



# **BREAKFAST WITH JOHN WHAT'S GOING ON WITH OFCCP IN THE TRUMP ADMINISTRATION? August 4, 2017**

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# 1) Democrats Played a Winning Game of Delay of Trump Cabinet Level Nominees: Took 100 + Days to Seat Them

- “KILL THE CLOCK” strategy successful as President’s “Honeymoon period” has wound down...to zero?
- Slowest start to seat a new government in modern history
- Over 1000 “Advise & Consent” nominees to go: 167 Judges
- So much for “Bi-Partisan” spirit in Washington D.C.
- 3 1/2 more years of head knocking lies ahead: Get used to it



## 2) USDOL Still Frozen on Obama Course

- The delay to seat a new Secretary of Labor has left the Department in a VERY slow transition
- Acosta also moving VERY slowly to install his team
- Most of the former Obama Administration policies and operations day-in and day-out continue, as a result, as before without the Trump influence just yet. “Business as usual.”



### 3) EEO Related Appointments

- **EEOC Acting Chair:** Victoria A. Lipnic  
(See DirectEmployers *WEEK IN REVIEW* Jan 30, 2017)
- **Attorney General:** Sen. Jeff Sessions (R-Ala)  
(See DirectEmployers *WEEK IN REVIEW* Feb 13, 2017)
- **VA Administrator:** Dr. David Shulkin  
(See DirectEmployers *WEEK IN REVIEW* Feb 20, 2017)
- **OMB Director:** Mick Mulvaney  
(See DirectEmployers *WEEK IN REVIEW* Feb 20, 2017)
- **Assistant Attorney General for Civil Rights:** White House floated the name of Eric Dreiband, Partner at Jones Day Washington DC. (May 1, 2017). No nomination yet.
- **OFCCP:** There may be no OFCCP political appointee to run the agency (TBD)



#### 4) **OFCCP Will Continue on The Course The Obama Administration Set Until Trump Political Appointees Arrive at OFCCP**

- The delay to seat a new Secretary of Labor has left the Department in a VERY slow transition
- Acosta also moving VERY slowly to install his team
- Most of the former Obama Administration policies and operations day-in and day-out continue, as a result, as before without the Trump influence just yet. “Business as usual.”

## 4) OFCCP Still On Obama Course (Cont'd)

OFCCP audits will continue to cite the same 6 violations the Obama Administration has found for the last 7 years until Team Trump arrives

- What are those violations?
  - Steer clear of the following first 6 violations and you will likely NOT sign an OFCCP Conciliation Agreement



# OFCCP 2015/2016 ENFORCEMENT STATISTICS



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2015 & 2016 OFCCP Enforcement Statistics Summary							
Violation		# of Violations		% per Total Audits			
		FY2015		FY2016*	FY2015		FY2016*
1	Recordkeeping	<del>233</del> 235	224	156	<del>8.9%</del> 9.0%	9.5%	9.20%
2	Recruitment	<del>228</del> 229	221	142	<del>8.7%</del> 8.8%	9.4%	8.40%
3	Written AAP	<del>130</del> 132	120		5%	5.6%	7.10%
4	Past Performance	<del>116</del> 109	109	71	<del>4.5%</del> 4.6%		4.20%
5	Other (Job Listing)	<del>100</del> 101	83	40	<del>3.8%</del> 3.9%	3.5%	2.40%
6	Hiring	<del>38</del> 37	43	5	<del>1.5%</del> 1.4%	1.8%	0.003%
7	Selection or Testing	8	6	4	<del>.31%</del> .25%		0.002%
8	Promotion	<del>2</del> 3	3	4	<del>.08%</del> .13%		0.002%
9	Salary	7	15	3	<del>.27%</del> .64%		0.002%
10	Termination	<del>2</del> 1	1	3	<del>.08%</del> .04%		0.002%
11	Accommodation	<del>4</del> 2	2	2	<del>.15%</del> .08%		0.001%

\*As of 2/20/17



## 5) OFCCP Compensation Initiative a Compliance Bust But a Political Hit

- Compensation claims will continue to be almost nonexistent, as OFCCP data show and as an OFCCP former senior official has now candidly admitted:

**“I don’t think anyone is saying or would say in examining the [OFCCP] pay data that it shows there’s a massive and widespread problem with systemic pay discrimination among all federal contractors [OFCCP] reviewed, but you do see the agency more engaged and I think more effective in addressing the problems that do exist.”**

