



# OFCCP Revises Its Standard Audit Procedures

*What You Need To Know  
About the Newly Revised  
Federal Contract  
Compliance Manual*

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# Presenters



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# Seyfarth Shaw's Perspective

- Informed by experiences of more than 300 employment attorneys representing management
- Handling many of the most significant employment cases today
- Our practice is national in scope: 10 offices in the US
- Nationally recognized leaders in understanding and communicating affirmative action compliance and developing successful affirmative action programs (AAPs)
- Have defended hundreds of OFCCP compliance evaluations across every region in the US
- Consulting with hundreds of employers about employment policies and best practices, including selection and pay equity



# Federal Contract Compliance Manual

- OFCCP's procedural framework for executing compliance evaluations and complaint investigations
- Eight chapters, a list of key words and phrases, a glossary and several attachments, including sample forms and letters
- Standardization goal (regional differences should be minor and infrequent)
- Does not establish substantive agency policy or create/change legal rights
- Regulations and OFCCP policy trump FCCM



# Overall Themes

- Memorializes some well-known OFCCP policies, while adds some new ones
- More user-friendly (explanatory intros)
- Applicability to Section 503 and VEVRAA (but needs to be updated)
- Clarifications on required OFCCP approval/signatures and methods of transmission
- Focus on favored v. nonfavored groups
- Deleted references to “Letters of Commitment,” “Voluntary Resolution of Violations” and I-9 Inspection



# Key Words and Phrases



# Key Words and Phrases (Formerly FCCM Chapter 1)

- Most definitions are unchanged from the original FCCM
- Employee: Adopts the “common law agency” test
- Internet applicant rule
- Revised race/ethnicity categories from 2006
- Favored and non-favored groups
- Additions: Physical or Mental Impairment, Essential Function, Armed Forces Service Medal, Shortfall, Regression Analysis, Caregiver Discrimination
- Updated: Accessibility, Availability



# Chapter 1:

## Desk Audits





# Chapter 1: Desk Audit

- New Focus: “determine whether federal contractors maintain non-discriminatory hiring and employment practices” (1A02)
- Substantive changes to Scheduling Letter and Itemized Listing per OMB reauthorization process are not reflected in FCCM (FN 15)
- CO should contact the contractor within 15 days after sending the Scheduling Letter (1B04)
- Standard compliance evaluation report (SCER) is more detailed (see Appendix A1 for updated form)
- Confidentiality: to the maximum extent the information is exempt from public disclosure under FOIA (1A06)



# Chapter 1: Desk Audit (Cont.)

- Initial investigation to identify “company-wide practices that result in discrimination” (1B05-9):
  - ✓ EEOC/State/Local FEP agencies for EEO litigation/court orders
  - ✓ Pending audits and closed case files
- Review of 3 years of EEO-1 Reports for trend analysis (1K00)
- Extensions: Supervisor discretion to “determine whether to grant . . . a reasonable extension and the length of time of any extension” (1C)
- Evaluation period “at least the last full year,” plus applicable update (e.g., Jan-July) (1C03)
- “Special circumstances” (e.g., appearance of potential discrimination) warrant two year review period prior to the date of scheduling letter and may examine information after the date of the scheduling letter (with supervisor approval) “to fully investigate and understand the scope of potential violations” (1C03)



# Chapter 1: Desk Audit (Cont.)

- To evaluate AAP implementation, CO must conduct on-site investigation in most cases (1F00)
- Impact Ratio Analysis (IRA) of less than 80% for a protected group “generally” must be investigated onsite (1O), including individual race and ethnic groups (1O01)
  - FN 54: “COs may run standard deviation analyses to determine whether and what types of additional information they may need to establish potential discrimination.”
  - No mention of FE or other small numbers test
- Determining Underutilization (1F03c): May choose any method, but must apply uniformly to all job groups, as appropriate:
  - Any difference
  - One whole person
  - “80 percent” rule
  - Statistical significance



# Chapter 1: Desk Audit (Cont.)

- “Other areas” that might affect success of AA program (seniority practices, leave practices, time off policies, policies regarding part-time work) (1F05b)
- AAP internal audit and reporting system should describe frequency, corrective steps, designation of responsibility and management review of results (1F05d)
- Re-focus on “underrepresentations” and “concentrations” (1N00)
- Use of Job Area Acceptance Range (JAAR) Analysis to measure minority and female distribution patterns (1N01)



