

“OFCCP Enforcement Update: What Can Colleges and Universities Expect From the New Administration?”

Sponsored by **VALIC**

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Presenter



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**Agenda**

- Impact of New Administration
- What Has OFCCP Done Since Election
- Section 503 and VEVRAA Enforcement
- Hiring Discrimination Enforcement
- Pay Equity Enforcement
  - Impact of Google Case
- How Universities Can Prepare for an OFCCP Compliance Review

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### Impact of New Administration

- Still awaiting key leadership changes
  - OFCCP Director, key national office roles, Regional Directors
- Government reorganization
  - Consolidation of local offices
  - Merger with EEOC
- Impact of new budget priorities
  - Voluntary retirement & separation packages offered
- Potential change to enforcement protocols
  - Active Case Enforcement vs. Active Case Management

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### Impact of New Administration

- Obama OFCCP issued massive amount of regulation; new administration must comply with Trump "2 For 1" Executive Order
  - Increase to coverage thresholds?
- 'Friendlier' OFCCP
  - OFCCP presence at ILG National Conference
  - Town Hall Meetings (D.C., Chicago, & San Francisco)
- Annual certification process?
- Sub-regulatory guidance more likely to be revised
  - Directive 307
  - FCCM
  - Active Case Enforcement Directive

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### Post November 2016 OFCCP Activity

- Filed 3 high-profile "midnight hour" administrative lawsuits**
- **Google, filed 1/4/17:** Denial of access case relating to OFCCP request for additional year of compensation information, and employee names and contact information
  - **JPMorgan Chase & Co., filed 1/18/17:** Alleges 93 female Application Developer Lead II, Application Developer Lead V, Project Manager, and Technology Director positions within Investment Bank, Technology & Market Strategies unit were paid less than men employed in same positions
  - **Oracle, filed 1/18/17:** Claims white males paid more than females, African Americans, and Asians in 80 job titles and that Asians were favored for 69 technical roles by, among other things, offering referral bonuses to employees that encouraged heavily Asian workforce to recruit other Asians

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**Post November 2016 OFCCP Activity**

- Issued new CSAL list in February 2017; sent to establishment, not HQ
  - 800 Establishments; 29 industries; 373 companies
  - 30 CMCEs
  - Can confirm establishments on CSAL list by emailing [OFCCP-DPO-Scheduling@dol.gov](mailto:OFCCP-DPO-Scheduling@dol.gov)
- Scheduling of reviews from new list began March 2017, but reviews from old lists still being scheduled
- FAAP reviews still being scheduled separately

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**FY 2017 Compliance Review Activity**

- OFCCP completed 1,142 compliance evaluations
  - 78% resulted in notice of compliance
  - 18% closed with non-discrimination violations
  - 4% closed with discrimination violations
- Recovered \$24M in back pay
  - About 35% of recovery involved pay discrimination

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**FY 2017 University Reviews**

- Each OFCCP office generally assigned one academic institution review each scheduling cycle
- Since 2016, OFCCP has closed about 30 university compliance reviews
  - 6 closed with a conciliation agreement
  - Issued involved recordkeeping, producing timely AAP, and past performance
  - No discrimination findings against academic institution

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**Poll Question**

Has your academic institution been subject to an OFCCP Compliance Review in the past 3 years?

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**Poll Question**

If you are currently being audited, or were subject to an audit in the last three years, how long has your compliance review been open?

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**FY 2017 OFCCP Financial Settlements**

- Some larger-scale compensation discrimination settlements
  - **B&H Foto: \$3.2 million** settlement for compensation and promotion discrimination against Hispanics and hiring discrimination against Females, Blacks and Asian applicants.
  - **LexisNexis Risk Solution (FL & GA): \$1.2 million compensation discrimination** settlement for 211 females in exempt, non-commissioned operational leadership roles.
  - **State Street: \$5 million settlement** to resolve claims that Black vice presidents and female senior vice presidents, managing directors and vice presidents were paid lower base salaries, bonuses, and total compensation

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### FY 2017 OFCCP Financial Settlements

