INTRODUCTION

About HudsonMann

With over 25 years of helping companies through OFCCP compliance reviews, HudsonMann has acquired a wealth of knowledge on the process. In this book we’ve distilled the insight and best practices gained over this time period.

Here you’ll find:
• An overview of the OFCCP audit process
• The most common causes of financial remedies
• How to avoid common violations
• Much, much, more...

What you won’t find is legal advice (sorry, our lawyers made us say that). While this book captures general information, each company’s response to a compliance evaluation will be different.
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OFCCP AUDIT BASICS

Federal contractors and subcontractors subject to affirmative action regulations can be audited by the Office of Federal Contract Compliance Programs (OFCCP). One of the police arms of the U.S. Department of Labor (DOL), OFCCP has a wide berth in reviewing a company’s personnel policies and practices. This guide outlines the basics of the OFCCP audit process.
1. Compliance Check

The compliance check comes with a streamlined scheduling letter. This contains an abbreviated, itemized listing of requirements which includes showing your Affirmative Action Program (AAP) results for the preceding year. Also requested are examples of job advertisements and accommodations made for individuals with disabilities. OFCCP is using the compliance check to ensure that federal contractors have an AAP in place.

2. Compliance Evaluation

These types of reviews represent the majority of OFCCP’s audit activity and focus on a specific location or “establishment.” A compliance evaluation is a thorough analysis and assessment of the employment practices of the contractor, including the written AAP, and the results of the contractor’s affirmative action efforts.

3. Section 503 Focused Review

The Section 503 focused review is designed to ensure compliance with regulations surrounding protection of individuals with disabilities. OFCCP leadership has historically had a passion for disability inclusion and has implemented these focused reviews. An on-site visit should be expected to include interviews with managers and employees. No detailed compensation data or personnel activity reports are expected in the initial submission of this review of compliance with Section 503 of the Rehabilitation Act.

4. VEVRAA Focused Review

The VEVRAA focused review is designed to ensure compliance with regulations surrounding protection of protected veterans. An on-site visit should be expected to include interviews with managers and employees. No detailed compensation data or personnel activity reports are expected in the initial submission of this review of compliance with Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA).

5. Corporate Management Compliance Evaluation (CMCE)

CMCE’s are similar to establishment compliance evaluations but with a focus on determining if there are artificial barriers to advancement into mid-level and senior management positions. Sometimes referred to as “glass ceiling reviews”, these audits also look at mobility in the upper management levels of federal contractors. With OFCCP’s increasing focus on promotion activity, expect these investigations to continue to deepen.
6. Functional Affirmative Action Program (FAAP)

Similar to establishment compliance evaluations in structure, the main difference in a Functional Affirmative Action Program (FAAP) is scope. These only apply to employers with approved Functional Affirmative Action Program agreements with OFCCP. The complexity and length of these reviews will primarily be dictated by the size of the particular FAAP in review. Since these represent a small number of audits compared to establishment-based reviews, employers will, at times, have to manage the expectations of compliance officers who are less accustomed to viewing AAPs at the functional level.
AUDIT PROCESS

The compliance evaluation is OFCCP’s most common method of enforcing affirmative action laws. Commonly known as audits, these evaluations are a comprehensive review of a company’s hiring and employment practices as well as their written Affirmative Action Program (AAP). These reviews can proceed in several stages:

Pre-audit Notification

Many audits are preceded by inclusion on a Corporate Scheduling Announcement List (CSAL) from OFCCP. Historically these communications were addressed to individual establishments that were likely to receive a compliance evaluation. Currently, however, OFCCP publishes a list twice a year with the establishments listed and the type of audit expected. OFCCP is under no legal obligation to provide this advanced notice.

Scheduling Letter

Scheduling letters come via certified mail to the establishment under review. Once the letter is received, the company has 30 days to respond with an initial submission. A sample scheduling letter and itemized request list is included in the resources section of this book. Updated versions of these letters were approved by the U.S. Office of Management and Budget (OMB) in April 2020.

