Breakout Sessions – Series 3

OFCCP ENFORCEMENT DURING THE TRUMP ADMINISTRATION

WHAT FEDERAL CONTRACTORS NEED TO KNOW

Tevis Marshall (Moderator) – Ogletree Deakins (Richmond)

T. Scott Kelly – Ogletree Deakins (Birmingham)

Leigh M. Nason – Ogletree Deakins (Columbia)
The last fifteen months have brought increased activity and significant changes to the Office of Federal Contract Compliance Programs (OFCCP), including the appointment of new Director Craig E. Leen and the arrival of 11 new policy directives. This paper will discuss the directives and other significant OFCCP initiatives.

I. OFCCP DIRECTIVES

OFCCP policy directives are intended to provide guidance to OFCCP staff and federal contractors on enforcement and compliance policy. While directives do not establish any new rights or obligations and do not change the applicable laws and regulations under Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA), they often provide insight into OFCCP initiatives, procedures, and processes.

Below is a brief summary of the directives and other significant initiatives during Director Craig Leen’s tenure at OFCCP:

<table>
<thead>
<tr>
<th>Directive</th>
<th>Executive Order 11246, § 204(c), Religious Exemption</th>
</tr>
</thead>
<tbody>
<tr>
<td>2018-03 (August 10, 2018)</td>
<td>This directive is designed to ensure faith-based organizations can compete for federal grants, contracts, programs, and federal funding opportunities without having to disavow their religious character.</td>
</tr>
<tr>
<td>2018-04 (August 10, 2018)</td>
<td>Focused Reviews of Contractor Compliance</td>
</tr>
<tr>
<td></td>
<td>This directive outlines OFCCP’s plans to conduct focused reviews in fiscal year 2019 to evaluate a single protected group in a compliance review, starting with individuals with disabilities.</td>
</tr>
<tr>
<td>2018-05 (August 24, 2018)</td>
<td>Analyses of Contractor Compensation Practices During a Compliance Evaluation</td>
</tr>
<tr>
<td></td>
<td>This directive includes revamped guidance on compensation investigation and enforcement, and its accompanying frequently asked questions provide contractors with some insight into how OFCCP may evaluate their compensation data in an audit.</td>
</tr>
<tr>
<td></td>
<td>This directive aims to ensure contractors are annually preparing and implementing written affirmative action programs (AAPs) by requiring contractors to annually certify they have prepared AAPs and to develop information technology so OFCCP can collect and review AAPs. The directive allows OFCCP to include noncompliant contractors in the neutral audit scheduling process.</td>
</tr>
<tr>
<td>2018-08 (September 19, 2018)</td>
<td>Transparency in OFCCP Compliance Activities</td>
</tr>
<tr>
<td></td>
<td>This directive is aimed at increasing agency and audit transparency. OFCCP reserves the right to grant contractors extensions to submit support materials if they timely submit their AAPs. Failure to timely submit AAPs and support data in a desk audit will result in the issuance of a show cause notice.</td>
</tr>
</tbody>
</table>
### Directive 2018-09 (September 19, 2018)
**OFCCP Ombud Service**
This directive creates a new Ombud Service to listen to contractors’ concerns about OFCCP matters and areas for improvement, and to facilitate resolution of issues at the district and regional office levels.

### Directive 2019-01 (November 30, 2018)
**Compliance Review Procedures**
This directive rescinds Directive 2011-01, which required full desk audits, and will help to “shorten full desk audits and conciliate violations more efficiently.” Any contractor establishment audited by OFCCP will not be audited again for 24 months after closure of an audit or acceptance of a final progress report under a conciliation agreement.

### Directive 2019-02 (November 30, 2018)
**Early Resolution Procedures**
The goal of this directive is to resolve supply and service contractors’ audits “at the earliest stage possible” and to work with multi-establishment contractors to develop corporate-wide corrective actions to remedy non-discrimination violations, such as recordkeeping. If early resolution procedures are utilized, OFCCP will not schedule a new compliance evaluation for five years from the date of an Early Resolution Agreement with Corporate-Wide Corrective Action.