*Pam Coukos, Esq., former OFCCP Senior Program Advisor and strategist behind OFCCP’s compensation assault on Government contractors in the Obama Administration in a February 24, 2017 BNA interview “Q&A: OFCCP Former Pay Equity Expert Stays Focused For Trump Era”*



## 5) OFCCP Compensation Initiative a Compliance (Cont'd)

### a. Audits Not Likely to Survive Deep Dive After Team

#### Trump Lands At OFCCP

1. OFCCP Compensation audits failed and backfired on the civil rights community (and cost KORS almost \$1B to defend)
  - ~1/400th of 1% alleged violation rate
  - Fewer than 1,000 alleged pay violations alleged out of over 12,000 audits and over 12 million employee-level pay decisions reviewed





## 5) OFCCP Compensation Initiative a Compliance (Cont'd)

- Less than \$5M in back pay during the 8 years of the Obama Administration for compensation claims
- A Government Contractor cost to defend OFCCP compensation audits have exceeded \$100M per year (~\$60,000/audit)
- There never was widespread compensation discrimination:
  - Not an OFCCP hoax
  - Pat Shiu and Pam Coukos just did not know what they did not know
  - Obama White House loved the political mileage it got out of OFCCP, so it\ allowed OFCCP to keep drilling “dry wells”



## 6) So It Starts; OMB Tells All Federal Executive Agencies, Including USDOL, To Start Planning To Reorganize And Downsize

- President Trump wants to slash the size of the Federal Executive Branch (overall) by over 15%. You must understand two things:
  - First, Trump approach to OFCCP is a reaction to the Republican belief that the federal government AS A WHOLE is FAR too big and the federal debt no longer allows for the luxury of the large regulatory administrative state we have built. Trump means to dramatically shrink the federal government and believes that is the people's mandate.
  - Second, Trump further intends to streamline those operations which remain. OFCCP is caught in that policy debate. Significant Senators believe OFCCP is redundant and the budget is too small to fund duplicates. Trump is not alone.

## 6) So It Starts; OMB Tells All Federal Executive Agencies to Downsize (Cont'd)

NOTE 1: These are universal issues: It is not about OFCCP: all agencies are caught in this undertow. OFCCP is no exception.

REMEMBER: Secretary Acosta testified on Capitol Hill June 7, 2017 that the OFCCP merger with EEOC would simply shift the location of OFCCP; not change mission.

NOTE 2: The bigger issue is the 16.5% reduction in OFCCP's budget (less than USDOL's proposed 21% overall reduction). But, can OFCCP function that small, even within a relatively well managed EEOC (much better managed and trained than OFCCP with much more mature infrastructure, and routinely achieving superior enforcement results and enjoying much higher morale).





## 6) So It Starts; OMB Tells All Federal Executive Agencies to Downsize (Cont'd)

- The White House sees a two-step process to transition the federal government, including OFCCP, to the new downsized federal regulatory world it envisions:
- FY2018 budget planning (unfolding now) is a dry-run rehearsal to get ready for the big transition being planned now; and
- FY2019 budget (which begins October 1, 2018=13 months from now) is the big **DENOUMENT**

## 6) So It Starts; OMB Tells All Federal Executive Agencies to Downsize (Cont'd)

Here is the three part play unfolding now:

- STEP 1: April 12, 2017: “Budget Hawk” OMB Director Mick Mulvaney sent a detailed 14 page ["Memorandum"](#) to all federal Executive Branch agencies. The Memorandum put teeth into three prior Trump orders:
- STEP 2: January 23, 2017: “Presidential Memorandum” (“PM”) establishing an immediate hiring freeze in the Executive Branch of Government. Mulvaney’s April 12 Memorandum explained that the January 23<sup>rd</sup> Hiring Freeze PM “ensured immediate action was taken to halt the growth of the Federal Workforce until a ‘long-term plan to reduce the size of the Federal Government’s workforce’ is put in place”. Director Mulvaney’s April 12, 2017 Memorandum then lifted the Hiring Freeze, BUT then directed the agencies to create more detailed and specific agency plans to now force agency closures, employee transfers and terminations;



## 6) So It Starts; OMB Tells All Federal Executive Agencies to Downsize (Cont'd)

- March 13, 2017: President Trump issued an [Executive Order](#) directing agencies to begin the process of reorganizing along the lines of the President's (about to then be unveiled) Fiscal Year 2018 budget.
- This Executive Order directed agencies to start a top-to-bottom review of the need and utility of every federal Executive Branch agency and agency practice to root out duplication and unnecessary cost.
- The White House instructed the agencies to “start from scratch” with a pencil in one hand and a blank piece of paper in the other and start to design the agency of today as though the current agency did not exist.