Desk Audits

Desk audits comprise the bulk of most audits. OFCCP will review your AAP and supporting documents to determine your compliance status. Multiple requests for additional information are common during this time. Ranging from days to years in length, many audits end directly after the desk audit.

On-site Review

If OFCCP elects to conduct an on-site review, additional written notification will be sent in advance. On-site reviews will typically focus on issues discovered during the desk audit. Employee interviews, facility tours and an examination of required job listings should be expected.

Letter of Compliance

If no apparent violations are found, OFCCP will send a closure letter, often referred to as a Letter of Compliance. These letters simply state that the audit is closed, while reserving OFCCP’s right to alter their findings within 45 days. In most cases the same establishment will not be audited again for two years.
Conciliation Agreements & More

If OFCCP finds violations of their regulations, they will issue a Conciliation Agreement. These usually consist of a reporting period ranging from 12-24 months wherein the contractor must document specified compliance. If discrimination or unresolved issues are found, the audit can proceed to mediation, financial settlements, litigation or debarment.

Why Me? What Next? And Other Burning Questions

OFCCP’s Audit Selection Process

The Federal Contractor Selection System (FCSS) is used by OFCCP to select which companies and establishments will be reviewed each year. This system incorporates various data sources including EEO-1 information, Dun & Bradstreet data, Federal procurement data and more. In 2019 OFCCP began publishing its potential scheduling lists and methodologies for compliance evaluations. This affords federal contractors greater visibility into the OFCCP scheduling process. Early notification of upcoming compliance evaluations allows for additional self-audit time.

We know from the scheduling methodology that OFCCP is putting higher priority on examining larger facilities. They are also focusing more establishment reviews on industries with a greater history of discrimination violations. There is no legal limit to the number of audits conducted per company.

A smaller percentage of audits result from complaint investigations. Covered workers can file complaints with OFCCP and, similar to an EEOC investigation, OFCCP will determine the merits of the complaint and may initiate investigative actions.

OFCCP’s Federal Contract Compliance Manual (FCCM) details the compliance evaluation process. Weighing in at more than 500 pages, it is not considered formal agency policy and is subject to change without public comment.
The U.S. Department of Labor announced that the OFCCP had a record-setting Fiscal Year (FY) 2019. OFCCP obtained a record $40,569,816 in monetary settlements for affected class members during FY 2019, over $16 million more than the next highest year in FY 2017. As a comparison, the three-year total of monetary settlements for FY 2017-2019 is the highest three-year period on record. OFCCP FY 2021 budget anticipates over 3,000 compliance evaluations annually. (Source: USDOL/OFCCP)
BEST PRACTICES

This section covers a variety of best practices for ensuring a successful audit experience. You’ll be able to identify key risk areas, common pitfalls and tips for minimizing the disruptions that an OFCCP audit can cause.
THREE WAYS TO LOSE MILLIONS TO OFCCP

OFCCP collects millions of dollars from federal contractors each year. While OFCCP doesn’t levy fines for non-compliance, that is little consolation when writing a big check for back pay to victims of discrimination. Below are the most common causes of financial remedies and what you can do to avoid them.

1. Hiring Discrimination

The most common type of violation with financial remedies come from instances of discrimination in the hiring process. In FY 2019, over 59% of compliance evaluations that ended with financial remedies included hiring violations. A review of OFCCP’s news archives and enforcement database reveals that this long-established trend continues to this day.

Entry-level jobs are among the easiest targets. With high employee populations and low minimum qualifications, hiring practices for these positions are especially at risk. Many of OFCCP’s multi-million dollar settlements include hiring discrimination for entry-level positions.

Remedies: The first step in avoiding hiring discrimination issues is to conduct annual reviews of all hiring and selection activities. An adverse impact analysis (also known as an impact ratio analysis) will reveal statistically significant hiring disparities. These can be performed at the requisition, job title or job group level to uncover potential problem areas. One major benefit of an adverse impact analysis is the ability to discover disparate impact discrimination – cases where a seemingly neutral policy has discriminatory results.

