

CLIENT UPDATE

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APRIL 2022

This client update highlights the changed direction at OFCCP as it alters initiatives, directives, and regulations that the prior OFCCP administration put in place as due process guardrails for employers. These proposed regulatory and directive changes are not surprising. Whenever there is a shift in the political party that holds the Executive Office and the executive branch of government, there tends to be a shift in OFCCP's enforcement philosophy and priorities. It is important that organizations be aware of this shift and prepare accordingly. The initiatives we discuss below will result in looser standards and less transparency and due process from OFCCP to employers and undo a large part of OFCCP's rulemaking during the Trump administration.

This Client Update addresses seven topics. The first three topics are related to the OFCCP's realignment of its compliance review procedures, and the last four topics are informational.

1. [The new OFCCP Pay Equity Audits directive \(#2022-01\);](#)
2. [The new OFCCP Effective Compliance Evaluations and Enforcement directive \(#2022-02\);](#)
3. [The Notice of Proposed Rulemaking \(NPRM\) in the March 22 Federal Register regarding OFCCP's enforcement procedures;](#)
4. [The OFCCP's Contractor Portal;](#)
5. [The EEOC's collection of EEO-1 data starting on April 12;](#)
6. [The National ILG Conference in Boston July 25-28; and](#)
7. [The OFCCP's new Veteran Hiring Benchmark.](#)

1. OFCCP'S PAY EQUITY AUDITS DIRECTIVE 2022-01

On March 15, 2022, OFCCP issued directive 2022-01 labeled "Pay Equity Audits." Its stated purposes are to "provide guidance on how OFCCP will evaluate federal contractors' compliance with pay equity audit obligations" and "clarify OFCCP's authority to access and review pay equity audits conducted pursuant to 41 CFR Section 60-2.17(b)(3)."

The directive can be summed up in a few bullet points:

- OFCCP's regulations require employers to "perform an in-depth analysis of their total employment practices to determine whether and where impediments to equal opportunity exist."
- OFCCP's regulations also state that contractors should be conducting "an in-depth analysis of their compensation systems to determine whether there are gender-, race-, or ethnicity-based disparities."
- Contractors are required under the regulations to perform this analysis, and OFCCP is entitled to ask contractors to produce the analysis that was performed to demonstrate compliance with this regulatory requirement.
- The regulatory requirement that employers conduct pay equity audits as part of their affirmative action plan does not specify the methodology that contractors may use. The regulations do not require the use of regression or statistical analyses.
- The analyses that employers prepare to meet this regulatory obligation cannot be withheld from OFCCP on the basis of attorney-client privilege or the attorney work-product doctrine.
- The contractor may conduct its own separate pay equity audit under attorney-client privilege, and OFCCP will not require submission of that separate analysis.
- OFCCP will continue to use the methodology in its 2018 directive when it evaluates employer compensation data during a compliance evaluation, which relies on the use of regression analysis to assess contractor's pay practices, albeit not exclusively.

Regarding the use of regression analyses, some individuals, including individuals at OFCCP, may believe that the regulations require use of regression analysis to meet the requirements of 60-2.17(b)(3), but that is false.

- Because the regulations do not define "in-depth analysis," it is relevant to go back to the year 2000, when OFCCP first inserted that provision in its regulations, to appreciate the context and meaning of the words and the requirement.
- On November 13, 2000, when OFCCP published its Final Rule in The Federal Register (65 FR 68021, at 68036), regarding compensation analyses in 41 CFR

Section 60-2.17(b)(3) and in response to contractor concerns about the burden such a requirement might impose, OFCCP indicated that the new provision would add no time or burden because contractors already were required to ensure that they were not discriminating in pay or compensation. Moreover, in response to any inference that OFCCP was somehow prescribing a methodology, OFCCP stated quite clearly: “In addition, contractors have the ability to choose a type of compensation analysis that will determine whether there are gender-, race-, or ethnicity-based disparities.”

- The regulation itself has not changed since 2000. Thus, there never has been any regulatory requirement that a contractor use regression analyses to evaluate pay.

Using a job title cohort may be the best approach for most contractors to satisfy the requirements of 2.17(b)(3) because job title is the grouping that most likely meets the legal standard of “similarly situated” for most employers.

Should an employer wish to retain counsel to evaluate pay using regression analysis for purpose of obtaining legal advice regarding compliance with any other equal opportunity pay laws or regulations – such as Title VII, the Equal Pay Act, state fair pay laws, or for advice regarding the best and most strategic way to submit compensation to OFCCP in response to itemized listing 19 in an audit – it can continue to do that under attorney-client privilege and not have to submit those analyses to OFCCP.

