



Affirmative Action and Compliance

Trends and Targets for 2013

The OFCCP's 2013 Agenda

Embarking on ambitious plans for 2013, the OFCCP recently released the Unified Agenda which describes the new regulations it intends to roll out.

- ▶ **Section 503** – With a deadline of April 2013, the OFCCP intends to publish final rules related to requirements for protected individuals with disabilities. The new regulations would increase the federal contractor/subcontractor's data collection obligations, require additional recordkeeping, and establish a "utilization goal" of seven percent (7%) across the workforce.
- ▶ **4212 Protected Veteran Regulation** – With increasing numbers of veterans returning from duty in Afghanistan, Iraq and other locations, the OFCCP wishes to strengthen Federal regulations to increase employment opportunities for protected veterans. As with Section 503, these proposed regulations would impose new requirements for applicant self-identification, including documented outreach efforts (a minimum of three specified types of outreach and recruitment efforts per year), and increased recordkeeping and analysis obligations. Here again, the OFCCP has set a deadline of April 2013 to release the final rules.
- ▶ **Compensation Data Collection Tool** – Responding to increased demands for fair pay laws, the OFCCP intends to issue a Notice of Proposed Rulemaking (NPRM) for a new compensation data collection tool in June 2013. This data collection tool would collect and sort compensation data by race, gender and national origin to identify contractors in violation of Executive Order 11246. However, such a tool will take time, require testing, as well as considerable resources to develop. Don't expect to see one in the near future but make preparations to respond to increased data collection obligations.
- ▶ **Sex Discrimination Guidelines** – Sex discrimination regulations have not been updated since 1978. You can expect that by the end of 2013, you will be updating your sex discrimination policies.
- ▶ **Construction Regulations** – Scheduled to be released in October 2013, the OFCCP has announced that it intends to replace the current obligations of construction contractors with those that "reflect the realities of the labor market and employment practices in the construction industry today."

What can you do to prepare your organization?

- Make sure that disability and accommodation policies are up to date with ADAAA changes.
- Review current recordkeeping to determine how to track an employee's status as a veteran or disabled worker in your existing system.
- If you aren't close to the 7% goal, make sure you are documenting efforts and adjust your strategy to close the gap.
- Consider local vets and disability organizations as potential targets for linkage agreements.
- Recognize that today's compliance will require increased resources and budget appropriately. Don't get caught short.



OFCCP's 2013 Priorities

The trends and targets that we see in 2013 stem from priorities coming out of the White House with continued focus on the movement to enhance recruitment of veterans and individuals with a disability as well as close the pay gap.

► **More Aggressive Enforcement Techniques Continue**

In Obama's first term, the OFCCP put a lot of energy into developing their approach. Now that it's the second term, expect to see them vigorously enforcing their approach. Interestingly, we have also learned that a lot of OFCCP staff in leadership positions have a strong background as plaintiff-side class action attorneys specializing in anti-discrimination cases. Further evidence that the OFCCP is more aggressively enforcing regulations is the increase in conciliation agreements. Over 30%, or at least 1 of 3 compliance evaluations have closed with a finding of non-compliance. That is a 20 % increase over the previous fiscal year and an 85% increase over FY 2009. The total number of compliance evaluations closed with some form of financial remedy was at an all time high in FY2012; a 66% increase over FY2009.

The bottom line: A lot of federal contractors, having passed a previous audit, believe that they are doing everything necessary for any future audits. Be cautioned: don't expect the same kind of audit the next time. Take proactive measures to ensure your organization is complying with all of the OFCCP's regulations or be prepared to risk exposure and litigation.

► **Compensation**

Pay discrimination is the top priority at the OFCCP with increased effort and resources being directed toward investigations and enforcement. Four years ago, there were no compensation-related conciliation settlements. Last year, there were 27 settlements. Clearly, they are gaining traction. Expect a deep dive into pay practices and compensation analyses. The OFCCP will look at all differences whether it affects 400, 30 or 2 individuals.

In 2011, the OFCCP proposed rescinding the 2006 Compensation Standards and Guidelines. And while we continue to await the fate of this NPRM, it has left contractors with no current guidelines. In fact, the OFCCP has stated that they don't intend to publish new standard and guidelines, wanting flexibility and no single "standard."

With no guidelines in effect, contractors are being asked questions about pay practices more vigorously than before. They may be asked to provide information such as education, previous years' experience, time in position, and pay history. They may ask to review pay practices and ask questions such as, "How is pay determined?" Auditors are also asking to see companies' compensation policies and procedures, and how those are communicated to employees.