- Focus in all regions on hiring activity in more than just entry-level positions
  - **Splunk**: \$2.7 million settlement of claims company failed to hire Blacks & Asians in three **technical professional** jobs; Required hiring of EEO expert to oversee compliance.
- Continued emphasis on “steering” issues
  - **Palantir**: \$1.65 million hiring discrimination settlement; OFCCP claimed that **employee referral system** resulted in discrimination against Asian applicants for **engineering** positions.
- Cross-region or multiple establishment “enterprise” settlements

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### Enforcement Trends To Watch

- Hard to “quietly settle” OFCCP discrimination cases
  - Class locator database:  
<https://www.dol.gov/ofccp/cml/index.htm>
  - FOIA reading room:  
<https://www.dol.gov/ofccp/foia/foiareadingroom/>
  - **But**, since election, many settlements without press release
- Agency aggressively seeking enforcement on access to data—strong track record in these cases
- OFCCP has been more willing to sue than settle for pennies on the dollar; but budget may make it difficult for OFCCP to continue these cases

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### Enforcement Trends To Watch

- What is establishment selected for review?
  - Entire University, regardless of location?
  - Entire campus where letter sent?
  - Particular Building?
- Success with smaller plan approach in Pacific and Northeast; questions raised in Mid-Atlantic

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**Enforcement Trends To Watch**

- What workers should be included in AAP?
  - Pacific and Southeast region consistently asking whether all individuals “who work at facility” are included on Item 19 snapshot
- More intense questions around unique university positions
  - Student Workers?
  - Graduate Fellows?
  - Research Assistants?

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**Enforcement Trends To Watch**

- Job Group Structure
  - IPEDS and EEO-1 categories are too broad for most academic institutions
- Strategies
  - Create job groups based on how you hire
    - Are all admin hired centrally, or does each school play a role?
  - Create smaller job groups for non-faculty by function and/or level
  - Create smaller job groups for faculty by tenure status and school/discipline
  - Goal is job groups of 30-100, but okay to have job group of one

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**503 and VEVRAA Enforcement**

- Honeymoon period is over – all contractors should be in full compliance with revised Section 503 and VEVRAA regulations
- Do not expect major changes to these regulations
- Agency is consistently looking at
  - IWD utilization and PV benchmark data, and six-month updates
  - Accommodation requests and resolutions
  - Qualification and personnel process reviews
  - Audit and reporting system compliance
  - Annual outreach efforts and evaluation

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**Polling Question**

Are you completing an annual evaluation of your outreach activity for IWDs and veterans?

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**Hiring Discrimination Enforcement**

- OFCCP is examining personnel activity using lots of different analyses:
  - Minority vs. Total Minority
  - Favored Group vs. each Other Group
  - Hispanic vs. Black or White
  - Hispanic vs. White and Black
  - White vs. Black
  - White vs. Other Races with large applicant pools

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**Hiring Discrimination Enforcement**

- Requests to interview HR and hiring managers on application and hiring process
  - Seeking to debunk requisition based hiring argument
  - Questions about moving or linking candidates, how data was gathered, steps in process
- Follow-up data requests for “complete candidate file”
  - Agency more likely to explore whether contractors have applied Internet Applicant rule correctly
- Requests regarding use of agencies
- Requests for underlying documents to build own applicant database or evaluate reasons for non-selection

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### Hiring Discrimination Enforcement

- If you are submitting update data in addition to AAP, be aware the OFCCP is often combining annual and update data in addition to calculating them separately.
  - This is a problem for contractors, especially when you have requisitions that cross time periods. Applicants will be counted twice in their analysis.
  - Will often lead to OFCCP asking for additional data going backwards and forwards.

