

# OFCCP Webinar

## What Do OFCCP's Recent Directives and Rulemakings Mean For Contractors?

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# Presenters

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# Agenda

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- OFCCP has signaled a new, aggressive shift in its enforcement efforts through new Directives and regulatory initiatives in recent months
- Today, we will examine the legal and practical implications of:
  - **Directive 2022-02**, which significantly modifies OFCCP audit procedures;
  - **Directive 2022-01**, which addresses OFCCP's access to contractors' privileged pay equity materials;
  - **Proposed regulatory amendments** to loosen standards for OFCCP's discrimination findings;
  - **The Contractor Portal** and AAP Certification Requirements.



# In Like a Lamb...

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- Little activity in year one:
  - **Jan. 21, 2021:** Combatting Race and Sex Stereotyping Executive Order rescinded
  - **Jan. 2021:** New OFCCP Director Jenny Yang appointed
    - Replaced Craig Leen
  - **Mar. 2, 2021:** OFCCP kills “focused reviews”
  - **July 1, 2021:** OFCCP issues small CSAL list
- Recoveries – FY 2021:
  - Decline in the number of scheduled and completed supply and service audits;
  - Continued decline in the number of completed discrimination cases (relative to the FY2019 peak);
  - Total financial remedies dropped to \$25.5M (compared to over \$40M in FY2019);
    - Only **one** settlement more than \$1M;
    - **Three of the top five** settlements occurred before January 20, 2021 (Biden inauguration).



# Directive 2022-02

# Directive 2022-02 – Background

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- During Trump Administration:
  - Agency was active (record recoveries), but
  - More contractor friendly:
    - Numerous initiatives to increase certainty, efficiency, recognition, and transparency (“CERT”)
    - Efforts to improve relations with contractor community that soured during Obama Administration
- Directive 2022-02, titled “Effective Compliance Evaluations and Enforcement” contains several significant changes in this approach
  - Issued on March 31, 2022



# Directive 2022-02 – Less/No Forgiving Timelines

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- **Contractors no longer guaranteed advance notice of audits.**
  - Contractors previously had at least 45 days after appearing on the CSAL.
  - “OFCCP may [now] begin scheduling contractors upon the publication of the CSAL.”
- **Contractors can no longer expect extensions of time from OFCCP during audits.**
  - Contractors will be “required to submit all AAPs and itemized listing data, including support data, within 30 calendar days.”
    - Involving 22 separate information requests
  - Eliminates rule where contractors who submitted their AAPs within 30 days of receiving a scheduling letter automatically received a 30-day extension to provide additional items requested.
  - Now, extensions may be granted only in the event of **extraordinary circumstances**, and OFCCP may ask for supporting documentation.
    - E.g. “Death in the immediate family of key personnel.”



# Directive 2022-02 – More Document/Data Requests

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- **Contractors can expect more requests for additional data during audits.**
- Reiterates that OFCCP “may request supplemental data, follow-up interviews, and/or additional records and information if the contractor’s desk audit submission is incomplete or OFCCP identifies issues that warrant further analysis.”
  - Supposed to be “reasonably tailor[ed] ...to the areas of concern, allow contractors a reasonable time to respond, and include the basis for the request.”
- “Where OFCCP finds additional compliance issues, these supplemental requests do not limit the agency’s ability to request additional information or expand the investigation.”
  - This includes information from **two years prior** to the contractor receiving the Scheduling Letter.



# Directive 2022-02 – Increased Witness Focus

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- **Contractors can expect OFCCP’s audits to include more requests for witness information and more witness interviews.**
  - Highlights “the importance of contractors providing access to their premises and records relevant to OFCCP’s investigation,” which “includes records ... that will enable OFCCP to contact employees, former employees, applicants, or other witnesses.”
  - “OFCCP **will** request that contractors provide the agency with unredacted contact information such as telephone numbers, mailing addresses, email addresses, and social security numbers for these individuals.”
  - Signals pre-onsite witness interviews, and agency direct contact with the employees/former employees without contractor involvement/knowledge.

# Directive 2022-02 – Changes to Audit Scheduling

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- The Directive makes clear there will be changes to audit scheduling.
- OFCCP will be “enhancing its neutral scheduling procedures for selecting federal contractors for compliance evaluations.”
- Will make efforts “to identify those with greater risk factors for noncompliance with nondiscrimination and affirmative action requirements.”
- No further details.
  - Likely connected to AAP verification/certification initiative.

# Directive 2022-02 – Bye, Bye CERT

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- The Directive also rescinds four directives previously implemented under Director Leen:
  - (1) **DIR 2018-08**: Transparency in OFCCP Compliance Activities
  - (2) **DIR 2020-02**: Efficiency in Compliance Evaluations
  - (3) **DIR 2018-06**: Contractor Recognition Program
  - (4) **DIR 2021-02**: Certainty in OFCCP Policies and Practices

# Directive 2022-01

# Directive 2022-01 – “Pay Equity Audits”



- Issued on March 15, 2022.
- Addresses contractors’ obligations to analyze their compensation systems and to turn over such analyses when under audit.
- Under 41 C.F.R. § 2.17(b), contractors “must perform in-depth analyses” of their “compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities.”
- “[W]here impediments to equal employment opportunity exist,” contractors are required to “develop and execute action-oriented programs designed to correct any problem areas.” 41 C.F.R § 2.17(c).

