

Contractor Portal Certification & Other Big OFCCP Changes Have Arrived – *Are You Ready?*

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ABOUT MICKEY SILBERMAN, ESQ.



Mickey Silberman, Co-Chair of The Institute, is the founder of and a Shareholder with Silberman Law PC. For more than 25 years Mickey has represented employers in all areas of employment law, specializing in pay equity, systemic EEO, affirmative action and OFCCP compliance and audit defense, and Diversity, Equity & Inclusion.

Mickey has directed the preparation of thousands of affirmative action plans across all industries and throughout the country. He has directed the defense of hundreds of OFCCP investigations, including many of the agency's largest discrimination investigations during the past 10 years. In the last 1,000 OFCCP enforcement matters Mickey has defended, he has obtained Letters of Compliance – the best possible outcome – in more than 99.5% of the audits.

Mickey also is recognized as a national expert in the areas of pay equity and pay data reporting. He helps employers conduct pay analyses on a proactive basis and in response to pay investigations by OFCCP and EEOC.

He spends much of his time counseling employers on complex "real world" EEO issues and provides creative, strategic representation to his clients throughout the country.

LAWYER'S DISCLAIMER

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SO WHAT SHALL WE TALK ABOUT?

- OFCCP is Rapidly Transforming Into a “New” Agency
- We Are Seeing Major Changes Just in Past Month
- New OFCCP Directives on Pay Analyses, Privilege and More
- The “Contractor Portal” Has Arrived
- So, What Should Employers Do Now to Respond?

OFCCP IS MOVING AHEAD WITH CHANGED 2022 PRIORITIES

- OFCCP recently announced new enforcement priorities, including –
 - Two new OFCCP Directives on pay and privilege and transparency, hot off the presses!
 - Proposed changes to the PDN Rule
 - A requirement that contractors notify OFCCP of each of their subcontractors
 - “Modernize” affirmative action programs and employer’s EEO obligations
 - Company-wide AAPs?
 - Specific-race goals?
 - LGBTQ data reporting and analyses?
 - The above is in the (near) future, let’s talk about the “now” . . .

2022 OFCCP PRIORITIES: DIRECTIVE 2022-01

- AAP regulations require employers to “evaluate its compensation system” at least annually
- OFCCP will seek “pay equity audits” employers conduct to meet this requirement
- **This includes pay equity audits conducted under attorney-client privilege, if the purpose at least in part is for OFCCP compliance**
- So what’s an employer to do?
- Emerging best practice – two separate pay projects, one for OFCCP compliance and another, under privilege for legal advice, not for OFCCP compliance

2022 OFCCP PRIORITIES : THE END OF THE PDN RULE?

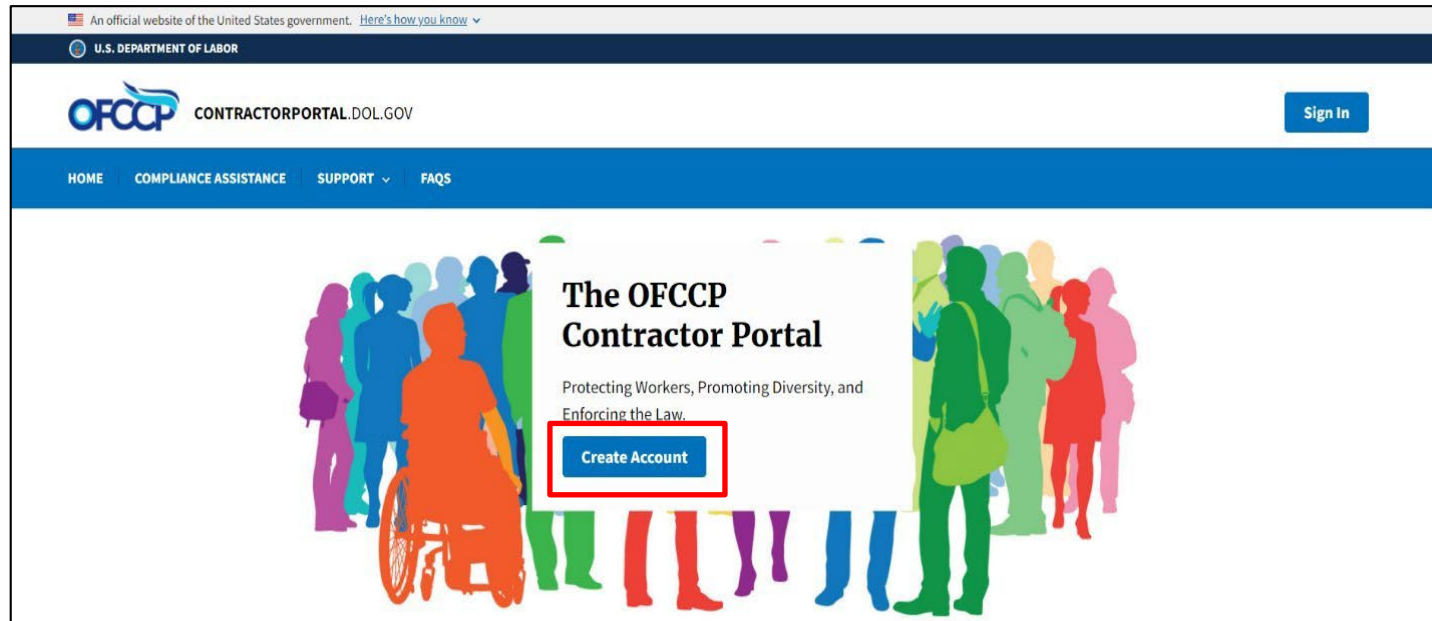
- OFCCP has proposed significant changes to the PDN Rule
- OFCCP **dislikes** the current PDN Rule
 - OFCCP has to “show their cards” and provide details of their evidence
 - Requires supporting evidence, not just statistical indicators
- Agency claims PDN Rule is slowing audits and tying the Agency’s hands
- Proposal removes the supporting evidence requirements
 - So OFCCP can simply rely on “stats” – but Big Numbers are Bad Numbers

