

Frequently Asked Questions: Government Contracting and Affirmative Action Compliance Requirements administered by the Federal Office of Compliance Programs (OFCCP)

Who is required to have an Affirmative Action Plan?

Under Executive Order 11246 and Section 503 of the Rehabilitation Act of 1973, employers are required to establish written affirmative action plans for females and minorities and for individuals with disabilities for each of their establishments if they have a total of 50 or more employees and meet one of the following four criteria:

1. Have entered into at least one single government contract for \$50,000 or more in any 12-month period; or
2. Have government bills of lading which in any 12-month period total, or can reasonably be expected to total, \$50,000 or more; or
3. Serve as a depository of Government funds in any amount; or
4. Are a financial institution which is an issuing and payment agent for United States savings bonds and savings notes in any amount?

A written AAP is required for covered veterans under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) for contracts entered into before December 1, 2003, and the above criteria is applied to determine coverage. The Jobs for Veterans Act, which amended VEVRAA, raised the threshold for the written plan requirement to \$100,000 for contracts entered into or modified on or after December 1, 2003.

What are the various requirements to ensure Contract Compliance?

Generally, to comply with the law, a government contractor or subcontractor needs to have written affirmative action plans that cover women and minorities, individuals with disabilities and veterans. As part of its obligations, a contractor or subcontractor needs to track and analyze employment data, including hires, promotions, terminations and applicants. Further compliance steps include compensation analysis, training management, recruiting qualified individuals and posting notices.

If you are unsure about your company's specific requirements to comply, contact a member of Flex HR Affirmative Action Team. Our team of experienced Human Resources professionals and AAP Specialists are available to assist you in identifying what records are required to comply with your Affirmative Action obligations. We will partner with you to develop all of the required AAP components at a cost effective rate. We assist clients with policy development, provide preventive advice, review hiring and

compensation practices for identification of potential discrimination issues, and provide attorney-client privilege and work product protections.

What are the penalties or implications for non-compliance?

If deficiencies or violations of Executive Order 11246, the Rehabilitation Act and the Vietnam Era Veterans' Readjustment Assistance Act are found during a compliance review or complaint investigation, the OFCCP is authorized to take certain actions to resolve such problems. The OFCCP must use reasonable efforts to attempt to secure compliance through conciliation and persuasion. Most violations are resolved informally. The two most common methods of informal resolution are: (1) compliance evaluation closure letters and (2) conciliation agreements.

Compliance evaluation closure letters are used to resolve minor technical violations. The letter typically includes a statement that a violation was found and appropriate corrective action has been taken. Under a conciliation agreement, a contractor promises to undertake remedial action necessary to correct violations and/or deficiencies. Conciliation agreements may encompass reporting requirements or monetary payments (in the case of compensation disparities or adverse impact). Monetary violations seek to make the persons whole and can include back wages, benefits and interest (at the government's standard rate).

Failure or refusal to submit an affirmative action plan or cooperate in the compliance review process can lead to debarment (cancellation of the federal contracts from all locations), a significant amount of local and national bad publicity, and the ability of the OFCCP to instruct the federal contracting agency not to pay on the current contracts citing a material breach of the contracts (for failure to abide by Executive Order 11246 and cooperation with the US Department of Labor).

We have received an audit letter - what should we do?

As a covered contractor or subcontractor you must comply with the OFCCP's request and submit your affirmative action plan within thirty days from receipt of the letter. If you do not currently have a plan, you have thirty days from receipt to compile one and submit it to the agency. In addition to a current plan, you will also have to submit employment data, compensation information and evidence of your compliance efforts.

The information submitted is reviewed by the government to identify any areas of non-compliance, adverse impact or compensation disparity. If questions arise, the OFCCP may come on-site to do a more thorough review and analysis. Because of the potential monetary liabilities, it is prudent to seek counsel for assistance with the preparation or review of the plan and data before submittal to the agency.

How can we reduce our chances of liability?

The two areas where OFCCP is most likely to allege discrimination is in hiring and compensation. Thus, contractors can reduce their chances of a finding of discrimination - and potential monetary liability - by ensuring that their hiring and compensation practices are in compliance and do not have an adverse impact against females or minorities.

To accomplish this, contractors should keep all pertinent and required records. The first and best defense to any claim of discrimination is generally the employment records that can demonstrate that all decisions were based on legitimate, non-discriminatory reasons. Unfortunately, many employers fail to ensure that their managers and HR staff maintain appropriate records, and recordkeeping violations are the most frequent citations issued by OFCCP. Without employment records, contractors are automatically at a disadvantage when it comes to defending their practices.

