

# Construction Contractors Take Note: OFCCP's Industry-Focused Technical Assistance Guide (TAG) May Prove Helpful in Preparing for Anticipated "Compliance Check" Reviews

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Federal construction contractors are barred from discriminating in employment on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or covered veteran status, and many also must take affirmative action to ensure nondiscrimination and equal employment opportunity. Late last year, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published a highly anticipated "Technical Assistance Guide" (TAG) for federal construction contractors subject to the affirmative action requirements of Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). The new construction contractor TAG outlines all the EEO and affirmative action program requirements that apply to direct federal (and federally assisted) construction contractors and subcontractors and offers some useful best practices for maximizing compliance. The tips and advice contained in the TAG may come especially in handy for a whole crop of construction contractors that may soon find themselves the subject of an OFCCP "compliance check" — a more streamlined type of compliance evaluation that the agency hopes will enable it to conduct a greater number of audits than are possible under the formal compliance review program currently in place. **About the Construction Industry Compliance Program** Executive Order 11246 requires federal government contractors of a certain size to practice affirmative action to ensure equal employment opportunity and nondiscrimination for women and minorities. Section 503 and VEVRAA impose similar obligations on covered contractors with respect to individuals with disabilities and protected veterans, respectively. In addition, like supply and service contractors,

covered contractors with direct federal construction contracts (not federally assisted construction contracts) must develop and maintain written affirmative action plans (AAPs) outlining their efforts to ensure equal employment opportunities for individuals with disabilities and covered veterans. Although OFCCP's Executive Order regulations do not require covered construction contractors to develop written AAPs, they must take 16 specific affirmative action measures, described in detail in both the regulations and the TAG, to advance equal employment opportunities for women and minorities. OFCCP is responsible for enforcing federal contractor compliance with EEO and affirmative action requirements. It does so in a number of different ways, including by investigating individual discrimination complaints and, more commonly, conducting government audits of a contractor's EEO and affirmative action efforts. OFCCP compliance evaluations can take one of four forms:

1. **Compliance review** consisting of a "comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor."
2. **Off-site review of records**, including the written AAP(s) and supporting documentation, as well as other data and information relevant to the contractor's employment practices.
3. **Compliance check**, in which OFCCP assesses the contractor's compliance with its record-keeping requirements.
4. **Focused review**, which involves "an on-site review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices."

Although OFCCP has employed all four types in evaluating the compliance of supply and service contractors, audits of federal construction contractors currently are limited to full compliance reviews. In April 2019, however, OFCCP published a notice in the Federal Register seeking approval of two new information collections that will enable it to schedule construction contractors for the ostensibly more streamlined compliance check — one for direct federal construction contractors and the other for federally assisted construction contractors. OFCCP received public comments on the proposal and, after making minor modifications to the proposed forms, submitted them to the Office of Management and Budget (OMB) on December 12, 2019, for final approval. Once that happens, OFCCP will be closer to its aim of reaching more construction contractors than it has to this point. Importantly, before it actually schedules any compliance checks using the new forms, OFCCP has committed to publishing, for the first time, the methodology it uses to select a construction contractor for a compliance evaluation. In the meantime, there are a number of proactive steps that construction contractors may wish to take to get ahead of the anticipated increase in OFCCP audit activity that is likely to come with the approval of the compliance check procedures. **How to Prepare for an OFCCP Construction Contractor Compliance Check Audit Your Records.** Because the focus of an OFCCP compliance check will be on adherence to technical record-keeping requirements, it is important that construction contractors understand and

proactively try to correct any potential record-keeping gaps and issues that could prove problematic during an audit.

Are you compliant with all the employment-related record-keeping requirements outlined in OFCCP's Executive Order, Section 503, and VEVRAA regulations, including the obligation to preserve all personnel or employment records "made or kept" for at least two years, or one year for small contractors (with fewer than 150 employees and a contract valued at less than \$150,000), or until final disposition of a compliance audit, complaint, lawsuit, or enforcement proceeding? Can you produce all the following information specifically required by OFCCP's proposed construction contractor Compliance Check Scheduling Letter and Itemized Listing?

