

2021 OFCCP Developments

What Federal Contractors Need to Know for 2022



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Today's Agenda

- Recently issued Executive Orders
- Review of 2021 OFCCP Directives/Notices
- OFCCP activity in 2021
- Upcoming Developments
- AAP Areas to Focus On
- What to Expect from the OFCCP in 2022



Recently Issued Executive Orders and Reminders on Older Regulations

EO No.	Title	Effective Date	Comments
13658	Establishing a Minimum Wage for Contractors <ul style="list-style-type: none"> <i>Min. wage increases to \$11.25 and tipped employees min. cash wage of \$7.90, <u>eff. 1/1/2022</u></i> 	Contracts entered into/modified on or after 1/1/2015	<i>Applies only to certain types of federal government contracts; superseded 1/30/2022 by EO 14026 to extent inconsistent with 14026</i>
14026	Increasing the Minimum Wage for Federal Contractors <ul style="list-style-type: none"> <i>Min. wage increases to \$15.00 and tipped employees min. cash wage of \$10.50, <u>eff. 1/30/2022</u></i> <i><u>Eff. 1/1/2023</u>, annual increases based on inflation determined by DOL</i> 	Contracts entered into/extended on or after 1/30/2022	<i>Applies only to certain types of federal government contracts</i>
14042	Ensuring Adequate COVID Safety Protocols for Federal Contractors <ul style="list-style-type: none"> <i>Mandates vaccine, no testing option</i> <i>Must consider medical exemptions/delays religious</i> 	Contracts entered into on or after 11/14/2021 Pre-10/15/2021 contracts when	<i>Implementation by January 4, 2022 (delay per recent OSHA rule); only certain types of</i>

E.O. 14026 Increasing the Minimum Wage for Federal Contractors

- Covered contracts entered into or modified on or after 1/30/2022*:
 - Procurement contracts for construction, Davis-Bacon Act (DBA)
 - Service contracts, Service Contract Act (SCA)
 - Concessions contracts
 - Services provided on federal property or lands

**Contracts that result from a solicitation issued pre-1/30/2022 entered into on or between 1/30/2022 and 3/30/2022 not covered until extended, renewed or option exercised*
- Not Covered:
 - Grants
 - Contracts or agreements with Indian Tribes
 - Procurement contracts for construction, non-DBA
 - Service contracts, exempt from SCA
 - Contracts for the manufacturing or furnishing of materials, supplies, articles, or equipment
 - Employees exempt from FLSA minimum wage requirements
- Flow-down clause required in covered lower tier contracts

E.O. 14042 COVID Safety Protocols (Federal Contractor Vaccine Mandate)

Covered Contracts and Subcontracts

- Services, construction, real property leases
- Services covered under the SCA
- Concessions
- Services for federal employees, their dependents, or the general public in connection with federal property or lands

Entered into during certain dates

- Entered into after November 14 for solicitations issued before October 14
- Contracts on new solicitations issued on or after October 15
- Extensions or renewals of contracts awarded on or after October 15
- Options on existing contracts and orders exercised on or after October 15

CONTRACTS EXCLUDED Federal grants, Contracts with Indian Tribes, Employees working outside of the U.S., Contracts equal or less than the simplified acquisition threshold (presently \$250,000), Subcontracts solely for the provision of products



E.O. 14042 New FAR Clause: FAR 52.223-99

Contractors must comply with Task Force Guidance, including FAQ

- “Task Force Guidance” is not fixed; contractors must follow “all guidance . . . as amended during the performance of this contract . . .”
- <https://www.saferfederalworkforce.gov/faq/contractors/>

Mandatory flowdown to subcontractors above simplified acquisition threshold

Clause currently is in effect for solicitations through “class deviations”

- Agencies are seeking to include the FAR clause in all contracts, regardless of size
- Read your procurement agency’s class deviation letter (37 federal agencies have issued):
<https://www.acquisition.gov/content/caac-letters>



