

The logo for Hogan Lovells, consisting of the name "Hogan Lovells" in a black serif font on a light green square background.

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A photograph of the U.S. Capitol building in Washington, D.C., featuring the iconic dome and a statue in the foreground, set against a blue sky with white clouds. The image is partially obscured by a white diagonal graphic element and a green diagonal graphic element.

Contractor crunch time:

Responding to OFCCP's new initiatives on pay equity, compliance certification, audits, and more

May 10, 2022

Introductions

Speakers



George Ingham
Partner,
Northern Virginia



Stacy Hadeka
Counsel,
Washington, D.C.



Amy Folsom Kett
Senior Associate,
Northern Virginia



Heather McAdams
Associate,
New York

Housekeeping items

- This webinar is being recorded
- CLE credit
- Use Q&A button for questions



Basic background



Legal framework for supply and service contractors

- Executive Order 11246
 - Prohibits discrimination on the basis of **race, color, religion, sex, sexual orientation, gender identity, and national origin**
 - Requires affirmative action with respect to **sex, race, and ethnicity**
- Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 793
 - Prohibits discrimination against and requires affirmative action with respect to **qualified individuals with disabilities**
- Vietnam Era Veterans' Readjustment Act of 1974 (VEVRAA), 38 U.S.C. § 4212
 - Prohibits job discrimination against and requires affirmative action with respect to **protected veterans**
- These laws are enforced by the **Office of Federal Contract Compliance Programs (OFCCP)** in the U.S. Department of Labor

Are you covered?

- Do you have a **government contract**?
 - Any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services
 - Does not include (a) agreements where the parties stand in the relationship of employer and employee; or (b) federally assisted construction contracts
- Do you have a **government subcontract**?
 - Any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee): (1) for the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or (2) under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed
 - Does not include an agreement between a health care provider and a health organization under which the health care provider agrees to provide health care services or supplies to natural persons who are beneficiaries under TRICARE
- Are you a “**single entity**” with a government contractor or subcontractor?
 - Are entities so closely integrated that they may constitute a single entity for purposes of OFCCP jurisdiction?

Are you covered?

- **Employee Threshold:** Contractors/subcontractors with fewer than 50 employees are not subject to Affirmative Action Program (AAP) requirements (but can be subject to other requirements)
- **Dollar Threshold:** Contractors/subcontractors must have a contract valued at more than \$10,000 to be covered by Executive Order 11246; \$15,000 to be covered by Section 503; \$150,000 to be covered by VEVRAA
- **Note:** The rules for *federally-assisted construction contractors* (as opposed to supply and service contractors) are different, and will not be discussed today



What are the basic requirements that apply?

- Solicit voluntary self-identification from applicants, offeres, and employees
- List job openings with state agencies
- Include required language in job advertisements
- Post required notices
- Retain records
- Pay transparency
- Flow down requirements to subcontractors
- Develop and update annual Affirmative Action Programs (AAPs) for each establishment
 - Most significant burden
 - Annual assessment of HR data, generally with help of statistician
 - Take action if underrepresentation or other issues identified
 - Documentation of actions taken
 - AAPs do **not** require or permit quotas or discriminatory decision making

Consequences for failure to comply

- Enforcement is through periodic audits
- Deep dive into HR information and AAP processes
- Evaluate technical compliance and look for evidence of discrimination (including “disparate impact”)
- Potential consequences:
 - Conciliation agreement
 - Termination of contract
 - Suspension/Debarment
 - Corrective remedies based on discrimination, e.g., back pay, front pay, non-monetary relief





OFCCP contractor portal

Relevant dates

- The Contractor Portal opened:
 - March 31, 2022
- Deadline to certify compliance:
 - June 30, 2022
- The next Corporate Scheduling Announcement List (CSAL) is expected to be released:
 - Sometime in May 2022



How to certify compliance

- The Portal will pre-populate a list of establishments from the 2018 EEO-1 report
 - (Universities do not file EEO-1s so they will not have a pre-populated portal)
- For each establishment, the contractor must certify compliance by:
 - Representing one of the following three statements:
 1. Entity has developed and maintained affirmative action programs at each establishment, as applicable, and/or for each functional or business unit;
 2. Entity has been party to a qualifying federal contract or subcontract for 120 days or more and has not developed and maintained affirmative action programs at each establishment, as applicable; or
 3. Entity became a covered federal contractor or subcontractor within the past 120 days and therefore has not yet developed applicable affirmative action programs.

- Affirming the following declaration:

The contractor represents that: I attest that this Affirmative Action Program (AAP) certification is true and correct to the best of my knowledge. I understand that the penalty for making false statements with respect to this certification is prescribed in 18 U.S.C.1001.

