

# PUBLICATION

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## Get Ready for Audit? The OFCCP Issues 1,000 Audit Announcement Letters to Federal Contractors

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**Although the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) under the Trump Administration may lean toward compliance over enforcement, it is clear that nothing has changed yet regarding the OFCCP's aggressive enforcement. In fact, the OFCCP conducts approximately 1,500 to 4,000 compliance audits each year. This year appears to be no different.**

On February 1, 2018, OFCCP mailed 1,000 Corporate Scheduling Announcement Letters (CSALs) to federal supply and service contractors notifying them of a potential compliance evaluation. The CSAL is not required by law, and it is *not* a letter indicating that a compliance audit will ensue; rather, it is a courtesy notification to a contractor's establishment that has been selected to undergo an evaluation during the scheduling cycle. CSALs provide contractors with at least 45 days' advance notice of a possible compliance audit, and they should use this gift of time wisely to prepare for a possible audit. On a positive note, the OFCCP has indicated that it will not audit a contractor's establishment if a compliance review closed in the last five years.

The OFCCP's website indicates that it will begin mailing CSALs on March 19, 2018. If a contractor receives a letter, that means the OFCCP will conduct a review of the contractor's compliance efforts. Contractors must submit their affirmative action plans and supporting documentation to the OFCCP within 30 days after receiving the CSAL. Thus, contractors that receive CSALs should use their time wisely to conduct a self-audit in the event they find themselves under review. In fact, the OFCCP calculates that contractors have a minimum of 75 days to make sure their affirmative action plans (AAPs) are ready. Given this advance notice, the OFCCP has stated that it will not grant extensions for "routine business reasons" and that any extension granted would be limited to 15 days.

### Overview of the OFCCP's Compliance Evaluation Process

Certain federal contractors must prepare AAP(s) in compliance with Executive Order 11246 (race, gender) Section 503 of the Rehabilitation Act (individuals with disabilities) and the Vietnam Era Veterans' Readjustment Assistance Act (protected veterans) (VEVRAA). If a contractor receives a scheduling letter, the OFCCP will conduct a "desk audit," and the contractor must submit its AAP(s) and supporting documentation, which includes items such as EEO-1 reports, goal attainment report, personnel activity data (applicants, hires, promotions, terminations), detailed compensation data, and more, within 30 days of receipt of the CSAL. After a contractor submits its AAP(s) and supporting documentation, the OFCCP may request additional documents and/or information, and it may identify problem areas – some or all of which may be resolved at the desk audit stage.

If the problem areas remain unresolved, the OFCCP will conduct an onsite audit to investigate those unresolved issues. An onsite audit normally involves a review of the contractor's personnel and employment policies, a facility tour, inspection of required posters, inspection and copying of documents related to employment actions, and interviews of employees, supervisors, and managers, particularly those managers involved in the hiring process. Additionally, post-onsite follow-up – i.e., additional document or data requests – may occur. At any stage of a compliance evaluation, the OFCCP can close the audit. Of course, the best case is receipt of a CSAL, which means that the OFCCP did not find any technical violations or other deficiencies.

Conversely, the OFCCP may cite the contractor with technical violations (e.g., failure to post required notices or failure to engage in outreach to minority, disabled, and protected veterans). Such violations do not involve any monetary penalty; however, the contractor will need to take affirmative steps to correct the violations. If, however, the OFCCP alleges that the contractor engaged in, for example, hiring or pay discrimination, the OFCCP will seek to obtain monetary relief for the class of individuals affected by the contractor's discriminatory actions.

### **Steps to Take upon Receipt of a CSAL**

The CSAL gives contractors the benefit of time to get the location(s) scheduled for review "audit ready." As noted above, contractors will likely not be able to obtain an extension, so using this time prudently is a must.

While waiting for a CSAL (and hoping that one never arrives), contractors should closely review compensation data, hiring trends, and outreach efforts to protected veterans and individuals with disabilities for "red flags" with a view toward finding problems and identifying explanations, or building defenses to minimize liability.

Contractors should also ensure that the technical aspects of compliance are in place. For example:

- Ensure the EEO tag line is on advertisements
- Ensure the website contains all the required EEO policy statements and an accommodation statement for disabled individuals
- Ensure subcontracts and purchase orders contain the correct EEO clause
- Review of outreach efforts to determine effectiveness
- Make sure that the EEO-1 is submitted by March 31, 2018

### **Construction Contractors are Easy Targets for an Audit**

Historically, the OFCCP has focused its efforts on supply and service contractors for compliance reviews. Since 2014, however, when new regulations required construction contractors to maintain AAPs for compliance with Section 503 and VEVRAA, the OFCCP has increasingly targeted construction contractors for compliance evaluations. Historically, the OFCCP has found that women and minorities continue to be underrepresented in construction occupations. So, the risk of a construction contractor being selected for an audit is on the rise.

Construction contractors normally will *not* receive a CSAL; rather, they may first receive a telephone call from a compliance officer and then a follow-up letter scheduling an *onsite* audit. Unlike supply and service contractors, construction contractors do not get the "benefit" of a desk audit prior to an onsite audit.

During the onsite audit, which may last two to three days (or more) depending on the size of the company and the number of jobs that are open, the OFCCP will interview management and visit open job sites to interview employees. The OFCCP will also collect AAPs, review the contractor's good faith efforts to achieve goals for minority and female participation, and focus on compliance with the applicable 16 affirmative action steps outlined in the regulations.

Generally, those steps relate to recruitment practices, EEO implementation and dissemination, EEO and anti-harassment training for supervisors and managers, personnel operations, and solicitation to small disadvantage business enterprises and minority- and female-owned businesses. Construction contractors must also make certain that their subcontractors and vendors are aware of their affirmative action obligations under the OFCCP regulations, as well as comply with Davis-Bacon Act wage determinations. The contractor must maintain documentation to demonstrate that it has in good faith complied with those 16 steps. Failing to do so will result in technical violations of the regulations. The OFCCP will also analyze pay data for compliance with the Davis-Bacon Act, as well as for potential pay discrimination.

## Key Takeaways

Those federal contractors who received a CSAL should be using their time wisely to get audit-ready. Construction contractors should ensure that they are audit-ready at all times, as they may not receive substantial advance notice of an onsite audit. All contractors should periodically conduct self-audits to help minimize potential liability and to put themselves in a position to successfully handle an OFCCP audit.

For more information on this or other matters, please contact [Donna Glover](#) or a member of the Firm's [Construction Group](#).