2022 OFCCP PRIORITIES : DIRECTIVE 2022-02

- OFCCP rescinded the four “CERT” Directives issued by previous OFCCP leadership:
 - *Contractor Recognition*
 - *Transparency in OFCCP Compliance Reviews*
 - *Efficiency in Compliance Reviews*
 - *Certainty in OFCCP Practices*
- No more automatic 30-day audit extension for support data
 - “Extraordinary circumstances” now required for an extension
- No 45-day scheduling delay after CSAL is published
- OFCCP is demanding detailed private employee and former employee contact info

OFCCP CONTRACTOR PORTAL

OFCCP'S NEW "CONTRACTOR PORTAL"



OFCCP'S NEW "CONTRACTOR PORTAL"

- Let's start with OFCCP's 1st FAQ –The Contractor Portal is a new OFCCP platform where contractors and subcontractors *must certify* they are meeting their requirement to develop **and** maintain annual AAPs
- The new web-based portal will serve two functions:
 1. Require employers to certify **annually** it is in compliance with OFCCP affirmative action regulations
 2. When scheduled for an audit, require employers to upload the "desk audit" AAP submission to the portal
- Why "Contractor Portal" versus "AAP-VI"? Is this the path to annual AAP data collection?

ANNUAL CERTIFICATION – THIS IS BIG

As part of the **annual** certification requirement, employers will use the portal to select one of the below responses.

- **Option 1:** Entity ***has developed and maintains*** affirmative action programs at each establishment and/or for each functional or business unit.
- **Option 2:** Entity ***has not*** developed and maintained affirmative action programs at each establishment.
- **Option 3:** Entity became a contractor for less than 120 days and has not yet developed an affirmative action program.
- Fourth, unstated, option, the employer doesn't respond

CERTIFYING FOR *EVERY* LOCATION OR FUNCTIONAL AAP

- Employers are certifying compliance for ***each and every*** entity and location
- **Important** – locations will either be based on 2018 EEO-1 reports – if the employer chooses – or employer will manually input entities/locations
 - Employers with multiple affiliates that file for the parent and subsidiaries should consider conducting a “single entity” evaluation before certifying
- Many employers take the position that only the entity holding the government contract is covered. ***This. Is. Wrong.***
- Single entity FAQ
 - <https://www.dol.gov/agencies/ofccp/faqs/single-entity-test>

SEPARATE FACILITY EXEMPTION WAIVER

Employers that want to exclude some entities or locations from AAP requirements can seek a **Separate Facility Exemption Waiver**

- OFCCCP regulations provide an exemption from AAP requirements for entities or locations of a contractor not directly connected to the government contract *only if*:
 - The employer can demonstrate it is *not* a single entity. ***This. Is. Hard.***
 - The employer seeks the Separate Facility Exemption Waiver *before OFCCP initiates* an audit
- <https://www.dol.gov/agencies/ofccp/directives/2002-01>

WHAT ABOUT YOUR EEO-1?

