

NEW OFCCP SCHEDULING LETTER CREATES ADDITIONAL BURDENS FOR FEDERAL CONTRACTORS: YOUR 5-STEP PLAN

Insights
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The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) announced on August 25 that it has updated its Supply and Service Scheduling Letter and Itemized Listing – also known as its scheduling letter – in ways that federal contractors will find burdensome and time-consuming. The changes result in an expansion of coverage in both breadth and scope of compliance evaluations conducted by OFCCP, and it applies to supply and service compliance evaluations scheduled on or after August 24, 2023. Here are five steps you can take to ensure you remain in compliance with the revised rules.

What is the Scheduling Letter?

OFCCP issues a "scheduling letter" to inform a federal contractor that they will be audited by the agency through a compliance evaluation. Compliance evaluations are fairly routine for OFCCP, but federal contractors often experience significant disruption to their routines when required to assemble the items required for submission in response to a scheduling letter. The updated [Supply and Service Scheduling Letter and Itemized Listing](#) changes several key aspects when it comes to federal contractor obligations.

What Changed and How Do the Revisions Impact Federal Contractors?

There are some significant changes to both the breadth and scope of items that will be required of federal contractors thanks to these changes. In addition to some of the content changes discussed below, OFCCP has also implemented

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notice and communication changes as well. For example, contractors may now *only* receive notice of the audit via email with a read receipt request rather than an email communication and a communication via U.S. Certified Mail. Previously, the U.S. Certified Mail notification signaled the beginning of the time period for audit submissions. Additionally, contractors may now complete electronic submission of audit materials through OFCCP's secure file sharing system, Kiteworks.

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Breadth: OFCCP Requires More Documentation

- Item 7 (action-oriented programs) is a new requirement that asks federal contractors to provide documentation on the development and execution of action-oriented programs designed to correct problem areas identified in the immediately preceding AAP year. Although the regulations require contractors to create action-oriented programs to address problem areas, contractors previously have not had to provide documentation of such efforts with their initial audit submissions.
- Revised Items 8 and 12 now require not only documentation of outreach and recruitment efforts for individuals with disabilities and veterans, but also documentation describing actions to be taken when outreach efforts were ineffective, and any alternative efforts explored.
- Item 11 (disability utilization analysis) now requires federal contractors to provide documentation regarding efforts to meet the disability utilization goal if there is an underutilization of individuals with disabilities.
- Item 18 (employment activity) has also been revised. Previously, OFCCP had only required a definition of "promotion." It now requires "documentation that includes established policies and describes practices related to promotions." The new scheduling letter also now requests incumbency by gender and race/ethnicity at the start of the prior AAP year. While OFCCP typically requests this information during compliance reviews, this change requires the data be submitted with the contractor's initial audit submission, and ensures that the documentation will be collected for all audits.
- Item 21 (recruiting policies) is a new requirement, asking federal contractors to submit "information and

documentation of policies, practices, or systems used to recruit, screen, and hire, including the use of artificial intelligence, algorithms, automated systems or other technology-based selection procedures." This is consistent with OFCCP's focus on ensuring that technology-based selection procedures do not create barriers to equal employment opportunity.

Scope and Breadth Increased for Compensation Data

There are also important changes to Item 19 (compensation). The most significant change is the requirement to provide an additional snapshot of compensation data, covering the workforce analysis from the previous year's AAP. Thus, the contractor must now provide **two years** of individual compensation data, instead of only one.

OFCCP also requires the contractor to include "other compensation or adjustments to salary," making it clear that the information for total, not merely base compensation data, is now a required part of the submission. OFCCP also now mandates the submission of "relevant data on the factors used to determine employee compensation" and "documentation and policies related to the contractor's compensation practices," which were previously optional. This greatly expanded request is consistent with OFCCP's continued focus on compensation disparities.

The agency has also added a new request in the Itemized Listing – Item 22 – which requires the contractor to evaluate its compensation systems as part of its "in-depth analyses of the total employment process." Contractors will be required to submit documentation that demonstrates when compensation analyses were completed, the number of employees the analysis included, the forms of compensation analyzed, that the compensation was analyzed by gender, race, and ethnicity, and the method used for the compensation analysis.

Scope: OFCCP Expands Approach to Post-Secondary Institutions and Other Contractors With a Campus Setting

One very significant change is to the scope of compliance evaluations. OFCCP added the following language:

If you are a post-secondary institution or Federal contractor with a campus-like setting that maintains multiple AAPs, you must submit the information requested in this

scheduling letter for all AAPs developed for campuses, schools, programs, buildings, departments, or other parts of your institution, or company located in [city and state only].

Previously, the scope of a compliance review was limited to a single establishment, as required by the federal regulations. Now, if a scheduling letter is received by any one of several entities in a “campus-like setting,” all affirmative action plans (AAPs) for the entire “campus” – and the documents required for the Itemized Listing – will be required for the submission.

For example, a university campus with a hospital will now be required to submit AAPs and supporting documents for both the University and for the hospital, whenever either one is selected for a compliance evaluation. Likewise, a federal contractor with several operations on its “campus-like setting” will be required to submit AAPs for each facility, whenever any of them are selected for a review. This wider scope may result in larger numbers and, if disparities are identified, in more costly class-type relief.

Another change that will impact post-secondary educational institutions is the new requirement for them to provide three years of IPEDS reports. Item 16 has always required non-academic supply and service contractors to provide EEO-1 Reports for the past three years, but academic institutions file IPEDS reports instead of EEO-1 Reports, so the revision addresses this difference.

Other Changes to the Scheduling Letter

- Item 23 (reasonable accommodation), which was previously Item 20, has been clarified to require data on requests for reasonable accommodation made during the preceding AAP year.
- Item 24 (EEO policies) now requires federal contractors to provide copies of existing employment policies and documents related to equal employment opportunity.
- Item 25 (assessment of personnel processes) now requires federal contractors to “include, at a minimum, a description of the assessment, *any impediments to equal employment opportunity identified through the assessment*, and any actions taken, *including modifications made or new processes added*, as a result of the assessment.”

What Should Federal Contractors Do to Prepare for an Audit? Your 5-Step Plan

The changes to the scheduling letter will significantly increase the burden of the response. However, there are a few steps you can take now to reduce the impact on your organization if (or when) you receive an audit notice letter.

1. **Analyze your compensation** and address any inequities. OFCCP has renewed its focus on compensation, and even small differences can create significant financial consequences. Be sure to conduct all compensation analyses with legal counsel, so as to ensure attorney-client protection.
2. **Conduct a comprehensive review** of all employment processes. Determine what's working, and what's not. Then fix the processes that are not working. Document your efforts.
3. Ensure that all of your **employment policies and procedures** are up to date and distributed to all personnel.
4. Provide **relevant annual training to managers/supervisors and human resources personnel**, as required by the individuals with disabilities and veterans' regulations. Keep records of attendance for each training.
5. **Document, document, document.** The changes to the scheduling letter are primarily designed to require federal contractors to fully document all aspects of compliance. Setting up systems for documenting on the front end will prevent scrambling to come up with data at the back end.

Conclusion

We will continue to monitor developments that impact your workplace and provide updates when warranted. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. For further information, contact the authors of this Insight, your Fisher Phillips attorney, or any attorney in our [Affirmative Action and Federal Contractor Compliance Practice Group](#).