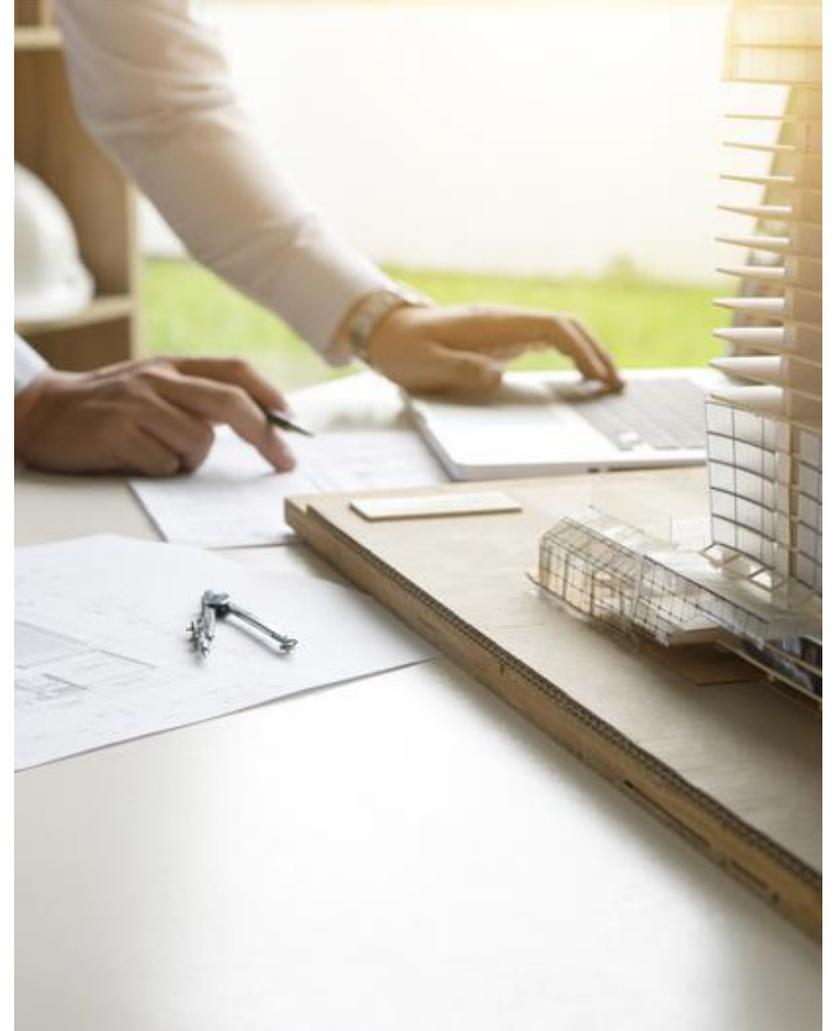
Strategic issues

- Before certifying, consider the date of your plan, especially if the plan date falls within the certification window (March 31 to June 30)
 - Remember that you are certifying compliance as of the date of certification
- Remember that when you certify, you are representing that you are meeting all of OFCCP's affirmative action program requirements
 - Requirements include statistical analysis, and action-oriented programs to address any disparities
 - Note that it takes time to do the work to meeting annual AAP requirements; make sure to give yourself sufficient time to complete the requirements before the certification date



Strategic issues (continued)

- Consider possible consequences for failing to certify, or failing to certify on time
 - Increased risk of auditing
- Consider possible consequences for incorrectly certifying
 - Possible criminal liability
- Currently unclear how contractors should handle the reporting of related entities (subsidiaries or parents) that are not contractors
 - Single entity test



OFCCP audits and enforcement



What to expect

Compliance reviews

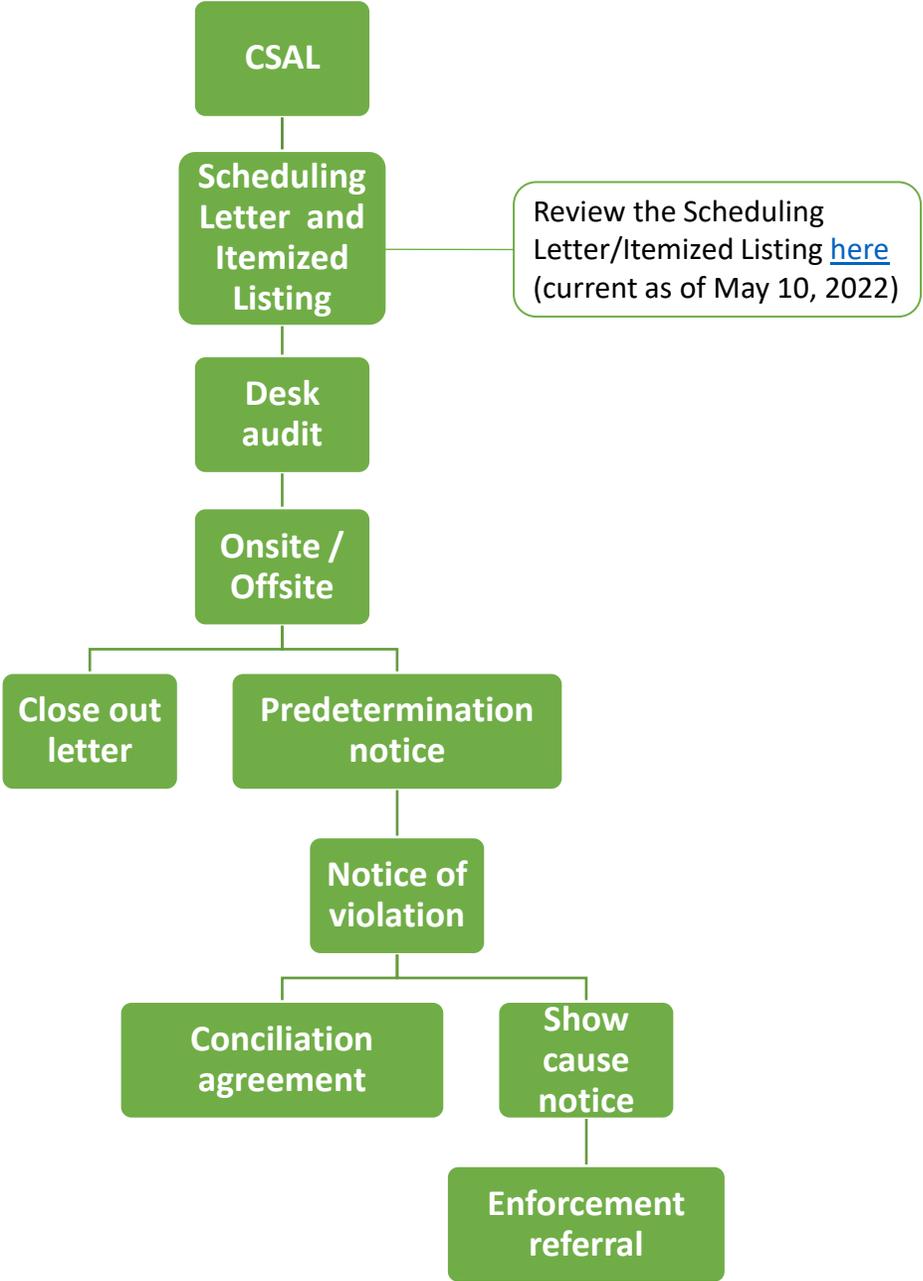
- More aggressive compliance approach
- Less flexibility for contractors
- Broader discretion for investigators