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### Pay Equity Enforcement

- OFCCP wants to examine pay in broad groupings
  - Follow-up requests for entire workforce, whole job groups, exempt versus non-exempt
- Agency struggles to understand compensation beyond base pay, but is asking about these components more often
- OFCCP interviews of employees and compensation manager
- Agency follow-up requests for “pay factor” information
  - Common requests for 15-60 follow-up items for each employee
  - Longest request was for 90+ items
  - Requests for last self-audit

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### Google Compliance Review

- In September 2015, Google’s HQs selected for review
  - AAP included 21,114 employees on campus setting
- Extensive document exchange during review
  - 1.3 million data points about applicants
  - 844,560 data points on compensation
  - 329,000 documents
  - Required 2300 hours at estimated cost of \$500K
- Two-day onsite visit
- Interviews of 20+ HR, compensation director, recruiter, and hiring managers

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**Google Compliance Review**

- Reached impasse over following requests made in in June and September 2016:
  - Second compensation snapshot dated September 1, 2014, with same data points
  - Salary and job history for all individuals on both snapshots, going back to founding of Google in 1998
  - Name, address, telephone number, and personal email of all employees on either snapshot

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**The Decision**

- OFCCP should have offered “information about the issues it was finding” to allow contractor to evaluate whether additional requests for information were “relevant” as part of good faith conciliation obligation
- OFCCP requests are like administrative subpoenas, subject to 4<sup>th</sup> amendment standards:
  - Does agency have authority to investigate
  - Have procedural requirements been followed
  - Is material relevant and material to investigation
- OFCCP has no more authority than EEOC

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**The Decision**

- Judge denied OFCCP’s request for:
  - Complete salary histories for all employees on both snapshots
  - Contact information for all 21K employees
  - Data on place of birth, citizenship, visa status, date of birth, or locality data for second snapshot
  - No job or salary history information on snapshot (Department hired into, job history, salary history, starting CompaRatio, starting job code, starting job family, starting level, starting organization, starting salary)

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### The Decision

- BUT Judge ordered Google to provide:
  - 2014 compensation snapshot (as limited) based on “conclusory statement that OFCCP conducted an analysis that showed widespread pay disparities”
  - Contact information for OFCCP-selected sampling of 5000 employees, with opportunity to request contact information for up to 3000 more employees as follow-up
    - “OFCCP sees its role as protecting workers’ rights, yet it has done nothing to ask if any of Google’s employees objects to disclosure.”

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### Impact on Other Contractors

- Second compensation snapshot requests will become more typical
  - According to anecdotal evidence at ILG National Conference, many contractors are already providing this on a routine basis
- Requests for contact information may increase
  - Contractor should discuss manager contact information with agency
- Decision is clear signal that agency is interested in impact of starting pay and use of prior salary on current pay gap

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### Impact on Other Contractors

- Providing the second snapshot
  - Evaluate timing of the request
    - Are they still asking clarifying information about the first data set?
  - Ask for more information about what they are seeing
- Whenever contractor denies OFCCP request, contractor should:
  - Make clear continued intent to cooperate
  - Offer to provide some of requested data if possible

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**How to Prepare for an Audit**

- Continue to prepare annual and update AAPs
- Reconsider plan structure
- Re-evaluate who will be included in AAP
- Review and revise job group structure
- Request CSALs and ensure locations are audit ready
- Follow all technical compliance requirements

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**How to Prepare for an Audit**

- Re-evaluate and audit hiring processes
  - Ensure all hiring data is being collected
  - Improve voluntary self-id process
  - Best practice for universities is to centralize and document all searches
  - Use strategic disposition codes
  - Implement strategic workflow models that limit compliance risks and narrow applicant pools to best candidates

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**How to Prepare for an Audit**

- In-depth review of personnel activity data analytics for EEO concerns
  - Discuss hiring process with stakeholders
  - Evaluate how you determine applicant pools
    - Best practice is to reverse engineer from new hires file
  - Refine data in job groups where there is significant impact
  - Be on the lookout for use of tests, preference given to employee referrals, matching/moving applicants

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### How to Prepare for an Audit

- Make strategic decisions about what pay to provide and when to explain reasons for pay discrepancies in a compliance review
- Determine how you will present faculty pay, especially for faculty who earn extra compensation or who are paid in part through other sources
- Prepare for compensation manager interview
- Evaluate what factors influence pay at your organization and how accessible that data is to you
- Proactively examine pay under privilege

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### Questions?

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### Thank You!

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- [Americans With Disabilities Act \(ADA\) – Section 503](#)
- [Gender Identity in the Workplace](#)
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