### Directive 2019-03 (November 30, 2018)
**Opinion Letters and Help Desk**
This directive is designed to enhance the self-service feature of OFCCP’s Help Desk to make prior responses to inquiries searchable. OFCCP also plans to resume the use of opinion letters to provide guidance to contractors.

## II. SECTION 503 FOCUSED REVIEWS

In accordance with Directive 2018-04, OFCCP will initiate “focused reviews” in compliance evaluations scheduled in Fiscal Year 2019 (October 1, 2018 – September 30, 2019). During these reviews, OFCCP will go on-site to a contractor’s establishment and focus on one of OFCCP’s three authorities: Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and VEVRAA. The first round of these reviews will be focused on Section 503 compliance and will be scheduled for the corporate headquarter locations of 500 federal contractors.

OFCCP has published a new scheduling letter that will notify contractors that they have been selected for a Section 503 focused compliance review. The Section 503–focused scheduling letter does not seek any new information that is not already requested by OFCCP but focuses on information relevant to Section 503 obligations and recordkeeping requirements, such as the current Executive Order 11246 AAP, EEO-1 forms for three years, a copy of the current collective bargaining agreement (CBA), and any policy statements, employee notices, or handbooks that implement, explain, or elaborate the provisions of the CBA. Contractors will also need to provide information to OFCCP regarding recruitment, hiring, promotion, training, compensation, and retention efforts that the company has undertaken to comply with the affirmative action regulations applicable to individuals with disabilities.
OFCCP has added a section to its website containing extensive information relating to Section 503 focused reviews: [https://www.dol.gov/ofccp/Section503-FocusedReviews/index.html](https://www.dol.gov/ofccp/Section503-FocusedReviews/index.html) (last accessed March 21, 2019). Among the resources on the landing page are disability inclusion best practices, documents explaining what to expect during a Section 503 Focused Review, and important OFCCP contact information.

In addition, Director Leen has publicly announced the following eight best practices for Section 503 compliance:

1. Maintain a centralized reasonable accommodation system.
2. Ensure that top leadership endorses and supports disability inclusion through video and correspondence.
3. Coordinate with state and local rehabilitation agencies.
4. Provide accessible online recruiting tools.
5. Provide a comprehensive and welcoming self-identification program.
6. Sponsor disability inclusion programs in the workplace.
7. Utilize employee resources groups.
8. Consider naming a Chief Diversity/Accessibility Officer (or perhaps an ADA Coordinator).

Contractors can also expect changes to the disability self-identification form, which may include links to OFCCP’s definitions of words used on the form, such as a link to a definition of “disability.”

III. COMPENSATION

For the third time in the last 10 years, on August 24, 2018, the Office of Federal Contract Compliance Programs (OFCCP) revamped its guidance on compensation investigation and enforcement by issuing Directive 2018-05 and publishing frequently asked questions (FAQs) on the new directive. This directive applies to compliance reviews scheduled on or after August 24, 2018, and may be used by OFCCP in earlier, open cases to the extent it doesn’t conflict with prior guidance or procedure.

**On Which Pay Cases Will OFCCP Focus?**

In the directive, OFCCP offers general guidance on the legal theories under which it will pursue compensation discrimination and how those align with program priorities. Stating that compensation disparities can be created through inequities in monetary compensation, inequitable training or advancement opportunities, and assignment/placement differences, OFCCP reiterated its reliance on statistical analyses reflecting a statistically significant difference of two standard deviations or more as well as non-statistical (or anecdotal) evidence of discrimination. (Anecdotal evidence could be testimony regarding biased statements or remarks, examples of differential treatment, testimony about individuals who were given misleading or contradictory information about employment or compensation practices, etc.)

Signaling a potential shift in agency practice, however, the directive notes that “OFCCP will be less likely to pursue a matter where the statistical data are not corroborated by non-statistical evidence of discrimination unless the statistical evidence is exceptionally strong.” (OFCCP does not define the phrase “exceptionally strong.”) Moreover, a footnote explains that OFCCP may pursue a case without anecdotal evidence if the agency detects patterns of discrimination over several years or at multiple contractor establishments. Finally, OFCCP may conduct
comparative analyses of small groups of similarly-situated employees to determine if pay differences due to discrimination exist.