E.O. 14042 Key Requirements

Deadline for Completion of Primary Vaccination or Approved Exemption

- January 4, 2022 or first day of performance on a newly awarded contract
- Primary vaccination is 1 dose of single dose vaccine or final dose of multi-dose vaccine
- Full vaccination status 2 weeks later (January 18, 2022)

Covered employees

- Full-time, part-time, temporary, remote
- Who work on or in connection with a covered contract
- Includes employees who provide support (HR, legal, accounting, billing, etc.)
- Those in same workplace



E.O. 14042 Key Vaccination Requirements

Must require proof

- Specific documentation required

No testing alternative

- Although testing could be condition of an accommodation

Must consider “legally required accommodations”

- Disability (medical) and Religion



E.O. 14042 Other Key Requirements

Mandatory protocols for masking and social distancing

- Required to follow CDC guidance - that may vary with the level of community spread
- Need to check CDC tracker on community spread

Must designate a person or persons to coordinate COVID-19 workplace safety efforts

- Specific responsibilities for administration, including to visitors

Recently Issued Executive Orders and Reminders on Older Regulations

EO No.	Title	Effective Date	Comments
14055	Nondisplacement of Qualified Workers Under Service Contracts (reinstates EO 13495) <ul style="list-style-type: none"> <i>Requires federal contractors/subcontractors to offer employment to service employees from predecessor contracts whose employment might be terminated</i> 	Solicitations issued on or after eff. date of final regs issued by FAR Council	US DOL to issue final regulations within 180 days of EO (EO issued 11/18/2021), FAR Council to issue FAR provision 60 days later
n/a	National Defense Authorization Act - Fair Chance Act <ul style="list-style-type: none"> <i>Prohibits federal contractors from inquiring about job applicant's criminal background in hiring process until after conditional job offer made</i> 	Contracts awarded on solicitations on or after 12/20/2021	
13985	Advancing Racial Equity and Support for Underserved Communities Through the Federal Government <ul style="list-style-type: none"> <i>Rescinded EO 13950 Combating Race and Sex Stereotyping which prohibited contractors from providing certain workplace diversity training and programs</i> 	1/20/2021 for rescission	
13988	Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation <ul style="list-style-type: none"> <i>Requires federal agencies to review orders, regulations, guidance, policies and other actions to identify those that are inconsistent with policies prohibiting discrimination on the basis of gender identity or sexual orientation and develop a plan to rescind, revise or otherwise</i> 	Effective immediately (1/20/2021) with plan developed within 100 days	

National Defense Authorization Act - Fair Chance Act

- Prohibits federal contractors from inquiring about job applicant's criminal history in hiring process until ***after conditional job offer made***
 - For job openings related to federal contract work
 - "Conditional offer" is an offer of employment for a position related to work under a contract that is conditioned upon the results of a criminal history inquiry
 - "Criminal history record information" means arrests, indictments, information, or other formal criminal charges, and any disposition arising therefrom, sentencing, correction supervision, and release
- Certain positions excepted from the prohibition
 - access to classified information
 - sensitive law enforcement or national security duties
 - law requires consideration of criminal history BEFORE offer is made
 - others to be added in regulations
- Regulations were to be issued by April 2021 (yet to be issued)



2021 OFCCP Directives/Notices



- Directives: None issued during 2021
- Notices: Required use of 2014-2018 Census EEO Tabulation in AAPs commencing on or after January 1, 2022
- Regulatory changes expected to earlier regulations regarding FOIA, Pre-determination rules (PDN), and religious exemptions
 - Federal Register notice (November 9, 2021) of proposal to rescind religious organization exemptions regulations which were effective January 8, 2021. Comments are due by December 9, 2021.
 - This will return OFCCP to addressing exemptions on a case by case basis as they were in the Bush and Obama administrations

OFCCP 2021 Activity



- OFCCP Director Jenny Yang appointed on January 20, 2021 and has been in office over 10 months
- Compliance Reviews (audits) still down
 - 1,125 reported closed for most recent year, Fiscal Year 2021 (10/1/2020 to 9/30/2021)
 - Includes 135 Conciliation Agreements (violations)
 - 1,318 reported closed for Fiscal Year 2020 (10/1/2019 to 9/30/2020)
- Continues to be way below OFCCP past performance many years ago at 4,000 to 5,000 reviews annually