# Directive 2022-01 – Will Demand “Pay Equity Audits”

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- “[C]larifies OFCCP’s authority to access and review contractors’ compensation system analyses, which it defines as “pay equity audits.”
  - “will request that the contractor provide a complete copy of the pay equity audit(s) conducted ... that shows all pay groupings that were evaluated, any variables used, and the results of the analyses, including any disparities found. For compensation regression or statistical analysis results, OFCCP may request the model statistics (such as b-coefficients, significance tests, R-squared, adjusted R-squared, F-tests, *etc.*) for all variables or comparisons in the model. OFCCP may also request information relating to the frequency of pay equity audits, the communication to management, and how the results were used to rectify disparities based on gender, race and/or ethnicity.
  - OFCCP will request such analyses when a desk audit “reveals disparities in pay or other concerns about the contractor’s compensation practices.”
  - Requests for these analyses may cover a period beginning **two years prior** to receipt of the Scheduling Letter.



# Directive 2022-01 – Hostility to Privilege Claims

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- Challenges use attorney-client privilege to shield production of internal pay equity audits:
  - “Contractors **cannot** withhold these documents by invoking attorney-client privilege or the attorney work-product doctrine.”
  - However, where the contractor turns over a pay equity analysis, OFCCP will not seek other privileged pay equity analyses a contractor may have conducted – provided the contractor can establish privilege exists.
- Warns: **“Failure to provide the required pay equity audit will be considered by OFCCP as an admission of noncompliance with these regulatory requirements.”**



# Proposed Regulatory Amendments

# Background

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- On December 10, 2020, OFCCP published its “Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures To Resolve Potential Employment Discrimination.”
- Established important procedural and substantive requirements before OFCCP can issue discrimination findings.
- Provides for transparency in the compliance evaluation process to ensure contractors understand the bases for OFCCP’s preliminary findings and to foster dialogue to avoid erroneously-based Notices of Violation.

# Proposed Amendments – Key Provisions

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On March 21, 2022, OFCCP published proposed amendments to this rule.

## 1. Reducing contractors' time to respond to a Pre-Determination Notice

- PDN informs contractor of discrimination finding before issuance of NOV, providing opportunity to respond.
  - Generally issued with little/no notice.
- Currently, contractors have 30 days to respond.
- Proposal would revert time back to 15 days, which may be extended for “good cause.”

## 2. Removal of evidentiary and procedural standards for PDNs and NOVs

- Currently:
  - Required to disclose both the “qualitative” (*i.e.*, testimony and documents) and “quantitative” (*i.e.*, data analysis) evidentiary support for its preliminary finding(s).
  - Quantitative evidence must be “practically significant.”
  - PDNs must be approved by the OFCCP Director before issuance.
  - NOVs may not include discrimination findings unless they were also included in the PDN.
- All of these safeguards would be eliminated under the proposed amendments.

# Proposed Amendments – Key Provisions

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## 3. Show cause notice changes

- SCN provides contractor 30 days' notice to show cause why enforcement proceedings should not be instituted.
- OFCCP proposal would make clear that SCNs may be issued without first issuing a PDN or NOV, where the contractor “has failed to provide access to its premises for an on-site review or refused to provide access to witnesses, records, or other information.”
- Also provides SCNs can include violations not included in NOVs.
  - SCNs must “include each violation that OFCCP has identified at the time of issuance,” and where “OFCCP identifies additional violations after issuing a [SCN], OFCCP will modify or amend the” SCN.
  - Contractors will be offered “an opportunity to conciliate additional violations identified in the” SCN that are not included in a prior NOV.

# Contractor Portal and AAP Verification



# Contractor Portal and AAP Certification Requirements

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- OFCCP Contractor Portal announced in December 2021.
- Supply and Service contractors and subcontractors (*i.e.*, not construction sub/contractors) must register with the Portal and certify compliance with requirement to develop and maintain Affirmative Action Programs on the Portal.
- Key Dates
  - **February 1, 2022** – portal opened for registration;
  - **March 31, 2022** – portal opened for certification;
  - **June 30, 2022** – deadline to certify compliance.
- Certification must be submitted **annually**.



# AAP Certification

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The Portal prompts users to **select one** of three options to certify their current status with regard to AAPs:

- (1) Entity has developed and maintained affirmative action programs at each establishment, as applicable, and/or for each functional or business unit.
- (2) Entity has been party to a qualifying federal contract or subcontract for 120 days or more and has not developed and maintained affirmative action programs at each establishment, as applicable.
- (3) Entity became a covered federal contractor or subcontractor within the past 120 days and therefore has not yet developed applicable affirmative action programs.

# AAP Certification – What Does It Mean?

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- **Plain text:** “Entity has developed and maintained affirmative action programs at each establishment, as applicable, and/or for each functional or business unit.”
- **Directive 2022-02:** “OFCCP clarifies that when covered contractors use OFCCP’s Contractor Portal to register and annually certify compliance with their AAP obligations, they are certifying that they have developed and maintained complete AAPs”
  - Footnote: “For further details on the complete AAP components and obligations, see 41 CFR part 60-2, subpart B; 41 CFR part 60-300, subpart C; and 41 CFR part 60-741, subpart C.”
    - Includes developing and executing “action-oriented programs to correct problem areas,” that “consist of more than following the same procedures which have previously produced inadequate results”
    - Includes developing and implementing “an auditing system that periodically measures the effectiveness of its affirmative action program” and documenting and retaining records of these actions

# Questions?

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