

# RECENT SIGNIFICANT DEVELOPMENTS AT THE OFCCP

AUGUST 2, 2018

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# AGENDA

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# BEFORE I BEGIN...

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# BEFORE I BEGIN...

I bring greetings from Leonard J. Biermann...





# BEFORE I BEGIN...

The passing of an era...

IN MEMORIAM

Brian W. Bulger, Esq.



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# I. WHERE OFCCP IS TODAY

- A. Ondray Harris' departure from OFCCP will not slow OFCCP down
- Craig Leen will drive OFCCP forward
- B. In their 9 months at OFCCP, Former Director Ondray Harris and Craig Leen got traction **FAST:**
- CSAL audit list with new targeting rules (Jan 31, 2018)
    - Release to public of targeting rules (April 18, 2018)
  - Predetermination Notices (to keep OFCCP field offices marching in line) (March 13, 2018)
  - Four senior career employees just transitioned
    - Brad Anderson (OFCCP Regional Director, Chicago) to EEOC District Director, Birmingham, Alabama
    - Janette Wipper, OFCCP SF Regional Director to General Counsel of CA DFEH
    - Diana Sen rumor wrong





# I. WHERE OFCCP IS TODAY (Con't)

## B. Former OFCCP Director Ondray Harris got traction **FAST** (Con't):

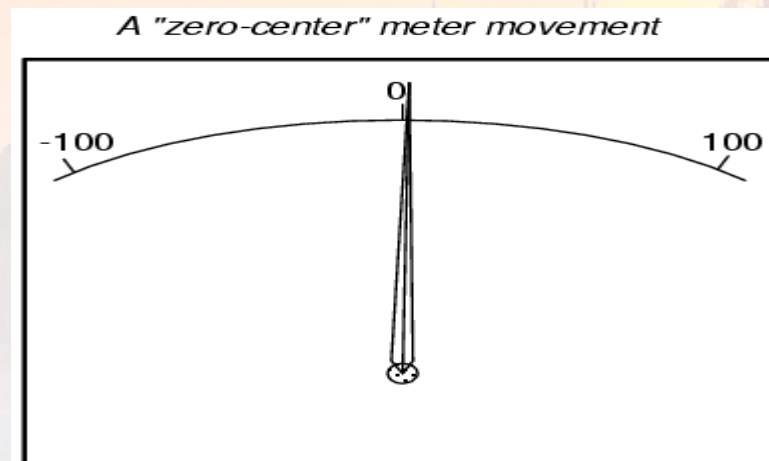
- Tom Dowd (OFCCP Deputy Director) to USDOL ETA
- Consuela Pinto (lawyer in Solicitors National Office advising OFCCP) back to private practice
- Cuts to SOL litigation budget for FY 2018/FY2019
- Rescission: OFCCP Compensation Directive 307 (however, stalled since April 2018)
- One-year audit running time limit imposed via internal management instruction
  - The “fire sale” on open contested audits we have been expecting is now slowly beginning to occur



# I. WHERE OFCCP IS TODAY (CoN'T)

## C. Stopping the Madness

- What is the madness, you ask?
  - 7 crazy policy initiatives lacking support in Title VII law referenced below
- All of these initiatives are designed to either stop the madness going forward, or stop the in-progress madness before it can continue
- Director Harris' legacy was to START the "Rewind" of OFCCP to the center



BLUE

RED



# I. WHERE OFCCP IS TODAY (CoN'T)

## C. Stopping the Madness (Con't)

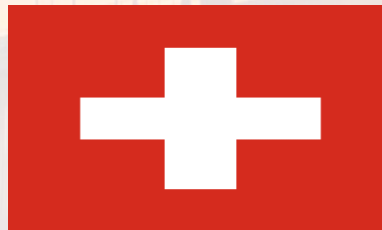


- Now that Washington D.C. has become a “winner-take-all” political zone where bi-partisanship is now rare, is OFCCP’s future now going to track the NLRB’s experience: a “Yo-Yo” with policies which Democrats take beyond the law and Republicans then pull back to normal limits?

# I. WHERE OFCCP IS TODAY (CoN't)

## C. Stopping the Madness (Con't)

- Is OFCCP's future following the Obama Administration to now be either Blue or Red, and not Switzerland?





# I. WHERE OFCCP IS TODAY (CoN'T)

## D. Look Forward: The Trump OFCCP Agenda

- It will take years to implement the two initiatives unique to the Trump OFCCP
  - Linking Apprenticeship Training Programs to Affirmative Action
    - Needs regulatory reform
    - Government contractors may nonetheless go forward voluntarily
  - Contractor Awards Program



# I. WHERE OFCCP IS TODAY (CoN'T)

## E. Mid-Term Elections Have Already Substantially Stalled Team Trump's Reform Efforts At OFCCP





# I. WHERE OFCCP IS TODAY (CON'T)

## E. Mid-Term Elections Have Already Substantially Stalled OFCCP (Con't)

- Secretary Acosta is also:
  - a cautious moderate Republican not cast from the Trump anti-administrative state mold
- THIS MAY BE ALL THERE IS: Employers have now already wrung out as much as they are likely to get out of USDOL in Trump Term 1 on the big picture policy issue roll-backs with broad public interest and money behind them:
  - “Fiduciary Rule” roll-back;
  - “Tip Credit Rule” roll-back
  - “Joint Employer Rule” roll-back
  - “Persuader Rule” roll-back

The federal courts spared Secretary Acosta from several other roll-backs:

- Fair Pay and Safe Workplaces Act
- Overtime Rule



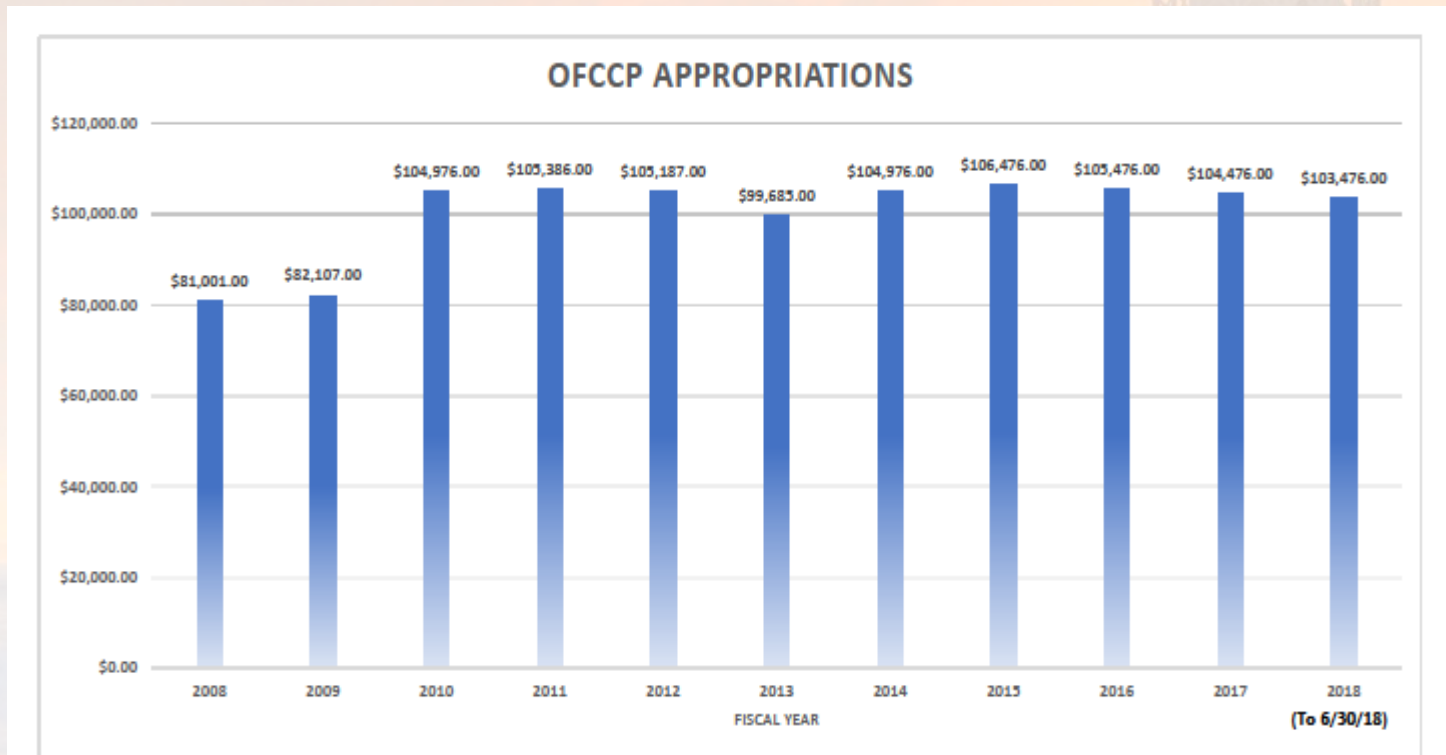




# I. WHERE OFCCP IS TODAY (CoN'T)

## F. The Incredible Shrinking OFCCP Footprint

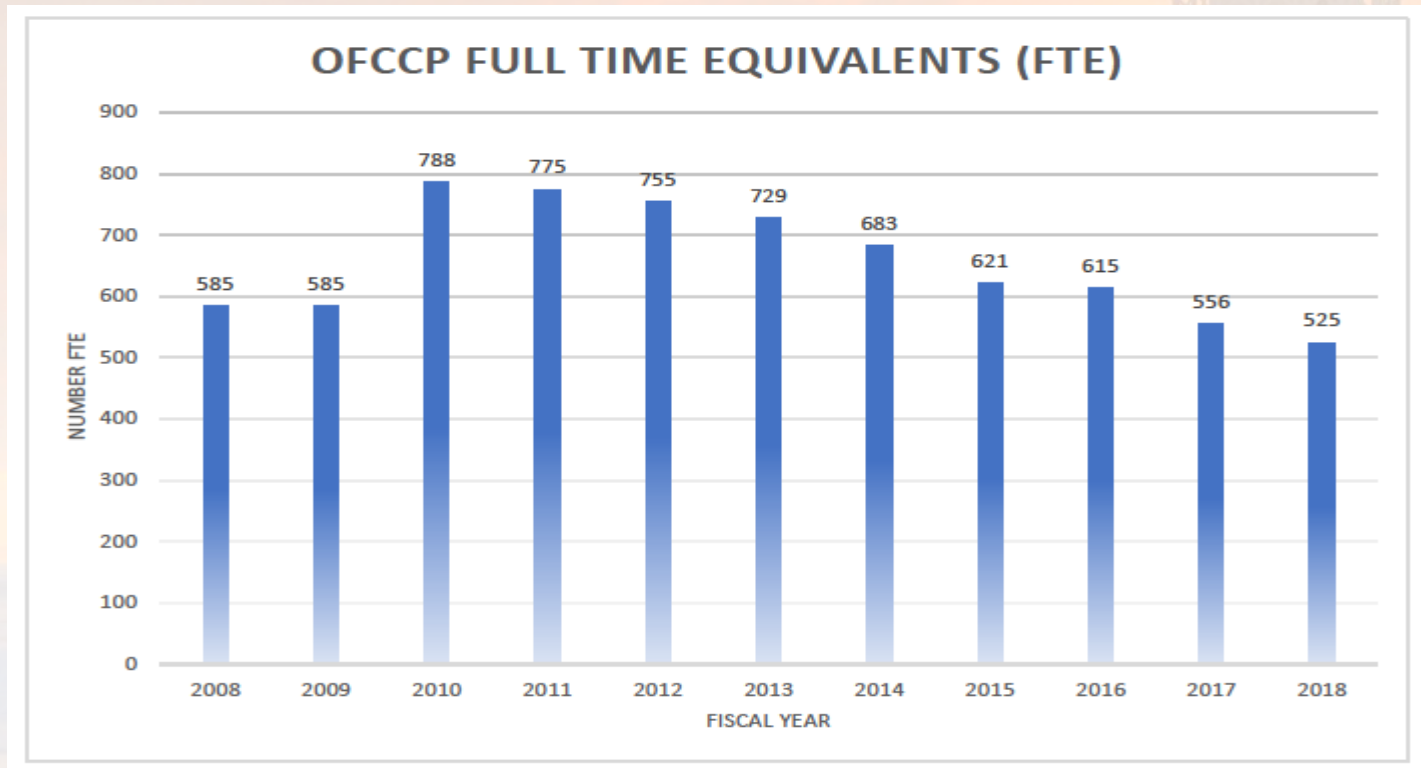
- Let OFCCP's figures do the talking



# I. WHERE OFCCP IS TODAY (Con't)

## F. The Incredible Shrinking OFCCP Footprint (Con't)

- Let OFCCP's figures do the talking (Con't):