What Pay Data Will OFCCP Review in Compliance Evaluations?

- **“Item 19” data:** Contractors must provide individual-level pay data to OFCCP in response to the itemized listing that accompanies a compliance evaluation scheduling letter (item 19 of that listing requests pay data). The directive further instructs agency compliance officers to ensure that the pay data provided is complete and acceptable; if not, the compliance officer must quickly request that the contractor provide it, in electronic format if it is maintained in that fashion. Failure to provide such information will result in the issuance of a Notice to Show Cause, which could lead to litigation for failure to provide access to pay data. OFCCP gives high priority to so-called “failure of access” cases and will initiate litigation quickly in the appropriate situation.

- **Compensation hierarchy/job structure:** The directive encourages contractors to provide their compensation hierarchies and job structures with the Item 19 data so that OFCCP can attempt to design a pay analysis based on those structures. The directive is silent, however, on how OFCCP defines (or the conditions under which it accepts) a contractor's compensation hierarchy and job structure. Most important, OFCCP does not commit in the directive to design a pay analysis based on the contractor’s structure!

- **EEO-1 categories/AAP job groups:** If OFCCP finds that the contractor’s compensation hierarchy or job structure is unreasonable, cannot be documented through written policies, and/or if the pay groupings do not lend themselves to a meaningful systemic statistical analysis, the agency will conduct a preliminary pay analysis based on EEO-1 categories or affirmative action program (AAP) job groups. Unfortunately, these types of broad groupings may include employees who do not do similar work as measured by Title VII of the Civil Rights Act.

- **Other aggregations:** If the contractor’s AAP job groups are unreasonable; do not represent jobs with similar content, wage rates, and opportunities; and/or are not of a sufficient size to conduct a meaningful systemic statistical analysis, OFCCP will create an analysis model based on information developed during its investigation.

- **Additional pay data requests:** OFCCP will notify contractors, in writing, of the “general nature” of any preliminary compensation disparities that trigger further information requests or an on-site review. This is a nod to OFCCP’s recent promise to be more transparent with contractors as compliance reviews unfold.

How Will OFCCP Group Contractors’ Pay Data?

**Identify Similarly-Situated Employees**

According to the directive, “similarly-situated employees” are “those who would be expected to be paid the same” (not the Title VII standard) based on:

- job similarity (such as tasks performed, skills required, effort, responsibility, working conditions, and complexity of duties) and
- other objective factors (such as minimum qualifications and certifications).
Develop Pay Analysis Groupings

As it did under previous guidance, OFCCP will develop Pay Analysis Groupings (PAGs) of "comparable" (not "similarly-situated") employees. According to FAQ 7, a PAG could aggregate employees from one or multiple job titles, units, categories. Generally, according to FAQ 14, OFCCP prefers each PAG to contain at least 30 employees under a similar pay system who perform broadly similar job functions.

Statistically Control for Differences

Depending on information provided to OFCCP by the contractor, OFCCP will statistically control for additional differences among PAGs, such as division, business unit, product line, location, company tenure, prior experience, education, full-time status, grade level or range, etc. Disappointingly, this process enables OFCCP to continue its Obama-era practice of aggregating potentially dissimilarly-situated employees in a statistical analysis. OFCCP will try to ensure that there are at least 10 observations (or employees) per control variable. For example, if a PAG has five control variables (e.g., sex, years in job, other years with company, years of prior experience, and required certification), under FAQ 14 and FAQ 15, that PAG would ideally have at least 50 employees.

Remedies and Sanctions

If a contractor cannot rebut OFCCP’s statistical and/or anecdotal findings of pay discrimination, OFCCP may pursue various remedies through conciliation, including back pay and benefits, interest, salary adjustments, and monetary relief, such as modifying policies and procedures or providing training opportunities, work assignments, promotions, and/or job placements. Should conciliation fail, and, according to FAQ 22, where OFCCP “finds strong evidence of discrimination,” OFCCP can pursue legal action and may seek sanctions to include cancellation of current federal contracts and debarment from entering future contracts.

