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Covered Federal Contractors Will Soon Be Required to Certify That They Have an Affirmative Action Plan

*By Brent Hamilton and Gregory A. Hendershott**

The authors offer steps that federal contractors and subcontractors should consider taking in light of the impending implementation of the Affirmative Action Plan Verification Interface procedure.

Federal contractors and subcontractors will soon be asked to regularly certify that they have compliant affirmative action plans (“AAPs”), and contractors may even be required to upload a copy of their AAPs on an annual basis, even if they are not subject to an active compliance evaluation.

Those contractors who cannot certify that they have developed and maintained an AAP will be at significantly increased risk for a compliance audit. Covered federal contractors should take steps now to ensure they have developed and maintained AAPs, including separate AAPs for each covered establishment.

AFFIRMATIVE ACTION PLAN VERIFICATION INTERFACE COMING SOON

Although federal contractors have known for some time that such a certification would be coming, a recent and subtle change suggests that the certification requirement is coming soon. The U.S. Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”) recently added a landing page on its website for the Affirmative Action Plan Verification Interface.¹

Under the title “Coming Soon,” the landing page explains, “Affirmative Action Plan Verification Interface (AAVI) is a secure web based interface created to improve communication and the transfer of Affirmative Action Plan data, between Federal Contractors and the Office of Federal Contract Compliance Programs.” Once the AAVI system goes live, federal contractors will have 90 days to certify that they have a compliant AAP.

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¹ <https://www.dol.gov/agencies/ofccp/aavi>.

IN 2016 GAO CRITICIZED OFCCP'S COMPLIANCE PRACTICES

In September 2016, the U.S. Government Accountability Office (“GAO”) published results of a study² that assessed how OFCCP conducts compliance evaluations, and evaluated OFCCP outreach assistance and guidance for contractors in complying with the requirements OFCCP enforces. That study was critical of OFCCP’s “weak compliance evaluation selection process.”

The study also found that OFCCP’s outreach and compliance assistance activities had declined due to a focus on enforcement activities.

The GAO study concluded with recommendations to ensure that federal contractors are complying with equal employment opportunity requirements, including changing the process for developing the contractor scheduling list for compliance evaluations, monitoring AAPs on a regular basis, and requiring annual certifications by contractors about their AAPs.

OFCCP RESPONDED BY PROPOSING ADDITIONAL VERIFICATION PROCEDURES

In response to the 2016 GAO study, OFCCP issued a directive³ to implement a verification process with the objective of ensuring that all covered federal contractors are preparing a written AAP, including a yearly certification whereby contractors would affirm their compliance with AAP requirements. Part of OFCCP’s directive was to include a criterion in its neutral scheduling methodology, increasing the likelihood of compliance reviews for contractors who have not certified compliance with the AAP requirements.

In September 2020, OFCCP made its formal request⁴ to the Office of Management and Budget (“OMB”) for approval of a new information collection request to collect and monitor AAP from covered federal contractors and subcontractors on a regular basis. That formal request outlines OFCCP’s AAVI process.

A key feature of AAVI is transitioning OFCCP’s compliance evaluation processes and recordkeeping to a fully electronic mode by enabling a direct connection between the contractor and OFCCP. At present, AAP data and documents are submitted through email or a physical delivery service, and OFCCP cannot guarantee the security of the significant personal information

² See “EQUAL EMPLOYMENT OPPORTUNITY Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance” (September 2016), *available at* <https://www.gao.gov/assets/gao-16-750.pdf>.

³ See “Directive (DIR) 2018-07” (August 24, 2018), *available at* <https://www.dol.gov/agencies/ofccp/directives/2018-07>.

⁴ <https://www.regulations.gov/document/OFCCP-2020-0001-0002>.

contained therein. OFCCP believes that allowing a contractor to directly upload AAP data will “vastly decrease[] the chances of data breach compared to email submissions.”

AAVI WILL REQUIRE CONTRACTORS TO AFFIRMATIVELY CERTIFY THEIR AAPs

AAVI will also include a regular certification requirement. Covered federal contractors will be asked to certify one of the following:

- 1) The contractor has developed and maintained affirmative action programs at each establishment, as applicable, or for each functional or business unit;
- 2) The contractor has been party to a qualifying federal contract or subcontract for 120 days or more and has not developed and maintained affirmative action programs at each establishment, as applicable; or
- 3) The contractor became a covered federal contractor or subcontractor within the past 120 days and therefore has not yet developed applicable affirmative action programs.

Existing contractors will have 90 days to comply with the certification requirement once it takes effect. New contractors and existing contractors who become subject to AAP requirements after the effective date will have 90 days after they have developed their AAPs, which must be completed within 120 days after a contractor becomes subject to OFCCP’s AAP requirements.

After the initial certification year, OFCCP will set a date by which all existing contractors must renew their annual certification.

CONTRACTORS MAY ALSO BE REQUIRED TO UPLOAD AAPs ANNUALLY

As of September 2020, OFCCP was considering three potential options regarding the type and frequency of the data it would collect through AAVI:

- Option 1: All contractors would be required to certify annually. Contractors who are scheduled for a compliance evaluation will submit their AAPs as they currently do, via email or a delivery service.
- Option 2: All contractors would be required to certify and upload their AAPs on an annual basis.
- Option 3: All contractors would be required to certify every two years. Contractors who are scheduled for a compliance evaluation will submit their AAPs as they currently do, via email or a delivery service.

Option 2 carries the most significant burden for contractors, as it is the only option that requires all contractors to upload their AAPs annually (even if that

contractor is not subject to a compliance evaluation). Option 1 and Option 3, by contrast, would require only contractors who are scheduled for a compliance evaluation to submit their AAPs.

And while Option 1 would require contractor certification annually, Option 3 would require contractor certification every two years. As of this writing, the public comment period has closed (with most comments favoring Option 3), but it is not clear which Option OFCCP and OMB may adopt and approve.

TAKEAWAYS FOR FEDERAL CONTRACTORS AND SUBCONTRACTORS

In light of the impending implementation of the AAVI procedure, federal contractors and subcontractors are advised to take the following steps:

- Review whether any current contracts or subcontracts fall within OFCCP's jurisdiction, and specifically whether those contracts or subcontracts trigger AAP requirements;
- Review and analyze whether a covered contractor has multiple establishments (or functional or business units) that may require separate AAPs;
- For covered contractors or establishments that may not have prepared an AAP, take immediate steps to develop a compliant AAP; and
- For covered contractors or establishments that have previously prepared an AAP, ensure that AAP has been updated and document those steps taken to maintain the AAP.