

## OFCCP Establishment Review Scheduling Letter Updates

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This, our third and final blog in [a series discussing the proposed changes to OFCCP's scheduling letters](#), takes a look at the Agency's proposed changes to the establishment review letter and itemized listing.

With the appearance of [Focused Reviews](#) and Compliance Checks on [this year's CSAL](#), contractors have been abuzz about their obligations associated with these "new" reviews. Though the vast majority of contractors will undergo a standard establishment review, these have not garnered much attention given the relative "routine" nature of the audits. Yet, as [we previously indicated](#), OFCCP has recently released a proposed establishment review scheduling letter and itemized listing, which would change a number of the requirements that contractors have come to know and expect.

While the majority of the proposed changes appear in the itemized listing, there is one notable change to the scheduling letter. OFCCP requires in the new letter a list of the contractor's largest subcontracts based on value. The likely rationale for this item is because, historically, and admittedly, OFCCP has had difficulty identifying and extending its compliance reach to subcontractors. Contractors identifying their largest subcontractors for OFCCP would likely allow the Agency a means of better tracking, and more easily monitor, subcontractor compliance.

Below is a summary of the most significant changes to the proposed itemized listing.

- **Sub-Minority Utilization & Availability Data (Item 6):** The proposed itemized listing requires information on the sub-minority self-identification of each employee in an AAP and applicable labor markets. OFCCP's purpose here is to be able to determine whether there were substantial disparities in the utilization of any one particular minority group, or in the utilization women of a particular minority group, such that separate placement goals may be necessary. OFCCP cites 41 § CFR 60-2.16(d) as its authority for this requirement, but note the permissive language of this regulation: "a contractor *may* be required to establish separate goals for those groups" (emphasis added). It is currently unclear what standard OFCCP may

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apply to determine when the expressly required minority and female goals are insufficient and a contractor is to establish sub-minority goals.

- **Placements by Sub-Minority Group (Item 16):** Keeping with the theme of evaluating goals at a sub-minority level, the proposed listing also requires contractors provide personnel activity, or “placement,” data by sub-minority group. This would permit OFCCP to evaluate the progress made on any underutilization sub-minority goals they may determine are required. Again, it is unclear whether setting sub-minority goals is a regulatory requirement.
- **Compensation Analyses (Item 7):** While little has changed to the proposed submission of compensation data, the proposed listing separately requires contractors to provide “[r]esults of the most recent *analysis* of the compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities” (emphasis added). The regulations, however, require that contractors “*evaluate* [applicable] compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities.” 41 CFR § 60-2.17(b)(3) (emphasis added). Note that the regulations require an “evaluation” not an “analysis” so compliance with this item – if it is approved – may impose an additional, implicit burden beyond what the regulations require and may implicate production of analyses covered by the attorney-client privilege.
- **Employee Promotion “Pools” (Item 17):** For those [long-time OFCCP request watchers](#), the proposed listing again requests that contractors “provide the pool of candidates from which the promotions were selected by gender and by race/ethnicity.” The last time this was proposed, OFCCP withdrew its request due to the public comments. [See Supporting Statement final 09 11 2014](#) (2011), at 20 (“While OFCCP believes records of employment activity, including promotions and terminations, are essential tools in investigating potential discrimination, the agency acknowledges challenges that contractors face in providing pools of candidates for promotions and terminations. Thus, OFCCP is eliminating the pool data requirements for promotion and termination activity.”). However, OFCCP’s current justification explains this new request to eliminate burden of post submission follow-up requests that “*may*” arise. [See S and S Supporting Statement](#) (2019), at 9.
- **Involuntary Terminations Summary Data (Item 17):** The proposed listing requires contractors break out summary terminations data to identify which terminations were voluntary and which were involuntary. This change may materially reduce post-submission audit follow-up, and likely carries very little additional burden.
- **Expanded Data Submission Requirements (Items 9, 12, 17):** Under the proposed listing, contractors who receive a scheduling letter more than 6 months into their plan year would have to submit additional personnel activity data and veteran and disability summary data for every completed month of the AAP plan year — not just data for the first six months, which could require contractors to engage in monthly data pulls instead of annual or six-month update collections.

As a reminder, OFCCP is requesting public comment on this and the other proposed scheduling letters. Comments will be accepted until June 11, and the existing letters are set to expire at the end of June. The changes to these letters are significant and will undoubtedly impact contractor preparation and production in a compliance review. Take advantage of this opportunity to be heard and [provide feedback](#) on these proposed changes.

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