

Federal Contract Compliance Manual

October 2014



Federal Contract Compliance Manual

July 2013



TABLE OF CONTENTS

INTRODUCTION..... 1

CHAPTER 1 DESK AUDIT 3

 1A INTRODUCTION 3

 1A00 TYPES OF COMPLIANCE EVALUATIONS 3

 1A01 CONTENTS OF CHAPTER 4

 1A02 PURPOSE OF THE DESK AUDIT 5

 1A03 PRINCIPLES AND FOCUS OF DESK AUDITS 5

 1A04 USE OF THE STANDARD COMPLIANCE EVALUATION REPORT 6

 1A05 CASE MANAGEMENT SYSTEM..... 7

 1A06 CONFIDENTIALITY OF INFORMATION 7

 1A07 NOVEL ISSUES..... 7

 1A08 CORPORATE MANAGEMENT COMPLIANCE EVALUATIONS..... 8

 1A09 FUNCTIONAL AFFIRMATIVE ACTION PROGRAMS 8

 1A10 PREAWARD COMPLIANCE EVALUATIONS 8

 1B PRE-DESK AUDIT ACTIONS 8

 1B00 INITIAL CONTACT WITH THE CONTRACTOR..... 8

 1B01 PREPARATION AND MAINTENANCE OF THE CASE CHRONOLOGY
 LOG 10

 1B02 CREATION AND MAINTENANCE OF THE CASE FILE 11

 1B03 SENDING THE SCHEDULING LETTER AND ITEMIZED LIST 14

 1B04 FOLLOW-UP CONTACT WITH CONTRACTOR 14

 1B05 CONTACTING EEOC, VETS AND OTHER AGENCIES 15

 1B06 INFORMATION ON EEO COMPLAINTS FILED WITH OR BY OTHER
 AGENCIES..... 16

 1B07 RELATIONSHIP OF OFCCP COMPLIANCE ACTIVITIES TO EEO
 LITIGATION OR COURT ORDERS..... 16

 1B08 REVIEW OF COMMUNITY RESOURCE FILES 17

 1B09 REVIEW OF PREVIOUS COMPLIANCE ACTIONS 17

 1C RECEIPT OF AAPs AND SUPPORT DATA FOR DESK AUDIT 18

 1C00 NON-RECEIPT OF EXECUTIVE ORDER AAP 18

 1C01 NON-RECEIPT OF EXECUTIVE ORDER SUPPORT DATA..... 18

 1C02 NON-RECEIPT OF SECTION 503 AND SECTION 4212 AAPs 19

 1C03 EVALUATION PERIOD 19

 1D INITIAL REVIEW OF AAPs 20

 1E REVIEW OF AAPs FOR CURRENTNESS AND INCLUSION FOR EO11246,
 SECTION 503 AND SECTION 4212 20

 1E00 ACTION WHEN AAP IS NOT CURRENT 21

 1E01 INCLUSION 21

 1E02 MISSING AAP ELEMENTS 21

 1F REVIEW OF AAPs FOR ACCEPTABILITY 23

Federal Contract Compliance Manual (FCCM)

1F00	REVIEW OF EXECUTIVE ORDER AAP FOR ACCEPTABILITY	23
1F01	ORGANIZATIONAL PROFILE.....	23
1F02	JOB GROUPS.....	25
1F03	UTILIZATION ANALYSIS	27
1F04	PLACEMENT GOALS	29
1F05	ADDITIONAL REQUIRED ELEMENTS OF AAPs.....	29
1G	REVIEW OF EXECUTIVE ORDER SUPPORT DATA FOR ACCEPTABILITY	31
1H	REVIEW OF SECTION 503 AND SECTION 4212 AAPs FOR ACCEPTABILITY	34
1H00	ITEMS INCLUDED	34
1H01	POLICY STATEMENT	35
1H02	CONTRACTOR REVIEW OF PERSONNEL PROCESSES.....	35
1H03	CONTRACTOR REVIEW OF PHYSICAL AND MENTAL QUALIFICATIONS	36
1H04	REASONABLE ACCOMMODATION TO PHYSICAL AND MENTAL LIMITATIONS.....	37
1H05	HARASSMENT PREVENTION	37
1H06	EXTERNAL DISSEMINATION OF EEO POLICY AND OUTREACH	37
1H07	INTERNAL DISSEMINATION OF EEO POLICY	37
1H08	AUDIT AND REPORTING SYSTEM	37
1H09	ESTABLISHMENT OF RESPONSIBILITY FOR AAP IMPLEMENTATION.....	38
1H10	TRAINING TO ENSURE AAP IMPLEMENTATION.....	38
1H11	NO REDUCTION IN COMPENSATION	38
1I	SUMMARY OF ACCEPTABILITY PROBLEMS WITH AAPs AND SUPPORT DATA	38
1J	ANALYSIS OF SECTION 503 AND SECTION 4212 AAPs: REVIEW OF ONLINE APPLICATION PROCESS.....	39
1K	ANALYSIS OF EO 11246 AAP: OVERVIEW OF SUPPORT DATA, EEO TRENDS, WORKFORCE STRUCTURE AND PERSONNEL PRACTICES	40
1K00	EEO TREND ANALYSIS.....	40
1K01	WORKFORCE STRUCTURE AND PERSONNEL PRACTICES.....	41
1L	ANALYSIS OF EO 11246 AAP: GOALS PROGRESS AND GOOD FAITH EFFORTS	41
1L00	ANALYSIS OF GOALS PROGRESS	42
1L01	EVALUATION OF GOOD FAITH EFFORTS	42
1L02	PLAN FOR EVALUATION OF GOOD FAITH EFFORTS.....	43
1M	BASIS FOR POTENTIAL DISCRIMINATION ANALYSES.....	43
1N	ANALYSIS OF EO 11246 AAP: AUDIT OF THE WORKFORCE ANALYSIS OR ORGANIZATIONAL PROFILE.....	44
1N00	UNDERREPRESENTATIONS AND CONCENTRATIONS.....	45
1N01	DETERMINING THE RELEVANT WORKFORCE SECTOR AND JOB AREAS	45

Federal Contract Compliance Manual (FCCM)

1N02	ANALYSIS BASED ON A PARTICULAR RACE OR ETHNICITY	48
1O	ANALYSIS OF EO 11246 AAP: AUDIT OF PERSONNEL ACTIVITY AND THE IMPACT RATIO ANALYSIS	48
1O00	CALCULATING THE IRA	48
1O01	SPECIFIC RACE AND ETHNIC GROUP ANALYSIS	50
1O02	PROPER USE OF THE IRA RESULTS	50
1O03	IRA, STATISTICAL ANALYSIS SUMMARY AND ONSITE PLAN.....	50
1P	ANALYSIS OF EO 11246 AAP: AUDIT OF COMPENSATION DATA	52
1P00	DATA FOR COMPENSATION ANALYSIS	53
1P01	ACTION BASED ON THE DESK AUDIT RESULTS.....	53
1P02	REQUESTING ADDITIONAL DATA OR INFORMATION.....	54
1Q	SCER SUMMARY OF POTENTIAL DISCRIMINATION AREAS AND ONSITE INVESTIGATIVE PLAN (ALL LAWS)	54
1R	CONCLUSION OF THE DESK AUDIT.....	55
1R00	DOCUMENTS FOR CLOSING COMPLIANCE EVALUATION AFTER THE DESK AUDIT	55
1R01	REASONS TO PROCEED WITH ONSITE REVIEW.....	55
1R02	COMPLETING APPROPRIATE SCER PAGES	56
CHAPTER 2 ONSITE REVIEW		57
2A	INTRODUCTION	57
2B	DETERMINING THE NEED FOR AN ONSITE REVIEW	59
2C	ONSITE REVIEW PREPARATION.....	59
2C00	PROHIBITION AGAINST RETALIATION.....	59
2C01	USE OF THE STANDARD COMPLIANCE EVALUATION REPORT AND INFORMATION MANAGEMENT.....	60
2C02	HISTORICAL DATA AND COMPLAINT HISTORY	61
2C03	ONSITE PLAN.....	62
2C04	NOTICE OF THE ONSITE DATE AND REQUESTS FOR ADDITIONAL INFORMATION.....	63
2D	ONSITE PROCESS.....	63
2D00	ENTRANCE CONFERENCE.....	63
2D01	FACILITY INSPECTION.....	64
2D02	ACCESS TO CONTRACTOR RECORDS.....	65
2E	EO 11246 AAP REQUIREMENTS	66
2E00	EO 11246 AAP AND SUPPORT DATA SUBMISSIONS	66
2E01	ADDITIONAL REQUIRED ELEMENTS OF AN EO 11246 AAP	67
2E02	EVALUATION OF GOOD FAITH EFFORTS	69
2E03	AUDIT OF EMPLOYMENT ACTIVITY TO ENSURE EQUAL EMPLOYMENT OPPORTUNITY	70
2F	SECTION 503 AND SECTION 4212 AAPs, AND ADDITIONAL REQUIREMENTS	71

Federal Contract Compliance Manual (FCCM)

2F00	AAP(S) AND SUPPORT DATA SUBMISSIONS.....	72
2F01	AVAILABILITY OF AAPs FOR INSPECTION	76
2F02	INVITATION TO SELF-IDENTIFY	76
2F03	ADDITIONAL REQUIREMENTS.....	77
2G	RELIGION AND NATIONAL ORIGIN REQUIREMENTS	78
2G00	CONTRACTOR POLICY AND IMPLEMENTATION.....	78
2G01	RELIGIOUS ACCOMMODATION	78
2G02	POTENTIAL HARASSMENT AND DISCRIMINATION	79
2G03	COMMUNITY CONTACTS	80
2H	COMPLIANCE WITH SEX DISCRIMINATION GUIDELINES	80
2H00	REVIEW OF CONTRACTOR POLICIES AND IMPLEMENTATION.....	81
2H01	SEX DISCRIMINATION AND HARASSMENT.....	83
2I	TECHNICAL REQUIREMENTS.....	85
2I00	TECHNICAL REQUIREMENTS OF EO 11246, SECTION 4212 AND SECTION 503.....	85
2I01	EO 13496 REQUIREMENTS	87
2I02	RECORDKEEPING	88
2J	SUPPORT AND PERSONNEL ACTIVITY REQUIREMENTS	88
2J00	ANALYZING THE SELECTION PROCESS.....	88
2J01	DISTINGUISHING OBJECTIVE FROM SUBJECTIVE SELECTION CRITERIA	90
2J02	ANALYSIS OF OBJECTIVE CRITERIA.....	91
2J03	ANALYSIS OF OBJECTIVE CRITERIA FOR ADVERSE IMPACT.....	92
2J04	ANALYSIS OF SUBJECTIVE CRITERIA AND DETERMINATION OF ADVERSE IMPACT	93
2J05	JUSTIFICATION OF SELECTION PROCEDURES WHEN ADVERSE IMPACT IS IDENTIFIED.....	93
2K	LINKAGE AGREEMENTS.....	94
2K00	LINKAGE OBJECTIVES	94
2K01	LINKAGE REQUIREMENTS.....	95
2K02	IMPLEMENTATION UNDER EO 11246.....	95
2K03	WHERE LINKAGE AGREEMENTS ARE NOT REQUIRED (EO 11246 Only)	95
2K04	LINKAGE AGREEMENTS FOR INDIVIDUALS WITH DISABILITIES AND DISABLED AND OTHERWISE PROTECTED VETERANS	96
2K05	CONFIRMATION OF LINKAGE AGREEMENT	96
2L	COLLECTING INFORMATION	96
2L00	TYPES OF EVIDENCE	97
2L01	PERSONNEL ACTIVITY AND SELECTION PROCESS.....	98
2L02	SELECTION PROCEDURES AND TESTING	99
2L03	COMPENSATION	100
2M	INTERVIEWS.....	102
2M00	GENERAL INTERVIEW PRINCIPLES AND PROCEDURES	103

Federal Contract Compliance Manual (FCCM)

2M01	MANAGEMENT INTERVIEWS	105
2M02	EMPLOYEE INTERVIEWS.....	106
2M03	ISSUES THAT ARISE DURING THE ONSITE REVIEW	106
2N	EXIT CONFERENCE.....	107
2N00	AREAS TO COVER AT THE EXIT CONFERENCE	107
2O	RETURN ONSITE VISIT AND DENIAL OF ACCESS	107
2P	INVESTIGATION SUMMARY OR REPORT WRITING	108
2P00	SUMMARY OF FINDINGS	108
CHAPTER 3 CONSTRUCTION INDUSTRY COMPLIANCE PROGRAM.....		110
3A	GENERAL.....	110
3B	COVERAGE	110
3B00	REGULATIONS APPLICABLE TO CONSTRUCTION CONTRACTORS.....	110
3B01	REQUIRED CONTRACT CLAUSES	111
3B02	CONSTRUCTION CONTRACT NOTICE AND SPECIFICATIONS	111
3B03	SUPPORT FROM OTHER AGENCIES RELATED TO CONSTRUCTION CONTRACTORS	112
3C	GENERAL PRINCIPLES APPLICABLE TO THE CONSTRUCTION INDUSTRY	113
3C00	GOALS	113
3C01	PRECONSTRUCTION CONFERENCES	114
3C02	NOTICE OF SUBCONTRACT AWARDS	114
3D	THE COMPLIANCE REVIEW PROCESS.....	114
3E	PRE-REVIEW PREPARATION: SCHEDULING AND COORDINATION WITH OTHER AGENCIES.....	115
3F	ONSITE REVIEW PROCESS	116
3G	ENTRANCE CONFERENCE.....	117
3H	REVIEW OF RECORDS	118
3H00	PAYROLL RECORDS.....	118
3H01	EMPLOYMENT ACTIVITY RECORDS	118
3H02	COLLECTIVE BARGAINING AGREEMENT (CBA)	119
3H03	PERSONNEL POLICIES.....	119
3H04	DISCRIMINATION AND HARASSMENT	120
3I	AUDIT OF AFFIRMATIVE ACTION STEPS SET FORTH IN 41 CFR 60-4.3(a) 7	121
3I00	AUDIT OF RECRUITMENT PRACTICES	122
3I01	AUDIT OF TRAINING.....	124
3I02	AUDIT OF EEO POLICY IMPLEMENTATION	125
3I03	AUDIT OF PERSONNEL OPERATIONS	128
3I04	AUDIT OF CONTRACTING ACTIVITY	130
3J	INTERVIEWS.....	131

Federal Contract Compliance Manual (FCCM)

3K	PHYSICAL INSPECTION OF CONTRACTOR WORKSITES	131
3K00	INVESTIGATION OF COMPLIANCE.....	132
3K01	COMPLIANCE WITH EXECUTIVE ORDER 13496	132
3L	COMPLIANCE WITH 41 CFR PART 60-20.....	132
3M	COMPLIANCE WITH 41 CFR PART 60-50.....	133
3N	COMPLIANCE WITH SECTION 4212 AND SECTION 503	133
3O	IDENTIFICATION AND RESOLUTION OF EMPLOYMENT DISCRIMINATION	133
3P	EXIT CONFERENCE.....	134
3Q	STANDARD CONSTRUCTION COMPLIANCE EVALUATION REPORT	134
3R	NOTIFICATION OF COMPLIANCE REVIEW RESULTS AND RESOLUTION OF VIOLATIONS.....	135
3S	USE OF CONCILIATION AGREEMENTS	136
3T	REVIEW COMPLETION LETTER.....	137
3U	REFERRAL FOR ENFORCEMENT	137
CHAPTER 4 CORPORATE MANAGEMENT COMPLIANCE EVALUATIONS		139
4A	INTRODUCTION	139
4A00	PURPOSE OF CMCEs.....	139
4A01	SCOPE OF CMCE.....	140
4A02	CONFIDENTIALITY.....	141
4B	PRE-DESK AUDIT ACTIONS	142
4B00	FOLLOW-UP CONTACT WITH CONTRACTOR.....	142
4B01	CORPORATION BACKGROUND RESEARCH.....	142
4B02	SEARCH FOR PUBLISHED REPORTS	143
4B03	RETRIEVAL OF "FORM 10-K" REPORTS.....	143
4B04	RETRIEVAL OF EEO-1 REPORTS.....	144
4B05	OFCCP COMPLIANCE HISTORY REPORTS	145
4B06	CONTACTING EEOC, VETS AND OTHER AGENCIES	145
4B07	FOLLOW-UP AND USE OF INFORMATION ON COMPLAINTS FILED WITH OR BY OTHER AGENCIES	146
4B08	RELATIONSHIP OF OFCCP COMPLIANCE ACTIVITIES TO EEO LITIGATION OR COURT ORDERS.....	146
4B09	REVIEW OF COMMUNITY RESOURCE FILES	146
4B10	REVIEW OF PAST OFCCP COMPLIANCE ACTIONS	147
4B11	EVALUATION AND ANALYSIS OF CORPORATE INFORMATION	147
4B12	EVALUATION OF EEO-1 REPORTS.....	149
4C	RELATIONSHIP TO THE STANDARD DESK AUDIT	150
4D	DESK AUDIT – REVIEW OF THE ORGANIZATIONAL PROFILE.....	150
4D00	ANALYSIS OF NONFAVORED GROUPS’ MANAGEMENT LEVEL PARTICIPATION	151

Federal Contract Compliance Manual (FCCM)

4D01 FUNCTIONAL AREAS.....152

4E DESK AUDIT: AAP AND EMPLOYMENT ACTIVITY INFORMATION DURING A REVIEW OF SELECTION PROCESSES AND DEVELOPMENTAL PROGRAMS155

4F NOTICE OF ONSITE REVIEW AND FOLLOW-UP DATA REQUESTS.....156

4G ONSITE REVIEW156

4G00 ENTRANCE CONFERENCE156

4G01 CORPORATE CULTURE157

4G02 INTERVIEWS158

4H ONSITE: FILLING OF MANAGEMENT JOBS159

4H00 GENERAL QUALIFICATION STANDARDS.....159

4H01 EXTERNAL HIRES161

4H02 SOURCES OF APPLICANTS AND CANDIDATES161

4H03 SAMPLE QUESTIONS AND ANALYSIS FOR VARIOUS SEARCH SOURCES.....163

4H04 INTERNAL DEVELOPMENT164

4H05 MANAGEMENT TRAINING AND EXECUTIVE DEVELOPMENT176

4H06 MENTORING AND NETWORKING.....177

4I ONSITE: RETENTION178

4I00 OVERVIEW OF TOTAL COMPENSATION PACKAGES.....178

4I01 RECOGNITION: AWARDS AND HONORS.....183

4J ONSITE: TERMINATIONS184

4K COMPLETION OF COMPLIANCE EVALUATION: EXIT CONFERENCE, REPORT WRITING AND NOTICE OF EVALUATION184

4K00 NOTICE OF EVALUATION COMPLETION184

CHAPTER 5 FUNCTIONAL AFFIRMATIVE ACTION PROGRAM COMPLIANCE EVALUATIONS186

5A INTRODUCTION186

5A00 APPLICABILITY OF CHAPTER186

5A01 PURPOSE OF THE FAAP186

5A02 RELATIONSHIP TO STANDARD COMPLIANCE EVALUATIONS.....186

5A03 RELATIONSHIP TO THE STANDARD COMPLIANCE EVALUATION REPORT187

5A04 OFCCP PARTICIPANTS IN FAAP COMPLIANCE EVALUATIONS187

5B PRE-DESK AUDIT ACTIONS187

5B00 CREATION AND MAINTENANCE OF THE CASE FILE.....187

5B01 SENDING THE SCHEDULING LETTER AND ITEMIZED LIST188

5B02 FOLLOW-UP CONTACT WITH CONTRACTOR188

5B03 OFCCP COMPLIANCE HISTORY REPORTS188

5B04 CONTACTING EEOC, VETS AND OTHER AGENCIES189

5B05 GATHERING EEO INFORMATION189

Federal Contract Compliance Manual (FCCM)

5C	DESK AUDIT	189
5D	ONSITE	190
5E	COMPLIANCE EVALUATION COMPLETION	190
CHAPTER 6 COMPLAINT INVESTIGATION		191
6A	INTRODUCTION	191
6B	BASES OF COMPLAINT ALLEGATIONS.....	191
6C	COMPLAINT PROCESSING	192
6C00	RECEIPT OF COMPLAINTS.....	192
6C01	WHO MAY FILE A COMPLAINT	193
6C02	COMPLAINT PERFECTION	193
6C03	CASE FILE.....	194
6C04	CORRESPONDENCE.....	197
6C05	COUNSEL OR OTHER REPRESENTATION	197
6C06	TIMELY COMPLETION OF INVESTIGATION.....	198
6C07	OFCCP CASE MANAGEMENT SYSTEM.....	198
6D	PROVIDING THE CONTRACTOR A COPY OF THE COMPLAINT.....	198
6D00	REVIEW OF COMPLAINT BEFORE RELEASE.....	199
6D01	RELEASING COPY OF THE COMPLAINT	199
6E	TYPES OF COMPLAINT ALLEGATIONS.....	199
6E00	APPROACH TO INVESTIGATING COMPLAINT ALLEGATIONS	200
6E01	INITIAL STEPS	200
6E02	INVESTIGATIVE FRAMEWORK.....	201
6E03	PATTERN OR PRACTICE ALLEGATIONS.....	202
6E04	HARASSMENT: HOSTILE ENVIRONMENT	202
6E05	RETALIATION AND INTERFERENCE.....	203
6E06	ALLEGATIONS SPECIFIC TO EO 11246.....	203
6E07	ALLEGATIONS SPECIFIC TO DISABILITY COMPLAINTS	203
6E08	ALLEGATIONS SPECIFIC TO SECTION 4212 (NON-DISABILITY) COMPLAINTS	206
6E09	TECHNICAL AND RECORDKEEPING REQUIREMENTS	206
6E10	NOVEL ISSUES.....	207
6F	INVESTIGATIVE PLAN	207
6F00	DEVELOPMENT OF THE INVESTIGATIVE PLAN	207
6F01	DOCUMENTARY EVIDENCE AND RECORDS	208
6G	ONSITE INVESTIGATIONS.....	209
6G00	NOTIFYING THE CONTRACTOR OF THE ONSITE INVESTIGATION	209
6G01	ONSITE INVESTIGATION	210
6G02	DATA GATHERING	211
6G03	CONDUCTING INTERVIEWS.....	215
6G04	INTERVIEW QUESTIONS	216
6G05	REVIEW OF RECORDS	221
6G06	EXIT CONFERENCE	221

Federal Contract Compliance Manual (FCCM)

6H	CONDUCTING ANALYSES AND THE INVESTIGATIVE REPORT.....	221
6I	USE OF A NOTIFICATION OF RESULTS OF INVESTIGATION.....	221
6I00	SIGNATURES AND PROCEDURES.....	222
6I01	NOTICE TO LABOR UNION VIOLATION.....	222
6J	RESOLUTION OF THE COMPLAINT.....	222
6J00	SETTLEMENT BEFORE COMPLETION OF INVESTIGATION.....	222
6J01	PRIOR TO ISSUING A NO VIOLATION NORI.....	223
6J02	CLOSURE OF COMPLAINT WITH NO VIOLATION NORI.....	223
6J03	CLOSURE OF COMPLAINT AND ISSUANCE OF “NOTICE OF RIGHT- TO-SUE” UPON REQUEST.....	223
6J04	NOTICE ISSUED UPON ADMINISTRATIVE CLOSURE.....	224
6J05	SETTLEMENT AFTER COMPLETION OF INVESTIGATION.....	225
6K	ENFORCEMENT.....	226
CHAPTER 7 EMPLOYMENT DISCRIMINATION REMEDIES.....		227
7A	INTRODUCTION.....	227
7A00	APPLICABILITY.....	227
7A01	RELATIONSHIP TO SCER.....	227
7A02	PROCESS.....	227
7A03	APPLICABLE LAW.....	227
7B	TIMELINESS AND CONTINUING VIOLATION.....	227
7B00	CONTINUING VIOLATION.....	228
7C	REMEDIES.....	229
7C00	DESIGNING THE REMEDY.....	229
7C01	CORRECTIVE REMEDIES.....	229
7C02	MAKE-WHOLE RELIEF.....	230
7C03	FRONT PAY.....	230
7C04	RETROACTIVE SENIORITY.....	230
7C05	OTHER REMEDIES AFFECTING A UNION AGREEMENT.....	232
7C06	BACK PAY.....	232
7C07	TIME LIMITS FOR RELIEF.....	234
7C08	CALCULATION OF INDIVIDUAL BACK PAY AWARDS.....	235
7C09	REMEDIES IN A PATTERN OR PRACTICE CASE.....	236
7C10	VICTIM-SPECIFIC REMEDIES.....	236
7C11	PREFERRED METHOD FOR DETERMINING RELIEF: FORMULA RELIEF.....	238
7C12	NOTIFICATION TO CLASS MEMBERS.....	240
7C13	LIABILITY OF A SUCCESSOR EMPLOYER.....	240
CHAPTER 8 RESOLUTION OF NONCOMPLIANCE.....		241
8A	INTRODUCTION.....	241
8A00	APPLICABILITY.....	241
8A01	REMEDIES.....	241
8A02	PREPARATION OF DOCUMENTS.....	241

Federal Contract Compliance Manual (FCCM)

8A03 COMPUTATION OF TIME.....242

8A04 ORGANIZATION OF THIS CHAPTER.....242

8B OVERVIEW OF RESOLUTION AND ENFORCEMENT PROCEDURES AND DOCUMENTS243

8B00 GENERAL USE OF A SHOW CAUSE NOTICE.....243

8B01 USE OF A SHOW CAUSE NOTICE AT THE DESK AUDIT243

8B02 DOCUMENTS USED IN THE ONSITE AND OFFSITE PHASES OF COMPLIANCE EVALUATIONS (Supply & Service and Construction).....246

