

ROUGH EDITED COPY

NILG
WEBINAR
AUGUST 13, 2020

TRANSCRIPT PROVIDED BY:
ACCESS INTERPRETING, INC.
www.ainterpreting.com

* * * * *

This is being provided in a rough-draft format. Communication Access Realtime Translation (CART) is provided in order to facilitate communication accessibility and may not be a totally verbatim record of the proceedings

* * * * *

>> Hello and welcome to the NILG2020 webinar series. My name is Anita Clemon and I represent the southeast region on the NILG board. We have a few items we'd like to share before getting started. The session is being recorded. A copy of the presentation is attached to the webinar and available for download and a transcript will also be made available.

You should have received a link to closed captioning, and if you have questions, please use the chat functionality. Before I introduce our speakers, we'd like to take a moment to thank our sponsors. The support they've shown us these past few months has been amazing, and we greatly appreciate it. Thank you to the sponsors we see on the screen for supporting the NILG and the 2020 webinar series.

Now I'd like to introduce our speakers. Justin Gayle is the HR compliance senior manager at Booz Allen Hamilton, currently leading HR operations and employment compliance programs. She serves adds the Booz Allen affirmative action and EEO manager where she is responsible for the firm's FAP program, reporting and adherence to employment compliance regulations.

Guy Brenner is a partner in the labor and law department in Washington, D.C. labor and labor practice. He is head of the government contractor compliance group. He has extensive experience representing employers in both single plaintiff and class action matters, as well as in arbitration proceedings. He also regularly assists federal permit contractors with the many special environment related compliance challenges they face.

Rick Holt is a partner in the Washington, D.C. office of Resolution Economics. Dr. Hot is a labor economist that has been involved in projects for almost 20 years, covering all aspects of employment discrimination cases, including compensation, hiring, promotion, and termination.

Dr. Holt has worked with several Fortune 500 companies on projects involving OFCCP investigations, FLSA wage and hour cases, and economic damages, single plaintiff, multiplaintiff, and class action. Please join me in welcoming our speakers for today.

>> Well, thank you so much, Anita, and this is Guy Brenner. I'm very pleased to be with you all today.

Because I'm the lawyer on the panel I'll just note the disclaimer which basically says that you know, which are not providing any legal advice that you should consider as part of your -- as part of your daily operations. We have an attorney client relationship. We're here to provide you with our views for your general bobbing ground and understanding and then we encourage you to seek legal counsel to the extent you feel necessary. But hopefully you'll find this presentation formative and if we could go back, to stem one, the purpose of today's presentation is to essentially help everyone understand what to do when you are on the, so I'll turn it over to my panelists to set the table and then we'll get in to what you all need to know.

>> Great. Thank you guys. Okay. Go ahead, Rick.

>> Okay. So I'll start off us by before we start what you should do when you get a CSAL, let's talk a little bit about what CSAL is and what the status of C sells are right now.

So the definition on the OFCCP website is pretty clear so I'm going to pair rise, the C cells corporate scheduling announcements lists, several of them, so we call them lists, are courtesy notifications to an establishment selected to undergo a compliance review, CNCW, FAP review, section 508, 503 focus ready he view, AVERA focussed review or compliance check.

The purpose is twofold. First, to provide the contractor establishment internal staff at least 45 days advanced notice to prepare for the compliance review and encourage contractors to take advantage of the OFCCP's compliance offerings. So that's what the CSAL is.

So what is the current state of the world with respect to this? Just a little bit of history first. Over a year ago, in March 2, 2019, a large list was released containing 4,000 audits. Those audits fell in to several categories, section 503, CMC, compliance, of course the main establishment category, and FAPs. So that was a major list that to my knowledge the OFCCP is still working its way through more than a year later.

That list was supplemented in November 2019 with another list of 500 audits, completely focussed on AVERA.

So with that history, what do we know about the future?

Not a lot. They there have been no released since then but we do know based on some comments, the, the webinar series, July 6th webinar series, where Director Leen made several comments related to C cells. In particular he said there may very well be a new CSAL list released before the end of the fiscal year.

You about I can't guarantee it. So that's a basically a maybe.

We do know he made some other interesting comments about the CSAL list pending audits referring to focus, focussed on religious freedom, continued focus on disability, and then he mentioned something from prior talks that I know is very important to him and that's the category of focussed reviews on promotions. I've heard him speak that he believes that many of the pay gaps that are identified out there are really not directly

related to pay but, instead, more closely related to opportunities for promotion. And he's interested in looking at that question.

So that is just meant to be a level set to what the CSAL world. I would like to yield the floor to Justine to introduce what we should do when something will show up on the CSAL list.

>> Thanks, Rick. I think we can go to the next slide. But as this slide says, it is, so if you find yourself on a CSAL, take a deep breath, don't panic and then come pose yourself.

So the obvious here is that you don't ignore it. While you might want to run away, hide in the woods, maybe do some peaceful camping like we have in this picture here, that doesn't make it go away. Preparing in advance can be a lifesaver which we'll talk a little bit more about later in this presentation as well. I think it is important to note here how critical it is to get buy-in with your senior leadership not just during an audit but as part of your corporate culture. They can help drive efforts to ensure that you have the resources available and the support across the firm. Also periodic reviews with leaders and stakeholders to review diversity, equity, and inclusion initiative. And ensuring you're incorporating and collaborating with them to incorporate all of your affirmative action plans, goals and requirements. To keep this top of mind and advance your effort. You shouldn't ever under estimate how much time and effort will be needed to respond to this and the following up request.