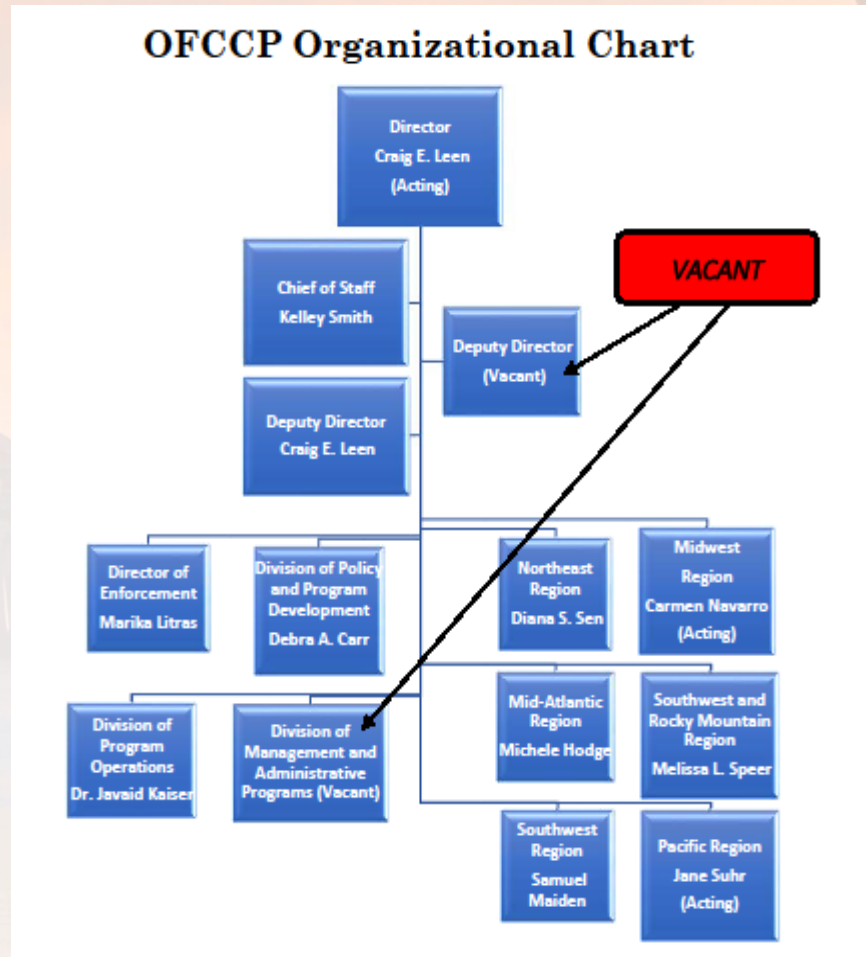




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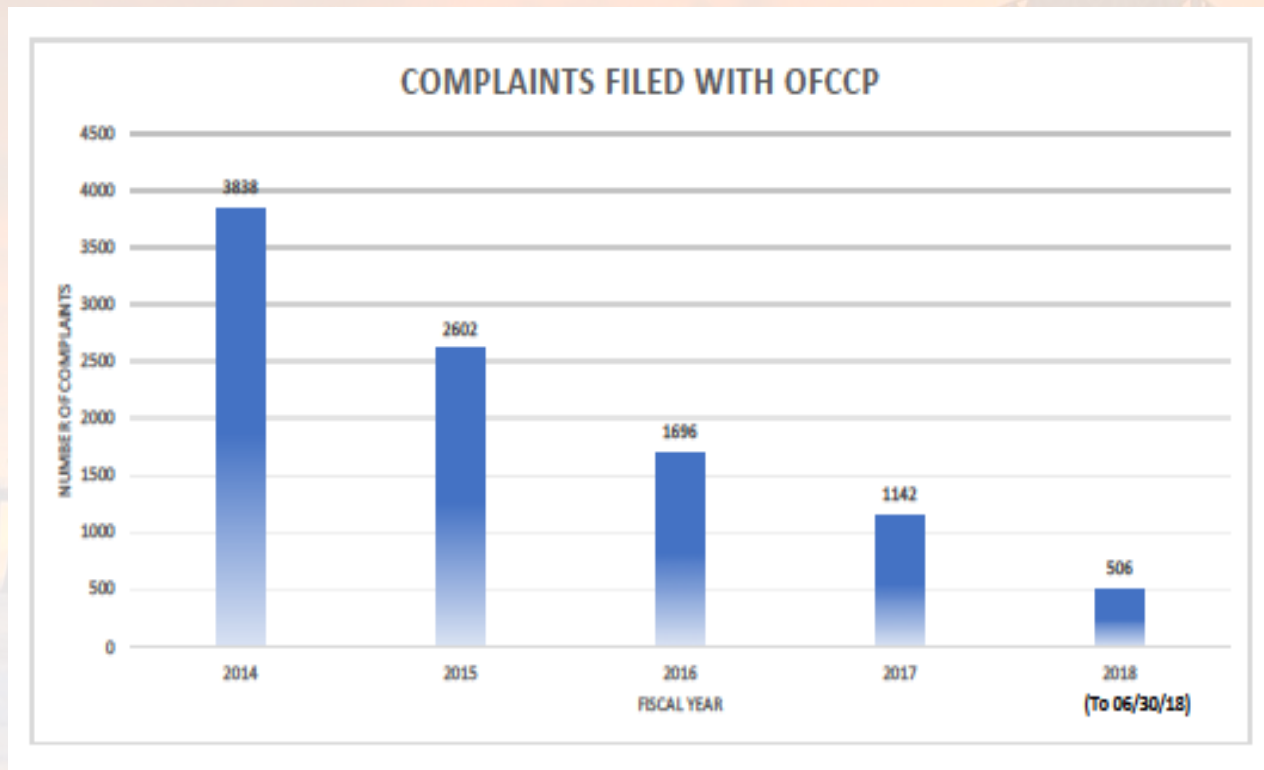
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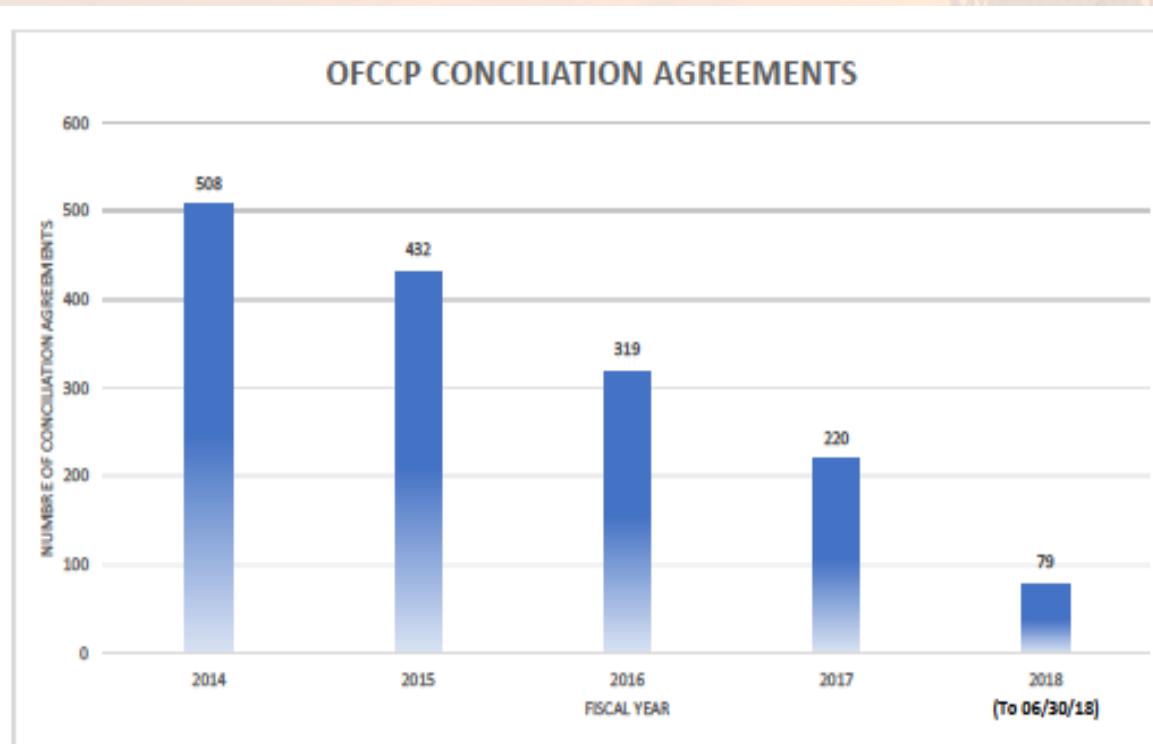