8B03 DOCUMENTS USED IN COMPLAINT INVESTIGATIONS.....250

8B04 DOCUMENTS USED IN MONITORING CONCILIATION AGREEMENTS.....254

8C NOTICE TO THE LABOR UNION OF A PROPOSED REMEDY256

8C00 WHEN TO USE A NOTICE TO THE LABOR UNION.....256

8C01 CONTENTS OF THE LABOR UNION NOTICE.....256

8C02 WHO RECEIVES THE LABOR UNION NOTICE257

8C03 SIGNATURE AUTHORITY.....257

8C04 UNION’S RESPONSE TO THE NOTICE257

8D SHOW CAUSE NOTICE.....257

8D00 PROGRAM APPLICABILITY257

8D01 WHEN A SHOW CAUSE NOTICE IS REQUIRED258

8D02 WHEN A SHOW CAUSE NOTICE IS NOT REQUIRED258

8D03 CONTENTS OF A SHOW CAUSE NOTICE259

8D04 WHEN TO USE AN AMENDED SHOW CAUSE NOTICE259

8D05 WHO RECEIVES A SHOW CAUSE NOTICE OR AMENDED SHOW CAUSE NOTICE.....259

8D06 SIGNATURE AUTHORITY.....260

8D07 CONTRACTOR’S RESPONSE.....260

8D08 RESCISSION OF A SHOW CAUSE NOTICE261

8E PREDETERMINATION NOTICE261

8E00 USE OF A PREDETERMINATION NOTICE.....261

8E01 CONTENTS OF A PREDETERMINATION NOTICE.....262

8E02 WHO RECEIVES A PREDETERMINATION NOTICE.....262

8E03 SIGNATURE AUTHORITY.....263

8E04 CONTRACTOR’S RESPONSE TO A PREDETERMINATION NOTICE263

8F NOTICE OF VIOLATION264

8F00 WHEN TO USE A NOTICE OF VIOLATION264

8F01 CONTENTS OF A NOTICE OF VIOLATION.....264

8F02 WHO RECEIVES THE NOTICE OF VIOLATION265

8F03 SIGNATURE AUTHORITY.....265

8F04 CONTRACTOR’S RESPONSE TO A NOTICE OF VIOLATION265

8G CONCILIATION.....265

8G00 BACKGROUND266

8G01 GENERAL.....266

8H CONCILIATION AGREEMENTS.....266

Federal Contract Compliance Manual (FCCM)

8H00	WHEN TO USE A CONCILIATION AGREEMENT	266
8H01	CONTENTS OF A CONCILIATION AGREEMENT	267
8H02	TERMINATION DATE	275
8H03	SIGNATURE AUTHORITY	275
8I	POST CONCILIATION AGREEMENT ACTIONS	275
8I00	RETENTION OF EVIDENCE OF VIOLATIONS	276
8I01	EVALUATION OF PROGRESS REPORTS	276
8I02	VIOLATION OF A CONCILIATION AGREEMENT	277
8J	THE 15-DAY NOTICE	278
8J00	WHEN TO USE A 15-DAY NOTICE	278
8J01	PROCEDURES WHERE NO IRREPARABLE INJURY EXISTS	278
8J02	PROCEDURE WHERE IRREPARABLE INJURY EXISTS	278
8J03	WHO RECEIVES THE 15-DAY NOTICE	278
8J04	SIGNATURE AUTHORITY	279
8J05	CONTRACTOR’S RESPONSE TO THE 15-DAY NOTICE	279
8K	ENFORCEMENT RECOMMENDATIONS	279
8K00	WHEN TO MAKE OR SEEK APPROVAL OF AN ENFORCMENT RECOMMENDATIONS	279
8K01	CONTENTS IN A COMPLIANCE EVALUATION FILE	280
8K02	CONTENTS IN A COMPLAINT INVESTIGATION	281
8K03	WHO RECEIVES THE ENFORCEMENT RECOMMENDATIONS	281
8K04	SIGNATURE AUTHORITY	281
8L	PRE AND POST REFERRAL ISSUES RESULTING IN ENFORCEMENT PROCEEDINGS	282
8L00	PRE-REFERRAL TO SOL	282
8L01	POST-REFERRAL TO SOL	282
8M	TYPES OF ENFORCEMENT PROCEEDINGS	282
8M00	ADMINISTRATIVE ENFORCEMENT PROCEEDINGS	282
8M01	JUDICIAL ENFORCEMENT PROCEEDINGS	282
KEY WORDS AND PHRASES		284
GLOSSARY OF ABBREVIATIONS		328
STANDARD FORMS LIST		333
APPENDIX A1 – A14		334
APPENDIX A-1:	STANDARD COMPLIANCE EVALUATION REPORT (SCER) FORM	335
APPENDIX A-2:	STANDARD COMPLIANCE EVALUATION REPORT (SCER) INSTRUCTIONS	356
APPENDIX A-3:	STANDARD COMPLIANCE EVALUATION REPORT	364
APPENDIX A-4:	INDEX FOR A SUPPLY AND SERVICE REVIEW	389
APPENDIX A-5:	INDEX FOR A CONSTRUCTION REVIEW	390

Federal Contract Compliance Manual (FCCM)

APPENDIX A-6:	SPECIAL REMEDIAL CONSIDERATIONS APPLICABLE TO STOCK	391
APPENDIX A-7:	CORPORATE MANAGEMENT COMPLIANCE EVALUATION SUPPLEMENTARY NARRATIVE REPORT	393
APPENDIX A-8:	INDEX FOR A COMPLAINT FILE.....	395
APPENDIX A-9:	RETALIATION AND INTERFERENCE; COMPLAINT PROCESSING OUTLINE AND CHECKLIST	396
APPENDIX A-10:	INVESTIGATIVE REPORT	401
APPENDIX A-11:	INFORMATION RELATED TO FILING SUIT UNDER TITLE VII AND TITLE I OF THE ADA.....	402
APPENDIX A-12:	INTEREST RATES ON BACK PAY	404
APPENDIX A-13:	"MACMILLAN" FACTORS CONCERNING SUCCESSOR EMPLOYER LIABILITY	405
APPENDIX A-14:	TRANSMITTAL MEMORANDUM FOR AN ENFORCEMENT RECOMMENDATION	407
FIGURES 1-5		412
FIGURE F-1:	CASE CHRONOLOGY LOG (CC-53).....	413
FIGURE F-2:	OFCCP SCHEDULING LETTER AND ITEMIZED LISTING	414
FIGURE F-3:	COMPLIANCE CHECK CONTROL SHEET	420
FIGURE F-4:	OFCCP COMPLAINT FORM	422
FIGURE F-5:	STANDARD TEXT FOR CONCILIATION AGREEMENT	426
LETTERS L1 – L33.....		430
LETTER L-1:	SAMPLE INQUIRY LETTER FOR REQUESTING COMPLAINT DATA FROM EEOC AND STATE AND LOCAL FEPS	431
LETTER L-2:	SAMPLE INQUIRY LETTER FOR REQUESTING JOB LISTING FROM EMPLOYMENT SERVICE.....	432
LETTER L-3:	SAMPLE INQUIRY LETTER FOR REQUESTING INFORMATION ON PENDING REVIEW FROM VETERANS EMPLOYMENT AND TRAINING SERVICE.....	433
LETTER L-4:	NOTICE OF CLOSING: COMPLIANCE EVALUATION (NO VIOLATIONS FOUND)	434
LETTER L-5:	SAMPLE LINKAGE LETTER	435
LETTER L-6:	REQUEST FOR LITERATURE SEARCH	437
LETTER L-7:	LETTER TO CONTRACTOR FORWARDING EO 11246, SECTION 503 OR SECTION 4212 COMPLAINT.....	438
LETTER L-8:	LETTER ACKNOWLEDGING RECEIPT OF EO 11264, SECTION 503 AND SECTION 4212 COMPLAINT.....	440
LETTER L-9:	AUTHORIZATION FOR RELEASE OF MEDICAL INFORMATION.....	441
LETTER L-10:	CONFIRMATION OF ONSITE INVESTIGATION.....	442
LETTER L-11:	LETTER TO CONTRACTOR CONFIRMING COMPLAINT RESOLUTION	443
LETTER L-12:	LETTER TO COMPLAINANT CONFIRMING COMPLAINT RESOLUTION	444

Federal Contract Compliance Manual (FCCM)

LETTER L-13:	NOTIFICATION OF RESULTS OF INVESTIGATION: NOTIFICATION OF NO VIOLATION	445
LETTER L-14:	NOTIFICATION OF RESULTS OF INVESTIGATION AND NOTICE OF RIGHT-TO-SUE UNDER TITLE I OF THE ADA OR TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: NOTIFICATION OF NO VIOLATION	447
LETTER L-15:	NOTICE OF RIGHT-TO-SUE UNDER TITLE I OF THE ADA OR TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (ISSUED UPON REQUEST)	450
LETTER L-16:	NOTICE OF RIGHT-TO-SUE UNDER TITLE I OF THE ADA OR TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Dismissal)	452
LETTER L-17:	NOTIFICATION OF RESULTS OF INVESTIGATION: NOTIFICATION OF VIOLATION	454
LETTER L-18:	SHOW CAUSE NOTICE: FAILURE TO SUBMIT	455
AN EO 11246, SECTION 503 OR SECTION 4212 AAP(S) (Supply & Service)	455	455
LETTER L-19:	SHOW CAUSE NOTICE: FAILURE TO SUBMIT AN ACCEPTABLE EO 11246, SECTION 503 OR SECTION 4212 AAP(S) (Supply & Service).....	458
LETTER L-19a:	SAMPLE ENCLOSURE TO LETTER L-19	460
LETTER L-20:	SHOW CAUSE NOTICE: FAILURE TO SUBMIT EMPLOYMENT ACTIVITY OR COMPENSATION DATA FOR DESK AUDIT	461
LETTER L-21:	SHOW CAUSE NOTICE: FAILURE TO SUBMIT CORRECTED EMPLOYMENT ACTIVITY OR COMPENSATION DATA	463
LETTER L-22:	SHOW CAUSE NOTICE: UNRESOLVED VIOLATIONS	465
LETTER L-22a:	SAMPLE ENCLOSURE TO LETTER L-22	467
LETTER L-23:	SHOW CAUSE NOTICE: UNRESOLVED VIOLATIONS	470
LETTER L-24:	AMENDED SHOW CAUSE NOTICE FOR UNRESOLVED VIOLATIONS	472
LETTER L-25:	SHOW CAUSE NOTICE FOR DENIAL OF ACCESS	474
LETTER L-26:	RESCISSION OF AN ERRONEOUSLY ISSUED SHOW CAUSE NOTICE	476
LETTER L-27:	PREDETERMINATION NOTICE	477
LETTER L-28:	NOTICE OF VIOLATION.....	479
LETTER L-29	15-DAY NOTICE: VIOLATION OF A CONCILIATION AGREEMENT	480
LETTER L-29a:	SAMPLE ENCLOSURE TO LETTER L-29	482
LETTER L-30:	RESCISSION OF THE 15-DAY NOTICE	483
LETTER L-31:	PROGRESS REPORT RESPONSE LETTER	484
LETTER L-32:	CLOSURE LETTER FOR SUBSTANTIVE VIOLATIONS	486
LETTER L-33:	CLOSURE LETTER FOR SUBSTANTIVE VIOLATIONS	488
ADDENDUM A:	MODEL CA TEMPLATE FOR COMPENSATION	504
ADDENDUM B:	MODEL CA TEMPLATE FOR HIRING, RECORDKEEPING, ACCESS, AND OTHER ISSUES.....	519

INTRODUCTION

At the Office of Federal Contract Compliance Programs (OFCCP), we protect workers, promote diversity through equal opportunity, and enforce the law. We hold those who do business with the Federal Government, contractors and subcontractors, to the fair and reasonable standard that they take affirmative action and not discriminate based on sex, race, color, religion, national origin, disability or status as a protected veteran.

It is estimated that nearly one in four American workers is employed by a company receiving federal funds for contracted work. That is nearly more than 200,000 businesses with contracts totaling almost \$700 billion based on 2011 data from the Division of Program Operations. Among the several ways OFCCP protects employees of companies doing business with the Federal Government, and educates these companies about their rights and obligations, is conducting quality compliance evaluations and complaint investigations.

This revised Federal Contract Compliance Manual (hereafter referred to as the “FCCM” or the “Manual”) provides new and experienced compliance officers (COs) the procedural framework for executing quality and timely compliance evaluations and complaint investigations. It provides procedural and technical guidance on compliance issues based on current agency procedures and processes, and improves consistency across the agency’s regional and field offices. It may also provide our contractors and subcontractors more transparency and clarity about basic OFCCP procedures and processes. That said, there might be slight differences between regions and offices because some discretion remains with COs and their supervisors as to the best way to manage individual compliance evaluations and investigations within the framework created by the Manual. Remember, these differences should be minor and should occur infrequently because one of the goals of the Manual is standardization. All references to the terms “compliance officer” and CO in this Chapter and throughout the Manual include any OFCCP employee that is responsible for the tasks or activities described.

The FCCM does not establish substantive agency policy. Therefore, if there is an inconsistency between material in the Manual and other OFCCP policies and its implementing regulations, the latter are controlling. OFCCP continues to use directives and other issuances to communicate substantive policy guidance, procedures, and agency enforcement priorities to its COs and those we regulate. This Manual is subject to change without public notice. The FCCM does not create new legal rights or requirements or change current legal rights or requirements for federal contractors. The official sources for contractors’ compliance obligations remain Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended; OFCCP’s regulations at 41 CFR Part 60; and applicable case law.

The Manual has eight chapters, a list of key words and phrases, a glossary and several attachments, including sample forms and letters. The chapters cover how OFCCP’s COs, and others responsible for conducting the activities covered in the Manual, conduct a desk audit, an onsite review, a construction industry compliance evaluation, a corporate management compliance evaluation and a complaint investigation. It also covers the agency’s functional

affirmative action program (FAAP), the various types of discrimination remedies and ways to resolve noncompliance issues.

The National Office wishes to acknowledge the contributions of our regional and field staff during the development of this revised Manual. Their insight and experience greatly enriched this Manual. The agency is dedicated to providing its COs ongoing support and training because we believe that a well-trained workforce is an effective workforce. We will continue supplementing the processes and procedures in this Manual with uniform staff training and by providing other appropriate resources.

CHAPTER 1 DESK AUDIT

1A INTRODUCTION

The regulations implementing Executive Order 11246 (EO 11246), as amended, authorize OFCCP to conduct compliance evaluations of federal contractors.¹ Compliance evaluations determine whether federal contractors maintain nondiscriminatory hiring and employment practices.² OFCCP also uses them to determine whether contractors are taking affirmative action to ensure that applicants and employees are treated without regard to race, color, religion, sex or national origin.³ Other regulations permitting OFCCP to conduct compliance evaluations are 41 CFR 60-250.60 and 60-300.60 implementing provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (Section 4212 or VEVRAA); and the regulations at 41 CFR 60-741.60 implementing Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793 (Section 503). These evaluations are to determine whether federal contractors are complying with their obligations to ensure nondiscrimination. They also determine whether contractors are taking affirmative action to employ, promote, train, retain and provide reasonable accommodation to certain protected veterans and individuals with disabilities, respectively.

1A00 TYPES OF COMPLIANCE EVALUATIONS

OFCCP may conduct a compliance evaluation that consists of one, or any combination of, the following investigative procedures:

- compliance review,
- offsite review of records,
- compliance check, and
- focused review.

Each of the investigative procedures is discussed in this chapter, the first is compliance review procedures. A compliance review is a comprehensive analysis and evaluation of the employment practices of the contractor, including the contractor's written affirmative action program (AAP), and the results of the contractor's affirmative action efforts. A compliance review may proceed in three stages:

- desk audit,

¹ 41 CFR 60-1.20. The term "contractor" as used in the Manual includes "subcontractors" unless otherwise noted.

² Ibid.

³ Ibid.

- onsite review, and
- offsite analysis.

However, the regulations do not require an onsite review or offsite analysis in all cases. Depending on the circumstances or the results of the desk audit, a compliance review may:

- close after the desk audit,
- continue with an onsite review, or
- continue with an offsite analysis of the information gathered during or pursuant to the onsite review.

An offsite review of records is an analysis and evaluation of the all or some portion of the AAP and supporting documentation, and other documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor complied with the requirements of EO 11246, Section 503 and Section 4212, as appropriate. COs must use the desk audit procedures outlined in this chapter when conducting an offsite review of records.

A compliance check is an examination to determine whether a contractor maintained certain records as required by the regulations at 41 CFR 60-1.12, 41 CFR 60-250.80, 41 CFR 60-300.80, and 41 CFR 60-741.80. The contractor has the option of providing the documents either onsite or offsite. Therefore, COs must contact the contractor to determine whether the requested records will be provided onsite or offsite.⁴ COs will also need to contact the contractor during the course of the review if they need specific issues clarified. A compliance check need not include an onsite review. If a contractor provides records offsite, but a CO finds that it may be appropriate to conduct a physical, onsite inspection, the CO must discuss the matter with his or her supervisor.⁵

Finally, a focused review is an onsite review focused on one or more components of the contractor's organization, or on one or more aspects of the contractor's employment practices. OFCCP will identify the subject of the focused review and inform the contractor prior to the start of the review.

1A01 CONTENTS OF CHAPTER

This chapter outlines the procedures COs use to conduct a desk audit during a compliance evaluation, whether it is conducted in the office or onsite. The elements of this chapter also apply when COs are conducting compliance evaluations using the investigative procedures for

⁴ All references to the term Compliance Officer (CO) in this Chapter and throughout the Manual include any OFCCP employee that is responsible for the tasks or activities described.

⁵ See Chapter 2 – Onsite Review. This chapter covers onsite review procedures, including any required supervisory approvals.

the offsite review of records. Additionally, this chapter references the relevant sections of the Standard Compliance Evaluation Report (SCER) that COs must complete during the desk audit stage of compliance evaluations.

1A02 PURPOSE OF THE DESK AUDIT

By conducting a desk audit of the AAP and supporting documentation provided by contractors, a CO begins to determine whether a contractor is complying with all relevant provisions of 41 CFR Chapter 60; specifically:

- complying with applicable nondiscrimination provisions, and
- complying with the applicable affirmative action provisions to ensure equal employment opportunity without regard to race, color, religion, sex, national origin, disability or status as a protected veteran.

1A03 PRINCIPLES AND FOCUS OF DESK AUDITS

A desk audit typically enables COs to review a contractor's compliance with its affirmative action and equal opportunity obligations at a particular establishment. COs must conduct desk audits in accordance with the following general principles:

- a. *Equal Employment Opportunity.* A contractor's personnel policies and practices must not have the purpose or effect of discriminating against anyone because of race, color, religion, national origin, sex, disability or status as a protected veteran. Contractors must eliminate and remedy discrimination that, for example, limits a job applicant's or an employee's ability to engage in open and fair competition for a job or position, or that results in paying employees differently based on race, sex or membership in other protected classes.
- b. *Affirmative Action Program.* An affirmative action program is a management tool. The written affirmative action program includes diagnostic and self-monitoring components as well as a set of specific and result-oriented policies and procedures designed to achieve equal employment opportunity.
- c. *Inclusion and Acceptability.* An affirmative action program is assessed for "inclusion" and "acceptability." This chapter discusses these concepts more fully in Sections 1E – 1H.

When conducting the desk audit, COs focus on a review of the following areas:

- a. *Workforce Structure, Personnel Policies and Procedures.* COs examine a contractor's personnel policies and procedures to determine if they warrant in-depth investigation such as an onsite review. Likewise, an examination of a contractor's basic organizational or workforce structure may reveal irregularities that merit investigating.
- b. *Good Faith Efforts.* COs examine a contractor's good faith efforts to achieve established goals. In doing so, they should seek to determine at least three specific things:

Federal Contract Compliance Manual (FCCM)

- Whether there are any areas where there is a lack of progress toward established goals;
 - Whether further information is needed in any area; and
 - Whether an onsite visit is needed to evaluate the contractor's good faith efforts to develop and implement affirmative action programs designed to improve opportunities for minorities, women, people with disabilities and protected veterans.
- c. *Potential Discrimination.* COs must be aware of the signs of potential discrimination. Being alert to these signs allows a CO to assess when additional investigation is required. Below are examples of signs of potential discrimination:
- Individuals in a particular protected class are significantly overrepresented or underrepresented in a particular area of the workforce.
 - Indications exist that an employment practice or procedure has adversely affected individuals based on their race, sex or ethnicity.
 - Compensation practices of a contractor result in differences in pay that appear to be based on race, sex or ethnicity.
 - Indications exist that leave for family caregiving is applied differently for men and women.

1A04 USE OF THE STANDARD COMPLIANCE EVALUATION REPORT

The SCER is a tool used by COs to conduct and document desk audits. The SCER and its instructions, found in Appendices A-1 and A-2, establish a framework for conducting the desk audit, and assisting in the development and implementation of the onsite investigative plan. COs use the SCER, either in whole or in part, when conducting a compliance evaluation using the compliance review, offsite review of records or focused review investigative procedures discussed in subsection 1A00 of this chapter. Compliance checks require the completion of the Compliance Check Control Sheet, rather than the SCER.⁶

The SCER has a Compliance Evaluation Summary section which is followed by three main parts.⁷

- a. *Part A: Preparation.* Part A includes general information about the contractor, such as the contractor's past review history, overall EEO trends in its workforce and its organizational structure. It also documents a CO's initial review of the contractor's AAP(s) and support data for inclusion and acceptability.

⁶ See Figure F-3 – Compliance Check Control Sheet.

⁷ The SCER also has three other parts: Part D is for corporate management evaluation narratives, Part E is the Compliance Check Control Sheet, and Part F is a summary of the findings.

- b. *Part B: Affirmative Action.* Part B summarizes any problems with the AAP(s) and support data. It provides for analysis of affirmative action progress and identifies any areas where a CO needs additional information to determine the extent of a contractor's good faith efforts. This Part also includes an assessment of a contractor's implementation of any other affirmative action obligations. For each affirmative action problem unresolved at the conclusion of the desk audit, the SCER requires the development of an onsite plan.
- c. *Part C: Problems Identified.* Part C identifies problems found during the compliance evaluation, including the nature of the problem, relevant evidence reviewed, actions taken to resolve the problem, and whether and how the problem was resolved. For each potential discrimination problem unresolved at the conclusion of the desk audit, the SCER requires the development of an onsite investigative plan.

1A05 CASE MANAGEMENT SYSTEM

The Case Management System (CMS) is the data collection component of the OFCCP Information System (OFIS) COs use to record basic information about the contractor, to track major events encountered throughout the evaluation, and to summarize any violations found and remedies obtained. COs must ensure that all relevant dates, information and occurrences are promptly entered into CMS, beginning with the initial scheduling of the compliance evaluation and ending with the closure of the review, including the Conciliation Agreement (CA) monitoring period, if applicable. COs should refer to the CMS Manual for further instruction on how and when to enter case status information. The reporting component of OFIS is the Executive Information System (EIS).

1A06 CONFIDENTIALITY OF INFORMATION

Under the regulations at 41 CFR 60-1.20(g), *Public Access to Information*, COs must treat information obtained during the compliance evaluation as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552. This applies to confidential information as well as sensitive information such as personnel records, medical information and salary data. During the course of a compliance evaluation, a CO will handle contractor information that is both sensitive and non-sensitive in nature.

1A07 NOVEL ISSUES

Novel issues are those that are unfamiliar, unique or fall outside the norm. COs may encounter novel issues in the course of a compliance evaluation and when this occurs they must, in coordination with their supervisor and Regional Office (RO), contact the Division of Program Operations (DPO) in the National Office before recommending a finding of compliance or non-compliance. Examples of novel issues include issues not routinely addressed or that involve coordination with the Statistical Analysis Unit (SAU) or DPO such as testing, multi-establishments, complex or unusual compensation issues and fetal protection. Chapter 6 of this Manual includes a brief discussion of other novel issues as they may arise in the context of complaint investigations.

1A08 CORPORATE MANAGEMENT COMPLIANCE EVALUATIONS

Under the regulations at 41 CFR 60-2.30 on corporate management compliance evaluations (CMCEs), COs may conduct a CMCE to ascertain whether individuals are encountering artificial barriers to advancement into mid-level and senior corporate management. The desk audit procedures outlined in this chapter apply to CMCEs. We discuss CMCEs in Chapter 4 of this Manual.

1A09 FUNCTIONAL AFFIRMATIVE ACTION PROGRAMS

Under the regulations at 41 CFR 60-2.1(d)(4), a contractor can seek the agency's agreement to develop and use an AAP that is based on a functional or business unit instead of an establishment. This type of AAP is called a functional affirmative action program (FAAP). The desk audit procedures outlined in this chapter apply to both traditional and functional AAPs. Chapter 5 fully covers FAAPs.

