



← Home ← Insights ← Industries ← Government Contracting

ARTICLE

June 20, 2022

BY:

**Mackenzie Scheel**

Manager, Industry Specialty Services

**Matthew Sigmund**

Director, Industry Specialty Services

# New OFCCP Contractor Portal Requires Mandatory Annual Certification Requirement for Affirmative Action Program Compliance

Government contractors have long been subject to affirmative action obligations arising under Executive Order (EO) 11246, Section 503 of the Rehabilitation Act of 1973 (Rehab Act) and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA). These laws are often

incorporated into federal awards via FAR 52.222-26 Equal Opportunity, FAR 52.222-36 Equal Opportunity for Workers with Disabilities and FAR 52.222-35 Equal Opportunity for Veterans, respectively. Together, they require contractors take affirmative action to recruit and advance qualified minorities, women, persons with disabilities and covered veterans using activities such as training programs and outreach efforts. These commitments must be developed, documented and maintained in the form of written Affirmative Action Programs (AAPs).

The U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) is the federal agency responsible for the enforcement of these requirements. Historically, the OFCCP would conduct compliance evaluations by issuing Scheduling Letters to contractors requiring that they produce their AAPs within 30 days of receipt. This practice has been criticized by the Government Accountability Office (GAO), which found that many contractors have not been preparing (or maintaining) AAPs. The GAO issued a recommendation that the OFCCP develop a mechanism to monitor contractors' compliance with AAPs on a more regular basis. As a result, the OFCCP has developed a new online portal, referred to as the Contractor Portal, where contractors must certify on an annual basis whether they are meeting their requirement to develop and maintain AAPs.

## Contractor Portal Requirements

Who is required to use the Contractor Portal?

- ▶ Organizations that hold a contract or subcontract valued at \$50,000+ and retain 50 or more employees must develop and maintain AAPs pursuant to EO 11246 and the Rehab Act.
- ▶ Organizations that hold a contract or subcontract valued at \$150,000+ and retain 50 or more employees must develop and maintain an AAP pursuant to VEVRAA.
- ▶ Exemption: Contractors that are exclusively construction contractors (not supply and service contractors) do not have to certify their AAPs in the Contractor Portal.

What are contractors required to certify in the Contractor Portal?

- ▶ The Contractor Portal will prompt users to select one of three options to certify their current status with regard to AAPs:

- Entity has developed and maintained AAPs at each establishment, as applicable, and/or for each functional or business unit.
- Entity has been party to a qualifying federal contract or subcontract for 120 days or more and has not developed and maintained AAPs at each establishment, as applicable.
- Entity became a covered federal contractor or subcontractor within the past 120 days and therefore has not yet developed applicable AAPs.

Where is the Contractor Portal located?

- ▶ [Contractor Portal Landing Page](#)

When will contractors be required to certify in the Contractor Portal?

- ▶ **The deadline for certification is June 30, 2022.**
- ▶ Contractors that become covered at a later date are required to create AAPs within 120 days of being awarded a covered federal award and must register and certify compliance within 90 days from the creation of their AAPs.
- ▶ Contractors must submit this certification annually.

## Key Considerations When Developing AAPs

Preparing, implementing and maintaining AAPs, especially for the first time, can be a complex and time-consuming process. Being fully compliant involves implementing various policies and procedures beyond the written AAPs, as well as a significant amount of ongoing data tracking and analysis. Compliant AAPs include, but are not limited to, the following:

- ▶ Conducting an annual organizational profile and job grouping analysis to develop goals to incorporate in written AAPs.
- ▶ Designing action-oriented programs to make good faith efforts toward hitting those goals.
- ▶ Ensuring all internal and external communications to prospective and current employees include complete and accurate language regarding AAPs (e.g., job descriptions and

advertisements, affirmative action and EEO posters, self-identification as mandatory or voluntary based on covered status, etc.).

- ▶ Flowing down appropriate FAR clauses to covered subcontractors.
- ▶ Conducting periodic self-assessments of all policies and procedures surrounding AAPs.
- ▶ Delivering up-to-date training to appropriate employees on an ongoing basis.
- ▶ Recordkeeping and retention.

## Related EEO Regulations

It is important to note that certification of compliance with AAPs in this new Contractor Portal does not absolve any contractors from continuing to comply with other EEO requirements, such as the EEO-1 report, VETS-4212 report or EEO Pre-Award Clearance.

## Consequences of Non-Compliance

The OFCCP has noted that they intend to use this database to assist with determining which contractors will receive future Scheduling Letters, triggering a full compliance review on AAPs, by focusing on contractors who have not certified compliance.

In the event you do have a review and are found non-compliant, it can result in the government withholding payments, terminating or suspending your contract, and/or debarment.

Contractors who certify that they have complied with AAP requirements, but have not really done so, are risking potential liability under the False Claims Act or for false statements made under 18 U.S.C. § 1001.

[BDO's Government Contracting practice](#) can help contractors understand compliance obligations regarding AAPs and the new OFCCP Contractor Portal.

---

[Have Questions? Contact Us](#)