

Full-Blown OFCCP Construction Contractor Compliance Evaluations May Soon Be on the Horizon – Are You Ready?

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Late last year, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published a notice in the *Federal Register* that it was seeking OMB approval to use a new scheduling letter and accompanying itemized listing to commence and conduct full evaluations of construction contractors' compliance with federal nondiscrimination, equal employment opportunity, and affirmative action requirements.

OFCCP already [sought and received clearance](#) to move forward with its construction contractor "compliance check" program and in September of last year published a new fiscal year 2020 Corporate Scheduling Announcement List (CSAL) containing a list of 200 construction contractors. This was the first time that construction contractors were included on a CSAL. Being the only kind of audit for which an OMB-approved scheduling letter existed at the time, the construction contractors appearing on the FY 2020 CSAL were all identified for "compliance check" reviews.

Now that OMB has [signed off](#) on OFCCP's proposed construction contractor "Scheduling Letter and Itemized Listing," the expectation is that the agency will soon publish a new CSAL identifying construction contractor establishments selected for a full compliance evaluation.

There is a significant incentive for OFCCP to step up its construction contract compliance efforts, not least of which is the hope and expectation that Congress will pass the Biden administration's multitrillion-dollar infrastructure proposal - increasing, potentially exponentially, the number of contractors with new - or substantially larger - direct or federally assisted construction contracts. Some [estimate](#) that these initiatives, if implemented, will result in approximately 440,000 new jobs in the construction industry by 2024.

There's Still Policy (and Regulatory) Legwork to Be Done

That said, one of the potential impediments facing OFCCP is the fact that the current regulations governing construction contractor affirmative action compliance have not been revised in more than four decades. For example, the current women and minority participation rate goals are based on 1970 census data, which may not (and likely does not) reflect the current participation rates of women and minorities in the construction labor force.

According to OFCCP, this should not impede contractors' good faith efforts to achieve their EEO and affirmative action compliance objectives because the participation rate goals are not "quotas" and do not create mandatory female or minority "set-asides." Rather, they are "minimum targets for the participation of women and minorities that should be reasonably attainable by acting in good faith to take the 16 affirmative action steps" that comprise the EEO construction contract specifications outlined in the regulations.

OFCCP to this point has not announced an intention to revise the construction regulations, which could be a huge policy and political lift. Notably, several published regulatory agendas during the Obama administration contained reference to possible revision of the construction regulations. For instance, the DOL's spring 2016 regulatory agenda indicated that OFCCP would publish a notice of proposed rulemaking in August of that year to revise the existing regulations:

[B]y removing outdated regulatory provisions, proposing a new method for establishing affirmative action goals, and proposing other revisions to the affirmative action requirements that reflect the realities of the labor market and employment practices in the construction industry today.

Nevertheless, the proposed rule never came to be.

The Foundation Has Been Laid for Increased OFCCP Enforcement

Although a formal proposal never came to fruition in either the Obama or Trump administration, OFCCP during the latter part of the Trump administration took steps to bolster its construction contractor compliance program and to implement recommendations contained in a March 27, 2020, report from the Department of Labor's Office of Inspector General (OIG) titled "[OFCCP Did Not Show It Adequately Enforced EEO Requirements on Federal Construction Contracts.](#)"

One of OIG's recommendations was that OFCCP update the minority and female participation rate goals, which have not been revised since they were first published in the *Federal Register* in April 1978 (and extended indefinitely by notice subsequently published in the *Federal Register* at the end of the Carter administration on December 30, 1980).

While the Trump administration OFCCP did not initiate formal rulemaking to update its minority and women participation goals, it did take four important steps toward increased construction contractor enforcement. First, it sought and obtained approval for the compliance check scheduling letter. Second, it published a detailed [Construction Contractor Technical Assistance Guide](#) (TAG) outlining all the EEO and affirmative action program requirements that apply to direct federal (and federally assisted) construction contractors and subcontractors. Third, the agency published the FY 2020 construction CSAL discussed above and, finally, it submitted the construction contractor Scheduling Letter and Itemized Listing to OMB for approval.

We fully expect the Biden administration OFCCP, led by Former EEOC Chair Jenny Yang, to ramp up construction contractor enforcement efforts, which Yang has said is critical to ensuring EEO and nondiscrimination in the construction industry. We also expect to learn more soon, especially as President Biden's infrastructure plans move forward and start to take shape.

Plan Ahead for a Government Audit of Your EEO Practices

1. **Familiarize yourself with OFCCP.** Review OFCCP's TAG and other technical assistance resources, including the Federal Contract Compliance Manual, and the applicable affirmative action regulations.

2. **Understand the Potential Scope of a Compliance Evaluation.** OFCCP compliance evaluations of construction contractors typically will examine a range of areas and information to determine whether the contractor is meeting its EEO and affirmative action program obligations, including with respect to (among other things) the contractor's:

- Recruitment and selection practices across all construction projects, including recruitment sources and documentation of good faith outreach efforts;
- Attainment of women and minority participation rate goals;
- EEO training;
- Record of discrimination violations;
- EEO/AA policy implementation, including with respect to harassment prevention, leave policies, and workplace accommodations;
- Record-keeping compliance, including the maintenance of payroll and employment transactions (applicants, hires, promotions, recalls, terminations) data for all construction trade employees;
- Contracting activity, including documentation of solicitations to minority- and women-owned contractors and suppliers; and
- Section 503 and VEVRAA compliance, including invitations to self-identify, assessments of physical and mental qualifications, evaluations of outreach and recruitment efforts, reasonable accommodation policies and practices, and required data elements (disability utilization and veteran hiring benchmark attainment).

3. **Conduct a Self-Audit.** Are you required to have a written affirmative action plan under section 503 (individuals with disabilities) and/or VEVRAA (protected veterans) and, if so, is it current? Do you have written documentation of good faith efforts to comply with the EO 11246 affirmative action requirements? Do you have proper records of personnel activity and have you monitored for adverse impact in employment selections? Have you reviewed your compensation practices to ensure nondiscrimination?

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