A well-documented hiring process is another key tool in preventing hiring discrimination. Jobs should be filled through a standard process. This allows everyone involved in the hiring process to ensure that discrimination does not enter into the selection process. The training of hiring managers and recruiters is simplified and improved through the implementation of a written hiring process.

2. Compensation Discrimination

In FY 2019, 35.9% of OFCCP’s discrimination findings were cases of pay discrimination. OFCCP continues to increase its focus on pay discrimination with a team of statisticians concentrating specifically on pay equity in the workplace.

Remedies: Document your compensation philosophy and procedures. Without a well-defined system for paying employees, it will be much harder to defend differences in compensation. This is especially true if job descriptions or classifications are missing or do not form a solid foundation for your compensation practices.

Conduct an internal pay equity analysis. This analysis focuses on pay discrepancies by race and gender. The ultimate goal is locating pay disparities and determining whether the differences in pay can be explained by non-discriminatory business reasons. Internal equity analyses vary greatly in their level of sophistication.
Cohort analysis, multiple-regression analysis and anecdotal comparisons are among the methods that can be used. The most appropriate method will depend upon the size of the company and kinds of jobs that are under review.

3. Poor Recordkeeping

Employers do not receive the “benefit of the doubt” during OFCCP compliance evaluations. If OFCCP finds evidence of adverse impact, they can assume discrimination has occurred unless the selection process can be justified (see 41 CFR 60-3.3). Furthermore, if a company fails to keep appropriate records, OFCCP can “draw an inference of adverse impact of the selection process” (41 CFR 60-3.4). This means that a company without the documentation to defend its hiring decisions or pay practices will likely be found guilty of discrimination.

Remedies: An internal or third-party review of processes and documentation is essential to successful recordkeeping. A well-structured review will identify areas for improvement and suggest action plans for addressing them. The key to OFCCP compliance is simple: documentation, documentation, documentation!

OFCCP Is Talking About You...

Find Out What They’re Saying

As a Federal agency, OFCCP collects and publishes a variety of public data. If you’ve been audited by the OFCCP recently, chances are there is sensitive information on your company that is available to the public. Here we will discuss both the very public and obscure places that your information is available.

Press Releases

If you have entered into a financial agreement with OFCCP, expect your company’s name to be on the front page of their website. OFCCP does not offer confidentiality as a part of their settlements. So even if your company settles without admitting guilt, OFCCP will publicize the occasion as a win for the affected workers, equal opportunity and themselves.

Class Action Site

OFCCP’s Class Member Locator site allows victims of discrimination to identify financial or other remedies that may be available to them. This data base lists the company name, location, jobs in question and the groups affected by discrimination. It also provides case summaries and Conciliation Agreements. While the Conciliation Agreements are redacted, they still provide a high level of detail into the types of violations and remedies required.

Enforcement Data

Less publicized, but still accessible, is OFCCP’s enforcement database. This site includes downloadable databases of Compliance Evaluation and complaint investigation data. Company addresses, number of employees, dates of audits and results are available for perusal.
AVOIDING COMMON VIOLATIONS

Mastering the following areas of compliance could significantly cut your chance of a conciliation agreement. The majority of OFCCP’s findings of violations are in just a few categories. In this section we’ll discuss the most common violations and what you can do to avoid them.

Mandatory Job Listings:

One violation that is easy to get is failing to meet your mandatory job listing requirement. This requirement says you need to list all open positions with the appropriate employment service delivery system (ESDS), also known as your state workforce agency. There are three exceptions to that rule: positions in executive and senior level management, positions lasting three days or less, and positions filled internally. Otherwise, if you open a job up externally, you need to be listing it with the ESDS.

Even if you are listing the jobs, it can sometimes be difficult to prove. Here are three ways to document your efforts to meet this obligation:

1. Screenshots are your first and best line of defense against these violations, specifically one for every job opening you filled. If that sounds like a lot of work, that’s because it is. Ultimately, though, this is your best defense.

