



2023 AIRLINE LABOR & EMPLOYMENT LAW SYMPOSIUM



# OFCCP Update


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SEPTEMBER 21 AND SEPTEMBER 22, 2023 | ST. ANTHONY HOTEL | SAN ANTONIO, TX

2023 AIRLINE LABOR & EMPLOYMENT LAW SYMPOSIUM



## Agenda

- Updates to the PDN Rule
- New OMB-approved Scheduling Letter
- September CSAL
- Upcoming Deadlines




OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

OFCCP

U.S. DEPARTMENT OF LABOR

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## Update to PDN Rule

- Pre-enforcement Notice and Conciliation Procedures (a.k.a. the PDN Rule) was a contractor-friendly rule under the prior administration that built in transparency requirements that OFCCP had to meet when issuing a Pre-Determination Notice.
  - OFCCP determined that the PDN Rule “unduly constrained its broad enforcement discretion,” and “imposed inflexible evidentiary requirements early in the compliance evaluation process and attempted to codify complex evidentiary definitions for ‘qualitative’ and ‘quantitative’ evidence and other standards.”



## Update to PDN Rule

- Eliminates evidentiary requirements set out in the 2020 final rule.
  - The 2023 rule no longer requires OFCCP to include a discussion of the qualitative and quantitative evidence identified during the compliance review that supports the alleged violations outlined in the PDN.
  - OFCCP is no longer required to demonstrate that the alleged disparity is practically significant.
- District and Regional Offices are no longer required to obtain the Director’s approval before issuing a PDN or an NOV.
- Contractors have only 15 - instead of 30 - calendar days to respond to a PDN or NOV.
- Extensions will be granted for good cause only:
  - extended medical absences of key personnel;
  - localized or company-specific disaster affecting records retrieval such as a flood, fire, or computer virus;
  - unexpected absence of key personnel due to military service; or
  - unexpected departure of key affirmative action official.





## Update to PDN Rule

- The final rule allows OFCCP to identify additional violations in a subsequent NOV or Show Cause Notice (SCN).
  - The Agency is **not** required to issue an amended PDN before moving to the NOV.
- OFCCP may issue a SCN without first issuing a PDN or an NOV.
- Changes greatly limit a contractor's ability to evaluate OFCCP findings and/or realistically consider early resolution.
- Under new rule, it is expected that few, if any, contractors will agree to conciliation without a more well developed basis for the alleged violation.



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## New Scheduling Letter

- On August 24, 2023 the Office of Information and Regulatory Affairs in the Office of Management and Budget (OMB) approved OFCCP's revisions to its scheduling letter and itemized listing for Supply & Service contractors.
- Minimal changes from the version proposed in April 2023.
- OFCCP updated its FAQs to reflect the contents of the changes.
- This letter will be used for all unscheduled Supply & Service contractors, including those on the September 8, 2023 CSAL.



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## New Scheduling Letter

- Itemized listing increased from 22 to 28 items.
- Substantial new data, policy, process and qualitative items typically being requested during the desk audit.
- Electronic transmission of scheduling letter and documentation and materials submission via KiteWorks.
- Still *only 30 days to submit.*



## New Scheduling Letter

- ***Campus-Like Settings***

Language is added to clarify that post-secondary education institutions and **contractors with “campus-like settings”** must submit information for all affirmative action plans (AAPs) for that campus, even if separate AAPs are maintained for different buildings or addresses (establishments).





## New Scheduling Letter

### • **More Compensation Data**

- Requests the submission of **two** compensation rosters.
  - Prior requirement was only one roster as of the AAP snapshot date
  - New requirement requests an additional compensation roster as of the **prior** AAP snapshot date
- Updates language to require submission of data on additional pay factors along with relevant documentation.
  - No longer includes former “should” language
- Removed language about the inclusion of staffing agency employees (hooray!)

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## New Scheduling Letter

### • **Evidence of Evaluation of Compensation System**

- This concept isn't new – regulatory requirement under 41 CFR 60-2.17(b)(3) to “...*evaluate its ‘compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities,*” as part of your in-depth analyses.
- Item 22 requires submission of **documentation** that the contractor has satisfied the above obligation.
- OFCCP indicates it does not seek privileged analyses, but contractors must be able to prove compliance with this requirement. Sufficient evidence criteria is detailed in Directive 2022-01.

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## New Scheduling Letter

### • **Item 21 Selection Documentation**

*“Identify and provide information and documentation of policies, practices, or systems used to recruit, screen, and hire, including the use of artificial intelligence algorithms, automated systems or other technology-based selection procedures.”*

- Allows OFFCP to understand if there are applicants who are not in your applicant pool/if you are applying the internet applicant rule appropriately?
- Likely being used as part of recordkeeping analysis.
- Lots of questions regarding knock-out questions; automated selection or screening.
- If you don't have AI/algorithm involved – say it!



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## New Scheduling Letter

### • **Outreach & Recruitment Related Obligations**

- **Item 7:** Provide action-oriented programs designed to correct any problem areas in the minority/female AAP.
  - List out action-oriented programs that have been implemented to address any job group level goals
- **Items 8 & 12:** Requests documentation of recruitment activities from prior year in addition to the assessment of the effectiveness.
- **Item 11:** More thorough documentation of what you did to overcome underutilization for employees.
  - Areas to consider: self-ID efforts; resurvey of workforce



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## New Scheduling Letter

- **Promotion Data**

- Provide documentation that includes established policies and describes practices related to promotions.
- Additionally, for each job group or job title, provide the total number of promotions by gender and race/ethnicity. Where the contractor maintains data on whether the promotion is competitive or non-competitive, it **may** also provide this information in its submission.

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## New Scheduling Letter

- **Copies of Policies**

- New request for copies of existing written employment policies and documents that may have ramifications for equal treatment of employees, including anti-harassment policies, EEO complaint procedures, and employment agreements.

- **Item 18 Employment Data**

- For each job title or job group, provide total number of employees, by gender and race/ethnicity, as of the start of the immediately preceding AAP year.

- **Accommodation Log** – clarifications on temporal scope.

- **Review of Personnel Processes** – clarification on submission expectations.

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## Latest CSAL

- 1,000 Supply & Service contractors and subcontractors
  - 36 functional affirmative action plans
  - 30 corporate management compliance evaluations (CMCE)
  - 12 university reviews
  - 922 establishment-based reviews
- Methodology - two primary criteria:
  - (1) those contractors engaged in low-wage industries; and
  - (2) companies receiving the highest frequency of contract awards under the Bipartisan Infrastructure Bill.
  - According to OFCCP's website, this methodology resulted in the selection of contractors and subcontractors in the following NAICS sectors: Agriculture, Forestry, Fishing and Hunting; Manufacturing; Retail Trade; Professional, Scientific and Technical Services; Administrative and Support; Waste Management and Remediation Services; Accommodation and Food Services; and Other Services (except Public Administration).



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## Upcoming Deadlines

### 2023

- September 30 – VETS 4212 Reports
- December 5 – EEO-1 Reports
- ***TBD: Update on OFCCP's regulations regarding compensation analyses***

### 2024

- May 8 – CA Pay Data Reporting
- June 30 – Contractor Portal Certification
- **TBD – EEO-1 AND LIKELY COMPONENT 2 [TAKE 2]**
- September 30 – VETS 4212



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# Questions?



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