Have a prepared question and reviewing on a consistent basis to ensure it is up to date is key. You will not want to be running around to find records, policies, point of contacts, if you work with your internal teams to consistently review these policies, procedures, data, records and your point of contact, you will be thankful when you are notified of a CSAL.

I also recommend you that have a compliance assistant programs offered by the OFCCP office. You can hear directly from the district directors and the compliance officers about what they're expecting. We found them very valuable.

Guy or Rick, I'm not sure if there's something you wanted to adhere.

>> I thought that was great and I think the important thing to realize is that sometimes the CSAL, you're on the CSAL -- so last year the CSAL list came out in March, March of 2019. I have some compliance that didn't receive an actual audit scheduling letter for another year, a year later, but you shouldn't count on that because the CSAL, you're basically on the clock, it is basically a 45-day alert. So you could get it at any point. So you may have had the experience or you may have heard of other contractors that didn't receive their scheduling letter for a year afterwards, you should not count on not getting it for a year. In fact, you should prepare although you're going to get it in 45 days. Rick, were you going to do something?

>> Guy, this is Rick. I 100% agree. And the last thing in the world I want to do is remove the sense of urgency that you and Justine are conveying but I would just like to highlight that the OFCCP does have some guidance on its website about requesting or at least some flexibility about dead lines and extensions as it relates to COVID-19 and work disruptions and difficulty in responding to data requests because of COVID-19. So if that becomes necessary, that's something that contractors can use.

>> And Rick, that's a great point in light much the -- , you know, in light much our current circumstances, I'll tell you my experience with the OFCCP has been very understanding with respect to requests for extensions in this period of time.

We will talk a little bit about one area where they don't have a lot of tolerance for extensions, but stay tuned for that. Justine, I'll turn it back to you.

>> Thanks. Yep. I definitely agree with both of you.

If we could go to the next slide.

So the next thing that I want to talk about is you should fall some friends, like my colleagues who are on the phone with me today. Another reason to ensure you have leadership buy-in during the budget process because you can prepare while you're being audited what it would look like if you need to engage a economist or you're working with an AAP vendor, you should always have that top of mind.

If you are using an AAP vendor, you flee to reach out to them immediately so that they are prepared. Many times they already know and they're having a conversation. But you should ensure you reach out and have a strong relationship with them, not just that they work the numbers but that you should be understanding what they do, how you do they do and you're in the constant communication.

When a audit arises you should not have any open questions about how your AAP works and what type of data or analysis. Again, it is important to have strong relationships there.

You should inform others at your company about what's coming up and what you're going to need. We've created a core working group at my firm that is notified when we are on a CSAL. It includes legal, compensation, talent acquisition, HR, DNI and the technical would be the core team.

We're also making sure that we're reaching out and they know that we need specific data so we're talking about that over time, not just then.

We figure out who will take the letter and tell them not to ignore it. This is something that we think is really important. We've seen a lot of times the letter, people receive mail and they're not sure what to do with it. So we reach out to our CEO and the officers associated with the functional affirmative action plan that is being audited along with their assistants. We also ensure our mailroom understands the importance of certified mail, and the letters that are arriving from the Department of Labor.

If there is not a specific name on the letter, as we've some that say just to general HR or they're sent to a person that no longer works at Booz Allen we have a dedicated POC within the mailroom that they know who to send those letters to and so that they understand the reports.

With that, I'll hand it over to Guy, and I think we can go on to the next slide, unless you guys had anything additional.

>> Actually.

>> Next slide.

>> Sorry. Sorry, Rick. I'll go first.

If you go back to step 3, I've had some colleagues -- I've talked to some government contractors and, you know, some contractors are concerned if you get legal counsel involved and how much somehow, you know, they're involved in communicating eventually with the OFCCP and somehow it seems like you're concerned or there's a

problem. And I'll tell you that I have dealt with, you know, numerous companies with audits as legal counsel and what I, at least my approach with those, is one that never creates that concern, at least not that I've ever been able to tell. And in fact, what I find with my clients that they find appreciative is that let's be honest, the people on this call are obviously 100% dedicated to diversity, inclusion, and affirmative action.

Maybe others at the company may not be as involved in these issues day to day. And sometimes people in your positions need an ally and sometimes it is helpful to have somebody who is a lawyer who has experience with the OFCCP and with the regulations in order to explain to skeptical people who have provided everything you've told them about OFCCP requirements about why we have to do this, what you should expect.

So sometimes having legal counsel is helpful to not only make sure that what you're submitting to OFCCP is as clean as it can be, and we'll talk about that, and make sure you know what to expect through the audit process, but even before you get the scheduling letter and submit things to OFCCP, it can help you get buy-in from others at the company to understand that you're not just making stuff up, that this really is what is required, and serve as a, you know, as a partner in getting your company the best place forward when the time comes. Rick, did you have something to add?

>> Yeah. That makes perfect sense. I just have one slightly different point to add, and that is, among the people that you may want to call is if you're a larger government contractor that subject to two or three or God forked bid five or six simultaneous audits as different establishments or different parts of the company, it's important that there's visibility and cord neighbor nation going on with respect to the response. Because the OFCCP will certainly be paying attention to the different elements of any one given contractor's response. And it would certainly be awkward if those responses were not coordinated and sending the same message.

>> Yeah. I couldn't agree more, Rick, and that's exactly what we do. And we have our core working group, that's to notify everyone that we are actually being audited, and those are the types of things we're talking about throughout the entire year but it also let's everyone know that we need to be in sync and that we really should be thinking about the things from the same perspective when we're doing our daily work but also when we're responding to audits, so I definitely would agree. Thank you.

