



# 3RD QUARTER MEETING

## AUGUST 19, 2021

- 1:00 PM **Welcome/Opening Remarks**
- 1:10 PM **OFCCP Update**  
-LaToya Smith, Assistant District Director, OFCCP
- 1:25 PM **EEOC Update**  
-Marina Guerra, Outreach & Education Coordinator, EEOC
- 1:40 PM **OFCCP Update: New Leadership – New Enforcement Priorities**  
-Mickey Silberman, Founder and Shareholder, Silberman Law PC
- 3:10 PM **Open Forum/Networking**
- 3:25 PM **Closing Remarks/Announcements**
- 3:30 PM **Adjourn**

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# OFCCP Updates

LaToya Smith

Assistant District Director

OFCCP

Please share any feedback





# EEOC Updates

Marina Guerra

Outreach & Education Coordinator

EEOC

Please share any feedback





## Mickey Silberman, Esq.



Mickey Silberman is a Shareholder of Silberman Law, PC. For more than 25 years, Mickey has specialized in OFCCP compliance and audit defense, affirmative action, pay equity, systemic EEO and diversity, equity & inclusion.

Mickey has overseen the preparation of thousands of AAPs and he has directed the defense of hundreds of OFCCP audits and systemic discrimination investigations. In the last 1,000 audits Mickey has defended, he has obtained Letters of Compliance - the best possible audit outcome - in more than 99% of the audits.

Mickey is recognized as a national expert in the areas of pay equity and systemic pay discrimination. He directs the preparation of pay analyses on a proactive basis and in response to OFCCP pay investigations. He regularly defends employers against claims of systemic pay discrimination.



# Lawyer's Disclaimer

The materials contained in this presentation were prepared by the law firm of Silberman Law, PC for the participants' reference in connection with education seminars. Attendees should consult with counsel before taking any actions and should not consider these materials or discussions to be legal or other advice.

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## So, What Shall we Talk About

- Structuring AAPs in a Post-Pandemic Workplace
- The “New” OFCCP
  - Director Jenny Yang & OFCCP’s Priorities
  - OFCCP’s big new budget (request)
  - A new CSAL list has arrived, and audits have begun
  - Audits and investigations – change is already here
- Intersectionality Is Here – How do we respond?
- Takeaways – What’s coming & how to prepare





# Structuring AAPs in a Post-Pandemic World

- As employers bring employees back to the workplace, many employees won't, and won't be required to
- So how do we account for those employees in establishment-based AAPs?
- The good news: existing OFCCP regulations fully address the issue
  - 60-2.1(d) – Who Is Included in Affirmative Action Programs
  - Should employers think differently?
  - Do FAAPs make more sense and are they easier to administer in a changed workplace?
  - But consider the audit implications – Big Numbers are Bad Numbers

Please share any feedback





# Jenny Yang

- Jenny Yang became OFCCP Director on January 20<sup>th</sup>, *one hour* after the inauguration, and has “hit the ground running”
- Past EEOC roles provide her with significant government agency management experience
- Announced systemic racism and pay discrimination enforcement will be top priorities
- Dispensed with Focused Reviews and Compliance Checks on 2020 CSAL and a new CSAL coming soon



Please share any feedback







# GHILG

## Jenny Yang at NILG Conference

- Director Yang Announced two new National Office Placements –
  - Michelle Hodge – OFCCP National Deputy Director
  - Maya Raghu – OFCCP National Director for Policy
- Enforcement Priorities –
  - Deep Dive Pay Investigations
  - Specific Race/Ethnicity Goal-setting – not only for “Minorities”
  - Find ways to conduct audits/investigations beyond “establishment” to better align with the modern workplace
  - Non-binary reporting protocol and focus in investigations

Please share any feedback





# OFCCP's Big New (Proposed) Budget

- Biden Administration recently announced its Fiscal Year 2022 budget
- And – no surprise – OFCCP received the largest increase of *any* DOL enforcement agency
- \$106 M to \$141 M – a 33% increase
- Most of that will be for hiring 188 new enforcement specialists
- Once trained, the new employees will give OFCCP a much larger team of compliance officers to conduct audits and onsite investigations
- And a new CSAL list has arrived – 750 new audits are coming our way

Please share any feedback





# GHILG

## New Administration, New Agenda – What Does it mean for OFCCP Compliance?

- Director Yang has said in recent pronouncements that –
- OFCCP will make systemic discrimination its top priority
- Administration's focus on Systemic Racism – What does that mean for OFCCP, and contractors?
- We already are seeing large changes in existing audits
  - Extensive RFI's and deep dive investigations with more on-sites soon to arrive
  - Back to the future?
- Systemic pay investigations have been OFCCP's biggest recent area of focus and monetary recovery – expect more, and changes to enforcement approach

Please share any feedback





## Assessment of *Effectiveness* of Outreach & Recruitment

- This is an important change to our traditional approach to making “good faith efforts”
- *Assessment* of each effort is required – focus on the “pull in”, not the “push out”
- Document the evaluation of each effort, including:
  - How did you evaluate the *effectiveness*
  - Was each effort *effective* and if not, what did you do in response
- Best practice (but not required) - monitor the number and quality of applicants referred by each source and make changes when appropriate

Please share any feedback





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## Focus on “Systemic Racism” - What that means for Adverse Impact and Pay Analyses?