## 6) So It Starts; OMB Tells All Federal Executive Agencies to Downsize (Cont'd)

**March 16, 2017** President Trump submitted to The Congress his “Budget Blueprint” (i.e. “skinny budget”—which lacked sub-Department budgets such as for agencies within the USDOL like OFCCP, the Wage-Hour Division and OSHA) but gave guidance in general that as to the U.S. Department of Labor that 21% budget cuts were ostensibly coming (but only after Congressional approval). See DE *WIR* for Monday, March 20, 2017.







## 6) So It Starts; OMB Tells All Federal Executive Agencies to Downsize (Cont'd)

- In conjunction with the April 12 Mulvaney Memorandum, Senior White House staffers also met April 11 with CEOs to obtain their suggestions for reorganization. Director Mulvaney has also been quoted as saying that the Trump OMB, as the Obama OMB sought unsuccessfully to do, is looking at the possibility of restructuring by combining common functions from across numerous government departments (i.e. all issues dealing with trade in a “Trade Department”).
- **US DOL has taken to heart the “functional combination” instruction. Hence the proposed merger of OFCCP into the EEOC.**

## 6) So It Starts; OMB Tells All Federal Executive Agencies to Downsize (Cont'd)

- **TIMELINES:** While President Trump's March 13, 2017 (Reorganization) Executive Order gave Director Mulvaney and his OMB until March 13, 2018 to submit a plan to reorganize the Executive Branch of the federal government, the April 12 Mulvaney Memorandum steps up the pace of reorganization by a full year. The April 12 Memo pegs substantial near-term change to early 2018 and long term and final change to the FY2019 budget submission due (initially) to OMB in September 2017. Director Mulvaney has identified these five significant dates:
- **“Immediately”** begin to take actions within each federal Executive Branch agency to achieve “near-term” workforce reductions and cost savings, including planning for funding levels set out in the President's FY2018 Budget (which as to the USDOL as a whole would reduce spending by about 21%).



## 6) So It Starts; OMB Tells All Federal Executive Agencies to Downsize (Cont'd)

- **June 30, 2017:** agencies sent “high-level” drafts of their “Agency Reform Plans” to OMB and must have developed a Plan to “maximize employee performance” by June 30, 2017.
- **September 2017:** agencies must submit “Agency Reform Plans” to OMB, including long-term workforce reductions.
- **“First of next year” [2018]:** Director Mulvaney has predicted “real, tangible ideas” out of President Trump’s Executive Order to reorganize the federal government will be published.
- **FY2019 Budget** (which begins October 1, 2018). Director Mulvaney told media outlets that “what grows out of this [Executive Order reorganization process] will be hardwired into the 2019 budget, which begins in September” [2017]. “That is when agencies start their budget planning.”



## 6) So It Starts; OMB Tells All Federal Executive Agencies to Downsize (Cont'd)

- **May 6, 2017:** President Trump signed the FY2017 budget (now 7 months late) funding the federal government through the end of FY2017 = September 30, 2017.
- The budget was for most agencies, including OFCCP, a “Continuing Resolution” budget... which keeps agency budgets at the same level as their prior year’s budget.





## 6) So It Starts; OMB Tells All Federal Executive Agencies to Downsize (Cont'd)

- OFCCP “ducked a bullet” since it was scheduled to take between a \$1M and \$5M budget reduction for FY2017.
- The bad news about flat line budgets, however, is that agency expenses increase year over year (pension payments increase, rent increases, etc.).
  - In OFCCP’s case, it projected \$2.1M in increased expenses in FY2017
  - So OFCCP has to reduce its costs between now and September 30, 2017 by \$2.1m.

