

OFCCP's Federal Contract Compliance Manual Enters the 21st Century

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The July 2013² revision to the Federal Contract Compliance Manual ("FCCM" or the "Manual"), first issued in 1979 by OFCCP and updated subsequently only by directives (albeit some chapters were reissued in their entirety³), represents the first complete overhaul in the nearly quarter century since its inception. The new FCCM is a streamlined, modernized, reorganized, and improved tool for the contracting community. Substantial parts of the content are unchanged, but OFCCP has taken the opportunity to include new content that reflects its recent focus on hiring, overrepresentation of both protected and non-protected groups, and corporate policies.

It is beyond the scope of this Alert to provide a comprehensive overview of the new Manual, which is more than 500 pages in length. This Alert focuses primarily on the Desk Audit and on changes to the definitions that are of most immediate and general interest. While the FCCM does not have the force of regulations, it provides a behind the scenes view of the methods OFCCP expects its Compliance Officers ("CO") to use to assess contractor compliance which will be helpful in anticipating the course of a compliance evaluation.

ORGANIZATION. The new FCCM follows the same chapter and section format of the original Manual, although the chapters and sections do not align precisely with their earlier counterparts. In particular, Functional Affirmative Action Program Compliance Evaluations are covered in a new chapter (Chapter 5), and definitions (formerly Chapter 1) now appear as Key Words and Phrases before the Appendices. Some archaic sections have been removed, such as the process for I-9 inspections (no longer the responsibility of OFCCP), and Letters of Commitment (no longer used to close compliance evaluations).

KEY WORDS AND PHRASES. While many definitions are unchanged from the original, including, for example, Organizational Unit and Job Group, others have been added or modernized. Some revisions reflect statutory changes under VEVRAA and ADA/ADAAA, such as the definitions of Accessibility, Physical or Mental Impairment, Essential Function, and Armed Forces Service Medal. Other new definitions reflect regulatory changes, such as those due to the Internet Applicant regulation and the revised race/ethnicity categories from 2006.⁴ Somewhat puzzling are those new definitions that pertain to topics that may seem settled, such as Davis Bacon Act and Exempt Jobs. The definitions do

support the current focus that contractors have seen in compliance evaluations, such as the review of race/ethnicity subgroups and the shift in focus away from women and minorities, to “favored” and “non-favored” groups and overrepresentation.

The definitions related to statistical concepts have been updated (Availability Analysis no longer reflects the 8-factor basis), and new ones added (Shortfall and Regression Analysis). One new definition worth noting is that of Employee, which adopts the “common law agency” test for determining who is an employee “under OFCCP programs.” The definition’s new focus on who provides the tools, and who controls the right to schedule work hours and the right to assign additional projects may foreshadow a renewed interest by OFCCP regarding who is included in an AAP.

DESK AUDIT PURPOSE. The Introduction to the new FCCM states that the focus of a compliance evaluation is to “determine whether federal contractors maintain non-discriminatory hiring and employment practices.” The original Manual stated the focus of the desk audit as compliance with the regulations, confirmation that the contractor was not discriminating and was taking affirmative action. This newly articulated focus on hiring discrimination will come as no surprise to contractors who have been subject to a compliance evaluation recently, and have seen early and intense attention paid to many areas of adverse impact in the hires analysis submitted for the desk audit.

The Principles and Focus section gives as a general principle the assessment of AAPs for “inclusion and acceptability,” and COs are instructed to examine: Workforce Structure, Policies and Procedures; Good Faith Efforts; and Potential Discrimination. The latter is clarified to include overrepresentation and indications of Caregiver Discrimination (now covered in the Key Words and Phrases). A new concept here is that of so-called Novel Issues, which include testing, multi-establishments, complex compensation, and fetal protection, and for all of which a CO must seek supervisor guidance.

COMMENCEMENT OF THE DESK AUDIT. The Manual specifies that the CO should contact the contractor within 15 days after sending the Scheduling Letter. (Chapter 1, §1B04). Simultaneous with sending the scheduling letter, the CO is directed to confirm the filing of the VETS-100 Report, check with the Wage & Hour Division for FALA violations (Chapter 1, §1B05), check for any pending audits of the same contractor by another office, and review closed case files. These latter checks are to discuss issues that may indicate “company-wide practices that result in discrimination” or issues identified in closed evaluations including those covered by conciliation agreements. (Chapter 1, §1B09). Another initial assessment is to conduct a “trend analysis” of the last three years of EEO-1 Reports to identify expansion and contraction of the work force, changes in the distribution of jobs, and changes in the representation of women and minorities. (Chapter 1, §1K00).

Contractors who have encountered the recent “no extensions” posture of the agency may find interesting the section on “Receipt of AAPs and Support Data for Desk Audit.” This section provides that the CO’s supervisor has the discretion to “determine whether to grant . . . a reasonable extension and the length of time of any extension.” (Chapter 1, §1C).

