

OFCCP Compliance Evaluations

A compliance evaluation (also referred to as a compliance review or audit) is the most comprehensive audit mechanism utilized by the OFCCP to monitor a contractor's affirmative action efforts. The purpose of the review is two-fold: (1) to determine if the contractor is complying with affirmative action laws and regulations, and (2) to find if there has been unlawful employment discrimination occurring within the audited establishment.

The contractor is selected randomly from either government contracting databases or a system put into place by OFCCP that identifies contractors from previous EEO-1 submissions. During the audit process, OFCCP is allowed full access to all documentation supporting the employment process. Upon receipt of a scheduling letter, the contractor has 30 days to submit the AAP and support documentation. Requests for extension can be made to the regional office that initiated the evaluation.

Evaluation Process – Types of Reviews

There are four different types of evaluations:

- *Compliance review* – Most comprehensive evaluation, but rarely initiated by OFCCP with its new emphasis towards enforcement. Desk audit of a written affirmative action plan and documentation; on-site review of problems and documentation; off-site review to measure results of AAP efforts.
- *Off-site review* - Analysis and evaluation of written AAP (or part of the plan) and support documentation, personnel policies, and compliance actions (similar to the previous "desk audit" phase of the compliance review and still commonly referred to as the "desk audit"). This is the most common type of evaluation administered by OFCCP. If the results of the off-site analyses reveal adverse impact (with a standard deviation greater than two) in any job group for an employment activity, OFCCP may request additional written documentation to support the activity. For example, OFCCP may request copies of resumes of applicants considered for employment along with resumes/applications of candidates hired. To support this more detailed examination of the selection process, OFCCP may also request job descriptions for the positions filled in the job group with adverse impact. To determine if the selection process reveals evidence of potential discrimination, OFCCP will compare the qualifications of the candidates not hired to those hired against the posted job specifications. The contractor may be given the opportunity to defend its employment decisions if not obvious to OFCCP. Also analyzed during this phase are the pay practices within each grade/band/position/EEO-1 category/job group to determine if pay inequities exist for minorities and/or females. If OFCCP feels that questions or discrepancies remain after their off-site analysis, they may come onsite to gather more information in a focused review.
- *Focused review* - On-site review restricted to one or more components of a contractor's organization or aspect of employment practices. This may occur if the off-site analysis of the desk audit submission reveals a potential problem area. Typically, onsite visits take place for the purpose of interviewing employees. To better understand the selection process and to further inquire into hiring decisions, OFCCP may want to interview all managers involved in hiring decisions for positions in the job group with

adverse impact. A company representative is permitted to observe interviews with management employees, but not with non-management employees.

While onsite, the compliance officer may also review personnel policies, tour the facility, inspect I-9 forms and personnel files to determine if affirmative action efforts are being undertaken and if there is evidence that employment discrimination exists in the workplace.

- *Corporate Management review* – (a.k.a. "glass ceiling review") A comprehensive audit of the management of equal employment opportunity throughout a corporation.

Evaluation Closure

Upon completion of all phases of the compliance review, the OFCCP will close out the review in one of several ways. If the contractor escapes the review, the company will receive a "closure letter." This letter indicates that *"during the compliance evaluation we reviewed your Affirmative Action Program (AAP) and support data, and on the basis of our review have determined not to proceed further with the compliance evaluation. This closure should not be interpreted as either a finding of compliance, or of noncompliance."* Receipt of this letter signifies closure of the audit. If the contractor is cited for minor violations, i.e., failure to properly track promotions, the company will instead receive a "closure letter with minor violations." Even though this type of closure is available to OFCCP, it is not typically used.

A third method of resolving an audit is the "conciliation agreement." This agreement is utilized by the OFCCP if material violations of affirmative action obligations are found. For example, if a contractor fails to maintain applicant flow data, fails to list jobs with the state employment office, or fails to make good faith efforts to recruit minorities or females for a particular job group, the OFCCP will issue a conciliation agreement. After entering into a the conciliation agreement, the company typically has reporting requirements during which time it updates the OFCCP on good faith efforts made to correct the violations detailed in the agreement. If conciliation efforts fail, the OFCCP will make a "recommendation of enforcement" in which it details alleged discrimination in employment. The remedies for a found violation can include back pay, front pay and reinstatement of employment.

After any of the three types of closures, OFCCP will not return to conduct another evaluation for two years from receipt of the closure.

Record Retention

Most contractors are required to keep all employment or personnel records for not less than two years from the date of making the personnel action. Computerized records are added to the items that contractors will permit the agency to inspect; copy, and remove for off-site review. These computer records are in addition to other books, materials, accounts and records relevant to an investigation and compliance with the Executive Order.

Contractors that employ less than 150 employees or have a government contract of less than \$150,000 only need to keep records for at least one year. When notified of a filed complaint, compliance evaluation or enforcement action, the contractor must preserve all relevant personnel records until final disposition of the action.

Where the contractor has destroyed or failed to preserve records as required by the regulations, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor, provided that the failure to preserve was not outside the contractor's control. If this occurs, OFCCP will do everything in its power to find evidence of discrimination.

Sanctions

Sanctions that may be ordered by the Secretary of Labor are increased from an indefinite period that could be subject to reinstatement to a fixed minimum or indefinite period. Sanctions may be exercised only by or with approval of the Deputy Assistant Secretary of Labor. Reinstatement of ineligible contractors would be authorized after a compliance evaluation. Interest on back pay awards by OFCCP will be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service.