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NILG
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>> My name is Anita Clemon from Southeast Region. We'd like to share a few housekeeping items before we get started.

The session is being recorded. A copy of the presentation is attached to the webinar and available for download, a transcript is also being made available. And you should have received a link to closed captioning.

If you have a question, please use the chat functionality.

Before I introduce our speakers, I want to take a moment to thank our sponsors. The support that they've shown us these past few months has been amazing and is greatly appreciated. Thank you to the sponsor s you see on the screen for supporting the NILG and the 2020 webinar series.

I'd like to introduce David Cohen. He is president of DCI consulting group incorporated and cofounder institute for workplace equality. He provides consulting services to employers and management law firms on a wide range of human resource risk management strategies, particularly in the areas of EEO affirmative action program development, systemic compensation, statistical analyses, comprehensive HR, self audits, and employee selection and test validation.

Patricia Davidson, or Patti Davidson, has been a part of the Department of Labor since 1987, when she began her federal career as an investigator for the Wage and Hour division. In February of 2020, Patti joined the office of federal contract compliance programs as the deputy director.

Bob is director of the enforcement for office of federal contract compliance. He oversees the OFCCP's statistical and economic analysis program and serves as the agency's expert technical advisor in the development and resolution of systemic discrimination cases.

Please join me in thanking all of our speakers today. And we welcome you.

>> Thank you, Anita. This is Patti Davidson. Thank you to Anita and the NILG for allowing -- for that nice introduction, Anita, and the NILG for hosting us today and allowing us to make the presentation, the slide that you see on the screen in front of you is our disclaimer. Nothing that we say in this presentation today is intended to be -- for any other purposes, other than providing clarity about the existing requirements under law or agency policies.

We have a lot to cover and we hope to get through as much of it as quickly as we can so that we leave time for questions and answers at the end of the hour.

But we're going to, as you can see from the slide, we're going to cover updates, statistics, significant cases, our early resolution [compliance](#) agreements, mediation, conciliation and efficiency directives, we'll talk a little bit about focus reviews, and, at the end, we'll give you a update on enforcement for the rest of this fiscal year 2020 and in to 2021ment

And now I'd like to turn it over to David Cohen.

>> Thanks so much, Patti. And hi, everybody. So great to be with you all. I was saying before the call that this is my 22nd NILG conference in a row. And I have been probably presenting at the conference for about 18 years. And I have to say this is the first time that I've presented in shorts and no shoes so I kind of like this. So Tony, I know you're role in NILG, maybe we can make this a permanent thing of shorts and no shoes, this kind of fun.

Kidding aside, good to be involved, we've put a lot into this update and a lot of interesting stuff going on, and hope to get through as much of the information as possible.

Next slide. So I have been doing this OFCCP update I think at the NILG conference since at least a decade now.

And OFCCP has certainly made it easier to get access to information. And I give a lot of credit in order for me to do this presentation, historically, I would have to go through an entire FOIA request, Freedom of Information Act request, to each region and to get a copy of the conciliation agreements. As you know now, for better or for worse, the agency publishes all conciliation agreements on the website.

And there is a natural lag. So one of the things I will say, is you know, we were making real-time adjustments to this presentation because settlements are coming in. So what we're going to do is, on the slides, I'll give you kind of as of, you know, last week what the settlement tally was but even between last week and today there have been some significant settlements, and those have though the been posted on OFCCP's website. But on OFCCP's website, there are 24 financial agreements and 54 technical violations, so the differentiation between those two, financial settlements, is there a finding of discrimination, a compliance evaluation when he where there are technical he is violations, you know, failure to list your jobs with the state or recordkeeping, those get categorized and technical agreements.

So I use that data source as well as the Department of Labor's public enforcement database. And any of you can get access to that data.

One caveat, when you see my presentation, you're going to say some of the numbers don't match. That's correct. Just using the data that's out there, there are differences between the OFCCP's website and the DOL enforcement data bails. So just having that understanding.

So let's get into the statistics of OFCCP's compliance evaluation if you go to the next slide.

Actually you can go two, Tony. One more.

And so this is a chart that I've been compiling since 2004. So let me quickly explain how to read this chart. So these are OFCCP's fiscal year which ends September 30th, starts October 1st, and if you scroll all the way to the right, that shows the number of compliance evaluations that have closed during the year. Not initiated. Not that are still open but closed. With compliance evaluations this also includes compliance checks. So most of you know that this year the compliance check is back. So that will be included in that number. And so those the total number of reviews that have closed. If you go to the left-hand side, letter of compliance, you will see of those audits that were initiated by the agency and closed, how many of them closed with a letter of compliance. So no finding of discrimination, no technical findings.

Then we have consent decrease which would be case that is have been litigated and an ALJ ruling or a some sort of settlement.

And then we have the financial remedies which are the last column, actually, let me take a step back, the nonfinancial remedies are the technical violations. So you've got compliance, litigation, and some sort of resolution, technical violation, and then the financial remedy.

So let's just go to 2020. And you know, one of the challenges with doing this presentation is that, you know, we're not done with the fiscal year so mid August right now, OFCCP tends to settle a lot of cases and close a lot of cases between now and the end of September. So this is kind of will change, you know, probably in six to eight weeks you're going to see a drastic change to some of these numbers.

But what we see here is OFCCP closed 1,159 reviews. So that is certainly less than what I think the agency was anticipating and certainly a continued kind of decrease over the years, you know, the Bush Administration really was kind of ripping through compliance evaluations doing about 4,000 a year. You can see those numbers.

