

NOW & NEXT

DEI Strategic Services Alert

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The OFCCP's AAP demands on federal contractors are growing — and fast

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Federal contractors should begin making changes to their policies and procedures regarding Affirmative Action Programs right away to avoid playing catch-up later.



What's the Impact?

- / Federal contractors must submit AAP compliance certifications via OFCCP's Contractor Portal to minimize scrutiny
- / Compliance reviews will require contractors to produce more voluminous data within a 30-day window
- / Be prepared — review and adjust practices for collecting, compiling, and analyzing compensation data

Once upon a time, federal contractors were mostly able to fly under the radar without detection by the Office of Federal Contract Compliance Programs (OFCCP). So long as a federal contractor did not end up on the OFCCP's relatively short compliance-review list, the OFCCP was none the

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wiser. But now, the OFCCP has mechanisms to uncover noncomplying federal contractors, and the information and data that it seeks in compliance reviews (and particularly, compensation data) will be nearly impossible for a noncompliant federal contractor to compile on the fly. Federal contractors should review and update their systems soon to keep up with the OFCCP's developing guidelines.

No more flying under the radar

One of the responsibilities of the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) is to enforce laws that prohibit federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. OFCCP requires contractors to "take affirmative steps" to ensure equal employment opportunity in their employment process. One such affirmative step is the development of a written Affirmative Action Program (AAP). Federal contractors are required to (1) develop a written AAP within 120 days of commencement of the contract and (2) to update it annually.

Based on a 2016 report from the U.S. Government Accountability Office (GAO) that the OFCCP had no process to ensure that federal contractors had taken the necessary steps to develop or maintain their AAP and that 85% of federal contractors had not fully developed or implemented AAP(s) in 2015, the GAO recommended that the OFCCP develop a mechanism that could electronically collect federal contractors' certifications of completion of their AAPs.

OFCCP's Contractor Portal

In response to GAO's recommendation, the OFCCP developed a Contractor Portal that launched February 1, 2022. The OFCCP cautioned that contractors that did not submit a certification of compliance (or state they had not developed or maintained an AAP) through the portal would be more likely to appear on the OFCCP's scheduling list than contractors that have certified they are in compliance.

Additionally, the OFCCP issued a bulletin stating that contractors not certified by September 1, 2022, would be included on a list provided to federal agency contracting officers in order to secure compliance. Although the original deadline has passed, the portal remains open for federal contractors to certify AAP compliance for their establishments and functional/business units.

Pay equity audits and demands for more information

For decades, federal contractors have been required to conduct an in-depth review of their employment practices, including their compensation systems, to determine whether there are any race- or gender-based disparities. In recent years, however, the OFCCP has increased its focus on federal contractors' compensation systems and in its more recent Directives, seemingly imposed a requirement for federal contractors to conduct "pay equity audits." Although the OFCCP has not prescribed a particular method to conduct these "pay equity audits," the OFCCP hinted in Directive 2022-01 that it expects employers to use some form of "multiple regression

analysis, decomposition regression analysis, meta-analytic tests of z-scores, compa-ratio regression analysis, rank-sums tests, career-stall analysis, average pay ratio, cohort analysis," or something similar.

Federal contractors should not ignore this new requirement—not least because the OFCCP may come asking for it soon. In late-November 2022, the OFCCP requested comments on proposed changes to the Scheduling Letter and Itemized Listing that it sends to federal contractors to initiate a compliance review.

These proposed changes significantly expand the scope of compensation information and data that the OFCCP would request in compliance reviews, including (among many other things) employee-level compensation data for both the snapshot date of the AAP submitted and the prior year snapshot. This request for compensation data would include data concerning each employee's base salary and other compensation, including bonuses, commissions, incentives, overtime, etc. Critically, it would also include relevant data to determine an employee's compensation, such as education, experience, tenure, duty location, geographical differentials, performance ratings, and other factors. Federal contractors would also be required to provide evidence that the contractor fulfilled the regulatory requirement to evaluate its compensation system for disparities, including by identifying the date and method of analysis of the federal contractor's pay equity audit.

To make matters worse, because these requests for information and documentation are in the initial Scheduling Letter and Itemized Listing, the OFCCP would expect federal contractors to produce all of this information and data **within a mere 30 days of receipt** of the Scheduling Letter and Itemized Listing. To put a fine point on it, a federal contractor would be required to turn around all of this information and data within just 30 days of learning that it is subject to an OFCCP compliance review.

What federal contractors should do NOW

First, federal contractors should be sure they have the very fundamentals completed—namely, that they have completed an AAP and certified completion of the same through the OFCCP's portal.

Second, federal contractors should start to adjust their practices for collecting, compiling, and analyzing compensation data because it does not appear that the OFCCP's focus on compensation data will change anytime soon. For many federal contractors, this may involve a full overhaul (or at least significant modifications) to their Human Resources Information Systems (HRIS) to allow those systems to capture the data that the OFCCP has suggested it will find relevant, such as education, experience, tenure, duty location, geographical differentials, and performance ratings. In addition, federal contractors should start to conduct and document their pay equity audits, if they have not already started to do so. In doing so, federal contractors should consider maintaining privilege and/or work product protection by engaging an attorney to assist with the completion of the pay equity audit.

Nixon Peabody can help you with your compliance and all other federal government contracting obligations. For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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