>> All right. Next --

>> So yeah, thanks, Justine. I was about to say the next thing. Next slide, move to step 4. Thank you.

The next step is reviewing the scheduling letter. You know, while the CSAL might still panic when you see yourself on the list, you should really view it as a gift. Maybe not a great gift. But a gift nonetheless in that it is telling what you is coming and not only does OFCCP tell you we're coming but they tell you what type of review you are going to be scheduled for and that's really important, because depending on what type of compliance evaluation you're going to state, that will determine what you need to do. So when you see your name on the list and you recover from the initial shock and panic and you've calmed down, you want to take a look and figure out what's coming your way. And there are three main types of compliance evaluations. There's a compliance check which is really minimal. They just want to see they asked for a small number of

pieces of information and it's really just to ensure that you are in compliance and like the name suggests. It's just a quick check. And these are genuinely pretty quick, they close pretty quick, they're not a huge lift. But they serve as a good opportunity for you to double check what you're doing and make sure you've got everything in order and so you know, but that's what their purpose is.

Then there are focussed reviews. Rick talked about this in the beginning. Right now there are two types much focus reviews. There are 503 focus areas he views that focus on the individual disability affirmative action amendment of the OFCCP compliance regime and then there's VEVRAA which focus on protected veterans.

Those, you'll see, are more robust than the compliance check but they are focussed.

As their name suggests on the area the legal framework that they focus on. So individual disabilities or veterans, protected veterans. So you'll see that those are ones where they really dig in.

Now, focus reviews will come to your corporate headquarters and they will focus on the areas that I discussed, and they will include an on-site, a mandatory on-site, during this COVID time, all of the on sites are being done virtually through you know, various platforms, not Zoom. Zoom has been banned by I think the government entirely but OFCCP in particular. So those definitely come with a on-site component so you want to be prepared for that understanding that's coming and making sure people in the affected areas know that that will be part of the process.

The third one is an establishment review, and that will be if you don't have a functional affirmative action program but you create the affirmative action program by establishment or location, it will be a compliance evaluation of that establishment.

To be perfectly technical, it could also be a functional area review, meaning if you have a functional affirmative action program, they may audit a particular function that might just stand over a number of establishments.

Those are much more involved. There's more than 20 pieces of information that are requested at the outset and those really require a lot of preparations and more so than the other two because they really are addressing all aspects of compliance and the OFCCP's areas of responsibility.

So all of the scheduling tables are available at the OFCCP's website. You should pull them. And I like to use it as a checklist. The first thing you're going to be doing is submitting a response to the scheduling letter, you know exactly what you're going to have to do and you can start kind of thinking about what you have to do and as we say here, preparing a task force to figure out what you need to do and who needs to help you.

We can turn to the next slide step five is getting your affirmative action program to change. I know everyone on the call has seen affirmative action programs are prepared almost immediately at the beginning of the year and don't need any sprucing up.

But if there's anybody on the call that may be, you know when, they see themselves on the CSAL, they're thinking flipped, you know, now is the time that it is in order and maybe giving it a little bit more attention because it is, it will be submitted to the OFCCP and you want to make sure that they're, as we say here, ready for prime time. And one of the reasons for that is that, you know, as Rick and my discussion earlier pointed out that the OFCCP particularly during this COVID time has been pretty understanding when contractors need more time. And the OFCCP came out with a directive where

they said, even despite the fact that they have given you notice of the CSAL that if you need additional time, you get 30 days to respond to the scheduling letter. If you need an additional 30 days, you can get an automatic additional 30 days to respond with the exception of the affirmative action group. Director Leen has been very clear that he expects contractors to have their affirmative action programs ready and he does not have much tolerance for contractors who don't have them prepared. And if you look at the directives during the tenure, you'll see that throughout them, there is, you know, I guess the theme of making sure that contractors are intensified and are preparing their affirmative action programs because, in his view, if you're not preparing them, then you can't be doing all of the things you're supposed to be doing. So that is another reason why you know, one of the April firm priorities when you see yourself on the CSAL is to make sure your affirmative action programs are in good shape.

Rick, I know you have some things to add so I'll turn it over to you.

>> Well, just very briefly I want to just add that the affirmative action plan documents are incredibly important, and a lot of, a larger contractors especially, engage with third parties to help them complete that, those plans, that makes perfect sense. But it does run the risk of that if the contractor completely deputizes the development of the plans to a third party that they -- I would just encourage people compliance folks, HR folks, to really make an effort to validate those plans, validate the data, no one knows your company, no outside party knows your company as well as you do. So I avoid the temptation to simply get the plan documents from your vendor and file them away without reviewing them. Because it's not ideal to discover a serious problem in the way that job groupings have been formed or what is getting counted. You want to get those kinds of problems in the bud even before you find yourself on the CSAL.

>> The other thing I'll say just to add on with what Rick has said is that one thing that we've noticed is that OFCCP likes to use job groups for the analysis groups and so while you may not view them that way and there are opportunities for you to explain OFCCP how they should look at your job groups, but you may want to prepare for the chance that OFCCP says, you know what, we think job groups are what you should use, despite the directive that might suggest otherwise. So it doesn't hurt to maybe take another look at your job groups and make sure that they are, if they were to be used that you would be comfortable with that or at least prepared for that.