And what you see, though, is a big decrease from the Bush Administration to the Obama Administration and part of that was the active case enforcement directive. And what you see there is that those cases were taking longer. What we know now is that the OFCCP kind of is moving off of the active case enforcement directive, more towards kind of a case management, moving through an audit when there's a problem, we're going to start to see these numbers go back up again and I think Patti is going to talk about the efficiency in audits, the age cases, and the statistics are really staggering in terms of how long it is taking OFCCP to start the desk audit and close it. The numbers are down significantly. So I don't think these charts represent that and there's a natural lag. I think what we're going to see is OFCCP's numbers are going to go up in terms of the number of reviews the other thing I want to point out is the nonfinancial. So this is interesting. In that 2012, almost 30% of all audits, the OFCCP found some sort of violation, not discrimination by have you lags.

In 2020, that number is a little over 5%.

>> So what we're finding is, just like I think the intent of the agency, is to move through an audit and unless there are gross violations, still the agency is focussing on systemic discrimination, we're going to get into that in a little bit but unless there are gross violations, they're working with the contractor to resolve them, that's part of their

directive, and to move on and close the review. So I think that trend will continue. Certainly if there's a change in administration, we may see a shift but that TBD on that.

So once again, in terms of financial remedies, you'll see here 32, let's go to the next slide, you'll see that it doesn't match here on the next slide. But what I wanted to do was this was as kind of last week, there were 24 conciliation agreements posted on OFCCP's website.

And I know that that's changed. Bob and I were talking in real-time over the last couple of days, that number is now 33 if my numbers are correct. And more importantly, I think OFCCP's settlement are probably closer to \$33 million. Bob is going to talk about a settlement that was yesterday that was significant. But OFCCP is probably going to settle in north of \$30 million this year in terms of total settlement. But my chart here, like I said, this is this is all happening in real-time. 24 cases. Actually like I said, 32 as of today, close to the \$30 million in settlement. But of the 24 I did categorize, I wanted to give a break down of the type of settlement.

And here's the thing, OFCCP, historically, their bread and butter was hiring cases. And that continues to be the case.

But as we see here, compensation, no surprise, continues to be a focus. So we have 17 hiring cases which resulted in \$10 million in backpay and interest. Work comp cases, \$6 million in backpay and interest. And two cases had a comp and hiring component for \$574,000. And there was one case with a failure to provide an accommodation to a disabled veteran, a small case for 1500 dollar.

I looked a little more closely because I wanted to say, okay, what are the cases? Is it mostly section discrimination? Is it race, ethnicity, discrimination? There's overlap. A case could be section and race ethnicity. But out of my 24 cases I have here on the screen, 15 out of the 24 involve a finding or a allegation of discrimination based on sex. Interestingly enough, a couple of the cases were discrimination against men and about 2 cases were discrimination against whites.

So I think what we're going to see at the end of the fiscal year is that the numbers in terms of settlement dollars are going to be very close to last year, maybe fall short but OFCCP is on target for another record and banner year, so let's go to the next slide, how did that compare? Historically? You know, once again, I've been doing this for a long time, and I've been building this database since 2007 in and what's interesting is, you know, over time, OFCCP has shifted really from a majority of the focus on affirmative action to now an emphasis on discrimination, systemic discrimination as it relates to hiring and also compensation.

Now, let me pause for a second and say compensation pay he can did I reviews take the agency a lot longer and are a lot more complicated which is why the agency has built out the burrow of expert services that happens a group of labor economists and statisticians to do those robust statistical models. This stuff is complicated. The agency is committed to it. But what you'll see is because these cases are moving towards bigger more systemic cases, they're covering more employees and the total settlement dollars are growing, as part of this, Bob is going to talk later on, a lot of these settlements include these ERCA agreements, early resolution compliance conciliation agreements that are broader than just an establishment and so the OFCCP is saying, okay, we're finding an issue, if you will, we want you to solve the issue at this location, we want to broaden this to all locations or a division or some other subset and not only

are you going to do back pay and interest but we want you to make changes to your policies, procedures, your practices, what have you.

And I think that's smart. I think the agency is looking to say, let's resolve the issue but let's look to what is driving the issue, get ahead of it and have a contractor fix that.

The one thing I will mention about the chart here and the chart before is you will know the cases are still hiring and compensation. And I've been tracking this since 2007 and although the agency does investigate termination issues and promotion issues, in terms of finding, there are very few systemic findings in the last 13 years that are promotion or termination cases.

Now, stay tuned, right? The agency is looking to kind of change the way it evaluates promotions, change the way it does the promotions analyses. I think one of the things the agency is figuring out is that there are really two types of promotion, competitive promotions, natural progression motions. So my prediction is that the agency, as they launch these promotion focus reviews, they're going to look at glass ceiling issues, they're going to look at promotion practices, and we may start to see that yes, it's hiring, yes, it's compensation, but as part of even these compensation cases, there are promotion issues.

So my advice to folks on the call, start thinking about if you haven't already, evaluating promotion practices because that is the direction the agency is certainly going in.

So the last year, best recorder in terms for OFCCP on record, total settlement dollars. This year, I think they're going to come in close. Remember those numbers are moving. Right now they're at about 25 million, essentially up to 30 million. And we've got over a month to go before the end of the fiscal year.

So one of the things I wanted to do, because my theory was that the cases were changing and in my experience, the cases were getting larger, more complex, and more systemic in nature. Stow not only the case numbers go up in terms of total settlement dollars, what I wanted to look at is the average settlement per case. So if we can go to the next slide.

So this is fascinating. Look at this chart. So in 2007, the average conciliation agreement between a contractor and OFCCP for a finding of discrimination was \$200,000. The average settlement in 2019 was the 900,000

And if you look at the chart in 2020 we don't have the final numbers, but looking at the settlement, I think the average is going to be pretty darn close.