IV. FUNCTIONAL AAPS

On September 11, 2018, the Office of Federal Contract Compliance Programs (OFCCP) published a notice in the Federal Register and a draft of a revised directive to “establish policies and procedures for requesting and maintaining FAAP Agreements.” The revised directive and notice suggest that OFCCP is seeking to increase functional affirmative action program (FAAP) participation. In fact, OFCCP has stated that FAAPs may offer a solution for today’s workforce and “encourages all contractors who need to develop an affirmative action program (AAP) to consider using a FAAP.” But contractors may want to carefully consider whether a FAAP agreement with OFCCP is right for them.

What is a FAAP?

A FAAP is an alternative form of AAP development offered by OFCCP for multi-establishment contractors that may find it more practical to prepare AAPS based on business function or line of business rather than establishment. Under OFCCP’s FAAP directive, contractors may combine employees in the same function (e.g., sales) or business division (e.g., jet engines) to create plans that span across establishments located in different cities, states, or regions.

Contractors interested in preparing a FAAP must apply for and enter into a FAAP agreement with OFCCP. Contractors may request FAAPs covering all employees if it makes sense both
business-wise and from an equal employment opportunity/affirmative action perspective, or they may mix and match, using some FAAPs and some traditional establishment-based AAPs. Every employee must be included in an affirmative action plan.

Directive 2013-01, effective April 28, 2016, was the last modification to the FAAP program and set forth the applicable requirements. Note that FAAP agreements are only available to supply and service contractors and subcontractors, not construction contractors.

What Is OFCCP Offering in the New FAAP Proposal?

As a revamp of Directive 2013-01, the agency’s new FAAP proposed directive proposes revisions to FAAP requirements. The proposed directive, on its face, looks more favorable to contractors, but the nuances are complex.

Below are some of the revisions proposed by the new directive:

- **Contractors will not be required to update FAAP agreements on an annual basis.** This sounds good, except there is a requirement to modify a FAAP agreement with every merger, acquisition, reorganization, and/or downsizing that occurs during the term of the FAAP agreement, if it affects the AAP structure. The contractor must notify OFCCP within 60 days of the effective date of the change. For some employers, this requirement could result in more frequent updates than once a year and could result in the release of highly confidential, proprietary information before a company is ready to make a public announcement. Note that the new proposed certification requirement for traditional establishment AAPs will only require annual updates.

- **Failure to submit a timely modification notice to OFCCP could trigger a compliance evaluation, and repeated failures could lead to the termination of a contractor’s FAAP agreement.** This requirement allows OFCCP to step outside of its normal scheduled review process and conduct a review for untimely modification notices.

- **The exemption period for a FAAP unit that has completed a compliance review will be expanded from 24 months to 36 months from the date OFCCP closed the previous evaluation.** The scheduling methodology accompanying OFCCP’s September 7, 2018, corporate scheduling announcement letters (CSALs) explain that OFCCP will be permitting a five-year moratorium on scheduling reviews after an OFCCP evaluation is closed. Therefore, contractors using FAAPs have a lesser moratorium on scheduling than facility based-AAPs, which could potentially result in more scheduling for contractors with FAAPs.

- **FAAP agreements will last for five years rather than three years.** For contractors that expect few changes over time, this expanded period before certification expires may be beneficial. But as indicated above, for large employers that buy, sell, merge, and restructure, the length of the FAAP agreement creates more administrative hassle of reporting modifications to OFCCP as they occur.

- **The new directive is silent regarding any requirement that contractors with an approved FAAP agreement must be audited at least once during the term of the agreement.** Employers may see this as a plus, but given other changes in the proposed directive and the limited number of current FAAP agreements, it is likely that most contractors with a
FAAP agreement will undergo at least one compliance evaluation at a FAAP unit during the course of a five-year agreement.

- **OFCCP has made it easier to apply for a FAAP by removing the three-year waiting period for reapplying for a FAAP following the termination of an agreement and eliminating consideration of a contractor’s equal employment compliance history when deciding whether to approve a FAAP request.** OFCCP is clearly trying to make the FAAP program more appealing to employers.

