

CLIENT UPDATE

ALISSA A. HORVITZ
JOSHUA S. ROFFMAN
NORA K.S. EVANS
JAMES M. MCCAULEY
CHRISTOPHER J. LAUDENBACH

JANUARY 2021

RECENT OFCCP DEVELOPMENTS

As the Trump Administration OFCCP era comes to a conclusion, we wanted to summarize recent developments in our first Client Update of 2021.

AAP Verification Interface	2
Scheduling Letters for Promotions and Accommodations Reviews	4
Corporate Scheduling Announcement List	5
Accommodation Reviews	5
Promotion Reviews	6
Employment Resource Referral Directory	7
Executive Order 13950	8
New Supply and Service Technical Assistance Guide	8
California Pay Equity Reporting Obligations due March 31, 2021	9
Oracle Administrative Law Judge Decision	10
New Memorandum of Understanding (MOU) with EEOC and DOJ	13
OFCCP Final Rule Regarding TRICARE Enforcement	15
Religious Exemption Final Regulation	16
Final Rule on Procedures to Resolve Potential Employment Discrimination	17

AAP VERIFICATION INTERFACE

Although the public comment period closed in November regarding OFCCP's efforts to have government contractors certify annually that they are compliant with their affirmative action plan obligations, OFCCP recently announced that it would afford the public an additional 30 days to submit comments because only 16 comments were submitted during the first comment period. The OFCCP did not indicate how soon it would implement this proposal, and it also has not stated what the consequences would be to employers that fail to certify (a) in a timely manner or (b) not at all. It will be important for government contractors to prepare their 2021 and 2021-22 AAPs in as timely a fashion as resources permit so that when this certification proposal becomes effective, they are not scrambling to prepare their AAPs to meet the certification deadline.

OFCCP offered several different proposals in its request for comments, some of which could be very onerous for some government contractors. We address the proposals from least worrisome to most worrisome and then discuss the three certification statement choices from which contractors will choose the one that applies.

Certification and Audit Interface Option

- Alternate Option #3: Every government contractor and subcontractor would logon to a secure portal every **two** years and certify that they have prepared, or are current in, their affirmative action plan compliance obligations
 - o There currently is no database of subcontractors outside the construction contracting world, so supply and service subcontractors would be on their honor to certify
 - o The OFCCP has the ability to cross-reference certifications only by direct government contractors in its proposed AAP Verification Interface database with other government contracting portals such as the System for Award Management (SAM) and identify direct contractors that have failed to certify.
 - o Certifying every two years would be the least burdensome for contractors
- Alternate Option #1: Every government contractor and subcontractor would logon to a secure portal every year and certify compliance. Contractors that are selected for a compliance evaluation would continue to submit their AAPs as they do now: via email or delivery service.
 - o This proposal combination would require certification every year, but it would not require uploading of audit submission materials or annual AAPs.
- Compliance evaluation electronic upload: Separate and apart from the annual certification, any contractor that is required to submit their AAPs or data for a

compliance audit would do so by logging into the portal and uploading the information

- o Regardless of whether OFCCP elects to go with a bi-annual certification or annual certification, the OFCCP would be expecting contractors to upload audit submissions via the portal
- o In light of the massive Russian hack of U.S. federal agencies in 2020, there is a lot of suspicion and doubt that contractor confidential and proprietary data would be secure
- Most onerous Alternate Option #2: Contractors would be required to certify and upload all of their AAPs annually through the portal
 - o For contractors that have dozens, if not hundreds or thousands of annual AAPs, this upload obligation would be costly and burdensome
 - o This option fails to acknowledge the amount of time required to ensure that contractor data is internally reliable and consistent
 - o It fails to acknowledge that some organizations stagger completion dates
 - o It would enable OFCCP to run adverse impact analyses using summary tables of hires, applicants, promotions and terminations and target for audits those employers whose data results imply that they are not following principles of equal opportunity

Certification Statements

Contractors would have three statement options from which to choose for their compliance representation:

1. Entity has developed and maintained affirmative action programs at each establishment, as applicable, 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.

There are different compliance timeframes for existing and new contractors:

- Existing contractors will have 90 days to comply with the certification requirement once it takes effect.
- New contractors and existing contractors who become subject to AAP requirements after the effective date will have 90 days after they have developed their AAP(s) to certify.
 - o Once a new contractor becomes subject to OFCCP's AAP requirements, it has 120

days to develop its AAP(s). The 90-day timeframe for annual certification begins after the 120-day timeframe to develop its first set of AAP(s).

During the 90-day period, OFCCP will provide compliance assistance to contractors upon request. Contractors will not be penalized in any way for requesting assistance.