Analysis	Rate for Protected Group	Rate for Non-Protected Group	IRA	Standard Deviation
Minority v. Non-Minority	9/100 .09	1/100 .01	9.0	-2.596
Female v. Male	4/100 .04	6/100 .06	.67	0.649

Please share any feedback





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## Specific Race Adverse Impact Analysis

Analysis	Rate for Protected Group	Rate for Non-Protected Group	IRA	Standard Deviation
Minority v. Non-Minority	9/100 .09	1/100 .01	9.0	-2.596
Female v. Male	4/100 .04	6/100 .06	.67	0.649
Black v. All Others	1/80 .01	9/120 .08	.17	1.987
Black v. Asian	1/80 .01	8/20 .40	0.3	5.416

Please share any feedback



# Intersectionality – What, Why, How

- OFCCP has said “intersectionality” will become an important part of the Agency’s enforcement
- And now, it has arrived – expect a greater focus under new OFCCP leadership
- *Becton, Dickenson and Company* settled a systemic pay investigation with OFCCP paying \$100,000 to *African-American Females* making less than *Males* and *non-African-American Females*
- Think about that? Let it sink in.
- What are the implications for our adverse impact and pay analyses?

Please share any feedback





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## Intersectional Hiring Analysis

Analysis	Rate for Protected Group	Rate for Non-Protected Group	Standard Deviation
Minority v. Non-Minority	9/354 0.02	22/478 0.05	1.55
Black v. White	6/303 0.02	22/478 0.05	1.92
Black Females v. White	2/247 0.01	22/478 0.05	2.71
Black Females v. Black Males	2/247 0.01	4/56 0.07	3.07

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## Intersectional Pay Analysis

Analysis	Pay for Protected Group	Pay for Non-Protected Group	Pay Difference	Standard Deviation
Minority v. Non-Minority	\$69,400	\$71,000	\$1,600	1.35
Black v. White	\$67,700	\$71,000	\$3,300	1.95
Black Females v. White	\$61,900	\$71,000	\$9,100	2.98
Black Females v. Black Males	\$61,900	\$74,500	\$12,600	3.87

Please share any feedback



## OFCCP's Big Numbers

- FY2019 Recovery
  - OFCCP recovered over \$41M – a record for the Agency
- FY2020 Recovery – More than \$36 M
- FY2021 – *Less than six months in* already more than \$18 M
- These are by far the biggest monetary numbers OFCCP has ever achieved
- How are they doing it?
- And what can you do to protect your organization?



# Your Job Groups are OFCCP's Entry Point

- The “job group” has a long and interesting history
  - OFCCP regulations from the 1970s mandate employers create job groups by combining jobs with similar ***content, wage*** and ***opportunity***
  - Job groups designed to increase “sample size” to yield meaningful systemic trends
  - When first mandated by OFCCP – and for a few decades after – job groups were used exclusively to conduct utilization analyses and set affirmative action placement goals
  - However, we have seen steady job group “creep” into adverse impact analyses and, more recently, into pay analyses
  - What can you do to revise your job groups to respond to this changes approach?

Please share any feedback





# GHILG

## Your Job Groups are the OFCCP's Entry Point because . . . Big Numbers are Bad Numbers

Analysis	Rate for Females	Rate for Males	80% Rule	Standard Deviation
Female v. Male	1/50 .02	5/50 .10	.20	1.68
Female v. Male	10/500 .02	50/500 .10	.20	5.32
Female v. Male	100/5000 .02	500/5000 .10	.20	16.8

Please share any feedback



## How to Defend Your Audit *Post-Submission*

- OFCCP invariably will conduct deeper post-submission investigations, often with onsite audits
  - This will typically involve interviews with management, HR and compensation team members regarding policies and practices
  - It is important that you thoroughly prep those slated for interview
  - Strategy point – build your prep with interviewees to reinforce and support what you expect OFCCP is likely to find in the statistical analyses
    - Example – determine the factors that statistically impact and explain pay differences and prep the comp team to include those in interview responses





# Affirmative Action Verification Initiative

- Initiative began under previous administration's OFCCP leadership
- 2016 General Accounting Office report made relevant recommendations
- OFCCP has included on website while still awaiting approval
  - When will that approval come?
- In first phase, AAVI interface will require verification of compliance with affirmative action requirements, and provide a method for uploading data during compliance evaluations
- But how will it grow? Annual AAP uploads? Pay data reporting?

Please share any feedback





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## Key Takeaways

- New OFCCP Leadership means changed enforcement priorities
- Assess the *effectiveness* of your outreach and recruitment efforts
- Combatting systemic racism in pay and hiring will be the lead enforcement priority for OFCCP
- Intersectionality is now a “thing” – consider analyzing your data based on that
- Revise your job groups strategically to avoid “false positive” deep dive investigations

Please share any feedback





# open forum

What's on your mind, GHILG?

Please share any feedback







- Reminders
  - We value your feedback – please let us know how we can improve the experience for you!
    - <https://forms.gle/XaHsF3ENdcDCynL76>
  - Board position open for applications