Pre-Enforcement actions

- Less transparency about OFCCP's findings



Overview of the OFCCP audit process



Key changes to compliance evaluations

- **Directive 2022-02: Effective Compliance Evaluations and Enforcement**

- Effective March 31, 2022
- **Note:** “A [directive] does not change the laws and/or regulations governing OFCCP’s programs and does not establish any legally enforceable rights or obligations.”
- Directive 2022-02 rescinds four prior employer-friendly directives that created more flexibility, transparency for contractors:
 - Contractor Recognition Program* (Aug. 24, 2018)
 - Transparency in OFCCP Compliance Activities* (Sept. 19, 2018)
 - Efficiency in Compliance Evaluations* (Apr. 17, 2020)
 - Certainty in OFCCP Policies and Practices* (Dec. 11, 2020)

- **Casts a wider net**

- OFCCP intends to “enhance its neutral scheduling procedures” to select a “**broader universe of contractors and subcontractors**” for audit, identifying “those with **greater risk factors for noncompliance** with nondiscrimination and affirmative action requirements.”

- **Imposes tighter deadlines**

- Eliminates **45-day grace period** after publication of CSAL
- Eliminates automatic **30-day extension** for Itemized Listing materials
 - Exceptions only for **extraordinary circumstances** (e.g., extended medical absence of key personnel)
 - Noncompliance with deadlines may result in Notice to Show Cause why OFCCP should not initiate enforcement proceedings

Key changes to compliance evaluations (continued)

- **Potentially broader scope of investigation**

- OFCCP will continue to conduct “comprehensive compliance evaluations,” not focused (i.e., partial) reviews, which were abandoned in 2021
- The agency promises to implement a “coordinated, cross-regional approach” to multi-establishment reviews; details still to come
- If OFCCP finds potential violations, it may request additional records from **two years before the Scheduling Letter** as well as data **post-dating the Scheduling Letter**
 - Failure to preserve records may create a **presumption** that the records would have been unfavorable to the contractor

- **Direct access to employees, former employees, and applicants**

- OFCCP may request unredacted contact information, including telephone numbers, mailing addresses, email addresses **and SSNs**
- OFCCP’s intent is to speak directly with individuals, eliminating the employer as “intermediary”
- Contractor generally has no right to have representative present in interviews of nonmanagers or former employees



Proposed changes to pre-enforcement proceedings

Pre-Enforcement Notice and Conciliation Procedures

- Notice of Proposed Rulemaking (NPRM) issued March 22, 2022
- Comments closed April 21, 2022

What it does and why it matters:

- Rescinds [2020 Rule](#) requiring OFCCP to “**show its work**” in pre-enforcement proceedings.
- Lack of visibility into OFCCP’s reasoning makes resolution more difficult; creates pressures for early settlement.

CURRENT RULE	PROPOSED RULE
<ul style="list-style-type: none">• Predetermination Notice (PDN) generally must include<ul style="list-style-type: none">○ Quantitative evidence (e.g., statistical analysis) and○ Qualitative evidence (e.g., anecdotal)• Contractor has 30 days to respond to the PDN• Notice of Violation (NOV) must address contractor’s responses	<ul style="list-style-type: none">• Eliminates PDN evidentiary requirements<ul style="list-style-type: none">○ OFCCP need only identify preliminary indicators of discrimination• Contractor response window reduced to 15 days• NOV need not address contractor’s responses• OFCCP can add additional violations with a new show cause notice

Audit preparation checklist

Start this non-exhaustive checklist **before** the CSAL is released and before receiving a Scheduling Letter:

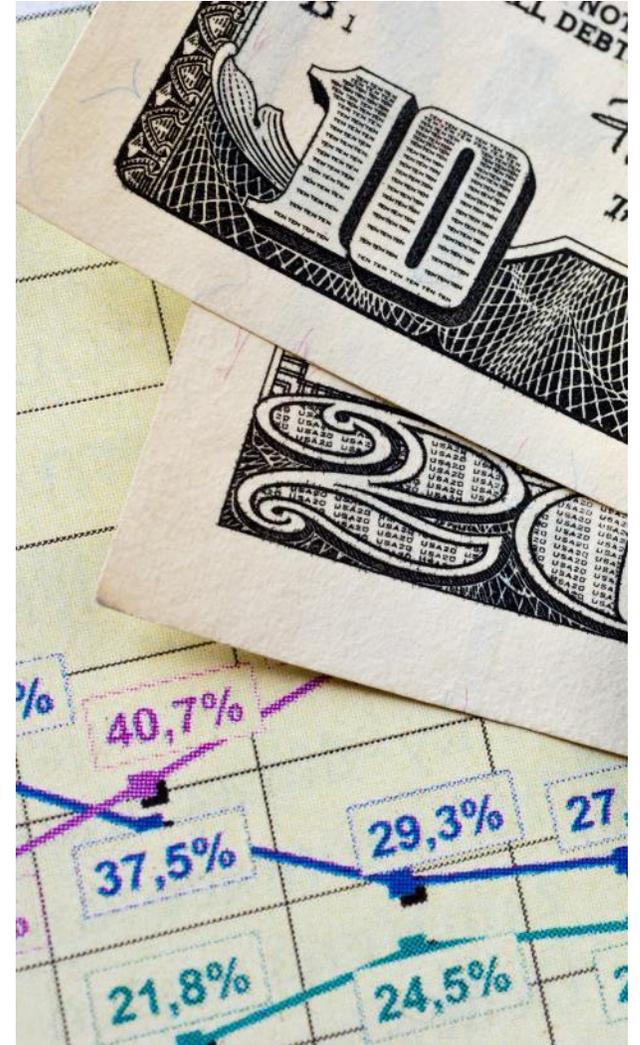
- ✓ Prepare current AAPs (including supporting data) and certify on the portal by June 30
- ✓ File your EEO-1 report (due May 17!)
- ✓ Conduct a simplistic nonprivileged pay equity analysis to share with OFCCP (more on that later)
- ✓ If you have multiple establishments, analyze data across establishments for potential areas of concern
- ✓ Ensure workplace notices are posted and up to date (e.g., pay transparency; EEO is the law; NLRA notice of rights)
- ✓ Ensure your records on prior year reasonable accommodation requests are complete
- ✓ Have AAPs and other relevant records from previous 2 years available
- ✓ Prepare managers likely to be interviewed in an audit to speak about your policies and practices (e.g., HR head; head of recruiting; benefits administrator); plan communications with others who may be interviewed
- ✓ Consider implementing regular audits of outreach efforts and other personnel practices (e.g., promotions and terminations) consistent with the Scheduling Letter and OFCCP regulations



Compensation Directive

Directive 2022-01: “pay equity audits”

1. Contractors must perform an annual “pay equity audit” to “determine whether impediments to pay equity exist and develop action-oriented programs to address these problems.”
2. If OFCCP’s “desk audit reveals disparities in pay or other concerns about the contractor’s compensation practices,” it may “request additional information,” including “additional compensation data, follow-up interviews, and additional records and information from the contractor, including its pay equity audit conducted pursuant to 2.17(b)(3).”
3. OFCCP may require production of privileged (or work product protected) pay equity audits in certain circumstances



How does OFCCP define “pay equity audit”?

- There is no definition of “pay equity audit” in the Directive or the regulations
- Regulations:
 - 41 C.F.R. § 60-1.4(a)(1) (prohibits discrimination on the basis of “rates of pay or other forms of compensation”)
 - 41 C.F.R. § 60-2.17(b)(3) (requires that the contractor “perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist,” including evaluating “[c]ompensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities”)
 - 41 C.F.R. § 60-2.17(c): “The contractor must develop and execute action-oriented programs designed to correct any problem areas identified pursuant to § 60-2.17(b)”
- The Directive implies that OFCCP expects a numerical/statistical analysis, but cites no legal authority to require this
- Past OFCCP statements suggest the form of compensation review is to be left to the discretion of the contractor
 - [Final Rule, Discrimination on the Basis of Sex, 81 Fed. Reg. 39,108, 39,125](#) (June 15, 2016) (“Because the regulation does not specify any particular analysis method . . . contractors have substantial discretion to decide how to evaluate their compensation systems.”)
 - [2020 Supply & Service Technical Assistance Guide](#) (p. 43) (“OFCCP does not dictate a particular method of analysis.”)

What is clear and what is not?

- What is clear:
 - Some sort of analysis of “compensation systems” must be conducted
 - The analysis must examine gender, race, and ethnicity
 - If problems are found, the contractor must take action to try to fix the problem
- What is not:
 - What type of analysis must actually be conducted to satisfy OFCCP?
 - Qualitative?
 - Quantitative?
 - How sophisticated an analysis need be conducted?



What will cause OFCCP to request a contractor’s “pay equity audit”?

- A pay equity audit will not be requested at the outset of an audit
- First, OFCCP will request compensation information pursuant to its Scheduling Letter and Itemized Listing. This information includes:
 - Employee-level compensation dated as of the AAP snapshot date, including all forms of compensation (e.g., salary, hourly wages, bonuses, incentives, etc.) and hours worked
 - Documentation and policies “related to compensation practices of the contractor . . . particularly those that explain the factors and reasoning used to determine compensation.”
 - Contractors may provide additional data on factors used to determine employee compensation (e.g., education, past experience, performance ratings, salary bands)

What will cause OFCCP to request a contractor's "pay equity audit"?