After the initial certification year, OFCCP will set a date by which all existing contractors must renew their annual certification.

- OFCCP offered no lens into the timing of subsequent certifications

Other concerns:

- It is not clear who at the contractor's organization would register and have access to the portal
- It is not clear the level of executive that is expected to certify
- As noted above, we do not know what the consequences are for failing to certify, certifying inaccurately, or certifying late
- We do not know how mergers and acquisitions affect certification deadlines
- We do not know how a potential AAP data upload will impact the current randomized, neutral audit selection process
- If the portal solicits the starting and ending dates of the contractor's AAP cycle, the OFCCP can select the contractor more than six months into its AAP cycle for an audit. When OFCCP selects a contractor for an audit more than six months into its AAP cycle, the OFCCP requires the employer to submit at least 18 months of data, not just 12 months of data. The audit becomes more complicated, requiring more time and resources.
- In exchange for an annual certification or upload, it would be a welcome option for OFCCP to select employers only in the first half of their AAP cycle, to minimize the amount of time and data being submitted for review at the outset.

NEW SCHEDULING LETTERS FOR FOCUSED REVIEWS ON PROMOTIONS AND ACCOMMODATIONS

On December 22, 2020, the OFCCP submitted to the Office of Management and Budget two new scheduling letters (<https://roffmanhorvitz.com/documents/roffman-horvitz-2020-11-12-scheduling-letters.zip>) that it intends to use in its promotion focused review and accommodations focused review. In the September 2020 audit list (see next story), the OFCCP

identified which employers it will select for these new audit types over the course of the next fiscal year.

The new scheduling letters will require employers to submit not just the narrative portions of their affirmative action plans, but also will require the employer to submit:

- The job group representation at the start of the prior AAP year (which enables OFCCP to prepare promotion and termination impact ratio analysis equations);
- All of its transaction data (hires, applicants, promotions and terminations for the AAP year), and
- Line item compensation data in Excel using the same data end date that is used to develop the workforce analysis in the women and minorities AAP, among other requests.

CORPORATE SCHEDULING ANNOUNCEMENT LIST – SEPTEMBER 2020

The OFCCP released its Corporate Scheduling Announcement List in September 2020.

1. There are several flaws with the list.
 - a. When OFCCP finishes an audit, it includes the organization's information on its Pre-Award Registry, and the organization cannot be re-audited at that location until after 24 months have passed since the Notice of Closure.
 - b. Several compliance evaluations that OFCCP conducted and resolved in the last 2 years, and which should have been listed on its Pre-Award Registry, were omitted from the registry.
 - c. When OFCCP generated its 2020 list of organizations to audit, it supposedly ensured that organizations with recent closure letters were taken off the list.
 - d. But, because the Pre-Award Registry list was flawed, OFCCP's consistency check was flawed, and thus there are facilities on the CSAL list that were audited recently within the last 24 months. They should have been subject to the 24-month moratorium.
 - e. When the District Office schedules these moratorium facilities for a new review, they will need to request Administrative Closure.
2. The CSAL list identified 2250 Supply & Service employer establishments for compliance evaluations, including two new types of audits: Accommodations Focused Reviews and Promotion Focused Reviews.
 - a. In an accommodation focused review (<https://www.dol.gov/agencies/ofccp/focused-reviews/accommodations>), OFCCP will be evaluating contractors' compliance with the religious and disability accommodation obligations.

- i. The goal of the Accommodation reviews is to ensure that government contractors are not discriminating against employees and applicants through denials of accommodation requests and to provide technical compliance assistance to contractors
- ii. OFCCP will be examining the contractor's policies and procedures related to religious and disability accommodations. The compliance officer will review documentation related to accommodation requests and dispositions, with particular emphasis on denials of accommodation requests.
- iii. The reviews also will include interviews with managers responsible for or involved in the accommodation process, as well as interviews with affected employees and applicants.
- iv. Examples of religious accommodations include (but are not limited to) providing space and time for prayers, allowing employees to wear religious head coverings or facial hair, and adjusting schedules so that employees do not have to work on religious holidays or Sabbaths.
- b. In a promotion focused review (<https://www.dol.gov/agencies/ofccp/focused-reviews/promotions>), OFCCP will be focusing on contractors' policies, practices, and personnel data related to promotions, and specifically whether there is evidence of systemic discrimination in advancement opportunities for qualified individuals.
 - i. Each promotion focused review will consist of a desk audit followed by an onsite investigation, which will include (but is not limited to) a review of
 - 01. Policies and procedures
 - 02. Employee personnel files
 - 03. Interviews with managers responsible for promotions decisions
 - 04. Affected employees.
 - ii. OFCCP may evaluate hiring and compensation data, as appropriate, to determine if women of color are being limited from advancing professionally.
 - iii. This type of review is the first time that OFCCP has expressed its intent to review the intersectionality of gender and race together.
 - iv. OFCCP expects contractors to evaluate their promotion personnel activity data to identify whether disparities exist on the basis of a protected characteristic.
 - v. "Self-audit results should be shared with OFCCP as part of the focused review." (Does not say shall or must; is permissive)
 - vi. OFCCP may also examine internal and external recruitment and outreach efforts to determine if candidate pools are diverse and reflective of available candidates in the market or workforce.

