

Steps For Gov't Contractors On The OFCCP's Audit List

By **Andrew Turnbull and Sadé Tidwell** (October 3, 2023, 5:08 PM EDT)

On Sept. 8, the Office of Federal Contract Compliance Programs released a list of 1,000 supply and service federal contractors selected to receive advance audit notices known as corporate scheduling announcement letters, or CSALs.[1]

This most recent CSAL list includes double the number of contractor establishments selected than OFCCP's last supply and service CSAL list, released on Jan. 20.[2]

Contractors on the CSAL list can find answers to some frequently asked questions below, including specific actions to take now, particularly in light of the OFCCP's new scheduling letter, which significantly increases the burden and potential risks for contractors.[3]

What are CSALs?

CSALs are courtesy letters that the OFCCP sends to federal contractors to alert them that one or more of their establishments is likely to be scheduled for an OFCCP audit in the coming months.

Receipt of a CSAL, however, does not mean that the contractor has been scheduled for an OFCCP audit.

Audits do not begin until a contractor receives an Office of Management and Budget-approved scheduling letter from the OFCCP. Since contractors on the CSAL list are typically scheduled for audits, contractors that receive a CSAL should check their OFCCP audit preparation and defense strategies to ensure they are prepared.

How did the OFCCP select contractors for this CSAL list?

The September 2023 CSAL list includes 1,000 contractor establishments, selected for the following types of potential OFCCP audits:

- 30 corporate management compliance evaluations;
- 922 traditional establishment-based compliance evaluations;
- 36 functional affirmative action plan compliance evaluations; and
- 12 university compliance evaluations.



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In accordance with its methodology,[4] the OFCCP used the following criteria to select contractors for this CSAL list.

For establishment-based reviews — other than financial institutions, universities and colleges — the OFCCP selected contractors engaged in low-wage industries, utilizing the Bureau of Labor Statistics' quarterly census of employment and wages data for the fourth quarter of 2022.

The office also selected nonconstruction contractors that received "the highest frequency of contracts awarded through the Bipartisan Infrastructure Bill."

Using these two parameters, the OFCCP then selected contractors engaged in several different North American Industry Classification System sectors, including manufacturing; retail trade; professional, scientific and technical services; administrative and support services; and waste management and remediation services.

The OFCCP started with a list of federal contracts valued at \$50,000 or more on USAspending.gov, a public data source of federal spending information, and refined the pool by removing certain types of contracts, such as TRICARE, and retaining contractor establishments with the highest employee counts in each OFCCP district office.

The OFCCP matched company names and addresses against the 2021 EEO-1 filings to obtain employee counts. For each parent company with at least one contract of \$50,000 anywhere in the organization, all establishments that meet the scheduling list's criteria were included in the eligible pool of contractors.

If a parent company had two or more establishments on the CSAL list, the OFCCP assigned these audits to a single OFCCP region so that it could review these in a coordinated manner.

The OFCCP created the pool of eligible financial institutions by downloading the names of banks insured by the Federal Deposit Insurance Corporation, their addresses and employee counts from the FDIC online data tools.

The OFCCP said that it removed the following establishments from the CSAL list, including those that:

- Are currently under review;
- Are currently in a monitoring period pursuant to a conciliation agreement;
- Are currently within the exemption period following a closed review;
- Are currently pending scheduling for review from a prior scheduling list; or
- Have an active separate-facilities waiver.

When should contractors on the CSAL list expect to receive a scheduling letter?

Contractors on the CSAL list will not be subject to an OFCCP audit until they receive a scheduling letter from the OFCCP. Historically, the OFCCP sent CSALs to service and supply contractors as a courtesy to let them know that one or more of their establishments may be scheduled for an audit and gave them at least 45 days' notice to prepare for the compliance review.

Last year, the OFCCP changed its policies to allow contractors to be scheduled for an audit immediately after the CSAL list is published.