# Chapter 1: Desk Audit (Cont.)

- Compensation audit: Consider “other information” regarding compensation system, including description of internal compensation pay practices and policies (e.g., “administration of bonuses” and “self-audit results”) (1P00)
- Where “indicators,” CO great discretion to request additional information on policies or procedures, and on categories of jobs or selections within jobs groups (1P02)
- Broader requirements and review of Section 503/VEVRAA AAPs (1H08-10)



## Chapter 2:

### Onsite Review



## Chapter 2: Onsite Review

- Adds Compliance Check (determine whether maintained records consistent with Section 503/VEVRAA regulations) (2A)
- Onsite necessary if insufficient data submitted, indicators of potential discrimination or identified for complete review (1R01)
- Instructs COs to inform managers and employees of prohibition against retaliation (2C00)
- Facility inspection should include possible “physical accessibility issues” for IWDs and disabled veterans and CO may ask about process for receiving/handling requests for accommodation (2D01)
- CO must document observations in Standard Compliance Evaluation Report (SCER) (2C01)



## Chapter 2: Onsite Review (Cont.)

- “Audit of Employment Activity to Ensure EEO” includes review of self-audit process (employment activity, selection criteria and good faith efforts) (2E03)
- Examination of Section 503/VEVRAA compliance, including EEO and anti-harassment policy statements; review physical and mental job qualifications; reasonable accommodation process; externally disseminate EEO policy; outreach and positive recruitment (2F00)
- Confirm postings: availability of Section 503/VEVRAA AAPs and Employee Rights under EO 13496 (2F01, 2I01)
- Updated invitations to self-identify under Section 503/VEVRAA (2F02)
- COs “must examine the application or personnel file, or both, of each individual who self-identifies as having a disability” (2F02)
- COs must review employment data indicating whether contractor hired IWDs and veterans, and, if not, reason for non-selection (2F02)





## Chapter 2: Onsite Review (cont.)

- Confidentiality of Medical Information: COs must assess contractor's system for maintaining confidentiality of medical information, including where records kept, who has access & why, and measures that ensure confidentiality of records (2F03)
- Contractors must provide all available information regarding test validation procedure, including development of the procedure, validity studies, and consideration given to alternative selection criterion (and reasons for rejection) (2J)
- Compensation (2L03): Case-by-case approach; Look for a “measureable difference” in compensation on the basis of sex, race, or ethnicity defined as “statistically significant difference, two standard deviations” (if enough information to use regression analysis), **OR**, if smaller groups, “sufficient evidence will be determined in conformance with Title VII principles” (FN 111)



## Chapter 2: Onsite Review (cont.)

- Attorney/Representative at Interviews (2M00d-e): Permitted for upper-level managers and directors speaking on behalf of company; NOT permitted for CO non-management personnel (unless employee requests a personal representative)
- When contractor provides new information, the CO must conduct any necessary investigation and analyses to determine if the new evidence changes any findings; “A basic part of any additional investigation is verifying the credibility of the new evidence” (2P00)
- Does OFCCP have bandwidth for increased and more comprehensive onsites?



# **Chapter 3:**

## ***Construction Industry Compliance Program***



# Chapter 3: Construction Industry Compliance Program

- Updated jurisdictional thresholds to reflect updated regulations (3B); compliance reviews under VEVRAA (if >50 ees and federal contract > \$100K) (3B)
- Discussion about where to include “Specifications” (3B02)
- OFCCP/GSA contract: information sharing on awards (3B03)
- Former 4B02 “Monthly Employment Utilization Report (CC-257)” removed
- Onsite review process more descriptive (Entrance Conference, Review of Records, Audit of Policies, Practices and Procedures, Interviews, Worksite Inspection, Identification and Investigation of Discrimination and Exit Conference) (3D)



# Chapter 3: Construction Industry Compliance Program (Cont.)

- New examples of items contractor must make available for inspection and copying during the review (3E)
- New instruction for CO to “review DOL’s enforcement database for information available from other labor agencies such as OSHA and the Wage and Hour Division” (3E)
- CO payroll records review to determine: (1) number of months of payroll activity to review/evaluate progress toward work hour participation rate goals; (2) uniformity in assignment of employees to various project sites; and (3) equity in allowing/granting overtime and other benefits (3H00)
- Added COs will conduct impact ratio analysis of hiring, promotions, separations, and compensation analysis and include findings and support documents in Narrative Summary of the SCER (3H01)
- If hiring controlled through a union hiring hall, CO must review CBA to verify; if CBA not clear, CO should contact union hall to determine the process (3H02)