SCOPE OF THE COMPLIANCE EVALUATION. The evaluation period is clarified as “at least the last full year” (Chapter 1, §1C03), but if the contractor is six months or more into the current year, the CO must evaluate current year performance. The Manual does not clarify that only a six-month update period must be provided, as contractors hoped. Instead, it gives the example of a calendar year plan, an August scheduling letter, and the update covering “the preceding January through July under the current AAP”-- in other words, a seven-month update (Chapter 1, §1C03). Furthermore, it mentions “special circumstances” that can warrant extending the audit to cover a period two years prior to the

date of receipt of the scheduling letter and can lead to a request for “information related to periods after the date of the scheduling letter” with supervisor’s approval. A related section states that “[g]enerally, it is better to have the longest possible period to evaluate.” (Chapter 1, §1G).

ONSITE REVIEWS. One thread that appears in many sections is the continuation of a desk audit with an onsite review. The Manual clarifies that the desk audit first confirms that the necessary elements of the submission are present, and then proceeds with an evaluation that the elements are acceptable. (Chapter 1, §§1F00/Executive Order and 1H/503/VEVRAA). “This is different from an evaluation of a contractor’s *implementation*. . . which in most instances the CO cannot determine without further investigation onsite.” (Chapter 1, §1F00) (emphasis added). Another key reference to the use of an onsite review appears in the Audit of Personnel Activity section (Chapter 1, §1O), which states that an Impact Ratio Analysis (“IRA”) of less than 80% for a protected group “generally” must be investigated onsite. The Manual also mentions use of the onsite to evaluate the implementation of the non-required elements of AAPs covering religion and national origin discrimination, sex discrimination, and associated leaves or accommodations. (Chapter 1, §1M). Absent an increase in staffing, it is difficult to understand how OFCCP can increase the number of onsite reviews to the level these changes would require, but the new FCCM certainly provides the basis for doing so.

STATISTICAL ANALYSES. The Manual does not change the structure of the Organizational Profile, the Job Group Analysis, or the Availability Analysis. It perpetuates the concept of Lines of Progression, however much of this concept has been abandoned by contractors. The basis for job groups is the same—they should not cross EEO-1 categories or combine employees who are in separate unions at an establishment. The Manual does clarify that an establishment of less than 150 employees may use the EEO-1 Report categories as job groups, (Chapter 1, §1F02(d)) whereas the language of the regulations reserves this option for contractors with a “total” workforce of 150. (*cf.* 41 C.F.R. §60-2.12(e)).

The review of the Organizational Profile and Job Group Analysis will focus on job titles or departments where women or minorities are significantly underrepresented or concentrated (Chapter 1, §§1N and 1N00). This leads to a reiteration of the Job Area Acceptance Range (JAR) that can be used by OFCCP to justify closer scrutiny of a category of jobs, a methodology commonly believed abandoned by OFCCP. The CO is directed to conduct IRAs for individual race and ethnic groups (Chapter 1, §1O01), suggesting that contractors would be well-advised to review the detailed race/ethnicity versions of their analyses when completing their annual plan, as they likely will be the focus during a desk audit.

POLICIES. Contractors have seen a new focus on a review of policies during compliance evaluations. That emphasis is reinforced in the new Manual. The list of required elements for the Section 503 and VEVRAA submission includes the contractor’s reasonable accommodation and harassment policies. (Chapter 1, §1E02(b)). The section on Additional Required Elements of AAPs, lists other areas that “might affect the success” of the program, including “leave policies, time off policies, policies regarding part-time work.” (Chapter 1, §1F05(b)).

APPLICANTS. Consistent with the emphasis on hiring in the desk audit, contractors can expect questions about “electronic data technologies used to collect expressions of interest,” and “if the contractor does not readily specify the applicant pool for job groups in which individuals applied through the Internet,” the CO must request the criteria used to define applicants. (Chapter 1, §1G). Elsewhere the Manual references the use of “criminal records, credit history, or unemployment status” as leading to a lack of minority representation, and potentially requiring action steps.

(Chapter 1, §1F05). Citing VEVRAA, the contractor is cautioned to limit consideration of a veteran's military record only to portions that are relevant to the specific job for which he or she is being considered. (Chapter 1, §1H02(c)). The requirement to ensure accessibility of the online application process is described and COs are required to check the system and document that, at a minimum, the name and contact information for a person to whom an accommodation request can be made are present. (Chapter 1, §1J).

COMPENSATION. The Manual provides great discretion for the CO to request additional information on policies or procedures, and on categories of jobs or selections within job groups. This discretion extends to compensation where a request for employee-level data on the entire workforce may be triggered by indicators of discrimination in the summary data, "evidence of discrimination with respect to another employment practice," "anecdotal evidence," or "data integrity issues," among other reasons. (Chapter 1, §1P02).



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² Dated July 2013, the Manual was posted on the OFCCP Web site on August 23, 2013.

³ See, e.g., Order FCCM 88-3/CH.4 (Nov. 4, 1988).

⁴ See, e.g., definition of Asian, which also references Asian/Pacific Islander, the category still used in 41 C.F.R.. Part 60-2.