

ALERT

OFCCP Announces Two Notable Developments in February

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WHAT: The Department of Labor's Office of Federal Contract Compliance Programs made two recent notable announcements for contractors. First, OFCCP will post an online-only list of the contractors included in the next wave of OFCCP's compliance reviews. The agency will not separately mail hard copy "Corporate Scheduling Announcement Letters" (CSALs) to those contractors. Second, OFCCP announced a "Voluntary Enterprise-Wide Review Program" (VERP) for contractors to proactively request reviews. OFCCP has indicated that contractors with positive results may be excused from OFCCP's review schedule for up to five years.

WHEN: OFCCP expects to update the web-only CSAL list in its FOIA Library in mid-to-late March 2019. For the new VERP, OFCCP expects to start accepting "applications" from contractors in fiscal year 2020.

WHAT DOES IT MEAN FOR INDUSTRY: Contractors must monitor the FOIA library for OFCCP's next scheduling wave and cannot rely on mailed CSAL notices. (Contractors can also subscribe to OFCCP's email list for updates.) Contractors listed for the next wave should begin preparing for an OFCCP audit in the coming months. As for VERP, although OFCCP has not announced all the details, contractors should consider undertaking privileged internal reviews now to assess whether the VERP may be a good opportunity based on the details OFCCP has so far released.

This next wave of CSALs will include reviews "focused" on compliance with Section 503 of the Rehabilitation Act of 1973. Last year, OFCCP announced plans for reviews targeting one of the three anti-

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discrimination authorities under the agency's responsibility: Section 503, plus Executive Order 11246 and the Vietnam Era Veterans' Readjustment Act of 1974. Compared to compliance reviews covering all three authorities, these focused reviews should streamline the resources contractors need to provide data and respond to any agency questions and concerns. OFCCP has created a page consolidating its Section 503-specific guidance [here](#).

In addition, this next review wave will include OFCCP's previously announced Affirmative Action Program Verification Initiative compliance checks. OFCCP will focus these verification reviews on whether contractors have prepared Affirmative Action Plans (AAPs) as required by their federal contracts and subcontracts. OFCCP has planned "review of a certification, followed by potential compliance checks," and then potentially "annual submission of AAPs to OFCCP for review." Contractors should ensure they make and update their AAPs as required and that they provide current, accurate, and complete certifications about their AAPs if selected for this review initiative.

Turning back to the VERP, OFCCP's announcement included the following key details for contractors that apply for this voluntary program:

- Each review will cover a contractor's headquarters and a sample or subset of establishments.
- To be selected for the program, contractors must show that they exceed compliance requirements, demonstrating a "commitment to and application of successful equal employment opportunity programs on a corporate-wide basis."
- OFCCP will recognize a top tier of contractors with "corporate-wide model diversity and inclusion programs" and a second tier of compliant contractors that are close to achieving top-tier status.
- OFCCP will enter into agreements with these successful contractors to remove them from OFCCP's general review-scheduling process for as long as the contractor participates in the program. OFCCP clarified that contractors can still be selected for reviews based on individual and third-party complaints while in the program.
- Contractors in the top tier will have five years in the program, with re-evaluations for another five years to follow. Contractors in the next tier will have three years in the program along with "individualized compliance assistance to become a top performer." Contractors will have to provide periodic reports to OFCCP while in the program.
- Contractors not recognized as achieving the top tiers will be returned to the general pool for scheduling. OFCCP's directive states that the agency "will not automatically place rejected applicants on a scheduling list."

As OFCCP releases further details on the VERP, contractors should carefully weigh the potential benefits of achieving OFCCP's recognition and going "off schedule" for multiple years against the effort required to participate in these reviews and the risk of adverse findings. Like Aesop's porcupine, OFCCP might turn out to be an unwelcome long-tenured guest once invited in voluntarily.

But contractors should give the VERP serious consideration. OFCCP has specifically recognized contractor wariness of its reviews. The agency has accordingly taken several steps to allay those concerns: inviting contractors' questions for compliance guidance; promising more transparency about OFCCP's analysis; and establishing an ombuds position for resolving certain contractor concerns, among other initiatives. Wiley Rein will closely monitor OFCCP's announcements of additional VERP details in order to assist contractors in assessing whether to participate in the program.

For background on CSALs, you can read our earlier alert [here](#).