- Personnel records that list construction trade employment activity (applicants, hires, promotions, layoffs, recalls, voluntary terminations, and involuntary terminations), including the name or ID number, job classification, gender, race, and/or ethnic designation for each employee or applicant
- Payroll records for all construction trade employees working in the relevant SMSA or non-SMSA county/counties **by project**, including each employee's name or ID number, gender, race/ethnicity, hire date, trade(s), total hours worked in each trade and overtime hours worked in each trade, wage rate(s) for each trade, apprenticeship status, and employment type (e.g., full-time, part-time, temporary, contract, per diem, day labor)
- Examples of job advertisements and postings
- Examples of religious or pregnancy accommodation requests received
- A copy of your current Section 503 AAP
- A copy of your current VEVRAA AAP
- Documentation of disability utilization data analysis
- Documentation of the most recently adopted veteran hiring benchmark

**Conduct a Thorough (Preferably Privileged) Self-Assessment.** Although the primary purpose of the new compliance check procedure is to determine whether the construction contractor under audit has complied with its record-keeping obligations, OFCCP will not disregard substantive violations (such as potential discriminatory employment practices, for instance) that it happens to discover along the way. Use OFCCP's TAG as a starting point for auditing your employment practices to identify and correct potential pay or other employment practices that may be impeding equal employment opportunities for women, minorities, individuals with disabilities, or protected veterans.

- Confirm that you have current and compliant disability and veteran AAPs in place that contain or address all the required elements.

- Assess your compliance with the “16 Affirmative Action Steps” required for construction contractors under Executive Order 11246 (affirmative action for women and minorities), which OFCCP groups into the following categories for audit purposes:
  - Recruitment practices
  - Training
  - EEO policy and implementation
  - Personnel operations
  - Contracting activity

### **16 Steps by Major Audit Category** *Recruitment*

1. Establish and maintain a current list of recruitment sources, including sources targeting minorities and women, provide written notice of job openings (that contains the appropriate EEO tagline), and track and retain records of recruitment source responses.
2. Maintain a record of all applicants and referrals for employment, including name, contact information, and race/ethnicity and gender, and document what action was taken with respect to each individual.
3. Immediately notify OFCCP, in writing, if a union fails to refer women or minorities, or the referral process otherwise impedes EEO.
4. Engage in positive outreach and direct recruitment efforts to minority, female, and community organizations; to schools with minority and female students; and to minority and female recruitment and training organizations.
5. Encourage current minority and female employees to recruit other women and minorities and, where reasonable, provide “after school, summer and vacation employment to minority and female youth both on the site and in other areas of a Contractor's work force.”

### *Training*

6. Develop on-the-job training opportunities and/or participate in training and apprenticeship programs that expressly include minorities and women, and provide notice of such programs to diverse sourcing organizations.

### *Evaluation of EEO Policy Implementation*

7. Disseminate EEO policy externally and include in all job ads (i.e., EEO “tagline”).

8. Review EEO obligations (in other words, conduct compliance training) with hiring managers and decision-makers at least annually and with on-site supervisors before any work commences on a job site, and keep records.
9. Disseminate EEO policy to unions and training programs and request their cooperation in meeting EEO obligations by:
  10. Including policy in CBAs and policy manuals
  11. Publicizing it in company publications
  12. Reviewing it at least annually with management and women and minority employees
  13. Posting it on bulletin boards accessible to all employees at each location where construction work is performed
14. Review the performance of supervisors in complying with EEO obligations at least annually.

#### *Evaluation of Personnel Operations*

11. Review promotional opportunities for women and minorities, and encourage women and minorities to apply for promotional opportunities, at least annually.
12. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, including by, where possible, assigning at least two women to each construction project.
13. Validate all tests and employment selection procedures consistent with the requirements of the Uniform Guidelines on Employee Selection Procedures.
14. Regularly monitor and maintain records regarding seniority practices, job classifications, work assignments, and other personnel practices to ensure barriers to EEO do not exist.
15. Ensure that all facilities and company activities are non-segregated, except separate or single-user restrooms and necessary changing facilities must be available to “assure privacy between the sexes.”
16. Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.

**Assess Compliance With Other Federal Contractor Obligations** There are a number of additional requirements imposed on federal government contractors, compliance with which OFCCP is likely to assess during an audit. These include, for example, the requirement that:

- Bid solicitations for construction contracts in excess of \$10,000 include a Bid Solicitation Notice and Contract Specifications for Construction Contracts;

- All federal construction contracts and subcontracts include an Equal Opportunity Contract Clause or incorporate it by reference;
- Covered contractors properly calculate and apply correct participation goals for women and minorities (i.e., the target percentage of hours to be worked by women or minorities);
- Covered contractors comply with applicable EEO notice posting requirements, including notification to OFCCP of a covered contract award within the proper time frame; and
- Covered contractors annually prepare and submit EEO-1 and VETS-4212 reports.

The penalties for failing to comply with OFCCP's affirmative action program requirements can be substantial — and also can jeopardize a company's ability to keep its existing, or acquire new, federal government contractors. If you are unsure of whether OFCCP's rules apply to your company, or have compliance-related questions, please don't hesitate to reach out to us.

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