

OFCCP Proposes Changes To Scheduling Letter and Itemized Listing

Government Contractor Compliance & Regulatory Update on **November 23, 2022**

On November 21, 2022, OFCCP published [notice](#) in the Federal Register that it is seeking reauthorization of a revised Compliance Review Scheduling Letter (“Scheduling Letter”) and Itemized Listing. These documents are issued at the outset of an OFCCP audit, requesting multiple categories of documents from the contractor selected for audit.

OFCCP’s proposed revisions to the Scheduling Letter include:

- Requiring contractors who have “campus-like settings”, including “hospitals and information technology companies” and other “work environments in which a contractor “maintains multiple [affirmative action programs (“AAPs”)] for the same campus,” to “submit the information requested in this scheduling letter for all AAPs developed for campuses, schools, programs, buildings, departments, or other parts of [a contractor’s] institution, or company located in” a city. OFCCP justifies this change by noting it is consistent with changes made to its audit scheduling methodology, and claiming the change will “avoid dispute over the compliance obligations of contractors with campus-like settings,” “provides a more efficient use of agency resources and promotes a broader understanding of an organization’s equal opportunity programs through a holistic review of the campus.”
- Adding in an option for the scheduling letter to be issued via email with a read receipt requested and requesting that contractors submit their AAPs and itemized listing information electronically.
- Modifying language regarding consequences for failure to submit the requested information, so that contractors are notified that “OFCCP may initiate enforcement proceedings if [they] fail to submit the AAPs and Itemized Listing information within 30 calendar days of... receipt of the” Scheduling Letter. The current Scheduling Letter’s language is less precise about what can lead to enforcement proceedings and does not include the deadline contained in the proposed language.

With regard to the Itemized Listing, OFCCP’s proposals include:

- Item 4: Expanding the scope of information sought regarding the contractor’s “determination of minority and female availability.” Currently, the Itemized Listing

limits the information sought to the factors found in 41 C.F.R. § 60-2.14 (c)(1)-(2) — “the percentage of minorities or women with requisite skills in the reasonable recruitment area” and “the percentage of minorities or women among those promotable, transferable, and trainable within the contractor’s organization.” OFCCP proposes to expand the scope of information sought in Item 4 to all the factors set forth in 41 C.F.R. § 60-2.14.

OFCCP explains its proposal now includes the requirement that “the contractor ... provide documentation to OFCCP demonstrating the consideration of the most current and discrete statistical information available, its reasonable recruitment area, and the pool of promotable, transferable, and trainable employees.” OFCCP contends “[t]his change allows OFCCP to better assess whether the contractor is in full compliance with all provisions of 41 CFR § 60-2.14.”

- Item 7 (new): Requiring federal contractors to provide “a list identifying all action-oriented programs designed to correct any problem areas identified pursuant to 41 CFR § 60-2.17(b).” OFCCP notes it “does not currently collect information about a contractor’s action-oriented programs with the current compliance review scheduling letter,” and that by “[a]dding this item to the letter” OFCCP will be able “to more thoroughly review contractors’ compliance in this important area, as well as enable OFCCP to understand the action-oriented programs that a contractor is undertaking as part of its AAPs at the beginning of a compliance review.”
- Item 8 (previously Item 7): Requiring the contractor to “indicate whether [it] believe[s] the totality of [its] efforts were effective” in recruiting qualified individuals with disabilities. Contractors concluding that the totality of their efforts was “not effective in identifying and recruiting qualified individuals with disabilities” must additionally “provide detailed documentation describing [their] actions in implementing and identifying alternative efforts, as provided in 41 CFR § 60-741.44(f)(3).” OFCCP explains this change is the result of contractor “confusion over what documentation is sufficient for their Item 8 submission,” and will provide for “uniformity in contractors’ submissions and ensure consistency in what OFCCP is requesting across field offices as well as allow OFCCP to more efficiently assess whether the contractor is in full compliance with 41 CFR § 60-741.44(f).”
- Item 11 (previously Item 10): Expanding the information contractors must submit regarding their Section 503 utilization analysis. The revised Item 11 specifies that contractors identifying an “underutilization of individuals with disabilities” must “provide a description of the steps taken to determine whether and where impediments for equal employment opportunity exist.” An employer’s response must include an “assessment of personnel processes, the effectiveness of...

outreach and recruitment efforts, the results of [the contractor's] affirmative action program audit, any other areas that might affect the success of the affirmative action program, and a description of action-oriented programs developed and executed to correct any identified problem areas." OFCCP states this change is a response to contractor "confusion" over the "documentation ... sufficient for their Item 11 submission," and notes the change will "promote uniformity in contractors' submissions and ensure consistency in what OFCCP is requesting to review across field offices."

