



DirectEmployers

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WHAT'S GOING ON WITH OFCCP AND WASHINGTON, DC IN THE TRUMP ADMINISTRATION

February 14, 2017

Happy Valentine's Day!

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1) DEMOCRATS ARE PLAYING AN EXCELLENT GAME OF DELAY OF TRUMP CABINET LEVEL NOMINEES

See Week In Review for **February 6, 2017:**

Senator Sessions story

- “KILL THE CLOCK” STRATEGY AS PRESIDENT’S HONEYMOON PERIOD WILL WIND DOWN

2) PUZDER NOMINATION DELAYED, AGAIN

See Week In Review for **February 6, 2017**

- Now scheduled for Thursday, February 16th

3) USDOL TRANSITION TO TEAM TRUMP IS BEING DELAYED

See Week In Review for **February 6, 2017**

4) OFCCP WILL CONTINUE ON THE COURSE SET BY THE OBAMA ADMINISTRATION UNTIL TRUMP POLITICAL APPOINTEES ARRIVE

- Audits will continue to be few in number (1/2 the usual annual total = ~1600/year instead of 3800 Supply & Service and ~250 construction audits instead of 550)
- Audits will continue to feature OFCCP's two fascinations...to investigate:
 - compensation, and
 - failure-to-hire claims

4) OFCCP STILL CONTINUE ON OBAMA COURSE (Cont'd)

Audits will continue to cite the same 6 violations the Obama Administration has found for the last 7 years

OFCCP 2015/2016 ENFORCEMENT STATISTICS

2015 & 2016 OFCCP Enforcement Statistics Summary

Violation		# of Violations		% per Total Audits			
		FY2015	9/22/2016	FY2015	9/22/2016		
1	Recordkeeping	233 235	224	101	8.9% 9.0%	9.5%	8.7%
2	Recruitment	228 229	221	83	8.7% 8.8%	9.4%	7.2%
3	Written AAP	130 132		67	5%	5.6%	5.8%
4	Past Performance	116 109		44	4.5%	4.6%	3.8%
5	Other (Job Listing)	100 101	83	26	3.8% 3.9%	3.5%	2.2%
6	Hiring	38 37	43	14	1.5% 1.4%	1.8%	1.2%
7	Selection or Testing	8 6		3	.31%	.25%	.26%
8	Salary	7 15		3	.27%	.64%	.26%
9	Accommodation	4 2		1	.15%	.08%	.08%
10	Promotion	2 3		1	.08%	.13%	.08%
11	Termination	2 1		3	.08%	.04%	.26%

5) WILL OFCCP SURVIVE?

Concern has erupted since AAAED recently discovered and circulated a July 2016 Heritage Foundation Report recommending that OFCCP be abolished by transferring its discrimination jurisdiction to the EEOC and abolishing its Affirmative Action mission

(See Week In Review for **January 30, 2017**)

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

5) WILL OFCCP SURVIVE? (Cont'd)

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

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

GRUTTER v. BOLLINGER, 539 U. S 306 (2003) GINSBURG, J., concurring

5) WILL OFCCP SURVIVE? (Cont'd)

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

What are the odds OFCCP will survive?

6) ASSUMING OFCCP SURVIVES, THE NEW DIRECTOR WILL MORE LIKELY THAN NOT ARRIVE IN MID-TO-LATE 2017

See Week In Review for **January 30, 2017**
(Puzder confirmation delay)

*** Important Note: The longer it takes for Puzder to be confirmed, the longer it will be for the new OFCCP Director to be named**

7) TWO ISSUES ON THE TABLE FOR THE TRUMP USDOL TO DECIDE RE OFCCP:

a. CONTINUE “DEEP DIVE” AUDITS INTO COMPENSATION (NOT LIKELY TO SURVIVE AFTER TEAM TRUMP LANDS AT OFCCP)

1. OFCCP Compensation audits failed and backfired on the civil rights community
 - ~1/400th of 1% alleged violation rate
 - Fewer than 1,000 alleged pay violations out of over 12,000 audits and over 25 million employee-level pay decisions reviewed

7) TWO ISSUES ON THE TABLE FOR THE TRUMP USDOL TO DECIDE RE OFCCP (Cont'd):

- Less than \$5M in back pay during the 8 years of the Obama Administration for compensation claims
- Government Contractor cost to service and defend OFCCP compensation audits have exceeded \$100M per year (\$60,000/audit)

7) TWO ISSUES ON THE TABLE FOR THE TRUMP USDOL TO DECIDE RE OFCCP (Cont'd):

- b. WHETHER “FAILURE TO HIRE” OFCCP AUDITS AND LAWSUITS WILL CONTINUE TO APPLY SIMPLISTIC “QUOTA ANALYSES”

8) OFCCP WILL NOW “FADE TO BLACK” ON THE REGULATORY FRONT

- a. The Trump Administration’s new “2-for-1” Rules (no pun intended) (See Week In Review for **January 30, 2017**).
- b. President Trump supports gay rights and gay marriage: no change coming to Obama LGBT EO 13672 (See Week In Review for **February 6, 2017**)
 - i. Can Trump carry wary Democrats and Republicans over the goal line to pass ENDA?
 1. What happened in 2009 and 2010 as to ENDA?

9) OTHER REGULATORY RULE ROLLBACKS

a) “**Blacklisting Rule**” Going, Going...? (See Week In Review for **February 6, 2017**)

i. Dangling parts:

1. The “Paycheck Transparency” component
2. The anti-arbitration component
3. The federal District Court litigation in Texas
4. What do Federal contractors do now if they complied with “Paycheck Transparency” or the anti-arbitration component?

9) OTHER REGULATORY RULE ROLLBACKS (Cont'd)

b. **EEO-1 Report:** The EEOC will likely withdraw the EEO-1 Compensation Component

i. It will take a long time, though...Fall 2017

1. Why?
2. Jenny Yang's commission does not end until July 1, 2017
3. Victoria Lipnic is now Acting Director of the EEOC – remember her speech at the ILG National Conference in 2016? (See Week In Review for **January 30, 2017**)

ii. No worries, though: no reporting due until March 2018

1. Do nothing right now. Wait. Be patient (I couldn't, but you need to be).
 - a. Figure out your last "Fail-safe" day: date you must begin to prepare to report

10) WHY GORSUCH IS AN ESPECIALLY IMPORTANT NOMINEE TO SCOTUS

- a. His philosophy goes to the heart of the differences between Democrats and Republicans (See Week In Review for **February 6, 2017**)
- b. If you do not know about “**Chevron deference,**” now is the time to learn

11) HOW DOES SENATOR SESSIONS' POSITION AS AG IMPACT OFCCP?

See Week In Review for:

- **January 23, 2017**
- **February 6, 2017**

12) TEAM OBAMA OFCCP FIRED OFF ALL IT'S LITIGATION CANONS AS IT LEFT TOWN

- a. OFCCP filed more Administrative Complaints against Government Contractors in December 2016 and January 2017 than they had filed in the last two Fys
 - i. Oracle and JP Morgan Chase compensation cases are among a flurry of regulatory activity
 - ii. Many other cases have already been recalled

THANK YOU

Questions?