But to reiterate—what the employer retains counsel to develop and advise on probably should not be the analysis that it prepares in order to comply with 60-2.17(b)(3). Contractors should consider preparing an analysis that evaluates compensation for compliance purposes in accordance with 2.17(b)(3), and then separately retaining counsel to advise the organization and to oversee a separate pay equity analysis using regression or other statistical methodologies to assess pay equity from a broader, systemic lens under attorney client privilege.

Where the tension arises in audits, however, has to do with how OFCCP evaluates pay.

- If you give OFCCP only the variables asked for by the scheduling letter, but do not give OFCCP any direction or guidance on how you want it to evaluate pay, you are leaving it up to OFCCP’s own devices to conduct an open-ended interview with your compensation witness, ask for massive databases and variables, and group your employees as it sees fit.
- If you have done a more rigorous analysis under attorney client privilege – for example, one that follows OFCCP’s Directive 2018-05, and you use information gleaned from the privileged analysis to prepare a compensation witness and guide OFCCP to replicate that same analysis on its end – it makes it far less likely that

OFCCP will go off on its own or will find your analysis to be deficient.

- The more you do OFCCP's analytical work for it, and give it to OFCCP in an audit, the less pushback you are likely to get.
- The more you convey to OFCCP that you gave it only the minimum you were required to give, and it should do its own original analytical work, the more you risk having OFCCP group job titles and employees in ways that make no sense to your organization.

Towards that end, and consistent with its new enforcement directive (see below), OFCCP is giving itself wide latitude to issue follow-up requests for information in compliance reviews:

"If the desk audit reveals disparities in pay or other concerns about the contractor's compensation practices, OFCCP may request additional information to investigate the contractor's compliance. This additional information may include, but is not limited to, additional compensation data, follow-up interviews, and additional records and information from the contractor, including its pay equity audit conducted pursuant to 2.17(b)(3). OFCCP may also request data relating to understanding compensation practices and disparities, such as factors that are not provided to OFCCP in the Item 19 submission including, but not limited to, information on prior experience or education, or other factors that may affect compensation, such as promotion, assignment or steering patterns."

OFCCP also stated that it intends to review the contractor's pay equity audit conducted pursuant to 2.17(b)(3) to understand the methodology used and verify compliance with the requirement. "Failure to provide the required pay equity audit will be considered by OFCCP as an admission of noncompliance with these regulatory requirements." Thus, during audits:

"OFCCP will request that the contractor provide a complete copy of the pay equity audit(s) conducted pursuant to 2.17(b)(3) 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."

Last, OFCCP stated that contractors cannot withhold their proof of compliance with 2.17(b)(3) by asserting privilege, but it acknowledged that employers could conduct pay audits under privilege. ("The contractor may conduct a separate pay equity audit for the purpose of obtaining

privileged legal advice, and not for demonstrating compliance with OFCCP regulations.”)

In sum:

1. Contractors should consider conducting a job title cohort analysis with some very simple explanatory variables to meet the requirements of 2.17(b)(3). For most employers, job title is the most accurate grouping of “similarly situated” employees.
2. Because OFCCP is signaling that it intends to ask for these analyses during audits, contractors need to follow-through and investigate the job titles with flags or indicators of unexplained pay differences.
3. Separate from the analysis that they prepare to comply with 2.17(b)(3), employers may continue to conduct privileged pay analyses that they do not have to share with OFCCP, but employers need to be clear from the outset that such an analysis is not being performed to meet its 2.17(b)(3) regulatory requirement. For example, articulating at the outset that such an analysis is being conducted under the Equal Pay Act, Title VII, state pay equity laws, and the like, and not for 2.17(b)(3) compliance purposes will memorialize the contractor’s intent to prepare privileged pay analyses for a separate purpose.
4. To the extent an employer wants to do a systemic pay analysis using the approach that OFCCP uses (see OFCCP Directive 2018-05) to determine how the compensation component of an OFCCP compliance review might proceed, it should do that separately and under attorney-client privilege. Roffman Horvitz would be pleased to assist in that regard.

2. OFCCP’S EFFECTIVE COMPLIANCE EVALUATIONS AND ENFORCEMENT DIRECTIVE (2022-02)

As noted in our opening remarks, OFCCP is moving away from the compliance assistance posture it took during the Trump-Leen administration and towards more vigorous enforcement during compliance evaluations. OFCCP is rescinding directives that provided employers more transparency and open communication during compliance evaluations because of the current OFCCP leadership’s belief that those directives “run counter to OFCCP’s goal of conducting comprehensive compliance evaluations that foster consistent accountability and timely submission of required information.”

