

CLIENT UPDATE

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RECENT OFCCP DEVELOPMENTS

With the government's fiscal year ending, we wanted to provide a short update on OFCCP and EEOC developments. This update addresses five topics:

1. OFCCP's AAP Verification Interface;
2. OFCCP's release of a Construction Contractor Audit Scheduling List on September 1, 2021 (which is in addition to the Supply and Service Audit Scheduling List it published on July 1, 2021);
3. The 2014-2018 Census EEO Tabulation Data;
4. The EEOC's Final EEO-1 filing deadline and the VETS-4212 deadline; and
5. Roffman Horvitz **complimentary web seminars** on OFCCP compliance obligations.

AAP VERIFICATION INTERFACE

On August 31, 2021, the Office of Management and Budget ("OMB") issued its final approval of the OFCCP's Affirmative Action Program Verification Interface ("AAP-VI"), but the portal is not yet live.

The AAP-VI is an online portal that is designed to accomplish two tasks:

1. All federal contractors will be expected to certify their compliance with annual affirmative action plan obligations, and
2. Audited organizations will be expected to use the portal to submit their data to the OFCCP during a compliance review.

The annual certification obligation will require employers to select one of three choices:

1. The contractor has developed and maintained affirmative action programs at each establishment or for each functional or business unit.
2. The contractor 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. [You really don't want to be selecting this option!!!]
3. The contractor became a covered federal contractor or subcontractor within the past 120 days and has not yet developed affirmative action programs.

The audit submission certification includes an accuracy certification:

"I certify that the information that has been provided as part of our Affirmative Action Plan (AAP) certification is true and correct to the best of my knowledge. I also understand that any attempt to refuse to submit an AAP certification, alteration or falsification of required records or information and any substantial or material violation may result in the institution of administrative or judicial enforcement proceedings. (regulation sections omitted here). I also understand that I will not be able to edit my Affirmative Action Plan(s) after I click the submit button. I affirm this declaration."

The notion that no employer being audited will be able to edit its affirmative action plans after submission to the OFCCP's portal, and that the person certifying is attesting to the accuracy of the employer's data, is going to place a very high premium on careful, thorough and accurate vetting of applicant, hire, promotion, termination and compensation data prior to submission.

To create an account on the portal, federal contractors will need their company's:

1. Employer Identification Number (EIN)
2. Headquarter/Company Number
3. Establishment/Unit Number
4. Legal Business Name

5. Parent Name as Reported to the EEOC for the EEO-1 reports
6. Company ID
7. DUNS Number
8. NAICS Code

The OFCCP also released a User Guide [<https://roffmanhorvitz.com/documents/roffman-horvitz-2021-aap-vi-user-guide.pdf>] and Admin Guide [<https://roffmanhorvitz.com/documents/roffman-horvitz-2021-offcp-aavi-admin-guide-02-04-2021-4pm.pdf>], which contain photos from a test version of the portal; in addition, they walk contractors through how to create an account, login, and upload their AAP data in an audit. But none of this is ready yet, and much still is unknown about the database, including what level employee will be required to certify, when will OFCCP open up the portal for contractor use, when will be the contractor community's first certification deadline, and what OFCCP is going to do with employers' responses. According to the OFCCP's documentation, contractors will be given at least 90 days in which to certify the first time that the data base is made available, but the fact that the database has passed OMB review means that it is closer to being made available to contractors for certification.

OFCCP CONSTRUCTION CONTRACTOR SCHEDULING ANNOUNCEMENT LIST

On September 1, 2021, the OFCCP published the 2021 Corporate Scheduling Announcement List for federal construction contractors. The list includes 400 federal construction contractors, federally assisted construction contractors, and federally assisted subcontractors for fiscal year 2021. OFCCP also published its methodology for creating this list which shows the agency included contractors with the highest aggregated contract values for all contract work performed in a district office's jurisdiction. Unlike in fiscal year 2020, OFCCP's methodology does not indicate that they considered a contractor's non-compliance with Occupational Health and Safety Administration or Wage and Hour Division regulations as a factor in selecting contractors for audit.

Some OFCCP Districts have started to use the 2021 Supply and Service Scheduling List (released on July 1) to schedule those audits. Other offices have not finished their 2019 VEVRAA audits or their 2020 Supply and Service audits, so it's not known when they will begin to use either the 2021 Supply and Service Scheduling List or the 2021 Construction Contractor Scheduling list.

Remember, audited employers have 30 days from the organization's receipt of the scheduling letter to submit the materials requested in the letter and its Itemized Listing. If you are on the OFCCP's Construction Contractor Scheduling List and would like a copy of the recently-approved Construction Contractor Scheduling Letter, please contact us by email and we will send it to you.

2014-2018 CENSUS EEO TABULATION DATA

On September 3, 2021, OFCCP announced that all federal contractors must begin using the 2014-2018 Census Bureau EEO Tabulation for their affirmative action plans which commence on or after January 1, 2022.

The 2014-2018 tabulation includes nationwide, state, county, and core-based statistical areas (“CBSAs”) and 236 detailed occupation codes that are based on the 2018 Bureau of Labor Statistics Standard Occupational Classification System (SOC). The number of detailed occupation codes has been shrunk significantly from the 2006-2010 census tabulation, which might make it harder for some employers to compare the types of jobs in their workplaces to the appropriate occupational code.

