

5 Steps For Gov't Contractor Affirmative Action Verification

By **Christopher Wilkinson and Joanna Colosimo** (June 7, 2024)

In 2022, the U.S. Department of Labor's Office of Federal Contract Compliance Programs, or OFCCP, kicked off its contractor verification system. This year marks the third year of the certification obligations, which grew out of a U.S. Government Accountability Office study that recommended the OFCCP improve its oversight of how contractors create and implement their affirmative action programs, or AAPs.[1]

The Trump administration formally proposed the verification system, and the Biden administration kept it on track through the Office of Management and Budget's approval process.

As the July 1 certification deadline approaches, contractors should keep five takeaways in mind.

1. Ensure the contractor meets the coverage and jurisdictional obligations.

Generally speaking, OFCCP jurisdiction may apply to any business or organization that:

- Holds a single federal contract, subcontract, or federally assisted construction contract in excess of \$10,000.00;
- Has federal contract or subcontracts with a combined total in excess of \$10,000.00 in any 12-month period; or
- Holds government bills of lading, serves as a depository of federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount.

The requirement to have a written AAP exists for federal contractors and subcontractors that are covered by the obligations in Executive Order No. 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act.

Executive Order No. 11246, titled "Equal Employment Opportunity," issued in 1965, requires covered federal contractors to forbid discrimination and engage in affirmative action in their workplaces during the performance of government contracts.

Section 503 of the Rehabilitation Act and the veterans' act extend those obligations to individuals with disabilities and covered veterans, respectively.

Dollar and employee-level thresholds apply. For EO No. 11246 and Section 503 of the Rehabilitation Act, written AAP obligations begin once the contractor has 50 or more employees and a contract of \$50,000 or more.

The Veterans' Readjustment Assistance Act obligations kick in at 50 employees, but the dollar threshold is \$150,000 or more.



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Most contractors will easily meet these dollar and employee thresholds. However, smaller contractors that occasionally contract with the government, or contractors with blanket purchase agreements that may not add up to the thresholds, should evaluate whether the coverage provisions apply before certifying in the portal.

2. Evaluate whether the type of contract is covered by the AAP requirements.

Various regulations define government contract and subcontract very broadly.

For example, EO No. 11246 implementing regulations define "government contract" as "any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services."

The "subcontractor" definition is similarly opaque as it covers agreements that are "necessary to the performance of any one or more contracts ... or under which any portion of the contractor obligation under any one or more contracts is performed, undertaken, or assumed." [2]

Most government grant vehicles are not covered. In addition, several regulatory exemptions apply, including those for indefinite quantities, subcontracts under the U.S. Department of Defense's Tricare health plan and contracts with religious entities. [3]

Moreover, construction contractors and subcontractors do not have to certify in the OFCCP contractor portal.

Deep analysis is often required to determine whether these ambiguous definitions and exemptions trigger coverage under the three laws enforced by the OFCCP.

For example, many U.S. Department of Energy agreements issued under the Inflation Reduction Act are unclear as to whether they are grant vehicles or covered contracts. Subcontracts can trigger the most questions, as some subcontracts may unintentionally include work on prime government contracts without the knowledge of a subcontractor and the agency generally takes an aggressive approach when asserting subcontractor liability.

Intentional or not, the regulations' coverage provisions are imported by operation of law into all covered subcontracts. As such, relying on or adding language in the prime contract that attempts to disclaim or limit coverage will not overcome the presumption of coverage. [4]

3. Certify with precision.

Some organizations could have subsidiaries that do not meet single-entity standards or OFCCP jurisdiction coverage. The OFCCP applies the following general factors derived from some case law when determining whether a separate business organization is a single entity for purposes of OFCCP jurisdiction:

- The entities have common ownership;
- The entities have common directors and/or officers;

- One entity has de facto day-to-day control over the other through policies, management or supervision;
- The personnel policies of the entities flow from a common or centralized source; and
- The operations of the entities are dependent on each other.[5]

The OFCCP's broad single-entity definition, as well as its guidance related to the portal, has the potential to rope in an employer's related companies that neither hold nor work on government contracts or subcontracts.