BIDEN/YANG OFCCP	TRUMP/LEEN OFCCP
<p>Publish the Corporate Scheduling Announcement List (CSAL) but give district offices authority to issue scheduling letters immediately with no waiting period; philosophy is that all employers need to be audit ready at all times.</p>	<p>Published the CSAL and waited 45 days before sending out new scheduling letters to give employers a chance to conduct self-audit, correct mistakes, and prepare for the evaluation</p>
<p>No extensions except in extraordinary circumstances. Extraordinary circumstances include (1) extended medical absences of key personnel; (2) death in the immediate family of key personnel; (3) localized or company-specific disaster affecting records retrieval, such as flood, fire or computer virus; (4) unexpected military service absence of key personnel; and (5) unexpected turnover or departure of key affirmative action official.</p>	<p>Allowed contractors an additional 30 days to submit the more complicated aspects of data analysis on hires, applicants, promotions, terminations and compensation, which especially helped employers who had to pull an additional six months of data because they received OFCCP's audit letter more than six months into the current year's AAP</p>
<p>OFCCP may directly contact workers without the contractor serving as an intermediary. 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 former employees who are relevant to the investigation, OFCCP may request best available contact information, including all information available on file such as telephone numbers, mailing addresses, email addresses, and SSNs.</p> <ul style="list-style-type: none"> • It doesn't seem to matter to OFCCP whether it shuts down an entire production line or pulls multiple employees out of an entire department all at once. • The employer's ability to schedule its workers appears irrelevant to the OFCCP's interview plans • OFCCP doesn't want the employer to prepare any employees in advance. • OFCCP wants the right to use the employer's email system to contact employees or give it the personal email addresses of employees • It's unclear whether the OFCCP intends to interview employees on non-working time or working time, and if on working time, whether this creates any wage and hour issues • For employees whose pay is based on production quotas, it appears that it will be up to the employee to notify the employer to ensure that the employee is given credit for investigation time off 	<p>The prior administration—and every administration prior to that—did not have a directive that addressed the interview portion of an onsite, but in practice:</p> <ul style="list-style-type: none"> • If OFCCP needed to speak with employees during routine compliance reviews, it always would coordinate with the employer. For the most part, OFCCP coordinated with the employer when OFCCP needed to interview witnesses during complaint investigations, too. • The employer would notify the employee's immediate supervisors about the need for the employee to be absent and provide a rough timeframe for how long the employee would be away from the office or manufacturing workstation. • The employer could allay employee fears about why OFCCP needed to interview the employee and allow the employee to ask questions in advance where time has passed and memories have faded. Employees often appreciated having their recollections refreshed with the employer's documents. • The OFCCP respected the employer's need to ensure multiple people from the same production line or same department were not absent all at once or interviewed one after the other in a manner that affected productivity. • Employers also had a heads up if they needed to deal with time-card or wage and hour issues associated with employees taking time away from production/quota-driven jobs to speak with OFCCP.

This directive also rescinds 2018-06, Contractor Recognition Program; 2018-08 Transparency in OFCCP Compliance Activities; 2021-02, 2020-02, Efficiency in Compliance Evaluations; and 2021-02, Certainty in OFCCP Policies and Procedures.

In addition, although there was no directive or regulation preventing the OFCCP during the Trump Administration from asking for data and documents after the date of the scheduling letter, the OFCCP was far more likely to ask for data going only 2 years back from the date of the scheduling letter and less likely to ask to bring the data forward. In a few cases, if a calendar year employer received its letter in October, but submitted data only through June 30, OFCCP might ask the employer for data from July 1 through December 31 so it had data that matched the employer's typical AAP data cycle and not a meaningless two year data period with a random start and end date that matched only the scheduling letter issuance date and not the employer's typical AAP data analysis cycle. To our recollection, the OFCCP during the Trump Administration never asked for data beyond the AAP year in which the audit began.

In short, contractors can expect less transparency, coordination, deference, flexibility and due process from OFCCP than they were afforded under the prior administration's directives, and less time to prepare for audits. It will be a hardship for some employers who receive their audit scheduling letter shortly after their plan year renews to be ready to submit their materials in 30 days from receipt of the scheduling letter. Most employers spend considerable time and effort ensuring the accuracy and internal reliability of their data before submitting it to the OFCCP in an audit, and these new timeframes will be challenging for some employers to adhere to. For employers that are concerned about the obligation to provide personal and private information about employees, such as SSNs, personal email addresses, and mobile cell phone numbers, please remember that there are confidentiality and relevancy arguments under 60-1.20(f), 60-1.20(g), and 60-1.43, and that regulations supersede a directive.

