



Should You Be Scared By The OFCCP's Proposed New Scheduling Letter?

What's In It, And What Do We Need To Worry About?

Who is *This* Guy?

www.Biddle.com



- Matt Nusbaum, Director of BCGi
 - Attorney (but not *your* attorney)
 - Practiced in New York and Washington DC for 10 years
 - Data Analyst/Computer Programmer
 - Database design, implementation, and management
- BCG Institute for Workforce Development
 - Education and training arm of the Biddle Consulting Group
- Biddle Consulting Group
 - Preparing and defending AAPs for nearly 50 years

<https://portal.biddle.com/bcgi/encyclopedia>

A vertical stack of several books with colorful covers in shades of green, yellow, orange, blue, and red. The BCGi logo is visible on the blue book cover.

Office of Federal Contract Compliance Programs (OFCCP)

- Agency within the Department of Labor (DOL)
 - Enforces federal contractor affirmative action obligations
 - Unlike the EEOC, they can (and do) “pop by for a visit”
- All audits are “full” audits
 - Every possible technical violation is on the table
 - Compensation practices are a major focus
 - Hiring discrimination is still the agency’s bread-and-butter
 - Already have incredibly broad investigatory authority
 - Still bound by *some* Constitutional limitations, though!

A vertical stack of several books with colorful covers (green, yellow, orange, blue, light blue, red) on the left side of the slide.

Scheduling Letter (and Itemized Listing)

- Perhaps the most important document the OFCCP has
 - Actually two documents that kick off an audit
 - Detail TONS of documents, data, and information you are required to turn over to the feds
 - Many of the “rules” in audits actually stem from the Scheduling Letter, not the OFCCP’s regulations
 - (Though, the regulations are chock full of enforcement rules, too)



The “Highlights”

- Lot’s of “shoulds” in the current letter change to “musts”
- Add a second compensation snapshot
- Let’s talk AI!
- Force everyone to do a B.S. compensation “analysis”
- Impose “campus-wide” audits
- Split your promotion “pools”
- Race-specific Job Group Analysis
- Submit your IPEDS reports (higher education)
- Let’s define the “review of personnel processes”
(in unenforceable subregulatory guidance)



Compensation Policies and “Documentation”

- Current Scheduling Letter *asks* for:
 - “Documentation and policies related to compensation practices”
- OFCCP wants to add:
 - “Copies of existing written employment polices” that concern:
 - Equal opportunity, including anti-harassment policies
 - EEO complaint procedures
 - Employment agreements, such as arbitration



Let's Talk About Artificial Intelligence

- AI tools are here and we are using them
 - Despite all our warnings!
- AI platforms obscure the decision-making process
 - Including factors actually relied on (and how)
- AI platforms absolutely perpetuate the fears and prejudices of their creators
 - Largely White men*
- OFCCP doesn't understand it (but wants to)
 - Do you?

* Note that BCGi capitalizes all race/ethnicity designations in accordance with longstanding EEOC guidance.



The Non-Existent Compensation Analysis Requirement

- **THERE IS NO ANNUAL COMPENSATION ANALYSIS REQUIREMENT!**
 - “Evaluation” of compensation *systems* required in the “identification of problem areas” if/when you set a placement goal
 - No goal? No required look into compensation!
 - Even then, no statistical analysis explicitly required
- **OFCCP wants to make it so, though**
 - Unfortunately, they created a mess
 - Just encouraging contractors to prepare a B.S. compensation “analysis” just to tick the (non-existent) technical compliance box
 - Like a simple comparison of average pay, not the expensive regressions you (should) perform (likely under legal privilege)



“Campus-Wide” Audits

- New “type” of audit being proposed
 - “Post-secondary institution with location(s) in [city and state]”
 - Higher education TAG is chock full of *suggestions* for preparing campus-wide AAPs
 - Forgetting to mention that campus-wide plans are not required and actually go *against* the OFCCP’s current regulations
- Interested in “campus-like” settings more broadly
 - Corporate headquarters campuses are the most common example
 - But could apply to any group of buildings in the same area



“Promotions”

- There is rarely a meaningful way to statistically analyze “promotions”
 - No definition of “promotion” BTW
 - Different types of promotions must be analyzed separately
 - “Competitive” promotions
 - Analyze along with “hires” if they were compared together (separately if not)
 - “Noncompetitive” promotions (progressions)
 - Typically no “pool” for analysis
 - OFCCP’s “proxy” pool is complete B.S.
- OFCCP wants you to report different types of promotions separately
 - And *really* wants to know how you’re evaluating noncompetitives



Your Job Group Analysis Is Worthless

- Your Workforce Analysis must show headcounts by individual race/ethnicity
 - If you prepare an Organizational Display instead, knock it off
- For no good reason, the Job Group Analysis does not!
 - Just total, female, and “minority” counts are required
- The Job Group Analysis *should* break things down by individual race/ethnicity
 - You *should* be preparing one for yourself!
 - And the OFCCP should update their regulations if they want to make this a requirement
 - Updating the scheduling letter does *not* make this a requirement



“EO Analysis” On IPEDS Data? Okay...

- Most organizations the OFCCP deals with file EEO-1 reports
 - OFCCP performs an “EO analysis” on your EEO-1 data in an audit
 - Won’t tell us what it is, how to perform one, or what it is meant to reveal, but whatever
- Higher education institutions do not file EEO-1 reports (any more)
 - They do file a similar report, though, to the Department of Education
- The OFCCP’s authority here is *thin*
 - But success here could lead to successes elsewhere down the road
 - What else do you produce, that is “employment-related,” that the OFCCP might be interested in seeing?
 - California pay data report, perhaps?



The “Review of Personnel Processes”

- What is it? The regulations actually aren't much help
 - Please ignore Appendix C in the VEVRAA regulations
- For disability and veteran AAPs, this includes a review of job descriptions
 - On a “scheduled basis” (not as openings occur)
 - Not actually has hard as people make it
- The OFCCP wants to see the *results* of these reviews
 - They are going to be disappointed



Flotsam And Jetsam

- No more paper submissions, please!
- Don't get cute with the "data" in the Itemized Listing
- Show your utilization cards
- Turn over your action plans! (?)
- Yes, you need action plans for your disability and veteran AAPs
- Wait, which veteran benchmark do you want?
- More promotion data!
- Are you classifying your terminations "correctly?"
- Compensation data for temps?



- www.Biddle.com
- www.BCGinstitute.org
- MNusbaum@Biddle.com
- 916-294-4250