Question and Answers
OFCCP Compliance Update Webinar

1 - I'm under an audit now and I've turned in my AAP but the auditor is requesting additional compensation data. Do they have to give me an extension?

There is no uniform OFCCP rule regarding contractor response time to follow-up requests. In the last administration, it was common for no more than five business days to be given for a response. In the new administration, we have seen more flexibility from the agency. We recommend that you first contact the compliance officer to understand what additional information is being requested, and why. These conversations often allow you to narrow the scope of the initial request to a smaller group of employees or to information that is truly relevant to your organization’s pay practices. We also suggest that you ask for more time than you need, since you are not likely to be given all the time you request. Thus, for example, if you think you need two weeks, ask for three or four. Another strategy is to provide some information within the specified timeframe and then to supplement that information on a regular schedule until all requested information is provided. This approach shows the OFCCP that you are cooperating in good faith with the compliance review, while allowing you more time to respond. Above all else, do not rush your response – it is more important for the information you provide to be correct than to be timely.

2 - Please elaborate on whether or not student workers and graduate assistants should be included in the AAP.

Under OFCCP’s regulations all “employees” are to be included in a contractor’s affirmative action plan. The OFCCP uses a multi-factor test, called the Darden test, to determine whether an individual is an employee. You can find more information about the OFCCP’s position at https://www.dol.gov/ofccp/regs/compliance/faqs/EmpRelationship.html.

3 - There’s a tendency to fill nonfaculty jobs with internals via promotions, transfers, reclassification. For [job groups with affirmative action placement] goals, that’s problematic because a huge majority of incumbents are nonminority. What’s OFCCP’s position on internal mobility that perpetuates lack of minorities?

In recent years, the OFCCP has refocused its attention on contractors’ good faith efforts to meet Executive Order 11246 placement goals, and has asked for the specific outreach the contractor has conducted to meet its placement goals. For example, if a contractor has a placement goal to hire more female engineers, the OFCCP expects that the contractor will be able to produce evidence of good faith outreach efforts (both external and internal) that demonstrate the contractor took proactive steps to encourage qualified females to apply for the engineering positions that were open during the plan year. General outreach to female organizations not tied to the specific positions may be insufficient.
In addition, the OFCCP has asked more questions about promotion activity in recent audits, particularly if the internal movement is non-competitive. Non-competitive movements in a job group with placement goals can be a concern to the agency because it suggests lack of good faith effort to achieve the placement goal. In addition, non-competitive movements also may impact compensation among protected groups, which is a key agency priority. Hand in hand with this, the agency is very focused on “steering” issues, or placement decisions where it appears a contractor is placing individuals in particular jobs due to stereotypical assumptions without evidence that the individual “sought” that position.

Given these agency priorities, it is important to examine the number of non-competitive movements within your organization, and to understand the business reasons for these selection decisions. Limiting non-competitive movements may be a good way to minimize risk in this area. Steps also should be taken to clearly document competitive internal movements.

Finally, organizations should examine how often internal candidates are being considered in conjunction with external candidates, and should perform analyses on those candidate pools to determine if there are significant selection disparities by race or gender.

4 - We’re getting more questions re employees (and applicants) who are gender nonconforming. Makes visual ID very uncomfortable for folks to make. Any guidance on how to count employees that want to disclose their gender as non-binary?

The OFCCP’s rules require that all employees be included in an affirmative action plan, and that each employee be assigned a race or gender. For employees who do not voluntarily disclose their race or gender, contractors are to use other employment records or visual identification. On the other hand, contractors are currently allowed to identify applicants as unknown race or gender in their AAP, as long as the contractor can demonstrate that it provided applicants with the opportunity to voluntarily self-identify at an appropriate time in the selection process.

The OFCCP has not specifically provided guidance on how to handle employees who wish to disclose their gender as non-binary. One option might be to include these individuals in certain AAP components, such as the workforce analysis and job group analysis, as non-binary. However, taking this approach would mean that these individuals would not be considered when evaluating personnel activity or progress towards placement goals. In addition, this approach may not be acceptable to the OFCCP, and could even be confusing to the agency. Given this, until further guidance is provided, use of other employment records or visual identification is the most compliant approach.