If your organization appears on the next CSAL (which OFCCP is rumored to be releasing in late May or June 2022), we strongly encourage you to let us help you conduct a self-audit under attorney client privilege. Get ahead of preparations so that when the audit letter arrives, and you have only 30 days from receipt to submit, you're already on the path towards gathering the information or correcting issues that surfaced in the self-audit.

3. NOTICE OF PROPOSED RULEMAKING REGARDING ENFORCEMENT PROCEDURES

On March 22, 2022, the OFCCP issued a Notice of Proposed Rulemaking (NPRM) aimed at rescinding the evidentiary and due process standards for issuing Predetermination Notices (PDN) and Notices of Violation (NOVs) set by a November 2020 final rule during the Leen OFCCP Administration. Prior to the November 2020 rule, the OFCCP maintained an inconsistent approach to giving contractors clear, timely, and transparent information regarding potential violations and discrimination allegations. The November 2020 rule finally codified the OFCCP's due process steps and thresholds and set reasonable and clear evidentiary standards that the agency would meet before issuing pre-enforcement notices.

- In disparate treatment cases, the agency must show qualitative evidence of discriminatory intent to cause a disparity and quantitative evidence of a disparity that is both statistically and practically significant.
- For disparate impact cases, the OFCCP must show qualitative evidence of a discriminatory policy as well as statistically and practically significant disparities.

Citing delays in resolution due to difficulties in meeting these evidentiary requirements, the OFCCP now proposes a rule that would remove those requirements and the definitions of qualitative and quantitative evidence, among other topics being altered.

- OFCCP asserts that the requirements to show practical significance and anecdotal evidence are inconsistent with Title VII discrimination law standards and unnecessarily require the agency to be “trial-ready” while still in the pre-enforcement stages.
- Furthermore, the agency asserts that the requirement to show anecdotal evidence would have a “chilling effect” on the willingness of witnesses to provide information out of fear of retaliation.

Employer groups have a different perspective, not surprisingly. When OFCCP conducts an onsite visit and interviews employees, the employer is not allowed to have a representative present. Thus, the employer never has any lens into the relevance of OFCCP's questions, the truthfulness of the witness's answers, or the time frame of the questions asked and answered. OFCCP will allege discrimination and claim that it has strong anecdotal evidence from witness statements, but the employer is not allowed to see those statements unless it wants to go to enforcement. Prior to the November 2020 rule, many employers felt pressured into settling discrimination allegations based on unsubstantiated statistical analyses and anecdotal evidence they could not verify.

Moreover, ensuring that OFCCP was “trial ready” and compelling OFCCP to share its evidence

meant that if OFCCP was proceeding to a PDN or violation stage, it had legitimate, verifiable information on which the contractor could make an informed settlement decision. By revealing its evidence to the employer, OFCCP could convince employers to assess more accurately their chances of success or failure.

The new proposed rule gives OFCCP more discretion to issue a Predetermination Notice regarding preliminary indicators of discrimination without disclosing all violations up front and without affording the employer due process on subsequently identified violations. The proposed rule states in the first sentence below that OFCCP may – not must – include all violations in the PDN. But any violation not included in the initial PDN may mean that the employer does not have a full opportunity to present additional records or defenses before OFCCP proceeds to the NOV or SCN phase:

“The Predetermination Notice may also include other potential violations that OFCCP has identified at that stage of the review. After OFCCP issues the Predetermination Notice, the agency may identify additional violations and include them in a subsequent Notice of Violation or Show Cause Notice without amending the Predetermination Notice.”

Any contractor who wishes to provide comment for this NPRM will need to submit before the April 21 deadline, and if your organization does not want to submit on its letterhead, we would be pleased to incorporate your thoughts into our comments. We think this rule will result in more controversy and more litigious positions during routine audits and will not facilitate settlement. When OFCCP had concrete evidence and a strong statistical position regarding discrimination allegations, and it presented that evidence to the employer during an audit, most organizations settled rather than fought.

4. UPDATE ON THE OFCCP'S CONTRACTOR PORTAL

On March 31, 2022, OFCCP activated the certification feature, allowing supply and service organizations that are required to prepare annual affirmative action plans to certify that they have AAPs for the list of establishments in the portal. [By way of reminder, OFCCP is not expecting construction contractor organizations to register].

- Contractors are required to certify compliance on or before June 30, 2022. Contractors will be able to “certify all” in one fell swoop or certify each establishment separately.
- For any establishment in the portal for which you do not prepare AAPs, it appears you can “close” the facility. OFCCP is not removing from the database establishments that you have sold off; if you send OFCCP a request through the portal help line to remove facilities that you sold off, they simply are marking them “closed” in the portal. Which any Admin User can do, too.

