



OFCCP Announces 'Minor' Changes to Directive on Functional Affirmative Action Plans

Insights

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The Office of Federal Contract Compliance Programs (OFCCP) recently announced “minor” changes to its directive on Functional Affirmative Action Plans (FAAPs) – but some of the changes don’t resonate as “minor.” First, what is a FAAP? Through an agreement with the OFCCP, a federal contractor may opt to establish an affirmative action program based on functional or business units rather than by establishment, as is traditional. So, what’s new? On September 22, the OFCCP announced that its third revision to Directive 2013-01 “provides clarification regarding procedural requirements, in addition to minor language and formatting changes, that continue to provide for a FAAP process that is efficient, fluid, and collaborative.” Although the update provides some clarity for contractors, you should be aware of certain inconsistencies. What do you need to know about the revised directive?

(Non?) Substantive Changes to FAAP Approval and Renewal Process

- First, we should give credit to OFCCP for revising the language regarding which changes to functional or business units require notification to OFCCP. *Only changes resulting in the creation or elimination of one or more functional or business units will require a federal contractor, with an approved FAAP, to notify OFCCP of the change.*
- There is a new requirement for federal contractors with approved FAAPs – to *notify OFCCP of any changes in the primary corporate contact listed in the FAAP agreement within 60 calendar days of a change.*
- OFCCP established some wiggle-room for approving FAAP requests from contractors. The agency no longer commits to making decisions within 60 days, but states instead:

Generally, OFCCP makes this decision within 60 calendar days of the request if all the required information is provided. OFCCP may require additional time if more information is needed.

- The most alarming change is the elimination of the language from Revision 2, section 6.b.5, which states that OFCCP is responsible for “using the information that a contractor provides in support of its request for a FAAP agreement solely to evaluate that request.” The elimination of this language is concerning, as it makes one wonder for what purpose OFCCP might be contemplating using the confidential data provided by federal contractors. The recent Freedom

of Information Act (FOIA) request has not provided contractors with much reassurance that its confidential data will not be released.

For the most part, the changes to the language of the directive provide clarity and consistency. However, there is at least one minor inconsistency remaining in the language. In section 9.e.ii(2), the old language, requiring notification of any modification to functional or business units rather than only those changes resulting in an addition or removal of a functional or business unit, was left intact. We are likely to see this changed in Revision 4.

What Does This Mean for Contractors?

Sadly, the contractor community may be disappointed in the limited scope of the FAAP's revisions. Many federal contractors had hoped that the FAAP process would be offered by OFCCP structure as a contractor-choice option to the historical brick-and-mortar establishment currently contemplated for AAPs in the federal regulations. Federal contractors that have seen a significant uptick in remote employees in their workforce now struggle to find a brick-and-mortar establishment with which these employees may be associated under the current regulatory options.

The FAAP concept may have been a viable choice for contractors with many remote employees, but the continued additional requirements imposed by the FAAP approval process add another administratively burdensome compliance requirement to contractors already facing new certification requirements, augmented compensation analysis directives, and recently, concern about the disclosure of their EEO-1 reports pursuant to a pending FOIA request.

However, OFCCP did suggest at the recent National Industry Liaison Group (NILG) Conference this summer that revised regulations may be issued in the spring. We will keep you posted.

Conclusion

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