal contractors will provide an actual date in response to these requests—more detail than some federal contractors may have been expecting.

We expect full enforcement of the revised Section 503 and VEVRAA regulations will not begin until mid-2015, when the “early adopter” contractors will complete their transition AAP year and begin their first full AAP year under the new regulations. **Now is the time for contractors to complete implementation plans for the new regulations** and to prepare for more detailed questions about how your employment practices impact IWD and PV.



Proposed Regulations

The OFCCP's regulatory agenda is full, with the President continuing to add new initiatives to the agency's plate with the stroke of his pen at a rate that has surprised the regulated community.

In 2014, the Department of Labor (DOL) finalized regulations to implement the following recent Executive Orders impacting federal contractors:

- Executive Order 13658, which requires federal contractors pay a minimum of \$10.10 per hour to non-exempt employees working on covered construction and service contracts. This Order was implemented by the DOL's Wage and Hour Division, not OFCCP.
- Executive Order 13672, which amends Executive Order 11246 to add protections for applicants and employees of federal contractors because of their sexual orientation and gender identity.

OFCCP also issued several proposed regulations in 2014. In September 2014, OFCCP published proposed regulations to implement Executive Order 13665, aimed at ensuring **"pay transparency"** by prohibiting federal contractors and subcontractors from discharging or otherwise discriminating against their employees and job applicants for discussing, disclosing, or inquiring about compensation. Comments on the proposed regulations were due by December 16, 2014. A final rule is expected in 2015. On August 6, 2014, the agency announced a proposal that would require the filing of an annual **"Equal Pay Report"** by companies, including construction companies that file EEO-1 reports, have more than 100 employees, and hold federal contracts or subcontracts worth \$50,000 or more for at least 30 days. Under the terms of the proposal, contractors would submit an annual Equal Pay Report to OFCCP using an electronic web-based system. The report would require contractors to provide summary data on the compensation paid to employees using a report that is similar in format to the EEO-1

Report currently filed by contractors with the Equal Employment Opportunity Commission (EEOC). As proposed, contractors would report the total W-2 compensation paid to all employees in a calendar year by sex, race, and ethnicity under each of the existing ten EEO-1 job categories: Executive/Senior Level Officials and Managers, First/Mid-Level Officials and Managers, Professionals, Technicians, Sales Workers, Administrative Support Workers, Craft Workers, Operatives, Laborers and Helpers, and Service Workers. Contractors also would report the total number of employees and total hours worked by all employees in each EEO-1 job category by race, sex, and ethnicity. The proposal was expected, as it was issued in response to a Presidential Memorandum signed by President Obama on April 8, 2014, which required the DOL to propose a rule to collect summary compensation data from federal contractors and subcontractors. OFCCP's commenting period for the Equal Pay Report ended on January 5, 2015. A final rule is expected in 2015.

Expected in 2015 are proposals regarding the following:

- Executive Order 13673, which requires, among other things, that companies seeking federal contracts disclose violations over the previous three years involving pay, safety, health, collective bargaining, and civil rights on a centralized government website. *This Order will be implemented by the Federal Acquisition Regulatory (FAR) Council, as well as the DOL. Final action is not anticipated until 2016.*
- Affirmative action regulations applicable to construction contractors.
- Revised sex discrimination guidelines.

Whether the agency is able to complete all of these proposals given the large number of other pending regulatory items, remains to be seen. However, we expect the agency will seek to finalize as many proposals as possible before the end of this Administration.

With such a rapidly changing enforcement environment, 2015 should be quite a year for OFCCP and federal contractors. Berkshire will continue to analyze and monitor any changes. For more information on ensuring your company remains in compliance in 2015, contact a Berkshire representative at 800.882.8904 or bai@berkshireassociates.com.

At-a-Glance View of Policy Updates and Areas That May Need Attention

Below is an at-a-glance summary of the most important enforcement trends and policy developments. Keep this list as a reminder of items you may need to evaluate, and to keep you organized as you proactively safeguard your company from any potential compliance issues.

Compliance Reviews

Personnel Activity Review:

Evaluate impact of personnel activities through a favored group analysis. Evaluate any potential steering issues.

Compensation Practices:

Review your compensation practices beyond base pay.

Preparing for Section 503 and VEVRAA Requirements:

Be prepared to explain compliance status to OFCCP. Develop processes to collect new applicant and hire data, evaluate outreach efforts, review personnel processes and mental and physical job qualifications, and document audit and reporting system.

Postings and Notices:

Be prepared to show documentation of required postings and recruitment, vendor, and union notifications.

Outreach and Recruitment Efforts:

Be prepared to show all required jobs were listed. Collect evidence of specific outreach and recruitment for job groups with placement goals.

New Policies on the Horizon

Proposed regulations to implement Executive Order 13665:

This proposal prohibits federal contractors and subcontractors from discharging or otherwise discriminating against their employees and job applicants for discussing, disclosing, or inquiring about compensation. **Final action expected in 2015.**

Equal Pay Report filing proposal:

Under the terms of the proposal, contractors would submit an annual Equal Pay Report to OFCCP using an electronic web-based system. **Final action expected in 2015. Reporting by federal contractors not expected until 2016.**

Minimum wage changes:

Executive Order 13658, which requires certain contractors pay a minimum of \$10.10 per hour to non-exempt employees working on covered government contracts. **Effective for contracts entered into on or after January 1, 2015.**

Protections based on sexual orientation and gender identity:

Executive Order 13672, which amends Executive Order 11246 to add protections for applicants and employees of federal contractors because of their sexual orientation and gender identity. **Effective for covered federal contracts entered into or modified on or after April 8, 2015.**

Sex discrimination regulations:

This proposal would update OFCCP's existing sex discrimination guidelines. **Final action expected in 2015.**

Blacklisting regulations:

Executive Order 13673, which requires companies seeking federal contracts disclose violations over the previous three years involving pay, safety, health, collective bargaining, and civil rights on a centralized government website. **Final action expected in 2016.**



Corporate Headquarters
8924 McGaw Court, Columbia, MD 21045
Phone: 800.882.8904, Fax: 410.995.1198
Email: bai@berkshireassociates.com
Web: www.berkshireassociates.com

Facebook:

<http://www.facebook.com/berkshirehr>

Twitter:

<http://www.twitter.com/berkshirehr>

LinkedIn:

<http://www.linkedin.com/company/berkshire-associates-inc>

YouTube:

<https://www.youtube.com/channel/UC3yV4eqH-1IGYJzLwRVFTzG>



YouTube