- c. To prepare for these types of reviews, contractors should do a self-audit (preferably under the protection of attorney client privilege) and correct or resolve issues prior to receiving OFCCP's scheduling letter.

EMPLOYMENT RESOURCE REFERRAL DIRECTORY (ERRD)

As part of its compliance assistance mission, OFCCP maintains a directory of outreach organizations called the Employment Resource Referral Directory (<https://www.dol.gov/agencies/ofccp/compliance-assistance/outreach/errd>). Recently, OFCCP updated the directory, and we commend you to review it.

From the landing page, click Search Directory, and you will be taken to a page that allows you to customize your search by:

- Region (you can limit your search to one of OFCCP's Six Regions)
- Organization Name
- Organization City (not all cities are available to search)
- State
- Applicant Type (White, Black or African American, Asian, Hispanic or Latino, Native Hawaiian or Pacific Islander, Alaskan Native or American Indian, Two or More Races, Female, Veteran, Disabled)
- Job Categories (Executives, Managers & Supervisors, Professionals, Technicians, Sales Workers, Administrative Service Workers, Craft Workers, Operatives, Laborers, Service Workers)

For organizations that are setting placement goals for females, minorities, or individuals with disabilities, or who are not meeting the Protected Veteran Hiring Benchmark, it would be worthwhile to see if there are organizations in your recruiting area on the ERRD.

We also encourage you to view the ERRD as the outreach floor, and definitely not the ceiling. You need to tailor your outreach to attract qualified candidates, and remember that under the OFCCP's Disability and Veteran regulations, if you assess those outreach efforts as ineffective when you prepare your written assessment of the effectiveness of each and every disability and veteran outreach initiative, you need to find new sources of outreach.

EXECUTIVE ORDER 13950

On September 22, 2020, President Trump issued an Executive Order (<https://roffmanhorvitz.com/documents/roffman-horvitz-2020-90-whitehouse-gov-presidential-actions-executive-order-combating-race-sex-stereotyping.pdf>) aimed at prohibiting training that included:

- (1) race or sex stereotyping;
- (2) race or sex scapegoating; or
- (3) divisive concepts.

On December 22, 2020, a federal court judge from the Northern District of California entered a nationwide preliminary injunction halting the federal government's ability to enforce Sections 4(a) and 5(a) of the Executive Order. These were the executive order sections that prohibited training if it contained any prohibited content and required flow-down of the clause in subcontracts and required unionized employers to post a notice given to them by their contracting agency. None of it is enforceable so long as the preliminary injunction remains in place.

There also is a significant likelihood that President Biden will rescind the Executive Order after the inauguration.

NEW SUPPLY AND SERVICE TECHNICAL ASSISTANCE GUIDE

OFCCP recently released an update to its Technical Assistance Guide (<https://roffmanhorvitz.com/documents/roffman-horvitz-2020-11-dol-ofccp-supply-and-service-contractors-technical-assistance-guide.pdf>) for Supply and Service Contractors. For practitioners who are new to the world of OFCCP compliance, the Table of Contents in the TAG can be very useful. The guide addresses common topics such as:

- Required posters
- Sample Self-identification form for veterans and a link to OFCCP's official disability self-identification form (Appendices R and S)
- Record keeping (what records need to be kept and for how long)
- Understanding what the data analyses mean, what OFCCP looks for in audits, and thus what contractors should be looking for in their own self-analyses
- How to conduct an adverse impact analysis (Appendix O) to ensure that you are evaluating properly the equal opportunity decision making of the organization
- Preparing the narrative portions of the AAPs and understanding the compliance

- obligations that arise out of the regulations
- Preparing for a compliance evaluation (audit)

We also commend OFCCP's compliance checklists in Appendix B.