OFCCP 2021 Activity: Current and Future Audits

OFCCP typically issues two Corporate Scheduling Announcement List (CSAL) annually of contractor establishments to be audited

September 2020: Two CSALs issued with 2,450 contractors (later reduced to these 700)

- 402 establishment reviews for EO 11246 (Minorities, Women), Section 503 (IWD) and VEVRAA (Veterans)
- 67 Corporate Management reviews (CMCE)
- 31 Functional AAP (FAAP) reviews
- 200 construction contractor reviews (on 2nd and separate list)

March 2021: These 1,750 reviews removed from Sept 2020 CSAL

- 500 Compliance check reviews
- 250 Focused reviews for Section 503 AAPs (IWD)
- 500 Accommodation reviews (new type of review)
- 500 Promotion reviews (new type of review)

July 2021: CSAL issued with 750 service and supply contractors

- 668 establishment reviews, 57 FAAPs, 10 CMCE and 6 universities

September 2021: CSAL issued with 400 federal construction contractors and federally assisted contractors listed



OFCCP 2021 Activity: Observations on Compliance Reviews

- OFCCP moving away from shorter reviews such as compliance checks and focused reviews
 - March 2021 OFCCP cancelled 1,750 focused reviews, compliance checks, etc.
- OFCCP spending more time on full-blown and deeper dive reviews
- OFCCP issuing more requests for data, documents and interviews
- OFCCP still relying on virtual onsite conducted by telephone
- With current OFCCP headcount, there are limits as to how many reviews can be initiated and completed
 - New budget developments may impact this area



OFCCP 2021 Activity: Financial Settlements

FY 2021 \$26.4 million v. FY 2020 \$35.6 million

Some significant settlements in FY 2021:

Hiring

- Google \$1.2 million (total \$3.8 million) - Asian, females
- Regus \$900,000 - African Americans, males
- RMS Engineering (Lockheed Martin) \$700,000 - Asians, African Americans, Hispanics

Compensation

- JP Morgan Chase \$9.8 million - females
- Google \$2.6 million (total \$3.8 million) - females
- Hewlett Packard \$1.4 million - females



Upcoming Developments 2022 Budget Request

OFCCP FY 2022 budget request for 33% increase (\$140 million up from \$104 million)

- Historically flat budget has led to frontline staffing declines
- OFCCP seeking to hire approximately 183 additional staff
- Increased staff will enable increased number and thoroughness of compliance reviews
- Senate and House appear supportive of the budget increase
- OFCCP seen as key enforcement agency for current administration's policies, including review for systemic pay discrimination



Upcoming Developments Required use of 2014-2018 EEO Tabulation

For AAPs (minorities, women) commencing/updated on or after January 1, 2022, Availability Analysis must use the 2014-2018 Census Equal Employment Opportunity (EEO) Tabulation

- This data estimates the availability of women and minorities in external labor markets (commonly referred to as Availability Analysis Factor 1)
- Availability Analysis estimates whether goals must be established for women and minorities
- More about the 2014-2018 EEO Tabulation
 - Latest Census occupational data for AAPs
 - Supersedes and replaces 2006-2010 EEO Tabulation
 - Released by the U.S. Census Bureau March 2021
 - Based on ongoing American Community Survey 2014 to 2018 (not on 2020 decennial census)
 - Special Census product for EEO and AAP use funded by key federal agencies (EEOC, OFCCP, DOJ and OPM)