The other thing that I have noticed that has been an issue is that sometimes contractors have a lot of people with the same title but very different jobs and very different way, and they might be in the same job group. And so what I find is useful later on, because OFCCP in later -- OFCCP likes to see things right the first time and doesn't like there to be a whole lot of changes later on, they view it understandably with some scepticism and suspicion.

So now is a good time that if you have a bunch of, you know, employees with the same title but different job responsibilities like analyst that you make sure that you add hints to their titles in your systems generally and in your AAPs so that it is clear what they do and so later when you explain to OFCCP well this analyst is different than this analyst, there is actually something in black and white that suggests that what you are you're doing is actually true, because this is an analyst in finance and this is an analyst let's say in human resources. So those are things you want to be thinking about, you

want to think about this document isn't just for your own internal use. It is going to be viewed by a third party that doesn't know your organization and it might think about it from that perspective and what you could do to make easier for the OFCCP compliance officer to understand your plan and understand your organization more easily at the outset.

>> Thank you, Guy.

>> Related to focus reviews, are they for all of the establishments? Or just the central headquarters?

>> The so the focus review of are of the headquarters. But what ends up happening is that the' head quarters ends to be the nerve center. And so effectively, you know, and because the focus reviews look generally at practices, general practices, if you look at the scheduling letter, you'll see what the OFCCP is looking at, it is more about, you know, your general approach to recruiting, general approach to reasonable accommodations, things of that nature. It is easy for it to become a general view of your practices over the entire organization even though it is focussed on your compliance with that regime and looking only at the establishment. So the on-site will be at the establishment, at the headquarters and so in that way it is only, the headquarters, like I said before, what they're looking at are likely to be practices that extend well beyond the headquarters.

Rick and Justine, I don't know if there's anything you want to add on that question.

>> It's good.

>> I think that's good.

>> Thank you. But the point that Guy made and that is that having people correctly lined in jobs that are adequately specific about what they could is incredibly foundational. To all of the equal opportunity statistical analyses that we do.

A huge percentage of the problems we encounter with employers is having to do with employees not being aligned directly or not in the correct jobs or the correct departments or the correct grades and then there's no end of mischief that can be caused by those kind of issues.

>> I think it is really critical that to make sure you have that relationship so that you can talk through these things and back to the previous slide that we had, I just wanted to stress there really is a lot of great information on the OFCCP website and that can really help be prepared and have those checklists available to you so you feel comfortable and confident with what is coming to you down the line.

If you want to move to the next slide. So preparing is really important. For example, we have a dedicated team that works directly with our employees for a reasonable accommodation. And he work with them from a compliance standpoint throughout the year, regardless whether or not there is an audit, to make sure we have up to date policies. Having a checklist available, ensuring all documents are up to date, easily accessible, be able to feel a sense of relief that some of the work is already done.

So going ahead and pulling the low hanging fruit as you can will save a lot of time. I think Guy wanted to add some information here about the categories about schedule letters so I will let you jump in here.

>> Sure. So you know, we've identified some of the easy things to collect, you know -- and like I said earlier, depending on the scheduling letter, some of these things

may be asked for and some of them might not be. But so look at your schedule letter and figure out whether these things are going to be necessary if you have a -- an establishment or a functional area scheduling letter on the way, if that's what the CSEL indicates, they're going to be asking if the collective bargaining agreements and for EEO1 and for various policies and those are easy to collect, they're also easy to review and to make sure that they are, you know, up to date, particularly the policies. They truly reflect what your policies are, is it, you know, I've had clients, that you know, we get the CSAL and they say we've been working on the new reasonable accommodation policy for a long time and it is, you know, just been gathering dust and now might be a good time to, particularly if it reflects what you're doing now, get it done. So sometimes opportunity to look at things on your to do list and get them done when they may be sort of other things may be getting prioritized.

>> Justine, back to you.

>> I also would point out that have you to really think about what you're pulling and when you're pulling it. So I think we'll talk a little bit later about pulling the data from the still but make sure you're pulling the right information that you have everything in the right central spot so that it is easy for you to identify. And have that ready before you're moving forward.

Do you want to move on to the next slide? And I think this is Patrick.

>> Yeah. Thanks, Justine. Yeah. So the approach, the tonics over the next few slides, are focussed on what the contractor should do to proactively prepare for any findings that the OFCCP or any indicators that the OFCCP may come back with and so this presupposes, I know, for example, this is Guy's philosophy, that ideally, before any data is turned over to the OFCCP that you, the contractor, have a pretty firm understanding of what the OFCCP is going to see around you know how to respond to it.

So the first area we'd like to talk about is an adverse impact check, so looking at if there are any indicators of disparities, unexplained disparities, race or gender in hires, promotions and terminations. So immediately you're confronted by questions around data and questions around methodology. So we'll talk a little bit more about data and how to make sure your applicant tracking data is on target and correct that you turn over to the OFCCP.

But so that's about methodology. There are a number of different ways to look at these adverse impact analyses. You know, we typically look at it using the statistical techniques that rely on concepts of statistical significance to identify problem areas to try to model decision making process, reflecting the various applicant pools or pools, of course, there's alternate approaches, ones that are, you know, maybe look at higher levels of aggregation, more simply at the job group level, and maybe are looking at nonstatistical methods like the four fifths rule.

And all of those are relevant, but typically endorse the more rigorous statistical approaches.

With the respect to methodology, there's also another kind of interesting detail to keep this mind and that is that we are no longer in a world or in a setting where you can -- your analyses can just assume that whites or Caucasians are the reference category and you're just testing for any disparities with respect to the other nonwhite race groups.