CALIFORNIA PAY EQUITY REPORTING REQUIREMENT BEGINS IN 2021

California recently enacted SB 973 requiring companies with 100 or more employees and that are required to file a federal EEO-1 report to submit employee pay data electronically to the Department of Fair Employment and Housing. The report will closely mirror the Federal EEO-1 Component 2 report filed by covered employers in 2019. Although EEOC discontinued the component 2 report and is assessing the quality and utility of data collected, California has determined that the data collection is necessary to address the gender pay gap. Very importantly, California reporting employers will be using the information from the employee's W-2 Box 5, not W-2 Box 1, to convert pay into the tallies, and unlike the federal requirement, California is commanding to employers to count the hours associated with paid leave:

"Unlike the federal EEO-1 Component 2 collection from 2017 and 2018, in which the EEOC required employers to exclude time on paid leave when calculating hours worked, DFEH is requiring employers to include time during which the employee was on any form of paid time off for which the employee was paid by the employer, because such pay will be included on the employee's W-2."

Which employers must file:

- Employers must count employees outside California plus employees in California to determine whether they have 100 or more employees.
- If the employer has 100 or more employees, and at least 1 employee in California, there is a reporting obligation, but employers are required to file data only on the employees working in or assigned to California workplaces.
- Employers may file tallies and hours on employees working outside California, but that is a permissive choice, not a mandatory obligation.

California updated its FAQs on January 7, 2021, and now includes a series of questions and answers on teleworking scenarios, too. <https://www.dfeh.ca.gov/paydatareporting/>. One of the newer FAQs confirms that Temporary Employment Agencies must report the pay of the employees that they assigned to work at other companies:

Does a temporary services employer report on the temporary staff that they place on assignment at other companies?

(01/07/2021) In addition to reporting on its permanent employees, a temporary services employer must report on the workers that it places on assignment at other companies if those workers are the “employees” of the temporary services employers. Government Code 12999(m)(1) defines “employee” to mean “an individual on an employer’s payroll, including a part-time individual, whom the employer is required to include in an EEO-1 Report and for whom the employer is required to withhold federal social security taxes from that individual’s wages.” Thus, a temporary services employer must report to DFEH on those workers assigned to client employers but who are on the payroll of the temporary services employer.

Under the California law, covered employers will be required to submit two data tallies by March 31 in 2021 and each year thereafter. The report requests:

- the number of employees by race, ethnicity, and sex in each of the EEO-1 job categories; and
- the number of employees by race, ethnicity, and sex whose annual earnings fall into a specific Bureau of Labor Statistics-defined pay range as well as total hours worked for each employee counted in each pay band during the reporting year

Multi establishment employers will need to compile this report for each establishment as well as a consolidated report. The data will be based off of employees in a single pay period “snapshot” taken between October 1 and December 31 of the prior year. Employers also may submit a copy of the EEO-1 report containing the same or substantially similar pay data as that required by the California report.

The full text of the new law can be found here: <https://roffmanhorvitz.com/documents/roffman-horvitz-2020-10-california-sb-973-employers-annual-report-pay-data.zip>

OFCCP V. ORACLE: CASE SUMMARY AND HIGHLIGHTS

On Sept. 22, 2020, a DOL Administrative Law Judge (ALJ) issued a Recommended Decision and Order (<https://roffmanhorvitz.com/documents/ofccp-v-oracle-america-inc-2017ofc00006-sep-22-2020-153743-cadec-pd.pdf>) in favor of Oracle in the OFCCP’s \$400 million pay bias litigation

matter. The 280-page decision touched on a number of issues related to the OFCCP's statistical approach in evaluating compensation. Ultimately the key concern for the ALJ was OFCCP's unjustified aggregation of contractor data that led to comparisons of employees that are not similarly situated for purposes of compensation analyses. On December 7, 2020, OFCCP announced (<https://roffmanhorvitz.com/documents/oalj-public-arb-decisions-arb-decisions-ofc-20-072-ofcp.pdf>) that it would not appeal the result.

In our opinion, this ALJ decision highlights the importance of having evidence in the form of accurate job descriptions or descriptions of projects, skills, and the employee's actual contribution to the organization memorialized in documents like performance evaluations. We understand OFCCP's perception that ratings can be biased, but having employees summarize annually the projects, tasks, deadlines, and other corporate goals that they were expected to achieve, and having supervisors review the accuracy of those descriptions, will help organizations to defend discrimination allegations like those raised in the Oracle case. Managers move on; employees move on; but the contemporaneous development of documents that memorialize differences in job duties helps to defend against over-aggregation of data.

The OFCCP raised three principal allegations:

- First, the OFCCP alleged that Oracle engaged in intentional compensation discrimination against female, Asian American, and African American employees in the Product Development, Information Technology, and Support job functions.
- Second, the OFCCP alleged that Oracle was steering women and minorities into lower paying jobs.
- Finally, the OFCCP alleged that Oracle had a policy of relying on prior pay that resulted in a disparate impact against female and minority employees.