5 - Question about improving the self-id process and what to do when the employee pool does not self-identify.

The OFCCP’s rules require that all employees be included in an affirmative action plan, and that each employee be assigned a race or gender. For employees who do not voluntarily disclose their race or gender, contractors are to use other employment records or visual identification. We recommend that academic institutions monitor this issue carefully on an annual basis since we find that large portions of the employee population, particularly faculty, often do not provide this information voluntarily.
Some ways to improve voluntarily self-identification response rates include allowing employees to update this information at any time through a self-serve portal; reminding employees to provide this information on a regular basis, such as during open enrollment; and explaining in any voluntary self-identification request that the government requires the institution to assign a race or gender based on employment records or visual identification if it is not voluntarily provided. You also could consider revising your voluntary self-identification process so that employees must choose a race or gender, or affirmatively indicate that they do not wish to disclose such information – sometimes the requirement to make a choice, even if it is to decline, improves response rates. In addition, you could reconsider when this information is being requested in the application process – the sooner it is asked for, the better the response rate generally is.

Otherwise, organizations should review the number of unknowns each AAP year, and take steps to identify a race or gender for those employees with unknown race or gender using employment records or visual identification each plan year.

6 - Is it a requirement for Community Colleges to have a AAP annual report? I am new to the institution and they do not have an annual report.

Whether a community college is required to prepare an annual affirmative action plan depends on whether it holds a covered contract or subcontract under Executive Order 11246, Section 503 of the Rehabilitation Act or the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA). You can find an infographic with the coverage requirements for each law on OFCCP’s website at https://www.dol.gov/ofccp/posters/Infographics/files/JurisdictionalThresholds-7_ENGESQA508c.pdf

7 - What are the top 3 things an academic institution should consider to mitigate risk in an audit?

The top three things an academic institution can proactively do to mitigate risk in an audit are the following:

1) Re-evaluate AAP plan structure, particularly if the university has many physical locations or campuses, but is preparing a single, university-wide AAP.

2) Re-examine AAP job groups to ensure that only similarly-situated employees are grouped together. Job groups that are based on EEO-1 or IPEDS categories, without further division, are likely too broad for most academic institutions. Consider how selection and pay decisions are made at your institution during this review. For non-faculty, consider grouping by function or level, or a combination of both. Ensure that faculty are appropriately grouped by school, discipline and/or tenure status.

3) Proactively examine compensation practices, particularly for faculty members, so that you fully understand how you pay employees and have a plan for defending your pay practices before the OFCCP asks.
8 - Do you expect a lot of OFCCP regulatory changes from the new administration?

We do not anticipate a significant number of regulatory changes during the Trump administration. Without a politically-appointed director of OFCCP almost a year into the new administration, time is running out for significant new regulations to be proposed and finalized in this administration. We do think it possible that some sub-regulatory guidance, such as Directive 307, will be rescinded or revised during this administration.

9 - Can you give some examples of how other universities have created a multi-plan AAP structure for a campus setting?

The OFCCP’s regulations require that an AAP be prepared for each “establishment” of 50 or more employees, and allow contractors to prepare AAPs for smaller establishments. This rule applies to all covered contractors, including academic institutions. Generally, smaller AAPs create less compliance risk during an OFCCP compliance review simply because the agency is reviewing a smaller employee population and fewer personnel transactions. Other federal contractors have taken this approach for years, while still finding ways to evaluate their overall affirmative action compliance and progress.

When re-evaluating AAP structure, academic institutions should examine their workforce strategically to determine if creating more than one AAP makes sense, and is defensible. For example, if a university’s medical school, graduate school, or law school are located at different physical addresses, there may be good reason to create a separate AAP for one or more of these schools. Similarly, if an academic institution has two distinct campus locations, even if in close proximity, separate AAPs may make sense. Creating separate AAPs for establishments on a single campus may also make sense, such as separate AAPs for distinct schools.