The OFCCP has noticeably released a couple of settlements, and I think there have been other claims, with whites being disadvantaged with respect to some other racial group. So that's something important to keep in mind when you're reviewing your adverse impact analysis.

The and then we'll talk a little bit more about potential data items on the next slide, but any other thoughts, Justin or Guy, that you want to raise with respect to implementing adverse impact checks? Okay. If not --

>> This is Guy. Sorry, Rick. I was, I think Justine and I were both deferring to each other.

The only thing aisle add is may have adverse impact findings for your hires, your promotions, your determinations. Now is the time to figure out what the explanation and if necessary, fix it, right? But what I like to do, and I think Rick noted is this, is I've had circumstances where there has been adverse impacts and I know they're going to see it and there's nothing you can do about it. But what I would like to do is explain it in the first submission and say listen, you're going to see this issue, let me explain to you what it, is you know, I had a client that they, you know, they had a risk and they closed a department and that created adverse impact results when you looked at determination. But, you know, we had -- and those were involuntary determinations because it was a risk. So, you know, it was getting ahead of it saying hey, listen I, this is what you're going to see and this is why it is going to happen.

The other reason you want to do it now is because you may not get audited for a year. Well, first of all, you should be doing it anyway. But putting that aside, you know, you may not get audited for a year and at that point you start looking at it and things are really stale, right? We're already looking at indicate data that's probably a year old. So then it is two years separated. So good luck talking to the recruit er about why they, you know, did this decision or, you know, figuring out the hiring manager about the promotion issues if the records aren't clear. They're going to figure it out now. You're supposed to do it every year anyway. So get that together. And get the package of whatever materials and explanations you're going to need ready now because that's not going to change.

And so this is a good opportunity to do that deeper dive if there is some kind of adverse impact.

>> Absolutely. Justine, did you have a comment?

>> No. He said it all.

>> Okay. I'll just embellish a little bit on what Guy said. By the way, Guy, it looks like you anticipated one. Questions, just answered one of the questions we just received about being upfront with the OFCCP if there is a flag, an indicator. When you're doing these adverse impact analyses, there's a lot of opportunity for exploration. For example, in the context of a hiring process, with a rich applicant tracking database, you can identify where in the applicant tracking process you're quote-unquote losing people on the certain demographic and drill down and figure out why that is.

And who knows, there may be an innocent explanation, interest may not, but if is better to know upfront.

Okay. I think next slide, please.

So is applicant tracking data is a potentially challenging area with a lot of things that need to be accounted for.

Next slide, please.

The when we're providing applicant tracking data, we need to make sure it is appropriately limited to the relevant population. So what do we mean by that? Relevant population and applicants in particular? We certainly want to eliminate unqualified candidates or candidates that don't meet minimum qualifications. We want to eliminate candidates who voluntarily withdrew, that includes candidates who were offered the job but then declined. Or offered an interview and then declined. There are also issues that can come up with respect to how the data is screened for geographer. I've worked on a project where we identified an issue, an indicator, and what we saw was that for a mid-level job and a location in the eastern United States, there were a start are startling number of applicants from Beijing, China, or Shanghai, China, and it wasn't clear if they were even authorized to work in the United States. So there are a lot of potential pitfalls in identifying the relevant set of applications to include among the data provided to the OFCCP.

And, of course, the internet applicant rule is the guide here. And that's a fairly clearly written guidance on what application should be included and what application should be excluded.

And then finally, of course, OFCCP is going to look at these with respect to job groups, AAP job groups, so just revisiting something we've you touched upon before. It is important that these AAP job groups actually make sense.

And that means the job groups may evolve over time as the work evolves.

So all of these things need to be taken in to consideration when providing applicant tracking idea.

And obviously, the OFCCP has guidance on soliciting race and gender information, and care needs done to make the best effort in that regard. It can be challenging to talk to the OFCCP when the -- when that is not the case.

So Guy or Justine, any comments on applicant tracking data?

>> We did have a question.

>> Sure.

>> Why don't we take the question first, Rick.

>> Yeah.

>> And what's the question?

>> Thank you. What rule of thumb do you use when conducting most favored race analysis? When the most favorite race has a very small sample size?

>> Okay. Yeah. That's a good question. So the OFCCP has actually provided clear guidance on that in the context of compensation studies which I know is what, we're not talking about that now, but I'll briefly share it.

The OFCCP in a compensation analysis that is examining race will identify the most favored group based on the group that has the largest average salary or largest average total compensation, whatever compensation measure you're looking at.

But we typically impose a minimum threshold on the number of individuals that go into that average for the group to be considered the quote-unquote favored group. And that threshold is high people. We're not -- if there happens to be a pay analysis group we're looking at that has two -- only two Asians, for example, but those two Asians happen to

have very high salaries, we're not going to designate that group as the favored group because they're there are simply two few people to make a reasonable identification that they're the favored group. So we use similar logic when identifying in the context of a hiring analysis. We're looking at which group has the highest selection rate, but again, that group may contain some minimum number, say five, people of selections in order for us to kind of consider identification of a most favored group.

But I agree with the characterization of rule of thumb. These are just rules of thumb. And there are a variety of different ways to look at this. And sometimes you need to try it both ways.