The ALJ concluded that the OFCCP failed to prove these discrimination allegations and engaged in a breakdown of the OFCCP's statistical approach to compensation discrimination claims.¹

The following are the key takeaways for contractors from the ALJ's decision:

1. OFCCP must account for the tasks performed by employees as well as their place in the organization and structure of the contractor when creating similarly situated groups for compensation purposes.²

The ALJ criticized OFCCP's statistical model for its failure to similarly situate employees at Oracle. The OFCCP argued that it was appropriate to control only for external variables like race, gender,

1. OFCCP v. Oracle Am., Inc., Dep't of Labor, No. 2017-OFC-00006 (Sept. 22, 2020).

2. Id. at 225-41.

prior experience, and education because Oracle's control over internal variables like the line of business in which the employee worked, tasks performed, and performance reviews made those variables biased.³ The ALJ held that excluding these internal variables without first establishing any actual bias in them was inappropriate. The ALJ viewed these internal variables as materially relevant to determining which employees are similarly situated. For example, Oracle presented evidence that the profitability of the particular product that the employee worked on played a role in determining the employee's compensation.⁴ OFCCP's exclusion of a variable like product profitability caused its models to compare employees that were not similarly situated.

Furthermore, the OFCCP claimed that Job Title represented the most granular manner of similarly situating employees for purposes of compensation analyses, but Oracle demonstrated that some job titles are necessarily broad and generalized. Some employees with the same job title performed materially different tasks than others in the same title, which impacted Oracle's compensation decisions.⁵ In light of this reality, the ALJ held that OFCCP's statistical models must account for the differing tasks employees may perform, even under the same job title, as well as their placement within the organization and structure of the contractor when deciding whether they are similarly situated.

Finally, the variables controlled for in OFCCP's model did not adequately account for the specialization of each employee. For example, in establishing its education variable, the OFCCP only measured the highest degree attained but did not account for differences in the majors of the employees selected by Oracle.⁶ The OFCCP's "experience" variable had a similar problem in that it was the employees' ages and not their relevant experiences in other jobs that may have provided an employee with a particular set of skills that made them especially valuable for Oracle.⁷ Oracle argued that an employee in software development who has a degree in philosophy with 10-years of experience teaching at a private school could be paid less than employee in software development who has a computer science degree and 10-years of experience at an Oracle competitor, and that difference in experience was not discriminatory.⁸

2. OFCCP continues to over-aggregate data which prevents it from comparing similarly situated employees.⁹

The OFCCP's model compared all of the women within the Product Development, Information Technology, and Support job functions but failed to account for the differences in the tasks the employees would perform in each separate function.¹⁰ Although the ALJ did not find this concern to be fatal to the model as a whole, the ALJ found that aggregation cast doubt on the inferences

3. Id. at 225-27.

4. Id. at 234.

5. Id. at 232-34.

6. Id. at 243.

7. Id.

8. Id. at 245.

9. Id. at 225-227.

10. Id. at 225.

that could be drawn from the data as a result.

3. OFCCP's steering theory of discrimination failed because it failed to identify a common mechanism of steering and did not account for the job that applicants applied for in their statistical model.¹¹

In making its steering claim, the OFCCP failed to identify the mechanism by which Oracle could actually accomplish the intentional discrimination. Applicants at Oracle did not apply to the broader job function groups and then have titles assigned to them, but rather applied to a job title and were hired into it. Clearly, under this system there was no means for Oracle to drive certain races and genders into particular job titles when it could not control which job titles applicants applied to in the first place. Other potential mechanisms, such as Oracle's college recruitment plan and mapping of new employees hired through acquisitions of other companies, failed to establish a pattern or practice of steering that could affect more than only a very small proportion of the class members.

Furthermore, the ALJ found the OFCCP's statistical model for inferring discrimination through steering was flawed because it failed to account for what job the applicants applied to and what job they were hired into. When the data was analyzed to account for these factors, the evidence showed that Oracle generally hired employees into the job titles they applied for, and there were no statistically significant disparities in "up-or-down leveling" of employees after the fact.¹²

MEMORANDUM OF UNDERSTANDING WITH EEOC AND DOJ

On November 3, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) revised a Memorandum of Understanding (MOU - <https://roffmanhorvitz.com/documents/roffman-horvitz-2021-eeoc-2020-11-fully-executed-ofccp-eeoc-doj-mou-11-3-20.pdf>) it had with the Equal Employment Opportunity Commission (EEOC), adding the Department of Justice (DOJ) as a party.