So what does that tell you? What that tells you are the settlement dollars going up, but the cases are becoming more systemic in nature. Meaning they're looking at broader policies and procedures as it relates to hiring or compensation and, right, in 2019, if you settled with OFCCP, for a conciliation agreement, on average, it was \$900,000, versus in 2007 or even in 2015, \$200,000.

So a lot more, it is showing the agency is going towards more systemic cases and I think we will continue to see that.

Next slide.

And Bob and Patti, by all means chime in at any point.

So the other thing I wanted to look at, of the nondiscrimination findings, right, as of this week there were 54 conciliation agreements posted on OFCCP's website, and so I wanted to see, okay, what were the types of violations? So remember, we talk about

technical violations, the answering, compliance evaluation, and they're saying, we don't think you engaged in systemic discrimination but you do have some deficiencies in your program.

So actually if you go to the next chart, what I did was just kind of tally up the violations. Now, you'll note these exceed the 54 because a lot of these agreements had multiple violations. But if you look at the top three and I will tell you, this hasn't changed. I have been tracking this since 2007, like I said, and the top three violations continue to be failure to engage in outreach and recruitment, so good faith efforts, and whether that be for individuals with disabilities, protected veterans, or minorities and females, recordkeeping, 23, and then a failure to list jobs with the state employment office, remember that requirement falls under BEVRA. So if you're looking to see the top three violations there you go.

And then the next one town is not really having a complaint and then a failure to conduct a verse impact analyses. So that gives you a summary of the nonfinancial violations.

Okay. Next slide. Moving on to the administrative complaint. So let me talk about this for a second and kind of set this slide up, right? So if you're not familiar with OFCCP's enforcement process, so you get a schedule for a [compliance](#) evaluation, you have that evaluation and hopefully, right, at the end of the evaluation, hopefully within a couple of months, I know certainly that's the goal of director Leen is to kind of move through these audits if there are no problems, but at the end of the review, OFCCP can close the case or if they think there's some sort of violation, they can issue a notice of violation and conciliation agreement.

If it involves alleged discrimination, there's a step in between called a predetermination notice. But either if you end up with a notice of violation, OFCCP will propose a conciliation agreement. And at that point you go in to conciliation.

And at some point, right, a contractor can either decide to conciliate and settle the matter. If not, and the case conciliation stalls, the agency could issue what's called a show cause notice to say, hey, tell us within 30 days why we shouldn't take this case hand it over to our lawyers and our lawyers could potentially file a complaint against you.

And at that point it becomes what is called administrative complaints and you've got litigation and you're involved in litigation.

And I've bucketed these administration and complaints in to two buckets. One, the allegation in the case involves discrimination or two, it is what we call a denial access kind of a case.

So I don't think I'm a contractor. I'm not going to turn over my plan because I'm not a contractor. OFCCP says you are a contractor. Well, a judge is going to decide that. Or I'm involved in a matter and OFCCP wants lots of records and I say, we're not willing to turn over those records. The agency may file a denial of access case.

So two types of cases. So look at 2015, 11 cases filed, 9, 11, and starting in 2018, 1; 2019, 2; and 2020, 0. So far in fiscal year 2020, no administrative complaints have been filed by the agency. I think part of that is, look, litigation is really not good for anybody. It is not good for OFCCP. It is not good for contractors. It takes a long time. Litigation is a very drawn out process.

So one of the goals, and like I said, Bob is going to talk about it, and certainly one of the goals of director Leen, is to go to contractors and say let's get in to FRCA, early resolution. We'll give in a little, you give in a little, but let's come up with a resolution that's in the best interests of all of us. So I think that happened of that could be one of the reasons why we see a significant decrease and so far this year zero administrative complaints. So we saw a lot at the end of the Obama administration, some of this litigation was called the midnight litigation right before the change of administration, litigation was filed but now we've seen that kind of a cool down on litigation.

Next slide. And I'm going to turn it over to Bob to talk about some significant conciliation agreements.

>> Yes. Thank you.

>> Oh, and sorry, this is Kevin. I just wanted to interject. Maybe before we segue, there were some questions that came in for David's portion. So do you want to wait until the end or --

>> Let's hold them. I may cover some of that.

>> Let's hold them.

>> Okay. All right.

>> Yeah. So thank you. Thank you for all of the connecting today. I think I address the court and this is my last time for this year, anyway. So some of the things are certainly proven by the early resolution. Those tend to be larger cases. They also involve multi establishments. So we're going to result in having large settlements and then if we're looking at the average persona, that's going to tend to be high because in many cases, like the first one shown here, if you can advance the slide, those involve establishments.

On Monday, the agency signed a global conciliation agreement with Wells Fargo for \$7.8 million to hiring discrimination findings, involving 3,400 class members and Wells Fargo has to extend 580 job offers that involved evaluations in the (Speaking away from microphone) some cases there were, but that's the approach, the flexibility we have with that is trying to resolve any issues and a variety of issues across multiple establishments.

This particular agreements involves 42FAPs that will be monitored nationwide. And in addition, this is an edit, I think, from the PowerPoint that was distributed, will also be monitoring of the employees. So it may come close to 112,000 employees in the end. So, you know, we're thankful that Wells Fargo will be monitoring and implementing those hiring practices.

Early in the year, I think it is technically September 30th, October 1st, we signed an agreement with Kris crow so the theme of this slide is we have big settlements, we are have small settlements, we have a variety of industries. We have good by ins and collaboration with the financial industry and the IT industry and we're looking to expand this to other industries, for example, or other industries.

So there's the Cisco agreement we signed that was compensation, the one that the real benefit to that was the minimum allocation of a half a million a year towards pay adjustments and more if need be. Just to remind people that we also review public utilities, and so we signed NRCA with northern Indian -- Indiana public service corporation.

And then more recently with Shamrock booth. So you can see there's a variety of industries that this has worked for.