## Chapter 3: Construction Industry Compliance Program (Cont.)

- COs to examine personnel policies and practices, including conditions of employment, distinctions based on marital status or caregiver responsibilities, and bona fide occupational qualifications (3H03)
- COs to gather information/conduct interviews to determine development/implementation of policy prohibiting sex discrimination (3H04)
- Detailed audit of training (3I01)
- Annually review EEO policy with all employees and inventory/evaluate all employees for promotional opportunities (not just women and minorities) (3I02)



## **Chapter 4:** *Corporate Management Compliance Evaluations*



# Chapter 4: Corporate Management Compliance Evaluations

- Focus on corporate-wide good faith efforts to identify and eliminate discrimination for middle/senior-level corporate management (4A00)
- Regional Director may attend CMCE onsite conferences (4G00)
- More robust confidentiality: if contractor expresses concerns, CO must advise that OFCCP will treat the information as confidential to the maximum extent the information is exempt from public disclosure under FOIA (4A02). Note:
  - Contractors should “clearly identify all trade secrets and commercial or financial information it believes are exempt from disclosure”
  - Under the Trade Secrets Act, it is a criminal offense for a government employee to release trade secrets and other forms of confidential commercial and financial information to another business or the public unless law authorizes disclosure





# Chapter 4: Corporate Management Compliance Evaluations (Cont.)

- Pre-onsite Research:
  - Corporation background research: COs to use internet “to learn as much as possible about the corporation’s operations, personnel procedures, and EEO compliance history” (4B01)
  - Contacting DOL enforcement agencies (OSHA, WHD) for complaint information (4B06)
  - Evaluation of EEO-1 Reports to identify major facility locations (>150 ees OR ee counts at least 33% higher than average of all facilities) (4B012)
- CO may expand evaluation beyond the corporate headquarters if a problem area is identified (4H04)



# Chapter 4: Corporate Management Compliance Evaluations (Cont.)

- Analysis of “Non-favored Groups”: Any “marked” decline in any group’s participation in top or middle-management? (4D00)
- Review/evaluate representation of protected veterans and IWDs in management and succession planning (4H04)
- Interviews with mid- and senior-level managers on the corporate culture, career development, mentoring, networking and employment opportunities (Attorneys may be present except when a manager is being interviewed in his or her capacity as an employee rather than as a management official) (4G02)
- More detailed review of retention and compensation packages, promotions, terminations, and selection procedures for management programs (4H, 4I)
- COs must consider additional sources of information (personnel files) if hear about practices that conflict with company policies (4H00)



# Chapter 5:

## *Functional Affirmative Action Program Evaluations*



# Chapter 5: Functional Affirmative Action Program Evaluations (FAAP)

- New chapter for FAAP reviews
- SCER and desk audit/on-site procedures (Chapters 1 and 2) apply to FAAP evaluation (5A02-3)
- OFCCP National Office FAAP unit schedules evaluations and coordinates with regional office and district field offices to conduct evaluation (5B01)
- National Office research into industry and EEO compliance (5B03-5)
- Assessment whether FAAP agreement is current (business unit or functional unit reflected in the FAAP agreement) (5C)
- Depending on desk audit issues identified, possible on-site at multiple locations (5D)
- At conclusion, field office closes the review and notifies the National Office of results (5E)
- COs must follow Chapter 8 (Resolution of Noncompliance) if find violations (5E)



## **Chapter 6:** ***Complaint Investigations***



# Chapter 6: Complaint Investigations

- More precise guidelines and direction for COs (types of questions to ask, documents to gather, etc.)
- Detailed templates for letters and communications (Appendix)
- Any individual, group or third party may file a complaint (6C01)
- OFCCP generally refers individual discrimination complaints to EEOC and investigates class and systemic discrimination complaints under EO 11246 (6B)
- OFCCP investigates individual and class complaints under VEVRAA and Section 503 (6B)
- Perfected complaint should be signed by complainant and include specifics (6C02)
- Include evidence of disability status (Section 503) and protected veteran status (VEVRAA) (6C02)



## Chapter 6: Complaint Investigations (Cont.)

- Specific guidelines for how case file is maintained (6C03)
- Completion of all investigations within 60 calendar days from mailing; Extensions up to 120 calendar days to complete investigation and 60 calendar days for conciliation for good cause (6C06)
- Expansion of investigation to compliance evaluation if learn of class, systemic or other issues; subject to supervisor and national approval (6E00)
- Investigative priority for complaints alleging irreparable harm (e.g., retaliatory threat of termination for filing complaint) (6E00)
- Interview and Investigative Plans (6E01, 6F) and Data Gathering (6G02)
- Onsite: facility inspection (photographs permitted), verify postings/notices, retaliation prohibition, exit conference (6G01, 6G06)