>> Thank you. Okay. So --

>> Rick, I'll just --

>> Oh, yeah. I'll just add, this is Guy, I'll add that, you know, the, I find a lot of times that the applicant tracking data can be quite voluminous and so it is not a bad opportunity to take a deep dive and make sure that the codes are right, that recruiters know what they're doing, and that you really are only considering true applicants because, you know, as Rick, you know, Rick's example is a great one, sometimes, you know, the data, you know, the data is only add goods as the inputs, so you want to make sure the inputs are as accurate as precise that you should be and you're only including the data that should be included. Because once you submit those numbers to OFCCP, if you start changing them, even if because you found a mistake, you're kind inform a messy place and we would much rather get it right the first time as opposed to OFCCP identifying something and then you've got to go and fix it. Not to say that won't happen because it is hard, the data is -- can be voluminous and difficult to manage. And mistakes happen. But to the extent you can minimize those mistakes, you know, you're going to be a much better place come audit time.

>> Great. Thank you, Guy. If there are no other comments, we'll move on to step 8. Next slide, please. So stepped 8, compensation. Guy is absolutely right, applicant tracking data can be quite voluminous, but compensation data takes the cake for being complex. And the reason this whole topic gives people heartburn is its complexity. And the fact that it's, frankly, a priority of the OFCCP and the plaintiff's bar.

So -- so we, of course, again, advise that the contractor review their compensation data, do an internal, frankly, ideally, privileged, compensation analysis and so the first step in that process is to collect the HR data, the payroll data, even, frankly, sometimes, the applicant tracking data. Why would applicant tracking data be relevant to compensation you might ask? Well, you know, sometimes we like to include information about education history or prior work experience that may only be relevant and available in the applicant tracking data. So it -- collecting the data is necessary for the compensation data submission is a potentially sprawling task and it is up to you, the contractor, to, with advise from histories, to identify the right set of data fields to provide. It says here on the slide you want to tailor your submission so it includes the field that help -- tailor the fields so it includes the fields that are helpful to explain how you compensate your employees and help explain in hopefully a non discriminatory fashion the pay difference that is exist without providing a lot of extraneous data that may tempt the OFCCP to go down rabbit holes that are not helpful.

So the best way to know what data you're providing is to conduct your own analysis.

Now, there are at least two ways you can do that. One is, and I, I'm describing this as two ways, because, frankly, there is a bit of a gulf now between the way a lot of practitioners and the consulting team look at this, and I'll say that we try and update true to Title 7 or as close as we can, and I'm sure the OFCCP would assert they're staying close to Title 7 as well. But the fact that is OFCCP approaches compensation analyses with a variety of rules and restriction that is a practitioners in the consulting community do not agree with. And so it is it is useful to look at it both ways.

The -- in the practitioner's -- in the consulting community will look at tailored, similarly situated employee groups that reflects the pay, decision making process at the firm and control for all of the relevant non discriminatory explanatory factors. That's pretty much it. And whereas the OFCCP does that as well but they, broadly speaking, they place restrictions that result in relatively broad job groupings, pay analysis groupings and any pay place limitations on a am in of control factors. So the situation you can end up in is that you have one analysis conducted internally that you believe is, reflects non discriminatory processes and shows no statistical significance add version disparities or statistically significant disparities, and then you modify that analysis so it is consistent with some of the guidance in the OFCCP compensation directive and suddenly have you indicators, suddenly have you indicators of disparity.

And so then it is a matter of reconciling those two sets of results, recognize what's driving the difference, and being paired to explain that.

Other things you should be aware of with when providing data to the OFCCP. There are certain factors that the OFCCP looks at with some amount of skepticism, whether justified or not, you need to know that. Those factors include salary grade, performance rating, and market rate. At a minimum. And those, you know, the objection the OFCCP raises to those factors have to do with the potentially tainted by discrimination or incompletely applied or underdocumented so there are sensitivities to be aware of there.

And then finally, having conduct this had analysis, have you a decision to make, the contractor, in consultation, probably with legal counsel, and that is how forthcoming should you be with the results of your analysis, to what extent do you want to be guided in your response and help -- I mean, my inclination is often to try to educate the OFCCP and frankly lead them in to an analysis that we think makes sense.

But sometimes that's not an appropriate thing to do and that's probably an audit by audit situation.

The last thing I'll mention, which I'll note here, obviously we're primarily talking about salary. But, of course, the OFCCP is more and more looking at forms of incentive pay and so that is something to keep in mind.

So Guy or Justine, any comments on this fairly gnarly topic of compensation is if >> Guy, I'll let you go first. I do have something I want to clarify from before. But I'll let you jump in if you do. No? Okay. I'm going to ask Rick and Guy if we could just take a step back, I'm watching the comments in the chat, if we went back one slide to slide 7, I think there's some confusion and I want to make sure we get that clarified. Because there's a question about the internet applicant rule and I don't think the slide was designed to be about the internet applicant rule because it does state that someone would be an applicant if at a point in the selection process prior to receiving a offer they

have not withdrawn. So I just wanted a clarification that that is on the slide because there's a question in the chat for that.

>> Yeah. I saw that question. I'm glad you raised it. And, look, the if you look at the internet applicant rule and the frequently asked questions about it, it is not consistent in terms of how the OFCCP terms he did whether, you know, there is that language that says that they haven't, you know, indicated a lack of interest prior to receiving an offer. But later on they ask how can you -- how do you determine whether or not a person has indicated they're no longer interested in a position, it talks about declining a job offer. And so that's an area that is a bit -- that's a bit of a gray area in terms of what even the OFCCP believes is appropriate.

I will tell you that job offers often have it, you know, even if they're, you know, regardless of whether they should be considered applicants or not, in my view, if someone if you make someone an offer and they don't accept it, they've withdrawn themselves from the process. And the other guidance is put out, in my mind, despite the ambiguity and the inconsistency in the guidance, in my mind they -- you're within your rights to take them out of the analysis.