I'll speak more about the pros and cons of the ERCA program. But we've been kind, what we've been able to dissolve and it has led to record breaking financial recoveries and I do think that we will, we'll definitely be north of 30 million this year probably pretty close to 35 million based on some of the things that are being negotiated right now. So next slide. At one point I would make, for example, on this Kris yo -- ERCA, you know, and look, that's one of the pros of the ERCA, right, and we'll talk about it later on, but the Cisco had compliance evaluations that were pending in process and as part of the ERCA agreement, all of those were closed. So to that -- that is a big pro to ERCA, this was a compliance evaluation at a location. But as part of the agreement, above and beyond what Bob mentioned, pending audits, current audits, you know, everything kind of got wrapped up in to one ERCA agreement and we'll talk later on but with an ERCA agreement, no new audits for five years and like I said, we'll talk about that more. But I mean, what you see here is once again, you know, a mix of cases and hiring cases, but these are substantial cases in terms of dollar amounts. For both hiring and compensation.

Next slide.

So the next kind of case we'll talk about, and I believe this was covered in another presentation. But if it didn't catch the presentation, I think Mickey covered this, it really is a fascinating conciliation agreement. And really, you know, when I first started doing it work, we really, you never saw OFCCP pursue or very rarely pursue a case where whites and/or males were victims of discrimination. And to OFCCP's credit, right, they're saying look, we're an agency. As part of our charter, we ensure nondiscrimination against any protected group. And remember, whites and males are a federally protected group.

So in the emphasis agreement and review, OFCCP alleged that emphasis discriminated against white applicants in favor of Asian applicants particularly Asian Indians for a computer systems analyst position. So we've seen these types of cases before, you know, OFCCP found that only 9% of the hires were white and 89% were Asian and Asian Indians were over 90% of the Asian hires. And emphasis \$171,000 as part of this agreement. So nothing stood it out as part of that agreement. We've seen these types of agreements before.

But if you'd go to the next slide, what was fascinating about this agreement, and full disclosure, we've had lots of conversations with the agency about this and the workplace equality and NILG have put in letters to the ache asking for clarification on this con sill congratulation agreement. And why? One of the things in the conciliation agreement. And let me take a step back. Certainly in the agency does an investigation and finds discrimination against whites, part of the remedies will be ensuring that the company is not kiss discriminating against whites.

But what was fascinating about this agreement is OFCCP, as part of the agreement, cited emphasis for not establishing affirmative action goals for whites and or men on the front end. That is very different. And remember, the affirmative action regulation do not cover whites and men, the nondiscrimination part of the regulation certainly covers whites and men but the intent of the executive order and standard practice and what's in the regulation we do not set up goals for whites and men.

And I've had lots of calls with clients who have said, wait a second, I read this agreement, is this saying that I should be doing a utilization analysis proactively for whites and men? My answer is no. Because remember, affirmative action is about targeted outreach or improvement to underrepresented groups. And if we're now saying that we're going to have affirmative action for all groups, well, really, then what's the approximate you were of affirmative action? So my advice is I think this was an error by the agency and I do not think it is the intent of the agency that contractors are proactively setting goals for whites and men.

And once again, in the event of a finding of discrimination, that could certainly be a part of the remedy and that makes good sense. I just wanted to, next slide, give some context behind it to kind of backup what I'm talking about is the regulations, right, talk about setting goals for minorities and women.

Now, there is a cause clause, it is interesting, if we remember, the proposed scheduling letter talked about potentially requiring contractors to set goals for men and women of a particular minority group. But the regulations once again, it cause in the event of a substantial disparity, that may be a I remember the OFCCP ultimately dropped that from the scheduling order and I think that makes sense, because it just gets confusing, but as a side note to this, folks, I think one thing to note is intersectionality discrimination is something that I know employers are starting to think about and starting to test that is not necessarily what is required under the regulations but intersectionality discrimination is something I think we may see the agency go to and certainly employers may want to explore under a DNI context. But as far as the regulation, certainly I don't think that that is required. And next slide, the regulations and once again, the federal compliance manual defines what a minority is and what you'll notice there is whites are not included as part of a minority group.

Now, certainly, situation specific, if you handed me a data set of an employer and said could whites be a minority of course they could be a date is set of. But the intent was not to include them for a proactive plan and proactively.

So the take away out of all of this, and I know there's been a ton of talk about it, I know NILG had concerns about it, is I think this is a one off, it should be only used in the event of a remedy when there's a finding of discrimination and employers should not be setting goals and analyses for whites and men.

Bob, Patti any thoughts is this

>> This is Bob. I'll just add that the agency's answer to the question posed by David's client is the same that we're not, with the conciliation agreement, trying to redefine affirmative action. However, if you had a similar fact pattern as we think you should start addressing, changing outreach and the like. And so, you know, the remedy, the nondiscrimination component is very important.

So if we pivot away from the affirmative action to nondiscrimination and David did mention the conciliation agreements for whites, white men. We actually had an enforcement ruling related to that and so I think the regulations are rather in that nondiscrimination. That has led to the permanency of our agency and the mission. The universality that's built into the component provides buy-in to multiple groups, the same way that FDR social security system or social security act was universal and it has been, you know, embraced by all members of society and people who propose public higher education also make the same argument for universality. So it is important and

director Lein realize it is important that we protect neutrality for all groups and so that is not necessarily redefining affirmative action.

>> Thanks, Bob. And that's a great tie-in into the most, one of the most recent ALG borders on the solutions. Do you want to talk about that?

>> Well, we both can. Again, that's it shall

>> Yeah.

