

Strategies to Ensure OFCCP Compliance

By James C. Pierce

EXECUTIVE SUMMARY

Federal contractors are obligated to comply with three federal laws that require two regulatory mandates: *nondiscrimination* and *affirmative action* administered by the Office of Federal Contract Compliance Programs' (OFCCP), U.S. Department of Labor (DOL).¹

On its face, these mandates should be rather easy requirements; however, achieving compliance is a complex process that requires comprehensive strategies. As a former Executive Manager in the OFCCP's Division of Program Operations, and as the former Director of two OFCCP District Offices, my experience finds that there are consistent non-compliant patterns among federal contractors when audited by the OFCCP. Even more surprising are findings of repeat violations for establishment-level entities within the same corporate organizational structure.

The central question is why are recurring violations and/or repeat patterns found during OFCCP audits? **I believe the answer lies in two broad areas: (1) a lack of focus and clarity by federal contractors regarding their Affirmative Action Program obligations and (2) the lack of dedicated resources allocated to ensure better compliance, thereby reducing the risk of non-compliance.** In this paper, I address these two areas and highlight strategies for federal contractors to ensure compliance with OFCCP's laws and regulations.

OFCCP BACKGROUND

In 1965, President Lyndon Johnson issued Executive Order 11246, which was later amended by Executive Order 11375 in 1967, prohibiting employers doing business with the Federal Government from discriminating on the basis of race, color, religion, sex, and national origin. President Jimmy Carter later consolidated and transferred the federal civil rights enforcement of the equal employment opportunity provisions under Parts II and III of Executive Order 11246 to OFCCP's authority. OFCCP's primary mission is to enforce, for the benefit of job seekers and wage earners, the contractual promise of affirmative action and equal employment opportunity required of those who do business with the Federal Government. As indicated in DOL's Fiscal Year 2013 Budget Brief and in its FY 2011 Annual Report, OFCCP ensures that employers doing business with the Federal Government comply with the laws and regulations requiring a fair and diverse workplace, free of discrimination and harassment. OFCCP carries out its responsibilities by:

¹ Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S. C. Section 4212.

- Conducting compliance evaluations and complaint investigations of federal contractors' and subcontractors' personnel policies and procedures.
- Obtaining conciliation agreements from contractors and subcontractors who are found in violation of regulatory requirements.
- Monitoring the progress of those contractors and subcontractors found in violation through periodic compliance reports.
- Forming linkage agreements between contractors and community organizations and job training programs to help employers identify and recruit qualified workers.
- Recommending enforcement actions to the Solicitor of Labor.
- Offering compliance assistance to federal contractors and subcontractors to help them understand the statutory and regulatory requirements and review process.

Compliance investigations are the primary method in which OFCCP assesses federal contractors' compliance with their legal obligations of nondiscrimination and affirmative action.

LACK OF FOCUS AND CLARITY CONCERNING AFFIRMATIVE ACTION PROGRAMS

The regulatory guidance promulgated by OFCCP describes clearly the purpose of an affirmative action program.² The guidance in part indicates that an affirmative action program:

- Is a management tool designed to ensure equal employment opportunity;
- Ensures equal employment opportunity by institutionalizing the contractor's commitment to equality in every aspect of the employment process; and
- Is more than a paperwork exercise.

Historically, the common-pattern for violations appears to be attributed to a lack of focus and direct attention toward the general purpose of the affirmative action program. Too often, the affirmative action program is not given the same corporate urgency and attention when juxtaposed against other corporate priorities within an organization. It is not used as a management tool for risk-management assessments. I contend that the keys to corporate business successes in non-affirmative action program/equal employment opportunity areas can be attributed to the implementation of management tools employing comprehensive risk-management strategies. These strategies may include corporate actions such as:

- Ensuring effective management systems are in place for the early identification and forecasting of potential problem areas;
- Employing immediate and aggressive corrective actions for problem resolutions;
- Requiring conscientious monitoring of all significant areas impacting the business' success;
- Expecting a total commitment from all principals involved in every aspects of the business; and

² See 41 CFR 60-2.10 (a).

- Instilling a corporate and organizational culture that the business' success depends on accurate and timely reports, individual responsibility, and management accountability, from top to bottom.

The risk-management strategies noted above are also necessary and should be equally applied to the affirmative action program/equal employment opportunity program (AAP/EEO) areas as strategic guiding principles to ensure success and compliance. In essence, successful operations in AAP/EEO business areas should be guided by aggressive *proactive measures* rather than by *forced reactive measures* in response to an OFCCP audit. For example, some large federal contractors have establishments within their organizational structure that undergo audits on a regular basis at various locations during OFCCP's audit cycles. When this occurs, an audit may identify a substantial violation that requires corrective actions, including appropriate make-whole remedies.³ Because of a lack of specific attention and focus on these types of violations, many federal contractors do not take action to determine whether similar deficiencies/inadequacies are occurring at other establishments within their organization. As a result, subsequent audits by OFCCP often find the same substantive violations at either a different establishment of the same contractor or sometimes even within the same audited-establishment. This then requires further corrective action by the federal contractor for the repetitive violations, which can mean additional financial risks, including the potential for loss of current and future federal contracts.