- Employers **may** use their 2018 EEO-1 data to populate their reports showing each establishment, but this is not required
- This can potentially save time, but think this through
- Is your current org structure the same as in your 2018 EEO-1 report?
 - Have you added or closed establishments since 2018?
 - Is your AAP structure the same as your 2018 location reports?
- There may be strategic reasons to have a different AAP structure than your 2018 EEO-1 report

WHAT ARE YOU CERTIFYING?

- **Important** – you are not only certifying you have current AAPs, you are also certifying you are in ***current OFCCP compliance***
- You are certifying *current compliance* with ***all OFCCP requirements***, including –
 - EO 11246 written and statistical AAP components
 - Section 503 and VEVRAA written and statistical AAP Components
 - Identification of Problem Areas
 - Goal Setting and Good Faith Efforts Outreach and Recruitment
 - Conducting Adverse Impact Analyses on applicant flow, hires, promotions, and terminations
 - Evaluating Compensation Systems – New OFCCP Comp Directive, *This is Big*
- ***And*** that you are ***taking specific steps*** to address indicators or deficiencies in these areas

OFCCP'S NEW "CONTRACTOR PORTAL"

- Let's be thoughtful about whether we auto-populate the 2018 EEO-1 report or manually enter our current locations

The screenshot shows the OFCCP User Authorization page. It features the OFCCP logo at the top left, followed by the title "User Authorization" and a sub-header "Enter the following unique identifiers as part of your account creation process." Below this are three input fields: "Employer Identification Number (EIN)", "Headquarter/Company Number", and "Establishment/Unit Number", each containing the placeholder "99999999". To the right of these fields is a checkbox with the text "I do not have the requested identifiers 'Headquarter/Company Number' and/or 'Establishment/Unit Number'". A red box labeled "Identifiers Not Known Path" is positioned above the checkbox, with a red arrow pointing to it. At the bottom right, there are "Back" and "Continue" buttons, with the "Continue" button highlighted by a red box.

OFCCP'S NEW "CONTRACTOR PORTAL"

Certification Question

The contractor represents that:

- 1. Entity has developed and maintained affirmative action programs at each establishment, as applicable, and/or for each functional or business unit. See 41 CFR Chapter 60.
- 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. See 41 CFR Chapter 60.
- 3. Entity became a covered federal contractor or subcontractor within the past 120 days and therefore has not yet developed applicable affirmative action programs. See 41 CFR Chapter 60.

Note: Covered contractors must develop an AAP within 120 days of entering a federal contract or subcontract. New contractors who select option three (3) will have 90 days from the development of their AAPs to access the Contractor Portal and update their certification.

OFCCP'S NEW "CONTRACTOR PORTAL"

Declaration Statement

The contractor represents that:

I attest that this Affirmative Action Program (AAP) certification is true and correct to the best of my knowledge. I understand that the penalty for making false statements with respect to this certification is prescribed in 18 U.S.C.1001.

I affirm this declaration *

OK, WHEN DO I NEED TO CERTIFY?

Feb 1, 2022 – Registration Already is Open

- Employers can register their organization now

March 31, 2022 – Certification Period Begins

- Employers can begin certifying the status of their OFCCP compliance for *each location and/or functional unit*

June 30, 2022 – Certification Period Ends

- Employers should certify the status of their OFCCP compliance before the period ends

HOW WILL OFCCP USE THE CERTIFYING DATA?

- The Portal data will allow OFCCP to run a “comprehensive and informative report identifying the AAP status of covered federal contractors”
- OFCCP will use this data as a part its *Federal Contractor Selection System* – the system for selecting employers for audits and investigations
 - If you certify and say “**no**”, you will be **more likely** to be targeted for OFCCP audits
 - If you **do not** certify, you will be **more likely** to be targeted for OFCCP audits
 - In theory, who will be audited less frequently? The employers who say “yes”

OK, NEXT STEPS, AND WHEN?

- Determine Your Covered Contractor Status
- Single Entity Test – Does it Apply and Should You Seek an Exemption?
- Compare Your 2018 EEO-1 Reporting to Your AAP Structure - *This is Big*
- ***Get into Current Compliance***
- Certify Starting on March 31st and No Later than June 30th

OFCCP AUDIT CHANGES – THEY'RE ALREADY HERE

- “Two or More Races” being used for comparison in audits as -
 - A favored group in pay and adverse impact analyses; and
 - A disfavored group to find discrimination
- Investigating pay using small group “cohort” analyses
- Requesting personal contact information for employees and applicants
- New Compensation Directive insists OFCCP have the right to review your compensation analyses
 - But what do the regs say?

QUESTIONS?



WANT TO CHAT AAP, OFCCP OR PAY
EQUITY?

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