- OFCCP will request a pay equity audit (and other info) if it finds “disparities in pay or other concerns about the contractor’s compensation practices.”
- Examples:
 - Pay disparities or other evidence of potential pay discrimination among similarly situated employees based on race, ethnicity, and/or gender, see [Directive 2018-05](#) (explaining analytical methods OFCCP may use to analyze compensation for indicators of discrimination);
 - Employee complaints of pay discrimination or other anecdotal evidence of discrimination;
 - Inconsistencies in how the contractor is applying its pay policies; and/or
 - Statistical analyses or other evidence that a group of workers is disproportionately concentrated in lower paying positions or pay levels within a position based on a protected characteristic.
- May also request additional compensation data, follow-up interviews, and compensation data going back two years

What if a requested “pay equity audit” is privileged?

- Employers typically conduct reviews of pay equity under attorney-client privilege
- Why?
 - Highly sensitive nature and confidential employee information
 - Technical analysis requiring judgment calls in how it is structured so that results are meaningful
 - Unfavorable results are evidence of liability (even if employer didn’t intend to discriminate) and potential “willful” violations if problems identified are not fixed immediately
 - Results can be taken out of context
- Historically, OFCCP has not insisted that a contractor produce privileged pay equity reviews

When will OFCCP require production of a privileged pay equity audit?

- If a pay equity audit is conducted to comply with OFCCP regulations (i.e., 41 C.F.R. § 2.17(b)(3)) → cannot be shielded from OFCCP by invocation of attorney-client privilege or attorney work-product doctrine
- **Exception:** A contractor “may conduct a separate pay equity audit for the purpose of obtaining privileged legal advice, and not for demonstrating compliance with OFCCP regulations.”
 - If contractor “has produced to OFCCP an acceptable pay equity audit sufficient to demonstrate compliance with 2.17(b)(3), OFCCP will not require production of these separate pay equity audits, to the extent that the contractor can verify that they were conducted under privilege.”
 - What is “acceptable”?
- Failure to produce a privileged pay equity audit conducted to comply with OFCCP regulations “will be considered . . . an admission of noncompliance.”

Key takeaways

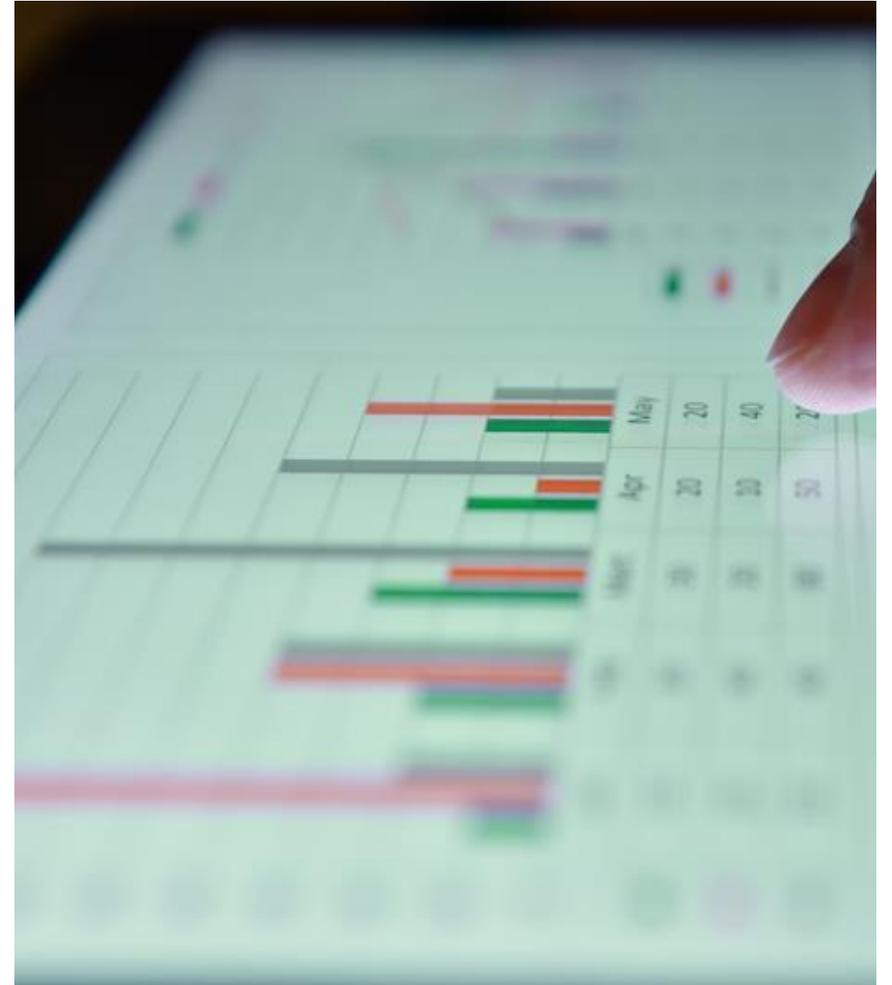
- Consider preparing two separate pay equity analyses
 - 1. Sophisticated, privileged analysis to assess potential legal exposure under all applicable laws and to identify potential disparities to correct
 - 2. Separate nonprivileged analysis to comply with 41 C.F.R. § 2.17(b)(3)
 - Simple and less probing
 - AAP-by-AAP
 - Only examine gender/race/ethnicity
 - If disparities found, document steps to correct
- Consider pushing back on OFCCP:
 - Requesting a “pay equity audit” without having first found “indicators”
 - Insisting that your “pay equity audit” be a sophisticated analysis
- Watch for new potential regulations that impose a legal pay equity audit requirement
- Take pay equity seriously; not just an OFCCP issue

