



What To Do When The OFCCP Comes Knocking

06.21.2018

If you are a member of the government contracting community, you probably have some familiarity with the Office of Federal Contract Compliance Programs (OFCCP), an arm of the U.S. Department of Labor (DOL). Hopefully, your company has not been subjected to a work-intensive OFCCP investigatory audit, yet. As wary veterans of the audit process can attest, it takes a full-on sprint to compile the voluminous amount of required documentation in a very short timeframe. Because one day you, too, may be the (un)lucky recipient of a [Scheduling Letter](#), which initiates the OFCCP audit process, why not get to work now, so you will be prepared when the OFCCP comes knocking?

The following is a snapshot of the OFCCP's focus, areas of jurisdiction and potential audit triggers. I have also listed some of the types of information you will be asked to provide in an audit and, most importantly, what your company can do to ensure that it is in compliance with applicable laws and regulations in the first place.

What is the primary focus of the OFCCP?

The OFCCP is charged with administering and enforcing three different laws:

- [Executive Order 11246](#) – regulates affirmative action plans
- [Section 503 of the Rehabilitation Act](#) – protects individuals with disabilities
- [Vietnam Era Veterans' Readjustment Assistance Act of 1974](#) – protects veterans and ensures they have an equal opportunity for jobs

Over what type of companies does the OFCCP have jurisdiction?

The OFCCP has jurisdiction over most private companies that hold contracts with the federal government and subcontractors to companies that hold contracts with the federal government. In fact, the OFCCP has jurisdiction over any business that holds a contract with the federal government or subcontract of more than \$10,000. However, if your business is a federal contractor or a federal subcontractor that has 50 or more employees and a contract that is worth at least \$50,000, the business is subject to the OFCCP's more burdensome Affirmative Action Plan requirements, including separate affirmative action requirements for hiring and retaining disabled individuals and veterans if the business has a federal contract or subcontract over \$150,000.

What triggers an OFCCP audit?

The short answer: it varies. Occasionally, the OFCCP will target a particular industry, such as the construction or health care or staffing services industry. The agency has also focused on awardees of very large federal contracts and subcontracts.

A common way that companies get caught up in an audit (even small companies with barely 50 employees) is that the OFCCP will audit a prime government contractor, and, through that audit, it learns who all of the prime's subcontractors are. Then, the agency will audit all of the subcontractors. While performing the subcontractor audits, if the OFCCP finds that a specific industry, such as temporary staffing or information technology service providers, is prone to have issues, it will key-in on that industry.

One thing is certain – once the OFCCP investigates your company, it will be back. And, if the OFCCP audits one branch or facility of a company – say its Atlanta branch office – it will likely be back to audit the company's Charlotte branch or its Los Angeles headquarters. The agency does not just audit a company as a whole; it audits the particular location it believes might be problematic and then may investigate further from there.

The OFCCP has a right to ask for progress reports for two years after it completes an audit. If a company does not pass an audit, the process will be longer. As part of the process, if violations are found, the company may be asked to sign a conciliation agreement, which provides for specific remedies that the company pledges to do, as well as a reporting schedule for the company to advise the OFCCP as to its progress in correcting areas of deficiency. The OFCCP may even order the company to provide back pay to adversely affected applicants and employees. One of those remedies is always that the OFCCP can come back to audit the company again, and it usually will.

Bottom-line: even if you do survive an audit, you are still on OFCCP's radar. The agency is more likely to look at your company again, and then may move on to audit your subsidiaries, affiliates and parent company.

If you are audited, what will you be asked to do?

As mentioned above, the OFCCP initiates an audit with a [Scheduling Letter](#), which contains 22 different types of information that your company must provide in 30 days. The following is a sampling of what you will have to submit:

- A copy of your company's Affirmative Action Plan. An Affirmative Action Plan is intended to be a plan that a company prepares every year that demonstrates how it intends to ensure it is meeting the necessary level of racial and gender diversity in the workplace. Generally, the OFCCP is comparing what the available labor pool is for different jobs and different job classifications to what

a company actually has in its workforce. For example, if the labor industry would expect to see 6.9 percent of African-Americans in a particular job classification, and your company's actual employee data show that you have 3 percent, that may be troubling to the OFCCP. The agency is looking for statistically significant disparities (more than two standard deviations for you statistics fans) between what one would expect to have in the workforce, and what one actually has. The OFCCP is evaluating race, gender, national origin/ethnicity, disability status and veteran status.

- A complete listing of all of your applicants who have applied for positions, including the applicants' race, gender and national origin (all done through self-identification). You must indicate how far the applicant made it through the hiring process. The OFCCP will consider if your available pool of applicants reflected whom you hired. For example, if you had 50 female applicants and two male applicants, and you hired a man, the OFCCP will be concerned that the hiring decision was made based on gender.
- Promotion and termination data. The OFCCP will investigate whether men or women, minorities or non-minorities are being promoted or involuntarily terminated at disparate rates. So, for example, if only men were promoted in a particular audit review year, the OFCCP may be concerned that the promotion practices have a disparate impact on women.
- Recruiting activities. The OFCCP will note if you have been recruiting through diverse sources, such as diverse websites and local community colleges. It will also assess if you met the requirement of posting every single one of your open jobs with the applicable state employment commission's job board.
- Compensation data. The OFCCP will determine if you are paying your employees equivalently for the same or substantially same position, and without regard to race or gender. The OFCCP will look at base compensation, as well as bonuses, commissions, and other incentive pay.

As the above examples demonstrate, an OFCCP audit is a very deep dive into your personnel data. If you do not have the data already compiled, it will be exceedingly difficult for you to respond to the [Scheduling Letter](#) in 30 days.

What can companies do to ensure they are in compliance?

The following are several tips to help your company fare better in the audit process:

- Visit the [DOL's](#) website. [OFCCP's](#) webpage is a great resource for small businesses, in particular.
- Review an example of a [Scheduling Letter](#). Note what your company should be doing, and make adjustments, as necessary.
- Keep comprehensive records of applicant data, employee data, promotions and terminations. Ensure that you are keeping detailed records of each and every effort that you put forth to recruit qualified personnel.

For more information

Please contact me at (804) 420-6466 or lwindsor@williamsmullen.com if you have any questions about OFCCP audits.

This blog post is based on Episode 14 of the Williams Mullen GovCon Perspectives podcast. To listen, please click [here](#).

Related People

- Laura D. Windsor – 804.420.6466 – lwindsor@williamsmullen.com