

OFCCP Issues Directive Announcing “Affirmative Action Program Verification Initiative”

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Quick Hit: OFCCP has issued a new [Directive](#) (Directive 2018-07), announcing its intention to develop an Affirmative Action Program Verification Initiative (the “Verification Initiative”). The Directive only notifies the contractor community that the program is in the works – for now, nothing has changed. However, the Directive shares that the program will, among other things, include “a process whereby contractors would certify on a yearly basis compliance with [Affirmative Action Program (“AAP”)] requirements,” and tweak OFCCP’s compliance evaluation scheduling criterion to attempt to increase the likelihood non-compliant contractors are scheduled for compliance evaluations.

Key Takeaways:

1. If you are a contractor that has not been diligent in preparing its annual AAP, in the near future you will have strong incentives to change your ways. If you are one of those contractors, **now** is the time to get your AAP house in order.
2. The Verification Initiative makes some practical sense and from the Directive it appears OFCCP has given the matter serious thought. That being said, the devil, as always, will be in the details. This program has the potential to be a positive development for compliant contractors, or another compliance headache.

Stay tuned. We will report on the details of the program once it is announced.

More Detail: As we previously reported, Acting OFCCP Director Craig Leen [announced](#) at the National Industry Liason Group Conference that the OFCCP is working on a contractor certification program. Although he was short on details, he shared that the program would aim to provide OFCCP with a way to identify contractors who are likely in compliance in order to focus compliance evaluations on contractors likely not in compliance.

In Directive 2018-07, OFCCP has formalized this initiative. As explained by OFCCP, the Verification Initiative appears to have two primary goals: (1) increase contractor compliance with OFCCP regulatory requirements; and (2) help OFCCP focus its compliance evaluations on non-compliant contractors.

The Directive notes that OFCCP can only conduct compliance evaluations for a small portion of the 120,000 contractor establishments governed by its regulations. The Verification Initiative is a way for OFCCP “to expand its compliance reach.” The Directive also expresses OFCCP’s “concern[] that many federal contractors are not fulfilling their legal duty to develop and maintain AAPs and update them on an annual basis.” The Directive cites to a 2016 U.S. Government Accountability Office [report](#) which found that “close to 85 percent of contractor establishments did not submit a written AAP within 30 days of receiving a scheduling letter.” Noting that the agency only audits a small fraction of government contractors, the Directive states that “federal contractor establishments have a small likelihood of discovery if they decide not to develop and update an AAP.” This, according to OFCCP, creates a “free rider” problem, where some contractors “benefit from participating in the federal procurement process while not bearing the corresponding costs of AAP compliance based on the current high likelihood they will not be listed (and potentially receiving an inequitable advantage over law abiding contractors).”

As such, the Directive announces that OFCCP seeks to “establish[] a program for verification of compliance by all contractors with AAP obligations.” The program would encourage compliance in two ways. First, contractors would have incentive to prepare their AAPs because they would have to certify compliance. Second, certifying compliance would lessen the chances that contractor would be selected for a compliance evaluation. As the Directive explains, the failure to develop and update an AAP violates threshold contractual and legal obligations, and indicates a lack of commitment to comply with equal employment opportunity and anti-discrimination obligations. Accordingly, in situations where contractor establishments fail to comply with the AAP requirement, the likelihood of other violations, including discrimination, may be higher. Thus, OFCCP believes that [adding certification information as a] new [compliance evaluation scheduling] criterion could be effective at identifying potential violators of the authorities OFCCP enforces.

The Directive only announces the creation of a verification program at some point in the future. As such, we still do not know what the program will entail or even when OFCCP aims to implement it. However, the Directive states that the program “would initially take the form of OFCCP review of a certification, followed by potential compliance checks, and could later take the form of annual submission of AAPs to OFCCP for review.” The Directive states that “comprehensive program” will include:

1. Development of a process whereby contractors would certify on a yearly basis compliance with AAP requirements.
2. Inclusion of a criterion in the neutral scheduling methodology increasing the likelihood of compliance reviews for contractors that have not certified compliance with the AAP requirements.
3. Compliance checks to verify contractor compliance with AAP requirements.
4. Requesting proffer of the AAP by contractors when requesting extensions of time to provide support data in response to a scheduling letter.
5. Development of information technology to collect and facilitate review of AAPs provided by federal contractors.

The Directive anticipates that the new program will not come as a surprise to contractors. It promises that “OFCCP will prepare a public outreach and education campaign on this initiative. The campaign would encourage contractors to contact the agency for compliance assistance regarding AAPs.”

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