Contractor
minimum wage



Key elements

- President Biden's Executive Order 14026 – April 27, 2021
 - Increases minimum hourly wage to \$15 (or \$10.50 for tipped employees) effective January 30, 2022
 - Beginning January 1, 2023, and annually thereafter, the minimum wage may be increased (but not decreased) to reflect inflation
- DOL final rule – November 24, 2021
 - Implements \$15 increase
 - Includes proposed clause (FAR 52.222-55, Minimum Wages for Contractor Workers Under Executive Order 14026)
- FAR Council interim rule – January 26, 2022
 - Amends FAR 52.222-55, to implement the procedures and requirements set forth by DOL
- Applies to work performed in the United States and certain outlying areas
- Applies to new contracts entered into on or after January 30, 2022
- Must flow down to covered subcontractors



Key Elements (continued)

- Covered contracts:
 - Procurement contracts for construction covered by the Davis-Bacon Act (DBA)
 - Service contracts under the Service Contract Act (SCA)
 - Concession contracts with the federal government
 - Contracts related to federal land and offering of services to the general public, federal employees, and their dependents
- Excludes the following agreements:
 - Grants
 - Contracts with and grants to Indian Tribes
 - Contracts for construction and services (except for those expressly covered by EO 14026), that are excluded from DBA or SCA coverage
 - Contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment to the federal government
- Applies only to certain categories of workers who are ***non-exempt*** under the Fair Labor Standards Act and working on or in connection with a covered contract

Update

- Several lawsuits have been filed directly challenging the implementation of EO 14026
 - Currently, the government is enjoined from enforcing the Minimum Wage Order in the context of contracts or contract-like instruments entered into with the federal government in connection with ***seasonal recreational services or seasonal recreational equipment rental*** for the general public on federal lands
- Tenth Circuit lawsuit – December 7, 2021
 - Arkansas Valley Adventure and the Colorado River Outfitters Association file suit, seeking injunctions blocking minimum wage hike and a provision of the regulations allowing employees of seasonal outdoor recreational companies to receive the wage increase
 - Argued the EO was an overreach of the president's authority over procurement issues
 - January 24, 2022: Colorado federal judge denied request for a preliminary injunction
 - January 26, 2022: Appealed to the Tenth Circuit
 - February 17, 2022: Tenth Circuit issued a temporary injunction, blocking the \$15 minimum wage for seasonal outdoor recreational services while the appeal proceeds
 - The plaintiffs lost their bid to stop the wage increase from going into effect for any federal contractors at all
 - The Tenth Circuit is now considering appeal of the loss
- On February 9 and 10, 2022, several state attorneys general challenged the legality of the minimum wage order in the United States District Court of Arizona and the Southern District of Texas
 - The suits request both declaratory relief that the EO and DOL Final Rule are unlawful and injunctive relief prohibiting enforcement of the EO and Final Rule