Indeed, the portal guidance emphasizes that a parent company assumes federal contractor status and obligations if a close relationship exists with an independent subsidiary who holds a contract.

Contractors should take care to certify for only those entities that hold government contracts and should analyze whether a single-entity argument could be made for related companies. This has recently gained significant importance because of the OFCCP's recent audit-scheduling practices.

In the past, OFCCP scheduling lists have been more accurate in matching supply and service contracts with the corporate entity holding the contract. However, we have observed that recent scheduling lists have been less precise, and have included employers that do not hold service and supply contracts. This makes it important to certify only for entities that have covered contracts and AAPs.

4. Certify strategically and timely.

It is prudent for contractors to certify in the portal as soon as possible, in alignment with their compliance initiatives. Contractors with AAP dates that expire before July 1 should consider certifying before the expiration date of their plan cycle to avoid the need for a tight turnaround in their AAPs.

Failing to certify has become very risky. The OFCCP has conducted significant outreach to contracting agencies to identify covered contractors, and has prioritized reviewing and auditing contractors that have not certified in the portal.

Relatedly, the agency has sought information related to subcontractors in its review of prime contractors to build out its list of subcontractors.

In prior audit scheduling methodologies, the OFCCP selected federal contractors and subcontractors that are required to maintain an AAP but did not complete the mandatory contractor-portal certification in the OFCCP contractor portal as of a certain deadline.[6]

As the government's prime motivation for the portal arises from its finding that contractors frequently failed to prepare plans until the agency schedules them for review. Failing to certify in the first place is not the right foot to start off on when facing an audit.

5. Certify with integrity.

During the certification and declaration process, contractors attest that the certification is

true and correct to the best of their knowledge and that they understand making false statements opens them to liability. So, what are contractors actually certifying?

Contractors have three choices:

1. That their entity has developed and maintained AAPs at each establishment or a functional affirmative action plan in alignment with Title 41 of the Code of Federal Regulations, Chapter 60;
2. That the entity has not developed or maintained AAPs when it should; or
3. That the entity became a covered contractor or subcontractor in the past 120 days, and they have not yet complied (but they will have 90 days from when they are required to comply at the 120-day mark to log into the portal and certify).

If an organization chooses option one and is certifying compliance, it is important that the organization truly is in compliance with all aspects of Title 41 of the Code of Federal Regulations Chapter 60,[7] including:

- It has written AAP materials and related statistics;
- It has posted required notices;
- Implemented procedures for required record retention;
- Implemented procedures in accordance with the Uniform Guidelines on Employee Selection Procedures;
- Incorporated the required EEO clauses into covered contracts and subcontracts;
- Met all other requirements.

The OFCCP did provide updated resources for contractors during this year's certification cycle, including minor clarifications and nonsubstantive updates to wording.

One FAQ addresses what to do when a contractor is no longer required to prepare AAPs. The new FAQ instructs contractors that have previously registered in the portal but no longer have AAP obligations to mark the parent company, and all establishments or functional business units, as "Closed."

Conclusion

With the deadline just a few weeks away, federal contractors and subcontractors should pay attention to these factors and ensure timely certification, aligning their compliance initiatives with certification requirements.

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[1] <https://www.gao.gov/products/gao-16-750>.

[2] 41 C.F.R Part § 60-1.3

[3] 41 C.F.R Part § 60-1.5

[4] U.S. v. New Orleans Public Serv. Inc., 553 F.2d 459, 469 (5th Cir. 1977) ("[W]here regulations apply and require the inclusion of a contract clause in every contract, the clause is incorporated into the contract, even if it has not been expressly included in a written contract or agreed to by the parties.")

[5] OFCCP v. Beverly Enterprises Inc., 130 F.Supp.2d 1 (U.S.D.C. 2000).

[6] <https://www.dol.gov/sites/dolgov/files/OFCCP/scheduling/files/SL23R1-SS-Methodology.pdf>.

[7] <https://www.ecfr.gov/current/title-41/subtitle-B/chapter-60>.