2. Listing logs: Keeping a log of positions you have listed, when and with whom, can be a great resource. You must be sure that you are following the state workforce agency’s listing process.

3. Third-party vendors: Using third-party services to list your jobs and conduct additional outreach can be a big time saver. That said, not all of those services are created equal. Even the best can still produce mixed results during a compliance evaluation. Ultimately, the burden for demonstrating compliance is on your company even if you use a third-party vendor. Do some spot checks with the state workforce agencies to ensure that the listing information you provide to your vendor is making it through to the ESDS.
Good Faith Efforts/Recruitment:

The next common violation is a lack of good faith outreach efforts. If you want to be found in compliance with this aspect of the regulations, you need three major elements:

1. A narrative explanation of your efforts: At a high level, summarize the efforts you have implemented and the reasons for them. This narrative should tie into the goals set at the beginning of your Affirmative Action Plan year.

2. Source documentation: This includes correspondence logs that document the contact information of the person you work with at each outreach source. This should also include recording dates of correspondence, copies of listings, emails, meeting notes, letters, faxes, and any other kind of documentation.

3. Annual self-assessment of outreach and recruitment efforts: You must analyze your outreach efforts for Veterans and Individuals with Disabilities enumerating number of openings, jobs filled, applicants, applicants who self-identified as Veterans and/or Individuals with Disabilities, and hires. You must evaluate EACH outreach effort and identify the criteria for evaluation. Using your applicant flow data for a source analysis is one way to accomplish this. You will also need to determine if the totality of your efforts is effective. If not, you must identify and implement alternative efforts. (CFR 60-741.44(k); CFR 60-300.44(k))

Examples of outreach may include:

- Partnerships with local service organizations
- Partnerships with vocational rehabilitation services
- Recruitment efforts at educational institutions to reach students who are covered veterans
- Job ads targeting veterans and individuals with disabilities
- Encouragement of subcontractor outreach efforts
- Veterans Administration job placement program participation
- On-the-job training opportunities

Remember that using a temp-to-hire process or recruitment process outsourcing (RPO) does not absolve your company of its good faith recruiting obligations. Work closely with your agencies to ensure appropriate outreach or conduct outreach on your own and point job seekers to the agency.

Recordkeeping:

Another major cause for Conciliation Agreements is poor recordkeeping, particularly regarding applicant data.

Keep in mind that you need to keep:

- 3 years of employment-related data for all of your employees
- 3 years of job seeker and applicant expressions of interest and self-identification information
Many recordkeeping violations center around not giving applicants the opportunity to self-identify their race, gender, veteran and disability status. We recommend that you provide the opportunity to self-identify as early in the process as is feasible. Waiting until the in-person interview stage will most likely show very small pools of applicants which can be a red flag to OFCCP.

Temp-to-hire processes can also create issues in applicant tracking. These scenarios can often result in a 1-to-1 applicant-to-hire ratio. Work with your agencies to ensure they are tracking applicants appropriately. This can allow you to show the appropriate pool of applicants for the positions you filled.
BEEF UP YOUR INITIAL SUBMISSION

The initial thought in preparing for an OFCCP audit can be to limit the submission documents to a bare minimum. While there can certainly be arguments made for this, some often-requested items can be submitted in addition to the required items. In today’s audits you are almost guaranteed to get a number of additional requests at the very outset. Sometimes these requests come before OFCCP has had a chance to fully review your submission. By anticipating the requests, companies can reduce the impact that the audit has on day-to-day operations.

Consider adding the following to your initial submission:

**Good Faith Efforts:**

Adding both narrative descriptions and original documentation of diverse recruiting efforts is highly encouraged.

**Job Listing Samples:**

Submitting documentation of your compliance with the mandatory job listing requirement is likely to save you time later in the audit. Sometimes a few samples will suffice, though auditors are often requesting documentation of listings for all external hires during the review period.

**Job Ads with EEO Statement**

All of your external job advertisements should have a tagline identifying your company as an EEO/Affirmative Action employer. Sending in a few examples of this is helpful.

