

Government Contractors: Preparing for OFCCP's Affirmative Action Program Compliance Certification

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Sara advises employers on a range of workplace-related matters, with a focus on legal and regulatory compliance. She devotes a significant amount of her practice to assisting clients in drafting policies, handbooks, employment-related agreements, and overall best practices to ensure compliance with federal, state, and local laws. Sara also has experience handling workplace investigations and drafting and conducting workplace-related trainings, including sexual harassment and anti-discrimination and harassment trainings.

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Mary Whitaker is a Project Manager with Thomas Houston associates, inc. and has over 17 years' experience as a Human Resources Professional. She has occupied various roles within the corporate Human Resources function including Compliance and Diversity Programs. During Ms. Whitaker's tenure with THA, she has managed various AAP projects from inception to completion, which includes development of Affirmative Action Plans, process improvement recommendations, representing companies in OFCCP compliance evaluations and providing on-site and web-based EEO and Affirmative Action related training to HR professionals and hiring managers across the United States. She possesses a Bachelor of Arts in Human Resources Management from the University of Central Florida and is SHRM-CP and PHR certified.

About PilieroMazza

PilieroMazza—a business law firm—serves as a strategic partner to government contractors and commercial businesses from across the United States in numerous industries.

We deliver results for our clients by implementing legal and business solutions that take the client's best interests into consideration. Moreover, PilieroMazza's efficient operational structure and lean approach to staffing matters translate into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

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The Office Of Federal Contract Compliance Programs (OFCCP)

- A subdivision of the US Department of Labor
- The OFCCP is responsible for ensuring that employers doing business with the federal government comply with the laws and regulations requiring nondiscrimination

Mission Statement Of The OFCCP

“At the Office of Federal Contract Compliance Programs (OFCCP), we protect workers, promote diversity and enforce the law, OFCCP holds those who do business with the federal government (contractors and subcontractors) responsible for complying with the legal requirement to take affirmative action and not discriminate on the basis of race, color, sex, sexual orientation, gender identity, religion, national origin, disability, or status as a protected veteran. In addition, contractors and subcontractors are prohibited from discharging or otherwise discriminating against applicants or employees who inquire about, discuss or disclose their compensation or that of others, subject to certain limitations.”

Who is Leading the OFCCP?

- Director Jenny Yang
- Formerly a plaintiff's attorney and then appointed to Chair of the Equal Employment Opportunity Commission (EEOC) before the OFCCP
- During her time at EEOC, introduced requirement to disclose pay data on EEO-1 reports
- Focus on pay equity and compensation discrimination

The OFCCP Administers And Enforces Three EEO Laws

- EO 11246
 - Established requirements for non-discriminatory practices in hiring and employment on the part of U.S. government contractors
- Section 503 of the Rehabilitation Act of 1973
 - Requires affirmative action and prohibits employment discrimination by Federal government contractors and subcontractors with contracts of more than \$10,000
- Vietnam Era Veterans' Readjustment Assistance Act of 1974
 - Originally enacted to protect returning Veterans from the Vietnam war from discrimination, it now covers all Veterans

Jurisdictional Thresholds

JURISDICTIONAL THRESHOLDS

| EXECUTIVE ORDER 11246 | | | |
|--|--|--|--|
| SUPPLY & SERVICE Basic Coverage Any + Contracts more than \$10,000 number of employees | | CONSTRUCTION Basic Coverage Any + Contracts more than \$10,000 number of employees | |
| AAP Coverage 50 + A contract of \$50,000 or more or more employees | | 16 SPECIFICATIONS Any + Contracts more than \$10,000 number of employees | |

| SECTION 503 | |
|--|--|
| CONSTRUCTION Basic Coverage Any + A contract of more than \$15,000 number of employees | |
| AAP Coverage 50 + A contract of \$50,000 or more or more employees | |

| VEVRAA | | | |
|---|--|---|--|
| SUPPLY & SERVICE Basic Coverage Any + A contract of \$150,000 or more number of employees | | CONSTRUCTION Basic Coverage Any + A contract of \$150,000 or more number of employees | |
| AAP Coverage 50 + A contract of \$150,000 or more or more employees | | AAP Coverage 50 + A contract of \$150,000 or more or more employees | |

Please note the coverage requirements for Section 503 and VEVRAA do not apply to federally assisted construction contractors. Additionally, both Section 503 and VEVRAA are subject to a federal statute that adjusts certain requisition-related dollar thresholds for inflation.