## 6) So It Starts; OMB Tells All Federal Executive Agencies to Downsize (Cont'd)

- So, from the FY2017 budget (this year) OFCCP just shrank another:
  - ~20 Compliance Officers.
  - ~10 COs per \$1m
- OFCCP will first try to take the cut in reduced travel. This means:
  - fewer on-site audits coming
  - watch out ILGs (reduced OFCCP attendance)



## 6) So It Starts; OMB Tells All Federal Executive Agencies to Downsize (Cont'd)

- USDOL on May 23, 2017 proposed a FY2018 Budget for OFCCP: a 16.5% reduction from ~105M to \$88M (DE WIR for May 29, 2017)
- That translates into 440 OFCCP personnel ostensibly beginning **October 1, 2017**=minus 131 employees (571-440)
- The budget also approves the Obama OFCCP's proposal to create two regional specialized skill centers in New York and San Francisco



## 7) Will OFCCP Survive?

- Concern has erupted since AAAED belatedly discovered and circulated a July 2016 Heritage Foundation Report recommending that OFCCP be abolished (not transferred):

“Congress should eliminate the OFCCP and the Women’s Bureau... . These programs are a poor use of tax dollars in a time of tight budgets.”





## 7) Will OFCCP Survive?

This issue is not new. This issue has been around for over 30 years.

The Heritage Foundation Report has been widely misreported as the foundation of the transfer idea. No. Heritage actually recommended abolition.

The Trump White House rejected the Heritage Foundation idea and proposed transfer, not termination, but also suggested a heavy budget cut, but less than other agencies within USDOL are taking.

So, while the OFCCP proposal is shocking to most, its shock value wears off in the broader context of the aggressive re-sizing of the federal government The White House hopes to accomplish in the next 14 months.

**IF** the aggressive downsizing occurs, OFCCP will have been treated no better and no worse than hundreds of other federal agencies.



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## 7) Will OFCCP Survive?

**NOTE:** The Affirmative Action era is drawing to a close. The issue is not whether, but when:

“It remains the current reality that many minority students encounter markedly inadequate and unequal educational opportunities. Despite these inequalities, some minority students are able to meet the high threshold requirements set for admission to the country’s finest undergraduate and graduate educational institutions. As lower school education in minority communities improves, an increase in the number of such students may be anticipated. From today’s vantage point, one may hope, but not firmly forecast, that over the next generation’s span, progress toward nondiscrimination and genuine equal opportunity will make it safe to sunset affirmative action.\*” (fn omitted) (emphasis added)

*Grutter v. Bollinger*, 539 U. S 306 (2003) Ginsberg, J., concurring

NOTE: There is still a little bit of time left on the clock...and still much economic and educational disruption in many Black, Hispanic, Native American and Hawaiian communities



## 7) Will OFCCP Survive?

If a generation is 25 years, then we are more than half way to the 2028 date to which Justice Ginsburg was in 2003 begging her colleagues on the SCOTUS to allow Affirmative Action to survive.





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## 7) Will OFCCP Survive?

My prediction on this issue BEFORE the election was:

- 70% likelihood of an EEOC acquisition
- <50% likelihood of abolition

Two significant budget events will tell the story as to the merger:

1. The U.S. House of Representatives will release its proposed FY2018 Budget in June or July 2017
  - a) If the House budget proposal for OFCCP does not anticipate the merger of OFCCP into EEOC, the merger idea will be dead

## 7) Will OFCCP Survive?

2. If the House budget proposal anticipates the merger (it will), it will take until probably Spring 2018 for the merger question to be decided

- a) There will likely NOT be agreement on the FY2018 budget by October 1, 2017
- b) A federal government shutdown and/or “Continuing Resolution” will then ensue
- c) A final FY2018 budget will be passed, more likely than not, in the Spring 2018 (5-7 months late)...and that budget will “tell the story”



## 7) Will OFCCP Survive?

The White House will be surprised how many Republican CEOs will vouch for OFCCP

Most CEOs want OFCCP efficient, focused, and professionally run; not killed



## 7) Will OFCCP Survive?

### The Problems:

- Team Obama politicized OFCCP for first time in 40 years (since Nixon Administration)
  - Many Republicans now angry
  - Many Democrats now wary
- OFCCP at its political nadir
  - Bi-partisan Senate Appropriations Committee voted 29-1 to shrink OFCCP budget in FY2017 (by \$1M)
  - House FY 2017 Budget was -\$5M



## 7) Will OFCCP Survive?

### The Problems (Con't)

- Many Democrats upset that OFCCP attacked their constituents
- Many Democrats upset Pat Shiu proved there was no widespread pay violations for which employers were responsible and which Democrats could claim to be solving to bring women into the Democrat party
- A great vote getting technique now badly damaged
- The Wage Gap is real, but employers are not a significant driver of The Gap.