*To FAAP, or Not to FAAP: That Is the Question*

Employers that are on the fence as to whether a FAAP agreement may be more practical may want to consider the following:

- On September 7, 2018, OFCCP sent CSALs to 66 FAAP functional units. According to the notice in the *Federal Register*, OFCCP currently only has 71 FAAP agreements in effect. If only one unit of a contractor is audited and next year’s data matches this year’s CSALs, the chances of a compliance review in the next fiscal year is practically guaranteed.

- FAAPs normally include employees who work at different facilities located in states across the region or the country. If OFCCP conducts an on-site visit, it will have access to even more records that at the desk audit stage and will also interview managers and employees at all of the locations covered by the FAAP.

- Many employers with FAAPs also end up preparing establishment AAPs since not all employees belong in the FAAPs based on function or business line. Because of this, human resources may need to closely monitor who belongs in each plan. Maintaining a FAAP may be more complicated than maintaining establishment AAPs.

- Once a contractor opts in to a FAAP agreement, it has to take action to get out. Contractors requesting, modifying, certifying, or terminating a FAAP agreement must follow the procedures outlined in the directive. And if an employer is in an open compliance evaluation when its FAAP is set to expire, OFCCP may extend the terms of an existing FAAP agreement until the evaluation is completed. This would keep all of the other FAAP units open to selection for review.

*V. EEO-1s AND PAY DATA*

Employers will recall that in 2014, President Obama issued a memorandum directing the Equal Employment Opportunity Commission (EEOC) to develop a pay data collection. In September 2016, after receiving approval from the Office of Management and Budget (OMB), the EEOC announced that this pay data collection would be implemented in December 2017 (15 months later) through a revision of the annual EEO-1 report filed by many employers. After the election of President Trump, however, the OMB paused the rule, pending review under the Paperwork Reduction Act, in order to assess the burden of such a data collection on employers. The National Women’s Law Center and the Labor Council for Latin American Advancement sued the OMB in November 2017, claiming that the OMB’s stay was unlawful.

In a surprising development on March 4, 2019, the U.S. District Court for the District of Columbia issued an order lifting the stay of the pay data collection component of the EEO-1.
the order, Judge Tanya S. Chutkan rejected the OMB’s decision to stay the pay data collection requirement, finding that the OMB failed to show justification for the stay. Accordingly, she ordered that the stay of the pay data collection requirement be vacated.

On March 18, the Equal Employment Opportunity Commission (EEOC) released the following statement on the pay data component:

The EEOC is working diligently on next steps in the wake of the court’s order in National Women’s Law Center, et al., v. Office of Management and Budget, et al., Civil Action No. 17-cv-2458 (TSC), which vacated the OMB stay on collection of Component 2 EEO-1 pay data. The EEOC will provide further information as soon as possible.

As of the date these materials were compiled, EEOC has provided no other information about the future implementation, if any, of the pay data component information in the EEO-1.

VI. CONCLUSION

As a result of the directives discussed above, as well as Director Leen’s announced plans and initiatives, contractors can expect more audits, increased focus on the disabled (accommodation, outreach, etc.), continued focus on compensation, audits for non-compliant contractors, emphasis by OFCCP on early resolution of alleged violations discovered during an audit, and publication of audit settlements by the agency. OFCCP shows no signs of slowing down in FY 2019, as can be seen by the agency’s announcement of 3,000 compliance reviews that will be scheduled throughout the United States in the next few months.

OFCCP’s compliance reviews always involve scrutiny of compensation, hiring, and outreach and recruitment and the agency has given ample guidance on its methodology for evaluating each of these processes. Contractors will be well-served to ensure that their policies and procedures in these areas are consistent, well-documented, and defensible.
OFCCP Enforcement During the Trump Administration—What Federal Contractors Need to Know

Presenters
Scott Kelly (Birmingham) and Leigh Nason (Columbia)

Moderator
Tevis Marshall (Richmond)

Agenda

- OFCCP on a roll . . .
  - Directives
  - 3,000 anticipated audits within months
  - Section 503 (and VEVRAA?) Focused Reviews
- Data analytics is where it’s “at” for compensation (and hiring)
- Proposed FAAP Directive
- EEO-1s and Pay Data Collection
- Other Developments and Best Practices
OFCCP Key Personnel and Leadership Changes

- December 2018: Craig Leen named Acting (Political) Director
- Marika Litras: Director of Enforcement -> Deputy Director
- Bob LaJeunesse, Branch Chief for Expert Analysis -> Acting Director of Enforcement
- Regional Director vacancies – Pacific (Melissa Speer (SWARM) is Acting RD); Midwest (Sam Maiden (SE) is Acting RD)
- No Ombudsman yet

What Are OFCCP “Directives”?  

