

Insights, News & Events

OFCCP WANTS TO EXPAND ITS REACH FOR MORE DATA UPFRONT IN AUDITS: YOUR 3-STEP ACTION PLAN TO PREPARE FOR THE CHANGES

Insights
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Every few years, OFCCP is required to seek reauthorization of its “compliance review scheduling letter” and “itemized listing” – the documents sent to federal contractors to let them know that their organization is now being audited and inform them of the information requested by OFCCP for its compliance evaluation. But this year’s proposed revisions to the scheduling letter, unfortunately, are far from routine. They seek to greatly expand the scope of the data that you would need to provide — and significantly expedite the time by which you would need to turn information over. The good news is that this change is currently just a proposal. The bad news is that comments on the revisions are due by January 20, 2023, and time is running out if you want to have input. What should you do about this significant impending change?

What This Impending Possible Change Means for Federal Contractors

If the revisions are implemented, the burden on federal contractors to respond to an initial inquiry – within 30 days – will increase dramatically. Below are some of the most significant proposed changes.

- Contractors would have to detail what steps you have taken to evaluate the effectiveness of “action-

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oriented” programs and document how you have addressed any deficiencies.

- You would be required to document your “policies and practices regarding all employment recruiting, screening, and hiring mechanisms, including the use of artificial intelligence, algorithms, automated systems or other technology-based selection procedures.”
- You would also need to identify promotions as either “competitive” or “non-competitive.”
- You would have to submit compensation data for the prior year, in addition to the requirement for the current year. (Yes, this proposed change would mean that you would need to provide **two years of compensation data** with your first submission.)
- Factors in compensation that were previously optional (education, experience, time in current position) would be required – and would need to be submitted by the first 30-day deadline.
- Contractors would need to explain the statistical methods used to examine your compensation data and provide additional details about internal compensation reviews.
- You would need to include compensation for temporary employees – including those provided by staffing agencies.
- Educational Institutions and other contractors who have “campus-like settings” would have additional reporting burdens. You would be required to provide an audit response for all work locations in either the city or the state of the facility for which notice of audit was actually given. For example, if a campus hospital was selected for an audit, the academic institution would be required to submit responses for the hospital, the university associated with the hospital, as well as all other campuses statewide.

- Academic institutions would be required to submit copies of your Integrated Postsecondary Education Data System (IPEDS) Human Resources Survey Component data collection reports.

What You Need to Do to Prepare for Potential Changes

Some of the changes being proposed are simply extensions of obligations that already exist, but others may require extensive overhaul. For example, if OFCCP establishes a requirement that the submission of pay data includes education, many federal contractors will be scrambling to include data points in systems that don't currently exist.

There are, however, several "best practice" recommendations that we recommend federal contractors begin implementing now in order to put yourself in the best possible position should these changes be adopted.

1. Document the effectiveness of outreach programs, at least annually, and develop strategies and/or alternatives for any deficiencies that are identified.
2. Develop policies and practices related to the use of artificial intelligence.
3. Distinguish "competitive promotions" from "non-competitive promotions" in the annual evaluation of adverse impact.

You may also want to consider upgrading your Human Resources Information System (HRIS) to incorporate all factors that impact compensation, including, but not limited to, education and prior work experience. To the extent that such factors explain pay, your affirmative action counsel will want to include them in the analysis model when they conduct the annual compensation evaluation.

How Fisher Phillips is Responding

Our team of attorneys is developing comments to submit in response to OFCCP's proposed rulemaking. If

you have any input to provide or have questions about the process, don't hesitate to reach out to your Fisher Phillips attorney, the author of this Insight, or any attorney in the [Affirmative Action and Federal Contract Compliance group](#). We will continue to monitor developments from the OFCCP, so make sure you subscribe to [Fisher Phillips' Insight system](#) to get the most up-to-date information directly to your inbox.