- The original 1970 MOU aided interagency coordination, increased efficiency, and reduced conflict, competition, and inconsistencies between the agencies by laying out procedures and provisions for coordination, referral of complaints, and sharing information.
- Prior to this 2020 revision, the most recent update occurred in 2011.
- By adding the DOJ to the MOU, the Trump Administration seeks to "ensure consistency in the agencies' approach to legal issues and enforcement of EEO laws."

¹¹. Id. at 257-65.

¹². Id. at 263.

- The revised MOU requires the OFCCP and EEOC to confer with the DOJ about any case that introduces “issues of law that are novel, unsettled, or may have significant precedential value for subsequent cases.”
- It also increases significantly the amount of information that will be shared between agencies, including an obligation for EEOC to issue quarterly reports to OFCCP regarding the outcome of any complaint/charge referred to EEOC by OFCCP involving a federal contractor subject to Executive Order 11246.

We believe that the revisions also arise out of the inconsistent positions taken by the Department of Justice and the EEOC on whether Title VII prohibits discrimination based on sexual orientation. The DOJ advocated that Title VII did not prohibit discrimination based on sexual orientation, and the EEOC took the position that Title VII prohibited discrimination based on sexual orientation. The Supreme Court held that Title VII does prohibit discrimination based on sexual orientation. *Bostock v. Clayton County* (<https://roffmanhorvitz.com/documents/roffman-horvitz-2021-supreme-court-opinions-bostock-clayton-county-19-17-1618-hfci.pdf>), June 15, 2020.

The provisions of the 2020 MOU also include:

- Allowing OFCCP greater latitude to retain individual complaints of discrimination against government contractors while continuing to provide for referral to the EEOC as a matter of discretion;
 - The change “ensures a role for OFCCP in addressing invidious discrimination against individual employees,” but changes a previous policy under which OFCCP was required to refer most such dual-filed individual complaints to EEOC;
- Including the Assistant Attorney General for the U.S. Department of Justice’s Civil Rights Division (DOJ) to the MOU as a signatory to help ensure that the agencies take a consistent approach to the complex enforcement and legal issues that arise under EEO laws;
 - The MOU now requires OFCCP and EEOC to consult with the DOJ regarding cases that raise issues of law that are novel, unsettled or may have significant precedential value;
- Adopting several measures to ensure that senior officials at all three agencies are directly involved in the ongoing coordination efforts pursuant to the MOU; and
- Including federal protections for religious liberty and conscience protections as an area of focus for coordination efforts.

In the absence of a significant increase in staff capacity under the Biden administration, we do not believe that the OFCCP has the capacity to investigate a steep rise in individual complaints of discrimination. It also remains to be seen whether OFCCP will use these new complaint retention

procedures to apply its religious exemption directive 2018-03 in a way that will encroach on LGBTQ+ nondiscrimination policies. Recall that Directive 2018-03 commands OFCCP staff to bear in mind that:

- They “cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices” and must “proceed in a manner neutral toward and tolerant of . . . religious beliefs.”
- They cannot “condition the availability of [opportunities] upon a recipient’s willingness to surrender his [or her] religiously impelled status.”
- “[A] federal regulation’s restriction on the activities of a for-profit closely held corporation must comply with [the Religious Freedom Restoration Act].”
- They must permit “faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for . . . [Federal] contracts.”
- They must respect the right of “religious people and institutions . . . to practice their faith without fear of discrimination or retaliation by the Federal Government.”

A Biden Administration OFCCP also has the authority to re-negotiate the MOU.

OFCCP FINAL RULE REGARDING TRICARE ENFORCEMENT

On July 2, 2020, OFCCP issued a final rule (<https://roffmanhorvitz.com/documents/roffman-horvitz-2021-fr-2020-07-02-2020-11934.pdf>) regarding its enforcement authority over TRICARE healthcare providers. The final rule exempts a narrow category of healthcare providers from OFCCP enforcement authority, but in doing so leaves the majority of healthcare providers subject to its jurisdiction. The rule will amend OFCCP’s implementing regulations to remove subcontracts for Healthcare providers participating in TRICARE from OFCCP coverage.¹³

TRICARE is the federal program providing healthcare to military personnel, veterans, and their families. OFCCP issued its final rule so that healthcare providers will not be dissuaded from providing medical services to armed service members and veterans because of the compliance burden associated with being considered a federal subcontractor. The rule codifies a previous moratorium on enforcement against these healthcare providers that had been in place since

13. Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors: TRICARE Providers, 85 Fed. Reg. 39,834 (Jul. 2, 2020) (to be codified at 41 C.F.R. pt. 60) (Interpreting section 715 of the National Defense Authorization act for Fiscal Year 2012 to remove TRICARE providers from OFCCP’s jurisdiction, or alternatively establishing a national interest exemption for TRICARE providers).