1A10 PREAWARD COMPLIANCE EVALUATIONS

Under the regulations at 41 CFR 60-1.20(d) and 60-1-29 on preaward compliance evaluations, an agency is required to notify OFCCP, and request a preaward evaluation when a nonconstruction contract or first tier subcontract of \$10 million or more is awarded. Within 15 calendar days of the notice, OFCCP will inform the awarding agency of its intent to conduct a preaward compliance evaluation. If OFCCP informs the agency of its intent to conduct a preaward evaluation, OFCCP is allowed an additional 20 calendar days after that date to provide a conclusion relative to the contractor's compliance. A preaward compliance evaluation of a supply and service contractor only covers the contractor's compliance with EO 11246

1B PRE-DESK AUDIT ACTIONS

This section discusses the various steps and actions that COs must take prior to starting a compliance evaluation of a contractor establishment. These steps include:

- contacting the contractor,
- setting up appropriate case files and logs, and
- obtaining relevant information about the contractor from other EEO and Department of Labor enforcement agencies.

1B00 INITIAL CONTACT WITH THE CONTRACTOR

This subsection covers the information COs gather through their initial contact with the contractor; specifically: the contractor's information, the contractor's representative's confirmation information, and information that may preclude the evaluation.

a. *Contractor Information.* Prior to issuing a Scheduling Letter and Itemized Listing, COs must verify the following information:

- the name of the highest ranking management official at the establishment,
- the legal name of the company,
- the name and e-mail of the person responsible for the preparation and implementation of the AAP, and
- the correct mailing address for the establishment.

If an establishment is part of a larger entity, the CO must obtain the name of the corporate chief executive officer (CEO), the name of the corporate person responsible for Equal Employment Opportunity and Affirmative Action matters, and the correct corporate mailing address. COs enter this basic identifying information on the Compliance Evaluation Summary, in the Background Information section of the SCER.

b. *Representation.* A contractor's statement about representation can come during the initial contact or at some later point. When a contractor indicates that it is or will be represented by counsel or a consultant company, a CO must ask the contractor to provide written confirmation of the representation, including:

- the contact information for the representative that includes the representative's name, address, e-mail, and phone number, and
- the scope of the representative's authority, including whether the authority granted to the representative extends to negotiating a settlement, if necessary, on behalf of the contractor.

A CO must also ask the contractor to clarify in writing as a part of the representation confirmation whether:

- all contacts, including routine ones to make appointments or to clarify data or other information, should be made through the representative, and
- all correspondence is only provided to the representative or if a copy is to be provided to the contractor.

The CO obtains the same written confirmation if a person indicates to the CO or other representative of OFCCP that he or she represents the contractor. After receiving written confirmation of representation, a CO must handle contacts and correspondence according to its terms for the duration of the evaluation. The handling of contacts and correspondence will change if the contractor specifies a different period or subsequently alters its instructions. Alterations of representation instructions must be in writing.

Federal Contract Compliance Manual (FCCM)

COs provide the contractor's highest-ranking management officials copies of all substantive documents that they mail. For these purposes, we define substantive documents as documents that this Manual requires a CO to mail. This would include, for example, any Predetermination Notice (PDN), Notice of Violation (NOV), Show Cause Notice (SCN), and Conciliation Agreement (CA).

- c. *Circumstances Precluding Evaluation.* Prior to beginning a compliance evaluation, a CO in coordination with his or her supervisor must determine whether circumstances exist that preclude conducting the compliance evaluation of the contractor. Several resources are available to a CO that assist with reaching this determination, including EIS and the Excluded Parties Listing System (EPLS).⁸ EPLS is the electronic version of the Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs. This database identifies entities and individuals excluded from receiving federal contracts, certain subcontracts and from certain types of federal financial and nonfinancial assistance and benefits. Other factors that could preclude selecting the contractor include closure of the establishment selected for review, review of the establishment selected within the last 24 months⁹, and the existence of an approved FAAP agreement.

Additionally, a CO will gather information about contract coverage, single entity status and other coverage issues. If circumstances arise that could preclude the compliance evaluation COs must discuss the matter with their supervisor.

1B01 PREPARATION AND MAINTENANCE OF THE CASE CHRONOLOGY LOG

COs must prepare and maintain a case Chronology Log for each compliance evaluation. This log is an integral part of the case file and is an invaluable tool in tracking the progress and the status of the case.¹⁰ It is, therefore, important that COs keep the case Chronology Log current. A case Chronology Log includes:

- Event summaries that begin with the initial contact with the contractor and continue through to the approval of case closing documents.
- Documentation of all telephone conversations, e-mails, correspondence and meetings associated with the evaluation, indicating the date, nature of the contact, person contacted, summary of discussion or actions taken, and the CO's name.

Records of telephone calls in the log should include the time of the call. All meetings must include the date, location, and names of the people in attendance. In addition, record in the log all requests for data and records, and the dates the CO received these items. COs must record all events and actions as they occur.

⁸ EPLS is located at <https://www.epls.gov/> (last accessed in Sept. 2011). EPLS is migrating to the System for Award Management (SAM) in 2012. EPLS users will have access to SAM.

⁹ The establishment is not currently being monitored by OFCCP as the result of a Conciliation Agreement or Consent Decree and received a notice of review closure in the last 24 months.

¹⁰ See subsection 1B02 – Creation and Maintenance of the Case File; Figure F-1 – Case Chronology Log (CC-53).

Many COs print a hardcopy of the case Chronology Log to facilitate their ability to write in the day-to-day events and activities as they occur. This practice is acceptable, as long as the final case Chronology Log included in the case file is typed, legible and maintained electronically.

1B02 CREATION AND MAINTENANCE OF THE CASE FILE

COs must create and maintain a case file for each scheduled compliance evaluation. The case file generally consists of various folders so, in order to create a case file, COs must create individual folders using the below headings.¹¹

- Folder 1: Standard Compliance Evaluation Report (SCER) and Data Pertaining to SCER Findings
- Folder 2: Case Chronology Log, Correspondence and Meeting Notes
- Folder 3: Collective Bargaining and Other Agreements, and Miscellaneous Items
- Folder 4: SOL Opinions, JRC Memoranda and Post SCER Update
- Folder 5: Progress Reports and Quality Audit
- Folder 6: Historical Review Results
- Folder 7: AAP and AAP Support Data

COs add information and documents to the appropriate folder throughout the course of the compliance evaluation. If enforcement becomes necessary, COs provide the compliance evaluation case file to the Solicitor's Office for further action. It is critically important that all information obtained, observed or reported be part of the case file and remain there through case closure.

Once again, maintaining these files is crucial. This includes labeling the folder and any additional folders or subfolders needed (e.g., Folder 1A, 1B). This is especially useful when the material in a folder is voluminous. COs must arrange the documents in each folder by date, with the most recent document on top. COs are required to attach certain documents in each folder to the left or right side of the folder, as indicated below. Generally, whenever there are ten or more separate documents in a folder, the CO must prepare an index and place it in the front of that folder.

A complete and thorough case file is critically important, especially in the event that enforcement becomes necessary. Therefore, COs must be sure that the case file contains all documents obtained or generated during the compliance evaluation, not just the material that

¹¹ Though the case file folder numbers and titles do not change, the case file contents may vary based upon the investigative procedures used in the compliance evaluation, and the availability and existence of specific documents.

supports the conclusions reached. This means, for example, that the file includes both evidence that supports the CO's violation findings, as well as evidence that supports the contractor's rebuttal. The case file must contain all contractor records and unaltered copies of all e-mail correspondences in paper or electronic format. Drafts of OFCCP memoranda are not included in the case file; COs retain only final versions of agency memoranda.

If a CO is submitting a case for enforcement a Transmittal Memorandum, as discussed in Chapter 8 of this Manual on the resolution of noncompliance, must accompany the case file. A copy of at least one contract or subcontract establishing coverage during the period at issue is also required. Additionally, the enforcement submission includes copies of all relevant analyses, properly labeled, in electronic format. Remember to keep a copy of all files submitted for enforcement in the appropriate field office.¹² Below is a list of the folders and their content.

Folder 1: Standard Compliance Evaluation Report (SCER) and Data Pertaining to SCER Findings. This folder contains the SCER and data pertaining to SCER findings such as:

- compliance officer notes, worksheets and analyses, including any regression analyses,
- witness statements that are appropriately labeled,
- contractor records, and
- other information and records pertinent to the issues investigated.

COs organize the material according to the relevant SCER issue, and tabs and labels them accordingly. Documents must cross-reference other folders, as appropriate. For example, if a SCER document in Folder 1 also involves or is relevant to a union contract matter, the document in Folder 1 will refer to the union contract placed in Folder 3. COs attach certain documents to the left side of this folder. They place CMS Form CC-100a on top and place underneath it the following items:

- contract coverage results,
- CMS forms associated with the review,
- contractor extension requests for the AAP and OFCCP responses, including extensions of time frames in a consent decree, and
- Preaward Clearance Request letter and other related materials.

¹² See Appendix A-4 – Index for a Supply and Service Review.

Federal Contract Compliance Manual (FCCM)

Folder 2: Case Chronology Log, Correspondence and Meeting Notes. This folder contains all correspondence and e-mails, both internal and external, as well as meeting notes associated with the review. File these items chronologically. CO's must preserve all communications related to the compliance evaluation or complaint investigation, data and record submissions, information gathering and interviews in this folder. This includes any material resulting from contacts with third parties such as other government agencies, local interest groups.

For ease of reference, the folder must have a tab for the closure document.¹³ A CA is the closure document if violations were identified and resolved, in the absence of violations a closure letter is the closure document. Place the original of the closure document in Folder 6, Historical Review Results. COs must attach a typed copy of the Case Chronology Log to the left side of this folder.

Folder 3: Collective Bargaining and Other Agreements, and Miscellaneous Items. This folder contains a copy of any collective bargaining agreements, fringe benefits and leave policy booklets, employee handbooks, apprenticeship or training agreements and any other similar contractor documents relevant to the establishment reviewed. COs place relevant documents that do not fit the description of documents contained in other folders into this folder.

Folder 4: SOL Opinions, JRC Memoranda and Post-SCER Update. This folder contains Solicitor's Opinions and Joint Review Committee memoranda associated with the review. It also includes any material, other than progress reports,¹⁴ generated after a CO submits the review report such as transmittal memoranda, additional conciliation efforts. This includes, for example, a record of any later conciliation efforts by the District Office, Regional Office and National Office, as appropriate, along with the results of those efforts.

Folder 5: Progress Reports and Quality Audit. This folder contains progress reports the contractor submitted under a CA, along with OFCCP's evaluation of those reports. COs enter the results of these evaluations on the "Summary of Progress Reports" form. After entering the last report, COs place a copy of the referenced summary in Folder 6, Historical Review Results. They also log all progress reports in the Chronology Log, and attach the Quality Audit form (CC-73) to the left side of this folder with relevant quality audit documents underneath it. This folder also includes consent decrees or other court orders.

Folder 6: Historical Review Results. This folder contains a copy of closure letters and documents, including any previous CA, generated by any past reviews of this establishment, as well as a copy of the closure letter and document for the current review. If a contractor must file progress reports under a current CA, when the CO evaluates the

¹³ Copies of these letters are in the Manual at Letters L-4 - Notice of Closing: Compliance Evaluation (No Violations Found), and at L-33, Closure Letter for Substantive Violations.

¹⁴ Progress reports are filed in Folder 5, Progress Reports and Quality Audit.

last report, the CO will add a copy of the "Summary of Progress Reports" to this folder on top of the original CA.

It is important that the field office retains the historical folder indefinitely. If OFCCP schedules another review of this establishment before this case file is retired and archived, the field office will pull the historical folder from the old case file and move it to the new one. If OFCCP does not schedule another review by the time the case file must be retired, the field office will pull the historical folder and retain it before retiring the rest of the case file.

Folder 7: AAP and Support Data. This folder contains the contractor's AAP(s) and AAP support data evaluated in this review. Place this material at the end only because it is often the most voluminous.

1B03 SENDING THE SCHEDULING LETTER AND ITEMIZED LISTING

OFCCP uses the Scheduling Letter and Itemized Listing to schedule a compliance evaluation and request the Affirmative Action Program (AAP) and supporting data from the contractor. Copies of these two items are Figures F-2 in the Manual. The Scheduling Letter and Itemized Listing are reauthorized for the agency's use every three years by the Office of Management and Budget (OMB), if not earlier should the agency seek it. Therefore, COs must review the most recently authorized Scheduling Letter and Itemized Listing to ensure that they are familiar with the documents and information requested from the contractor.¹⁵

This Scheduling Letter and Itemized Listing are sent by certified mail, return receipt requested, to the highest ranking official at the contractor's establishment or functional unit, with a copy to the CEO at the contractor's corporate headquarters unless the establishment and corporate headquarters are the same. The appropriate field office official signs the Scheduling Letter, the letter must include the name and telephone number of the CO who will receive the AAP and supporting data or the CO's appropriate supervisor.

1B04 FOLLOW-UP CONTACT WITH CONTRACTOR

COs must contact the contractor within 15 calendar days after sending the Scheduling Letter and Itemized Listing to ensure that the contractor or the contractor's representative, or both, fully understand the requests contained in the letter. If the contractor has questions, COs will provide technical assistance to clarify the contractor's obligations and the compliance evaluation process.

If the contractor challenges the agency's jurisdiction and the CO, in coordination with his or her supervisor and regional office, is unable to establish jurisdiction, the issue must be elevated to the attention of DPO. Once jurisdiction is established, and yet the contractor continues to

¹⁵ Discussions of the content of the Scheduling Letter and Itemized Listing are based on existing requirements as of September 2011. As of the completion of this Manual, the OMB reauthorization process for these two documents was still underway. The documents under OMB review propose several substantive changes and they are not reflected in this Manual.

dispute OFCCP's jurisdiction, the CO will recommend issuance of an Show Cause Notice (SCN). More on resolving noncompliance issues is in Chapter 8 where the focus is on resolving noncompliance issues.

1B05 CONTACTING EEOC, VETS AND OTHER AGENCIES

Simultaneous with the mailing of the Scheduling Letter, COs will seek information regarding the employment policies and practices of the contractor being scheduled from the Equal Employment Opportunity Commission (EEOC), Veterans Employment and Training Service (VETS) and other EEO and labor law enforcement agencies. Such information provides a better understanding of the contractor's workforce and operations, and may indicate potential problem areas.

- a. *EEOC and State and Local Fair Employment Practices (FEP) Agencies.* The CO sends an Inquiry Letter simultaneous with the mailing of the Scheduling Letter.¹⁶ The Inquiry Letter goes to the appropriate district office of the EEOC, and to the appropriate state and local FEP agencies. It requests information on discrimination complaints filed against the contractor, and any other information that may be pertinent to assessing the contractor's EEO posture. After 15 calendar days, COs must follow-up by telephone with any agency that failed to respond or from which additional information is needed.

OFCCP has a Memorandum of Understanding (MOU) with EEOC that includes provisions about complaint referrals, coordination and consultation. COs are urged to review and become familiar with the provisions of this MOU.

- b. *Veterans Employment and Training Service and Other DOL Enforcement Agencies.* COs must contact the VETS representative at the appropriate local employment delivery system to request any information that could be pertinent to the pending review, including information regarding the contractor's compliance with the mandatory job listing requirements of 41 CFR 60-250.2(a) and 60-300.5(a).¹⁷ When conducting compliance evaluations and complaint investigations, COs must query the VETS-100 database to verify that a federal contractor completed the annual reporting requirements for the appropriate reporting year. Moreover, the information in this database may be useful when analyzing an employer's recruitment and hiring practices. OFCCP has a MOU with VETS that includes provisions related to the VETS database and agency coordination and consultation. COs are urged to review and become familiar with the provisions of this MOU.

Additionally, COs must check the DOL Enforcement Database at www.dol.gov/enforcementdata for closed complaints and compliance evaluations of the contractor's establishment, and contact other DOL enforcement agencies to identify the number, types and status of any complaints filed against the contractor. For example, the

¹⁶ A sample of this letter is in this Manual as Letter L-1, Sample Inquiry Letter for Requesting Complaint Data from EEOC and State and Local FEPs.

¹⁷ Sample letters are in this Manual at Letters L-2, Sample Inquiry Letter for Requesting Compliance with Mandatory Job Listing Requirements from Employment Service Delivery Systems, and L-3, Sample Inquiry Letter for Requesting Information on Pending Review from Veterans Employment and Training Service.

Wage and Hour Division may have filed Family and Medical Leave Act (FMLA) violations related to the contractor that is the subject of a compliance evaluation.

1B06 INFORMATION ON EEO COMPLAINTS FILED WITH OR BY OTHER AGENCIES

COs must carefully examine all information regarding complaints against a contractor that they receive from federal, state, and local agencies in response to a letter of inquiry. COs enter basic information about these complaints in Part A.I of the SCER, including:

- the agency with which the complaint was filed,
- the jurisdictional or legal basis (e.g., race, sex) of the complaint,
- the current status of the complaint, and
- the area of the contractor's workforce involved in the complaint.

COs will note any patterns in the types of complaints filed and any discrimination findings made on them. For example, there may be a clustering of complaints filed by employees in certain job areas, or by applicants or employees from a particular race, religion, ethnic group or sex; by covered veterans; or by individuals with disabilities. As the review progresses, COs must cross-reference complaints to any potential problem areas they identify. There may be, for example, indications of a lack of good faith efforts, adverse impact ratio analyses (IRAs), or concentration or underrepresentation in areas where complaints were filed.

When appropriate, COs will contact the appropriate EEOC office or state or local FEP agency to arrange to review relevant discrimination complaint files as part of the compliance evaluation. This can be particularly useful when, based on as the result of the desk audit, a CO identifies potential systemic problems in complaint areas.

Upon receipt of the AAP and supporting data, COs must compare any information a contractor provides with respect to current or past complaints to the information received from other agencies. COs will note discrepancies and information not provided by the contractor for possible further investigation during the review, and will seek an explanation and additional information from the contractor.

1B07 RELATIONSHIP OF OFCCP COMPLIANCE ACTIVITIES TO EEO LITIGATION OR COURT ORDERS

If, during the conduct of a compliance evaluation, a CO finds that the contractor is involved in litigation or is under a court order on EEO matters, then the CO must identify:

- the EEO issues involved,
- the court and the parties, and

- the case name and number.

The CO must bring the matter to the attention of his or her supervisor. The field office, in consultation with the Regional Solicitor's Office, will determine whether the litigation or court order imposes limitations on the compliance evaluation.

1B08 REVIEW OF COMMUNITY RESOURCE FILES

Each field office must maintain resource files on the communities within its geographic area. For each community, these files should identify local organizations that represent or provide services to protected groups. These would include groups and organizations representing or servicing women, racial and ethnic minorities, veterans and individuals with disabilities. Some COs may not be knowledgeable about the local organizations in the area. In these instances, they must review the resource files and introduce themselves to representatives from the various organizations. The Communications Team in the National Office and Regional Office Outreach Coordinators (ROCs) may also be useful resources.

If a contractor is located near an Indian Reservation with a Tribal Employment Rights Organization (TERO) or other employment organization on the reservation, COs must contact these organizations. Chapter 2 of this Manual discusses the importance of linkages and how a CO can establish relationships with local organizations representing covered group members.

1B09 REVIEW OF PREVIOUS COMPLIANCE ACTIONS

COs must determine whether another OFCCP office reviewed the same contractor when scheduling contractor establishments for compliance evaluations. If another OFCCP office is currently reviewing a contractor proposed for an evaluation, the CO or the supervisor must contact the supervisor of the other OFCCP office to discuss what issues, if any, are present in their ongoing case. This is particularly important for detecting company-wide practices that result in discrimination. An example of this may be a test that is not validated and has an adverse impact on specific groups.

COs may also examine closed case files to identify issues relevant to the current evaluation. They will also note the terms of any CA or Consent Decree, including back pay, hires and other remedial measures contained in the CA or Consent Decree. In addition, COs must determine whether a contractor has been subject to an OFCCP complaint investigation and, if so, review the complaint file for any violations or problems identified.¹⁸ Any violations found in these past compliance actions must be recorded in Part A.I of the SCER. While the existence of a past problem is not considered evidence of the existence of present problems, COs must be alert to any indications that past problems remain unresolved, have recurred or that similar problems have arisen.

¹⁸ See subsection 1B06 – Information on EEO Complaints Filed with or by Other Agencies.

1C RECEIPT OF AAPs AND SUPPORT DATA FOR DESK AUDIT

The appropriate field office will receive copies of a contractor's current EO 11246 AAP within 30 calendar days of the contractor's receipt of the Scheduling Letter and Itemized Listing. It should also receive the AAPs for Section 503 or Section 4212, or both, within this same timeframe. If the field office does not timely receive the current AAPs, the CO calls the contractor to determine the status of the AAPs submission. If the AAPs were not submitted, the CO's supervisor has the discretion to determine whether to grant the contractor a reasonable extension and the length of time of any extension.

1C00 NON-RECEIPT OF EXECUTIVE ORDER AAP

If the contractor fails to request an extension, or if the request is denied, or if the contractor fails to submit the Executive Order AAP within the established timeframe, COs recommend issuance of an SCN. However, the regulations at 41 CFR 60-1.26(b)(1) give the director of OFCCP the discretion to go directly to administrative enforcement when a contractor refuses to submit an AAP and efforts to conciliate the matter are unsuccessful. COs must inform their supervisor of a contractor's failure to submit an AAP to determine if they should ask the director to exercise that discretion.

1C01 NON-RECEIPT OF EXECUTIVE ORDER SUPPORT DATA

If, in response to the Scheduling Letter, a contractor does not submit personnel activity data¹⁹ or submits incomplete data, the COs must contact the contractor and request that the information be submitted promptly. Examples of incomplete data include not submitting data for one or more personnel activity elements, such as applicant flow, hires, compensation, promotions or terminations. If the contractor fails to submit the personnel activity data promptly, the CO must recommend that the contractor be issued an SCN.

If the field office is issuing an SCN at the desk audit stage for reasons other than failure to submit the activity data,²⁰ the SCN will include the failure to submit the activity data. If, however, the only reason the field office is issuing an SCN at the desk audit is for the failure to submit the activity data, the CO will use the procedures outlined in Chapter 8 on resolving noncompliance issues to recommend issuance of the SCN.

If a contractor fails to submit personnel activity data because it did not maintain appropriate records, one or more of the following regulatory sections may be applicable and COs will cite it in the SCN:

- *General Data Requirements under the Uniform Guidelines on Employee Selection Procedures (UGESP)*. 41 CFR 60-3.4(A) requires that each contractor "...maintain and have available for inspection records or other information which will disclose the impact

¹⁹ Unless otherwise specified, all references to "personnel activity" include determinations related to rates of pay or other forms of compensation.

²⁰ See subsection 1C00 – Non-Receipt of EO 11246 AAP.

which its . . . selection procedures have upon the employment opportunities of persons by identifiable race, sex, or ethnic groups. . .” The identifiable groups are defined by 41 CFR 60-3.4(B) as black, Hispanic, Asian/Pacific Islander, American Indian/Alaskan Native and white.

- *Data Requirements under UGESP for Contractors with 100 or More Employees.* 41 CFR 60-3.15(A)(2) requires contractors with 100 or more employees to maintain and have available records for each job on all applicants, hires, promotions, terminations and any other selection decisions by sex and by each race and/or national origin group identified above.
- *Data Requirements under UGESP for Contractors with less than 100 Employees.* 41 CFR 60-3.15 (A)(1) requires contractors with less than 100 employees to maintain and have available records for each job on all applicants, hires, promotions, terminations and any other selection decisions by sex and by race and/or national origin for any race and/or national origin group constituting more than 2% of the labor force in the relevant labor area. However, it is not necessary to maintain records by race and national origin if one race or national origin group in the relevant labor area constitutes more than 98% of the labor force in that area.
- *Record Retention Requirements under 41 CFR 60-1.12.* Part 60-1.12 sets forth the required document retention periods and identification requirements for all employment and personnel records and AAPs.
- *Recordkeeping Violations and AAP Requirements under 41 CFR Part 60-2.* 41 CFR 60-2.17(b) requires that the AAP identify problem areas and 41 CFR 60-2.17(d) requires that the AAP include internal audit and reporting systems. COs can cite these requirements for recordkeeping violations because they cannot be appropriately implemented without maintaining and analyzing basic data on employment activity as required by 41 CFR 60-3.4 and 60-3.15.

1C02 NON-RECEIPT OF SECTION 503 AND SECTION 4212 AAPs

Section 503 and Section 4212 AAP(s) may be included in an Executive Order AAP, combined in one document separate from the Executive Order AAP or submitted as individual documents. If the contractor fails to submit the AAP within the established timeframe or request, or does not receive an extension, the field office generally issues an SCN.

1C03 EVALUATION PERIOD

COs must evaluate the contractor's performance for at least the last full AAP year. Contractor performance includes, for example, goals progress, good faith efforts and personnel activity. COs must also examine the current year performance if the contractor is six months or more into its current AAP year. For example, if the AAP is established on a calendar year basis, and the compliance evaluation is scheduled in August, a CO would evaluate the contractor's performance of the prior year from January through December under the prior AAP, and the preceding January through July under the current AAP.

Special circumstances or exceptions can exist that warrant a CO extending the analysis of a contractor's AAP(s), personnel activity, policy implementation and supporting documentation to cover a period beginning two years prior to the date the contractor received the Scheduling Letter. The appearance of potential discrimination is a special circumstance or exception. In order to fully investigate and understand the scope of potential violations the CO may need to examine information after the date of the Scheduling Letter in order to determine, for example, if violations are continuing or have been remedied. This assumes, however, that the CO can establish coverage for the entire period. If the CO believes it necessary to request information related to periods after the date of the scheduling letter the CO must discuss the issue with his or her supervisors.

The CO will request data relevant to the potential discrimination issues identified at the desk audit to determine how far into the evaluation period the violation extends and whether the violation continues to the present day. This information is necessary to ensure that any discriminatory practices have ended and to ensure that all victims of discrimination receive appropriate remedies.