>> That's dealt with the favorite phased retiring and go to the next slide where we are talking about WRMS, right? Yeah. So a group of Hispanic men were in shortfalls across multiple groups and then furthermore, discrimination in access to hours and pay for female workers and then also some race issues with compensation as well. And then unfortunately the Hispanics that were hired were intimidating and a coercive workforce so there was a injunction against that. And David, I'll let you speak to the last point there because that was an interesting part of the order.

>> Yeah. And I hit to criticize an ALG but I think that ALG got this wrong and one point about this, AZ, that means an administrative law judge, so this is not federal court, this is a labor department judge, and these are just recommended orders. So that this is not set agency policy. It really is just for a matter as it relates to this case.

But I think one of the interesting things about the ruling, how the judge interpreted this, and let me take a step back. One of the allegations by OFCCP is that they didn't is the prop rot rat record to conduct a meaningful analysis on applicants because they had to use census and other data to do an a evaluation. One of the things is they said they did not keep records in reference to evaluation.

I'm going to read to you what the judge ruled, that is fascinating, his interpretation. So this is a judge that says the regulations imposes an obligation on a covered contractor to preserve personnel employment records that are many or defendant quote-unquote. The regulations do not impose an affirmative action on covered contractors to create personnel and employment records.

So he basically concluded is well, yeah, they didn't keep records on all applicants and job seekers and race and section on all job seekers, but they didn't create a record of those individuals. So if they didn't create the record, there's no obligation under the regulation to then create the record. I think that's wrong. I think if you look at the regulations it is pretty clear that there is a recordkeeping obligation not only to keep it if it exists but to, for example, track all job seekers. I mean, the internet applications, the regulations, specifically talk about the record that must be maintained.

So I wouldn't hang my hat on that ruling to say, you know what, make it clear, I only have to keep the records that are created, I'm just not going to create any record. First of all I don't think that's going to work well for you. And I just think that's one ALG ruling. One other filing that about the compensation, once again, this is just an ALJ ruling, what the judge said, so OFCCP performed and OFCCP's expert performed a regression analysis.

And WMS said wait a minute, we don't think your regression analysis, first of all, is robust in enough, meaning it is not accounting for enough variance in pay and you're missing certain factors so they were criticizing the regression model. And what judge said, that is not enough. You must put forward your regression analysis to that that would cure the alleged flaws of OFCCP analysis. So again, this is only one ALJ ruling but this ALJ said you can't just criticize OFCCP's analysis, you are can't just say, well,

they're there are missing factors. The judge is saying I want to see what your factors are and your regression model to show that the statistical significance is no longer significant. So that was this judge's interpretation of Title 7 requirements. And I found that interesting.

>> Yep. Thank you, Dave. It is the reason I ask you to speak to some of that is because this case is still under exception. So we can't much about it until it has been finalized but there have been two other orders recently from ALJ that are noteworthy in their pat pattern. They didn't make the slide here but in JPMC we received an order that has led to an expansion of scope and discovery and the same with atonement abatement after about a 6-year waiting period. So both of those reenforced our ability to expand the temporal scope of our cases and I think that's noteworthy. As David said, sometimes these are just one ruling but when you see a pattern like that happening, then it is you take notice.

>> And I don't like that pattern, Bob. I just want to say that for the record.

All right. Bob, why don't you talk to us about ERCAs?

>> ERCA's great. So I gave you a little bit of preview. We assigned 21, go to the next slide, we assigned 21 ERCAs since the inception of the program back in 2018 so it has been a two-year check-in point. We secured pretty close to \$40 million in back pay. And as I mentioned in one incident there are salary adjustments so that's actually the case in a few others as well.

So a minimum of five salaries over the next five years.

We, you know, hope there will be more if needed and we'll be looking for that in the monitoring and the reporting that will cover north of 400,000 employees. And I expect this tally of ERCAs to approach 30 by the end of, I'm hopeful that it will approach 30 by the end of this year. And at that point we may have 6 or 700,000 employees under monitoring and reporting. So that that's good. It allows us to take certain contractors off the scheduling list and for us to, you know, vote this focus on others who might be ignoring obligations or violate them.

So we think it is a plus in terms of our scheduling, in terms of our operations, benefit companies as well because they're getting their exemption period as well as expanding the coverage to all employees that need to be examined. And it may help them examine ex wilt in others areas. I did put together a list. This is the most recent list I have. The next page is the hiring. Sore. First is a compensation. So you can get a feel for where the compensation discriminations are falling there is another public utility. And ID and finance individuals and one university has recently been add this had year to the compensation grid here for the ERCAs.

And then next slide is the hiring, you know, as David said, it is still the majority but only slightly so, you know, we've been using these ERCAs to address hiring, sometimes both, and then steering which there's some issue whether to that is a compensation issue or a election issue, I have that here as hiring, but it could go under comp as well, I guess.

So there you have it. Those are the 21s. And we're hoping to find more. I think this is a positive program. We've been able to address some age cases to. David's point earlier, about every establishment is at the same stage and as so some of them, for example, with recently that opened and others that dated back to 2010 but the ERCA

allows to us resolve all of those together, close them out, and close any pending reviews that are on the scheduling list.

So it has been very helpful in wrapping up, you know, a series of establishment that are open and admittedly some of them have been lingering so it has been very useful in reducing our age caseload. So Dave you had do you want to talk more about the pros and cons in ERCA in the next slide?