## 7) Will OFCCP Survive?

### The Problems (Con't)

- 54% of women voted for Reagan in 1980
- 57% in 1984
- 56% of women voted for Obama in 2008
- 56% in 2012

Obama completely reversed the Reagan legacy as to women voting primarily Republican



# 7) Will OFCCP Survive?

## OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

APPROPRIATION HISTORY (Dollars in Thousands)					
	Budget Estimates to Congress	House Allowance	Senate Allowance	Appropriations	FTE
2008					
Base Appropriation	\$84,182			\$81,401	585
2009					
Base Appropriation	\$89,013			\$82,107	585
2010					
Base Appropriation...1/	\$109,521	\$101,521	\$107,021	\$104,976	788
2011					
Base Appropriation	\$113,433			\$105,386	775
2012					
Base Appropriation	\$109,010			\$105,187	755
2013					
Base Appropriation...2/	\$106,415			\$99,685	729
2014					
Base Appropriation...3/	\$108,467			\$104,976	683
2015					
Base Appropriation	\$107,903			\$106,476	621
2016					
Base Appropriation...4/	\$113,687	\$100,500	\$96,000	\$105,476	615
2017					
Base Appropriation...5/	\$114,169				0
2018					
Base Appropriation	\$88,000				440



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## 7) Will OFCCP Survive?

### The Problems (Con't)

- Staffing levels at OFCCP now lowest since 1960s startup
- Audit levels are at lowest in history
- Back Pay is lowest in decades
  - much smaller than Bush Administration
- Professionalism at lowest point in history
  - Turnover at record high (>25 This issue is not new. This issue has been around for over 30 years)
- Morale is the worst that all “old hand” former OFCCPers can remember
- Training within OFCCP is virtually non-existent
  - None in last 2 years



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## 7) Will OFCCP Survive?

Regardless of transfer or no transfer, OFCCP needs a “turnaround manager” to put the agency on an operational path to success and improved morale and re-dedicate it to excellence



## 8) Hope For ENDA?

- a. President Trump supports gay rights and gay marriage: Thus, no change coming to Obama LGBT EO 13672 (See DE *WIR*: **Feb 6, 2017**) or to OFCCP's Sex Discrimination Rule
  
- i. Can Trump carry wary Democrats and Republicans over the goal line to pass ENDA?
  1. **What happened in 2009 and 2010 as to ENDA?**



## 9) EEO-1 Report: The Ticking Time bomb

OMB (not EEOC) will likely reject the (new) **Compensation Component** of the EEO-1 Report

Both OMB and EEOC have the power to reverse course

- OMB has the issue pending now pursuant to The Paperwork Reduction Act
- NOTE: OMB gets to review the “paperwork” components of all Executive Branch Final Rules a third time (at time of proposal; at time of Final Rule publication and then a third time AFTER the agency has published its Rule in Final form)
- OMB now has all final public comments as to the proposed EEO-1 revision (the “Compensation Component”) and is positioned to confirm, kill or modify the EEOC’s “Proposal”
- Survival chances?



## 9) EEO-1 Report: The Ticking Time bomb (Cont'd)

If the EEOC (not OMB) acts to withdraw/revise the Compensation Component, it will take a long time, though = late Fall 2017

1. Why so long?
  - a) Democrats still sit as 2 of the 5 EEOC Commissioners
    - (Democrat) Jenny Yang's commission expired July 1, 2017
  - b) - two Commission Chair vacancies exist now (no nominees pending)
    - Victoria Lipnic is the lone Republican Commissioner
      - remember her speech at the 2016 NILG Conference?
3. No worries, though: no reporting due until March 31, 2018
  - Keep your powder dry: Do nothing. Wait for it. Patience.
    - a. Practice Tip: *Calculate now your last “Fail-Safe” day: i.e. the last date you must begin to prepare to report compensation, if you had to report it*



## 10) Final Thoughts

- 1) Don't despair. If it were easy, they would call it football!
- 2) You still have compliance duties. (OFCCP has NEVER...in any administration...audited more than 4% of covered Government Kors)
  - The people in this room do the work of Affirmative Action and Non-discrimination...not OFCCP
  - You are the nation's first line of defense and primary protector of what is fair for your company and for its employees & applicants
- 3) I will worry ONLY if I do not see you at the next NILG, next year Believe in yourselves, and make us all proud!







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**THANK YOU !**



# Questions ?