1D INITIAL REVIEW OF AAPs

After receiving a contractor's AAP(s) and supporting data, COs must ensure that it is complete and acceptable. There are three types determinations: inclusion, missing items, and acceptability; each is described below.

- *Inclusion.* Immediately review the material to ensure that the contractor provided all of the materials identified in the Scheduling Letter and accompanying Itemized Listing.
- *Missing Items.* Create an inventory list of every document that the contractor provided, including the date requested, if any, and date received. Also record on the list the items requested but not provided by the contractor.
- *Acceptability.* Determine whether the AAP(s) and supporting data are current, complete and acceptable.

These determinations are discussed further in following Section 1E-II.

The results of this initial review for inclusion and acceptability, as outlined below in Sections 1E through 1H, are documented on Part A.II of the SCER. Each specific problem a CO identifies is described in Part A.III of the SCER, along with the corrective actions the CO plans to take to resolve them.

1E REVIEW OF AAPs FOR CURRENTNESS AND INCLUSION FOR EO11246, SECTION 503 AND SECTION 4212

This Section covers CO actions and responses when the AAP(s) is not current or is missing information requested in the Scheduling Letter and Itemized Listing. The first subsection, 1E00, is devoted to the AAP(s) that are not current while the subsequent two subsections cover the issue of inclusion and the actions that can be taken when the AAP(s) is missing elements, respectively.

1E00 ACTION WHEN AAP IS NOT CURRENT

After receiving the AAP(s) for a desk audit, a CO first determines whether the AAP is current, that is, whether the AAP is still effective either by the date of the Scheduling Letter or the data actually submitted. If it is not, the CO will contact the contractor and request immediate submission of the current AAP. If the contractor still fails to submit the AAP, the CO will recommend issuance of an SCN.²¹

1E01 INCLUSION

If the contractor's AAP(s) is current, the CO will review the AAP and support data to determine whether the contractor's submission includes all requested information. To do so, the CO must first determine whether the contractor submitted all materials requested in the Scheduling Letter and Itemized Listing, including the Section 503 and Section 4212 AAPs. Next, the CO must determine if the Executive Order, Section 503 and Section 4212 AAPs contain all the elements required by the regulations.

The elements of the required Executive Order AAP are listed in 41 CFR 60-2.10(b) while the required Section 503 and Section 4212 AAP elements are found in 41 CFR 60-741.44 and 41 CFR 60-250.44 and 60-300.44, respectively. Executive Order support data are also required.

1E02 MISSING AAP ELEMENTS

Actions that must be taken when an AAP is missing or inadequate under the legal authorities enforced by OFCCP are discussed in this subsection. First is the discussion of the Executive Order AAP, followed by AAPs under Section 503 and Section 4212.

- a. Executive Order AAP.* If one or more of the below listed Executive Order AAP elements is missing, COs must automatically consider the submission unacceptable.
- Organizational Profile (workforce analysis or organizational display).
 - Job group analysis, including a list of the job titles that comprise each job group.
 - Utilization analysis, including its component parts of job group formation, availability estimates and, as appropriate, identification of underutilization.

²¹ See subsections 1C00 – Non-Receipt of EO 11246, and 1C02 – Non-Receipt of Section 503 and Section 4212 AAPs.

Federal Contract Compliance Manual (FCCM)

- Comparison of incumbency to availability.
- Placement goals at least equal to the availability figure derived for women or minorities, as appropriate for job groups where minorities or women employed is less than would be reasonably expected given their availability.
- Designation of a responsible official.
- Identification of problem areas.
- Action-oriented programs.
- Internal audit and reporting system.

A CO may contact the contractor and request that it immediately provide the information. The CO may provide the contractor with compliance assistance, if needed. If the contractor does not comply, the CO must suspend the desk audit and recommend issuance of an SCN. If the contractor includes all of these elements, the CO will then evaluate them for acceptability.

b. Section 503 and Section 4212 (or VEVRA) AAPs. If one or more of the below listed Section 503 and Section 4212 AAP elements is missing, COs automatically consider the submission unacceptable.

- Equal employment opportunity policy statement.
- Review of personnel processes to ensure full consideration of individuals with disabilities and protected veterans for available opportunities.
- Review of physical and mental job qualifications to ensure they are job-related and consistent with business necessity.
- Reasonable accommodation policy.
- Harassment policy prohibiting harassment based on disability or veteran status.
- External dissemination of the contractor's EEO policy.
- Internal dissemination of the contractor's EEO policy.
- Description of the contractor's audit and reporting system.
- Identification of the person(s) responsible for implementation of the AAP.
- Training policy that provides training for all personnel involved in the recruitment, screening, selection, promotion, disciplinary and related processes to ensure that the commitments in the contractor's AAP are implemented.

COs may contact the contractor to request that the contractor provide the information immediately. The CO may provide the contractor with compliance assistance, if needed. If the contractor does not comply, the CO will suspend the desk audit and recommend issuance of an SCN. If the contractor included all of these elements, the CO will evaluate them for acceptability.

1F REVIEW OF AAPs FOR ACCEPTABILITY

The next three subsections discuss a CO's review of a contractor's AAP(s) for acceptability. Because the requirements for acceptability are not the same under all of the laws that OFCCP enforces, the acceptability requirements for the Executive Order AAP are not reviewed along with those from Section 503 and Section 4212. Section F reviews the acceptability requirements for the Executive Order AAP and Section G discusses the acceptability requirements for the Executive Order AAP support data. Lastly, Section H discusses the acceptability requirements for Section 503 and Section 4212 AAPs.

1F00 REVIEW OF EXECUTIVE ORDER AAP FOR ACCEPTABILITY

The regulations at 41 CFR 60-2.10 through 60-2.17 prescribe the required elements of an Executive Order AAP, and specify what a contractor must include in a written AAP. Once a CO determines that the contractor's submission includes the elements necessary to proceed with the desk audit, the desk audit proceeds with an evaluation of the acceptability of each required element. This means that the CO examines the AAP to determine if the information the contractor provided in each element is sufficient to satisfy the regulatory requirements. The determination of the *acceptability* of the items listed in Part A.II of the SCER is limited to the evaluation that the CO can conduct during the desk audit. This is different from an evaluation of a contractor's *implementation* of its AAP and regulatory requirements, which in most instances the CO cannot determine without further investigation onsite. Onsite reviews are discussed in Chapter 2.

We address the acceptability assessment of each required element below.

1F01 ORGANIZATIONAL PROFILE

An organizational profile is a depiction of the staffing pattern within an establishment. Contractors must use either a workforce analysis or an organizational display as its organizational profile.

- a. Workforce Analysis.* Pursuant to 41 CFR 60-2.11(c), a workforce analysis is acceptable if it:
- contains a listing of each job title, as it appears in applicable collective bargaining agreements or payroll records, within each department or other similar organizational unit, including the unit supervisor, ranked from lowest paid to highest paid (or highest to lowest); and

Federal Contract Compliance Manual (FCCM)

- provides a separate listing for each work unit or line of progression, including the unit supervisor when there are separate work units or lines of progression within the department or organizational unit.

In addition, the workforce analysis must include information by job title, wage rate, department and/or organizational unit, and lines of progression. Below is a description of each of these elements.

- *Information by Job Title.* Each job title listed shows the total number of people in the job title, the total number of men and women, and the total number of men and women in each of the following groups: whites, blacks, Hispanics, Asian/Pacific Islanders and American Indians/Alaskan Natives.²² The list must include all job titles, including managerial job titles. Upper management positions located in the establishment must be included in an establishment's workforce analysis even though the managers may have been chosen by those outside the establishment and included for goal-setting purposes in a corporate or mid-level AAP.²³
- *Wage Rate.* The wage rate or salary range for each job title is provided, although this information may be coded as discussed in the following bullet. Titles must be listed from lowest paid to highest paid.²⁴ Contractors must provide the key to wage rate or salary range codes if they are used. The codes must be consistent across department or unit lines. For example, a job with a salary code 1157 in Department A pays the same as one coded 1157 in Department B. The codes must also be consistent in wage rate or salary range order within each department or other similar organization unit. Finally, the contractor's submission should include a list of the codes used in wage and salary order with the lowest and highest codes labeled appropriately.
- *Departments or Organizational Units.* The departments or organizational units, or both, used in the workforce analysis are identifiable and should reflect the contractor's organizational structure. If the contractor provides an organizational chart as part of the supporting documentation, the CO will compare it to and match it with the units used in the workforce analysis.
- *Lines of Progression.* Lines of progression or usual promotional sequences show the order of jobs in the line through which an employee moves to reach the top of the line. Lines of progression or promotional sequences can be identified from collective bargaining agreements as well as from organizational charts. If the CO determines that lines of progression exist, but adequate information is not provided at the desk audit, the CO will contact the contractor to request a prompt submission of the information.

²² For purposes of complying with OFCCP requirements, contractors choosing to follow the current EEO-1 categories may count applicants and employees identifying as "two or more races" as minorities. (*Interim Guidance on the Use of Race and Ethnic Categories in Affirmative Action Plans*, OFCCP Directive, Transmittal 283 (Aug. 14, 2008).) This guidance indicates that OFCCP will accept AAPs and supporting records that reflect the race, ethnicity and job categories outlined in either 41 CFR Part 60-2 or the current EEO-1 Report.

²³ 41 CFR 60-2.11(c)(3) and (c)(4).

²⁴ Ibid.

b. *Organizational Display.* An acceptable organizational profile is one that meets the requirements of 41 CFR 60-2.11(b). It must contain the following elements for each unit:

- name of the unit;
- job title, gender, race and ethnicity of the unit supervisor (if the unit has a supervisor);
- total number of male and female employees in the unit; and
- total number of male and female employees in each of the following groups: black, Hispanic, Asian/Pacific Islander and American Indian/Alaskan Native.²⁵

1F02 JOB GROUPS

A job group analysis is acceptable if it meets the requirements of 41 CFR 60-2.12. Job groups must be comprised of a group of jobs and/or job titles within a particular establishment having similar content, wage rates and opportunities. Similarity of content refers to duties and responsibilities of the job titles that make up the job group. Similarity of opportunities refers to training, transfers, promotions, pay, mobility and other career enhancement opportunities offered by the jobs within the job group.

a. *List of Titles in Each Group.* In order for COs to assess job group acceptability, the AAP must include, for each job group, a listing of the job titles that make up that group. If a contractor did not provide the lists, the CO must immediately contact the contractor and request that the lists be promptly provided for the desk audit.

b. *Criteria for Acceptability.* The following criteria are to be used in assessing the acceptability of job groups:

- *Similar Work Content.* Similarity of work “content” refers to the duties and responsibilities of the job titles that make up the job group.
 - *Appropriate EEO Category.* The CO will review the establishment's job titles that make up each of the job groups to verify they are within the proper EEO-1²⁶ job categories. Job titles in each job group must, as a general rule, be within the same EEO-1 job category.²⁷

²⁵ For purposes of complying with OFCCP requirements, contractors choosing to follow the current EEO-1 categories, may count applicants and employees identifying as “two or more races” as minorities. (*Interim Guidance on the Use of Race and Ethnic Categories in Affirmative Action Plans*, OFCCP Directive, Transmittal 283 (Aug. 14, 2008).)

²⁶ Higher education institutions are required to submit the Integrated Post Secondary Education System Survey (IPEDS).

²⁷ Contractors that employ fewer than 150 employees are permitted to use the job categories listed in OFCCP’s regulations or the current EEO-1 job categories which subdivide the Officials and Managers category into two categories: Executive and Senior Level Officials & Managers and First and Mid-Level Officials & Managers.

- *Use of Occupational Information Network (O*NET).* The CO may refer to the Department of Labor's Employment Training Administration's O*NET database, as well as collective bargaining agreements, organizational charts and other data provided by the contractor to evaluate how the contractor formulated its job groups. O*NET lists standard job titles for most positions and codes them based on their duties, requirements and other factors. O*NET also gives descriptions of job duties and commonly required qualifications.
- *Similar Rates of Pay.* COs must review pay rates in conjunction with job content. Large apparent differences in pay, when associated with different job titles within a job group or different locations within an organization, or both, suggest an unacceptable job grouping. They may also indicate areas where compensation or job assignment practices need further review.
- *Similar Opportunities.* "Opportunity" refers to the ability to take advantage of training opportunities, transfers, promotions, mobility to desirable wage or salary situations and other employment benefits. Most often, it refers to upward mobility. Ideally, each job within a job group should offer the same opportunities as any other job title within that job group.
 - *Jobs in Separate Unions.* Jobs groups should not group together jobs from separate unions, or jobs from different departments where interdepartmental mobility is not available. For example, job groups should not normally group together nonunion clerical jobs and clerical jobs that are covered by a collective bargaining agreement.
 - *Jobs in Lines of Progression.* Contractors should separate jobs that are in lines of progression (LOP) from those that are not. When transferring or hiring into jobs above entry level is rare, COs must analyze each LOP separately. When there are LOP governed by strict seniority, the contractor should consider the job titles in the progression as a single job group.
- c. *Job Groups Must Not Obscure Underutilization.* Job groups that combine jobs with different content, wages or opportunities may obscure underutilization and OFCCP does not accept them.
- d. *Effect of Size of Contractor's Workforce.* While assessing the acceptability of a contractor's job groups, COs must remember that the size of the contractor's workforce is a major factor in determining how well the contractor meets the three criteria for acceptability of job groups.
 - *Job Groups Must Permit Meaningful Analyses.* Job groups should have enough incumbents to permit meaningful utilization analyses and goal setting. Optimally, when COs identify underutilization in a job group, the job group should be large enough so that a goal of at least one whole person can be established. No minimum size is established

for this purpose because the goal is dependent on the size of the job group and the percentage and the number of minorities or women already in the job group.

- *Job Groups Should Not Normally Cross EEO-1 Job Categories.* A contractor's job groups should not ordinarily cross EEO-1 job categories. This means, for example, that a job group should not consist of a mixture of job titles from the "Professional" category and the "Technicians" category. COs should note that larger contractor establishments may have multiple job groups that fall into the same EEO-1 job category. Also, COs should note that smaller establishments (less than 150 employees) may use the EEO- 1 job categories as their job groups.
- e. *Relationship Between Job Groups and Availability.* The organization of jobs into groups should allow contractors to tie specific jobs to availability statistics in order to assess the degree to which their own workforce representation approximates availability.

1F03 UTILIZATION ANALYSIS

The utilization analysis is a series of separate but interrelated analyses COs use to identify whether a contractor employs minorities or women in the workforce at a rate that would be expected based upon their availability for employment. Contractors must perform a utilization analysis that includes the placement of the contractor's employees into job groups, the determination of the availability for employment of minorities and women and a comparison of their incumbency in the job groups to their availability. If a contractor's utilization analysis reveals underutilization of minorities or women, or both, in any of the job groups the contractor must establish placement goals designed to cure the underutilization.

- a. *Placement of Incumbents in Job Groups.* Having combined the job titles for the job group analysis, the contractor must separately state the percentage of minorities and the percentage of women employed in each job group.
- b. *Determining Availability.* After aggregating individual job titles into job groups, the contractor must determine the availability of women and minorities for those job groups. "Availability" is a percentage estimate of the women and minorities in the reasonable recruitment area who have the skills required to perform the jobs within the job groups compared to all. When determining availability, the contractor must separately determine the availability of minorities and women for each job group and consider at least the following factors:
 - The percentage of minorities and women with the requisite skills in the "reasonable recruitment area." We define "reasonable recruitment area" as the geographical area from which the contractor usually seeks, or reasonably could seek, workers to fill the positions in question. When selecting the reasonable recruitment area, the contractor must not select an area in such a way that it would exclude minorities or women. For each job group, the contractor must identify and provide a brief explanation of the rationale for selection of that recruitment area.

Federal Contract Compliance Manual (FCCM)

- The contractor should utilize the most current and discrete statistical information available to derive availability figures (such as census data, data from local job service offices, colleges and other training institutions). When evaluating the contractor's availability information, COs must utilize the most recent Federal Consortium Census Special EEO File located on the Census Bureau's Web site under the "Access to Data from the Special EEO Tabulation" link.
 - The percentage of minorities and women among those promotable, transferable or trainable within the contractor's organization. The contractor must not define the pool of promotable, transferable and trainable employees in such a way as to exclude minorities or women. For each job group, the contractor must identify the pool of promotable, transferable and trainable employees and provide a brief explanation of the reason for selection of that pool.
- c. *Comparing Incumbency to Availability.* The contractor must compare the utilization of minorities and women in each job group with their estimated availability, and identify job groups where the percentage employed is less than would be reasonably expected given their availability.

We use the term "underutilization" to refer to the presence of fewer minorities or women in a particular job group than would reasonably be expected given their availability. Contractors use a number of methods to determine whether the actual representation rates of minorities and women are lower than would reasonably be expected. Some contractors declare underutilization when there is any difference between the availability percentage and the utilization percentage, while others conclude that underutilization exists when the number of minority or women incumbents in a particular job group is at least one whole person lower than the number predicted by the availability percentages. Other contractors use an "80 percent" rule of thumb and declare underutilization only when the actual representation of minorities or women is less than 80 percent of availability (which is the expected representation). Still others test whether the difference between the actual and expected representation of minorities and women is statistically significant.

While contractors may choose any of these methods for comparing incumbency and availability, they must uniformly apply the same standard to all job groups, as appropriate. Occasionally a different method may be more appropriate to determine underutilization. For example, in some instances it may not be reasonable for contractors to use the 2 standard deviation method. No matter the method used, the contractor should be able to explain why it selected that method. Contractors should not use more than one method so as to mask underutilization.

The contractor must establish a placement goal if the percentage of women or minorities, or both, employed in a specific job group is less than would be reasonably expected, given their availability percentage in that particular job group.

1F04 PLACEMENT GOALS

Regardless of the method employed to determine underutilization, the contractor must establish a placement goal for those job groups where minorities or women, or both, are underutilized.²⁸ The placement goal established must be at least equal to the availability percentage of the underutilized minorities and women for the specific job group.²⁹ If a contractor establishes a goal higher than required under the Executive Order, failure to meet this higher goal does not constitute noncompliance. Placement goals are not rigid and are not quotas.

In the event of a substantial disparity in the utilization of a particular minority group or in the utilization of men or women of a particular minority group, the contractor may be required to establish separate goals for those groups. We refer you to 41 CFR 60-2.16(d) for additional information.

1F05 ADDITIONAL REQUIRED ELEMENTS OF AAPs

This subsection, focusing on 41 CFR 60-2.17, covers the designation of responsibility for the AAP(s), identification of problem areas, creation of action-oriented programs, reporting system and internal audit, and reviewing the results of the report.

- a. *Designation of Responsibility.* Under 41 CFR 60-2.17(a), contractors must provide for the implementation of equal employment opportunity obligations and the affirmative action program by assigning responsibility and accountability to an official of the organization. These officials must have sufficient authority and resources, and must also have the support of, and access to, top management to ensure the effective implementation of the contractor's EEO obligations and affirmative action program. To be acceptable, the AAP(s) should contain, at a minimum, a narrative description of the positions or job titles, or both, that the contractor designates to direct or manage its affirmative action program and a description of the incumbent's duties.
- b. *Identification of Problem Areas.* 41 CFR 60-2.17(b) requires that contractors perform an in-depth analysis of their total employment process to determine whether or where impediments to equal employment opportunity exist. They must evaluate the following:
 - *Organizational Structure.* The contractor must examine its workforce by organizational unit and job group to determine whether there are problems of minority or female utilization, or of minority or female distribution;
 - *Personnel Activity.* The contractor must examine applicant flow, hires, recruitment, referral, terminations, promotions, transfers and other personnel activities to determine whether there are selection and termination disparities;

²⁸ See 41 CFR 60-2.15.

²⁹ See 41 CFR 60-2.16(b).

- *Compensation.* The contractor must determine whether there are gender, race or ethnicity disparities in its compensation system;
- *Personnel Procedures.* The contractor must determine whether its selection, recruitment, referral, and other procedures result in disparities in the employment or advancement of minorities or women and their resulting pay; and
- *Other Areas.* The contractor must evaluate any other areas that might affect the success of the affirmative action program. Examples include things that might affect the AAP include seniority practices, leave policies, time off policies, policies regarding part-time work, conduct of company sponsored social events, apprenticeship program practices, workforce environment, compliance with posting and union notification requirements.

These procedures should be consistent with the Sex Discrimination Guidelines at 41 CFR Part 60-20 in that the procedures should not create conditions of employment differentiated on the basis of sex and should not discriminate on the basis of sex. Sex discrimination can take several forms. One form may include treating a female employee or job applicant unfavorably because of pregnancy, childbirth, or medical issues related to her pregnancy or childbirth. It may also take the form of policies and practices that discriminate based on marital status or care giving responsibilities.

- c. *Action-Oriented Programs.* 41 CFR 60-2.17(c) requires that contractors develop and execute action-oriented programs designed to correct problem areas and to attain established goals and objectives. To be effective, contractors must ensure that their action-oriented programs are something other than following the same procedures that previously produced inadequate results. Action-oriented programs should be “specific” and “result-oriented.”

By “specific” we mean that the programs describe in some detail what action the contractor will take, who is responsible for taking the action, and when the action will be accomplished. “Result-oriented” programs are those where proper execution of the program will likely lead to an increase in minority or female participation, or both, in the department, job group, training program or other identified problem area. The action-oriented programs must be sufficient, if successfully implemented, to achieve their stated objectives. Contractors must describe these programs in the AAP(s).

For example, if a contractor identifies a lack of women in a job as a problem area the contractor should also identify the reasons for the absence of women. The reasons identified may include the rigid work hours, the impact or application of leave policies, the lack of recruitment, the lack of training, and the absence of a career path or ladder leading to the job, a working environment hostile to women, or hiring discrimination. Whatever the reasons contributing to the absence of women, the contractor should establish action-oriented programs to eliminate or minimize the reasons women are adversely affected. The action-oriented programs, when fully implemented, should result in an increase in the representation of women in the job identified as a problem area. Similarly, a lack of representation of minorities may result from the unwarranted screening out of applicants based on criminal records, credit history, or unemployment status that requires action-oriented programs.

d. *Internal Audit and Reporting System.* 41 CFR 60-2.17(d) requires contractors to design and implement an internal auditing system that periodically measures the effectiveness of its total affirmative action program. This system must be detailed in the AAP(s) and the internal audit and reporting system must:

- *Monitor Records.* The internal audit and reporting system must monitor records of all personnel activity, including referrals, placements, transfers, promotions, terminations and compensation, at all levels.
- *Require Internal Reporting.* The contractor produces an internal report on the effectiveness of the AAP(s) on a regularly scheduled basis.
- *Review Report Results.* Top management is advised of the program's effectiveness and any deficiencies, and management at all levels reviews the results of these reports.

The AAP(s) should contain a narrative description of every aspect of the internal audit and reporting system. This description should specify the frequency of reports and audits. It should also state that, as problems are discovered, the contractor is taking the necessary corrective actions. The description should also designate the contractor officials responsible for taking these corrective actions. Lastly, the contractor should state how and when it reviews program results and effectiveness with management at all levels of the company.

1G REVIEW OF EXECUTIVE ORDER SUPPORT DATA FOR ACCEPTABILITY

Contractors must prepare a report on the results of their prior year AAP and the current year AAP, if they are six months or more into the current year by the time they receive their Scheduling Letter.³⁰ This report is part of the support data for the AAP(s) that COs request in the Itemized Listing that accompanies the Scheduling letter. The Itemized Listing requests data and information indicating the numerical and other results of contractors' affirmative action goals for each job group for the current and preceding AAP years. For each goal not attained, or not currently being attained, contractors must describe the good faith efforts they undertook to achieve the goal. Contractors should always submit prior year data, unless they were not federal contractors covered by 41 CFR Part 60-2.

- a. *Data Required.* As noted above, the contractor must provide summary data indicating the numerical results of affirmative action goals for each job group.
- *Information on Job Groups with Goals.* COs, in order to measure the results of goals, must first know whether a contractor established goals for its job groups and what the goals are. The contractor's current AAP submitted for desk audit will have this information for the current year. The contractor's report on prior year goals should

³⁰ See 41 CFR 60-1.12(b), 60-2.16 and 60-2.17(c).

specifically state the goals for the prior year; however, when it does not, the CO must request a copy of the goals section of the contractor's prior year AAP.

- *Information on Placements into Job Groups with Goals.* Since contractors establish annual goals in terms of a percentage placement rate, evaluation of progress toward the these goals requires knowledge of the total number of placements into the job groups (hires, promotions and transfers) and the number of minority and female placements, as appropriate. If a contractor's progress report does not include this information or if it includes incomplete information (e.g., the number of minorities and females but not total placements), the CO will determine if the missing information can be obtained from the contractor's submission of personnel activity data. If the information cannot be obtained from the personnel activity data, the CO must ask the contractor to forward a copy of the report on the progress made toward its goals as prepared under its internal audit and reporting system.³¹ If the contractor employs 100 or more people, a copy of the underlying data it used for its adverse impact determinations on hires, promotions and any other placements into job titles within the job group should be requested.³²
- b. *Good Faith Efforts.* When a contractor's goals report does not describe its good faith efforts to achieve the goals that it failed to meet, or does not describe those efforts in sufficient detail for a CO to evaluate their adequacy, the CO must request additional information to review during the desk audit.³³ The CO must also include this request for more information in the onsite plan for evaluation of good faith efforts. Even if the contractor corrects the goals report, the closure letter may identify the incorrect or incomplete report as a technical violation that was corrected during the review.³⁴

The Itemized Listing requests support data regarding the contractor's employment activities such as applicants and hires, promotions, and terminations for the prior and current AAP years; and compensation data for all employees.³⁵

a. *Review of Support Data for Acceptability*

- *Data Format.* To be acceptable for the desk audit, the contractor must present support data either by job group or by job title. For example, data by total workforce is not acceptable; nor is data by EEO-1 job category, unless a category legitimately constitutes a job group at the particular establishment.
- *Information Included.* For each job group or job title, support data in each major personnel activity area (e.g., applicant flow, hires, promotions and terminations) must, at least, include the total number of actions, the total number of actions for women and the total number of actions for minorities. For example, applicant flow for a job group or job

³¹ See subsection 1F05(d)-Additional Required Elements of AAPs: Internal Audit and Reporting System.