>> So from my perspective, and I've worked on quite a few of these ERCA agreements and worked closely with Bob on these agreements so I'm very familiar with the program and how it works. And certainly I've counseled some mooch I clients to do an ERCA and sometimes it is just, it makes really good sense, right. I mean one of the things that is problematic about OFCCP compliance evaluation is it starts with the selection system and I think the agency will be the first to tell you, that you know, it is a challenge to figure out a list and to try and target contractors that are most likely out of compliance. So what we've seen throughout the years, prime contractors, not subcontractors, prime, they get picked for an audit and they get a letter of compliance and then they get audited over and over and over again. 20, 30 a year just to find they're in compliance. And I think the agency is the first to say yeah, that's just not efficient. So ECA allows the agency to say, a contractor, a subset of that, let's say a did I vision and we're going to wrap you in this program and not launch reviews over and over again for the next five years. So there's certainly a pro to that and once again, with the ERCA agreements, it is a early resolution, so the idea is you enter into it sooner rather than later, it allows the agency a lot more flexibility in terms of how they're going to position the audit. It certainly helps in terms of the press release. Because the agency probably has more protection built on that prerelease.

And the big pro is that no new audits for five years but, don't forget, everybody, at the end of the five year period, because you're going to be recording, so technically you're still under review, you get two years on the back end the moratorium once that five-year period is up.

So really from the signing of the audit until you will not have a new establishment review of those covered under the ERCA for seven years. And that's a nice thing in terms of managing your resources, audits are a huge drain on contractors. So that's certainly the up side. It allows you to look more broadly and it allows your internal resources to say, okay, what is the allegation that OFCCP is making, let's try to address that, fix that, we'll work with the agency so that they will review that and then in theory, that shouldn't be an issue going forward.

Sounds great. Here's my concern, right? We're in an election year and technically you're under audit because you're going to be recording during the five-year period. So you know, under the current administration and director lien, but if there's a new administration that comes in and says you know what, I don't like these ERCA programs and I want to go back in and there's really nothing in a lot of these agreements that prevent OFCCP from coming back in again and launching a full investigation. So that's a concern, certainly we have not seen that. I think certainly, you know, Craig lien stays at OFCCP, for the next four years, that won't happen. But we're in an election year and anything can happen.

So I think you need to be aware of that, think about what you're going to be reporting, thinks about what is going to allow OFCCP to come back in.

>> David, this is Bob.

>> That's my thoughts.

>> Can I respond to that?

>> Of course.

>> In the negotiation of some of these, you know, if there was a change, you know, in the directorship or administration, you know, I would try to prevail that there are better uses of the agency's resources than going in and reexamining some of these ERCAs. I mean, we're already getting something, we're getting some reporting. We think that we're confident, so I've always said we need to be confident with the model that is agreed to and the approach and the scope and the scale that is agreed to and once we have that confidence, it leads to permanency so we could make the argument and try to prevail and there are better ways of using the agency resources in the future, looking at the whole universe of contractors that haven't been examined in the last ten years, for example, and so I think that will provide some confidence, it has, because we've, you know, we've signed quite a few of these and continue to negotiate them. So hopefully that will be the case.

One other thing I'd like to say is we do have a prereps, I have a preference, any way, for the coverage to be as broad as possible because what difficulties we would have as a contractor that we would have to monitor is when negotiate a subset, we have to keep track of what establishments are exempt and which aren't and to keep the exempt establishments off the list and keep the others in the mix. So it is just easier if we can exempt the whole parent company. So that is something to keep in mind when negotiating with the agency that we prefer a larger scope to a smaller scope. That's all.

>> All right. Patti, I think you're up.

>> Thank you. I would like to talk a little bit about conciliation and mediation. I don't have a conciliation slide so I'm just going to talk it before we move to the mediation slide.

Conciliation has long been a means of dissolving discrepancies between OFCCP and contractors during enforcement progress. And we've had significant success resolving findings through that conciliation progress. We've talked about that all the way through this presentation and then moving through in to enforcement. But the agency still remains focussed on determining how we can make this process better. And we've done that through issuing a few directives.

In November of 2018 we issued the resolutions procedure directive which has a acronym like to say which is RR ERRP, issue and compliance directive in April of 2020. And it recognizes the procedural duty to negotiate with contractors prior to enforcement which me to mediation and prereferral mediation.

Tony, if you can go to the next slide please. So mediation has long been effective mention anymore for the agency and contractors seeking to resolve large and age cases. And given our success in OFCCP recently with mediation, we chose to identify ways that dispute resolution pros processes could be more actively utilized. And that led to the release of the prereferral directive in April of this year. This directive serves to establish parameters for how mediation will be arranged at OFCCP moving forward, including appropriate instances for use of mediation who will mediate the cases and

what the coordination of mediation logistics typically will look like. All of this is available on our website.

Basically the directive announces mediation as a last attempt as on take timely remedies and avoiding the delay and ex tunc of litigation. And as David and Bob have talked about in the previous hour, it has really assisted the agency to move through its age case backlog and reach resolution on a number of very large and significant cases. We found that it is most useful after attempts to conciliate following the issuance of a show cause notice, violations of discrimination but prior to referral for enforcement. OFCCP reserves the right to moderate -- I mean mediate at any stage and may indeed offer mediation to contractors at other stages during the review.

I think I'm kicking it back over to Bob now.

>> So the one thing I would say about mediation, and Patti and Bob and I were in one just a couple of weeks ago, and I thought it was effective. And I will tell you, we didn't think we would be able to resolve the issue premediation. And correct me if I'm wrong, Patti, but the mediation program at least according to OFCCP, has been very successful and every single one, am I correct, mediations have been resolved solved?

>> I think -- if we're not at 100%, we're at 99.

>> I think it's 100%. It would be hard to achieve 99, it has been less than a dozen. But I think you're right, 100% of resolution, I won't say success because neither side would describe it as a success or a failure. It is just a resolution. Like? An effective resolution means you're somewhat happy, you're somewhat disappointed but in the end you feel content that it was resolved.

And even the electronic or remote remediations have been far more efficient, useful and seamless than I expected. David is right, we had one last week, we have one next week, so we're continuing with that mediation directive.