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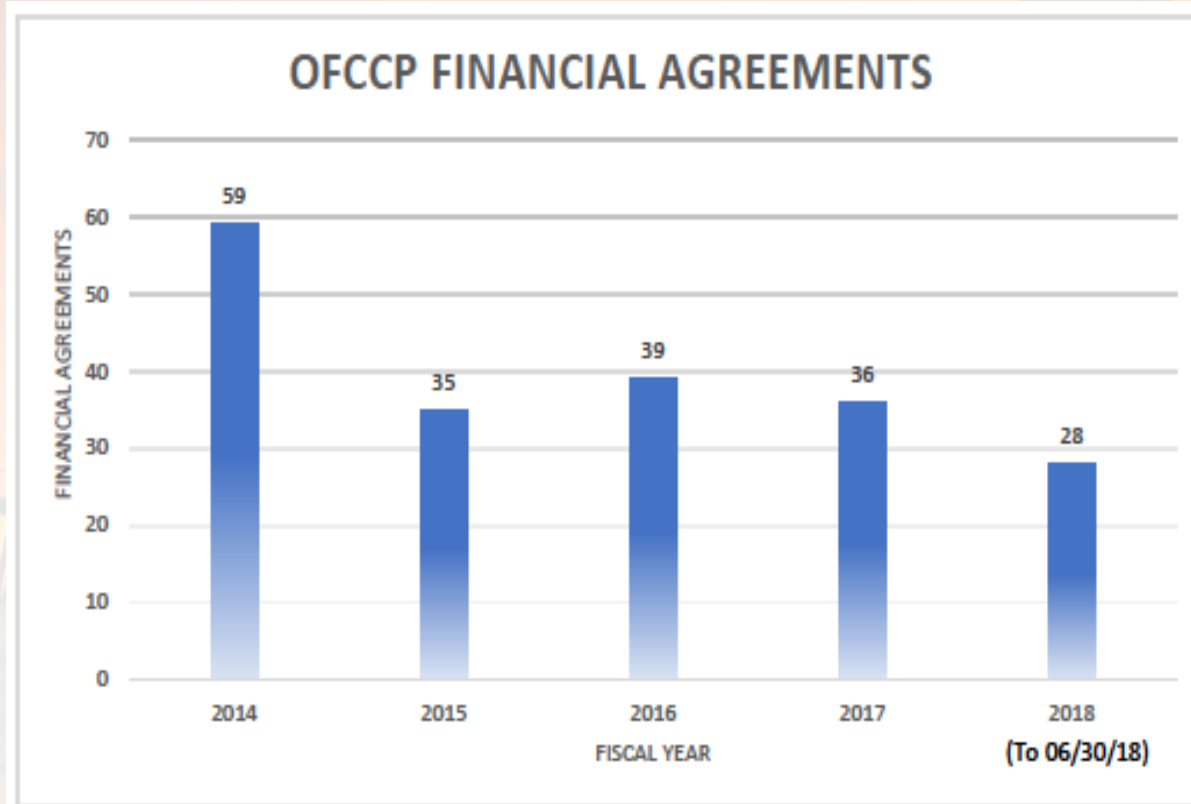
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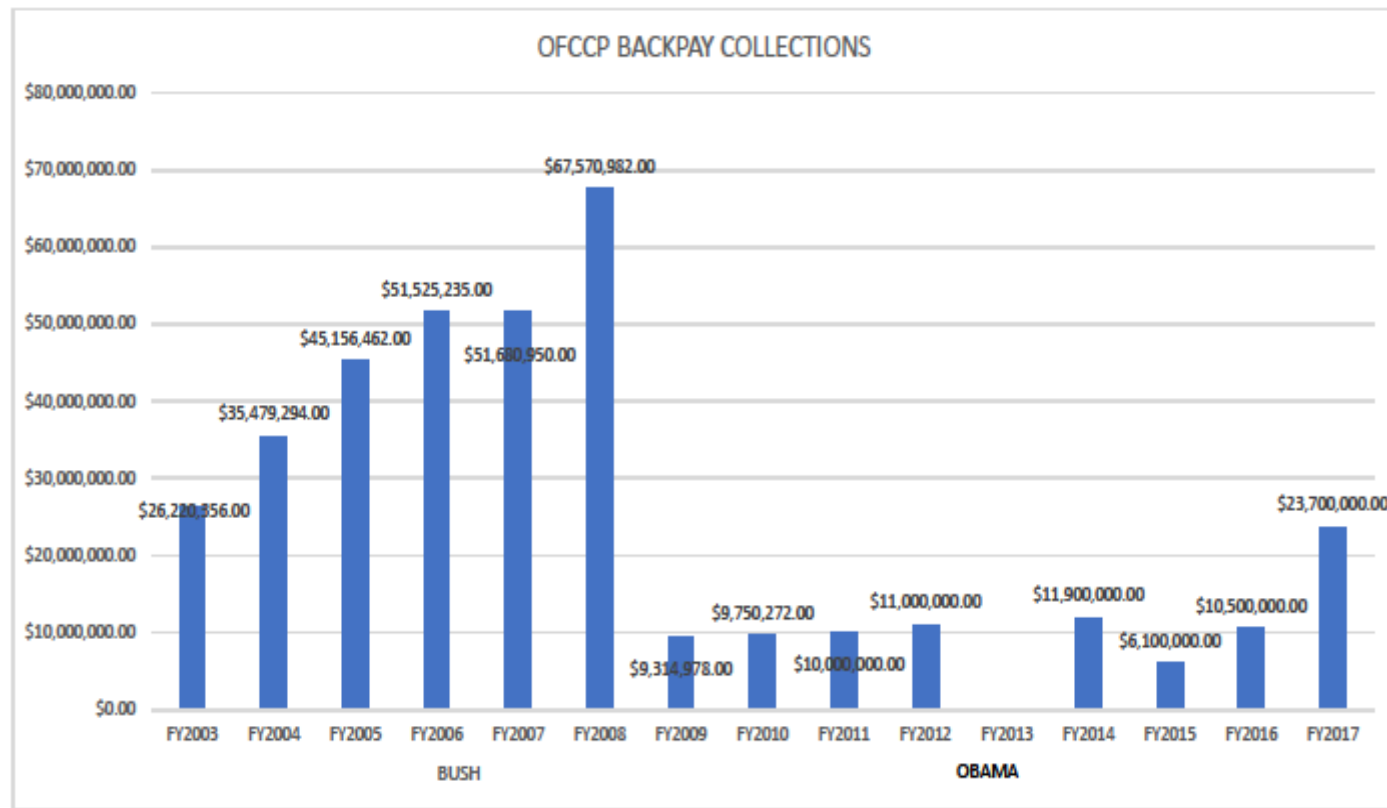
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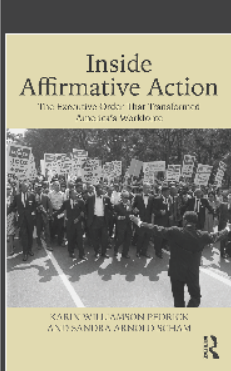


# II. WHERE OFCCP HAS BEEN. HOW WE GOT HERE

## THE DAILY DOUBLE!!



# II. WHERE OFCCP HAS BEEN. HOW WE GOT HERE (CON'T)



**Inside Affirmative Action**  
The Executive Order That Transformed America's Workforce

KARLN WILLIAMSON PEDRICK  
AND SANDRA ARNOLD SCHAM

July 2018: 6 x 9: 296pp  
13 Illustrations

Hb: 978-1-138-72697-0 | \$160.00  
Pb: 978-1-138-72699-4 | \$48.95  
eBook: 978-1-315-19109-6

**TABLE OF CONTENTS:**

Foreword: Who, What and When

**Part 1: Inside and Outside Affirmative Action**

1. Our Stories, Two Civil Servants and Ten Administrations
2. The Debate Outside Affirmative Action

**Part 2: The Making of Affirmative Action**

3. Freedom is Not Enough: John F. Kennedy and Lyndon Baines Johnson
4. Changes in Lattitudes, Changes in Attitudes: Richard Nixon, Gerald Ford and Jimmy Carter
5. On Account of One Afterthought or Slough Bomb?


**Part 3: Hesitation and Second Thoughts**

6. Jelly Belles and Indecision: Ronald Reagan's First Term
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11. From Seneca Falls to Selma to Stonewall: Barack Obama
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Afterword: What Hath LBJ Wrought?