Upcoming Developments Required use of 2014-2018 EEO Tabulation

Changes from 2010 EEO Tabulation

- 237 Census detailed occupation categories decreased from 488 (see samples following)
- Geographical areas: US, States, Core Based Statistical Areas (CBSA), Counties/County Sets, Places
 - CBSAs (micro and metropolitan areas) based on September 2018 definitions
 - Some CBSAs and Places data not reported due to confidentiality restrictions. County sets can be used instead.
 - For example, in a key tabulation for detailed occupation based on residence, data for 60 CBSAs not available.
- 7 race categories decreased from 15
 - Eliminated reporting Hispanic by race categories (e.g. White Hispanic) by reporting all Hispanics together and reporting race without Hispanics
 - (1) Hispanic/Latino, (2) White not Hispanic/Latino, (3) Black/Afr Am not Hispanic/Latino...(7) Balance not Hispanic/Latino
- 20 industries decreased from 91



Upcoming Developments

Sample Census Occupation Categories

4	2006-2010 EEO Custom Tabulation Occupation Code List	2014-2018 EEO Custom Tabulation Occupation Direct Match Code
7	Chief executives and legislators (0010) SOC 11-10XX	Top executives (0010) SOC 11-1000
8	General and operations managers (0020) SOC 11-1021	
9	Advertising and promotions managers (0040) SOC 11-2011	Advertising, marketing, promotions, public relations, and sales managers (0040) SOC 11-2000
10	Marketing and sales managers (0050) SOC 11-2020	
11	Public relations and fundraising managers (0060) SOC 11-2031	
12	Administrative services managers (0100) SOC 11-3011	Administrative services and facilities managers (0101) SOC 11-3010
13	Computer and information systems managers (0110) SOC 11-3021	Computer and information systems managers (0110) SOC 11-3021
14	Financial managers (0120) SOC 11-3031	Financial managers (0120) SOC 11-3031
15	Compensation and benefits managers (0135) SOC 11-3111	Compensation and benefits managers (0135) SOC 11-3111
16	Human resources managers (0136) SOC 11-3121	Human resources managers (0136) SOC 11-3121
17	Training and development managers (0137) SOC 11-3131	Training and development managers (0137) SOC 11-3131
18	Industrial production managers (0140) SOC 11-3051	Industrial production managers (0140) SOC 11-3051
19	Purchasing managers (0150) SOC 11-3061	Purchasing managers (0150) SOC 11-3061
20	Transportation, storage, and distribution managers (0160) SOC 11-3071	Transportation, storage, and distribution managers (0160) SOC 11-3071
21	Farmers, ranchers, and other agricultural managers (0205) SOC 11-9013	Farmers, ranchers, and other agricultural managers (0205) SOC 11-9013
22	Construction managers (0220) SOC 11-9021	Construction managers (0220) SOC 11-9021
23	Education administrators (0230) SOC 11-9030	Education and childcare administrators (0230) SOC 11-9030
24	Architectural and engineering managers (0300) SOC 11-9041	Architectural and engineering managers (0300) SOC 11-9041
25	Food service managers (0310) SOC 11-9051	Food service managers (0310) SOC 11-9051
26	Gaming managers (0330) SOC 11-9071	Entertainment and recreation managers (0335) SOC 11-9070
27	Lodging managers (0340) SOC 11-9081	Lodging managers (0340) SOC 11-9081
28	Medical and health services managers (0350) SOC 11-9111	Medical and health services managers (0350) SOC 11-9111
29	Natural sciences managers (0360) SOC 11-9121	Natural sciences managers (0360) SOC 11-9121
30	Property, real estate, and community association managers (0410) SOC	Property, real estate, and community association managers (0410) SOC
31	Social and community service managers (0420) SOC 11-9151	Social and community service managers (0420) SOC 11-9151
32	Emergency management directors (0425) SOC 11-9161	Emergency management directors (0425) SOC 11-9161