Findings of substantive violations within the same organization should not repeatedly occur and can be prevented or minimized with appropriate staff training regarding a contractor's obligations under the laws and regulations enforced by OFCCP and appropriate contractor resources. Further, substantive violations may be prevented by federal contractors through the implementation of AAP requirements such as:

- Performing in-depth analyses of their total employment processes to determine whether and where impediments to equal employment exist.
- Developing and executing action-oriented programs to correct any problem areas identified.
- Developing and implementing an auditing system that periodically measures the effectiveness of the total AAP.

LACK OF DEDICATED RESOURCES

Through my 28 years of OFCCP experience, another common theme I have observed on countless occasions is the notion that AAP/EEO requirements can be burdensome to federal contractors who lack dedicated resources. Additionally, not only are resources needed to comply with the federal regulatory AAP/EEO requirements, they are also needed to ensure compliance with other State, municipal and local statutory requirements. Nonetheless, with any successful business practice, adequate resources must be available and performance must be

³ OFCCP findings identifying violations such as individual and systemic patterns of hiring discrimination, compensation discrimination, recordkeeping deficiencies, adverse impact indicators, etc.

accurately tracked and measured. When the appropriate level of internal or external dedicated resources are not allocated for AAP/EEO monitoring, problems or violations requiring corrective actions are often found in OFCCP audits. These issues typically arise in areas such as AAP development and requirements, non-discrimination/EEO obligations, management accountability, internal auditing, documentation of Human Resources/hiring official actions, and records accountability.

To mitigate potential problem areas by resource-challenged federal contractors, it's imperative that competent resources are available and allocated to protect contractors from audit surprises and to minimize risks in employment activities. Compliant contractors must ensure that necessary resources and tools are available and in place as a proactive business strategy, including where appropriate the acquisition of external services and assistance. My experience has been that federal contractors with successful programs apply dedicated resources and fully commit those resources throughout their organization to the AAP/EEO programs and principles whether they are required contractually or not, because they recognize it is a good sound business practice. Further, there is an expectation by successful contractors that all employees, both management and non-management, fully embrace these critical programs. When appropriate resources are allocated, compliance and financial risks are minimized. Moreover, having competent AAP/EEO resources available or as a part of the federal contractor's team strengthens an organization's corporate strategy which will result in full compliance with complex regulatory obligations and help protect existing and future federal business.

CONCLUSION

Federal contractors with successful AAP/EEO programs historically undertake proactive measures, rather than being caught off-guard and reacting to unknown or repetitive problem areas requiring last minute corrections to be in compliance. The solution to minimize risks and challenges faced by unprepared federal contractors is to apply the same tried and tested principles employed by compliant contractors to increase the likelihood for success as discussed above. Akin to those principles are proven contractor strategies for successful AAP/EEO compliance programs such as:

- Implementing, tracking and monitoring personnel actions;
- Developing and implementing timely action-oriented programs; and
- Ensuring management accountability and accurate reporting for all aspects of the AAP/EEO program.

Piercing Strategies can off-set perceived regulatory burden for resource-challenged contractors by providing expert services that assist federal contractors in effectively managing their OFCCP obligations, thereby minimizing financial risk for being non-compliant as a result of an audit. My experience has shown that the deployment of careful risk management strategies can ensure that federal contractors are not surprised by their compliance status before, during or after an OFCCP audit. Piercing Strategies works with federal contractors to re-focus and to re-direct efforts to improve internal self-assessments for problem area identification, prepare for audits, defend and resolve questionable problem areas, and train staff. As clearly

demonstrated in non-AAP/EEO areas, the allocation of the right blend of dedicated corporate resources and external expert assistance provides a strengthened strategy, which minimizes risks for successful operations in the federal contracting market. Moreover, preemptively investing in Piercing Strategies can save money and avoid unnecessary negative outcomes.

ABOUT THE AUTHOR

James C. Pierce is the President and CEO of Piercing Strategies. He has over 40 years of Federal Government experience, 28 of which was spent within the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). Mr. Pierce is the former Deputy Director of OFCCP's Division of Program Operations. Additionally, he has held a number of other executive level positions with the OFCCP including: Director of the Functional Affirmative Action Programs Unit and Acting Policy Director, Acting Deputy Policy Director and Branch Chief of the OFCCP's Division of Policy, Planning and Program Development. He has also served as an OFCCP District Director.

Mr. Pierce's in-depth knowledge and extensive experience has allowed him to become a leading expert on federal contractor compliance issues.