The other directive that came out recently was efficiency of our audits. That's just a way for us to insure that the efficiency has been achieved under director lien are maintained. We don't want to go through all of this effort and work of improving on our age case lows through ERCA and others and then have it backslide. So can you go to the next slide for me?.

So that's been wonderful in terms of reducing our times of processing. And also we can greatly improved our desk audit to 35 and again it may be 32 days more recently.

So together steps that they will take to notify the front office when cases become delayed and an opportunity for contractors after a certain waiting periods to at least inquire about why that case is aged and we also have a ombuds office now that being you can contact to get a description or feedback on why a case has become aged. But we're going to do our best to keep those aged cases low and keep things moving.

Either free referral mediation or in referral to mitigation.

So that is all for me.

>> The one comment I'll make on this is this is a welcome change. I think one of the biggest complaints by contractors under the prior administration is that every audit under the application enforcement directive was treated as a flow blown audit so you'd send in the desk audit materials and then, you know, you'd get a 21-page request for information that would take, you know, 500 hours to satisfy regardless, you know, of what the agency found during a desk audit. That doesn't make sense for OFCCP, it doesn't make sense for contractors. So I think under the new directive, really is forcing

the agency to focus. And be much more efficient with their time and our time, and we're seeing that in the stats with desk audits closing more quickly when there are no issues. So I really think that's a welcome change for contractors.

>> That's actually a good segue for me, unless Bob want to say anything else about our good stats?

>> No. Conciliation is also a part of that and so the agency offered a webinar last week about how we're trying to streamline conciliation and mediation and the ombuds work so it all ties together in terms of keeping the cases moving and flowing through. So go ahead, Patti.

>> I was going to see way in to focussed reviews. You can go to the next slide, Tony. Thanks.

So generally speaking, in August of 2008, OFCCP has issued its focused review directives to ensure a portion includes under each of the three authorities that we enforce. They are one of the investigatory procedures that OFCCP uses to evaluate equal employment offers. Focused reviews are authorized in the regulations of each the three laws that we enforce.

The focused reviews are conducted at the headquarters facility and include a mandatory on-site review but because of COVID-19 and the restrictions of the pandemic, OFCCP is conducting virtual on-site reviews for these folks used reviews with the possibility of physical on-site reviews in the future. Although none of us know when that will be. So far we've had great success utilizing virtual onsite focused reviews and there's some best practices that have come out of this that we maintain as an organization moving forward. OFCCP has developed an extensive guidance package that's available on our website and I encourage all of you to visit.

And take a look at that.

In section 503 focused reviews, as the name would indicate, we focus on the policies and practices of a contractor related to section 503 compliance. We take a closer look at the contractor's AAP that they've developed and implemented to advance employment, individuals with disabilities, including outreach and recruitment efforts, applicant and hiring data analysis, and utilization goal analysis.

OFCCP ensures that the contractor is not discriminating with individuals with disabilities and complying with reasonable accommodation being applications.

Section 503 focused reviews are an essential part of OFCCP's commitment to disability inclusion in the workplace.

Under BEVRA, OFCCP started scheduling focused reviews in July of this year. And in a BEVRA focused review the compliance officer reviews policies and practices of the contractor he related solely to the compliance. OFCCP takes a closer look at the AAP that a contractor developed and implemented regarding employee and advancing within the workplace veterans, including outreach and recruitment efforts, applicant and hiring data analysis and annual benchmark establish

>> OFCCP ensures the contractor is complying with reasonable accommodation for disabled veterans and not discriminating against applicants or employees based on their status as protected veterans.

Next slide, please. Some of our upcoming focused reviews will focus on accommodations and promotions.

Under accommodations, we'll kick off promotions focussed -- I'm sorry, we'll kick off accommodations reviews, looking both at religious accommodations and disability accommodations.

As David talked about earlier, regarding our promotions accommodations, OFCCP is still reviewing definitions under this program we're working to define promotions. I'm sure people will have questions about that. We're working closely with our policy division to come up with those standards and as always OFCCP will be transparent and provide information on our website and provide guidance and compliance assistance and be as transparent as possible.

Go to the next slide.

So a little bit about our enforcement priorities moving forward, can we go to the next slide. So in terms of the remainder of this year, fiscal year 2020 and moving into 2021, under hiring and compensation, OFCCP will continue protecting all addresses equally and, as we talked about a little bit earlier, including white males, protecting small groups, for example, Native Americans and multirace groups.

We will be looking at intersectional discrimination, that's something that David talked about a little bit earlier in the presentation. And this has already been cited in some of our recent notice of violations.

For compensation enforcement, OFCCP will prioritize matters where there's statistical and nonstatistical evidence of discrimination. OFCCP continuously provides certainty for guidance in the form of our frequently asked questions on our website and in the past few months we've posted several FAQs on a variety of topics new including compensation guidance. Bob talked a lot about conciliation, we talked a little bit about the early resolution procedures establishing a program that gives the client service officers an efficient way to have evaluations early in the life of a compliance evaluation, by passing the predetermination notice and the notice of violations, and going straight to a conciliation agreement. With the commitment or a negotiated, ERRP, not my favorite acronym, earned the contractor a five-year scheduling exemption.

Through the early resolution program OFCCP aims to encourage and facilitate broad-based compliance before seeking enforcement through the legal system. Overall this can increase OFCCP's positive impact on American workers while maintaining and possibly even reducing the burden on contractors.

I'm going to finish up with terms and conditions of work. I just looked at the clock.

In like the of the COVID-19 pandemic, we will consider in our compliance evaluation contractors safety precautions and whether they have a disparate impact on any of the protected basis. They now prioritize accommodation requests based upon disability and religion. OFCCP reviews the contractors disability and religious accommodations policies all denied requests for accommodations and whether or not weather a lack of centralized accommodations systems cause as disparate impact.