That being said, you need to keep all of the records of them. And I have had situations where OFCCP has said, well, you know, we have an adverse result, and I'd be able to say, maybe we have a adverse result but that's because we offer, you know, he the jobs to three other people in that protected group and they declined that job and here's all of the records and information about that. So you know, you can't really fault us for not hiring people because we tried and, you know, it didn't work, they didn't accept the offer, we can't force them to, and we ended up going with the next best person who happened to not be in that protected class.

And I found that that, not always, as Rick knows from our battles together, that has, on occasion, worked. Other occasions it hasn't worked.

So I he wish that it was clearer in terms of what approach you would take. The guidance isn't clear. But it is to the point that I think another comment was made, offers matter and you still have to keep those records and they can often be helpful.

>> Yeah. I just echo that, agree, offers matter. And it is likely the case that the decline offers should be kept as part of the data submission. But I would argue more from an analysis perspective it is plausible that individuals who decline an offer effectively withdrew their expression of interest and could be excluded from an analysis.

>> Great, thank you, Rick. Thank you, Guy. I just wanted to make sure there was clarification on that.

If we could move to slide 15. Okay. Outreach. So I can't stress enough how important it is to document them. And you should be focussed on trying to document efforts as close to real-time as possible.

Again, reaching out to key stake holed [erlgs](#) as soon as you're on the CSAL and having those conversations overtime really helped and it gets everybody on board.

We reach out to our corporate affairs team, our diversity and inclusion teams, talent acquisition teams, section 503, hopefully you're looking at that on a regular basis and going through the checklist of audit and reporting and making sure everything is covered.

We schedule quarterly reviews, we're looking at all of the different pieces of 503 and VEVRAA outreach so we can make sure we have a understanding of what's going on

across the firm. So we communicate our AAP results to our business. We remind everyone that's the focus and the requirements here.

During those discussions we hear all kinds of things like we're doing workshops with veterans that are leaving the military who are working with vets organizations or we have partners with different organizations, should that be aligned. We are making sure they understand we're not just focussed on the recruiting events, we're looking at all different kinds of things, including we do résumé workshops with those that are leaving the military and we are a part of events and go to different events with them and support their activities.

We actually provide a template as well. Two teams so that they can know what they should be documenting, what group this is. We are functional affirmative action plan. So we want to know what group to apply to. What the focus is, is it improvement, is it a community partnership, what was the date, and is there a point of contact in case we had to go back and do a little bit more digging?

And it's really important to make sure you're keeping these things top of mind and, again, that you're documenting them. Guy, I'm not sure if you had something you wanted to adhere as well.

>> Well --

>> This is Rick. Go ahead.

>> Is I'll add one. This comment is not necessarily operational. It is meant to be more of a big picture comment. But one source of tension that exists out there in several industries, I'll just pick the obvious one, tech, is that these -- these companies, in certain fields, are -- are confronted with what they assert and the -- there is certainly data that backs them up, a very thin pipeline of you know, equal fielded individuals for certain technology jobs for certain race and gender groups. And so they can do all of the outreach they want but if the candidates, if the qualified candidates are so rare, there had a has been a trend in the news for some of these companies to even get involved in recruiting kids at a much younger age, you know, women and minorities to pursue these kind of STEM degrees.

And I think that employers are doing that, that's very farsighted of them because there's going to be this issue of closing these gaps if the pipeline of talent, the pipeline of the people of relevant skills is so thin.

>> Yeah. And this is Guy. The only other thing I'd add is that, you know, I know that I've been at previous occasions where OFCCP has said they're going to be more focussed on good faith efforts and having a goal, we all know, is not a violation of law, regulation, and there's nothing wrong with having a goal. But when what there is something wrong with not doing something about it. And so, you know, you want to make sure you're able to show OFCCP you've taken those goals seriously and be able to document what's done. Because if you haven't, then it doesn't look like you're really taking your affirmative action program seriously.

The other thing I'll say is if people don't know about your affirmative action program and they don't know about your goals, like the managers or executives, and they get interviewed for a on-site, it doesn't look very good. So you want to make sure people understand your goals and everybody understands the roles that they play in

addressing those goals and that you've done -- that your goals match what you've determined is the grass root cause of your -- good faith, excuse me, of the cause of what your goals are. So for example, if you have a [jund](#) I representation of women in a particular job group and you've done an analysis and you see that, you know what, we didn't hire many women but we didn't have many women applicants either, you want to make sure good faith efforts actually make sense and you're doing things to target more women applicants for jobs in that particular affected job group. Jews teen.

>> Guy, thank you. Actually, the next slide.

>> Boomerang.

>> Yeah.

>> Yeah. So let's move to the next slide. There we are.

So look, you know, you want to take the opportunity to think holistically. Nothing sharpens the mind in this space more than getting word you're on the CSAL. It is probably an opportunity where you're getting a lot more attention than maybe you're used to. I have had circumstances where individuals have you know, where individuals maybe don't get people higher up or in other areas of the organization aren't terribly interested in all of the minutia of what is involved in OFCCP compliance but when this the audit letter comes in, they really want to know and they want to understand everything and they can start to get really, really excited and it is your opportunity to calm them down and explain to them that you've got everything under control but it is also your opportunity to educate but it is your opportunity to educate and also opportunity to get people's attention to be focussed on things that they maybe haven't been because there hasn't been that sense of cause for urgency. So think about what are the other things that you're responsible for that might come up in the audit. Maybe it is not in the scheduling letter but it is still part of your obligation.

