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Proposed Changes to OFCCP's Scheduling Letter

Prepared Exclusively for Philadelphia ILG

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Firm overview

- We represent management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation.
- As leaders in educating employers about the laws of equal opportunity, Jackson Lewis understands the importance of having a workforce that reflects the various communities it serves.
- With 61 locations and more than 950 attorneys, we offer local knowledge backed by the support of a national firm.
- We are founding members of L&E Global, a global alliance of premier employer's counsel firms.

Practice Group Overview

Affirmative Action, OFCCP and Government Contract Compliance

- Integrated team of attorneys, data analysts, and statisticians, dedicated to equal employment opportunity, pay equity, and OFCCP defense.
- Prepares thousands affirmative action plans and pay analyses each year, defends them in OFCCP audits nationwide.
- Subject matter experts to ensure sophisticated legal representation on compliance, audits, and systemic discrimination claims.
- More than just consulting services, we provide strategic thinking and sophisticated representation to ensure your compliance program is strategic and minimizes burdens to your organization.
- Current insights, news, and strategies through our blog:
<https://www.affirmativeactionlawadvisor.com/>.

Matthew J. Camardella

Matthew Camardella is a principal in the Long Island, New York, office of Jackson Lewis P.C. He is the co-leader of the Affirmative Action Compliance and OFCCP Defense practice group.

Matt directs the preparation of more than 1,000 AAPs each year and has defended hundreds of OFCCP audits for a broad range of employers across the country.

He also serves as the practice group lead on responding to OFCCP allegations of class-based discrimination. He regularly counsels clients about the design and implementation of company-wide AAP structures, applicant flow tracking systems, and other complex “real world” compliance issues. He spends significant time advising clients on their compensation practices and directing pay equity analyses.

Taylor M. Napoli

Taylor M. Napoli is an Associate in the Long Island office of Jackson Lewis P.C., and a member of the Firm's Affirmative Action Compliance and OFCCP Defense Practice Group as well as the Pay Equity Resource Group.

Ms. Napoli assist federal contractors in the preparation of affirmative action plans and EEO-1 and VETS-4212 reports and defends contractors against allegations of discrimination on the basis of race, color, religion, sex, gender identity, national origin, disability and veteran status in connection with audits by the OFCCP and in related litigation brought on OFCCP's behalf by the Solicitor's Office at the U.S. Department of Labor. Ms. Napoli also provides counsel on state affirmative action obligations and assists clients in the design and implementation of proactive pay equity analyses.

Ms. Napoli received her J.D. from Hofstra Law.

Disclaimer

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OFCCP Scheduling Letter & Itemized Listing

Background

- Scheduling letter and the supplemental Itemized Listing is a tool used by OFCCP to initiate compliance reviews
- Authorized by the Office of Management and Budget (OMB) for a certain period of time
- Current scheduling letter authorization expires on April 30, 2023
- OFCCP seeking to revise the scheduling letter and had sought input from the public
 - Comment period ended on January 20, 2023

Overview of Proposed Modifications

- Proposed modifications include a number of additions to the Itemized Listing
- OFCCP is trying to collect more information at the initial submission stage of the compliance review
- If approved as proposed, the modifications will ***significantly increase*** the burden associated with responding to the Scheduling Letter and Itemized Listing

Overview of Proposed Modifications

- Campus-Like Settings
- Compensation Data
- Promotions and Terminations Data
- Employment Policies and Practices
- Evaluations and Assessments

Campus-Like Settings

- Requires submission of all AAPs associated with a campus environment – higher ed or corporate – when Scheduling Letter is sent to **any** building on a campus
- Higher Education Technical Assistance Guide (TAG) explicitly allows higher ed institutions to prepare multiple AAPs for a single campus under certain circumstances
 - This approach has been acceptable for years for private employers
- Represents formalization of a statement contained in the Scheduling Methodology accompanying last few CSALs
- Higher Ed Institutions – IPEDs filings now required to be submitted

Compensation Data

- Proposed Itemized Listing expands on what contractors must submit related to compensation
 - Policies and practices
 - ***Second snapshot from prior year***
 - Hours worked
 - Factors relevant to determining compensation (education, experience, time in position)
 - Include data on staffing agency employees
- Evidence of self-evaluation of compensation system

Promotions and Terminations Data

- **Promotions**

- Policies and practices
- Competitive/Non-Competitive
- Job Title (prior and current)
- Department (prior and current)
- Supervisor information (prior and current)
- Compensation data (prior and current)

- **Terminations**

- Breakdown of data by reasons for termination

Employment Policies and Practices

- Proposed modifications expands on the types of policy documents to be submitted initially
- Policies related to recruiting, screening and hiring
 - Includes artificial intelligence, algorithms, automated systems or other technology-based solutions
- Policies related to equal opportunity
 - Includes non-harassment, complaint procedures, and employment agreements, including arbitration agreements

Evaluations and Assessments

- Proposed Itemized Listing contains requests for documentation for multiple evaluations and assessments required under the regulations
- Documentation of all outreach and recruitment efforts targeting individuals with a disability and protected veterans and an assessment of effectiveness of each effort
 - Criteria used
 - Evaluation of effectiveness
 - Effectiveness of efforts overall
 - Any changes
- If underutilized, documentation of steps taken to identify impediments to equal employment opportunity for individuals with a disability
- Descriptions of most recent assessment of personnel processes
- Listing of all action-oriented programs designed to correct any problem areas

Burden Estimate

- OFCCP grossly underestimates the time it will take a contractor to respond to the proposed Scheduling Letter and Itemized Listing
- OFCCP Estimates:
 - Proposed Scheduling Letter – 39 Hours
 - Current Scheduling Letter – 28 hours (also an underestimation)
- Some surveys of contractors estimate 100 or more hours to respond to the proposed scheduling letter
- OFCCP not proposing to provide contractors with any more time to respond – still 30 days!

Questions?

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Thank **you.**