Contractor
vaccine mandate

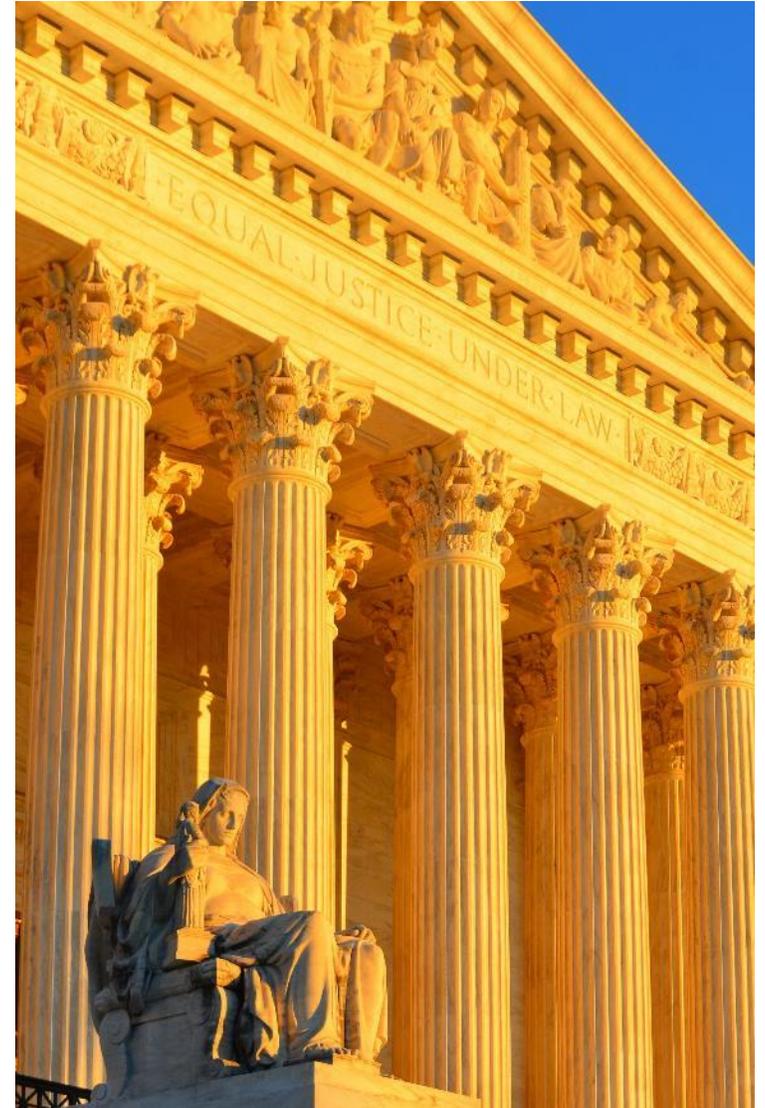
Key elements

- President Biden issued Executive Order 14042 – September 9, 2021
 - Imposed a COVID-19 vaccine mandate on many federal contractors and subcontractors
- The Safer Federal Workforce Task Force issued guidance in late September 2021 (“Task Force Guidance”) implementing the EO, which has been frequently updated
- FAR 52.223-99 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors
- DFARS 252.223-7999 Ensuring Adequate COVID-19 Safety Protocols for Federal Contractors (Deviation 2021-O0009)
- Several other agency deviations



Update

- At least 26 states have filed seven federal court cases that have resulted in six injunctions on the federal contractor vaccine mandate, one of which was nationwide
- The United States has appealed all six injunctions
- Sixth Circuit lawsuit
 - Was the first federal appellate court to consider whether the contractor mandate is legal
 - Three-judge panel voted 2-1 to uphold a lower court's ruling in Kentucky that found the administration didn't have the authority to order a vaccine mandate for federal contractors
- Eleventh Circuit lawsuit
 - In April, the 11th Circuit was the first appellate court to hear oral argument on the nationwide injunction issued by a Georgia court
 - We are awaiting a decision
 - This may go to the Supreme Court



Update

- Since the lawsuits, the Safer Federal Workforce Task Force has updated the guidance on its website with respect to enforcement of the EO
 - The Government will take no action to enforce the clause implementing requirements of EO 14042, absent further written notice from the agency, where the place of performance identified in the contract is a U.S. state or outlying area subject to a court order prohibiting the application of requirements pursuant to the Executive Order
 - The Task Force’s website lists all 50 states, the District of Columbia, and all outlying territories as excluded from enforcement of the EO
- The General Services Administration (GSA) similarly announced that its contracting officers cannot take any action to enforce the vaccine requirements in FAR 52.223-99 in any contract or contract-like instrument
- The Department of Defense (DoD) also issued a memorandum stating that its contracting officers shall not enforce DFARS 252.223-7999
 - DoD has also instructed its contracting officers not to include the DFARS clause in new or existing contracts
- The Office of Management and Budget (OMB) issued similar guidance, stating that for existing contracts implementing the requirements of EO 14042, agencies must notify contractors of the new Task Force Guidance providing that the government must take no action to enforce implementation of the clause subject to court orders
- Workplace safety protocols still apply to federal buildings and federally controlled facilities, and contractor employees working onsite in those locations must still comply with those rules