So, you know, do you have the posters up? It doesn't hurt to double check, you know, what's the latest on the posters, do you have them up, drew have the there are a few things you're supposed to have in your handbook, you know, like the pay transparency rule handbook language, is that in your handbook? Are your applicants, do they have access to the various things that they need to, particularly in the COVID time? A lot of contractors are making sure that they have that.

>> Yeah. And I would just remind everyone that, you know, if you do think over time and you're really thinking about it and you're making shoo you are that you're not just doing this and doing it, you find out you're on the CSAL, you're in so much better shape. You definitely need to do it as soon as you find out.

We can go to the last slide and then I think we might have time for the last few questions.

So I think it is important here, and I'll say my piece here and let Rick and Guy close out. We try to assume goodwill. We try to have good relationship with our compliance directors, regional officers, and stay clear and transparent and upfront with them, be clear about what you can and can't do and be reasonable about time frames. I really think you shouldn't look at this as someone is trying to get you. Doing what you're supposed to do and reviewing periodically what you should be reviewing, you should feel confident in what you're doing. I found that they're willing to work with you. And,

again, I would take advantage of the compliance department events and trainings. And then also work closely with your friends, I worked closely with callers on the phone, that you engage, outside vendors, economists.

I would also include this forum, NILG and local chapters are friends that you should be engaging with. Being part of my local Washington, D.C. organization, you can talk to great people, do same things, and you're collaborating together with the OFCCP and it really helps to make a difference. So I think it is really important. Pass it off to you next I think, Guy.

>> The sure. Look, I think that's all right and I think that what you -- you need to look at this as an opportunity even though it doesn't team like it. And that at the end of the day it is coming and there's nothing you can do to avoid it. And look, you may find problems, but if you have engaged the right, you know, people to assist you and you don't stick your head in the sand, generally these things can be overcome. I mean, Rick and I and Justine have faced circumstances where we've seen things that look pretty bad but, you know, you ask the right questions and you dig in and you realize, you know, particularly with the organizations that I know are involved in the NILG, you know, that are committed to diversity and inclusion, you know, chances are there's a reasonable explanation or there's something that is just off. And you can, you know, in nine experience, probably eight times out of ten, there's a way to figure out what happened and address it if you have enough time.

The time is the key sometimes. If you don't have the time, times you just, you run out of time and have you to submit data and you can't explain why there is a disparity or a discrepancy or there's some kind of adverse impact. And that's a real shame and a lost opportunity. So view this as an opportunity to get ahead of the game, put yourself in the best position to pass the audit and the opportunity to educate your organization more deeply in OFCCP regulations require of it. And you know, if you have that mind set and you stay positive, you're going to find it to be a much easier process than if you take a negative approach. Rick, anything you would like to add?

>> Yeah, no, I think especially at the beginning of the process, hopefully throughout, staying collaboratively with the OFCCP tends to be a more productive outcome and it does, you know, thoughtfully collaboratively and you, most of these audits, the oft quoted statistic that only about 2% of OFCCP audits end in a finding of discrimination. So the odds are if you take this seriously you're going to get interest you it just fine.

The issue is if you get in one of those positions where you are in audit and you're tagged with a finding of discrimination at the PDN stapling or hopefully not at the notice of violation stage, then it becomes kind of a potentially or deal for the company and for you personally. These things can go on for years. So taking it seriously at the beginning, kind of nipping it in the bud, if you will, is well worth your time.

>> Yeah. And there -- well said, Rick, I think one question, I know we're getting close to time here. But, you know, someone asked, what are the repercussions of failing an audit and you know we're hopefully -- you don't actually fail an audit. The word audit it is a compliance evaluation, we use the word audit as a short form. But effectively what can happen is that if the OFCCP finds violations, they will issue a notice of violation which details what they found and they are required to engage in a conciliation process this order to settle those violations. Some are technical violations which are you didn't keep the records or you didn't do, you know, you didn't follow the proper rules

as a technical matter and those, you know, are basically you agree that you're going to and you're going to submit the certain monitoring for a period generally two years, though there is a process, a ERCA process, which is five years, but that's a presentation for another day. Where you can really get in to, and I was going to mention this earlier, Rick's slides about adverse impact for promotions, hiring, terminations and then the compensation analysis, particularly hiring and compensation is where there becomes a real financial component to it as well for OFCCP is, you know, focus on getting back pay for the people they believe have been discriminated against. So if the question is what are the consequences for failing an audit, the consequences for the OFCCP finding, you know, violations are, you know, some form, generally, of a settlement with potential back pay which can be significant. You know, last year there were some as high as \$10 million. By those are rare. And then if you don't settle, then there's potential enforcement but again, that's another presentation for another day.

>> Thank you.

>> I --

>> Go ahead. I'm sorry.

>> Oh, I'm sorry. Rick, did you want to have some closing statements?

>> No. No, I was going to suggest we could, I see we haven't gotten to all of our questions, so we'd be happy to follow-up with those in written form.

>> Great. Great. We did have a few more that's step 7 seemed to be very popular for folks so he will with send the questions to the presenters and ask that they provide some guidance with those questions.

Thank you, Justine, Guy, and Rick for your presentation today. Next slide, please. We hope that this has given all of our attendees a taste of what you could have gotten in person had it not been for COVID, but we look forward to seeing you next year in Nashville, August 1st through the 4th, 2021.

We'd also like to again thank our sponsors for sticking with us through this time and supporting our efforts. We really do appreciate that. And lastly, we thank all of you for attending today's session. Take care. And stay safe.