- Directives provide guidance to OFCCP and contractors on enforcement and compliance policy
- Directives do not change laws or regulations
- Directives do not create any legally-enforceable rights or obligations
- **BUT**: directives give insight into OFCCP’s focus areas and enforcement methodology
Leen’s Directives (as of March 2019)

- 2018-03: Faith-Based Organizations
- 2018-04: Focused Reviews
- 2018-05: Analysis of Contractor Compensation Practices
- 2018-06: Contractor Recognition Program
- 2018-07: AAP Verification Initiative
- 2018-08: Transparency in Compliance Activities
- 2018-09: OFCCP Ombud Service
- 2019-01: Compliance Review Procedures
- 2019-02: Early Resolution Procedures
- 2019-03: Opinion Letters and Help Desk
- 2019-04: Voluntary Enterprise-Wide Review Program (VERP)

2018-05: Compensation Guidance and FAQs

- In a nutshell
  - OFCCP is trying to find and remedy pay issues and will spend lots of time on this issue
  - Contractors were looking for clear, unequivocal guidance to replace prior directive. This isn’t it.
  - OFCCP has enormous discretion in choosing how to analyze pay and results may be counter-intuitive or even contrary to other pay studies
  - Internal OFCCP tool allows compliance officers the leeway to run multiple models to find one that allegedly shows discrimination
Section 503 Focused Reviews

- New scheduling letter
- OFCCP Landing Page
  - Disability Inclusion Video
  - Disability Rights Factsheet
  - Reasonable Accommodations Pocket Card
  - Best Practices
  - ODEP Resources
  - Section 503 Resources
  - Learn How to File a Complaint

2018-05: Compensation Guidance and FAQs

- What types of pay cases?
  - Systemic, generally → “pattern or practice” discrimination
  - Could also be individual → individual disparate treatment or “cohort” comparisons
  - Focus: Inequities in monetary compensation
  - Focus: Inequitable training or advancement opportunities
  - Focus: Assignment/placement differences
  - Anecdotal evidence to support systemic allegation: MAYBE
  - What pay data will be reviewed?
2018-05: Compensation Guidance and FAQs

- How will OFCCP group pay data?
  - Will identify similarly-situated employees
    - “Those who would be expected to be paid the same” based on
      - Job similarity (tasks performed, skills, complexity of duties) and
      - Other objective factors (minimum qualifications, certifications)
  - Will develop pay analysis groupings (PAGs)
    - “Comparable” employees from one or more job titles, units, categories
    - OFCCP wants each PAG to contain at least 30 employees
  - Will statistically control for differences

- What if OFCCP finds problems with compensation?
  - Will issue a PDN
  - Will provide contractors with data necessary to replicate OFCCP’s regression results
  - If contractor cannot rebut, will issue NOV and conciliation agreement
  - Will seek back pay + benefits + interest for affected class
  - Debarment is highly unlikely without litigation/enforcement
2018-05: Compensation Guidance and FAQs

- Regulations require contractors to perform in-depth analyses of total employment process, including compensation, to ensure nondiscrimination
  - FAQs suggest “self-audits” with reports to management
  - Not required under regulations
- **Best practice**: review and possibly revise AAP job groups to reflect compensation architecture

---

2018-05: Compensation Guidance and FAQs

- **Best practice**: keep as much compensation data electronically as possible (if you can verify accuracy)
- No particular form of analysis required but should perform any proactive and voluntary analysis under privilege
- OFCCP is not the only fox in your henhouse: EEOC, state and local laws, Title VII/Equal Pay Act litigation may also occur
2018-08: Transparent Compliance Evaluations

