



Legal Alert: OFCCP Reinstates Use of Functional Affirmative Action Program Agreements

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Executive Summary: The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has issued a directive reinstating the use of Functional Affirmative Action Program agreements and revising the requirements for the use of such agreements.

Background

Executive Order 11246 requires companies with 50 or more employees and a federal contract of \$50,000 or more to create and implement affirmative action plans (AAPs). Generally contractors must develop, implement and maintain an AAP for each physical location of an establishment with 50 or more employees. OFCCP regulations interpreting EO 11246 permit large companies to develop and maintain AAPs based on function or business unit instead of by establishment through Functional Affirmative Action Program (FAAP) agreements.

In 2010, the OFCCP suspended the acceptance of requests to develop or renew FAAP agreements while it reviewed its policies regarding the FAAP procedure. On June 28, 2011, the OFCCP issued a new directive outlining the application and approval procedures for FAAP agreements. The new FAAP procedures are effective June 14, 2011. The new directive is available at: <http://www.dol.gov/ofccp/regs/compliance/directives/dir296.htm>.

Requirements for the Use of FAAPs

To be considered suitable for a functional AAP, the functional or business unit must: (1) currently exist and operate autonomously; (2) include at least 50 employees; (3) have its own managing official; and (4) have the ability to track and maintain its own personnel activity.

The new directive makes certain changes to the FAAP procedure including:

- Contractors must now have the written approval of the director of the OFCCP before developing and using a FAAP. This requirement eliminates the agency's prior practice of automatic approval of an FAAP if the agency failed to act upon a request for approval within 120 days;
- Applications, modifications and renewals of FAAPs are not automatic and must be approved by the OFCCP director; and

- Contractors must submit annual reports, 30 days after the anniversary of the FAAP, describing any minor changes to the agreement such as change of managing official or contact information. This report must also update federal contract information. If a contractor fails to submit this report, OFCCP may schedule the contractor for a compliance evaluation.

Additionally, the directive provides that all FAAPs will expire three years after the date of approval. However, contractors may renew an existing FAAP agreement for another three-year term by submitting a renewal request to the OFCCP Director no later than 120 calendar days prior to the expiration of the current FAAP agreement. A contractor with an approved FAAP agreement must have had at least two functional units undergo a compliance evaluation during the three-year term of the agreement to be eligible for a renewal of an existing functional AAP Agreement.

More detailed information regarding the requirements and procedure for using FAAPs is included in the policy directive. Additionally, the OFCCP has provided a series of Frequently Asked Questions regarding FAAPs, available at: <http://www.dol.gov/ofccp/regs/compliance/faqs/faapfaqs.htm>.

If you have any questions regarding FAAPs or affirmative action obligations of federal contractors, please contact any member of Ford & Harrison's Affirmative Action Compliance and Plan Development practice group or the Ford & Harrison attorney with whom you usually work.