

Management Alert



OMB Approves “New” Audit Scheduling Letter... Finally!

By Valerie J. Hoffman and Cassandra H. Carroll

So much has transpired in the federal contractor community this past year that OFCCP’s proposed “new” audit Scheduling Letter was all but forgotten. Indeed, more than three years ago—back in May, 2011—OFCCP first announced its intent to modify the Scheduling Letter, Itemized Listing, and Compliance Check Letter. Yesterday, OMB finally approved it, albeit with less sweeping changes, making the new collection criteria more manageable for the federal contractor community. Today, the new Scheduling Letter and Itemized Listing were officially released. To see the approval for the new Scheduling Letter, Itemized Listing and Compliance Letter, [click here](#), or use the direct links to the new [Scheduling Letter](#) and [Itemized Listing](#).

Here are the key substantive changes to the form:

First, although OFCCP initially proposed a new requirement mandating that federal contractors submit employment activity data by both job group and job title, the new Itemized Listing reverts back to the 2008 version, allowing contractors to submit data by either job group **or** job title. As explained by OFCCP, it opted to maintain the option of reporting by either method in response to comments that there would be significant burden associated with collecting, analyzing and reporting data in two different forms. [Click here](#) for our comments on the proposed changes to the scheduling letter, which highlighted some of the anticipated burden issues.

Next, contractors are now required to submit race and ethnicity information using five specific categories (African-American/Black, Asian/Pacific Islander, Hispanic, American Indian/Native Alaskan, and White) instead of two broad categories (i.e., minority and nonminority). This allows OFCCP to conduct analyses on the employment patterns of specific race/ethnicity groups. Practically speaking, most contractors have been conducting the more detailed analyses utilizing the five categories. Of note, however, is the OFCCP’s disregard of the Native Hawaiian/Other Pacific Islander category that is a standard EEO-1 reporting category separate from Asian.

One of the most significant changes involves “Item 19” (previously “Item 11”), which in its previous form required contractors to submit aggregated compensation data, a method that was all but useless in any meaningful pay analysis. Now, contractors must submit compensation data by employee, as of the date of the workforce analysis in the requested Affirmative Action Program, as well as the accompanying job title, job group, and EEO-1 category. In other words, contractors must include all of the individual backup compensation data that underlay the workforce analysis contained in the AAP. This method of organization will assist the OFCCP in pursuing its latest theory of pay discrimination—“steering.” “Steering” discrimination may be found where there is evidence that contractors maintain a practice of disproportionately “steering” individuals of a particular sex or race/ethnicity into certain jobs with diminished pay or promotion opportunities. Now that OFCCP will have immediate access to more detailed pay information, it will most certainly be looking for patterns where particular job titles appear to be race/ethnicity or gender segregated as potential evidence of “steering.” Accordingly,

contractors should be sure to consider whether their workforce analyses reveal any such patterns, and if so, investigate whether unlawful placement practices may be the underlying cause.

Moreover, under “Item 19,” contractors are now required to include their particular definition of “promotion,” as used by the establishment subject to the audit. If the “promotion” definition varies by different segments of the workforce or by job title, the term must be defined as used for each segment and/or job title respectively.

Further, OFCCP broadened the definition of “compensation” to include consideration of hours worked, incentive pay, merit increases, locality pay, and overtime. Consequently, the scope of the pay analysis will be broader—this is another very important move by OFCCP which, up to now, has not seemed particularly focused on finding pay issues outside of base pay. The White House has been demanding more enforcement of pay issues, and this information from contractors will give the OFCCP another angle for enforcement. Indeed, the White House’s focus on pay may be what finally moved the OMB to release this version of the Scheduling Letter which has been stalled in that agency for years.

In addition, with this new OMB approved Scheduling Letter, the agency is now requiring contractors to provide data electronically, but only if they maintain it in an electronic format that is useable and readable. This emphasis on electronic submission enables the OFCCP to begin its compensation analysis as soon as the first submission is made by the contractor. As we have noted in our past publications, OFCCP has been, as a major priority, increasing its efforts to find evidence of pay discrimination, and this change will enable them to more quickly and efficiently do so.

Very importantly, the new Scheduling Letter was also changed to reflect and supplement the new Section 503 and VEVRAA requirements. Indeed, some of the required submissions appear to fill a gap that was not specifically provided for in the regulations. While the regulations failed to specifically require the inclusion in the AAP of a report demonstrating numerical progress toward the OFCCP-established disability goal and veterans hiring benchmark, the new Scheduling Letter purports to require contractors to submit such reports as part of their initial audit submissions. Indeed, contractors subject to audit are now required to: (1) provide evaluation results reflecting the effectiveness of their outreach and recruitment efforts for qualified individuals with disabilities (IWDs) and protected veterans; (2) documentation reflecting efforts to comply with audit and reporting system requirements; and (3) documentation of the computations or comparisons set forth in 741.44(k) and 300.44(k) for the AAP year, including updated analyses for contractors who are least 6 months into their current plan year upon receipt of a Scheduling Letter. In addition, and as noted above as possibly exceeding the regulations, for Section 503, contractors must provide utilization analyses evaluating the representation of IWDs in the contractors’ workforce, again including updated analyses for contractors that are at least 6 months into their current plan year, and for VEVRAA, documentation of the hiring benchmark adopted, the methodology used to establish it (provided the five factors described in 300.45(b)(2) were used), also requiring updated hiring benchmark information for contractors who are at least 6 months into their current plan year.

Further, with respect to both Section 503 and VEVRAA, contractors are now required to submit copies of reasonable accommodation policies, as well as information regarding any accommodation requests and their resolution, if applicable. By doing so, OFCCP seems to now be making the reasonable accommodation “best practices” outlined in Appendix B to Part 60-741 mandatory—even though Appendix B specifically states that “written reasonable accommodation procedures” are not required, and the “failure to use such procedures will not result in a [] violation.” See Appendix B to Part 60-741 (emphasis added). Indeed, the only practical means by which contractors will be able to timely respond within 30 days to a current Scheduling Letter request for reasonable accommodation requests and their resolution is by maintaining a written reasonable accommodation log, which again, is set forth only as a “best practice” in Appendix B. This new requirement is likely to be controversial, as OFCCP seems to be making an end-run to re-impose the previously heightened mandatory reasonable accommodation standards that were later reduced to “best practices” in the final regulations after backlash from the contractor community.

Finally, for Section 503 and VEVRAA, contractors must provide their most recent assessments of their personnel processes and physical and mental job qualifications, including the dates those assessments were performed, any accompanying actions taken, and upcoming dates for subsequent assessments.

Contractors, Get Ready Now

These changes are effective immediately. If you are not doing so already, be sure to collect and analyze race and ethnicity information by the specific categories, and further maintain pay data individually by job title, job group and EEO-1 category. This will enable you to avoid a last minute “fire drill” when you receive the new Scheduling Letter. Be sure to compute your progress against the OFCCP’s disability goal and veterans hiring benchmark. Finally, treat Appendix B of the Section 503 regulations as mandatory, as OFCCP has now made it clear that contractors will need to submit written reasonable accommodation policies, as well as written documentation concerning accommodation requests and their resolution.

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