For any organization that missed our February 1, 2022 email about the purpose of the portal or the mechanics of logging in for the first time, we re-attach it to this communication for reference.

If you have questions about portal registration, adding or closing facilities in the list, or certification, please send us an email and we will set up a screen share session to help you navigate in the portal.

5. EEOC'S EEO-1 FILING

The Equal Employment Opportunity Commission will be opening its data portal soon to collect race and gender demographics for US employers with 100 or more employees and government contractors with 50 or more employees. The EEOC's EEO-1 portal will open on April 12 and close on May 17.

- The EEOC's Filer Support Center website recently made available on 3/22 the Instruction Booklet for the 2021 Filing, and updated FAQs.
- As a reminder, organizations that previously filed Type 6 reports for their small locations no longer will be able to do that. Organizations need to migrate over to the Type 8 upload format.

- If you have questions about counting Remote employees, we encourage you to read the EEOC's FAQs regarding remote workers.
<https://eeocdata.org/EEO1/support/faq>

If your organization needs assistance vetting your payroll data (which must be captured from a payroll that was run between October 1 and December 31, 2021), configuring the data for the batch upload, or uploading and certifying in the EEOC's portal, please contact us.

6. THE NATIONAL ILG CONFERENCE IN BOSTON, MASSACHUSETTS - JULY 25-28, 2022

We encourage you to consider coming to the National ILG conference in Boston MA, to network in person with other EEO compliance professionals, consultants, attorneys, and federal government officials from OFCCP, EEOC, and ODEP. This year's conference will be at the Omni Seaport Boston from July 25-28. Attorneys from Roffman Horvitz will be presenting in several sessions, and it's a great opportunity to hear directly from OFCCP's Director, top National Office officials, and OFCCP's six Regional Directors about OFCCP initiatives, compliance, and enforcement plans.

Please go to <https://nilgconference.com> to register or view the conference agenda.

7. THE OFCCP'S NEW VETERAN HIRING BENCHMARK

OFCCP announced that it is lowering the veteran hiring benchmark from 5.6% to 5.5% for employers with plan years that begin on or after April 1, 2022. For employers with 2022 calendar year cycles, the benchmark is 5.6%.

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About Roffman Horvitz

Roffman Horvitz, PLC was built from the ground up to provide a best-in-class outside counsel option for federal contractor employers in the areas of OFCCP compliance, affirmative action plan preparation and design, and employment data analytics.



Alissa A. Horvitz

Alissa Horvitz is a Member Attorney in the firm she co-founded with Josh Roffman. Alissa focuses her practice on representing clients in various matters before the OFCCP, preparing for and defending OFCCP audits and onsite visits, responding to OFCCP information requests, and conducting live and in-person training seminars on OFCCP compliance.



Joshua S. Roffman

Joshua Roffman focuses his practice primarily on advising and overseeing the preparation of affirmative action plans, conducting privileged pay equity analyses, and representing clients in various matters before the Office of Federal Contract Compliance Programs (OFCCP) in all six OFCCP regions, preparing for and defending OFCCP audits and onsite visits, responding to OFCCP information requests, evaluating single entity claims, opposing OFCCP jurisdictional claims for companies without government contracts, petitioning OFCCP for separate facility exemptions, evaluating compliance with the Uniform Guidelines on Employee Selection Procedures, and facilitating the identification of Internet applicants per OFCCP regulations.



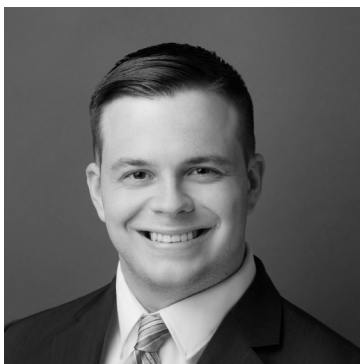
Nora K.S. Evans

Nora Evans's practice focuses on the preparation and review of affirmative action plans for federal contractors. She also assists clients in compliance reviews and uses regression analysis to evaluate compensation disparities and pay equity.



James M. McCauley

James McCauley is an Associate Attorney with Roffman Horvitz. His primary focus is assisting in the preparation of affirmative action plans for federal government contractors. James's experience includes creation and review of affirmative action plans, preparation of EEO-1 employment data, and analysis of applicant and hire records to address potential claims of hiring disparities.

**Christopher J. Laudenbach**

Christopher Laudenbach is a first-year Associate Attorney at Roffman Horvitz. He assists in the preparation and review of affirmative action plans for federal government contractors.