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## Inside Affirmative Action

### The Executive Order That Transformed America's Workforce

**Karl William Pedrick and Sandra Arnold Scham**

**'Here, at last, is the definitive work on Executive Order 11246. Written from the perspectives of two career Federal civil servants, *Inside Affirmative Action* presents an unbiased, yet committed, view of the enforcement of contract compliance by the Federal Government. ...This is a book that should be required reading for everyone who has an interest in federal contract compliance to promote and advance equal employment opportunity and affirmative action in American society!'**

—Weldon J. Rougeau, Director of the Office of Federal Contract Compliance Programs during the Jimmy Carter administration (1977-81)

**'Pedrick and Scham describe the fascinating interplay between proponents and opponents and the policy and bureaucratic battles engaged in over the decades. For those interested in understanding "how the sausage is really made," *Inside Affirmative Action* will present a front row seat as to how a critical component of American life was conceived, given substance and then implemented.'**

—Lawrence Lorber, former Director OFCCP, Member Board of Directors, Office of Congressional Compliance, Senior Counsel Seyfarth Shaw

**'OFCCP, Executive Order 11246, and Affirmative Action Goals and Timetables may be unfamiliar if you don't work for a major Government contractor. *Inside Affirmative Action* sheds light on these obscurities, and reveals how they helped to end black jobs and female jobs in the last half of the 20th Century and, for the first time, to include women and African Americans in the mainstream workforce. In this well-researched and readable volume, the authors juxtapose relevant and contextual historical data to tell the story of sex and race-based employment discrimination and its decline in America.'**

—James D. Henry, Associate Solicitor for Civil Rights 1973-1999, Office of the Solicitor, U.S. Department of Labor

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## II. WHERE OFCCP HAS BEEN. HOW WE GOT HERE (CON'T)

*Inside Affirmative Action  
The Executive Order That Transformed America's Workforce*

**By Karin Pedrick/Sandra Scham**

Karin was a Special Assistant to the OFCCP Director when Ellen Shong Bergman and I were running the OFCCP

Karin eventually followed her former Special Assistant colleague at OFCCP, Cari Dominguez, to the EEOC to be her Special Assistant when Cari became the Chair of the EEOC

Karin meets Sandra...

So, now they have written this book together about the early years of the Civil Rights movement and the transformation and evolution of the OFCCP into what it is today and documenting the positive impact it has had on America





# III. FORMER DIRECTOR HARRIS AND ACTING DIRECTOR LEEN HAVE BEEN BUSY

## A. OFCCP Champions Apprenticeships

- This interest starts with Secretary Acosta
- The Secretary's interest starts with the jobs data
  - 6.8M Americans out of work lacking skills for marketplace
  - 6.1M jobs are available and unfilled in America

Apprenticeship Bridge



Land of  
Unemployment



Land of  
Employment

# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## A. OFCCP Champions Apprenticeships (Con't)

- Where are the labor shortages...according to BLS (and where apprenticeships and educational re-focusing may make sense)?
  1. Home Health Care Aides (38% growth projected)
  2. Physical Therapists (35% growth projected)
  3. Financial Advisors (30% growth projected)
  4. Software Engineers (19% growth projected)
  5. Information Security Analysts (19% growth projected)
  6. Registered Nurses (16% growth projected)
  7. Data Scientists (16% growth projected)
  8. General Business and Operations Managers (7% growth projected)
  9. Truck Drivers (5% growth projected)

**NOTE:** The U.S. is short 250,000 welders (but welder vacancies are not even on the top 10 list)





# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## B. What is the Relationship of Apprenticeships to Affirmative Action?

The highest state of the art of “affirmative action” is creating availability where little or none exists. Here is what OFCCP’s 1972 Nixon-era OFCCP Rules used to require of covered Government contractors (until 2000) as one of the then 14 required ingredients of the “Narrative” in Affirmative Action Programs for Minorities and Women

41 CFR Section 60-2.13(j) **used to read** as follows:

**“Section 60-2.13 Additional required ingredients of affirmative action programs.**

**Effective affirmative action programs shall contain, but not necessarily be limited to, the following ingredients:**

**(j) Consideration of minorities and women not currently in the workforce having requisite skills who can be recruited through affirmative action measures”**





# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## B. What is the Relationship of Apprenticeships to AA (Con't)?

- While they did not line up one-on-one with each of the ingredients then required in Affirmative Action Plans, Subpart C's helpful and practical suggestions addressed most of the concepts within OFCCP's required Rules. Here are two of the pertinent SubPart C practical/helpful hints about how Contractors might have chosen to comply as it pertains to apprenticeship programs:

**41 CFR Section 60-2.24 (e)(9):** "Special employment programs should be undertaken whenever possible. Some possible programs are:

- (i) Technical and nontechnical co-op programs with predominately Negro and women's colleges."

**41 CFR Section 60-2.26 (c):** "The contractor should support vocational guidance institutes, vestibule training programs and similar activities."



# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## B. What is the Relationship of Apprenticeships to AA (Con't)?

In the 1970s, 80s and 90s, Government contractors and OFCCP interpreted that section to mean that Contractors should apply efforts to get people “off of the unemployment rolls and onto payrolls”

There was also a companion “SubPart C” of OFCCP’s Rules which were NOT BINDING...rather they were merely suggestive...like “Helpful Hints from Heloise.” OFCCP withdrew SubPart C in its entirety in 2000, although many of SubPart C’s core notions survive in today’s OFCCP Rules after being rewritten to sharpen the requirements and to make the requirements mandatory (i.e. OFCCP deleted all the references to the hortatory verb “should” and inserted command phrases like “the contractor shall” and or the “contractor must”



# III. HARRIS AND LEEN HAVE BEEN BUSY (CoN'T)

## C. Let's Play True or False as to Apprenticeships

Apprenticeships have grown over 40% in the last 5 years in the U.S.

True

False





# III. HARRIS AND LEEN HAVE BEEN BUSY (CoN'T)

## C. Let's Play True or False as to Apprenticeships (Con't)

In FY 2017, almost 200,000 individuals entered apprentice training programs in the U.S.

True

False



# III. HARRIS AND LEEN HAVE BEEN BUSY (CoN'T)

## C. Let's Play True or False as to Apprenticeships (Con't)

There are over 500,000 apprentices currently in training in the U.S.

True

False



# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## C. Let's Play True or False as to Apprenticeships (Con't)

Apprenticeships do not pay for themselves even taking into account increased productivity, reduced waste, and greater innovation.

True

False





# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## D. OFCCP's January 31, 2018 CSALs

- OFCCP mailed 1000 Corporate Scheduling Announcement Letters (CSALs) for Supply and Service Contractors (including FAAPS, CMCEs (“Glass Ceiling” audits) and universities) on February 1, 2018 (but not construction)

See DirectEmployers *Week in Review*: February 12, 2018

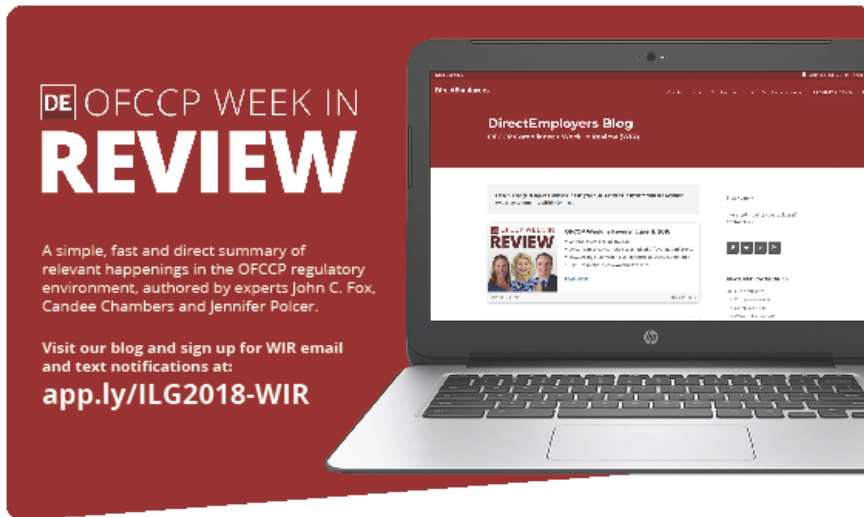


# III. HARRIS AND LEEN HAVE BEEN BUSY (Con't)

## THE DAILY DOUBLE!!



# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)



## • Week In Review (WIR) Blog Excerpts •

APRIL 30, 2018

### Tuesday, April 24, 2018: OFCCP Director Kicked Off DEAM18

"A breath of fresh air," stated a long time DirectEmployers Member, when asked what she thought about Director Harris's keynote. Without a doubt, he kicked off DEAM18 with a message unlike any we have heard from OFCCP in recent years.