## Chapter 6: Complaint Investigations (Cont.)

- CO makes factual findings with support and prepares Notification of Results of Investigation (NORI) for violation or no violation (6H, 6I)
- Before issuing a no-violation NORI, CO must contact complainant (6J01)
- Complainant may request Notice of Right to Sue if 180 days have passed; terminates OFCCP processing of Title VII/ADA complaint components unless continuing investigation would further effectuate purpose of statutes (6J03)
- Regional Director involved in conciliation for cases involving potential compensatory and punitive damages; RD must consult Regional Solicitor and the Director of Program Operations for punitives (6J05)





# Chapter 7:

## *Employment Discrimination Remedies*



# Chapter 7: Employment Discrimination Remedies

- Section 503 and VEVRAA now included in discrimination remedies (consistent with ADA principles) (7A00, 7A03)
- Removal of sections regarding substantive law for employment discrimination and disparate impact
- Process to identify potential discrimination deleted reference that potential problems are first investigated onsite (7A02)
- VEVRAA and Section 503 complaints must be filed within 300 calendar days of the alleged discriminatory act, “except for good cause shown” (7B)
- Continuing Violation Theory: Re-emphasizes use of theory in compensation cases (wages, benefits, or other compensation resulting from discriminatory decision or practice) and example references the same “or similar work” (7B00)



# Chapter 7: Employment Discrimination Remedies (Cont.)

- Corrective remedies references unvalidated or invalid tests; corrective action may include “validating the test in compliance with the Uniform Guidelines on Employee Selection Procedures” (7C01)
- Retroactive Seniority includes distinction between competitive and noncompetitive seniority (7C04)
- Union involvement in Retroactive Seniority: Participation limited to seniority issues (7C04e1); CO to consult local Office of the Solicitor if union refusal to participate/agree to seniority relief (7C04d)



# Chapter 7: Employment Discrimination Remedies (Cont.)

- Elements of Back Pay: Added additional examples of shift differentials, incentive pay, fringe benefits, stock options and awards (7C06b) and new benefits section (7C06c)
- Interest on back pay “must be compounded quarterly” (7C06f1) and employer cannot negotiate back pay to include its portion of FICA or unemployment insurance (7C06g1, 7C06g2)
- Back pay for 2 years prior to scheduling letter and forward until resolved (7C07)
- Formula Relief is “preferred method” (7F12)
- Victim-Specific Remedies Approach “used infrequently;” no longer “preferred” and “primary remedy” (7C10a)
- Contractor must hire class members before non-class members (7F12c5)



# Chapter 8: Resolution of Noncompliance





# Chapter 8: Resolution of Noncompliance

- Includes flowcharts for investigations
- Show Cause Notice if contractor “unreasonably interferes with the review process” or intimidates OFCCP representative, fails to submit compensation data” or “refuses to provide access to its premises for an onsite review” (8B02b, 8D01)
- Directly to enforcement (SCN not necessary) if intimidation or harassment of OFCCP agent or unreasonable interference with a complaint investigation or compliance review (8D02)



# Chapter 8: Resolution of Noncompliance (Cont.)

- PDN is not required; OFCCP “may proceed directly to an NOV incorporating the pattern or practice finding” (8B02c)
- Additional violations warranting NOV: lack of recordkeeping and lack of outreach and recruitment (8F00)
- CA also used for Section 503 and VEVRAA violations (8H00)
- “No provision of a CA may preclude OFCCP from issuing a press release or otherwise publicizing the results of compliance actions” (deleted “without the express prior approval of the Director, OFCCP”) (8H01)



# Chapter 8: Resolution of Noncompliance

- CA Termination Date “could be extended” if make-whole relief not completed (deleted “the CA termination date would be open-ended”) (8H02)
- Deleted “where the class exceeds 50 persons or back pay exceeds \$100,000, the CA must have written legal clearance by the Regional Solicitor before being signed by the RD” (8H03)
- Co must consult supervisor and National Division of Program Operations before engaging in onsite evaluation to evaluate compliance with CA (8I01)
- Enforcement recommendation if contractor not negotiating in good faith and unlikely agreement will be reached (8K00)





# Highlights

- Basic AAP Compliance
  - Conduct favored group analyses
  - Underrepresentation and concentration measurements
  - Compliance with new disability and veteran regulations, including self assessment
  - Validation studies with considerations of alternatives
- Be Audit Ready
  - Be familiar with new FCCM
  - Use sample questions for preparation
  - Focus on compensation
  - Review of medical files for appropriate confidentiality
  - Be prepared to explain why veterans and IWDs not hired