Currently, there are 60 CBSAs (i.e., Metropolitan and Micropolitan Statistical Areas (“MSAs”)) that were suppressed by the Census Bureau Disclosure Review Board. In other words, these 60 data sets are not yet available for use because there was a mis-alignment between how county-level data was compiled and one or more of the counties that comprise those 60 CBSAs. This creates an issue for contractors who recruit from these suppressed areas because neither the Census Bureau nor OFCCP has decided how to proceed, even though the OFCCP’s nationwide email to the contractor community implied that the full census data was available. Although the OFCCP acknowledged the suppressed jurisdiction issue in its FAQs and its September 15, 2021 web presentation, the OFCCP appears not to know whether the issue will be fixed. In its web seminar, the OFCCP indicated that one option could be to use state level data instead, but only if the state demographics are similar to what is in the CBSA (and for most jurisdictions, the demographic composition of the entire state is not going to match the demographic data of the CBSA).

Absent an indication from OFCCP that the data for the 60 suppressed CBSAs will be created, we believe that the best solution for contractors is to create proxies for the 60 suppressed CBSAs by compiling data from the County Sets that include the jurisdictions that comprise the CBSA. For each of the 60 CBSAs, this will involve including one or more counties that is not part of the CBSA.

- For example, the reason that the Baltimore-Columbia-Towson, MD Metropolitan Area wasn’t released yet is because Queen Anne’s County MD, which previously was part of the Baltimore-Columbia-Towson MSA, currently is commingled in the same County Set as Kent County, which was not in the MSA.

Notwithstanding the suppressed data set issues and the OFCCP’s unclear path forward, Roffman Horvitz, PLC will begin using the new 2014-2018 tabulation data. To determine availability for

the suppressed jurisdictions, we plan to build broader availability data sets using the available County Sets. In the example above, we will build a Baltimore-Columbia-Towson MD data set, and we intend to add the Queen Anne+Kent County Set to the other counties that comprise the Baltimore-Columbia-Towson MSA.

Another census data FAQ worth mentioning involves using the census category called “Balance of not Hispanic or Latino.” This is the tabulation of census responses most analogous to “Two or More Races.” When calculating the availability of all minorities for the incumbency versus availability analyses, OFCCP has directed government contractors to include the information from that census column in their availability calculations.

- The OFCCP is not requiring employers to re-label their self-identification forms using that category label, nor is it requiring a separate employment versus availability comparison for Two or More Races.
- It simply is reaffirming that when the contractor is comparing its employment tally of all incumbent minorities against census availability data, the “Balance of not Hispanic or Latino” needs to be added into the total minority availability count.

Because we have fielded a few client questions about that “new” census category, we wanted to clarify our understanding of the OFCCP’s FAQ in our Update.

EEO-1 AND VETS-4212 DEADLINES

The collection deadline for 2019 and 2020 EEO-1 reports is now October 25, 2021. Because of the pandemic, the EEOC deferred last year’s collection of the 2019 EEO-1 reports and is currently seeking to collect both the 2019 and 2020 reports. The EEOC also introduced a redesigned collection portal for filers at [<https://eeocdata.org/eeo1>]. Due, in part, to an overwhelmed filer support desk, the EEOC pushed the initial collection deadline from July 19, 2021 to August 23, 2021, and then citing the continuing impact of the pandemic on businesses, the EEOC has moved the deadline once more. Filers must now submit the 2019 and 2020 reports by October 25, 2021. There will be no additional changes to the deadline, so filers should ensure that reports for both years are submitted and certified on or before October 25, 2021 if they have not done so already.

The deadline for the 2021 VETS-4212 is September 30, 2021. If any organizations still need assistance with either filing requirement, please contact us.

TRAINING AND COMPLIANCE WEB SEMINARS

Finally, for employers not currently on any of the OFCCP's Corporate Scheduling Announcement Lists, in addition to those that are on the audit lists, we recommend you take this time to reacquaint yourself with the laws and regulations that OFCCP enforces. Perhaps there has been some internal turnover in your organization, and the individuals previously in charge of OFCCP compliance no longer are there, or the organization has hired new recruiters and diversity professionals who are unfamiliar with federal contractor record keeping and compliance requirements. It's good to take stock of compliance obligations when you are not being audited, rather than waiting until the audit notice arrives. The attorneys at Roffman Horvitz are happy to assist with any questions you may have about this alert and compliance in general, and we will be holding **complimentary web seminars** in October, November, and December 2021 to facilitate that training.

October 13, 2021 - OFCCP Regulatory Requirements and Compliance Obligations

3:00 p.m. ET (60 minutes)

<https://register.gotowebinar.com/rt/4755245271544023819>

October 20, 2021 - OFCCP Regulatory Requirements and Compliance Obligations

12:00 p.m. ET (60 minutes)

<https://register.gotowebinar.com/rt/4755245271544023819>

October 27:, 2021 - Preparing for an OFCCP Supply and Service Compliance Review

12:00 p.m. ET (60 minutes)

<https://register.gotowebinar.com/rt/8845262500614996747>

November 3, 2021 - Preparing for an OFCCP Supply and Service Compliance Review

3:00 p.m. ET (60 minutes)

<https://register.gotowebinar.com/rt/8845262500614996747>

November 10: Update on OFCCP Developments and the AAP Verification Interface

3:00 p.m. ET (60 minutes)

<https://register.gotowebinar.com/rt/2852599773305814283>

November 17: Update on OFCCP Developments and the AAP Verification Interface

12:00 p.m. ET (60 minutes)

<https://register.gotowebinar.com/rt/2852599773305814283>

December 1, 2021 - An Exploration of Three Different Uses of Pay Equity Regression Analyses

3:00 p.m. ET (60 minutes)

<https://register.gotowebinar.com/rt/1909960967022854667>

December 8, 2021 - An Exploration of Three Different Uses of Pay Equity Regression Analyses

12:00 p.m. ET (60 minutes)

<https://register.gotowebinar.com/rt/1909960967022854667>

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

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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.