

## CLIENT ALERT

### OFCCP Drumbeat Continues: Agency Announces New FAAP Procedures

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As the 40th President of the United States would have said to the Office of Federal Contract Compliance Programs (OFCCP or Agency), "there you go again." In the past few months, the OFCCP has issued several proposals that will significantly expand obligations imposed on covered federal contractors and subcontractors (collectively, Contractors). First, the Agency issued proposed regulations broadening in material ways the actions Contractors must take as to veterans. Soon thereafter, the OFCCP asked the Office of Management and Budget (OMB) to approve an overhaul of the "scheduling letter" received by Contractors, significantly expanding the data required to be submitted by Contractors at the outset of every audit. Among other things, the new scheduling letter would require the submission of personnel activity data on a job title basis and would require the submission of individualized compensation data from the get-go. Both proposals are pending, and revisions to regulations implementing Section 503 of the Rehabilitation Act may soon follow.

Now the OFCCP has issued Directive No. 296 (the Directive), overhauling the application and approval procedures for Functional Affirmative Action Plans (FAAPs). The Directive supersedes Directive No. 254, which was issued in 2002, and imposes new requirements on Contractors that wish to prepare FAAPs rather than establishment-based AAPs. "The FAAP is back and better than ever," OFCCP Director Patricia A. Shiu proclaimed, announcing the conclusion of the Agency's 12-month review of the FAAP program. For the duration of the review period, the OFCCP had suspended its consideration of any new requests for approval to prepare FAAPs, leaving in limbo Contractors that had submitted applications to the FAAP unit.

Since 2002, more than 130 Contractors have elected to prepare FAAPs rather than establishment-based AAPs. The principal advantage of FAAPs is that they often track much more closely a Contractor's actual decision-making structure as to personnel issues. For instance, a Contractor that prepares FAAPs can assess its utilization of women and minorities in job groups within a single functional unit of the company and address any underutilization within that specific unit, rather than try to assess – and then address – underutilization in a job group that spans a number of functions, none of which is integrated for the purposes of making personnel decisions.

However, a close look at the Directive reveals numerous changes, some of which may make Contractors wary about moving from establishment-based AAPs to FAAPs, or about maintaining FAAPs. First, to qualify as "suitable for a functional AAP," the functional business unit must "exist and operate autonomously" – a standard that is not explained further in the Directive – and must both have its own "managing official" and be capable of "track[ing] and maintain[ing] its own personnel activity." The Directive also requires, at the application stage, submission of "*unit-specific* policies related to recruitment; hiring; promotion; compensation; and termination." (Emphasis added).

Second, in considering an application that seeks approval to prepare FAAPs, the OFCCP will now consider "EEO violations of the requesting contractor for the past three years," including "EEO violations from other local, state and federal government agencies." The Directive fails to specify what constitutes an "EEO violation" or how it will obtain such information. Will it rely on

charges filed with the EEOC, findings of "cause" by the EEOC or local fair employment practices agencies nationwide, settlements of EEO charges, or actual adjudications, to final judgment, of EEO complaints filed in federal or state court?

Finally, any Contractor with an approved FAAP agreement now "must have had at least two functional units undergo a compliance evaluation during the three-year term of the agreement to be eligible for a renewal" of an existing FAAP agreement. In short, moving to FAAPs ensures at least two OFCCP audits in a three-year period. For Contractors, including relatively small Contractors, who have not undergone a compliance evaluation in several years, this requirement may be a significant disincentive.

With many key terms and concepts set forth in the Directive ill defined, and with audits of FAAPs now automatic, Contractors should carefully assess whether the advantages of preparing FAAPs (including that FAAPs often better reflect the actual decision-making process within a company) are now outweighed by the disadvantages. Contractors should also consider the implications of moving to, or not retreating from, FAAPs in the post-*Dukes* world, in which the locus of decision-making is central to issues of class certification.

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