

Inside OFCCP's New Affirmative Action Compliance Proposal

By **Aron Beezley** and **Amandeep Kahlon**

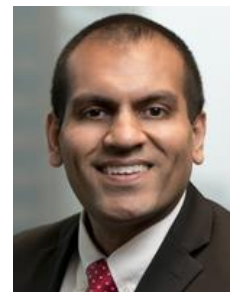
The U.S. Department of Labor's Office of Federal Contract Compliance Programs recently requested approval from the Office of Management and Budget of a new approach to review federal construction contractors' compliance with the OFCCP's affirmative action program, or AAP, and record-keeping requirements.[1] In its request, the OFCCP indicated that it hopes to employ less burdensome compliance checks in greater quantity as opposed to more intensive compliance reviews or audits. In addition, the OFCCP indicated that it plans to harmonize the procedures by which compliance checks are conducted. The OFCCP's proposal also includes changes to compliance reviews of federally assisted contractors, but those changes are not addressed here.



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Background

For federal contractors who satisfy the jurisdictional thresholds, the OFCCP is charged with administering and enforcing three equal employment opportunity laws: Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, or VEVRAA.



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Executive Order 11246 applies to contractors with a government contract in excess of \$10,000 or who reasonably expect to enter into government contracts aggregating over \$10,000 in a 12-month period. Section 503 applies to contractors with a government contract in excess of \$15,000. VEVRAA applies to contractors with a government contract of \$150,000 or more.

These laws are designed to prevent discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, natural origin and disability, and to prevent discrimination against protected veterans, including disabled, recently separated and active duty veterans. The laws also require federal contractors to implement affirmative action programs for marginalized groups, disabled individuals and veterans, and to avoid retaliatory actions against employees for discussing salary or pay.

Currently, under 41 CFR Sections 60-1.20, 60-300.60, and 60-741.60, the OFCCP may conduct compliance evaluations that consist of one or any combination of investigative procedures, including a compliance review, an off-site review of records, a compliance check and/or a focused review. Federal construction contractors are currently subject to compliance reviews that are lengthier and more involved than compliance checks.

The OFCCP's Proposal

If the OFCCP's proposal is approved, future compliance check notices to federal construction contractors will likely request the following:

- Personnel records that list construction trade employment activity — applicants, hires, promotions, layoffs, recalls, voluntary terminations and involuntary terminations — including the name, job classification, gender, race and/or ethnic designation for each employee or applicant[2]

- Payroll records for all construction trade employees working in the “standard metropolitan statistical area(s)” or in the “economic area(s)” during the specified review period, submitted by project, including each employee’s name or ID, gender, race/ethnicity, hire date, trade(s), total hours worked in each trade, overtime hours worked in each trade, wage rate(s) for each trade, apprenticeship status and employment type — e.g., full-time, part-time, temporary, contract, per diem, day labor
- Examples of job advertisements and postings
- Documentation of accommodation requests received and their resolution, if any
- A copy of the current Section 503 AAP
- A copy of the current VEVRAA AAP
- Documentation of the data collection analysis
- Documentation of the most recently adopted VEVRAA hiring benchmark

How Will the OFCCP Deal With Confidential Information Submitted by Contractors?

OFCCP has acknowledged that “[s]ome of the information contractors submit to OFCCP during a compliance evaluation may be considered business confidential information or personally identifiable information.” As such, the OFCCP’s request states:

OFCCP safeguards and protects personally identifiable information it receives from contractors to the maximum extent allowable under the law in accordance with the Privacy Act of 1974, as amended (5 U.S.C. §552a). In addition, the regulation at 41 CFR 60-1.20(f) allows a contractor that is concerned with the confidentiality of personally identifiable information such as lists of employee names, reasons for termination, or pay data, to use alphabetic or numeric coding or an index. The coding or index for pay and pay ranges must be consistent with the ranges assigned to each job group for purposes of the compliance evaluation.

Further, OFCCP has indicated that it will notify contractors, in writing, “whose records are subject to” a Freedom of Information Act request and that it will make “no decision to

disclose the information until contractors have an opportunity to submit objections to its release.”

Finally, with regard to confidential or sensitive information, OFCCP states that it “will not request information of sensitive nature from contractors or any other parties during the course of a compliance check.”

What Does This All Mean for Federal Construction Contractors?

With respect to small business federal construction contractors, OFCCP states that it will “minimize[] the impact of information collections on small businesses by exempting contractors with less than 50 employees from the requirement to create and maintain AAPs.”

For federal construction contractors that are not exempt from these potential changes, however, now may be a good time to start re-evaluating your compliance and record-keeping procedures related to AAPs. While OFCCP anticipates that the new compliance check approach will reduce the burden on federal construction contractors, contractors will likely need some time to adjust to the new protocols, especially as pertains to records described above and related programs.

Also, because OFCCP anticipates being able to conduct more compliance checks — approximately 500 annually — federal construction contractors may be subject to oversight more often, and it may make sense to update or modify existing AAP compliance regimes to accommodate the changing landscape.

OFCCP is soliciting comments relating to this proposal through June 11, 2019, before OMB conducts its final review of the request, which may result in additional changes to the compliance approach described above. Regardless, OFCCP’s recent action confirms that the DOL remains active in monitoring AAP compliance for federal construction contractors. Those contractors potentially affected by such compliance checks would be wise not to allow their internal compliance programs to grow stale.

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[1] The supporting statement for the request can be found at <https://www.buildsmartbradley.com/wp-content/uploads/sites/34/2019/04/OFCCP-2019-0001-0002-Statement.pdf>.

[2] 41 CFR Section 60-1.12(a) and (c).