2014.¹⁴ The regulation provides greater certainty to healthcare providers that would fall under OFCCP jurisdiction solely because of participation in TRICARE, but this exemption will remove only a narrow segment of healthcare providers from OFCCP coverage. Healthcare providers participating in the Federal Employees Health Benefit Program (FEHBP), contracts with the Prison Bureau, and providers with any other federal contract still need to comply with OFCCP's recordkeeping and affirmative action requirements. Additionally, unlike the moratorium, the regulation does not preclude enforcement against healthcare providers participating as a subcontractor under TRICARE and another federal healthcare plan like the Federal Employee Health Benefit (FEHB) Program. The moratorium on scheduling audits of healthcare providers with Veterans Affairs (VA) contracts remains in place but is currently set to expire in May of 2023.¹⁵

OFCCP's jurisdiction over healthcare providers providing medical services under federal health plans has been highly contested, involving litigation, congressional intervention, and evolving guidance from the OFCCP.

Under the Obama Administration, OFCCP aggressively pursued enforcement authority in the healthcare industry. Removing OFCCP jurisdiction over Tricare healthcare providers was something Congress felt strongly about – passing the NDAA and threatening to go as far as stripping OFCCP of all jurisdiction over the healthcare industry. The new 2020 regulation responds to that by exempting a small number of healthcare providers that would otherwise be covered solely because they provide healthcare services under Tricare. At the same time, it opens the door to enforcement against healthcare providers providing medical services under Tricare and the FEHBP or a Federal Prison Bureau program. Healthcare providers with VA contracts for medical services will continue to be exempt under the moratorium, but may also be subject to OFCCP enforcement when the moratorium expires.. While the OFCCP has stated plans to issue sub-regulatory guidance regarding the FEHBP, healthcare providers would be wise to watch these developments closely and determine whether they could be subject to OFCCP enforcement authority.

RELIGIOUS EXEMPTION REGULATION

On December 8, 2020, OFCCP released a final rule expanding the religious exemption (<https://roffmanhorvitz.com/documents/roffman-horvitz-2021-fr-2020-12-09-2020-26418.pdf>) from anti-discrimination laws. The rule applies to any employer that holds itself out to the public

14. The original moratorium was announced in OFCCP Directive 2014-01 and was extended by OFCCP Directive 2018-02. See Office of Fed. Contract Compliance Programs, Directive 2014-01, TRICARE Subcontractor Enforcement Activities (May 7, 2014), Office of Fed. Contract Compliance Programs, Directive 2018-02, TRICARE Subcontractor Enforcement Activities (May 18, 2018).

15. Office of Fed. Contract Compliance Programs, Directive 2021-01, Extending the Scheduling Moratorium for Veterans Affairs Health Benefit Program (VAHBP) Providers (October 19, 2020).

as “carrying out a religious purpose.” According to the OFCCP, the exemption is designed to encourage “full and equal participation” of religious groups as federal contractors, as well as clarify what kinds of organizations will qualify for the exemption and the obligations that apply to those organizations. The rule becomes effective on January 8, 2021.

The OFCCP added four new definitions to its implementing regulations, and it drafted a “broad interpretation” direction in favor of religious exercise. The four new definitions are:

- Particular Religion;
- Religion;
- Religious corporation, association, educational institution or society; and
- Sincere.

In addition, the OFCCP drafted two severability clauses (in the definition section and the interpretation section) so that if there is a future challenge either to the definition sections or the broad interpretation clause, the rest of the rule might survive the challenge.

Importantly, this new regulation does not alter the religious accommodation obligations of federal contractors, which are set forth separately in OFCCP’s regulations at 41 CFR Part 60-50 (<https://roffmanhorvitz.com/documents/roffman-horvitz-2021-federal-register-title-41-subtitle-b-chapter-60-part-60-50.pdf>).

FINAL RULE ON PROCEDURES TO RESOLVE POTENTIAL EMPLOYMENT DISCRIMINATION

During the Obama Administration, many government contractors under audit complained that audits would last a long time without any communication from the compliance officer and that OFCCP was not being transparent with the contractor about what it was finding in the data, nor was OFCCP communicating with the contractor with any regularity to apprise the contractor of its ongoing investigation. Then, without notice, the OFCCP would reach a discrimination conclusion and issue a Notice of Violations (NOV). Once an NOV was issued, it was very difficult to persuade OFCCP close the audit with no findings of liability or discrimination.

