

# Client Alert

October 2014

## OFCCP's New Scheduling Letter and Itemized Listing: Implications for Contractors

This week the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) received approval from the Office of Management and Budget (OMB) for a revised Scheduling Letter and Itemized Listing (aka, a "notice of audit") for service- and supply-covered contractors.

Those who follow the OFCCP know this development has long been in the works. In 2011, the OFCCP first suggested revisions to the Scheduling Letter and Itemized Listing, and collected public comments on its proposal. The contractor response was significant, and the OFCCP's revisions were put on hold. The OFCCP recently sought OMB approval again, this time for slightly more limited changes to the Scheduling Letter and Itemized Listing, which was granted.

### Significant Changes:

- Employment activity data must be reported by individual race and ethnicity, rather than by "minority" and "nonminority." (Reporting by gender is still required and unchanged.)
  - Interestingly, the OFCCP cites to five race and ethnic categories, rather than seven as used in the annual EEO-1 Report. Most likely, though, the OFCCP will continue to allow contractors to report on all seven categories.
- Compensation data must submit individualized compensation data, not aggregate data, including job title, job group and EEO-1 category.
  - The data must be as of the date of the workforce analysis in the Affirmative Action Program (AAP). Contractors can no longer select a pay reporting date.
- Compensation is more broadly defined, to include not only base salary or wage, but also hours worked, incentive pay, merit increases, locality pay and overtime.
- Data must be reported electronically, if contractors maintain it in an electronic format that is useable and readable.
- The OFCCP incorporated changes to the veteran and disabled final rules that were published in September 2013, which changed the data collection, recordkeeping and reporting obligations under Section 503 of the Rehabilitation Act and VEVRAA (the Vietnam-Era Veterans' Readjustment Assistance Act of 1974).
  - We have an earlier client alert, and two posts on our team blog, regarding the new veteran and disabled rules. See: <http://www.huntonlaborblog.com/2013/09/articles/ofccp-1/updated-ofccp-publishes-new-rules-for-veteransdisabled-effective-march-2014/> and <http://www.huntonlaborblog.com/2013/09/articles/ofccp-1/ofccp-publishes-new-rules-for-veteransdisabled-effective-march-2014/>

The Itemized Listing still allows contractors to submit employment activity data by either job group or job title, rather than both ways, as the OFCCP requested in 2011.

## **Implications for Contractors**

Contractors should immediately take note of these changes. Contractors must complete an initial submission to an audit notice within 30 days of receipt. Since contractors must now report employment activity by individual race and ethnic categories at that time, companies must quickly conduct a more detailed level of analysis than may previously have been required. And, additional compensation reports will need to be run, potentially from payroll systems separate from HRIS (human resources information systems), to provide the broadly defined “compensation” reports at the individual-employee level.

The most troubling aspect of the revised Itemized Listing is that it will increase the cost, scope and risk associated with an OFCCP’s investigation. Currently, many OFCCP offices analyze the aggregate pay data and will proceed to individualized questions only if the summary data reflects potential disparities. By requiring individualized pay data at the outset, the OFCCP will be able to simultaneously analyze pay by EEO-1 category, job group, SSEG (Similarly Situated Employee Grouping) and job title. Increasing the number of statistical analyses at this stage will, in turn, increase the likelihood that a pay investigation proceeds to a more detailed review. As those in the OFCCP field know well, compensation audits are already becoming increasingly prolonged and complex. This new approach will only contribute to the cost, burden, risk and difficulty of OFCCP audits for contractors. Employers should view very skeptically the OFCCP’s claim that the new letter “provides contractors with more flexibility” and “contribute[s] to faster and more efficient compliance evaluations.” See 79 Federal Register 189 (September 30, 2014).

The OFCCP’s requirement of individualized compensation data also seems strangely at odds with its recent proposed rule that would require a summary “Equal Pay Report” annually from contractors. See <http://www.dol.gov/ofccp/EPR.html>. Through the Equal Pay Report, the OFCCP proposes to collect the same type of aggregated pay information it no longer deems useful or adequate in audit. Our firm already raised concerns about the Equal Pay Report in an article published in *Inside Counsel*, and reproduced on our blog, at: <http://www.huntonlaborblog.com/2014/09/articles/ofccp-1/pay-close-attention-to-the-ofccps-proposed-equal-pay-report-rule/>.

The OFCCP has published the new Scheduling Letter and Itemized Listing online, at [http://www.reginfo.gov/public/do/PRAViewIC?ref\\_nbr=201104-1250-001&icID=13735](http://www.reginfo.gov/public/do/PRAViewIC?ref_nbr=201104-1250-001&icID=13735). It plans to begin using the new documents after **October 15, 2014**.

If your organization receives a Scheduling Letter from the OFCCP, it is more important than ever to immediately engage legal counsel to prepare a defense. The 30-day response period will seem all the shorter with these new requirements, while the initial submission is even more critical. Our experienced OFCCP audit team deals with OFCCP directors and compliance officers daily, so contact us today to prepare.

## **Contacts**

**Christy E. Kiely**  
ckiely@hunton.com

**Gregory B. Robertson**  
grobertson@hunton.com