Please note that this page provides general information. It is not intended to substitute for the actual law and regulations regarding the program described herein.

If you have additional questions about jurisdiction thresholds, please contact us at 1-800-397-6251, TTY 1-877-889-5627.



January 2016

| VEVRAA | | | |
|---|--|---|--|
| SUPPLY & SERVICE Basic Coverage Any + A contract of \$150,000 or more number of employees | | CONSTRUCTION Basic Coverage Any + A contract of \$150,000 or more number of employees | |
| AAP Coverage 50 + A contract of \$150,000 or more or more employees | | AAP Coverage 50 + A contract of \$150,000 or more or more employees | |

Please note the coverage requirements for Section 503 and VEVRAA do not apply to federally assisted construction contractors. Additionally, both Section 503 and VEVRAA are subject to a federal statute that adjusts certain requisition-related dollar thresholds for inflation.

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OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS
U.S. Department of Labor

January 2016

Two General Rules

- For a federal contractor to be in compliance with its EEO obligations, there are two general rules:
 - 1. Do not discriminate against applicants or employees based on any of the categories protected by the laws described above
 - 2. Take affirmative action . . .
 - a. To ensure equal employment opportunity without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin
 - b. To employ and advance in employment for qualified individuals with disabilities and qualified protected veterans

Polling Question #1

What is the deadline to implement an AAP once awarded a government contract?

- A) 30 days;
- B) 60 days;
- C) 120 days.

Developing and Maintaining AAPs

- New federal contractors subject to the AAP requirements must develop the written AAP(s) within 120 days from the start of the contract or subcontract
- During the AAP year, the contractor collects certain information and conducts analyses for various required components of the AAP
- The analyses help the contractor measure its progress toward equal employment opportunity

AAP Basics

- Selecting a plan year
 - Usually January 1st to December 31st
 - You may choose your own year if you have no discriminatory reason for choosing those dates
- Types of AAPs
 - Establishment based- single site or location
 - If 50 or fewer at a site, you can have a separate AAP, include in the AAP that covers the location of the personnel function which supports the establishment or that covers the location of the official to whom they report
 - Functional- based on distinct business units (reach agreement with OFCCP)

AAP Components

- Statistical Elements

- a) Adverse Impact
 - a) test personnel activities for statistically significant results
- b) Utilization
 - a) determining where under-representation exists
- c) Goals
 - a) establishing placement goals
- d) Compensation
- e) Applicant Tracking & Recordkeeping

- Non-Statistical Elements

- a) Good Faith Efforts
- b) Action Oriented Programs

AAP Components Cont'd

– Quantitative Analyses

- Organizational Profile
- Job Group Analysis
- Incumbents in Job Groups
- Determining Availability
- Comparing Incumbency to Availability
- Placement Goals

– ID of Problem Areas

- Personnel Activity Selection
- Compensation
- Personnel Procedures
- Other Areas

- Additional Required Elements

- Designation of Responsibility
- ID of Problem Areas
- Action-Oriented Programs
- Internal Audit & Reporting

- Analysis of Affirmative Action Progress

- Workforce Data

VEVRAA/Section 503 Data Collection Analysis

Requires contractor to document and update annually

Number of protected veteran and IWD applicants

Total number of applicants for all jobs

Total number of job openings and jobs filled

Number of protected veterans and IWD hired; and

Total number of applicants hired

AAP Components – Section 503

41 CFR 60-741.45 Utilization Goals

Contractor to establish a 7% utilization goal by job group for the employment of IWD

- If total workforce is 100 or fewer, company-wide goal of 7%

Invite employees to self identify as IWD at time of hire and at least one time every five years thereafter

AAP Components – VEVRAA

41 CFR 41 CFR 60-300-45 Benchmarks for Hiring

- Benchmark is not a goal
- Two methods for establishing benchmark
 - National percentage of veterans in the civilian labor force-currently 5.6%
(updated annually)
 - Establish an individual benchmark using 5 factors

AAP Verification Requirement

- On December 2, 2021, OFCCP finally announced the opening of its long anticipated Affirmative Action Program Verification Interface online portal (Portal)
- Contractors will be able to register to access the Portal on February 1, 2022
- OFCCP will send emails to contractors that it has email information for to invite them to register. To register, contractors will have to create a Login.gov account using an email and a secure password. They will also need to enter their Employer Identification Number (EIN), EEO-1 Headquarter/Company Number and Establishment/Unit Number. If a contractor does not know its EEO-1 identifiers, it will be required to enter its EIN, Legal Business Name, DUNS Number and NAICS Code
- Contractors will not be able to use the Portal to certify their AAP compliance until March 31, 2022, and will only have until June 30, 2022, to submit their certification

Polling Question #2

What contractors are subject to the new AAP verification requirement?