³² See Section 1G – Review of Executive Order Support Data for Acceptability.

³³ See Part B.I of the SCER.

³⁴ See Letter L-4 – Notice Closing Compliance Evaluation No Violation Found.

³⁵ For most current and detailed information on the content of the Itemized Listing you should refer to a copy of the most current Itemized Listing authorized by OMB for the agency's information collection.

title must include at least the total applicants, total female applicants and total minority applicants; hires for a job group or job title must include at least the total hires, total female hires and total minority hire.

- *Evaluation Period Covered.* Generally, it is better to have the longest possible period because the data are more likely to reflect the contractor's usual way of operating. At a minimum, however, the support data must cover the prior AAP year and, if the contractor is six months or more into its current AAP year when it receives the Scheduling Letter, the current AAP year. If there are indicators of a violation, the evaluation period will extend to cover the two years prior to the contractor's receipt of the Scheduling Letter. In order to fully investigate and understand the scope of potential violations, the CO may need to examine information relating to periods after the date of the Scheduling Letter in order to determine, for example, if violations are continuing or have been remedied. If the CO believes it is necessary to request information for periods after the date of the Scheduling Letter the CO must discuss the issue with his or her supervisor.
- *Source of Applicant Data.* COs must determine if a contractor used the Internet to recruit for any job group(s). When the AAP does not readily specify the applicant pool for job groups in which individuals applied through the Internet, the CO must contact the contractor to request the criteria used by the contractor in defining applicants for the job position(s) in question. The contractor's submission should address the following four questions:
 - Did the individual express an interest in employment through the Internet or related electronic data technologies?
 - Did the contractor consider the individual for employment in a particular position?
 - Did the individual's expression of interest indicate that the individual possesses the basic qualifications for the position?
 - Did the individual at any point in the contractor's selection process prior to receiving an offer of employment from the contractor, remove himself or herself from further consideration or otherwise indicate that he or she was no longer interested in the position?

To be acceptable, the contractor must identify the electronic data technologies used to collect expressions of interest, the specific job positions for which the contractor considered applications through the Internet and the basic qualifications for these positions. COs will note unacceptable submissions in Part A.III of the SCER, and investigate during the onsite review.

- b. *Action When Data Are Unacceptable.* If employment activity data is submitted, but is not acceptable, COs must call the contractor and request that the appropriate changes be promptly made and the data resubmitted within the timeframe specified by the OFCCP field office. If, at the end of the allotted timeframe, the data are not received in a form that is

acceptable, COs will recommend issuing an SCN specifying the regulatory sections the contractor violated.

Examples of unacceptable data submissions include, but are not limited to, instances where the data are in aggregations larger than job group or are not provided by sex or by minority versus non-minority.

1H REVIEW OF SECTION 503 AND SECTION 4212 AAPs FOR ACCEPTABILITY

As with an Executive Order AAP, the determination of the *acceptability* of items listed in Part A.II of the SCER for Section 503 and Section 4212 AAPs is limited to an evaluation conducted at the desk audit. This is different from an evaluation of the contractor's *implementation* of these items, which usually is done onsite. Additionally, the Section 503 and Section 4212 regulations require the contractor to take a number of actions even though the contractor does not address them in the AAP(s). Part B.III of the SCER covers the additional requirements, most of which are completed onsite.

1H00 ITEMS INCLUDED

The regulations at 41 CFR 60-741.44 identify the required elements of a Section 503 AAP. Similarly, the regulations at 41 CFR 60-250.44 and 60-300.44 list the required elements of a Section 4212 AAP. Therefore, to be acceptable, a contractor's Section 503 and Section 4212 AAPs must include the below items listed in 41 CFR 60-741.44(a) through (j), 41 CFR 60-250.44 (a) through (j), or 60-300.44 (a) through (j), as appropriate.

- Policy Statement
- Review of Personnel Processes
- Review of Physical and Mental Job Qualifications
- Reasonable Accommodations of Physical and Mental Limitations
- Harassment Prevention
- External Dissemination of EEO Policy and Outreach
- Internal Dissemination of EEO Policy
- Audit and Reporting System
- Responsibility for AAP Implementation
- Training

Since these items are similar in all three regulations, we discuss them together below. When there are differences, we expressly identify them. It is the responsibility of COs to determine whether the contractor included all of the required items in the contractor's Section 503 and Section 4212 AAPs. We describe the acceptability assessment of each required element below.

1H01 POLICY STATEMENT

Contractors are required to take affirmative action to employ and advance in employment qualified individuals with disabilities and protected veterans. The contractor must affirm its commitment to this affirmative action requirement by incorporating it in a policy statement included in its AAP(s).³⁶ The contractor must also post this policy statement conspicuously at the workplace and communicate the policy to all employees and applicants.

At a minimum, to be acceptable, the policy statement must include:

- a statement indicating the top establishment official's support for the EEO policy;
- a statement identifying the EEO official responsible for the implementation of the AAP;
- a statement that the contractor hires, recruits, trains and promotes without discrimination on the basis of disability or status as a protected veteran;
- a statement providing for an audit and reporting system;
- a statement that the contractor bases all employment decisions only on valid job requirements; and
- a statement that the contractor will not subject employees and applicants to harassment, intimidation, threats, coercion or retaliation because they engaged or may engage in filing a complaint or assisted in a review, investigation or hearing related to any federal, state or local law requiring EEO for individuals with disabilities or protected veterans; or because they opposed any act deemed unlawful by any of the above referenced laws; or because they exercised any other right under Section 503 or Section 4212.

1H02 CONTRACTOR REVIEW OF PERSONNEL PROCESSES

An AAP, to be acceptable, must affirm that the contractor reviewed its personnel processes. These processes must provide for the careful, thorough, and systematic consideration of the job qualifications of applicants for hiring or promotion, and all training opportunities offered or available and employees who are known individuals with disabilities and protected veterans.³⁷ A contractor's AAP(s) must describe its review and any modifications made or new procedures implemented because of that review.

³⁶ See 41 CFR 60-250.44(a); 300.44(a); 741.44(a).

³⁷ See 41 CFR 60-250.44(b); 300.44(b); 741.44(b).

- a. *Use of Appendix C.* Contractors may utilize the procedures described at Appendix C in 41 CFR Parts 60-250, 41 CFR 60-300, and 41 CFR Part 60-741, as appropriate, to fulfill this requirement. These procedures describe how contractors annotate applications or personnel forms of protected veterans and individuals with disabilities when considering them for employment opportunities.
- b. *Adequacy of Present Procedures.* Contractors may assert that their present personnel procedures are adequate and indicate that modifications to the procedures are unnecessary, COs must determine whether the information received during the desk audit supports that assertion in order to determine acceptability. COs must request additional information during the desk audit or onsite review if they are unable to make an acceptability determination.
- c. *Additional Section 4212 Requirement.* 41 CFR 60-250.44(b) and 60-300.44(b) also require contractors to limit any consideration of a disabled or other protected veteran's military record to only those portions of the record that are relevant to the specific job or promotion for which the veteran is being considered.³⁸

1H03 CONTRACTOR REVIEW OF PHYSICAL AND MENTAL QUALIFICATIONS

An AAP must contain the contractor's schedule for the review of all physical and mental job qualification requirements to ensure that, to the extent they tend to screen out qualified individuals with disabilities, they are job-related and consistent with business necessity.

- a. *Scheduled Review.* To be acceptable, an AAP must affirm that the contractor completed a review of the physical and mental job qualification requirements. If it is a newly covered contractor, the AAP must provide a specific and reasonable time by which the contractor will review the jobs qualifications. When the AAP indicates that the contractor completed the review and the qualification standards remain unchanged, the contractor is not required to review those physical and mental job qualification requirements again unless there is a change in working conditions. The AAP should state, however, that when there is such a change in working conditions the contractor will reevaluate the requirements.
- b. *Confidentiality of Medical Information.* To be acceptable, the AAP must affirm that any inquiries or medical examinations regarding an applicant's or employee's medical condition that are made by, or at the behest of, the contractor are conducted only in accordance with the law, and that all medical information the contractor obtains as a result of such inquiries or exams is kept confidential, except as otherwise provided for in the regulations. The CO may consult the EEOC's *Enforcement Guide: Preemployment Disability-Related Questions and Medical Examinations* (<http://www.eeoc.gov/policy/docs/preemp.html>) for more information on this subject matter.³⁹

³⁸ The contractor should confirm compliance with this requirement in the AAP.

³⁹ See 41 CFR 60-250.23(d) and 60-300.23(d); and 41 CFR 60-741.23(d).

1H04 REASONABLE ACCOMMODATION TO PHYSICAL AND MENTAL LIMITATIONS

Contractors must make reasonable accommodation to the physical and mental limitations of qualified individuals and veterans with disabilities unless they can demonstrate that such accommodation would impose an undue business hardship. In assessing undue hardship, contractors may consider factors such as financial costs and interference with the ability of other employees to do their jobs. To be acceptable, this section of the AAP must contain the contractor's policy with respect to reasonable accommodation. This policy must be consistent with the requirements of the regulations.

1H05 HARASSMENT PREVENTION

Contractors must develop and implement a policy prohibiting harassment based on disability or veteran's status. A contractor should include a copy of this policy and its implementation procedures in the AAP(s). This statement may be part of a broader anti-harassment policy that also prohibits harassment on other bases, such as race and sex.

1H06 EXTERNAL DISSEMINATION OF EEO POLICY AND OUTREACH

An acceptable AAP must affirm that the contractor periodically reviews its employment practices, and that the contractor undertakes appropriate outreach and positive recruitment activities when indicated by the findings of such reviews. The AAP may also describe in some detail the steps taken by the contractor in its review of employment practices and the resulting outreach and recruitment activities.

1H07 INTERNAL DISSEMINATION OF EEO POLICY

The contractor must disseminate its EEO policy internally. An acceptable AAP must address the contractor's internal procedures to foster understanding, acceptance and support of the contractor's obligation to promote equal employment opportunity for individuals with disabilities and protected veterans. The scope of the contractor's efforts will depend upon all the circumstances, including the contractor's size and resources and the extent to which its existing practices are adequate. The regulations at 41 CFR 60-250.44(g) and 60-300.44 (g), and 41 CFR 60-741.44(g) provide examples of the types of activities contractors may undertake in this area. For example, contractors may conduct meetings with executive, managerial and supervisory personnel to explain the intent of the policy and to delineate individual responsibility for its implementation.

1H08 AUDIT AND REPORTING SYSTEM

The AAP should contain a narrative description of every aspect of its internal audit and reporting system. The description should specify the frequency of reports and audits, and state that the contractor will take corrective actions, if necessary, as problems are revealed. The description should also designate the contractor official responsible for taking corrective actions. Lastly, contractors should indicate how and when their program results and effectiveness will be

reviewed with the various levels of management in the company. An acceptable internal audit system should also include a review of a contractor's online and electronic application systems to determine if they are accessible to individuals with disabilities, to ensure that procedures to request reasonable accommodation for the application process are prominently displayed and to ensure that individuals with disabilities can readily obtain needed accommodations.

1H09 ESTABLISHMENT OF RESPONSIBILITY FOR AAP IMPLEMENTATION

The AAP(s) should identify the person responsible for implementing the contractor's affirmative action activities with respect to individuals with disabilities and covered veterans and should describe his or her responsibilities. Management must give this official necessary support and staff to manage the implementation of the program. The AAP should also describe the responsibilities of line management in carrying out the program.

1H10 TRAINING TO ENSURE AAP IMPLEMENTATION

Contractors are required to train their personnel involved in recruitment, screening, selection, promotion, disciplinary and related processes about the company's EEO obligations and, if appropriate, about the contractor's affirmative action commitments under Section 503 and Section 4212. To be acceptable, this section of the AAP must contain the contractor's training policy.

1H11 NO REDUCTION IN COMPENSATION

COs must note that in offering employment or opportunities to individuals with disabilities and protected veterans, it is unlawful for a contractor to reduce the amount of compensation offered because of any income based upon a disability-related pension or other disability-related benefit the applicant or employee receives from another source. The CO must evaluate the contractor's implementation of this requirement onsite. Chapter 2, Section 2L provides detailed guidance on conducting this aspect of the onsite review.⁴⁰

II SUMMARY OF ACCEPTABILITY PROBLEMS WITH AAPs AND SUPPORT DATA

COs identify problems with the completeness and acceptability of a contractor's AAPs under EO 11246, Section 503 and Section 4212 and support data in Part A.III of the SCER. For each problem, COs must use Part A.III of the SCER to describe the specific problems and actions taken at the desk audit to resolve it and actions planned for onsite review.

A CO may resolve some problems with the AAP(s) and support data at the desk audit after additional contact with the contractor. For example, if the CO's problem is that he or she cannot evaluate job group acceptability because there is no information on what job titles are in each group, that CO may be able to resolve the problem by obtaining the missing information from

⁴⁰ See 41 CFR 60-250.21(i), 60-300.21(i) and 60-741.21(i).

the contractor. The CO will note this follow-up contact and receiving the additional information on the SCER. Such a notation could be written like this: "Called J. Smith May 1, 2011 and asked him to send a list of titles in each group. List received May 8, 2011."

If a CO determines that the Executive Order, Section 503 or Section 4212 AAP(s) does not meet one or more of the standards for acceptability as discussed previously in this chapter, the CO will suspend the desk audit and recommend issuance of an SCN in most cases.

1J ANALYSIS OF SECTION 503 AND SECTION 4212 AAPs: REVIEW OF ONLINE APPLICATION PROCESS

In addition to reviewing a contractor's Section 503 and Section 4212 AAP(s) as part of the desk audit, COs will review the contractor's online application system (electronic or Web-based) to:

- assess whether individuals with disabilities can access the application system, and
- determine whether the contractor is providing reasonable accommodation, when requested and otherwise appropriate.

If a contractor uses an online application system to accept applications for employment, the contractor must ensure that potential applicants with disabilities can use the system (with or without reasonable accommodation) or can submit an application in an equally effective and timely manner through alternative means. This includes providing a means for contacting the contractor, other than through the online system, to request a reasonable accommodation.⁴¹

The contractor must provide information on how to obtain reasonable accommodations on its online application system, as well as on its paper applications and job announcements. Ideally, the contractor should prominently display such notices, and include them at the beginning of the online application process. At a minimum, this information must include the name and contact information of the person to whom a request for an accommodation should be made and the process for requesting an accommodation. COs must check the contractor's online application system to determine if this information is readily displayed. COs will document the results of this analysis in Part B.III of the SCER.⁴²

⁴¹ The accommodation should give the applicant with a disability an equal opportunity to apply and be considered for the contractor's jobs.

⁴² OFCCP retains and investigates discrimination complaints involving federal contractors' online application systems rather than referring them to the EEOC or some other agency. This includes all Section 503 and VEVRAA complaints alleging failure to accommodate in the application process where an electronic process is used. It also includes failure to hire complaints based on an individual's status as a protected disabled veteran or disability where an online application system was used.

1K ANALYSIS OF EO 11246 AAP: OVERVIEW OF SUPPORT DATA, EEO TRENDS, WORKFORCE STRUCTURE AND PERSONNEL PRACTICES

The review of the personnel activity data such as hires, promotions and terminations provides a broad framework for the detailed review by job group of affirmative action progress, or placement goals, and the assessment of any potential discrimination in employment activity. COs will review personnel activity data to gain an understanding of the specific kinds of employment activity that took place, including where or in which job groups, during the contractor's current and prior AAP years. COs must use Part A.III of the SCER to describe the specific problems and actions taken at the desk audit to resolve issues with the contractor's support data.

1K00 EEO TREND ANALYSIS

COs must make an initial assessment of a contractor's workforce and utilization trends by reviewing the contractor's EEO-1 reports in Part A.IV of the SCER.

- a. *Long-Term and Short-Term Trends.* A CO must compare data from the contractor's most recent EEO-1 Report to data from its earlier EEO-1 reports. For example, if the contractor provides EEO-1 reports for 2010, 2009 and 2008, then the CO compares the 2010 data to the 2008 data to look at the long-term trends, and compares the 2010 and 2009 data for short-term trends. This information provides an overview of:
 - the distribution of jobs within the contractor's workforce (white-collar, blue-collar, predominant EEO job categories);
 - the direction of change in the total workforce and particular workforce categories (expanding, contracting, stable); and
 - the increases and decreases in minority and female representation in various areas.
- b. *Changes Due to Reclassifications.* If a CO observes significant changes in the size of EEO job categories with little or no corresponding personnel activity, the CO must investigate further to determine if the changes are due to the reclassification of jobs with concentrations of minorities or women from one EEO-1 job category to another. For example, suppose the total number of positions in the Craft category increases from one year to the next and indicates an increase in women. Over the same period, however, both the total number of Operative positions and the total number of women listed as Operatives decreases by nearly the same amount. The CO may then infer that the increase in Crafts may have resulted from the contractor changing the EEO-1 job category of the women's jobs, rather than from genuine hires or promotions.
- c. *EEO Category Patterns.* EEO trend analysis allows COs to identify broad areas where minorities and women have been persistently underrepresented or concentrated, setting a

framework for the detailed review of the workforce analysis for potential discrimination problems, and the review of the contractor's goals progress by job group.

- d. *Particular Minority Group.* This analysis permits the CO to identify any substantial disparity in the representation of a particular race or ethnic group when compared with the distribution of those same groups in the contractor's labor area and in possible internal feeder categories. The disparity may exist in the contractor's workforce as a whole or in certain categories. When a CO identifies such a disparity, the CO must plan to conduct an IRA of the particular group, at least in those workforce areas where the disparity exists and for the type of activity most likely to have created the disparity.

For example, if Hispanics are well represented in the labor area but have historically been absent from the contractor's workforce, the CO will plan to conduct hiring IRAs separately for Hispanics. If blacks have historically been concentrated in Laborers category, but poorly represented in Operatives and Crafts, the CO's review of the workforce analysis should focus on the types of jobs held by blacks and any structural impediments to upward mobility from those jobs. In addition, the CO's IRA of blue-collar job groups, particularly for promotions and hires into jobs above Laborers, should be conducted separately for blacks. Sections 1O00 and 1O02 below further discuss separate discrimination analyses for particular groups. The CO will also note if investigation of such a disparity does not show discrimination. The CO will consider whether goals and/or specific affirmative action steps for the particular group are warranted.

1K01 WORKFORCE STRUCTURE AND PERSONNEL PRACTICES

In the initial review of the AAP and support data, COs evaluated the workforce analysis for acceptability. As a result, they have a basic understanding of the contractor's organization and operations. For example, the workforce analysis should show:

- whether the contractor organizes the facility by department or other unit (e.g., division),
- whether lines of progression exist, and
- how the contractor structures pay and other characteristics that may prove useful for subsequent analyses of both affirmative action and potential discrimination issues.

Other supporting data that the contractor may provide with the AAP, such as copies of labor agreements, should contain additional information such as pay rates, work performed, organizational structure and rules for internal mobility. COs must enter this information, to the extent that it is available during the desk audit, in Part A.III of the SCER.

1L ANALYSIS OF EO 11246 AAP: GOALS PROGRESS AND GOOD FAITH EFFORTS

The effectiveness of a contractor's overall affirmative action program is not measured by whether the contractor met all its goals, but rather by whether the contractor made good faith

efforts to do so. Generally, if the contractor met properly determined goals in a job group, further examination of good faith efforts with respect to that job group is unnecessary. Therefore, to focus the investigation on good faith efforts, COs must take the following steps:

- measure the degree of progress in job groups where the contractor established goals and opportunities occurred;
- evaluate the contractor's resulting overall goals performance; and
- identify areas where specific additional information is needed to evaluate good faith efforts.

COs will evaluate both prior year and current year, if applicable, and address any goal issues in Part B.I of the SCER.

1L00 ANALYSIS OF GOALS PROGRESS

As noted earlier, to be acceptable, AAP support data must include a report of progress on prior AAP year goals. In addition, the contractor should include a report of progress on current goals if the contractor is at least six months or more into its current AAP year when it receives the Scheduling Letter. COs will use this progress report to conduct the analysis of goals progress.

- Data Needed.* To conduct this analysis, COs must first identify the job groups for which the contractor established goals at the beginning of the period under review. Second, COs must determine the percentage placement goal for each job group and the protected class to which it applies. Third, for each such job group, the number of total placements including hires and promotions, and the number of minority and/or female placements must be determined. If a contractor does not submit this information at the desk audit, COs will conduct the analysis below at whatever point in the review they obtain sufficient information.
- Analysis.* The analysis takes into consideration the number of opportunities the contractor provided in relationship to the goal. More specifically, to determine how many minorities or women the contractor would have placed if the goal were met, COs multiply the percentage placement goal by the number of placements that actually occurred. The CO then compares this result with the number of minorities or women actually placed.

If a contractor established a goal for a particular race or ethnicity, or for men or women of a particular race or ethnicity, then the CO conducts the evaluation of progress on that goal in the same fashion as in the above example. You can find additional examples in Part B.I of the SCER.

1L01 EVALUATION OF GOOD FAITH EFFORTS

An evaluation of good faith efforts includes a review of the contractor's overall performance toward goals, the identification of areas requiring additional examination, and ensuring that adequate information is available to determine good faith. Each is discussed in this subsection.

- a. *Overall Performance.* In evaluating a contractor's good faith efforts, COs must first make an overall assessment of its goals and affirmative action performance.⁴³ For example, were there areas where goals were established but not met? This evaluation should also take into account fulfillment of AAP commitments and the quality of those commitments in terms of creative problem-solving to remove any impediments to minority and female utilization.
- b. *Goal Areas Needing Further Examination for Good Faith Efforts.* Because of the analysis on goal progress, COs must identify goal areas needing further evaluation for good faith efforts.⁴⁴ For each such goal area, the COs will review any contractor description of good faith efforts pertinent to the area. This should be included as part of the contractor's report on goals. COs will also use the AAP and support data to identify the reasons for lack of progress and the type of AAP action items that would be pertinent. The below are some examples of the types of inquires a CO could pursue.
- Do the support data on employment activity show that the jobs were filled predominantly by hires or by promotions? If by hires, was there low applicant flow?
 - What AAP commitments did the contractor make about recruitment efforts? Is there any evidence they were fulfilled?
 - Was there an adequate representation of minorities and women in probable feeder groups if the contractor filled jobs primarily by promotion?
 - What AAP commitments did the contractor make concerning the promotion process (e.g., job posting, encouraging bidding, and training)? Is there any evidence the contractor fulfilled these commitments?

1L02 PLAN FOR EVALUATION OF GOOD FAITH EFFORTS

For each goal area without sufficient information to determine good faith efforts, the CO will list the additional information needed on SCER Part B.I. For example, the contractor did not meet its goal for minorities in the Clerical I job group. However, in reviewing the data, it appears that low applicant flow is the cause. The AAP may state that the contractor will use a particular agency with a significant minority clientele to aid in the recruitment of minority applicants for the Clerical I job group. The additional information needed here may include contact with the agency to confirm its use by the contractor, as well as other action such as identifying additional recruitment sources while onsite.

1M BASIS FOR POTENTIAL DISCRIMINATION ANALYSES

It is OFCCP's policy, in conducting analyses of potential discrimination issues based on race, color, religion, sex or national origin under the Executive Order, to follow the principles of Title

⁴³ See SCER Part B.I

⁴⁴ Ibid.

VII of the Civil Rights Act of 1964, as amended, which the U.S. Equal Employment Opportunity Commission (EEOC) enforces.

When conducting analyses for minorities versus non-minorities, the term “minorities” means blacks, Hispanics, Asians/Pacific Islanders and American Indians/Alaskan Natives.⁴⁵ As used in the instructions for potential discrimination analyses that follow, “minorities” may mean those groups taken together or individually, depending on the characteristics of the labor area and patterns in the contractor’s workforce. In general, when COs observe a disparity in the representation of a particular group, they conduct standard desk audit potential discrimination analyses separately for that group.⁴⁶

- a. *Guidelines on Discrimination Because of Religion or National Origin.* These Guidelines, at 41 CFR Part 60-50, are not a required AAP element under 41 CFR 60-2.10. Therefore, COs must evaluate them onsite. Chapter 2, Section 2G provides detailed guidance on conducting this aspect of the onsite review.
- b. *Sex Discrimination Guidelines.* These Guidelines, at 41 CFR Part 60-20, are not a required AAP element under 41 CFR 60-2.10. The contractor’s implementation of them, therefore, must be evaluated onsite. Chapter 2, Section 2H provides detailed guidance on conducting this aspect of the onsite review.
- c. *Desk Audit Observation.* While the implementation of these Guidelines can only be evaluated onsite, COs must pay particular attention to any problem area identified during the desk audit for women or religious or national origin minorities. Additional information should be gathered onsite and directed to those portions of both Guidelines that are not addressed elsewhere in the regulations; for example, leave for religious purposes and maternity leave.