The bottom line: Federal contractors need to be proactive in reviewing their pay practices, evaluating pay discrepancies among employees, and correcting those discrepancies, if warranted. If necessary, contractors should consult with employment counsel regarding best practices for compliance and for avoiding potential claims.

New Census Data Released

The U.S. Census Bureau released certain portions of the 2006-2010 American Community Survey (ACS) EEO Tabulation on November 29, 2012. The new EEO Tabulation, used by federal contractors to estimate availability percentages in affirmative action programs, is based on data extracted from 5 years worth of ACS annual surveys. This data can be accessed from the Census Bureau at American Fact Finder website. Previously, contractors used an EEO Special File produced from the 2000 decennial census. The OFCCP has not yet announced when contractors must begin using the new data but EKW&A's affirmative action planning software has been updated to comply once notification is official.

Differences between the 2000 and 2010 census data:

- Two new variables are available – citizenship (U.S. citizen or not a U.S. citizen) and unemployment (currently employed, currently unemployed and worked in the last year; or currently unemployed and last worked one to five years ago).
- Change in levels of geography – includes estimates and percentage of the labor force for all counties and places with 50,000 or more people.
 - National
 - All States, DC, and Puerto Rico
 - Change from Metropolitan Statistical Areas (MSA) or Primary Metropolitan Statistical Areas (PMSA) to Core Based Statistical Areas (CBSA). A CBSA can be either Metropolitan or Micropolitan areas.
 - Counties and EEO county sets
 - Places (within States appear to be mostly cities, towns, and municipalities)
- Provides statistics by location-based geography – residence, worksite, worksite or commuting flow.
- Tables may include citizenship, educational attainment, industry, age, earnings, and unemployment status.
- 488 census occupation codes based on 2010 Standard Occupational Classification. The codes and crosswalks are available at <http://www.census.gov/hhes/www/ioindex/crosswalks.html>
- The 2010 EEO Tabulation is available at <http://factfinder2.census.gov/>

Collaboration in Action

In addition to a 2013 regulatory agenda that suggests employers should begin preparing now for significant changes in workplace reporting, monitoring, and other compliance obligations, there is evidence that different branches of the Department of Labor are working more collaboratively during onsite visits.

This enforcement strategy includes a “more comprehensive, thorough, and timely compliance evaluation process that will result in deeper and more effective enforcement of all EEO laws and regulations administered by OFCCP.” For example, in a recent audit, subsequent follow-up of what an auditor believed to be safety violations resulted in OSHA fines for the contractor.

Although there is no official requirement for agencies to share information, there is nothing prohibiting the OFCCP from contacting other agencies to look into problems.

This serves to remind federal contractors that whenever any DOL agency representative is present, there is potential exposure in all areas that fall under their jurisdiction.

CSAL Mailings

The first set of courtesy audit notifications from the OFFCP went out mid-November of last year. These notifications, referred to as Corporate Scheduling Announcement Letters (CSAL), serve to give establishments a “heads-up” that an audit will likely be conducted during OFFCP’s next 6-month scheduling cycle. Note: a CSAL does NOT trigger an audit. Only a subsequent Scheduling Letter bearing an Office of Management and Budget (OMB) approval number triggers an audit.

It is important to also note that this wave of CSALs were addressed simply to “Human Resources Director” at the specific location of a multi-establishment federal contractor. However, this notification is not necessarily all-inclusive; meaning some establishments may not receive the notification letter, but still may be scheduled for an audit.

Make sure that your personnel, at the establishment level, is on the lookout for these CSALs and Scheduling Letters. In particular, the CSAL serves as a real opportunity for contractors to ensure that their affirmative action programs are current and defensible.

The next set of letters is expected out in the spring.

According to the OFFCP, contractors “may confirm whether their company was mailed a CSAL by faxing a written request on company letterhead to the Division of Program Operations at 202-693-1305.”

Disclaimer: This document is meant only as a guide based on practical recommendations for AAP compliance. The information is not intended to be, nor does it constitute legal advice. It is recommended that your Affirmative Action Plan compliance procedures and all employment policies, procedures and practices be reviewed by your in-house counsel or other legal counsel with qualifications background and experience in AAP compliance.

New Scheduling Letter to be released:

The OFFCP has submitted a New Scheduling Letter to the OMB for approval. The 60-day comment period has passed. If approved, the revised scheduling letter may include requests for:

- Policies
 - FMLA
 - Pregnancy leave
 - Accommodations for religious observance
- Personnel activity analyses for each minority group (i.e., African-American/Black, Asian/Pacific Islander, etc.)
- Personnel activity analyses to be reported both by job group and job title
- Submit raw compensation information for all employees including bonuses, incentives, commissions, merit increases, and overtime
- Compensation Policy
- VETS-100 and/or VETS-100A report for the last three years