- Will grant extensions of time for desk audit submission in “extraordinary” circumstances
  - Currently: must submit “basic AAPs” within 30 days
  - May get 30-day extension of support data if request it before AAP is due
- Notice to Show Cause (NSC) issued if AAPs are not submitted timely
  - 30 days to give OFCCP reasons why AAPs are not submitted
  - Currently: OFCCP may issue 2 NSCs for “denial of access” before proceeding to enforcement
- Goal is to close desk audits in 45 days

2018-08: Transparent Compliance Evaluations

- OFCCP must limit its data requests before concluding desk audit
- Post-desk audit supplemental requests must include the “basis for the request, be reasonably tailored to the areas of concern, and allow for a reasonable time to respond”
- Will notify contractor of “preliminary indicators” of discrimination found in OFCCP’s investigation
- Will provide contractors with status updates
- Will collaborate with contractors during the conciliation process, offering to involve OFCCP statisticians in discussions
- Now posting all conciliation agreements on OFCCP website – substantive (discrimination) and technical violations
Proposed: FAAPs

- September 2018: OFCCP published Notice and draft of revised FAAP directive; sought comments
  - No final directive yet
  - Only 7 comments filed
- FAAP: functional AAPs for multi-establishment contractors
- Requires approval by OFCCP and notification to OFCCP of any mergers, acquisitions, etc. that affect the AAP structure
- Audits of FAAPs involve large groups of people and more likelihood for systemic discrimination allegations
- FAAPs make OFCCP’s compensation scrutiny easier as the employees are already similarly-situated by function
- Other pros and cons of FAAPs

Proposed: FAAPs

- Proposed Revisions to FAAP Directive
  - Must be updated on an annual basis (and with each acquisition, merger, reorganization, or downsizing)
  - Failure to submit timely modification could trigger OFCCP compliance review or termination of FAAP agreement
  - Exemption from repeat audits would be expanded from 24 months to 36 months
  - FAAP agreements would last 5 years (as opposed to 3 years)
  - No indication of whether “required audits” will continue
  - Easier application process
- More pros and cons of FAAPs
EEO-1s and Pay Data

- **May 31, 2019 Filing Deadline**
- **Pay Data Component**
  - Stayed, then stay vacated in March 2019
- **Why Are EEO-1s Important?**
  - OFCCP uses information as part of audit selection methodology
  - EEOC uses information to aggregate private industry demographics/job patterns

In Other News . . .

- OFCCP has published audit methodology
  - Contractors can still push back if exempt
- Corporate Scheduling Announcement Letters
  - Part of transparency initiative
  - Next round of audits (3,000) will start on _____ and includes 500 Section 503 Focused Reviews
- Memorandum of Understanding with NILG
- Compliance guide for colleges/universities
- Construction regulatory update: none yet, although promised
So What Does All This Mean for You?

- More audits, quicker closures, faster response time required
  - OFCCP may not do “deep dive” into ALL statistical indicators
- OFCCP’s “bread and butter” is discrimination!
  - Hiring: low skilled, high turnover jobs
  - Compensation: discretionary and variable pay practices are prime targets, as are highly-paid managers and professionals

So What Does All This Mean for You?

- Compensation
  - Know what your data shows
  - Review your AAP job groups to reflect compensation architecture
  - Understand that white males can be victims of discrimination as well
  - “Fixing” pay equity problems for one protected group could lead to problems for other groups
  - Conduct all analyses under privilege
So What Does All This Mean for You?

- Friendlier, more “transparent” OFCCP interactions
- More consistency between regions and offices (at least in theory)
- More emphasis on disabled and veteran issues
  - Audit and documentation requirement; list of efforts is not enough – OFCCP wants narrative explanation of efforts
  - Focused reviews will enhance efforts and compliance (but likely lead to conciliation agreements)

So What Does All This Mean for You?

- Resolving problem audits: transparency in process but vigorous prosecution of noncompliance/discrimination
- Stay tuned . . . It might be a wild(er) ride!
OFCCP Enforcement During the Trump Administration—What Federal Contractors Need to Know

Presenters
Scott Kelly (Birmingham) and Leigh Nason (Columbia)

Moderator
Tevis Marshall (Richmond)