1N ANALYSIS OF EO 11246 AAP: AUDIT OF THE WORKFORCE ANALYSIS OR ORGANIZATIONAL PROFILE

The workforce analysis and organizational profile essentially reflect employment activity over an extended period. COs review the workforce analysis or organizational profile to determine whether minorities and females are present throughout the workforce. This review permits COs to look at individual work units or departments, or both. COs must closely examine patterns of minority and female employment in each department or work unit to identify disparities for further investigation onsite. One example of a disparity that may warrant further investigation is departments or job titles where women or minorities are either significantly over or underrepresented based on their representation in the overall workforce. COs must pay

⁴⁵ For purposes of complying with OFCCP requirements, contractors choosing to follow the current EEO-1 categories may count applicants and employees identifying as “two or more races” as minorities. (*Interim Guidance on the Use of Race and Ethnic Categories in Affirmative Action Plans*, OFCCP Directive, Transmittal 283 (Aug. 14, 2008).)

⁴⁶ See subsection 1001 – Specific Race/Ethnic Group Analysis.

particular attention to departments and work units where minorities or women are absent or comprise nearly the entire department or unit.

1N00 UNDERREPRESENTATIONS AND CONCENTRATIONS

When examining patterns of minority group and female employment within the contractor's workforce, COs look for evidence of concentration and underrepresentation.

- a. *Concentration.* The term *concentration* refers to any job titles where there are significantly high representations of a minority group or women than would be expected in consideration of their overall representation in the contractor's workforce or in a relevant unit of that workforce.
- b. *Underrepresentation.* The term *underrepresentation* is the opposite of "concentration." It exists when a minority group or women are found in a particular department, job group or job title in numbers significantly lower than would be expected in light of their overall representation in the contractor's workforce or in a relevant unit of that workforce.

It is important to note that the identification of a concentration or underrepresentation does not mean that there is discrimination. It is only an indicator that further investigation is warranted.

COs must document areas of underrepresentation and concentration on Part B.II of the SCER and investigate further.

1N01 DETERMINING THE RELEVANT WORKFORCE SECTOR AND JOB AREAS

COs must review a contractor's workforce analysis to identify the concentration and underrepresentation of minorities and women. Under certain conditions, COs may reasonably expect that the contractor would evenly employ minorities or females throughout a particular job area. A "job area" is a sub-unit (e.g., department, job group, line of progression (LOP)) of the blue-collar or white-collar sectors of the contractor's workforce. The conditions for such a "reasonable expectation" are that:

- the jobs in the area have similar entry-level qualification requirements, and
- the jobs above entry-level are filled primarily by promotion.

Where these conditions exist, COs may use the Job Area Acceptance Range (JAAR) Analysis to measure job area distribution patterns. The JAAR assesses the representation of minorities and women in a particular job area in comparison with the relevant base workforce sector. A workforce sector is the total workforce of a particular job area. For example, if a contractor has 1000 employees at an establishment, and its production division is composed of four departments with a total workforce of 400 employees, then the production division is the job area and 400 employees is the workforce sector. In order for COs to conduct this analysis appropriately, they must determine the relevant workforce sectors or job areas to analyze.

- a. *Relevance of Other Information.* To determine the relevant workforce sector and job areas for the analysis, COs are guided by the findings of the desk audit up to this point. For example, the information a CO obtains from the earlier analysis of EEO trends⁴⁷ may show persistent minority or female representation above or below comparable availability; or a CO may identify a substantial disparity in the representation of a particular minority group. Information the CO derived from the earlier review of the organization of the contractor's workforce and personnel practices (e.g., internal mobility, pay structure) informs the CO's analysis of workforce sector and job areas.

The CO must conduct the Impact Ratio Analysis (IRA) on the personnel activity data provided for each job group or job title by race/ethnicity and gender.⁴⁸

- b. *Workforce Sector and Job Area.* COs must determine the appropriate sector of the contractor's workforce with which to compare minority group and female representation in the particular job(s) being examined (e.g., blue-collar, white-collar, clerical, the entire workforce, job group). To do so, COs must remember that there is a reasonable expectation that absent discrimination minorities and women will be more or less evenly distributed among the job areas within the sector. This expectation is highest when:

- entry-level jobs in the sector require similar qualifications, and
- the contractor primarily fills jobs above entry-level in the sector by promotion.

The expectation may be lower if entry-level jobs in the sector are more differentiated in skill requirements. This is so because it may become more likely that minority or female availability will differ, or the contractor fills jobs above entry-level predominantly by hires.

- c. *Relationship to Particular Contractor.* An appropriate definition of the workforce sector depends on the particular contractor's structure, and legitimate skill needs and personnel practices. In general, analyses that focus on where minorities and women are located organizationally,⁴⁹ and analyses that focus on the level at which minorities and women are employed⁵⁰ tend to identify potential promotion problems. These problems may be related to placement. Examples of some problems in placement, concentration or underrepresentation of employees include:

- *Workforce as Sector or Departments as Job Area.* When there are departments or organizational units with largely similar qualifications for entry-level positions (e.g., unskilled and, to a more limited extent, semi-skilled, in blue-collar; undifferentiated trainee jobs in white-collar), COs must compare representation of women and minorities in each department with representation in the total workforce of all such departments.

⁴⁷ See SCER Part A.IV.

⁴⁸ See Section 1O, below.

⁴⁹ Examples include which departments, units, or lines of progression tend to identify potential placement problems.

⁵⁰ Examples include concentrations in lowest level jobs within a line of progression department.

- *Workforce as Sector or Lines of Progression as Job Area.* When there are LOP or usual promotional sequences that cut across department lines and have similar entry-level requirements, CO may compare representation of minorities and women in each LOP with representation in the total workforce of all LOPs.
 - *Department as Sector or Lines of Progression within Department as Job Area.* When there are separate LOP and/or usual promotional sequences within a department or similar organizational unit, COs may compare representation in each LOP with the representation in the department as a whole.
 - *Department as Sector or Jobs within Department as Job Area.* In the absence of LOPs or usual promotional sequences, and where jobs within a department are usually filled by promotion from within or might reasonably be filled in such a manner based on the nature of the jobs and the training the contractor could reasonably be expected to offer, COs may compare representation in a particular job area within that department with representation in the department as a whole.
 - *EEO-1 Job Category as Sector or Type of Job as Job Area.* It can be useful to compare representation in an EEO-1 job category or job group with the distribution within specific titles in that category or group, or both. For example, in an Office and Clerical category, women may be concentrated in General Clerical positions, but underrepresented in Production and Material Control clerical jobs.
 - *Lines of Progression as Sector or Jobs in Lines of Progression as Job Area.* The CO may also treat a LOP or usual promotional sequence, particularly one with a large number of incumbents, as a comparative workforce sector. Minority or female, or both, representation in the LOP can be compared with their representation in jobs at different levels in the LOP.
 - *Job Title as Sector or Job Title within Department as Job Area.* When a job title, particularly one with a large number of total incumbents, appears in several departments, COs can compare representation in the title as a whole with representation in the title in each department.
- d. *Applicability to Both White-Collar and Blue-Collar Jobs.* COs can apply these analyses to white-collar and blue-collar situations. In all cases, COs must ensure that the sector of the contractor's workforce that they use as a basis for comparison with a particular job area is, in fact, relevant. Particularly in the white-collar area, differences with respect to factors such as the need for specialized education or skills may make establishing a basis for comparison difficult.
- e. *Determining "Substantially."* Once COs select the job area and the relevant workforce sector, the next step is to perform the analysis and identify those job areas which have "substantially" more or fewer minorities and women than would reasonably be expected by their representation in the workforce sector selected. The COs will investigate these job areas, in addition to any other indicators identified, statistical or otherwise, onsite.

1N02 ANALYSIS BASED ON A PARTICULAR RACE OR ETHNICITY

If a CO's review of the contractor's EEO job category data (SCER Part A.IV) shows substantial disparities in the representation of a particular race or ethnic group in the workforce as a whole, or in their distribution among job categories, the review of the workforce analysis should include a focus on that race or ethnic group. This is especially the case in those job areas where a CO observed disparity.

For example, if category data show that American Indians were concentrated in the Laborers category, poorly represented in Operatives and absent in Crafts, the CO's review of the workforce analysis must:

- specifically identify the types of blue-collar jobs in which American Indians are employed, and
- determine whether these jobs fall into lines of progression or departments or units, or both, that tend to inhibit progression to Operatives and Crafts, etc.

Even when a CO does not observe these disparities in the initial category screen, the CO must be alert for indications of potential problems in the distribution of the particular racial or ethnic groups while reviewing the workforce analysis. This is especially necessary if the labor area has high representation of more than one race or ethnic group, or the general employment patterns in the industry involved differ among specific race or ethnic groups. It is worth noting that both situations may exist simultaneously and could give rise to indicators of a potential problem.

10 ANALYSIS OF EO 11246 AAP: AUDIT OF PERSONNEL ACTIVITY AND THE IMPACT RATIO ANALYSIS

Although related, a CO must not confuse adverse IRAs with the term "adverse impact."⁵¹ The Impact Ratio Analysis (IRA) is a method for identifying personnel activity that should be investigated further onsite. The IRA is a ratio between two selection rates, one for minorities or women, and one for others. Generally, if the selection rate for a particular group is less than 80% of the selection rate for the favored group for a particular personnel activity,⁵² (e.g., the selection rate for minorities or women is less than 80% the selection rate for non-minorities or men for a particular personnel activity), a CO must investigate further during the onsite.

1000 CALCULATING THE IRA

COs must ensure that contractors submit personnel activity data according to OFCCP's requirements as specified in Itemized Listing of the Scheduling Letter. They must conduct an IRA of the data of all job groups or job titles by gender and minority to non-minority.

⁵¹ 41 CFR 60-3.4.

⁵² Examples of activities are hiring, promotion and termination.

Federal Contract Compliance Manual (FCCM)

For analysis of gender and minority to nonminority, the impact ratio is the ratio between the selection rates for the favored and nonfavored groups. The favored group is whichever group has the highest selection rate for a positive personnel activity like hiring or promotion, or the lowest selection rate for a negative personnel activity. Examples of negative personnel activity include termination and layoff. When an analysis of the personnel activity data comparing race or ethnicity, or both, indicates that a group is selected at a substantially lower rate than the favored group, a subgroup analysis by individual race and ethnic categories is necessary.⁵³ The IRA is determined by:

- Calculating the selection rate for each group by dividing the number of people selected from a group by the number of applicants from that group.
- Observing which group has the highest selection rate.
- Calculating the impact ratios by comparing the selection rate for each group with that of the highest group. Do this by dividing the selection rate for a group by selection rate for the highest group.
- Observing whether the selection rate for any group is substantially less (i.e., usually less than four-fifths or 80 percent) than the selection rate for the highest group.

Below is an example using the appropriate formulas.

Step 1: Calculate the rate of selection for each group (round off to two decimal places).

$$\frac{10 \text{ (women selected)}}{100 \text{ (women applied)}} = .10 \text{ (10\% selection rate)}$$

$$\frac{30 \text{ (men selected)}}{100 \text{ (men applied)}} = .30 \text{ (30\% selection rate)}$$

Step 2: Observe which group has the highest selection rate.

Men are the most favored group because they have the highest selection rate (30% men is a higher rate than 10% women).

Step 3: Calculate the impact ratio for the two groups. Since this is a positive action, the most favored group's rate (in this case men) is in the denominator position.

$$\frac{.10 \text{ (selection rate for women)}}{.30 \text{ (selection rate for men)}} = 0.33 \text{ (impact ratio)}$$

Step 4: Observe whether the impact ratio in Step 3 is less than 80%. If the selection rate for one group is less than 80% of that for another, the CO considers the IRA adverse.

⁵³ See subsection 1001 – Specific Race/Ethnic Group Analysis.

The CO will investigate adverse IRA(s) when analysis or evidence indicates that it is necessary. Prior to scheduling an onsite review, the CO should obtain from the contractor any additional data that are needed in order to conduct offsite analyses prior to the onsite visit.⁵⁴ During the onsite, the CO will ask the contractor to provide a breakdown of the personnel activity data by individual race or ethnic categories for the job groups or job titles at issue. This breakdown can also be done by both race and ethnicity. In examining data, the CO pays particular attention to IRAs in those areas where review of the workforce analysis showed marked underrepresentation or concentration of minorities or women, or both.

1001 SPECIFIC RACE AND ETHNIC GROUP ANALYSIS

When the personnel activity data is provided by race or ethnicity, or both, COs must conduct individual IRAs for each race or ethnic group. For example, if data shows that Hispanics are persistently absent from the workforce, COs must calculate separate hiring IRAs for each job group for Hispanics. Similarly, if blacks were concentrated in the entry level Laborer group, but poorly represented or absent in the higher level Operatives and Crafts groups, COs must conduct separate IRAs for blue-collar job groups, particularly for promotions and hires into Operatives and Crafts.

Even when COs do not observe substantial disparities during the initial screen of a contractor's workforce, they must be alert for any indications of potential problems in the selection of particular racial or ethnic groups, or both. Such indicators include situations where the labor area has a high representation of more than one minority group, or the general employment patterns for racial or ethnic groups, or both, in the industry involved differ from the contractor's workforce.

1002 PROPER USE OF THE IRA RESULTS

It is important to remember that an adverse IRA is only a preliminary indicator of a potential discrimination problem. It is not proof, in and of itself, of discrimination or of the existence of an affected class. For example, a CO may compute an adverse IRA in a job group using an insufficiently refined candidate pool. Only further statistical analysis or further investigation onsite, or both, can determine whether discrimination has occurred.

1003 IRA, STATISTICAL ANALYSIS SUMMARY AND ONSITE PLAN

When COs identify adverse IRAs, they must request additional data from the contractor for further statistical analysis. If the statistical analysis confirms that the statistical disparities exist and further investigation is needed, COs must describe the problem on SCER Part B.II and indicate that the matter needs further investigation onsite to determine whether there is discrimination.

⁵⁴ The standard deviation represents the distribution of the responses or data around the mean, and is often used to measure the amount of confidence in statistical conclusions. COs may run standard deviation analyses to determine whether and what types of additional information they may need to establish potential discrimination.

a. *Contractor Adverse Impact Determinations (Contractors with 100 or More Employees).*

- *Maintenance of Records.* As noted earlier in the discussion of the acceptability of support data, the UGESP require contractors with 100 or more employees to maintain specific records by job title that are sufficient to disclose whether its selection procedures have an adverse impact on the employment opportunities of each sex, and each race or ethnic group, or both. The race and ethnic groups include blacks, American Indians/Alaskan Natives, Asians/Pacific Islanders, Hispanics and whites.⁵⁵
- *Analysis of Impact.* UGESP also requires that contractors with 100 or more employees annually analyze this data to determine whether the total selection process for each job is having any adverse impact. These determinations are required by sex and for each race and ethnic group (e.g., black, Hispanic, Asian/Pacific Islander, American Indian/Alaskan Native, white) that constitutes 2% or more of the labor force in the relevant labor area or 2% or more of the applicable workforce for jobs filled internally.

b. *Requesting Contractor Determinations.* When a CO identifies a job group with an adverse IRA, and the contractor employs 100 or more people, the CO will ask the contractor to furnish the adverse impact determinations prepared during the evaluated period as a part of its in-depth analyses for the job titles that fall within the job group. This assumes, of course, that the contractor has not already provided this information. For example, if the adverse IRA is for female hires into a Professionals job group, the contractor should submit its adverse impact determinations for the hiring of women in each title within the Professionals group. This will assist the CO in determining whether the IRA and other statistical analyses need to be refined before investigating further. A CO may also request the contractor's adverse impact analyses in other areas. For example, a review of the workforce analysis showed a concentration or underrepresentation suggesting a potential placement problem. The contractor provided personnel activity data by job group and it does not show placements into the titles of concern. In response, a CO must request the contractor's adverse impact analyses for hires, promotions and transfers into the job titles at issue. When appropriate, the CO may also ask to review the contractor's adverse impact analyses and/or may ask the contractor to identify those jobs where its analyses showed adverse impact.

c. *Need for Information about the Selection Process.* When the hiring, promotion or termination IRA for a job group or job title indicates that further investigation is needed, the CO must ask the contractor to provide a description of how the employment selections are made for positions in the job group or job title at issue. The description should include the steps in the process. For each step, the contractor should provide the data for each selection step, the decision makers, the criteria used, a description of how the criteria are used, and the records maintained. In addition, when a job group is under investigation, the CO should ask whether the selection process as a whole or individual steps apply to all of the job titles in the job group, and whether the process was the same throughout the entire duration of the review period. It is also helpful for the CO to know whether the process applies to other job groups or titles in addition to the group or title at issue. Steps may include, for example, review of

⁵⁵ 41 CFR 60-3.4 and 41 CFR 60-3.15.

application forms by the human resources representative, written tests, formal or informal interviews, physical examinations and on-the-job tests. The CO will plan to verify the contractor's statements through review of records, interviews with applicants and employees and, if possible, observation of the process by which applicants are screened and selected.

d. Multi-Component Selection Processes - Contractor Obligations.

- *Adverse Impact in Total Selection Process.* When the contractor submits its adverse impact analyses for desk audit, if the analysis shows adverse impact in the total selection process for a job group or job title, UGESP requires the contractor to evaluate the individual components of the total selection process for adverse impact. Therefore, in a multi-step and/or multi-criterion selection process with adverse impact, the CO must plan to request the contractor's records showing at what step(s) and/or by what criteria members of non-favored race/ethnicity or gender group(s) the contractor is disproportionately screening out, as well as any validity studies the contractor conducted of its selection procedures.
- *No Adverse Impact in Total Selection Process.* Generally, if the total selection process for a job does not have an adverse impact, a contractor will not usually be expected to evaluate the individual components for adverse impact or to validate those individual components, and enforcement action will not usually be warranted based on a component.

There are, however, several exceptions: when enforcement appears warranted and with individual complaints of discrimination.

- *Exception 1: When Enforcement May Be Warranted.* In some circumstances, even though there is no adverse impact in the total selection process, further investigation and, possibly, enforcement action may nonetheless be appropriate when an individual component has an adverse impact (e.g., height and weight requirements) and its use is not justified as job-related and consistent with business necessity.
- *Exception 2: Individual Complaints of Discrimination.* The “bottom line” standard – that a contractor need not evaluate the individual components of a selection process if the process as a whole does not result in adverse impact – does not preclude the investigation of complaints alleging race, ethnicity or gender discrimination caused by a component of a selection process.⁵⁶ The standard does not preclude investigating complaints alleging that a selection process or criterion screened out one or more individuals on the basis of disability.

1P ANALYSIS OF EO 11246 AAP: AUDIT OF COMPENSATION DATA

⁵⁶ See Questions and Answers Nos. 25 and 26 in Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures.

The compensation analysis is an indispensable part of OFCCP's task to enforce the nondiscrimination requirements of Executive Order 11246. COs must make sure that the data submitted for such analysis satisfy OFCCP's requirements.

1P00 DATA FOR COMPENSATION ANALYSIS

Upon receipt of a contractor's AAP and supporting compensation data, COs must confirm that the submitted compensation data, regardless of format, satisfies the requirements of the Scheduling Letter.⁵⁷ COs must also make sure that the data identify whether or not the compensation is set pursuant to a collective bargaining agreement.

If the submitted data do not meet the requirements of the Scheduling Letter, COs must determine whether the data can still be analyzed using OFCCP's compensation procedures. If the provided data cannot be examined under OFCCP's procedures, COs will contact the contractor to discuss the deficiency and, if necessary, request that the compensation data be resubmitted in accordance with the requirements of the Scheduling Letter.

During the desk audit and any ensuing onsite review, CO will also consider "other information" such as:

- an explanation or description of the contractor's compensation systems, and
- a description of internal compensation pay practices and policies (e.g., policies and practices regarding setting wages or salaries at hire, additions to regular pay including overtime, guidance on employee performance, the administration of bonuses or commissions, market survey data analyses, collective bargaining pay requirements, job descriptions and self-audit results).

Upon receipt of the data, a desk audit is conducted. OFCCP may continue to request and review additional compensation data, and conduct an onsite review, before making a final determination regarding compliance. During the desk audit and at subsequent stages of the compliance evaluation, the CO should communicate with the contractor, as appropriate, to ask clarifying questions about the materials submitted, interpret codes or categories used in the data, identify any missing or incomplete information, and to request additional information as needed. The CO should obtain all such information as early in the process as possible.

If the contractor fails to comply with the requirements of the Scheduling Letter within the agreed upon timeframe, a SCN must be issued in most instances.⁵⁸

1P01 ACTION BASED ON THE DESK AUDIT RESULTS

Once the contractor provides the appropriate pay data, COs will conduct the initial desk audit analysis of compensation data. COs may take one of two actions based on the desk audit results:

⁵⁷ See Figure F-2 – OFCCP Scheduling Letter and Itemized Listing.

⁵⁸ See Chapter 8 – Resolution of Noncompliance.

- a. *Closing the Compensation Review.* If the CO determines that there is no evidence or indicators of potential compensation discrimination, and that no further data or information is needed to make that determination, the CO may recommend closing, the compensation review portion of the compliance evaluation.
- b. *Continuing the Compensation Review.* If the desk audit indicates potential compensation discrimination, COs must record such findings in Part C of the SCER:

1P02 REQUESTING ADDITIONAL DATA OR INFORMATION

In cases where OFCCP begins a review with summary compensation data, the CO may request additional employee level data for the entire workforce for a more in-depth analysis. Situations where it is appropriate to request additional employee level data include, but are not limited to, indicators or evidence of potential compensation discrimination based on summary data, indicators or evidence of discrimination with respect to another employment practice, complaints or anecdotal evidence, data integrity issues, reviews for quality audit purposes, or any review where more data or information is needed to make a compliance determination.

A CO may also need to request additional information to understand how to analyze or interpret either summary or employee level data before determining whether to proceed with or close the desk audit.

1Q SCER SUMMARY OF POTENTIAL DISCRIMINATION AREAS AND ONSITE INVESTIGATIVE PLAN (ALL LAWS)

All potential discrimination problems that a CO identifies during the desk audit must be summarized on Part A.I (Past Problems/Known Complaints), Part B.II (Other Problems For Investigation), and Part C (Problems Identified) of the SCER. These include any problems the CO identifies in the review of the Section 503 and Section 4212 AAP(s), any problems the CO identifies by the review of the contractor's online application process and any problems the CO identifies during the review and analyses of the Executive Order AAP and support data.

For each potential discrimination problem a CO identifies an onsite investigative plan must be developed. If the CO finds indicators of what appears to be a single potential discrimination problem through more than one analysis such as an area of minority concentration with an adverse IRA for minority promotions out of the area, the CO only needs to describe the problem once in the onsite plan.

The onsite plan should be as specific as possible, and will set priorities for the documents to be gathered. For example, if the IRA indicates a potential problem in minority hires into a particular job group, the actions to be taken while onsite should include interviewing the people, reviewing applications and personnel files, and obtaining information.⁵⁹

⁵⁹Chapter 2, Subsection 2C03 – Onsite Plan.

1R CONCLUSION OF THE DESK AUDIT

If a CO completes the desk audit and no problem areas are found, no outstanding questions remain, and no violations are identified then the evaluation is closed at the desk audit stage. If the CO found non-substantive problems, such as an unacceptable AAP element, the CO may close the compliance evaluation after all the identified problems are adequately resolved.

In order to close the compliance evaluation after the desk audit, the CO must ensure that no outstanding substantive issues exist. As previously noted, the CO may need to request additional materials from the contractor for review during the desk audit. For example, the CO may need to ask for information on protected veterans to address the extent of affirmative action efforts on their behalf, substantive documentation of good faith efforts for job groups where the contractor has established goals, or an employee roster in order to conduct appropriate compensation analyses.

1R00 DOCUMENTS FOR CLOSING COMPLIANCE EVALUATION AFTER THE DESK AUDIT

When closing a compliance evaluation after a desk audit, the CO will use one of the following closure letters:

- a. A finding of no violations leads to issuance of a closure letter.⁶⁰
- b. A finding of minor technical violations, but no indicators of potential discrimination or lack of good faith efforts, leads to issuance of a closure letter, referencing the violations and their remedies.⁶¹

The appropriate supervisor must sign the closure letter (e.g., District Director or his or her designee) and send the letter to the contractor by first-class mail.

1R01 REASONS TO PROCEED WITH ONSITE REVIEW

The CO must proceed with an onsite review if:

- the contractor provided insufficient data to conclude the review at the desk audit stage;
- there are indicators of potential discrimination, failure to provide a completed AAP, complaints or problems that merit an onsite review; or
- the contractor has been identified for a complete compliance review in accordance with specific OFCCP selection procedures.

⁶⁰ See Letter L-4 –Notice Closing Compliance Evaluation No Violations Found.

⁶¹ Ibid.

An onsite review is required before a Notice of Violation is issued. In instances where problems are resolved through a document submission during the desk audit, the CO's onsite review may consist of technical assistance to ensure that the contractor is aware of its obligations.⁶²

1R02 COMPLETING APPROPRIATE SCER PAGES

COs must complete a SCER for every compliance evaluation. The stage at which the compliance evaluation is closed and the type of investigative procedures used in the compliance evaluation will determine which sections of the SCER COs must complete. In some evaluations, they may not be able to complete certain sections of the SCER; however, they must complete as much of the SCER as possible.

⁶² Chapter 2, Section 2I – Technical Requirements.

