

Seasonal Shortlist: Winter 2023

OFCCP: Looking Ahead – What’s Changing in 2023

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WELCOME AND INTRODUCTION

- K&L Gates Presenters
 - Labor, Employment & Workplace Safety Practice Group
 - OFCCP & Affirmative Action Compliance Focus Area
 - Craig Leen, Partner, DC
 - Leann Walsh, Partner, Raleigh
- Seasonal Shortlist Series
 - Join us quarterly for updates

AGENDA

- New Scheduling List/Contractor Portal
- Proposed Expansion of Scheduling Letter
- PDN Rule Change
- Responding to Supplemental Information Requests
- Additional DEIA Resources
- Federal Guidance Regarding Disability Discrimination and Service Member and Veterans Discrimination
- Hot Topic: Neurodiversity in the Workplace
- Hot Topic: Artificial Intelligence in Employment
- Important Reminders

NEW SCHEDULING LIST/CONTRACTOR PORTAL

- OFCCP released its FY 2023 CSAL and methodology on January 20, 2023. For the first time in history, and as we predicted, OFCCP focused the scheduling methodology on companies that did not certify in the Contractor Portal
- OFCCP is looking to increase its finding percentage through focusing on non-compliance with the Contractor Portal
- Companies on the list should determine whether they certified timely or whether they had an obligation to certify at all
- OFCCP will accept challenges to scheduling if a company can show that it should not have been scheduled under the methodology

NEW SCHEDULING LIST/CONTRACTOR PORTAL, CONT.

- Predictions
 - OFCCP will continue to use the Contractor Portal in the scheduling process in different ways in the future
 - OFCCP's goal is likely to drive the certification rate of contractors to 90% from the mid-40% range
 - Failure to certify will decrease chances of getting contracts (pre-review process); this will not end well for companies that fail/refuse to certify
 - OFCCP will move forward with the plan to have contractors identify subcontractors and will then focus on subcontractors as well

PROPOSED EXPANSION OF THE SCHEDULING LETTER

- OFCCP is going through the Paperwork Reduction Act process to expand information requested in the scheduling letter
- There are 13 substantial proposed additions including as to compensation, promotions, outreach, and recruitment
- There are numerous comments expressing burden and scope concerns filed, along with APA-related concerns
- The proposed expansion is likely to result in longer audits, less audits, and the move away from a triage approach
- It will be hard for OFCCP to adhere to the 45-day desk audit
- The proposed expansion moves the agency back towards Active Case Enforcement and away from DIR 2019-01
- The proposed expansion may be consistent with Secretary's Order, ARB No. 2022-0020

SUPPLEMENTAL INFORMATION REQUESTS

- OFCCP has committed to relying on the scheduling letter and placed limitations on supplemental information/records requests
- For example, in DIR 2022-02 and Section 1C04 of the FCCM, OFCCP has indicated that such requests “must include the basis for the request, be reasonably tailored to the areas of concern, and allow for a reasonable time to respond.”
- The Secretary’s Order is relevant here as well

PDN RULE CHANGE

- OFCCP has been moving slowly and may be reconsidering the PDN Rule change in part
- The current rule includes specific substantive standards for both disparate treatment and disparate impact claims consistent with Title VII, as well as procedural safeguards
- OFCCP is proposing to remove specific substantive standards and some procedural safeguards, seeking to grant more prosecutorial discretion with less specificity in the regulations as to how the Title VII standard would be effectuated
- The notice and comments were favorable to the prior rule
- The Oracle and Analogic decisions are still out there
 - The PDN Rule helps OFCCP comply with the holdings in those decisions

PDN RULE CHANGE, CONT.

- Contractors should continue raising protections of rule, including quantitative evidence definition
- Moving away from the PDN Rule may be challenged and may also complicate the agency's defense of enforcement actions in front of ALJ and in court if cases are brought that could not meet the prior rule
- It will be harder to triage cases and settle without the rule
- Contractors may continue to rely on FCCM, as many protections remain in there including as to transparency
- Contractors may also continue to raise both statistical and practical significance

REMINDER: PAY EQUITY SELF AUDITS/PRIVILEGE

- OFCCP modified its position in the 2022-01 Revision 1 to emphasize recognition of attorney-client privilege, which is welcome
- Contractors should be careful to correctly set up pay equity self-audits under privilege
- It may be best to continue with a qualitative/abbreviated analysis that can be released, with a comprehensive quantitative analysis that remains protected
- Contractors should be prepared to present an affidavit describing the self-audit
- OFCCP's focus is expanding in the pay equity area and is incumbent on contractors to do a comprehensive analysis
- Contractors should follow the PDN Rule and Compensation Directive
- OFCCP should provide regulatory guidance, following notice and comment, regarding constructing a pay equity self-audit
- OFCCP should recognize good faith for good pay equity programs

ADDITIONAL DEIA RESOURCES

- EEOC released an [updated resource document](#) regarding Hearing Disabilities in the Workplace and the Americans with Disabilities Act (ADA), providing information on how the ADA applies to job applicants and employees with hearing disabilities.
- It outlines how certain pre- and post-job offer disability-related questions can violate the ADA. It is a helpful guide of what you can ask, when, and for what purpose.

FEDERAL GUIDANCE RE: DISABILITY & SERVICE MEMBER & VETERANS DISCRIMINATION

EEOC/OFCCP released a resource document:
[Protections Against Employment Discrimination for Service Members and Veterans:](#)

- Describes federal protections from unlawful employment discrimination against service members and veterans
- Helpful summary of the federal laws that prohibit employment discrimination against veterans and service members
- Practical Q&As to determine whether someone qualifies for reemployment rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) or as a protected veteran under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)

HOT TOPIC: NEURODIVERSITY IN THE WORKPLACE

The DOL's Office of Disability Employment Policy (ODEP) and the Employer Assistance Resource Network (EARN) jointly released a [Neurodiversity in the Workplace tool kit](#) with new resources to help organizations recruit, hire, retain, and advance neurodivergent workers, including:

- Organizations, agencies, and programs to help employers source and hire neurodivergent workers
- Inclusive job descriptions and interview processes
- Recommendations for training for all staff, management specifically, and HR personnel also regarding neurodiversity in the workplace

HOT TOPIC: ARTIFICIAL INTELLIGENCE (AI) IN EMPLOYMENT

- The Partnership on Employment & Accessible Technology (PEAT) released a [Beginner's Checklist for Inclusive AI](#)
 - Contains a list of questions to ask AI vendors
 - Includes suggestions for how organizations can use AI technology in inclusive ways and monitor to ensure it is making fair decisions
- [Office for Civil Rights \(OCR\) Bulletin](#) re: Use of Online Tracking Technologies by HIPAA Covered Entities and Business Associates
- [National Labor Relations Board \(NLRB\) Memorandum](#) re: Electronic Monitoring & Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights

IMPORTANT REMINDERS

- 2/9/2023 - EEOC sought public comments on a Draft Strategic Enforcement Plan for 2023-2027 as part of its strategic planning process ([Regulations.gov](https://www.regulations.gov))
- 1/1/2023: Minimum wage for federal contracts covered by EO 13658 increased to \$12.15/hour (minimum cash wage for tipped employees increases to \$8.50/hour). Minimum wage for federal contractors covered by EO 14026 increased to \$16.20/hour (minimum cash wage for tipped employees increases to \$13.75/hour)
- 3/31/2023: EEO-1 report deadline for 2022
- Contractor Portal?: No deadline yet announced, but we anticipate it will be on or around 6/30/2023
- 9/30/2023: VETS-4212 report deadline

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Q&A

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