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Editor's Note: Changes for Government Contractors Victoria Prussen Spears	37
Changes Are Coming to the Biden Administration's Federal Sustainability Plan Taite R. McDonald, Kelsey M. Hayes and Hannah M. Coulter	40
Federal Government Announces New Affirmative Action Plan Certification Requirements for Federal Contractors Sheila M. Willis and Samina Weil	44
U.S. Department of Labor Issues Final Rule Implementing Minimum Wage Increase for Federal Contractors Christopher D. Durham and Meredith Gregston	47
U.S. Justice Department Signals Intent to Hold Government Contractors Accountable for Lax Cybersecurity Standards Robert M. Duncan, Lindsay K. Gerdes and Michael B. Stuart	52
Continuing to Pull Back the Curtain on Federal Relief Abuses Mark F. Sommer and Elizabeth D. Mosley	56
Recent Decisions Highlight Extra Diligence Needed When Acquiring a Government Contractor Shlomo D. Katz	59
Federal Contractor Vaccine Mandate Now Blocked Nationwide: A Playbook for Federal Contractors and Subcontractors Cheryl L. Behymer and Hannah Sweiss	63
In the Courts Steven A. Meyerowitz	66

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Federal Government Announces New Affirmative Action Plan Certification Requirements for Federal Contractors

*By Sheila M. Willis and Samina Weil**

In this article, the authors explain what government contractors need to know about their new obligations to develop and maintain affirmative action plans via an online contractor portal.

Federal officials recently announced that supply and service federal contractors and subcontractors who meet the designated jurisdiction thresholds for creation and maintenance of affirmative action plans (“AAPs”) will soon need to register and certify they are meeting their compliance obligations to develop and maintain annual AAPs via an online contractor portal¹ (an Office of Federal Contract Compliance Programs (“OFCCP”) Affirmative Action Program Verification Interface).

This new requirement, announced on December 2, 2021, will be a significant addition to compliance obligations for government contractors covered by this new requirement.

In fact, until now, OFCCP has never required annual reporting regarding the maintenance of AAPs.

While the contractor community has been awaiting this development since September 2020, when OFCCP published a notice seeking comment on the possibility of an annual AAP certification and verification process, this announcement still sends quite a jolt to those employers who will quickly need to ramp up their compliance efforts. What do federal contractors need to know about this development?

HOW DID WE GET HERE?

Federal contractors have long been required to complete annual affirmative action plans that address women, minorities, individuals with disabilities and veterans in contractors’ workforces.

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¹ https://www.dol.gov/agencies/ofccp/contractorportal?utm_medium=email&utm_source=govdelivery.

However, these plans have largely been on the “honor system” with OFCCP, with contractors only needing to produce them during OFCCP audits or certify their existence during the contracting process. Indeed, a U.S. Government Accountability Office (“GAO”) report from 2016 recognized that OFCCP does not have a method to regularly collect the AAPs that contractors are required to complete, noting the agency audits approximately two percent of the contractor community annually. The GAO report recommended that OFCCP “develop a mechanism to monitor AAPs from covered federal contractors on a regular basis.”

Enter this certification portal. Interestingly, the agency did not engage in any rulemaking process to bring about this new obligation. Rather, the agency relied on existing OFCCP regulations to roll out this initiative, which authorize OFCCP to require an annual program summary.

WHAT WILL CONTRACTORS BE REQUIRED TO DO?

Starting this year, federal contractors will need to provide certification of their AAPs to OFCCP via the AAP-VI portal. The agency has developed a gradual schedule for contractors that guides them through the registration and ultimate certification of their AAPs. The schedule for contractor registration and certification is as follows:

- On February 1, 2022, contractors may begin registering for access to the portal. OFCCP will also send an email to each covered federal contractor in its jurisdiction whose email information is available in its system inviting them to register.
- On March 31, 2022, contractors will be able to utilize the certification feature in the portal to certify their AAP compliance.
- By June 30, 2022, existing contractors must certify whether they have developed and maintained an affirmative action program for each establishment and/or functional unit, as applicable.

New contractors who have 120 days to develop their AAPs must register and certify compliance in the portal within 90 days of developing their AAPs.

Registration and annual certification will not exempt covered federal contractors and subcontractors from compliance evaluations.

The portal will also be the method by which contractors will upload their AAPs during scheduled compliance evaluations.

Notably, OFCCP has also provided several assurances regarding the safety of the information that is being uploaded to the AAP-VI, including login security limitations to full access of the content, password policies that require complex

passwords, and purported safeguards to protect against user identity theft and modules that protect the website from nefarious attacks.

WHAT SHOULD CONTRACTORS DO TO PREPARE?

Although OFCCP will only require annual certification by supply and service federal contractors, this may well change to cover the entire federal contractor and sub-contractor community. Now is a good time to review compliance practices.

Contractors should be prepared to complete the registration and certification process by next year. For registration, contractors will need their EIN number and Headquarter/Company Number and Establishment/Unit Number from the EEO-1 Reports. Contractors are permitted to have multiple users registered for the Contractor Portal, so they should determine who those users will be and if any back-ups are needed. OFCCP has already released some information regarding the interface and the information needed for this process, but will likely issue more guidance as well as provide updates to the FAQs that have already been populated by the agency.

Contractors also should ensure that they have a plan in place to ensure that they are timely and accurately completing their AAPs so that they may affirmatively certify to the agency that they are in compliance.

Finally, contractors should prepare for a future in which they may have to submit their AAPs to OFCCP, as many believe this certification portal is a giant step toward that potential requirement.