BE PREPARED: OFCCP RELEASES THREE INITIATIVES IN THREE DAYS – AFFIRMATIVE ACTION VERIFICATION, TWO OTHER MAJOR ANNOUNCEMENTS

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Labor, Employment, and Workplace Safety Alert

OVERVIEW

Nearly nine months after a change in administration, the Office of Federal Contract Compliance Programs (OFCCP) has begun to set its course through a series of major initiatives announced within just a few days.

OFCCP, a federal agency within the U.S. Department of Labor, administers and enforces the nondiscrimination and affirmative action requirements of Executive Order No. 11246 (E.O. 11246), Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act, which are applicable to federal contractors and subcontractors that meet certain criteria.

All federal contractors and subcontractors subject to OFCCP's jurisdiction should be aware of the following developments: (1) OFCCP received final approval to require federal contractors and subcontractors to provide annual verification of their compliance with affirmative action program requirements, (2) OFCCP announced it will receive and analyze 2018 Component 2 pay data from the Equal Employment Opportunity Commission (EEOC) relating to federal contractors and subcontractors as part of its focus on pay equity, and (3) OFCCP is returning to traditional construction compliance reviews instead of the less extensive compliance checks.

Annual Certification and Electronic Affirmative Action Plan (AAP) Filing

On 31 August 2021, after much anticipation, the Office of Management and Budget (OMB) approved OFCCP's Affirmative Action Program Verification Initiative (AAVI) in essentially the same form as originally proposed. The OFCCP first launched its AAVI efforts in August 2018 by Directive 2018-07, AAVI in response to several criticisms outlined in a 2016 Government Accountability Office (GAO) report.

Although final concrete details regarding the AAVI process have yet to emerge, federal contractors and subcontractors can expect to log onto the AAVI portal annually to certify that they have developed and maintained AAPs for the year at each establishment or line of business by selecting one of following:

1. The entity has developed and maintained AAPs at each establishment, as applicable, or for each functional or business unit.
2. The entity has been a party to a qualifying federal contract or subcontract for 120 days or more and has not developed and maintained AAPs at each establishment, as applicable.

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3. The entity became a covered federal contractor or subcontractor within the past 120 days and therefore has not yet developed applicable AAPs.

According to program manuals, federal contractors can also expect to disclose their entire corporate structure, including any parent companies and all establishments. Collecting this information will likely lead to more parents and affiliates of federal contractors and subcontractors realizing their need to develop AAPs for each establishment, unless they have a separate facility exemption or can assert a defense that they are separate entities for OFCCP purposes.

Even collecting just the basic information outlined above will likely result in a significant increase in OFCCP's enforcement of basic AAP obligations. The GAO has estimated that a significant majority of federal contractors and subcontractors do not comply with AAP requirements, despite the risk of debarment and cancellation of federal contracts, consent decrees, conciliation agreements, and injunctive relief for failure to comply. However, AAVI is anticipated to be a catalyst for change, steering more federal contractors and subcontractors toward compliance. Likewise, it will provide OFCCP with a wealth of information that could be used in scheduling contractors for audits, such as facilitating a focus on contractors that either do not register for AAVI or register but certify noncompliance (both of which may also lead to a show cause notice from the agency).

Further, OFCCP also made clear that contractors scheduled for audits will use the AAVI interface to upload their AAPs when scheduled for an audit. More information is “Coming Soon” at the OFCCP's AAVI landing page, which remains unchanged since its creation in March 2021.

While OFCCP has not announced an official deadline for verification, federal contractors and subcontractors should prepare to verify compliance through the AAVI interface for each establishment or line of business with AAP requirements at some point in the coming months. OFCCP's most recent publication filed with OMB injects some ambiguity into the timeline, but it clearly states that federal contractors and subcontractors “will have at least 90 days to comply with the certification requirement once it takes effect.” The OFCCP has also indicated that it will send an email invitation to all federal contractors and subcontractors for which it has contact information and post a notice on its website about the annual certification and AAP submission requirements. The notice will contain AAP registration instructions for federal contractors and subcontractors.

K&L Gates will provide more information as it becomes available from the agency. Craig Leen, former OFCCP director, has previously presented a webinar describing the AAVI program, available here. Mr. Leen will be hosting another webinar next Friday, 10 September, to discuss AAVI in further detail.

Pay Data Collection

On 2 September 2021, OFCCP published its Rescission of Notice of Intention Not To Request, Accept or Use Employer Information Report (EEO-1) Component 2 Data, 25 November 2019. The rescinded 2019 notice indicated that OFCCP would not request, accept, or use EEO-1 Component 2 data because the agency believed the data's aggregated nature would not prove useful in its administration and enforcement of E.O. 11246. OFCCP now plans to analyze previously collected Component 2 data, derive available insights into pay disparities across industries and occupations, and reassess the data's utility in advancing the OFCCP's goal of combating pay discrimination.