- Item 12 (previously Item 11): Similar to proposed Item 8, proposed Item 12 would require contractors to indicate whether they believe the totality of their efforts were effective in recruiting qualified protected veterans and provide "detailed documentation describing [their] actions in implementing and identifying alternative efforts." OFCCP justifies this change on the same grounds as it provided for proposed Item 8.
- Item 19 (new): Requiring contractors to provide "[d]ocumentation of policies and practices regarding all employment recruiting, screening, and hiring mechanisms, including the use of artificial intelligence, algorithms, automated systems or other technology-based selection procedures." OFCCP explains that the "use of [algorithmic] technologies may lead to instances of screening or selection bias" and so the "addition of this requirement will allow OFCCP to assess the contractor's use of such technology to determine whether these tools are creating barriers to equal employment opportunity."
- Item 20 (previously Item 18): Requiring contractors to provide additional promotion and termination information, specifically: (a) "identify whether each promotion was competitive or non-competitive," as well as "the previous supervisor, current supervisor, previous compensation, and current compensation"; (b) "[p]rovide documentation that includes established policies and describes practices related to promotions"; (c) break down "the total number of employee terminations" by "reason(s) for termination (g., retirement, resignation, conduct, etc.) including gender and race/ethnicity information for each." Proposed Item 20 also requires contractors to provide "[f]or each job title or job group ... the total number of employees, by gender and race/ethnicity, as of the start of the immediately preceding AAP year." OFCCP contends this information is necessary "to create accurate pools for the promotion and termination impact ratio analyses" and that including this information in the Itemized Listing will "promote the timely and efficient exchange of information."
- Item 21 (previously Item 19): Requiring contractors provide two snapshots of compensation data: one as of "the date of the organizational display or workforce analysis, and the other as of the "date of the prior year's organizational display or

workforce analysis.” OFCCP explains that the proposal “will allow OFCCP to better identify whether there is systemic pay discrimination happening at a contractor’s workforce.” Further, Item 21 will “clarify” that contractors must submit compensation data for temporary employees provided by staffing agencies.

In addition, revised Item 21(c) expands on the “documentation and policies related to the contractor’s compensation practices” contractors must submit, to include “those that explain the factors and reasoning used to determine compensation (e.g., policies, guidance, or trainings regarding initial compensation decisions, compensation adjustments, the use of salary history in setting pay, job architecture, salary calibration, salary benchmarking, compensation review and approval, etc.).”

- Item 22 (new): Adding a request that the contractor submit “[d]ocumentation that the contractor has satisfied its obligation to evaluate its ‘compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities,’ as part of the contractor’s ‘in-depth analyses of its total employment process’ required by 41 CFR 60-2.17(b)(3).”

Pursuant to this query, federal contractors must explain:

- “When the compensation analysis was completed;
- The number of employees the compensation analysis included and the number and categories of employees the compensation analysis excluded;
- Which forms of compensation were analyzed and, where applicable, how the different forms of compensation were separated or combined for analysis (e.g., base pay alone, base pay combined with bonuses, etc.);
- That compensation was analyzed by gender, race, and ethnicity; and
- The method of analysis employed by the contractor (e.g., multiple regression analysis, decomposition regression analysis, meta-analytic tests of z-scores, compa-ratio regression analysis, rank-sums tests, career-stall analysis, average pay ratio, cohort analysis, etc.).”

This proposed addition is consistent with [Directive 2022-01, as revised](#), which made clear OFCCP would request such information during audits.

- Item 24 (new): Requiring the provision of “copies of existing written employment policies concerning equal opportunity, including anti-harassment policies, EEO complaint procedures, and employment agreements, such as arbitration agreements, that impact employees’ equal opportunity rights and complaint

processes” OFCCP contends this information “will allow OFCCP to better assess a contractor’s EEO compliance.”

- Item 25 (previously Item 21): Expanding the information requested regarding contractors’ “most recent assessment of [their] personnel processes,” to include “at a minimum a description of the assessment, any impediments to equal employment opportunity identified through the assessment, and any actions taken, including modifications made or new processes added, as a result of the assessment.” OFCCP contends this change addresses contractor “confusion over what documentation is sufficient for their Item 25 submission,” that “[r]equiring the submission of this additional item will promote uniformity in contractors’ submissions and ensure consistency across field offices in what OFCCP is requesting to review,” and the new information will allow OFCCP “to more efficiently assess whether the contractor is in full compliance with all provisions of 41 CFR §§ 60-300.44(b) and 60-741.44(b).”

As the summary of key changes above demonstrates, OFCCP is seeking to impose significant new initial audit submission requirements. Notably, OFCCP is not proposing to change the 30 day deadline to submit this voluminous amount of information; indeed, as noted above, OFCCP is proposing to emphasize that failure to provide “the requested information ... within 30 calendar days” may lead to enforcement proceedings.

The public has until January 20, 2023 to submit comments on proposed changes.

We will continue to monitor and report on further developments here.

[View original.](#)

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