- A) Supply and Service contractors only;
- B) Construction contractors only;
- C) Both Supply and Service and Construction contractors.

AAP Checklist

- Appoint an AAP Coordinator
- Draft an EEO policy
- Conduct an EEO audit
- Obtain census data
- Conduct a self-audit
- Evaluate recruiting practices

Preparing for a Compliance Evaluation

- A compliance evaluation may consist of any one or more of the following investigative procedures:
 - **A compliance review**, consisting of a comprehensive analysis and evaluation of the hiring and employment practices of the contractor, any written AAPs the contractor is required to maintain, and the results of the affirmative action efforts undertaken by the contractor
 - **An off-site review of records**, consisting of an analysis and evaluation of part or all of any written AAPs the contractor is required to maintain, supporting documentation, and other documents relevant to a determination of whether the contractor has complied with the requirements of the regulations implementing Executive Order 11246, Section 503, and VEVRAA
 - **A compliance check**, conducted to determine whether the contractor has maintained records consistent with 41 CFR 60-1.12 (Executive Order 11246), 41 CFR 60-741.80 (Section 503), and 41 CFR 60-300.80 (VEVRAA), as applicable
 - **A focused review**, restricted to one or more components of the contractor's organization, or one or more aspects of the contractor's employment practices

Compliance Evaluations

- Areas of Focus
 - Good Faith Efforts, Outreach & Recruitment
 - Minorities & Females
 - Protected Veterans & Individuals with Disabilities
 - Adverse Impact & Selection
 - Support Documentation/Selection Decisions
 - Applicant Tracking/Recordkeeping
 - Pay Equity Disparities
 - State Employment Job Service Listing
 - Program Dissemination to Management
- Recent Trends

OFCCP Audits

Every year, the OFCCP publishes a new Corporate Scheduling Announcement List (CSAL) for supply and service contractors and construction contractors. The CSALs provide contractors a minimum 45-day courtesy notification before OFCCP begins sending its OMB-approved scheduling letters

Polling Question #3

After receiving the OMB-approved scheduling letter, how long do contractors have to submit AAPs?

- A) 30 days;
- B) 60 days;
- C) 90 days.

OFCCP Audits Cont'd

- All contractors on the current lists are receiving a minimum of 75 days advance notice to have the AAPs ready for submission
- OFCCP will also grant a one-time 30-day extension for supporting data where AAPs are provided timely
 - Provisions can be found on OFCCP's FAQ page:
 - <https://www.dol.gov/agencies/ofccp/faqs/scheduling-letters>
 - The list of contractors can be found on OFCCP's website

Best Practices

- Careful AAP planning and preparation is imperative
- Investing a little bit of money up front for a very thorough AAP preparation service and/or a robust Applicant Tracking System (ATS) could very well save you a lot more in the long run
- Be familiar with your organization and its internal practices
- Have a working familiarity with the OFCCP, the laws and regulations they govern, and what they mean to your particular organization and operations

Best Practices Cont'd

- Organization is key!
 - These audits ALWAYS come at the “worst time”
 - Have your documents in a central / known place, where multiple people have access to them
 - Keep AAPs for at least 3 years prior
- Try to do an internal audit annually:
 - Create a “Compliance Checklist” of detailed items the OFCCP will be auditing
 - Look for holes in your record-keeping
 - Recordkeeping is the top violation found in OFCCP audits
 - If your recordkeeping isn't in order, an onsite audit is more likely in your future.

To Do List

- Post the required posters and notices
- Have an Affirmative Action Program
- File required forms
- Review advertising and recruitment methods
- Select a compliance officer
- Review employment practices, even if small
- Record retention policies

Questions?



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