While both OFCCP and the EEOC have legal authority to collect EEO-1 data, the EEOC first conceptualized EEO-1 Component 2 data in 2016 as a new collection of summary compensation data. There was resistance to

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the initiative, including a stay issued by the OMB less than a year after its introduction, along with litigation. The EEOC discontinued collecting Component 2 data after 2019, but last year it announced plans to evaluate the 2017 and 2018 Component 2 data that it collected in 2019 to assess the data's utility in comparing similarly situated employees as required pursuant to Title VII standards. Accordingly, no Component 2 data is required on the EEO-1 forms for 2019 and 2020, both of which are due on 25 October 2021 (much later than usual, due to delays precipitated by the COVID-19 pandemic).

Whether the EEOC plans to reinstate Component 2 data collection in 2021 and beyond remains unclear. However, in light of OFCCP's latest notice, if and when compensation data is collected again, any such pay data received could be subject to Freedom of Information Act (FOIA) requests. Federal contractors should be cognizant of this possibility, as well as their ability to invoke Exemption 4 of FOIA in response to protect data submitted as part of Component 2.

More information is available on the EEOC's EEO-1 Data Collections landing page.

Corporate Scheduling Announcement List (CSAL) Construction Scheduling List

On 1 September 2021, following its publication of the FY 2021 CSAL Supply & Services Scheduling List earlier this summer, OFCCP published its FY 2021 CSAL Construction Scheduling List for federal construction contractors and subcontractors. OFCCP returned to scheduling only full construction compliance reviews in the new list after scheduling only construction compliance checks (which are not as extensive as compliance reviews) in the FY 2020 Construction Scheduling List.

In accordance with its usual practice, the OFCCP also published the methodology for developing the CSAL for construction contractors and subcontractors. Presumably, OFCCP will follow the steps and procedures outlined in the Construction Contractors Technical Assistance Guide released in October 2019.

FAQs

Q. Does AAVI apply to both federal contractors and subcontractors?

A. Yes, as it has been presented to OMB, both federal contractors and subcontractors that meet OFCCP's jurisdictional thresholds would have to register and certify under AAVI. It is possible that, as a matter of discretion, the agency could change this in some way, but further guidance will be needed. For now, contractors and subcontractors should prepare as if they will have to certify.

Q. I am a federal contractor or subcontractor. When do I need to register and certify compliance through AAVI?

A. The AAVI interface is not up and running yet, so there is no ability to register and certify as of the date of publication of this alert. According to documents submitted to OMB, there will be at least a 90-day period for contractors and subcontractors to register and certify once AAVI becomes effective. It is unclear whether AAVI is effective now (based on OMB approval) or will become effective after a certain time. More guidance from OFCCP is expected. For now, in an abundance of caution, contractors and subcontractors should assume that the time period could be as short as 90 days from the approval date (31 August 2021), although the time period will likely be longer.

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Q. Do affiliates of a federal contractor or subcontractor have to certify as well?

A. The federal contractor or subcontractor has to inform OFCCP of its corporate structure when it registers for AAVI, including its parent and all establishments. OFCCP takes a broad view of whether a parent and affiliates are considered a single entity with a federal contractor, applying the following test: Single Entity Test FAQs.

Q. What is the penalty for not registering and certifying?

A. The failure to comply with OFCCP regulations, including relating to having an affirmative action program when one is required, can lead to debarment and cancellation of federal contracts, enforcement actions, and injunctive and make whole monetary relief. The mere failure to register and certify may not by itself lead to these consequences, but it will likely lead to OFCCP following up with the federal contractor or subcontractor, potentially through scheduling a review or issuing show cause notice that could lead to such consequences.

Q. Does OFCCP's Federal Register notice mean that the EEOC will be collecting Component 2 compensation data again as part of the EEO-1 reporting process?

A. No, not as of now. The OFCCP notice means that OFCCP will be receiving and looking at 2018 Component 2 data submitted as part of the 2018 EEO-1 reporting process. There is no Component 2 compensation data required in the 2019 and 2020 EEO-1 reporting process. It is possible the EEOC and OFCCP may seek to change this in a future EEO-1 reporting process, but that would first need to go through notice and comment as part of the information collection process under the Paperwork Reduction Act.

Q. If a contractor or subcontractor is listed on a CSAL, how long does that entity have until it is scheduled for an audit?

A. OFCCP commits to providing at least 45 days from the date a CSAL is issued before any entity on the CSAL is scheduled for an audit. Once an entity is then scheduled, which can be any time after the 45-day period, the scheduling letter provides 30 additional days to respond and provide the requested information, with the possibility of extension in certain circumstances as well. See also:

- Corporate Scheduling Announcement List (CSAL) Frequently Asked Questions
- Scheduling Letter and Itemized Listing Frequently Asked Questions

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