The OFCCP's new scheduling letter also allows the OFCCP to issue the scheduling letter via email with a read receipt requested. Contractors should make sure that the appropriate personnel at establishments that may be selected for audit monitor their email inboxes.

Can contractors get extensions of time to respond to OFCCP scheduling letters?

Contractors should not anticipate receiving an extension of time to respond to a scheduling letter, except in very limited circumstances.

Contractors have 30 days from the date they receive the scheduling letter — whether via email or by physical copy — to provide the information requested in the OFCCP's current scheduling letter.

Under the current administration, the OFCCP will only grant extensions of time for submitting responses to the scheduling letter and itemized listing under extraordinary circumstances, such as an extended medical or military leave of absence of key personnel responsible for OFCCP compliance; a local or company-specific disaster affecting records retrieval, e.g. a flood, fire or computer virus; or the unexpected turnover or departure of key affirmative action personnel.

Despite the OFCCP's significant expansion of the number of items included in the scheduling letter contractors will be required to provide at the outset of an audit, the office has not changed its position on granting extensions to the 30-day timeline. Instead, the new scheduling letter states that the OFCCP may initiate enforcement proceedings if the requested information is not provided within 30 calendar days of the contractor's receipt of the letter.

What should contractors do if they believe their establishment is on the CSAL list in error?

The OFCCP collects contract data from USAspending.gov and establishment-level data from EEO-1 filings. Sometimes the information the OFCCP uses to select contractor establishments for the CSAL list is outdated.

Contractors may find that one of their establishments on the CSAL list has been closed or relocated, or that the listed establishment name does not reflect the company name due to corporate changes, such as a merger or acquisition.

Contractors that believe the OFCCP should not have selected an establishment identified on the CSAL list should determine whether there is a basis for asking the OFCCP to remove it from the CSAL list.

What should contractors on the CSAL list do right now?

Contractors on the CSAL list should promptly begin preparing for a potential audit. Below are some proactive steps to consider.

Notify relevant staff to watch for CSALs or scheduling letters.

CSALs and scheduling letters are typically sent to the director of human resources, or designated point

of contact, at the establishment on the audit list. As these individuals are not always responsible for the contractor's affirmative action compliance — or even aware of the contractor's affirmative action obligations — contractors should notify HR personnel and other designated points of contact at their establishments to keep a lookout for those notices in the coming weeks.

Prepare for a potential audit.

Contractors on the audit list should take advantage of the advance notice by immediately reviewing their affirmative action practices in preparation for a potential audit.

The OFCCP recently made several significant changes, showing that it intends to conduct more aggressive and less transparent audits.[5] The OFCCP also recently issued a new scheduling letter and itemized listing, significantly expanding the documents and data that contractors will be required to submit at the outset of the audit.[6]

The new scheduling letter not only increases the time and burdens associated with responding to the scheduling letter, but it also increases the risk that the OFCCP will find potential areas of noncompliance or indicators of discrimination, prolonging the audit or resulting in adverse findings.

Investing ample time upfront to have a good initial submission could potentially save significant costs in defending an audit and avoiding unnecessary adverse findings.

The internal review should generally begin with determining which type of compliance review will be conducted — i.e., establishment review, corporate management compliance evaluation or functional affirmative action plan review — and then using the OFCCP's new scheduling letter and itemized listing as a guide for preparing the initial submission.

It is critical to closely review any materials and data before submitting them to the OFCCP to ensure they are accurate, consistent and compliant.

Pay close attention to areas showing adverse impact, especially hiring and compensation.

In the last few years, the OFCCP has been effective at pursuing and settling systemic discrimination cases. In many instances, the best defense to these claims will be having a good offense.

If a contractor has potential indicators of discrimination in hiring, promotions, terminations or compensation, it should immediately analyze those areas under the attorney-client privilege, to ensure that the data and similarly situated employee groupings underlying those indicators are accurate, or that the contractor has legitimate explanations for those indicators.

Collect and closely review compensation factors and policies.