CHAPTER 2 ONSITE REVIEW

2A INTRODUCTION

This chapter describes the procedures COs follow when conducting the onsite review of a compliance evaluation for a supply and service contractor. During an onsite review, COs gather data and information from the contractor, employees, applicants and others to better assess the contractor's compliance with the regulations implementing EO 11246, Section 4212 and Section 503,⁶³ and with any other appropriate mandates.⁶⁴ This chapter provides guidance to COs on how to prepare for, conduct and conclude an onsite review.

The nature and scope of the onsite review in each instance will vary depending on the type of compliance evaluation a CO is conducting. They may also vary depending on whether the CO has already identified potential problems. As noted in Chapter 1, Desk Audit, a compliance evaluation may consist of any one or any combination of the following investigative procedures.⁶⁵

- *Compliance Review.* A comprehensive analyses and evaluation of the hiring and employment practices of the contractor, the written AAP, and the results of their affirmative action efforts. This procedure may proceed in three stages: desk audit, onsite review, and offsite analysis.
- *Offsite Review of Records.* An analysis and evaluation of the affirmative action program (AAP), or any part thereof, and supporting documentation.
- *Compliance Check.* A determination of whether the contractor maintained appropriate records consistent with 41 CFR 60-1.12, 41 CFR 60-250.80, 41 CFR 60-300.80 and 41 CFR 60-741.80. At the contractor's option, the contractor may provide the documents onsite or offsite.

⁶³ The regulations implementing the EO 11246 applicable to supply and service contractors are at 41 CFR Part 60-1, Obligations of Contractors and Subcontractors; 41 CFR Part 60-2, Affirmative Action Programs; and 41 CFR Part 60-3, Uniform Guidelines on Employee Selection Procedures. Part 60-20 contains the Guidelines on Sex Discrimination; and Part 60-50 contains the Guidelines on Discrimination Because of Religion or National Origin. Section 4212 implementing regulations are at 41 CFR Parts 60-250 and 60-300, and the regulations implementing Section 503 are at 41 CFR Part 60-741.

⁶⁴ When onsite OFCCP is responsible for assessing a contractor's compliance with Executive Order 13496, if applicable.

⁶⁵ 41 CFR 60-1.20, 41 CFR 60-250.60, 41 CFR 60-300.60 and 41 CFR 741.60.

Federal Contract Compliance Manual (FCCM)

- *Focused Review*. An onsite review that is restricted to one or more components of the contractor's organization, or one or more aspects of the contractor's employment practices.

Of the four options, the compliance review is the most common and is typically the most comprehensive. For this reason, this chapter focuses on the specific procedures COs follow when conducting an onsite review as a part of a compliance review.⁶⁶ There are generally four major tasks in an onsite review:

- investigating potential problem areas the CO identified at a desk audit;
- verifying the contractor's implementation of its AAP(s) or its assertions regarding its personnel activity and employment practices, or both;
- investigating matters that cannot be fully examined at the desk audit; and
- initiating resolution of identified violations.

The onsite review principles discussed in this chapter also provide guidance for performing an onsite review as part of other types of reviews. If the compliance evaluation is of a contractor that maintains a FAAP then the evaluation will essentially be the same as the other processes. A possible addition is onsite visits to more than one location to address all of the components of the FAAP. Chapter 5 discusses FAAP reviews in more detail.

The onsite portion of a review, a preaward compliance evaluation of a supply and service contractor only covers the contractor's compliance with EO 11246 unless it is converted to a postaward review.⁶⁷ The purpose of a preaward compliance evaluation is to determine whether a bidder, prospective prime contractor or proposed subcontractor will be able to comply with the provisions of the EO 11246 equal opportunity clause. COs conduct a postaward review in the same manner as a compliance review under 41 CFR 60-1.20(a)(1), 41 CFR 60-250.60(a)(1), 41 CFR 60-300.60(a)(1) and 41 CFR 60-741.60(a)(1) and they must cover a contractor's compliance with EO 11246, Section 503 and Section 4212.

Lastly, complaint investigations include an onsite review that responds to the specific allegations raised in the complaint unless OFCCP converts a class complaint into a full compliance review. Complaint investigations are discussed in detail in Chapter 6, Complaint Investigations.

⁶⁶ In light of their more limited scope, focused reviews and compliance checks may not always include all of the elements discussed in this chapter.

⁶⁷ A preaward compliance evaluation is subject to specific timeframes and is conducted prior to the award of a nonconstruction contract of \$10 million or more. See 41 CFR 60-1.20(d). The preaward review requirement applies to both current and prospective contractors and to their first-tier subcontractors with proposed subcontracts of \$10 million or more. Directive 223, issued Apr. 15, 1998, provides additional detail on preaward clearance procedures.

2B DETERMINING THE NEED FOR AN ONSITE REVIEW

When OFCCP schedules a contractor for a compliance evaluation, the compliance evaluation may use any one or a combination of investigative procedures, including a full or a focused compliance review, an off-site review of records or a compliance check. Onsite reviews are a part of each full or focused compliance review. COs determine whether to conduct an onsite review in conjunction with an off-site review of records or a compliance check, based on the circumstances of the evaluation and the outcome of the initial review. For example, if a CO finds indicators of compliance problems during a limited compliance check, the CO may expand the compliance check to a full compliance review.

In some instances, an onsite review may not be necessary. One example exists when the desk audit findings are that the required AAPs are acceptable and, for other reasons, the CO is not conducting an onsite review. With the approval of a supervisor, the CO may conclude the compliance evaluation with an offsite review of records.

2C ONSITE REVIEW PREPARATION

When conducting an onsite review COs are neutral fact finders and official representatives of the Federal Government. Consequently, COs must be unbiased in the identification and examination of all data and information that contributes to the full understanding of the contractor's employment practices and affirmative action efforts. They must attempt to verify assertions made by the contractor regarding its affirmative action efforts, personnel activity and employment practices.

Before going onsite, COs must review a contractor's compliance evaluation and complaint history, develop an Onsite Plan, and provide advance notice of the onsite review to the contractor. A part of a CO's preparation includes sound information management and an awareness of employee concerns surrounding employee retaliation. The subsections below discuss these and other preparatory steps.

2C00 PROHIBITION AGAINST RETALIATION

COs must be concerned with gaining information that makes the onsite review useful to answering the question of whether the contractor complied with its obligations. If employees are afraid of cooperating for fear of retaliation, the onsite review could be compromised. COs should, therefore, take specific actions to notify and protect employees.

COs, when onsite, must inform the contractor's managers, employees and applicants that individuals exercising their rights under OFCCP's laws have protections from retaliation. Specifically, the regulations implementing EO 11246, Section 503 and Section 4212 prohibit interference and intimidation of any individual exercising his or her rights under OFCCP's laws. The CO must give this notice to the contractor at the entrance and exit conferences, and include it as a part of any interview conducted during the onsite review.

The prohibition against interference and intimidation includes threats, coercion, harassment and discrimination. Retaliation may take the form of adverse employment actions such as termination, demotion, failure to hire and harassment. As with interference and intimidation, contractors may not retaliate against an individual for exercising his or her rights under the laws enforced by OFCCP. Specific activities protected from contractor interference, intimidation and retaliation include:

- filing a complaint;
- assisting or participating in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the EO 11246, Section 503 and Section 4212 or other EEO laws;
- opposing any act or practice that violates any of these EEO laws; and
- exercising any other right afforded them by these laws.

2C01 USE OF THE STANDARD COMPLIANCE EVALUATION REPORT AND INFORMATION MANAGEMENT

a. *The Standard Compliance Evaluation Report (SCER).* The SCER documents the scope, progress and results of an onsite review.⁶⁸ It also includes notes confirming that a contractor met its obligations or describing any problem areas the CO identified during the desk audit, offsite analysis and onsite review. A CO may not be able to complete the desk audit portion of the SCER because the quality of the desk audit data is inadequate or was insufficient. In this example, the CO's initial task during the onsite review is to complete the desk audit portion of the SCER. You will find a copy of the SCER and instructions for completing it in Appendices A-1 SCER and A-2 SCER Instructions.

With a full understanding of the contractor's employment practices and affirmative action efforts, a CO may identify new problems or find that the contractor resolved previously identified problems. COs must describe problems identified during the onsite review and record any recommendations for corrective actions to resolved problems.

b. *Obtaining and Maintaining Records.* All communications and information COs gather during the compliance evaluation must remain in the case file. Examples of information or data a CO might gather are data and record submissions by the contractor; information gathered from other sources such as applicants and employees; and interviews with contractor officials, employees and others. This includes all information obtained during the onsite review. In addition, COs must document their activities and communications in

⁶⁸ COs will not use all the pages of the SCER in every evaluation. Rather, which sections of the SCER are appropriate to each review will depend on the type of compliance evaluation. However, COs must complete all relevant SCER pages and sections.

connection with the onsite review in the compliance evaluation or complaint Chronology Log.⁶⁹

These are several of the general principles for properly maintaining records:

- Every document collected during the review, even if it does not support the ultimate finding, is included in the case file. This includes both paper and electronic documents.
- All e-mail and other written communications must be dated, identify the individuals participating in the communication, and accurately reflect any agreed upon commitments. For example, the e-mails in a CO and contractor e-mail exchange on possible dates for the onsite review would reflect the CO's name and position, the name and position of the contractor's representative, the dates discussed and the dates for the onsite review that were agreed on.
- Original documents submitted by contractors or otherwise obtained by COs must not be altered. Alterations, including notes made by a CO, should be made on working copies.
- Interview statements, whether obtained by a CO in person or by telephone, must remain in the case file. These statements must include the name and position of the person conducting the interview, the name of the person interviewed and his or her title or position, the date and time of the interview, and the location of the interview. COs must also note if other people were present during the interview like the legal counsel or a personal representative. Interviewees should review and sign the CO's interview notes and typed statement indicating that they are accurate. Section 2M of this chapter provides specific information on interviews.
- Information obtained during interviews and a CO's observations must be reduced to writing as soon as feasible. The CO must type handwritten notes, using MS Word, before placing them in the case file.
- Supporting evidence must be in a clearly labeled section of the case file. Supporting evidence may include the CO's notes, worksheets, contractor data and any other material related to specific problem areas identified by the CO.

2C02 HISTORICAL DATA AND COMPLAINT HISTORY

Prior to going onsite, COs must check the electronic Case Management System (CMS) and the Executive Information System (EIS) to obtain a list of prior compliance evaluations of the establishment and identify any issues found in the previous OFCCP reviews. This information

⁶⁹ See Chapter 1, subsections 1B01 – Preparation and Maintenance of the Case Chronology Log; 1B02 – Creation and Maintenance of the Case File and Figure F-1 Case Chronology Log for additional information regarding the case file and Chronology Log.

may be useful when determining what information a CO wants to obtain or examine during the onsite review. If the CO previously performed this task as part of a related desk audit, the CO must review this information as part of the preparation for the onsite review. If OFCCP obtained a CA in a prior review, the CO must use the onsite visit to confirm that the contractor took and maintained the required corrective actions. If the purpose of the onsite review is to address questions that arose as part of the monitoring of a CA, the CO must develop an investigative plan that addresses those specific questions.

If COs do not already have information regarding discrimination complaints filed against the contractor with other agencies, they must contact the Equal Employment Opportunity Commission (EEOC) and the appropriate state or local fair employment practice (FEP) agencies to ascertain the existence, nature and scope of any complaints. COs must include the replies or information obtained from these agencies in the case file and incorporate them, as appropriate, into the onsite plan.⁷⁰ In addition, COs must check the Department of Labor's enforcement database⁷¹ for information on the compliance posture of the establishment and the VETS-100 database.

2C03 ONSITE PLAN

An onsite plan is an important step, and COs must develop one prior to each onsite review. Although the scope of the onsite review may change as a result of the onsite observations and evidence, the onsite plan serves as the initial outline or “road map” for conducting the onsite review.

The onsite plan must include each problem area identified during a desk audit and described on the SCER in Part A. For each problem area, the onsite plan must identify or describe the data and records the CO will obtain and review, interviews that the CO will conduct, and any other known relevant materials the CO will review while onsite. For example, additional information may include materials related to the desk audit findings like personnel records, payroll records, applications and resumes, and materials not included in the original submission like employment advertisements, position descriptions. Interviewees might include the human resources manager, selection officials and applicants for promotion.

The onsite plan must also include a list of technical items, such as the posting of the equal employment opportunity poster, that the CO will verify while onsite. Additionally, the plan must identify field office staff who will participate in the onsite review, and their roles and responsibilities. The onsite plan must also include the projected dates for the onsite review, as discussed with the contractor.

If a CO is going onsite as part of a focused review, the onsite plan will reflect the more limited scope of this type of review. Similarly, if a CO is going onsite to conduct a compliance check the onsite plan will be narrower. This is because the plan will not encompass all of the elements

⁷⁰ See Letters L-1 for a sample letter requesting complaint data from EEOC and state and local FEPS.

⁷¹ See <http://www.dol.gov/enforcementdata> (last accessed September 2011). Chapter 1, subsections 1B05 and 1B06 also include discussions on gathering information from the EEOC and other agencies.

of an onsite plan that the CO would develop for a full review. When conducting a compliance check, COs must use the Compliance Check Control Sheet to record whether the contractor maintained the appropriate records or whether the contractor needs to provide additional information and documentation.⁷²

2C04 NOTICE OF THE ONSITE DATE AND REQUESTS FOR ADDITIONAL INFORMATION

In preparation for the onsite review, the CO must contact the contractor, or the contractor's representative, to schedule the onsite review, request any additional information, and identify the contractor officials who will need to be available during the onsite visit. The CO must also inform the contractor that he or she may need additional information and interviews as the onsite review progresses. Having such a discussion prior to the onsite visit provides the contractor with time to locate and make available requested information and interviewees. It also provides notice that the CO may make additional requests for data and interviews.

The CO must provide the contractor with written confirmation of the onsite date(s) and time(s) at least three business days prior to the onsite. This confirmation must also include requests for other data and information that the CO is aware of at that time. The confirmation is sent to the contractor by certified mail, return receipt requested; however, a courtesy copy may be sent by e-mail or facsimile.

2D ONSITE PROCESS

The onsite review typically includes three important phases: entrance conference, facility inspection, and access to contractor records. However, other information may also be gathered. Each phase has its own unique challenges for COs and those related to the entrance conference, facility inspection and access to contractor records are discussed in the following subsections.

2D00 ENTRANCE CONFERENCE

The onsite review typically begins with an entrance conference with the CEO or highest ranking official in charge of the facility, his or her representative, and senior officials who are responsible for implementing the AAP(s). The entrance conference will provide general information to the CEO and explain the purposes of the compliance evaluation. During this conference, a CO will provide:

- a summary of the contractor's obligations under the programs administered by OFCCP,
- a description of the scope of the onsite review and the length of time that the CO anticipates being onsite, and

⁷² See Figure F-3 – Compliance Check Control Sheet.

- a description of the information needed while onsite.

A CO must also advise the contractor of the need to conduct confidential employee interviews. During the conference, the CO will inform the CEO of the need to meet again to discuss tentative findings of the investigation and any outstanding requests for data and information.⁷³

2D01 FACILITY INSPECTION

The facility inspection is an opportunity for COs to observe and evaluate the working conditions in departments or other organizational units of a contractor's establishment. It is also an opportunity to observe the composition and concentration of groups by race or ethnicity, or both. In addition, COs all have an opportunity to observe the composition and concentration of groups by sex and disability within the workforce. COs also use the inspection process to observe work performed in different job titles and to conduct brief focused interviews with supervisors and employees in order to obtain information about the facility and the work performed there. The CO will also conduct more formal interviews of supervisors, employees and the top union official, as appropriate, during the onsite visit.

By observing how employees complete their work, particularly in any job titles identified as problem areas, COs develop a better understanding of the functions and conditions of the job positions. This contributes to a CO's ability to make decisions and assess matters such as the relationship of certain job criteria to selecting individuals for certain jobs. For example, if females are underrepresented in a particular job title for which "the ability to lift 50 pounds" is a selection criterion, a CO may observe that the job is done with the use of mechanical equipment that performs the lifting rather than the employee. Further, the CO may observe that employees rarely lift 50 pounds without assistance from another employee. This observation allows the CO to question the contractor regarding:

- the timing and nature of the development of the selection criterion,
- the assessment that the criterion is job-related and consistent with business necessity,
- the changes in the selection process since the criterion's development,
- the point in the selection process when the selection criterion is applied, and
- the contractor's assessment of the validity of the selection criterion as a measure of whether an applicant can perform the job.

A facility inspection also allows COs to make observations regarding possible physical accessibility issues. COs must note whether there are physical barriers to applicants and employees. The presence of physical barriers does not mean that disability discrimination exists. Rather, a CO may use this opportunity to provide compliance assistance on providing reasonable

⁷³ See also 2C00 – Prohibition Against Retaliation.

accommodation to individuals with disabilities and disabled veterans. The CO may also ask about the contractor's process for receiving and handling requests for accommodation.

During the inspection, COs must visually confirm the posting of equal employment opportunity (EEO) posters and policy statements. Contractors are required to conspicuously display the *Equal Opportunity is the Law* poster, and EO 13496 requires that covered contractors post the prescribed notice of employee rights under the National Labor Relations Act.⁷⁴ Additionally, COs must observe and question, as appropriate, how the contractor provides notice to employees of the location and hours of availability of Section 4212 and Section 503 AAPs.⁷⁵ A CO must take notes during the inspection to record his or her observations, or record the observations immediately following the inspection. The CO must type handwritten notes, using MS Word, before placing them in the case file. During the inspection or during off-site analysis, the CO may verify required electronic postings. The CO must document his or her observations and findings in the SCER.

In appropriate circumstances, COs may also take photographs. However, if a contractor objects to the CO taking photographs, the CO must contact the District Office to discuss the contractor's concern.

2D02 ACCESS TO CONTRACTOR RECORDS

The agency's regulations require contractors to provide COs access to the contractor's books, records and accounts for the purpose of determining the contractor's compliance with the laws administered by OFCCP. When a CO knows that he or she will likely need to obtain copies of materials, the CO must initiate a discussion with the contractor regarding the need to obtain copies of materials prior to the onsite review. Working out the logistics for obtaining copies of requested materials prior to the onsite review may help the CO avoid conflicts. This may also be useful when scheduling the time needed to obtain copies of requested materials. If requested materials are available electronically, in a compatible format, the CO must accept the materials in electronic form. The CO must ensure that all requested data is present within the various materials.

Some of the types of records a CO will request and obtain prior to or during the onsite visit include:

- job applications for every applicant for the jobs at issue,
- personnel files,
- relevant payroll and HRIS data,
- labor agreements,

⁷⁴ See subsections 2100 – Technical Requirements of EO 11246, Section 4212, and Section 503; Chapter 2, subsection 2101 – EO 13496 Requirements.

⁷⁵ See 41 CFR 60-250.41, 41 CFR 300.41 and 41 CFR 741.41.

- policy and compensation manuals,
- directives,
- company newsletters, and
- posted job opening announcements.

COs must photocopy, digitize, transcribe or summarize pertinent information, as appropriate. If summarizing, the CO must describe the source documents in detail and describe the summarizing process. Also, the CO must ensure that his or her handwriting is legible. Photocopied originals are preferable to document summaries.

If a contractor objects to providing photocopying facilities or if, for any other reason, the CO must use an offsite copying facility, the CO will take appropriate precautions in removing original documents from the premises. COs must assure the contractor that the originals will return in a timely manner. It may also be helpful for COs, in coordination with a contractor official, to make a written inventory of the documents and materials that are being provided by the contractor for copying.

If the contractor refuses to provide access to materials or denies the CO the ability to copy requested materials, the CO will contact his or her supervisor to discuss denial of access concerns. It may be necessary to prepare an SCN for denial of access following this discussion. Chapter 8, Resolution of Noncompliance, is a source of additional information on this particular point.

2E EO 11246 AAP REQUIREMENTS

This section discusses the onsite review of identified problems related to the EO 11246 AAP and support data submitted for desk audit; the contractor's implementation of additional required elements of the AAP, and the contractor's good faith efforts and goals attainment. For each of the EO 11246 AAP elements, COs must indicate on the corresponding SCER section any problem areas identified during the onsite review and confirmation of any corrective actions taken by the contractor. Be aware that the desk audit results will already be recorded in the SCER.

The SCER will also include references to relevant evidence COs obtained during the onsite review and recommendations for any appropriate corrective action. It is important to note that COs may need to conduct an offsite analysis of evidence gathered during the onsite review to ensure a full understanding of the contractor's personnel activities and practices, and to appropriately identify problem areas that may constitute a violation requiring corrective action.

2E00 EO 11246 AAP AND SUPPORT DATA SUBMISSIONS

During the desk audit, a CO examines the contractor's AAP and support data to determine completeness or whether they included all the required elements, and whether the Executive

Order AAP and support data are acceptable. Part A of the SCER is used to report any problems in these areas. Before going onsite, the CO develops an onsite plan that reflects how the CO will address the identified problem areas during the onsite review.

A CO must conduct an onsite review to assess the contractor's implementation of its AAP(s). Before going onsite, a CO schedules an entrance conference the content of which is informed, in part, by the CO's onsite plan. The entrance conference must include a discussion of unresolved AAP deficiencies, especially if the official responsible for preparing and implementing the AAP(s) is present. The CO also explains which aspects of the program are unacceptable during the desk audit, and why they were unacceptable. The CO will also request that the contractor provide any additional information or documentation that the CO needs that the contractor did not provide as a part of the onsite review.

2E01 ADDITIONAL REQUIRED ELEMENTS OF AN EO 11246 AAP

The onsite review must include an assessment of the additional elements required in the EO 11246 AAP. The additional elements COs must examine are the designation of a responsible person for the AAP, the identification of problem areas, the use of action-oriented programs, and the existence of an internal audit and reporting system. Each element is discussed below.⁷⁶

- *Designation of Responsibility for the AAP.* The contractor's appointment of a person to be responsible for implementing the AAP must be an executive who has the authority and resources to ensure that the AAP is put into practice. COs must obtain a copy of the responsible official's position description to ensure that it includes implementing the AAP. During the interview, the official responsible for the AAP's implementation must describe how the specific provisions of the AAP are implemented. The roles of the interviewed officials in developing and implementing the AAP must be the same as specified in the written AAP. If they are not the same, COs must ask the contractor for an explanation.
- *Identification of Problem Areas by the Contractor.* To evaluate the contractor's in-depth analysis of its total selection process, by race, ethnicity and sex, COs must first review any problems the contractor identified in the AAP. The contractor's analysis of its total employment process should indicate whether and where impediments to equal employment opportunity exist based on its utilization, personnel activities, compensation analysis, and selection procedures. During interviews with individuals who contributed to the development of the AAP, implementation of the AAP, and who are involved in the hiring or selection process, COs must discuss the contractor's identified problem areas. COs must determine how the contractor identified each problem, the scope of the problem, what solutions the contractor implemented, and the effectiveness of the actions taken.

In its AAP, the contractor should identify concentrations and absences of any specific protected group within its workforce. During the onsite review, COs must seek to identify

⁷⁶ See Chapter 1, subsection 1F05, Additional Required Elements of AAPs.

any job titles for which there are significantly high or low representations of any protected group. COs must incorporate questions regarding these circumstances into the interviews with the contractor's supervisors and employees. Additionally, they must ask whether the company has disseminated and explained its EEO and harassment policies to employees, and whether the company has trained supervisors to understand their responsibility for carrying out the policies.

- *Action-Oriented Programs.* COs must ensure that the contractor took appropriate steps to eliminate impediments to, and disparities in, equal employment opportunity; to increase employment opportunities for underutilized groups; and to produce quantifiable outcomes. The contractor should design action-oriented programs to address any specific problems the contractor identified. The programs should specifically describe who is responsible for implementing the program, what actions the contractor will take and when and how the program will work. The onsite review often illustrates the contractor's compliance with this requirement when COs investigate other issues. For example, in requesting copies of position descriptions and discussing them with personnel, a CO can determine how recently the contractor reviewed the descriptions, if the descriptions are accurate and if the contractor's selection process screens for the knowledge, skills and abilities related to the position descriptions. Additionally, when the CO questions interviewees like the contractor officials, employees and third parties about the contractor's recruitment and outreach efforts, the CO can obtain information related to the action-oriented nature and relative success of these efforts.
- *Internal Audit and Reporting System.* The contractor must design and implement internal audit and reporting systems which measure the effectiveness of the total AAP. Beginning with the desk audit, COs evaluate the contractor's internal audit and reporting systems. COs must interview appropriate officials to gain an understanding of how the contractor conducts its audits and to request documentation of how the contractor reports the results of internal equal employment opportunity and affirmative action audits. COs must request documentation, in the form of copies of reports, or copies of minutes of meetings.

Below are several examples of relevant questions COs should ask contractors about their auditing and reporting system.

- What data does the contractor review as a part of the audits?
- How and when does the contractor gather and analyze the data?
- Does the contractor prepare written reports, other than the AAP? If so, how often?
- Who prepares the other written reports, who receives and reads them, and what is done in response to them?

COs must remember to record either their confirmation or description of problem areas identified in Part B of the SCER. The SCER must also include a description of any identified or implemented problem resolutions.

2E02 EVALUATION OF GOOD FAITH EFFORTS

One purpose of the onsite review is to evaluate whether the contractor made good faith efforts to implement the action-oriented programs outlined in the AAP. COs must assess good faith efforts on a case-by-case basis, taking into account all of the relevant facts and circumstances. However, in most situations good faith efforts will produce positive results. When a contractor's efforts have not produced such results, COs must ask the contractor to explain the following:

- why its efforts were not effective,
- why it did not make additional or alternate efforts, and
- why its additional or alternate efforts, or both, were not sufficiently effective.