The energy at the DirectEmployers Annual Conference (DEAM) is always through the roof, and this year was no

exception. "It's like attending a family reunion—except one where you actually want to see everyone!" stated another DE Member. Among a packed room at the beautiful Olympic Hotel in downtown Seattle, in front of several hundred DE Members, Partners, and additional colleagues; Director Harris took the stage and did not speak at us, but rather to us, about his four major goals for OFCCP:

"It's like attending a family reunion—except one where you actually want to see everyone!"

1. Help Government Contractors come into compliance and stay in compliance
2. Reduce the time of audits
3. Change the relationship between Government Contractors and OFCCP
4. Recognize high performing Government Contractors

Learn more about Director Harris's four goals, as well as additional takeaways from DEAM18. Plus don't miss Diversity & Inclusion Awareness Month ideas and upcoming deadline reminders at: <https://app.ly/2rb0A1r>





# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## D. OFCCP's January 31, 2018 CSALs (Con't)

- OFCCP began mailing audit Scheduling Letters on a rolling basis beginning **March 19, 2018** and will continue until it exhausts this new audit scheduling list regardless of whether it finishes during this FY2018 (as has been OFCCP's habit since November 2014).
- OFCCP sent the January 31, 2018 CSALs to Human Resources Directors (or designated point of contact) at each establishment on OFCCP's audit scheduling list



# III. LEEN AND HARRIS HAVE BEEN BUSY (CON'T)

## D. OFCCP's January 31, 2018 CSALs (Con't)

In a major transparency move, OFCCP in April of this year, following much discussion of OFCCP's audit protocols at a DirectEmployers Listening Session (see DirectEmployers *Week in Review*, April 3, 2018) held at OFCCP Headquarters, posted to its website a succinct, but detailed, description of the methodology OFCCP used to create the audit scheduling list for the January 31, 2018 CSALs

- See DirectEmployers *Week in Review*, April 23, 2018  
OFCCP's description makes clear that this CSAL round does not include any;
  - industry targets;
  - company targets;
  - recidivism algorithm (total random selection has returned to OFCCP)





# III. LEEN AND HARRIS HAVE BEEN BUSY (CON'T)

## D. OFCCP's January 31, 2018 CSALs (Con't)

The order of audit selection is also now skewed to audit first those with larger employee establishments within the jurisdiction of each OFCCP District Office

PRACTICE TIP: Smaller AAP establishments reduce the risk of audit

- OFCCP also put limits on the number of coming audits as follows:
  - OFCCP set no more than ten establishments of a single contractor on the audit scheduling list
  - OFCCP set no more than four establishments of a single contractor in a single OFCCP District Office on the list





# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## D. OFCCP's January 31, 2018 CSALs (Con't)

- OFCCP set no establishments on this upcoming audit scheduling list, if OFCCP had closed a Compliance Evaluation at that establishment within the last 5 fiscal years

**NOTE 1:** OFCCP's existing 2 year Audit Moratorium Rule in FCCM still operates

**NOTE 2:** OFCCP is still finishing up both the **November 11, 2014** and **February 21, 2017** CSAL lists. It has been OFCCP's practice on these two prior CSALs to complete them even if OFCCP does not notice for audit the establishments on those lists by the end of the Fiscal Year in which OFCCP issued the CSAL

Corporations may confirm whether OFCCP mailed an establishment a CSAL by e-mailing a written request on company letterhead to the Division of Program Operations at [OFCCP-DPO-scheduling@dol.gov](mailto:OFCCP-DPO-scheduling@dol.gov)



# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## D. OFCCP's January 31, 2018 CSALs (Con't)

- VERY NEW: A significant change is that OFCCP increased the audit threshold for establishments from its historic 50 employee threshold to two different thresholds depending on whether the **establishment** in question had signed a covered Government K. Specifically, OFCCP excluded from audit:

“Direct Establishments” (i.e. these establishments signed a covered Government contract, but employed fewer than 70 employees...based on EEO-1 reports);

- PRACTICE TIP: Have an establishment of under 70 employees sign prime government contracts; **AND**



# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## D. OFCCP's January 31, 2018 CSALs (Con't)

- VERY NEW (Con't):
  - “Associate Establishments” employing fewer than 100 employees (“Associate” because the company which owns the establishment company had signed a covered Government contract even though the establishment selected for audit had not signed a covered Government contract)





# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## D. OFCCP's January 31, 2018 CSALs (Con't)

- OFCCP also limited audits within any OFCCP District Office's jurisdiction to prevent the office from annually auditing more than one university, one CMCE and two FAAPs
  - Universities: You now know that once one of your nearby Universities/Colleges gets an audit letter, you may now relax



# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## D. OFCCP's January 31, 2018 CSALs (Con't)

- RECAP: WHO IS "SAFE" FROM AUDIT?
  - Establishments which closed an OFCCP audit between January 31, 2013 and January 31, 2018
  - Establishments which did not receive a CSAL dated:
    - November 11, 2014; or
    - February 21, 2017; or
    - January 31, 2018
  - How long is this audit immunity going to last?
    - **Fox estimate:** late summer/early Fall 2019



# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## D. OFCCP's January 31, 2018 CSALs (Con't)

- RECAP: WHO IS "SAFE" FROM AUDIT? (Con't)
  - All establishments which are under 70 employees
  - All "Associate" establishments which are under 100 employees
  - If another University in your OFCCP District Office's jurisdiction got a CSAL
  - If another corporate HQ in your OFCCP District Office's jurisdiction got a CSAL
  - If you know two other Government Contractors with FAAPs in your OFCCP District Office's jurisdiction got a CSAL





# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## E. 2018 PDN “Rules of the Road”

- On February 27, 2018, OFCCP issued Directive 2018-01 titled “Use of Predetermination Notices” (“PDN”)
- Predetermination Notices are writings from OFCCP to a Kor alerting it to alleged individual and class discrimination law violations at the conclusion of a Compliance Evaluation (Complaint or any form of “audit”)
- The Bush Administration (the father) OFCCP invented PDNs to put the Kor on specific notice of alleged violations and invited the contractor to either confirm or rebut some or all of OFCCP’s allegations
- Use of PDNs was previously discretionary with OFCCP District Directors: now mandatory



# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## E. 2018 PDN “Rules of the Road” (Con’t)

- OFCCP’s use of PDNs fell out of favor in the Bush (the son) OFCCP Administration, other than in the Chicago Region, and were rarely, if ever, seen in the Obama Administration
- As reincarnated, this PDN must precede all OFCCP Notices of Violation **“for preliminary individual and systemic discrimination findings”** (emphasis added) AND OFCCP’s National Office will review them in advance of the District Office’s publication of the PDN to the Kor
- Advance review in the National Office is a BIG deal:
  - this is how the NO will coordinate/calibrate/control OFCCP’s six Regional Offices and their approximately 50 subordinate District Offices as to going forward discrimination analyses
  - this is also how the NO will be able to stop in advance any errant Regional and District Directors acting beyond Title VII case law and/or OFCCP official policy





# III. HARRIS AND LEEN HAVE BEEN BUSY (CoN'T)

## E. 2018 PDN “Rules of the Road” (Con’t)

- Beginning with the issuance of the PDN on February 27, 2018, OFCCP’s National Office review will hopefully help harmonize alleged violations within OFCCP across all six Regions and stop the sense Kors have that there are “six different OFCCPs” operating across the United States
- The new PDN takes the form of a letter from OFCCP to the Kor “...to inform federal contractors and subcontractors of the agency’s preliminary findings of employment discrimination” (emphasis added)
- Contractors will have 15 calendar days from receipt of the PDN to rebut OFCCP’s proposed findings that sufficient evidence exists of discrimination





