

# CLIENT ALERT

## OFCCP Announces Timeline for Opening of Contractor Portal

December 7, 2021

The Office of Federal Contract Compliance Programs (OFCCP) has announced the opening of its Affirmative Action Program (“AAP”) Verification Interface, which will be available through a new online Contractor Portal. The new system implements a new requirement that contractors and subcontractors (“contractors”) certify, on an annual basis, whether they have developed and maintained an AAP for each establishment and/or functional unit, as applicable. The portal also allows scheduled contractors to submit to their AAPs during compliance evaluations by the OFCCP. In FAQs issued on December 2, 2021, the Agency notes that it “implemented the Contractor Portal with the objective of ensuring that all covered contractors are meeting their obligation to develop and maintain written AAPs.”

OFCCP has identified the following dates and deadlines:

- On **Feb. 1, 2022**, contractors may begin registering for access to the portal. OFCCP will send an e-mail to each covered federal contractor in its jurisdiction whose email information is available in its system inviting them to register. OFCCP strongly recommends that contractors start registering as soon as possible. All contractors are required to register, even if they do not receive an email from the OFCCP.
- 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.

The thresholds determining which contractors must develop AAPs remain unchanged. Specifically, supply and service contractors that hold a contract of \$50,000 or more and employ 50 or more employees must develop and maintain AAPs pursuant to Executive Order 11246 and Section 503 of the Rehabilitation Act of 1973. Likewise, supply or service contractors with at least 50 employees and a contract of \$150,000 or more must also develop an AAP pursuant to the Vietnam Era Veterans’ Readjustment Assistance Act of 1974. These contractors will now use the Contractor Portal to register and certify that they have developed the required AAPs on an annual basis.

At this time, OFCCP is requiring annual certifications from supply and service contractors only. Contractors that are only construction contractors and not also supply and service contractors are not required to certify compliance, and accordingly should not register for the portal. Notably, the OFCCP’s FAQs do not specify what actions the OFCCP will take if covered contractors fail to register and/or fail to certify compliance with their AAP requirements, though the User Guide that the OFCCP previously issued indicates that the certification will state that “any attempt to refuse to submit an AAP certification, alteration or falsification of required records or information and any substantial or material violation or the threat of substantial or material violation may result in the institution of administrative or judicial enforcement proceedings.”

Presumably the certification will be made under penalty of perjury, and false certifications could give rise to False Claims Act liability and potential liability for False Statements. The OFCCP will likely provide additional information about the Contractor Portal and the registration process in the coming months.

This is the first time that contractors have been required to make such certifications directly to the OFCCP. Since 2018, contractors have been subject to similar certification requirements under the System for Award Management (SAM) administered by the General Services Administration (GSA). SAM requires contractors to certify to the GSA that they either have an affirmative action plan in place or that they are not required to do so. That information was available to the OFCCP, though it is not clear that the OFCCP has used the information captured in SAM to target contractors for audit or for other purposes.

By introducing the Contractor Portal and the certification requirement, OFCCP has raised the stakes for contractors who currently either do not prepare annual affirmative action plans or fail to do so in a timely way. Given the certification requirement, and the attendant liabilities associated with false certifications, this action by the OFCCP underscores the need for all covered contractors to develop the required affirmative action plans annually and in a timely manner. We will continue to monitor this development and will report on any further guidance from the OFCCP.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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