Another important step in reducing the possibility of monetary liability is the annual development of Affirmative Action Plans and analysis of employment activity and compensation. This provides the contractor the opportunity to self-assess its data before OFCCP becomes involved. If problem areas are discovered, the contractor should investigate to determine the cause of any adverse impact and whether it can be reduced or eliminated. This self-assessment allows the contractor to correct any policies or practices that are actually causing adverse impact.

Flex HR can help you reduce the chances of monetary liability by assisting you by analyzing your hiring and compensation data, helping to develop policies to ensure that all necessary employment records are maintained, providing management training and reviewing your employment policies and practices for compliance.

What documents and/or records do we need to keep?

Government contractors with 150 or more employees and contracts of at least \$150,000 are required to retain any personnel or employment record for a period of two years from the date of the making of the record or the personnel action involved, whichever occurs later. For contractors with less than 150 employees or contracts less than \$150,000, the time period is one year. Such records include, but are not limited to, records pertaining to hiring, assignment, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, selection for training or apprenticeship, any records pertaining to requests for reasonable accommodation, results of any physical examination, job advertisements and postings, applications and resumes, tests and test results, and interview notes. Upon receipt of notice that a compliance evaluation has been initiated by OFCCP, all records listed above must be retained until OFCCP makes a final disposition of the evaluation. In addition, any contractor required to develop and maintain a written AAP must retain its AAP and documentation of good faith efforts for both the current and immediately preceding plan years.

Failure to preserve complete and accurate records constitutes noncompliance with the contractor's obligations under the regulations. This could also lead to the presumption by OFCCP that the information not properly maintained would have been unfavorable to the contractor, possibly resulting in substantial monetary penalties.

If you have any questions about which records your company has to maintain and for how long, the Human Resources professionals and AAP Specialists at Flex HR can assist you with identifying the specific records that should be retained in connection with OFCCP regulations and provide guidance in all other aspects of AAP development.

We have several facilities. Do all of our facilities need to have an Affirmative Action Plan?

Each facility may not need its own AAP but every single employee needs to be included in an AAP. Contractors may include those employees in either an "establishment AAP" or in a "functional AAP". A functional plan is based on business units of the multi-establishment company, rather than by facility location, and must meet further requirements, including prior approval by the Deputy Assistant Secretary for Federal Contract Compliance.

Generally contractors develop a written AAP for each facility; however if there are fewer than 50 employees at a particular establishment, the contractor may: (1) develop an AAP including only the workforce at that establishment; (2) include those employees in the AAP that covers the location of the human resources function which supports that facility; or (3) include those employees in the AAP that covers the location of the official to whom those employees report.

Each contractor's needs are different. We offer many years of experience in assessing contractors' operations and making recommendations which provide the contractor with cost-effective options for development of a favorable AAP program that will avoid the costs and liabilities of non-compliance.

Is a contractor required to make sure that the vendors and suppliers with whom they do business develop an AAP?

A contractor is required to notify its suppliers and vendors that it is a federal contractor covered under Executive Order 11246. We recommend this be done by providing language to this effect in contracts, purchase orders and lastly by mailing a certification letter annually reminding them of their obligations.

What are EEO categories and job groups?

In order to evaluate the job titles included in your organization as required by the regulations, all contractors are required to group their job titles into subsets known as "EEO categories." These groupings represent the broad categories into which all jobs at your location or facility fall based on skill and job function. Traditionally, these broad categories have been identified as follows: 1 - Officials and Managers; 2 - Professionals; 3 - Technicians; 4 - Sales Workers; 5 - Office and Clerical; 6 - Craft Workers; 7 - Operatives; 8 - Laborers; and 9 - Service Workers. In accordance with changes recently made to the EEO-1 Report, EEO category 1 has now been broken into two separate categories: 1.1 - Executive/Senior Level Officials and Managers; and 1.2 - First/Mid Level Officials and Managers.

How much does the preparation of an AAP cost?

Because development of an AAP is company specific and therefore Flex HR, Inc. prepares a proposal that incorporates all of the professional services and materials that meet the total compliance needs of the individual organization. . A comprehensive plan is tailored to the individualized needs and structure of each organization. The cost to prepare an AAP depends on individualized factors including the number of facilities, number of employees, organizational structure and the records and information maintained by the company.

At Flex HR, we provide quality plan development at competitive prices. Our Human Resources professionals and Affirmative Action Specialists have years of experience developing and defending plans, and they use this experience and knowledge to streamline plan development, while still providing customized service. To learn more about the costs of plan development, please call us at **770.814.4225** or e-mail us at GCaudle@flexhr.com. For additional information about the other labor and employment services we offer, visit www.flexhr.com.