# III. HARRIS AND LEEN HAVE BEEN BUSY (CoN'T)

## E. 2018 PDN “Rules of the Road” (Con’t)

### IMPORTANT GOVERNMENT KOR HABIT CHANGE:

- OFCCP does not intend to further debate whether a violation has occurred or not AFTER it finalizes its response to the PDN. Accordingly, a Kor must “pull out all the stops” and put forward its best and complete facts and legal argument(s) in response to the PDN
- OFCCP does not intend to “relitigate” with Kors its “finding” of a discrimination law violation once it issues a “final” determination post-PDN
- If OFCCP deems the Kor’s rebuttal to its PDN insufficient, and the Kor does not resolve the dispute with OFCCP, the agency’s next step would be to issue a Notice of Violation (NOV)

**NOTE:** The OFCCP District Director will have the OFCCP Region and National Office backing him/her, with Solicitors too, when the DD rejects some or all of your PDN pushback



# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## E. 2018 PDN “Rules of the Road” (Con’t)

- **NOV:** OFCCP’s expectation when it issues an NOV after having issued an unresolved PDN will be that the Kor will remedy the alleged discrimination by, among other things, writing a backpay check. OFCCP does NOT intend to then again “relitigate” the liability or damages issue with the Kor. OFCCP will reason that the time for negotiating and exchanging proof has come and gone

**NOTE:** alleged compliance failures other than discrimination allegations are still “fair game” to push back or at the NOV stage





# III. HARRIS AND LEEN HAVE BEEN BUSY (CON'T)

## E. 2018 PDN “Rules of the Road” (Con’t)

- **SCN:** Similarly, if the Kor does not resolve the matter with OFCCP after OFCCP’s issuance of an NOV, OFCCP will then issue a Show Cause Notice (SCN) asking why OFCCP should not file an Administrative Complaint absent compliance within the next 30 days. Again, OFCCP’s expectation when it issues an SCN after having issued an unresolved PDN will be that the Kor will remedy the alleged discrimination by, among other things, writing a backpay check
- Absent new evidence or new arguments, OFCCP does NOT intend to then again “relitigate” the liability or damages issues with the Kor. OFCCP will reason that the time for negotiating and exchanging proof has come and gone at the time of the rebuttal to and resolution of the PDN





# III. HARRIS AND LEEN HAVE BEEN BUSY (CoN'T)

## E. 2018 PDN “Rules of the Road” (Con’t)

- So, OFCCP and Kors will address and either resolve or reach impasse as to OFCCP discrimination claims MUCH earlier in the compliance evaluation process than has historically been the case
- Kors will also OFTEN have to seek a SUBSTANTIAL extension of time beyond the 15-day rebuttal allowance to respond to an OFCCP PDN alleging systemic discrimination. This is an extension of time a Kor will have to ask OFCCP to grant



# III. HARRIS AND LEEN HAVE BEEN BUSY (CoN'T)

## E. 2018 PDN “Rules of the Road” (Con’t)

- You may not assume that OFCCP will accept and tolerate a tardy response since OFCCP’s Directive limits the Kor response window and is quite specific as to only a 15 calendar day response allowance. OFCCP should have an incentive, however, to grant reasonable extensions because the otherwise result could well be that the agency gallops forward pursuing a case it does not know is fatally flawed



## IV. WORK AT OFCCP YET TO BE DONE

- A. There are four “False Positive” discrimination finding generators left over from the Obama OFCCP which OFCCP is routinely still deploying in current Failure-to-Hire audits
- B. There are three “False Positive” discrimination finding generators left over from the Obama OFCCP which OFCCP is routinely still deploying in compensation audits
- C. These seven erroneous investigative analyses are too numerous to discuss here. I will discuss at length in the October NELI ***Affirmative Action Briefing*** series in Chicago and Austin
  - I will also discuss at the NELI ***AAB*** the contractor’s cure for OFCCP’s poisonous audit prescriptions





## V. THE LITIGATION REPORT

- 1) BAKER DC PROVED AN OFCCP NATIONWIDE CONSTRUCTION INDUSTRY AUDIT TARGET SELECTION PRACTICE VIOLATED THE FOURTH AMENDMENT

### ***ETHICS ALERT***

The case is ***OFCCP v. Baker DC***, 2017-OFC-00005 filed 1/12/17 (the mid-Atlantic construction company of Baker Construction) headquartered in Monroe, Ohio (within the jurisdiction of the Cincinnati federal District Court)

OFCCP now revamping its audit selection procedures for construction contractors



# V. THE LITIGATION REPORT (CON'T)

## *OFCCP v. Baker DC (Con't)*

### THE FACTS:

- Construction audits, **unlike** Supply & Service audits, START WITH AN ON-SITE AUDIT (no “Desk Audit”: i.e. Kor submits no paperwork prior to OFCCP’s On-Site)
- Baker DC signed a covered Government subcontract to work on a “Mega-Construction Project” in Washington D.C.
  - A Mega-Construction Project is one > \$25M
- OFCCP then audited the General Contractor and created a list of all subcontractors on the project



## V. THE LITIGATION REPORT (CON'T)

### *OFCCP v. Baker DC (Con't)*

#### THE FACTS (Con't):

- OFCCP then identified all subcontractors for audit in the order they were going to perform the work on the Mega-Construction Project
- Baker DC was #10 on the subcontractor audit list
- Nonetheless, OFCCP took Baker DC out of order and audited it fourth, allegedly because OFCCP had heard gossip that some Black employees were unhappy with Baker





## V. THE LITIGATION REPORT (CON'T)

### *OFCCP v. Baker DC (Con't)*

#### THE LAW:

- All OFCCP on-site audits trigger the need for OFCCP to prove “probable cause” to procure a “**Warrant**” allowing on-site access, or the civil investigative agency equivalent: i.e., either
  - (a) a Complaint alleging a violation within the agency’s scope of responsibility (not applicable here), or
  - (b) a “Neutral Administrative Plan” (“NAP”) devoid of discretion, but neutrally selecting the company for audit
- OFCCP argued that its Mega-Construction Project audit protocol was the NAP authorizing the audits AND, that NAP also included a sub-plan to audit subcontractors out of order if there were “credible complaints” about that sub



# V. THE LITIGATION REPORT (CON'T)

## OFCCP v. Baker DC (Con't)

### THE LAW (Con't):

- By contrast, OFCCP requests for documents trigger a separate Fourth Amendment protection (“**Subpoena**” rule), but not the higher level of protection accorded to companies under (on-site) investigation via the requirement that OFCCP secure a “**Warrant,**” or its equivalent
- **Baker DC** is a “Warrant” case (OFCCP’s pending Complaint against **Google** is a “Subpoena” case to access documents Google has refused to supply OFCCP)

**NOTE 1:** OFCCP does not in fact have a federal judge issue a “Warrant.” Filing an Administrative Complaint with the Office of Administrative Law Judges (“OALJ”) and getting a Final Order compelling the EMPLOYER to provide OFCCP onsite access is the “Warrant”

**NOTE 2:** OFCCP does not in fact issue a subpoena. It does not have subpoena power. Filing an Administrative Complaint with the OALJ then allows OFCCP to issue a subpoena compelling, if it is properly drawn, the Employer to provide the requested documents/information





# V. THE LITIGATION REPORT (CON'T)

## THE LAW (Con't):

### HOLDING:

- Because OFCCP Baltimore District Director Tom Wells exercised his discretion to audit Baker DC out of order from the NAP, the decision to audit Baker at that time was no longer “neutral”

POST-MORTEM: OFCCP is working with the Associated General Contractors (“AGC”) and others to produce a new process to select construction contractors for audit

## 2) *OFCCP v. Analogic Corporation*, No. 2017-OFC-1

- Compensation discrimination case claiming gender-based pay disparity in “Assembler 2” and “Assembler 3” job titles. Case is awaiting decision before ALJ (decision imminent)