On February 27, 2018, OFCCP issued its Predetermination Notice Directive (<https://roffmanhorvitz.com/documents/roffman-horvitz-plc-2018-dol-ofccp-directive-2018-01-pdn-corr-1esq-a508c.pdf>), which provided an important layer of additional due process to government contractors under audit. OFCCP announced that in every compliance review in which OFCCP believed it had sufficient evidence to conclude that discrimination was occurring, it would issue a predetermination notice and afford the employer an opportunity to see how OFCCP was

reaching its preliminary conclusions. The employer could muster additional evidence and submit explanations for the OFCCP's observations. If the employer carried its burden of production, then OFCCP would not proceed with a Notice of Violations. If the employer did not carry its burden of production, the OFCCP could proceed to issue a Notice of Violations (NOV). If the employer was not willing to conciliate the matter with OFCCP after receiving the NOV, the OFCCP could continue to pursue administrative enforcement and remedies against the employer.

Although that directive was a welcome due process step, it was done by directive, not by regulation. Legally, it is easier for subsequent administrations to revoke or overturn a directive than it is to un-do a rule.

What OFCCP finalized in November 2020 is a rule that will be codified in OFCCP's regulations at 41 Code of Federal Regulations Part 60. The new rule defines quantitative and qualitative evidence, and it substantially revised the previous regulatory sections on Conciliation Agreements. The new "Resolution Procedures" section:

- Identifies when OFCCP may issue a Predetermination Notice under a disparate treatment theory of liability
- Sets forth what circumstances permit OFCCP to issue a Predetermination notice without satisfying all the evidentiary burdens that the rule provides
- Identifies when OFCCP may issue a Predetermination Notice under a disparate impact theory of liability
- Commands OFCCP to "disclose the quantitative and qualitative evidence relied on by OFCCP in sufficient detail to allow contractors to investigate allegations and meaningfully respond"
- Describes the next procedural step after the PDN – the Notice of Violations
- Includes the original section on use of Conciliation Agreements, and
- Codifies the opportunity for contractors to pursue Early Resolution Conciliation Agreements (which originally had been provided for only by Directive - <https://www.dol.gov/agencies/ofccp/directives/2019-02>).

The new rule gives government contractors more transparency and certainty regarding the procedures that OFCCP has to follow and the evidence that OFCCP and/or the contractor need to produce.

Practical takeaways: Contractors should know what quantitative evidence they are submitting to OFCCP as part of the desk audit submission and whether that evidence might imply that discrimination could be playing a role in the employer's decisions (hiring, promotion, termination, compensation).

If OFCCP asks to interview managers or employees as part of an Establishment Review, Functional AAP review, Promotions Focused Review, or Corporate Management Compliance Evaluation, it is very important to evaluate and document, preferably under attorney-client privilege, the qualitative evidence that the organization is amassing for the interview or onsite visit:

- Testimony, interview statements and documents about biased statements, remarks, attitudes or acts based upon membership in a protected class, particularly when made by a decision maker involved in the action under investigation
- Testimony, interview statements, and documents about individuals denied or given misleading or contradictory information about employment or compensation practices, in circumstances suggesting discriminatory treatment based on a protected characteristic;
- Testimony, interview statements, and documents about the extent of discretion or subjectivity involved in making employment decisions, in conjunction with evidence suggesting the discretion or subjectivity has been used to discriminate based on a protected characteristic; or
- Other anecdotal evidence relevant to determining a contractor's discriminatory or non-discriminatory intent, the business necessity (or lack thereof) of a challenged policy or practice, or whether the contractor has otherwise complied with its non-discrimination obligations.

If you have any questions about the content in this Client Update, please contact any of the attorneys who contributed content:

Joshua S. Roffman
Managing Attorney
jroffman@roffmanhorvitz.com
(703) 752-3775

Alissa A. Horvitz
Member Attorney
ahorvitz@roffmanhorvitz.com
(703) 752-3776

Nora K.S. Evans
Associate Attorney

James M. McCauley
Associate Attorney

Christopher J. Laudenbach
Associate Attorney

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.



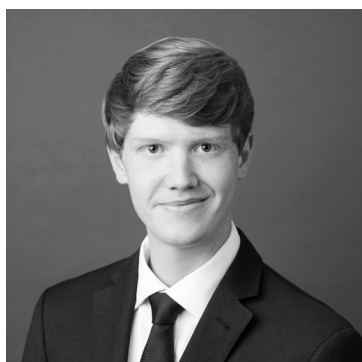
Joshua S. Roffman

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.