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OFCCP Issues New Scheduling Letter and Itemized Listing

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On October 1, 2014, the Office of Federal Contract Compliance Programs (OFCCP) released its new compliance evaluation scheduling letter and accompanying Itemized Listing, which the OFCCP will begin using to schedule new audits on October 16, 2014 after a self-imposed two-week scheduling moratorium.

Changes to the Scheduling Letter

The scheduling letter identifies for the first time whether the contractor is being selected for a routine compliance review or a corporate management compliance evaluation, and indicates whether the OFCCP will perform an establishment review or Functional Affirmative Action Plan (FAAP) review. In the letter, the OFCCP indicates its intent to check for Veterans' Employment and Training Service (VETS) contractor reporting compliance. The scheduling letter does not make clear, however, how many years of VETS reports the contractor must submit. It also suggests that the contractor will not be submitting the VETS reports at the initial desk audit submission, but will submit those upon request in later phases of the audit as contractors have done in the past.

Changes to the Itemized Listing

Attached to the scheduling letter is a list of data that the contractor is required to submit along with its affirmative action plans (AAPs). This attached list is called the Itemized Listing. The major changes to the Itemized Listing represent an attempt to incorporate the new requirement of Section 503 of the Rehabilitation Act and Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) that contractors submit data related to employment activity (applicants, hires, promotions, and terminations) by individual race/ethnicity rather than by minority status, and that contractors submit individualized compensation data.

Items 7 through 9 are new, requiring contractors to submit the results of their internal evaluations of their outreach efforts to attract qualified individuals with disabilities (IWDs). These items also require documentation of all actions taken to comply with the auditing, reporting, and recordkeeping requirements for applicants, hires, and job openings under the amended Rehabilitation Act Section 503. Item 10 is the utilization analysis of each job group, evaluating IWDs representation within the contractor's workforce to determine which job groups failed to meet the 7% representation goal.

Items 11 through 13 are new and parallel Items 7 through 9. These relate to outreach efforts made to attract qualified protected veterans. These provisions mirror, for veteran data, the reporting the requirements imposed on contractors with respect to IWDs by Items 7 through 9. Item 14 requires documentation of the hiring benchmark adopted by the company and the contractor's methodology used in establishing its own benchmark, if that benchmark was constructed according to the five factors described in 41 CFR § 60-300.45(b)(2), rather than adopting the OFCCP's 7.2% benchmark in 2014.

Items 15 through 17 include carry-overs from the old scheduling letter: Item 15 asks for three years of EEO-1s; Item 16 is the collective bargaining agreement (CBA) paragraph; and Item 17 is the same as the old paragraph 9, which asked about the job group representation at the start of the prior plan year, goals in the prior year's AAP, and progress towards those goals. With respect to new Item 16 and the CBA, however, the new Itemized Listing asks for significantly more documentation implementing the CBA, not just information that would have assisted the OFCCP in understanding any mobility system. The new CBA paragraph asks for "any other documents you prepared, such as policy statements, employee notices or handbooks, etc. that implement, explain or elaborate on the provisions of the collective bargaining agreement," a tremendous expansion of the prior Itemized Listing.

Item 18 is derived from old Item 10, dealing with transaction data (applicants, hires, promotions, and terminations). It will require contractors to submit all data related to employment activity according to individual race. The OFCCP's race categories, however, do not mirror the EEO-1 race categories. There are seven ethnicity and race categories on the EEO-1 submission, and the OFCCP is compressing those into five: (1) African-American/Black; (2) Asian/Pacific Islander; (3) Hispanic; (4) American Indian/Alaskan Native; and (5) White. The OFCCP wants contractors to re-combine Asian with Native Hawaiian/Pacific Islander, and it does not want information on anyone who self-identified as "Two or More Races." This approach also suggests that the OFCCP will be shifting away from the broader minority v. non-minority methodology that it previously employed when evaluating whether a particular employment activity has an adverse impact on a protected category. The approach also suggests that the agency is taking a much closer, and more granular, look at contractors' employment processes. As to promotion data, the contractor must include its definition of promotion, and whether the promotions are to the job group, from the job group, or within the job group. For any contractor that presents its promotion data by job title, the Itemized Listing now requires that the contractor include the department and job group from which and to which the employee was promoted. Contractors may feel compelled to run infinitely more adverse impact analyses, race by race, prior to submitting their response to the scheduling letter.

Item 19 requires that contractors submit compensation data at an individual level rather than the previously required group level. The compensation data must include base salary and/or wage rate and hours worked for all employees. Contractors must also submit other compensation such as bonuses, incentives, commissions, merit increases, and overtime for each employee. In addition to compensation data, contractors are now required to submit the hire date, individual race/ethnicity, job title, job group, and EEO-1 category for each employee. Like Item 18, this change to the Itemized Listing suggests that the OFCCP will be looking at disparities on a more granular basis with respect to race and also that it will begin to scrutinize more closely compensation disparities among different races in the non-base pay categories (e.g., bonuses, incentives, and commissions). The Itemized Listing allows the contractor to provide additional factors that may explain its compensation decisions, such as educational level, past experience, and performance reviews. This is going to place increased pressure on contractors to explain all compensation differences using quantifiable variables.

Item 20 requires that contractors submit information related to reasonable accommodation, both religious and disability. This request includes submission of reasonable accommodation policies, requests made for reasonable accommodations, and the resolution of those requests (both granted and denied).

Items 21 and 22 require that contractors provide information about their most recent internal assessments of personnel policies and physical and mental qualifications for jobs, respectively. These assessments should focus on preventing stereotyping and ensuring equal access to employment opportunities to IWDs and protected veterans. They should also focus on the extent to which current practices may unfairly disadvantage these groups and, if any practices are determined to do so, should make every effort to expeditiously correct such problems. The submission to the OFCCP should include the date of the most recent assessment and any changes that were made to the personnel policies and physical and mental qualifications. More information about the OFCCP's expectations for these Itemized Listing paragraphs may be found in the Federal Contract Compliance Manual in sections 1H02 and 1H03, and in Appendix C to the veteran regulations.

In sum, the OFCCP's new Itemized Listing is going to require a significant amount of advance planning. New processes will need to be developed to track and monitor compliance, and other procedures will need to be implemented to ensure that the information can be gathered and assembled within 30 days of receiving the scheduling letter.

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