Upcoming Developments

Sample Census Occupation Categories

4	2006-2010 EEO Custom Tabulation Occupation Code List	2014-2018 EEO Custom Tabulation Occupation Direct Match Code
41	Human resources workers (0630) SOC 13-1070	Human resources workers (0630) SOC 13-1070
42	Compensation, benefits, and job analysis specialists (0640) SOC 13-1141	Compensation, benefits, and job analysis specialists (0640) SOC 13-1141
43	Training and development specialists (0650) SOC 13-1151	Training and development specialists (0650) SOC 13-1151
44	Logisticians (0700) SOC 13-1081	Logisticians (0700) SOC 13-1081
45	Management analysts (0710) SOC 13-1111	Management analysts (0710) SOC 13-1111
46	Meeting, convention, and event planners (0725) SOC 13-1121	Meeting, convention, and event planners (0725) SOC 13-1121
47	Fundraisers (0726) SOC 13-1131	Fundraisers (0726) SOC 13-1131
48	Market research analysts and marketing specialists (0735) SOC 13-1161	Market research analysts and marketing specialists (0735) SOC 13-1161
49	Business operations specialists, all other (0740) SOC 13-1199	X
50	Accountants and auditors (0800) SOC 13-2011	Accountants and auditors (0800) SOC 13-2011
51	Budget analysts (0820) SOC 13-2031	Budget analysts (0820) SOC 13-2031
52	Credit analysts (0830) SOC 13-2041	Credit analysts (0830) SOC 13-2041
53	Financial analysts (0840) SOC 13-2051	X
54	Tax examiners and collectors, and revenue agents (0930) SOC 13-2081	Tax examiners and collectors, and revenue agents (0930) SOC 13-2081
55	Appraisers and assessors of real estate (0810) SOC 13-2021	Other financial specialists (0810) 13-20XX
56	Personal financial advisors (0850) SOC 13-2052	
57	Insurance underwriters (0860) SOC 13-2053	
58	Financial examiners (0900) SOC 13-2061	
59	Credit counselors and loan officers (0910) SOC 13-2070	
60	Tax preparers (0940) SOC 13-2082	
61	Financial specialists, all other (0950) SOC 13-2099	
62		
63	Computer and information research scientists (1005) SOC 15-1111	Computer and information research scientists and analysts (1005) SOC 15-12XX
64	Computer systems analysts (1006) SOC 15-1121	
65	Information security analysts (1007) SOC 15-1122	
66	Computer programmers (1010) SOC 15-1131	Software and web developers, programmers, and testers (1010) SOC 15-1250
67	Software developers, applications and systems software (1020) SOC 15-113X	
68	Web developers (1030) SOC 15-1134	
69	Computer support specialists (1050) SOC 15-1150	Other computer occupations (1050) SOC 15-12YY
70	Database administrators (1060) SOC 15-1141	Database and network administrators and architects (1065) SOC 15-1240
71	Network and computer systems administrators (1105) SOC 15-1142	
72	Computer network architects (1106) 15-1143	
73	Computer occupations, all other (1107) 15-1199	X

Upcoming Developments

Sample Census Occupation Categories

4	2006-2010 EEO Custom Tabulation Occupation Code List	2014-2018 EEO Custom Tabulation Occupation Direct Match Code
273	First-line supervisors of office and administrative support workers (5000) SOC 43-101	First-line supervisors of office and administrative support workers (5000) SOC 43-101
274	Switchboard operators, including answering service (5010) SOC 43-2011	Communications equipment operators (5010) SOC 43-2000
275	Telephone operators (5020) SOC 43-2021	
276	Communications equipment operators, all other (5030) SOC 43-2099	
277	Bill and account collectors (5100) SOC 43-3011	Financial clerks except bookkeeping, accounting, and auditing clerks (5100) SOC 43-3000
278	Billing and posting clerks (5110) SOC 43-3021	
279	Payroll and timekeeping clerks (5140) SOC 43-3051	
280	Procurement clerks (5150) SOC 43-3061	
281	Tellers (5160) SOC 43-3071	
282	Gaming cage workers (5130) SOC 43-3041	
283	Financial clerks, all other (5165) SOC 43-3099	
284	Bookkeeping, accounting, and auditing clerks (5120) SOC 43-3031	Bookkeeping, accounting, and auditing clerks (5120) SOC 43-3031
285	Court, municipal, and license clerks (5220) SOC 43-4031	Information and record clerks, except customer service representatives (5200) SOC 43-4000
286	Credit authorizers, checkers, and clerks (5230) SOC 43-4041	
287	Eligibility interviewers, government programs (5250) SOC 43-4061	
288	File clerks (5260) SOC 43-4071	
289	Hotel, motel, and resort desk clerks (5300) SOC 43-4081	
290	Interviewers, except eligibility and loan (5310) SOC 43-4111	
291	Library assistants, clerical (5320) SOC 43-4121	
292	Loan interviewers and clerks (5330) SOC 43-4131	
293	New accounts clerks (5340) SOC 43-4141	
294	Correspondence clerks and order clerks (5350) SOC 43-4150	
295	Human resources assistants, except payroll and timekeeping (5360) SOC 43-4161	
296	Receptionists and information clerks (5400) SOC 43-4171	
297	Reservation and transportation ticket agents and travel clerks (5410) SOC 43-4181	
298	Brokerage clerks (5200) SOC 43-4011	
299	Information and record clerks, all other (5420) SOC 43-4199	
300	Customer service representatives (5240) SOC 43-4051	Customer service representatives (5240) SOC 43-4051
301	Cargo and freight agents (5500) SOC 43-5011	Material recording, scheduling, dispatching, and distributing workers (5500) SOC 43-5000
302	Couriers and messengers (5510) SOC 43-5021	
303	Dispatchers (5520) SOC 43-5030	
304	Production, planning, and expediting clerks (5600) SOC 43-5061	
305	Shipping, receiving, and traffic clerks (5610) SOC 43-5071	
306	Weighers, measurers, checkers, and samplers, recordkeeping (5630) SOC 43-5111	

