



AAAED “CANDID CONVERSATIONS”

10/19/2020

2:00PM – 4:00PM EST

AGENDA

Welcome & Opening Remarks

OFCCP Agency Updates and Q&A

EEOC/OFCCP and Other Insights

- New EEOC Commissioners (Shirley)
- AAP Verification
- Recent Cases/Settlements
- Executive Order 13950

Thoughts on the Supreme Court Seat

Open Q&A

Closing Remarks

Richard Baker, Pres. AAAED

Craig Leen, Dir. OFCCP

Matt Camardella, Jackson Lewis

SUBMIT Qs through Chat

Shirley Wilcher, ED, AAAED



OPENING REMARKS





OFCCP AGENCY UPDATES AND QUESTIONS



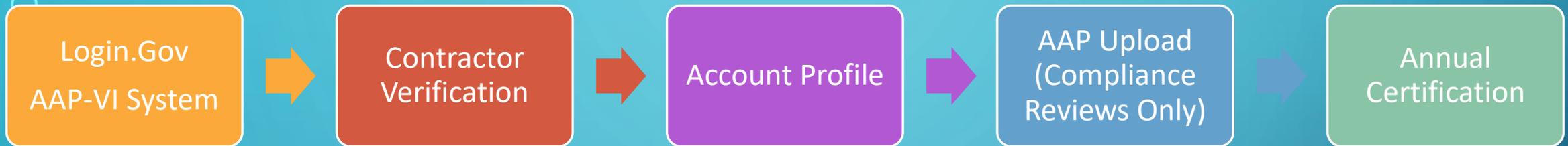


EEOC/OFCCP AND OTHER INSIGHTS



AAP CERTIFICATION PROCESS

Proposed Process:



Stated Alternatives:

- **Option 1** - All contractors would be required to certify annually. Contractors who are scheduled for a compliance evaluation will submit their AAPs as they currently do, via email or a delivery service.
- **Option 2** - All contractors would be required to certify **and** upload their AAPs on an annual basis.
- **Option 3** - All contractors would be required to certify every two years. Contractors who are scheduled for a compliance evaluation will submit their AAPs as they currently do, via email or a delivery service.

AAP CERTIFICATION PROCESS

OFCCP is soliciting your input regarding:

- The frequency of the certification (the proposal is for annual certification);
- The type of information and level of detail to be required in the certification;
- Whether certification would be practically useful to OFCCP in service of its mission, as compared to the burden on contractors; and,
- Whether the estimated burden on contractors (36 minutes to certify) is accurate.

Contractors can submit their input to OFCCP on or before November 13, 2020 via the federal e-Rulemaking portal at <https://www.regulations.gov/> .

ACCOMMODATION FOCUSED REVIEWS

- 500 on latest CSAL
- Focus on disability *and* religious accommodations
- Anticipate review of:
 - Accommodation/leave policies
 - Interviews with managers responsible for accommodation process
 - Interviews with affected employees and applicants
- Required on-site?

PROMOTION FOCUSED REVIEWS

- 500 on latest CSAL
- Focus on promotion policies and procedures, including impact on compensation
- Anticipate review of:
 - Promotion policies
 - Personnel files
 - Promotion data
 - Competitive pools
 - Non-competitive criteria
 - Interviews with managers responsible for promotion decisions
 - Interviews with affected employees
- Required on-site?

“OFCCP may also evaluate hiring and compensation policies, procedures, and data, as appropriate, to determine if qualified applicants are being steered into lower paying positions with limited upward mobility or otherwise prevented from advancing professionally.”

EXECUTIVE ORDER TO COMBAT RACE & SEX STEREOTYPING

Prohibits contractors and subcontractors from using any workplace training that “inculcates in its employees” any form of race or sex stereotyping or any form of race or sex “scapegoating.”

Includes concepts that:

- One race or sex is inherently superior to another race or sex;
- An individual, by virtue of their race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;
- An individual should be discriminated against or receive adverse treatment solely or partly because of their race or sex;
- Members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- An individual’s moral character is necessarily determined by his or her race or sex;
- An individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- Any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or
- Meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race.

EXECUTIVE ORDER TO COMBAT RACE & SEX STEREOTYPING

Effective Dates

- For existing federal contractors, the EO is effective immediately through OFCCP's enforcement of existing Executive Order 11246
- The requirement for insertion of the requirements in federal contracts take effect November 21, 2020.
 - *Appears to apply only to contracts entered into on or after November 21 and resulting subcontracts and vendor purchase orders.*

EXECUTIVE ORDER TO COMBAT RACE & SEX STEREOTYPING

Recommendations

- Be on alert for required language in new contracts and to comply with flow-down and notice requirements
- Look for certification requirements associated with applicable grants
- Prepare talking points for employee questions
- Prepare to respond to complaints (internal, OFCCP/EEOC, external stakeholders) and anticipate potential retaliation claims
- Inventory and review training content, website, and other internal/external communications
- Consider “disclaimer language” and pros/cons of recording training sessions
- Train trainers/presenters on EO requirements and organization’s related decisions
- **DO NOT STOP** conducting EEO/AA and diversity and inclusion training

ORACLE DECISION

- **Background**

- Compliance review of HQ location initiated September 24, 2014
- OFCCP filed an Administrative Complaint against Oracle January 17, 2017, alleging Oracle owed \$400M in lost wages to females and minorities

- **Major Discussion Points**

- Similarly situated employees and the “Aggregate Assumption”
- Adequately accounting for non-discriminatory factors that influence pay
- Causal links between starting salary and pay disparities

- **What Next?**

- OFCCP has until early November to file an appeal
- Could spur change in how OFCCP conducts pay analyses going forward

RECENT HIGHER ED SETTLEMENTS

- **July 10, 2020:** Nova Southeastern University – a private university in Davie, Florida – has agreed to pay \$300,000 in back wages in addition to \$587,070 in salary adjustments already made by the university to resolve pay disparities. OFCCP’s preliminary findings showed that pay disparities existed for 86 women employed in business-related director/manager positions. <https://www.dol.gov/newsroom/releases/ofccp/ofccp20200710>
- **October 2, 2020:** Yale University has agreed to pay \$87,500 to resolve alleged pay discrimination at the university’s New Haven, Connecticut, campus. During a routine compliance review, the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) found that in 2016 Yale University paid four female cardiologists less than similarly situated male employees at Yale’s School of Medicine’s Cardiovascular Medicine Section. <https://www.dol.gov/newsroom/releases/ofccp/ofccp20201002>

RECENT HIGHER ED SETTLEMENTS

- **October 5, 2020** - Princeton University has agreed to pay \$925,000 in back pay and at least \$250,000 in future salary adjustments to resolve allegations of compensation discrimination involving over one hundred female professors.
<https://www.dol.gov/newsroom/releases/ofccp/ofccp20201005>
- **October 7, 2020** – The University of Delaware in Newark has agreed to pay \$100,000 in back pay, interest and benefits to the affected male class members who applied and were not hired for custodial technician positions.
<https://www.dol.gov/newsroom/releases/ofccp/ofccp20201007>

THOUGHTS ON THE SUPREME COURT SEAT







CLOSING REMARKS