Contractors should ensure that parental and family leave policies and related benefits are neutrally applied and sufficiently available to avoid a disparate impact.

OFCCP has a self identification form which is available on o our website for individuals with disabilities in May of this year and it became effective in August. During the revision and authorization process, OFCCP considered the feedback it received from the contractor community. OFCCP hopes that the revised form will better help contractors in developing programs to increase the utilization of people with disabilities

and thereby meeting their annual 7% aspirational goal. When a contractor finds its applicants and employees are declining the use of a self-identification form, OFCCP recommends as a best practice that they evaluate how welcoming is the environment to make it conducive to applicants and employees to reveal sensitive information. So I wanted to leave enough time for questions and answers.

>> I know I've been monitoring the chat. I know there are a lot of questions. And Anthony, I don't know if you want to facilitate that for us or how you want to do that?

>> Thank you, Patti.

>> We do have quite a few questions and I don't know that we'll have enough time to go through all of them. But we do hope that we'll be able to get them to you so that within share the answers. With the audience.

I'd like to go back to the technical violations slide. One of the questions is what is a noncompliant AAP and on the same slide there was a question related to how is the failure to file this 4212 a violation.

>> So I'll start with it. I think when OFCCP, you know, sends out the scheduling letter, there is the item-eyed listing and it has the job analysis, workgroup analysis, utilization goals and so on and so forth.

So let's just say didn't do proper utilization analysis or you didn't do your BVRA hiring benchmark or your disability goals. I think the agency would say you submitted your plan but it is not technically compliant so therefore you have sufficient sees for compliance assistance to ensure that your plan is compliant.

As it relates to 4212, my understanding is the agency has the right to cite the non -- you know, not filing the bench 4212 report.

Bob, Patti, any thoughts?

>> Yeah. That, Bob, that was -- that is my understanding as well. (Speaking away from microphone) but it is kind of interesting that that collects the AAP data. It's in a different format with the EEOS job groups and so it is a little different in terms of the detail we would refer to receive.

>> Thank you.

>> With rash to the emphasis case, was there adverse impact with statistical significance in hiring? Or was it based on gross disparity? Of hiring?

>> So there was, I am not exactly sure how they answered that. I don't like to use the term disparate impact because it has a particular legal so there was certainly statistical significance but if you just look at the fact pattern there, we would have relied on statistical tests rather than just some kind of an impact rule. And then what was the second part of the question?

>> The question was there statistical significance or adverse impact? Or was it based on gross disparity of hiring the conciliation agreement wasn't clear on that fact.

>> I'm not sure what is meant by gross disparity but it was large standard deviation, I'll just say that much.

>> Okay.

>> Yeah. And Bob, just correct me, you know, you and I have had this conversation, right, that everyone should stop calling them adverse impact analyses because that is a legal term of a type of discrimination so there were the disparity analyses and Bob, I believe correct me if I'm wrong, it was not an impact case, it was a disparate treatment pattern or practice case, two different things.

>> Yeah. I believe that's right.

>> Thank you.

>> Two more questions on the emphasis case. What could be part of the remedy for whites or men?

>> So the remedy stipulated also in the CA is that the you hope engage in outreach and recordkeeping and improve their applicant flow so that it looks similar to the availability.

>> Thank you. How did OFCCP identify Asian Indians as a separate and not have been collected in self ID, self identification process?

>> I don't know specifically in this case but in others we are able to discern that from Visa data. We have data on Visas and country of origin so sometimes it is in the item 19 data that we receive.

>> Thank you. Bob. I think you and he this. But are the ERCA settlements included in the OFCCP overall settlements?

>> Yes. But my physician for that are over time so those are from 2018. Is he that is why the figures are different.

>> Okay. And do ERCAs require annual reporting for five years?

>> No most cases yes and sometimes biannual. So for hiring violations, you know a lot of times you'll have a lot of activity in a six-month period and so we'll typically have a six-month reporting period. The compensation, that usually changes annually. So we usually accept just annual reporting on compensation.

>> Thank you. Focus review, there are some other questions that I'm going to pick two more because we're at time, but regarding focus reviews, as contractors continue to sign ERCAs, exempting many establishments, what other areas will the agency focus its efforts, on what other areas?

>> That may be related to my resource commentary, you know, there are a lot of unscheduled contractors out there for us to focus our efforts on, as well as outreach and compliance assistance. And then as we mentioned, we will be looking and promotions more closely. So those are the areas that are forthcoming.

And then another, you know, enforcement update is that with warrant to start looking for inter sectional discrimination and then including smaller groups and shortfalls where we can. Because we do anticipate a further expansion of the percentage of people identifying as multirace, two race, and the like.

>> Thank you. I'm sorry?

>> That's fine. Plenty of areas for us to investigate or to you know, focus our attention that may have been overlooked in the past.

>> Thank you. Final question, will OF -- will the OFCCP definition of promotion for focus group use glow to the goal attainment or IRAs?

>> I --

>> So let me just comment on that. So the -- just quickly, the goal attainment report, and not to go in to detail, but the goal attainment report covers promotions but it is only promotions to a job group, where the analytics that are done are promotion from and within a job group. So those are different types of analyses but they both look at promotion. I think that the agency will put out guidance on first separating competitive from noncompetitive promotions because those are two different things and then from there best practices to analyze those two different practices.

>> Thank you. Thank you, David, Patti and Bob, and I thank all of the folks who were in attendance today. I'd like to thank the sponsors again. And just as a reminder, you can receive SHRM and HRCI credits for these webinars. Also, we look forward to seeing you hopefully in Nashville next year in 2020, August 1st through the 4th. Take care. And stay safe.