Upcoming Developments

Sample Census Occupation Categories

4	2006-2010 EEO Custom Tabulation Occupation Code List	2014-2018 EEO Custom Tabulation Occupation Direct Match Code
367	First-line supervisors of mechanics, installers, and repairers (7000) SOC 49-1011	First-line supervisors of mechanics, installers, and repairers (7000) SOC 4
368	Aircraft mechanics and service technicians (7140) SOC 49-3011	
369	Automotive body and related repairers (7150) SOC 49-3021	
370	Automotive glass installers and repairers (7160) SOC 49-3022	
371	Automotive service technicians and mechanics (7200) SOC 49-3023	
372	Bus and truck mechanics and diesel engine specialists (7210) SOC 49-3031	Vehicle and mobile equipment mechanics, installers, and repairers (714
373	Heavy vehicle and mobile equipment service technicians and mechanics (7220) SOC 4	
374	Small engine mechanics (7240) SOC 49-3050	
375	Miscellaneous vehicle and mobile equipment mechanics, installers, and repairers (
376	Computer, automated teller, and office machine repairers (7010) SOC 49-2011	
377	Radio and telecommunications equipment installers and repairers (7020) SOC 49-202	
378	Avionics technicians (7030) SOC 49-2091	
379	Electric motor, power tool, and related repairers (7040) SOC 49-2092	
380	Electrical and electronics repairers, transportation equipment, and industrial and ut	
381	Electronic equipment installers and repairers, motor vehicles (7110) SOC 49-2096	
382	Electronic home entertainment equipment installers and repairers (7120) SOC 49-209	
383	Security and fire alarm systems installers (7130) SOC 49-2098	
384	Control and valve installers and repairers (7300) SOC 49-9010	
385	Heating, air conditioning, and refrigeration mechanics and installers (7315) SOC 49-9	
386	Home appliance repairers (7320) SOC 49-9031	
387	Industrial and refractory machinery mechanics (7330) SOC 49-904X	
388	Maintenance and repair workers, general (7340) SOC 49-9071	Other installation, maintenance, and repair workers (7010) SOC 49-XXXX
389	Maintenance workers, machinery (7350) SOC 49-9043	
390	Millwrights (7360) SOC 49-9044	
391	Electrical power-line installers and repairers (7410) SOC 49-9051	
392	Telecommunications line installers and repairers (7420) SOC 49-9052	
393	Precision instrument and equipment repairers (7430) SOC 49-9060	
394	Coin, vending, and amusement machine servicers and repairers (7510) SOC 49-9091	
395	Locksmiths and safe repairers (7540) SOC 49-9094	
396	Manufactured building and mobile home installers (7550) SOC 49-9095	
397	Riggers (7560) SOC 49-9096	
398	Helpers--installation, maintenance, and repair workers (7610) SOC 49-9098	
399	Other installation, maintenance, and repair workers, including wind turbine service	
400		
401	First-line supervisors of production and operating workers (7700) SOC 51-1011	First-line supervisors of production and operating workers (7700) SOC 51-
402	Electrical, electronics, and electromechanical assemblers (7720) SOC 51-2020	Electrical, electronics, and electromechanical assemblers (7720) SOC 51-
403	Engine and other machine assemblers (7730) SOC 51-2031	Engine and other machine assemblers (7730) SOC 51-2031
404	Structural metal fabricators and fitters (7740) SOC 51-2041	Structural metal fabricators and fitters (7740) SOC 51-2041