**Purchase Order:**

Your purchase orders and covered subcontracts need to reference the Equal Opportunity (EO) clause from OFCCP’s regulations.

**Online Accessibility Statements:**

OFCCP is intent on ensuring online accessibility for individuals with disabilities. If you have an online application system, it is a best practice to give notice of how an accommodation can be requested. Screenshots are the best way of documenting this for OFCCP.
6 COMPENSATION QUESTIONS
YOU NEED TO ANSWER NOW

Compensation interviews have become commonplace in OFCCP compliance evaluations. Are you prepared for the questions they’ll ask? OFCCP will typically begin the compensation interview with something like the following: “We conducted an analysis of your compensation data and found an indication of possible discrimination. Thus, the reason for this discussion and interview.” While it can be perfectly OK to say, “I don’t know” or “I need to get back to you with an answer”, it is much better to be prepared in advance. Below are some questions that OFCCP is likely to ask.

Does your company have written guidelines on compensation administration?

This fundamental question will set the baseline for the rest of the compensation review. Companies with well-documented policies tend to fare better than companies with very loose compensation practices. Of course, written policies that are not consistently implemented are high on OFCCP’s target list, too. Which leads us to...

Who determines the starting salary for a new employee for your company?

Disparities in starting pay can lead to larger disparities over the course of employment. Systems with defined ranges for starting pay and multiple levels of approval tend to fare well in OFCCP audits. Lack of oversight in the setting of starting salaries is a red flag to OFCCP.

Are there annual performance increases? What is the basis for these increases?

Difference in performance is recognized as a potentially legitimate reason for salary differences. But like everything else in an audit, you’ll need the documentation to back it up. Are performance ratings being used and documented? Do similar ratings mean similar increases in pay?
Do you conduct periodic internal audits of compensation?

Federal affirmative action regulations require annual analysis of pay systems to ensure there are no race- or gender-based disparities in compensation. While there is no mandated format, it helps to conduct analyses like those used by OFCCP. This will help you identify areas that may be of concern. If possible, these analyses should be conducted within the context of attorney-client privilege.

Does your company provide training on compensation administration to managers?

OFCCP wants to know if the people making compensation decisions have been trained in the affirmative action and non-discrimination aspects of compensation. Training that emphasizes the importance of equal opportunity, compliance and documentation can make or break a compensation system.

May we have a copy of that?

This may be the most common question of all. If you can't document it, it didn't happen. If you say you have a policy, OFCCP will ask for it in writing. Be prepared!

This list only scratches the surface of the questions OFCCP may ask during a compliance evaluation compensation interview. You can expect follow up questions in each of these categories to explain the details of how your compensation system works. OFCCP may also ask questions about specific employees, departments or job titles.

Once the interview is complete, OFCCP may send its notes in writing for your review and editing. Your answers are typically then forwarded to statistical teams within OFCCP for additional review. If the valid business reasons you describe explain most differences in compensation, the compensation portion of the audit will typically end. If unexplained compensation differences remain, OFCCP may ask for additional documentation.
RESOURCES

Your Next Steps Start Here. This chapter gathers key resources for your convenience. Checklists, sample audit letters, templates and helpful links await.
RECURSES FROM HUDSONMANN

OFCCP Audit Checklist

Race, Gender, and Veteran Status Self-Identification Template

OFCCP News Blog

Affirmative Action Plan Training from HudsonMann

RECURSES FROM OFCCP

OFCCP Website

OFCCP Frequently Asked Questions

Federal Contractor Compliance Manual

Disability Self-Identification Form

Section 503 Checklist

VEVRAA Compliance Assistance
WANT HELP WITH AFFIRMATIVE ACTION COMPLIANCE?

http://hudsonmann.com/contact/

Schedule A Custom Demo

HudsonMann’s Affirmative Action outsourcing solution provides complete OFCCP audit support along with:
• Compliant AAP development
• Year-round support
• Custom web portal
• and more...

Contact us today for a demo.