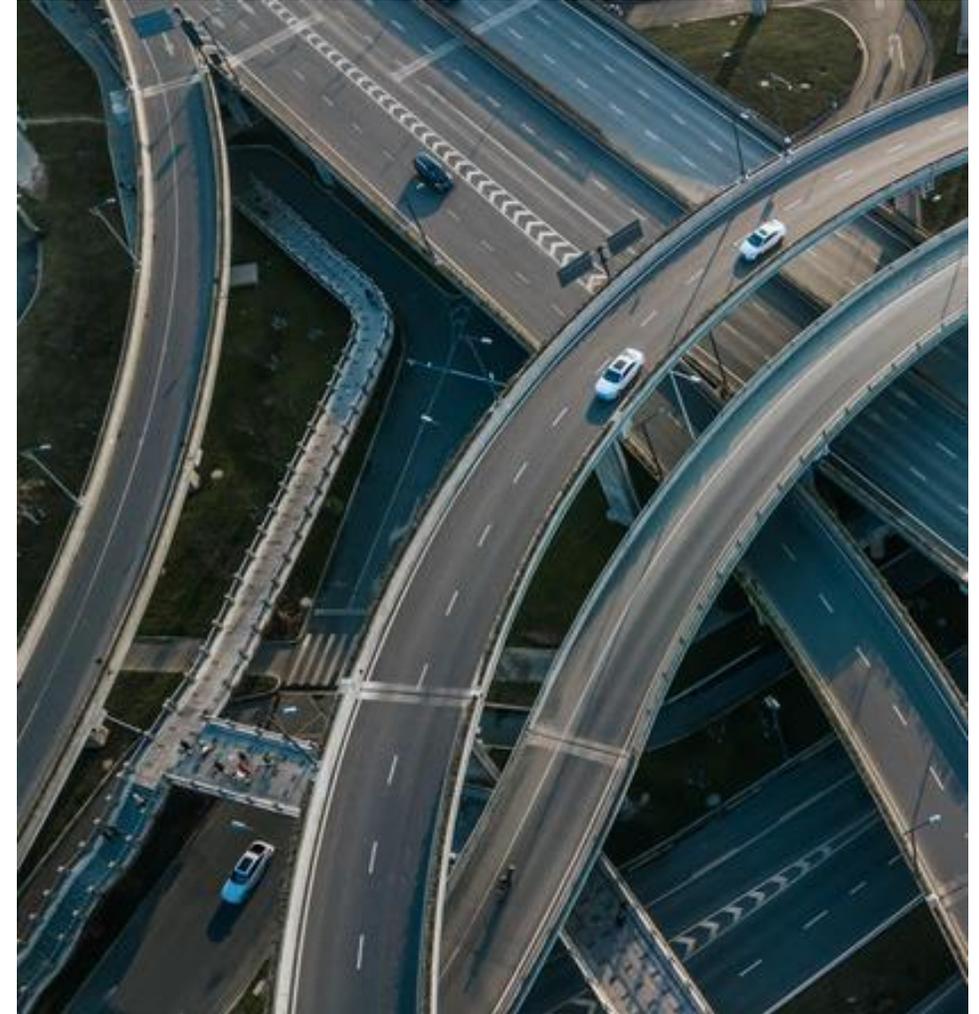




Ban the Box – Fair Chance Act

Key elements

- Fair Chance to Compete for Jobs Act of 2019 (“Fair Chance Act”)
 - Section 1123 of the 2020 NDAA signed by President Trump
- Federal contractors can no longer inquire (orally or in writing) about an applicant’s criminal history before extending a conditional job offer
 - Prohibited criminal history record information includes arrests, indictments, information, or other criminal charges and any dispositions arising from those
 - Includes a prohibition on the use of sealed and expunged information as well as juvenile delinquency information
- Intended to make it easier for people with a criminal record to gain employment
- Exceptions to the law include positions related to law enforcement and national security duties, jobs requiring access to classified information, and roles required by law to reveal criminal history information before the conditional offer stage
- Many state ban-the-box laws already restrict inquiry into criminal history



Key elements

- Became effective December 20, 2021
 - It applies to federal contracts and solicitations as of December 20, 2021
 - Generally, it applies to all federal agencies (*e.g.*, executive, legislative, and judicial branches) as well as federal civil contractors and defense contractors
- Penalties for federal contractors for failure to comply with this requirement include
 - (i) a written warning for first-time violations, and
 - (ii) potential suspension of payment under the contract for subsequent violations until the contractor demonstrates compliance with federal law
- The Fair Chance Act requires the Administrator of General Services, the Secretary of Defense, and the Federal Acquisition Regulatory Council to issue regulations to implement the Fair Chance Act
 - They have not yet done so
 - Open FAR Case 2020-008 – Drafting proposed rule
- On April 27, 2022, the Office of Personnel Management (OPM) published a Proposed Rule with Request for Comments in the Federal Register
 - 87 Fed. Reg. 24,885
 - Creates enforcement mechanisms for implementing the Fair Chance Act mandate



Next steps

- Federal contractors may see new or amended solicitations and contract clauses prohibiting them from inquiring into a job applicant's criminal past until a conditional offer of employment has been made
- Employers should review and revise, if necessary, their hiring practices, application forms, checklists, policies and procedures to ensure compliance
 - *E.g.*, review hiring policies and procedures to ensure that questions are not being asked about criminal history prior to a conditional offer of employment, either during the hiring process or on job applications
- Employers should provide periodic training to those involved in recruiting and hiring processes
- Private employers may still conduct a criminal history background check as part of their hiring and onboarding process, and may consider criminal history as part of the hiring process
 - Fair Chance Act impacts the timing of any such inquiries, and consideration of such information, as it cannot occur until after a conditional offer of employment is made



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You can access the CLE affirmation form through the confirmation email sent yesterday.

Six things to remember:

1. Complete your Affirmative Action Programs (AAPs) and certify on the AAP portal by no later than **June 30, 2022**. If you haven't started, get started now!
2. Get prepared in advance of an OFCCP audit. Audits will have tighter deadlines and may be both more intrusive and less transparent
3. Prepare a simplistic non-privileged "pay equity audit" to protect privilege on your more sophisticated pay equity audit
4. If applicable, adjust pay to reflect the contractor minimum wage hike, but also track litigation developments
5. Track litigation developments regarding the contractor vaccine mandate
6. Implement "ban the box" in your hiring practices

A top-down view of a green plant, likely a succulent, showing a prominent spiral pattern in its leaves. The leaves are arranged in a Fibonacci spiral, with each leaf overlapping the previous one. The color is a vibrant green, and the lighting creates strong shadows, emphasizing the texture and structure of the plant. A large, glowing green circular graphic is overlaid on the image, with a smaller, similar circle nested inside it, both centered on the spiral. In the bottom-left corner, there is a dark green, trapezoidal shape containing the text "Questions?".

Questions?

Contact us

Speakers



George Ingham
Partner,
Northern Virginia
George.Ingham@hoganlovells.com



Stacy Hadeka
Counsel,
Washington, D.C.
Stacy.Hadeka@hoganlovells.com



Amy Folsom Kett
Senior Associate,
Northern Virginia
Amy.Kett@hoganlovells.com



Heather McAdams
Associate,
New York
Heather.McAdams@hoganlovells.com



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