Upcoming Developments Required use of 2014-2018 EEO Tabulation

What will be the impact on AAP goals?

- It depends
- Based on general trends, there is greater representation of women and minorities but this will vary by occupation and geography
- If organization reflects general trends and has increased representation of women and minorities, it may or may not impact goals to be established



For more information about the 2014-2018 EEO Tabulation

www.census.gov/topics/employment/equal-employment-opportunity-tabulation.html

Upcoming Developments AAP Verification Interface (AAP VI)

- OFCCP had received approval and clearance from OMB on August 31, 2021 to require contractors and subcontractors to register and to certify AAP compliance
 - Known as the AAP Verification Interface (AAP VI)
- On December 2, 2021 OFCCP announced the initial details about the “Contractor Portal” which is the implementation of the AAP Verification Interface (AAP VI)
- Key dates for Federal contractors and subcontractors
 - Register on the Contractor Portal starting **February 1, 2022**
 - Certify AAP compliance during the three month period **March 31 to June 30, 2022**
 - Deadline for AAP certification is **June 30, 2022**
- Certification initially applies only to service and supply contractors and subcontractors. Expect construction contractors to be added later.
- OFCCP released some initial resources to assist filers including a timeline and FAQs which can be viewed at the AAP VI website
 - https://www.dol.gov/agencies/ofccp/contractorportal?utm_medium=email&utm_source=govdelivery



Upcoming Developments AAP Verification Interface (AAP VI)

- Known details about contractor/subcontractor AAP certification
 - Required for all establishments (EEO-1 reported establishments) each year
 - Required on establishment by establishment basis (not just as one global entity)
 - Based on preliminary documents, it appears that the contractor/subcontractor must certify by selecting one of the following statements:
 - *It has developed and maintained affirmative action programs at each establishment, as applicable. See 41 CFR Chapter 60.*
 - *It has been a party to a qualifying federal contract or subcontract for 120 days or more and has not developed and maintained applicable affirmative action programs at each establishment, as applicable. See 41 CFR Chapter 60.*
 - *It became a covered federal contractor or subcontractor within the past 120 days and therefore has not yet developed applicable affirmative action programs. See 41 CFR Chapter 60.*
 - Again based on preliminary documents, they must agree to the following additional certification:

I also understand that I will not be able to edit my Affirmative Action Plan after I click the submit button.





Polling Question

- Which of the following accurately describes your organization:
 - *Our company has developed and maintained affirmative action programs at each of its establishments in accordance with all applicable affirmative action regulations.*
 - *Our company has been a party to a qualifying federal contract or subcontract for 120 days or more and has not developed and maintained applicable affirmative action programs at each of its establishments in accordance with all applicable affirmative action regulations.*
 - *Our company became a covered federal contractor or subcontractor within the past 120 days and we have not yet developed applicable affirmative action programs.*
 - *I do not know whether our company has developed and maintained affirmative action programs at each of its establishments in accordance with all affirmative action regulations.*

Upcoming Developments AAP Verification Interface (AAP VI)



