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OFCCP Signals More Rigorous Enforcement Landscape With Three Big Moves

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has taken three recent notable actions. Specifically, OFCCP (1) will require a contractor to submit a verification of an affirmative action plan (AAP); (2) has explained that compensation data submitted to the U.S. Equal Employment Opportunity Commission (EEOC) in 2019 may be used to identify contractors for compliance evaluations; and (3) released its 2021 list of audits of federal construction contractors.

After a quiet start at the outset of the Biden administration, these recent OFCCP actions signal a more rigorous enforcement landscape for federal contractors.

AAP Verification With the DOL

On August 31, 2021, the Office of Management and Budget (OMB), through the Office of Information and Regulatory Affairs (OIRA), [approved](#) OFCCP's Affirmative Action Program Verification Interface (AAP-VI). The verification program requires that federal contractors log into an OFCCP portal to certify that each covered contractor establishment has developed and maintains an affirmative action program (AAP). If OFCCP selects a contractor through its neutral selection process, contractors will submit their actual AAPs through the portal. Two user guides will govern the process ([Admin Guide](#); [Federal Contractor User Guide](#)). Notably, it remains the case that the government is not requiring federal contractors to submit AAPs until OFCCP requests the plans after the contractor has been selected for audit.

This initiative grew out of a Government Accountability Office (GAO) study which recommended that OFCCP improve its oversight of how contractors create and implement their AAPs. The Trump administration formally proposed the AAP-VI and the Biden administration has kept it on track through the OMB approval process. Covered federal contractors will have to log into a portal and affirm that they have prepared an affirmative action plan. The system will include a System for Award Management (SAM) declarations page where contractors will affirm that they have "developed and maintained affirmative action programs at each establishment, *as applicable*." For many, the "as applicable" language will be important as not all companies are covered. For example, companies are not covered because they may be grantees, the procurement contracts are below the regulatory employee/monetary thresholds, or may have operations that are separate and distinct from their federal contracts. We expect that this initiative will be effective by the end of this calendar year.

Use of EEO-1 Compensation Information

In 2019, contractors were required to submit their employee compensation information to the EEOC as part of their EEOC-1 submissions. This one-time requirement was the result of a winding road that passed through several regulatory and judicial reviews and revisions. During the data collection, the EEOC publicly stated that the data would have limited usefulness and OFCCP announced that it would not use the information for any

purposes. The Biden administration, however, rescinded that announcement in a September 2, 2021, federal register [notice](#). The OFCCP now states that the data "could help identify neutral criteria to select contractors for compliance evaluations." Further, the agency has stated that information may provide "insight into pay disparities across industries and occupations and strengthen Federal efforts to combat pay discrimination."

We note that the EEOC Component 2 wage data provides very little insight into an employer's compensation practices. The reports merely provided aggregated wage data in the nine EEO categories and do not account for any pay factors such as job title, pay grade, market, geography, or any other legitimate drivers of pay. OFCCP's desire to utilize this data in its selection procedures may result in targeting various contractors or industries. Indeed, tucked into footnote 11 of the federal register notice is OFCCP's statement that the data could be useful *for enforcement purposes*. OFCCP's notice is effective immediately with no comment period allowed.

OFCCP Federal Contractor Audit List

OFCCP [released](#) its 2021 list of federal construction contractors that OFCCP will audit during the next year or so. OFCCP utilizes a neutral selection system to identify and audit contractors. Reviews can be complex and far-ranging depending on the size of the project and the contractor. We expect that these reviews will become a larger focus in the new administration.

Conclusion and Recommendations

In total, these three actions signal a larger Biden administration effort to enhance its investigative and enforcement tools to review EEO compliance by federal contractors. We expect these tools will lead to longer and more rigorous government audits.

Given these government actions, we recommend the following:

- Federal contractors should ensure that they are creating and maintaining current AAPs to ensure compliance with the certification requirement once it takes effect.
- Contractors should be conducting pay equity audits to ensure that they are prepared for OFCCP's clear intent to focus on compensation practices in coming audits.
- Construction contractors should ensure that they are meeting their complex compliance obligations required by OFCCP's regulations.

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