The OFCCP's new scheduling letter requires contractors to provide, for each employee at the establishment under audit, (1) "relevant data on the factors used to determine employee compensation"; and (2) "documentation and policies related to the contractor's compensation practices."

Contractors that "do not maintain any of these items" will have to inform the OFCCP of that fact in their initial submission. Not only do these new requirements increase the burden on contractors to collect,

quality check and assess their compensation practices, but they also provide the OFCCP a greater opportunity to identify issues for investigation during audits and increase the likelihood of the OFCCP alleging pay-discrimination findings.

Ensure you can document privilege for pay-equity studies.

The OFCCP issued a directive last year and updated its scheduling letter to require that contractors provide copies of their regulatory required-pay studies.[7] The OFCCP's regulations require contractors to analyze their compensation systems for race and gender-based disparities, but the regulations do not provide specifics on how contractors should perform that analysis.

In its directive, the OFCCP provided details on the types of compensation assessments it expects to see from contractors to meet this regulatory requirement, as well as the documentation contractors must provide to maintain the attorney-client privilege over those compensation analyses.

The new scheduling letter requires contractors to provide documentation demonstrating at least the following for their regulatory required-pay analysis:

- When the compensation analysis was completed;
- The number of employees the compensation analysis included and the number and categories of employees the compensation analysis excluded;
- Which forms of compensation were analyzed and, where applicable, how the different forms of compensation were separated or combined for analysis — e.g., base pay alone, base pay combined with bonuses, etc.; and
- That compensation was analyzed by gender, race and ethnicity.

Since this documentation will be required at the beginning of audits, contractors should start considering now what type of analysis they will perform to meet the additional required elements of affirmative action programs under Title 41 of the Code of Federal Regulations, Section 60-2.17(b)(3), and the type of documentation they will have available to prove that an analysis was conducted if they plan to withhold that analysis from the OFCCP on attorney-client privilege grounds.

Collect and review technology and artificial intelligence-based selection tools.

The OFCCP's new scheduling letter requires contractors to identify and provide documentation about their "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."

Accordingly, contractors should start tracking and evaluating their use of such tools to understand how they are being used. Contractors should assess those tools under attorney-client privilege to determine if they have any potential adverse impact based on protected characteristics.

Remember to certify that affirmative action plans have been completed.

All contractors subject to the OFCCP's affirmative action plan obligations are now required to certify to the OFCCP that they have created and maintained a current plan in compliance with the laws enforced

by the OFCCP.[8] The certification must be done annually.

Last year, contractors were required to provide this certification on or before June 29, using the OFCCP's contractor portal.[9] The OFCCP has not yet announced the deadline for contractors to make the certification for 2024, but we anticipate that the deadline will be around that same time.

Contractors who have not certified for last year should consider doing so as soon as possible since the OFCCP has prioritized selecting contractors for audit that have failed to certify compliance with this requirement.

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[1] <https://www.dol.gov/sites/dolgov/files/OFCCP/scheduling/files/FY2023-CSAL-Construction-Scheduling-List.xlsx>.

[2] <https://www.mofo.com/resources/insights/230123-ofccp-releases-new-audit-list-for-2023>.

[3] <https://www.dol.gov/agencies/ofccp/manual/fccm/figures-1-6/figure-f-3-combined-scheduling-letter-and-itemized-listing>.

[4] <https://www.dol.gov/sites/dolgov/files/OFCCP/scheduling/files/SL23R2-SS-Methodology.pdf>.

[5] <https://elc.mofo.com/topics/ofccp-signals-return-to-more-aggressive-and-less-transparent-audits>.

[6] <https://elc.mofo.com/topics/ofccp-s-new-burdensome-audit-scheduling-letter-approved>.

[7] <https://www.mofo.com/resources/insights/220825-ofccps-revised-directive-softens>.

[8] <https://elc.mofo.com/topics/ready-set-certify--ofccp-releases-mandatory-annual-aap-certifications>.

[9] <https://www.dol.gov/agencies/ofccp/contractorportal>.