- OFCCP has provided a generous lead time before certification deadline of June 30, 2022 after effectively promising at least 90 days
- Questions exist as to legality of requiring certification as well as agreement to refrain from AAP edits following certification
 - Regulations cited by the OFCCP as to its authority are not compelling
 - What does a contractor do?
 - Certify even though significant concern about legality and in some cases admit to OFCCP it is a covered contractor or subcontractor? Especially issue for subcontractors
 - Not certify and face higher risk of being audited (if selected for audit may have cause to challenge legality of selection and certification)
- OFCCP also expected to expand portal capabilities to require contractors to submit AAP documents for compliance reviews using portal (again issues on regulatory authority exist)
 - OFCCP will need to modify scheduling letters to require submission through portal
 - There has been speculation that OFCCP will move to require AAPs to be submitted annually (again issues on regulatory authority and much further down the road)

AAP Areas to Focus On: Compensation

- OFCCP still focusing on compensation during reviews especially with shift to comprehensive compliance reviews
- Several large financial settlements in FY 2021 but still relatively few compensation cases and few affected individuals despite all of the reviews completed
- When litigating, OFCCP does not have a good track record with regard to compensation issues
- Under new Director, Jenny Yang, the OFCCP expected to step up efforts in investigating compensation



AAP Areas to Focus On: Compensation *(cont.)*

EEO-1 2018/2017 Component 2 Pay Data

- OFCCP has reversed its earlier position and it appears will in fact be making use of EEO-1 Component 2 pay data as submitted by employer
- Some states are suing to get access to the Component 2 pay data submitted by employers
- EEOC likely to revive the Component 2 pay data collection (once a majority of Democrat appointees are seated)



AAP Areas to Focus On: Compensation *(cont.)*



Should you undertake a compensation analysis?

- Regulations don't explicitly require a formal analysis, but do require a review of compensation which could be review of process and policies
- Analysis can provide insight into what OFCCP will observe in a compliance review (although OFCCP analysis tends to manipulate and aggregate data in many ways not followed by mainstream analysis)

AAP Areas to Focus On: Compensation *(cont.)*

Should you undertake a compensation analysis?

- Some Considerations
 - Conduct under attorney-client privilege
 - Simple or sophisticated. Cohort or regression.
 - Smaller organizations can make use of cohort analysis with limited calculations and data. Larger organizations with more employees can be more challenging.
 - Compensation is difficult to model and study. Challenge of not having all of the data in machine readable format.
 - Cost and time to do study. Both external and internal resources. Research.
 - Be ready to address any deficiencies and take corrective action if determined appropriate



AAP Areas to Focus On

Outreach efforts

- **Protected Veterans and Individuals with Disabilities**
 - Many contractors fail to engage with local outreach partners. Just posting jobs with outreach agencies is not sufficient under the regulations.
 - Complete assessment of outreach efforts annually to evaluate effectiveness
 - Be sure to document
- **Women and Minorities**
 - What are your efforts to make good faith efforts for any goals established?
 - Be sure to document what you undertake. More than just posting jobs.

Individuals with Disabilities self-identification

- Continue to encourage employees to self-identify
- Consider surveying more often

Conduct and document self-audit of compliance obligations

- Especially for Protected Veterans and Individuals with Disabilities



What to Expect from the OFCCP in 2022

- Low numbers of compliance reviews in calendar 2022
 - Under 1,300 if they continue to spend longer on each review?
- Longer reviews (and costlier) with more data, document and interview requests
- Increased focus on compensation (along with hiring as always)
- Less transparency in reviews and reluctance to share findings?
- Possible return to onsites during compliance review
- Requirement to certify AAP compliance
- At least another year without EEO-1 component 2 collection
- Expect additional OFCCP staff hired assuming budget increase granted. It will probably take a year plus to hire and train the 180+ expected staff and see their full impact on OFCCP's increased capacity
- OFCCP ramping up for an even busier 2023





Questions?



PRESENTATION AVAILABLE FOR VIEWING

Don't forget...

- Today's PowerPoint presentation and recording will be available by Friday on www.smithlaw.com/resources-webinars and all past recorded webinars are available to view and download too



***Thank you for attending
today's webinar!***

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