## V. THE LITIGATION REPORT (CON'T)

### 3) *OFCCP v. Google, Inc.*, No. 2017-OFC-4

- Access to compensation data case (see DirectEmployers ***Week in Review*** dated July 14, 2017)
  - No formal substantive claims of unlawful compensation alleged
- Currently pending appeal to the Administrative Review Board (“ARB”), by OFCCP, after OFCCP won what OFCCP estimates to be 90% of the access case



## V. THE LITIGATION REPORT (CON'T)

### 3) *OFCCP v. Google, Inc.*, No. 2017-OFC-4 (Con't)

- Horrible treatment of Google by OFCCP...a federal Court will have a field day with these facts: one of two Janette Wipper cases against the Tech industry
  - \$600,000 covered Government contract
  - Google spent over \$1M to produce compensation data alone at Google, Mountain View, CA HQ and OFCCP still not satisfied with data production



## V. THE LITIGATION REPORT (CON'T)

### 3) *OFCCP v. Google, Inc.*, No. 2017-OFC-4 (Con't)

- no allegation of unlawful compensation discrimination UNTIL OFCCP was in Court arguing the access case and then OFCCP Regional Director Janette Wipper (now former RD) announced on the witness stand that OFCCP had allegedly found “widespread” compensation discrimination at “every level” of the company
  - no prior notice to Google
  - no conciliation with Google
- This is a “subpoena case” so the legal standard for OFCCP to obtain documents from Google is that the subpoena be only:
  1. “sufficiently limited in scope;”
  2. “relevant in purpose;” and
  3. specific in directive so that compliance will not be unreasonably burdensome





## V. THE LITIGATION REPORT (CON'T)

### 4) *OFCCP v. Oracle America, Inc.*, 2017-OFC-6

-OFCCP's claims: failure to hire/compensation discrimination involving applicants to and employees of Oracle's HQs in Redwood Shores, CA

COMPENSATION: Oracle allegedly engaged in "systemic compensation discrimination against women (incumbents) and Asians and African Americans in three lines of business (including 80 job titles)"

FAILURE-TO-HIRE: Oracle allegedly engaged in a "pattern and practice of hiring discrimination against qualified White, Hispanic, and African American applicants in favor of Asian applicants, particularly Asian Indians, based on race in 69 job titles."

-Lawsuit is currently stalled pending settlement negotiations

-This is the second Janette Wipper case against the Tech industry



# V. THE LITIGATION REPORT (CON'T)

## **ETHICS ALERT**

**5) OFCCP v. JBS USA LUX S.A. and SWIFT BEEF COMPANY d/b/a JBS and JBS USA, f/k/a JBS USA, LLC, JBS USA, Inc., and Swift & Co.** (Hyrum, UT plant), Case No. 2015-OFC-00001

- failure to hire claims re Evergreen entry-level production labor jobs
- will finish week 10 of trial later this month
- been a joy to try with my partner Jay Wang
- decision-expected in early 2019, unless settled
- OFCCP's position is that Contractors may not undertake "subjective decision-making" to hire employees





# V. THE LITIGATION REPORT (CON'T)

## 5) OFCCP v. JBS Hyrum (Con't)

-OFCCP also takes the position that corporate **Disposition Codes are ENTIRELY IRRELEVANT AND USELESS**

-OFCCP trial testimony was that OFCCP's Expert Witness simply ignored the evidence of legitimate non-discriminatory reasons for rejection of every at-issue White, Black and Female Person Expressing Interest who JBS rejected

-OFCCP's testimony was that one removes only certain "Not Applicants" from one's statistical analyses and then MUST hire on a statistically proportional basis, based on race and gender from the remaining pool of Persons Who Expressed Interest...a classic **quota case**

-OFCCP's expert Labor Economist did not remove from "Applicant" definition all those who were less than minimally qualified (only "Self-Select Outs" SSOs and those illegal to work)





# V. THE LITIGATION REPORT (CON'T)

## ***ETHICS ALERT***

**6) OFCCP v. Enterprise RAC Company of Baltimore, LLC, Case No. 2015-OFC-00001**

- Failure to hire claims re Evergreen “Management Trainee” job
- Just finished 8 day trial
- Been a joy to try with my partner Alexa Morgan
- Decision-expected in late 2018/early 2019, unless settled
- OFCCP’s position is that Contractors may not undertake “subjective decision-making” in hiring employees



## V. THE LITIGATION REPORT (CON'T)

### 6) OFCCP v. Enterprise RAC Company of Baltimore (Con't)

- OFCCP also takes the position that corporate **Disposition Codes are ENTIRELY IRRELEVANT AND USELESS**

- OFCCP trial testimony was that OFCCP's Expert Witness simply ignored the evidence of legitimate non-discriminatory reasons for rejection documented not just in Disposition Codes, but also via detailed contemporaneously documented written Notes of recruiters



# V. THE LITIGATION REPORT (CON'T)

## 6) OFCCP v. Enterprise RAC Company of Baltimore (Con't)

-OFCCP's trial testimony is also that one removes only "Self-Select Outs" from one's statistical analyses and then MUST hire on a statistically proportional basis based on race and gender from the remaining pool of Persons Who Expressed Interest...a classic quota case

### ASSUME:

- 1,100 Persons Expressing Interest
- - 100 Self-Select Out (SSOs)
- 1,000 "APPLICANTS" (**OFCCP ignored all Disposition Codes**)
- 60% of the remaining pool (what OFCCP calls the "Applicant" pool) is White
- 40% of the remaining pool (what OFCCP calls the "Applicant" pool) is Black
- 100 Hires

Persons Expressing Interest Pool (only SSOs removed) =

- 600 White (60%) ⇨ ⇨ ⇨ ⇨ ⇨ ⇨ ⇨ ⇨ ⇨ ⇨ ⇨
- 400 Black (40%) ⇨ ⇨ ⇨ ⇨ ⇨ ⇨ ⇨ ⇨ ⇨ ⇨ ⇨
- 1000

Hires should be:

- 60 White (60%)
- 40 Black (40%)
- 100





# VI. WHAT CONTRACTORS SHOULD BE DOING DURING THIS ERA WHEN: “THE DUGOUT IS EMPTY”

## 1. Best time to recruit minorities and women... EVER!

### RECRUITER ALERT

- Black unemployment rate at all time record low = 6.5%
- Hispanic unemployment rate at all time record low = 4.6%
- Asian unemployment rate at all time record low = 3.2%
- Persons with a disability unemployment rate at all time record low = 9.2%
- Female unemployment rate at all time record low = 3.7%

This is the very best time in history for Diversity recruitment!

**NO EXCUSES LEFT: “The Dugout is Empty”**



# VI. WHAT CONTRACTORS SHOULD BE DOING DURING THIS ERA WHEN: “THE DUGOUT IS EMPTY” (CON’T)

2. You are recruiting from only four primary pools, at this time, right?:

1) Your competitors

2) High schools/universities/educational institutions

3) Immigrant camps

4) Unemployed:

• “The long-term unemployed” (jobless for 27 weeks or more) = ..... 1.5M

• “Part-time for economic reasons” (i.e., involuntary part-time) = ..... 4.7M

• Those “marginally attached to the work force”  
(have not worked for year+, but want to work) = ..... 4M

Total ..... 10.2M



# VI. WHAT CONTRACTORS SHOULD BE DOING DURING THIS ERA WHEN: “THE DUGOUT IS EMPTY” (CON’T)

## 3. Are you using Recruitment Microsites? WHY NOT?

- Need to migrate your corporate culture to exalt employees
  - Best Places to Work notion
  - Rebrand your company as one which has a corporate culture and actions which demonstrate your company/institution cares about its employees (to attract employees from your competitor)
- At Fox, Wang & Morgan, we have one corporate culture which drives all decision-making:

**“The individual must respect the institution and the institution must respect the individual”**





# Be Respectful!

# Be Happy!



# Thank You!