During the desk audit, COs evaluate the contractor's past goal attainment and progress on meeting current goals, and identify any goal areas requiring further evaluation of good faith efforts. To make informed judgments about the quality of the contractor's good faith efforts, COs must be familiar with the local area's community resources, a list of which is maintained in each field office. The list of community resources may include non-profit groups, EEO organizations, faith-based groups and caregiver support groups that can assist contractors in attaining their goals. Chapter 1, subsection 1B, includes a discussion of community resources

During the onsite review, COs explore the contractor's good faith efforts through interviews with contractor officials, employees and other pertinent parties.⁷⁷ For each of the activities listed below, COs must identify and obtain documentation that provides evidence of the extent of the contractor's good faith efforts.

a. *Good Faith Efforts – Internal Placements.* For internal placements through actions like hiring and promoting current employees, good faith may include the contractor's efforts to address barriers to opportunities for women, minorities, people with disabilities, and protected veterans. Possible areas of inquiry on this point are listed below.

- *Disseminating Information About Internal Opportunities.* Are job openings posted? If so, are they posted where all potentially eligible employees would see them? Are all jobs posted, or only certain jobs or classes of jobs? Why? Are jobs posted promptly? Is there ample time to apply?
- *Providing Training Opportunities.* Does the contractor provide apprenticeship programs? On-the-job training? Tuition reimbursement? If so, for which employees are these opportunities available? Are employees in favored and nonfavored groups equitably represented?

⁷⁷ See also Chapter 1, Section L – Analysis of E0 11246 AAP: Goals Progress and Good Faith Efforts.

Federal Contract Compliance Manual (FCCM)

- *Providing Counseling and Encouraging Minority and Female Employees to Apply for Internal Openings.* How does this occur? How often? What does the counseling or encouragement consist of? Does the contractor periodically assess whether its efforts are successful? Is counseling and encouragement available for caregivers?
 - *Recruiting Externally into Feeder Job Groups.* What recruitment efforts is the contractor making? What resources is the contractor using?
 - *Reviewing Selection Criteria and Selection Procedures.* Did the contractor review its selection criteria and determine whether it is applying them in a nondiscriminatory manner? Whether the selection criteria might have a disparate impact? How does the contractor document the review? Did the contractor ensure that the officials and managers responsible for applying selection criteria and procedures are familiar with, and are implementing, the contractor's EEO policies? Is the contractor providing training? How frequently?
- b. *Good Faith Efforts – External Placements.* For external placement opportunities, evaluation of the contractor's good faith efforts may include exploring the below areas.
- *Recruiting Sources in the AAP.* Does the contractor use the recruitment sources listed in its AAP to reach out to minorities and women? If so, when and how? This inquiry includes the CO contacting at least some of the listed organizations to confirm and assess the contractor's use of the organization as a recruitment source.
 - *Using Other Recruitment Sources.* Does the contractor use other recruitment sources that are not listed in its AAP to reach out to minorities and women? Does the recruitment source provide assistance and support regarding caregiver issues? What are they? How useful have they been?
 - *Using the Media.* How are job openings advertised? Does the contractor advertise in publications or other media that are targeted to minorities and women? If so, which ones?
 - *Recruiting at Schools and Universities.* Does the contractor recruit at high schools, colleges, and universities that enroll large numbers of minorities and women? If so, which ones?

2E03 AUDIT OF EMPLOYMENT ACTIVITY TO ENSURE EQUAL EMPLOYMENT OPPORTUNITY

An essential part of the contractor's affirmative action program is that it audits its employment activity to ensure progress toward meeting its goals. COs must ask and consider the answers to these questions in order to begin understanding the contractor's audit process:

- Does the contractor audit its employment activity?
- Who is responsible for conducting the audit?

Federal Contract Compliance Manual (FCCM)

- What is involved in the audit?
- How frequently does the contractor conduct the audit?
- Does the contractor issue a report? What happens to the report?
- Do the CEO and other high ranking officials receive the report?

COs must also specifically examine records on the contractor's employment activity, and selection criteria and processes to understand the contractor's good faith efforts. Questions that may be useful to CO in these two areas of inquiry are provided below.

- Records of Employment Activities.* Applicant flow data may provide useful documentation about the effectiveness of the contractor's good faith efforts, as can internal bid lists and applications for posted job openings. Does either the applicant flow data or the bid lists, or both, show an increase in previously underrepresented groups in the applicant pool? If so, for what positions were the contractor's efforts effective? If there are no changes, or there are decreases in representation, what alternative actions has the contractor taken or proposed taking in the future?
- Review of Selection Criteria and Selection Procedures.* Did the contractor review its selection criteria? Did the contractor apply the criteria in a nondiscriminatory manner and determine whether the selection criteria might have an adverse impact? Did the contractor perform validity studies on any criteria found to have an adverse impact, and did the contractor properly determine the criteria to be job-related and consistent with business necessity? How frequently does the contractor review selection criteria? How does the contractor document the review? Do the contractor's efforts comply with the Uniform Guidelines on Employee Selection Procedures at 41 CFR Part 60-3? Did the contractor ensure that the officials and managers responsible for applying selection criteria and procedures are familiar with, and are implementing, the contractor's EEO policies? Does the contractor provide training? If so, how frequently is training provided?

COs must record findings on the contractor's good faith efforts in Part B of the SCER, and include supporting documentation and other relevant evidence in the case file. This includes materials such as copies of correspondence, job orders, bid lists for posted job openings, contractor recruiting manuals, relevant pages from labor agreements, employee manuals, and summaries of conversations and interviews with contractor representatives, employees, applicants and recruitment source contacts.

2F SECTION 503 AND SECTION 4212 AAPs, AND ADDITIONAL REQUIREMENTS

Contractors must prepare, maintain and update on an annual basis, an AAP for individuals with disabilities and an AAP for protected veterans. This section addresses the AAP requirements

under Section 503 and Section 4212 together because they are similar.⁷⁸ The contractor has the option to prepare a combined Section 503 and Section 4212 AAP or to prepare separate Section 503 and Section 4212 AAPs. COs use the onsite review to investigate problem areas they identified during the desk audit, to gather further information regarding the AAPs and their implementation, and to learn more about the contractor's employment activities and personnel practices. To gather information related to the Section 503 and Section 4212 AAP obligations, COs must interview contractor officials, employees and others, as appropriate. They must also identify and obtain documentation that evidences the contractor's compliance efforts. CO must record the information they obtain in the SCER Part B and include it in the case file.

2F00 AAP(S) AND SUPPORT DATA SUBMISSIONS

During the desk audit, COs examine the AAP(s) and support data to determine whether all required elements are included (completeness), and whether the AAP(s) and support data are acceptable. During the onsite review, they interview contractor officials and others regarding their development and implementation of the AAPs, and obtain documentation evidencing the same. COs record any problems identified during the desk audit in the SCER Part A. Any problems COs identify during the onsite review are noted in the SCER Part B. COs must examine whether the contractor satisfied the following elements that are required parts of Section 503 and Section 4212 AAPs:

- a. *Develop an Equal Opportunity Policy Statement.* COs must examine the contractor's written EEO policy statement, noting whether the contractor updates it annually and whether the information on the contractor's EEO Coordinator is current, including the coordinator's name, job title, location and phone number. Along with a statement that the contractor does not discriminate on the prohibited bases, the EEO statement must also reflect that the contractor will not subject employees and applicants to retaliation or reprisal. COs must verify that the EEO statement is clearly posted on bulletin boards in areas open to employees and applicants, and is communicated to employees and applicants.
- b. *Review of Personnel Processes.* Several questions are relevant to a CO's review of personnel processes and they include, but are not limited to:
 - Does the contractor's AAP provide for periodic review of personnel processes to ensure that the job qualifications of individuals with disabilities and protected veterans are considered? How is this done? When?
 - Do the personnel files contain notes regarding consideration for opportunities? Are these notes ever destroyed or removed from the personnel files? If so, why or at what point?
 - Does the contractor document its review of personnel processes and any actions it takes? How is that review conducted and by whom?

⁷⁸ See Chapter 1, subsection 1H – Review of Section 503 and Section 4212 AAPs for Acceptability.

All relevant documentation, including reports and personnel files, must be obtained and reviewed by the CO.

If the contractor asserts that its present personnel procedures are adequate, COs must confirm that the contractor gives individuals with disabilities and protected veterans hiring and promotional opportunities through a review of appropriate records and interviews with contractor officials and employees.

- c. *Review of Physical and Mental Job Qualifications.* The contractor is obligated to periodically review the physical and mental qualifications of its jobs and to eliminate those qualifications that tend to screen out qualified protected veterans or other individuals on the basis of disability, and are not job-related and consistent with business necessity. The AAPs should contain a schedule for this periodic review. Changes in technology, manufacturing processes, labor agreements, and changes in the industry are a few changes that may also trigger the review.

To begin to assess the contractor's review of its physical and mental job qualifications, COs must ask or consider the following questions:

- When did the contractor write or last update the job descriptions? Do the job descriptions accurately reflect the duties of the job? Do the job descriptions require the employee or applicant to perform duties in a specific way?
 - Are there job qualifications that would tend to screen out individuals on the basis of disability or disabled veterans?
 - Are the contractor's job qualifications based on business necessity? If not, are there alternative qualifications that the contractor can use?
 - Are there positions that do not have written job descriptions? If so, how does the contractor identify and review job qualifications?
- d. *Provide Needed Reasonable Accommodation to Qualified Individuals with Disabilities and Disabled Veterans.* Contractors must provide needed reasonable accommodation to the known physical and mental limitations of qualified individuals and disabled veterans unless the accommodation would cause an undue hardship. Accommodations may include, but are not limited to:
- modifying work places and making work places and other contractor facilities used by employees accessible;
 - restructuring of marginal functions of jobs;
 - allowing essential functions to be performed in a different way;
 - assigning nonessential functions of the job to other employees;

Federal Contract Compliance Manual (FCCM)

- providing readers, sign language interpreters or assistive devices;
- providing part-time work, flexible hours, or telework; and,
- reassigning employees to a vacant position, if necessary.

COs must verify that there is a process in place by which individuals can request needed accommodations and procedures exist for promptly responding to requests and implementing accommodations. They must also verify that employees and applicants are aware of the process and that officials responsible for implementing the procedures are knowledgeable and appropriately trained. CO must interview contractor officials and employees to confirm that the contractor implemented the procedures and provided needed accommodations in a timely manner. A reasonable accommodation does not have to have been provided if the contractor demonstrates that the needed accommodation would have caused it undue hardship. COs must also review the contractor's accommodation request records to see that the contractor responds to requests promptly and appropriately. All accommodations made by the contractor must be effective. Generally, this means it must provide the person who needs the accommodation the ability to perform essential job duties or, in the case of an applicant to apply for employment opportunities. If requests for accommodation were denied, COs must obtain documentation reflecting these decisions and the basis for the decisions to ensure that the denials were proper.

As a part of the desk audit, COs must examine whether individuals with disabilities can access the contractor's online application system and determine whether the contractor is providing reasonable accommodation, when requested, unless such accommodation would cause an undue hardship. During the onsite review, COs must question contractor officials, employees and applicants regarding how the online application system works and whether any accessibility problems have occurred. The COs will determine whether the contractor is providing needed reasonable accommodation when requested, unless such accommodation would cause an undue hardship. This includes providing an alternate means for an applicant to contact the contractor and apply for jobs other than through the contractor's online system. If there are application or testing kiosks onsite, COs must ensure that individuals with disabilities can access them, that information regarding how to request accommodation is clearly displayed, and that the contractor promptly made needed reasonable accommodations.

- e. *Develop and Implement Procedures to Prevent Harassment.* COs must confirm that the contractor developed and implemented policies and procedures for preventing harassment. Part of the process includes COs requesting a copy of the policies and procedures, interviewing the official responsible for implementation, and reviewing reports or internal investigations of alleged harassment and the contractor's response.
- f. *Disseminate EEO Policy Externally and Perform Outreach and Positive Recruitment.* COs must verify during the onsite review that the contractor engaged in outreach and positive recruitment activities. To do this, COs must conduct interviews with contractor officials and third party organizations regarding outreach and recruitment efforts. Interviews with applicants and employees may also provide information regarding these efforts.

Outreach and positive recruitment may also include linkage agreements.⁷⁹ COs must be prepared to refer the contractor to groups that serve individuals with disabilities, including disabled and otherwise protected veterans.

- g. *Disseminate EEO Policy Internally.* AAPs should clearly describe the methods the contractor used to disseminate its EEO policy internally. COs must verify that the contractor actually implemented these measures. They must also obtain documentation and verify through interviews that appropriate staff meetings were held to thoroughly discuss the policies. COs can also evaluate the effectiveness of the contractor's methods of internal dissemination, in part, from the participation of individuals with disabilities, and disabled and other protected veterans, in promotions and in training programs.
- h. *Design and Implement an Audit and Reporting System.* COs must confirm that the contractor has an audit and reporting system, and that it measures the effectiveness of its total AAP. The audit system should periodically review all of the contractor's employment practices and policies, compensation systems, recruitment efforts, training programs, reasonable accommodation procedures, and other terms, conditions and privileges of employment. COs must obtain copies of past audits, determine the frequency of reports, and when corrective action was taken, determine the nature of the problem and the effectiveness of the action taken to remedy it. The COs will also conduct interviews with responsible officials and employees.
- i. *Designate a Management Official to Assume Responsibility for Ensuring the Implementation of the AAP.* COs must obtain documentation regarding who the contractor appointed to serve as director or manager of the contractor's affirmative action activities. COs will seek an interview with the named individual to determine the specific responsibilities and authority assigned to that individual, how the official carries out those responsibilities, and how the official assesses the implementation of the AAP. COs must obtain documentation, such as a copy of the individual's position description, copies of reports the individual has prepared, and supporting documentation for any assessments the official conducted.
- j. *Train Personnel to Ensure that the Contractor Implements EEO and AAP Commitments.* COs must interview contractor staff, managers and officials to confirm that the contractor's personnel involved in the recruitment, screening, selection, promotion, discipline and related processes are knowledgeable about its EEO obligations. Questions relevant to this determination include:
- Does the contractor provide training to personnel? What type of training does the contractor provide? When, how frequently, and by whom is this training provided?
 - What are the trainer's qualifications?
 - Did the trainer use training materials? What were they?

⁷⁹ See Section 2K – Linkage Agreements.

- If the trainer used written training materials, the CO must request a copy.

2F01 AVAILABILITY OF AAPs FOR INSPECTION

COs must confirm that the contractor posted a notice, available to both employees and applicants for employment, stating that the Section 503 and Section 4212 AAP(s) are available to any employee or applicant for employment to inspect, upon request. When the contractor conducts personnel related business through the Internet, such as recruiting and disseminating employment notices, COs should strongly encourage the contractor to post AAP notices electronically. The notice must include the location and hours during which the documents may be obtained. An example of possible acceptable language is, "The AAP is available in the personnel office during regular business hours."

2F02 INVITATION TO SELF-IDENTIFY

Contractors must offer applicants the opportunity to self-identify as an individual with a disability under Section 503 or as a disabled veteran under Section 4212 after they extend a job offer but before the applicant begins working.⁸⁰ A contractor may invite individuals with disabilities and disabled veterans to self-identify prior to making a job offer when:

- the contractor is actually undertaking affirmative action for individuals with disabilities or disabled veterans, or both, at the pre-offer stage; or
- the invitation is made pursuant to a federal, state or local law requiring affirmative action for disabled veterans.⁸¹

Contractors may invite all other applicants to self-identify as a veteran protected by Section 4212 anytime before the applicants begin working.⁸² COs must confirm that the invitation to applicants to self-identify as an individual with a disability or as a disabled or protected veteran is voluntary. The contractor must keep information an employee provides regarding disability in response to the invitation to self-identify in a separate confidential file and not in the employee's personnel file. The contractor must not use an applicant's refusal to self-identify to subject the applicant to any adverse treatment. COs must confirm how the contractor used the information and ensure that the contractor used it only in accordance with the applicable regulations. A copy of the invitation must be obtained if it was not provided in the AAPs.

COs must examine the application or personnel file, or both, of each individual who self-identifies as having a disability. They must also review employment data indicating whether the contractor hired these individuals and, if not, the reason for nonselection. COs will also examine whether the individual requested a reasonable accommodation, and if so, review the appropriate accommodation records to determine whether the contractor handled the accommodation request

⁸⁰ See 41 CFR 60-741.42(a), 41 CFR 60-250.42(a) and 41 CFR 60-300.42(a).

⁸¹ See 41 CFR 60-250.42(a)(1)-(2) and 41 CFR 60-300.42(a)(1)-(2).

⁸² See 41 CFR 250.42(b) and 300.42(b).

appropriately. If the contractor denied an accommodation request, COs must determine whether the denial was proper and whether, if needed, the contractor provided a suitable alternative accommodation without undue delay. If any concerns are identified, COs will also interview the affected applicants, employees and others, as appropriate.

2F03 ADDITIONAL REQUIREMENTS

- a. *Disability-Related Questions and Medical Examinations.* Section 503 and Section 4212 prohibit contractors from asking applicants disability-related questions or questions that are likely to elicit information about a disability. These same laws also prohibit contractors from conducting medical examinations of applicants *until after a conditional job offer is made*. Once the contractor makes a conditional job offer, the contractor may ask disability-related questions and require medical examinations, regardless of whether they are related to the job, as long as this is done for all entering employees in the same job. COs must determine whether the contractor improperly made such inquiries on the job application itself or during the selection process, and whether the contractor administered medical examinations prematurely. The contractor needs to take corrective action to ensure the discontinuation of these unlawful practices.

COs must also assess whether the contractor used lawfully obtained disability-related information, including information about an impairment that is not “transitory and minor”, when withdrawing a conditional job offer.⁸³ If so, the contractor must show that the criteria used to withdraw the job offer from the individual with a disability or the disabled veteran are job-related and consistent with business necessity. This could possibly include showing that the individual would have posed a direct threat.⁸⁴

Disability-related inquires and medical examinations of *employees*, such as return to work exams and periodic physicals, are permissible only when, and to the extent that, they are job-related and consistent with business necessity. The contractor may not use information obtained as a result of such a lawful inquiry or exam in a way that discriminates on the basis of disability. Drug tests for the illegal use of drugs are not medical exams.

- b. *Confidentiality Requirement.* Whenever a contractor makes a disability-related inquiry or conducts a medical examination of an applicant or employee, the contractor must keep any information obtained about the individual’s impairments or health in a separate confidential medical file and not with personnel files. However, government officials investigating compliance with EEO laws may have access; the contractor may inform supervisors and managers of necessary restrictions or needed reasonable accommodations; and the contractor may inform first aid and safety personnel of any needs. COs must make an assessment of acceptability of the contractor's system for maintaining confidentiality of medical information, including inspecting where the records are kept, who has access to the records and why, and measures that ensure confidentiality of the records.

⁸³ An example of a transitory or minor injury is a simple sprain wrist expected to heal normally.

⁸⁴ For more information on direct threat see 41 CFR 60-741.2.

2G RELIGION AND NATIONAL ORIGIN REQUIREMENTS

COs must include assessment of the contractor's compliance with the *Guidelines on Discrimination Because of Religion or National Origin* as a part of the onsite review.⁸⁵ Although the Executive Order AAP does not require that the contractor include a reference to these guidelines, the contractor must still comply with them. COs must examine the contractor's policy statement to ensure that it references the contractor's obligation to provide equal employment opportunity without regard to religion and national origin. COs must also interview contractor officials and employees regarding implementation of the policy, including the provision of accommodation for religious observances and practices. COs include information obtained during the onsite review in the SCER in Part B III.

2G00 CONTRACTOR POLICY AND IMPLEMENTATION

A contractor must review its employment practices to determine whether members of various religious and ethnic groups receive fair consideration for job opportunities. COs must ask the contractor whether it conducted a review of its employment practices for this purpose, and if so, when, how, and whether they documented the review. If the contractor undertook a review, the CO must verify its results and the sufficiency of any corrective actions that the contractor implemented. In making this assessment, the CO will keep in mind that the scope of the contractor's efforts depends on a review of all circumstances, including the nature and extent of any problem areas, as well as the size and resources of the contractor. COs must take into consideration that contractors are not required to collect data on applicants' and employees' religious affiliation. Therefore, a contractor's self-analysis will not use employment records to identify employees' religious affiliations. If the contractor did not conduct a review, the contractor must take corrective action.

COs must verify that the contractor communicated the nondiscrimination policy to contractor officials, human resources personnel, employees and applicants, and that procedures implementing the policy are in place. A CO will also verify that the contractor has participated in recruitment and outreach efforts. A CO will review employment policies regarding nondiscrimination based on religion and the provision of religious accommodations. During interviews with contractor officials, employees, and applicants, a CO will ask about requests for religious accommodations and how the contractor responded to these requests. COs must obtain documentation regarding recruitment and outreach, and other affirmative action efforts.

2G01 RELIGIOUS ACCOMMODATION

The contractor must accommodate the religious observances and practices of its employees and prospective employees; unless it can demonstrate that making a particular accommodation would result in undue hardship on its business.⁸⁶ In interpreting the extent of the contractor's obligation to provide reasonable accommodations on religious grounds, COs must consider:

⁸⁵ 41 CFR Part 60-50.

⁸⁶ See 41 CFR 60-50.3.

- business necessity,
- financial costs and expenses, and
- resulting personnel problems.

The agency follows Title VII legal principles on religious accommodations.⁸⁷ COs should note that Title VII standards for religious accommodation are not the same as those for reasonable accommodation under Section 503 of the Rehabilitation Act. COs must ask the contractor whether and how it has made accommodation to the religious observances and practices of its employees.⁸⁸ COs must also ask whether the contractor denied any religious accommodation requests. If so, the CO will seek documentation and verification of the reasons for denial and ensure that they were proper. In reviewing employee files, COs must be alert for any pattern of discipline or terminations based on refusal to work on certain days based on religious observances. If the contractor reports that no requests were made, COs must review procedures available for evaluating such requests.

2G02 POTENTIAL HARASSMENT AND DISCRIMINATION

While conducting interviews and review of records, COs may obtain information regarding potential harassment or discrimination based on religion or national origin, or both. Like harassment based on race, sex or disability, harassment based on religion or national origin may take a number of forms, including name calling, negative treatment, derogatory speech directed at individuals of a specific religion, national origin, or ethnicity. If a CO obtains information about potential harassment or discrimination, the CO must investigate further to determine:

- whether the discrimination occurred in the past or is ongoing,
- whether the contractor knew or should have known of the discrimination,
- whether the contractor has internal discrimination and harassment complaint procedures in place,
- whether the contractor's internal discrimination and harassment complaint procedures are known to the employees, and
- whether the contractor has done anything to address the problem.

Additional information regarding harassment and hostile environment on the bases of race, color, sex, national origin, religion, disability or veteran status is discussed in Chapter 6, Complaint Investigation.⁸⁹

⁸⁷ Title VII of the Civil Rights Act of 1964, as amended, (sections 701(j), 703 and 717).

⁸⁸ See 41 CFR 60-50.3 and <http://www.eeoc.gov/laws/types/religion.cfm> (last accessed September 2011).

⁸⁹ See also Subsection 2M03 – Issues that Arise During the Onsite Review.

Additionally, if the CO finds indicators of disparate treatment or disparate impact,⁹⁰ or both, the CO must fully investigate the issue. The CO must obtain copies of any documents reflecting these concerns, or indicating how the contractor dealt with the concern. The CO must also interview people knowledgeable about the matter. If the investigation identifies issues specific to religious or national origin discrimination that the *Guidelines* do not address, the CO must follow Title VII principles in determining whether a violation may have occurred.

2G03 COMMUNITY CONTACTS

As part of the onsite review, COs may identify organizations representing the interests of various nationalities and religious groups located in the labor area serving the contractor's facility. COs may find it useful to contact such groups for information about possible employment problems experienced by their members who have applied for employment with the contractor.

2H COMPLIANCE WITH SEX DISCRIMINATION GUIDELINES

It is unlawful for a contractor to discriminate against any employee or applicant for employment because of sex. The contractor may not make any distinction based on sex in recruitment, hiring, firing, promoting, training, paying, assigning hours, assigning jobs, determining benefits, or in other terms, conditions, or privileges of employment.⁹¹ COs are reminded that discrimination on account of pregnancy, childbirth, childbearing capacity, or related medical condition is a form of unlawful sex discrimination. A few examples of unlawful pregnancy discrimination are:

- Refusing to hire pregnant women or women of childbearing capacity, or subjecting these women to adverse employment treatment because of their pregnancy or their capacity to bear children;
- Providing employees with health insurance that does not cover hospitalization and other medical costs for pregnancy, childbirth, and related medical conditions to the same extent that hospitalization and other medical costs are covered for other medical conditions;
- Denying an alternative job assignment or modified duties to a pregnant worker who is temporarily unable to perform some of her job duties because of pregnancy, childbirth, or related medical conditions when such assignments or modifications are provided to other workers whose abilities or inabilities to perform some of their job duties are similarly affected; and

⁹⁰ Disparate impact the theory of discrimination that focuses on the effect of a practice or policy. Disparate impact discrimination occurs when a contractor's use of a facially neutral policy or selection procedure (e.g., a test or degree requirement) disqualifies members of a protected class at a substantially higher rate than others and is not justified by business necessity and job relatedness. Discriminatory intent is not required. See definitions in the Key Words and Phrases section of the Manual.

⁹¹ 41 CFR Part 60-20.

- Firing a woman or requiring her to go on leave because she becomes pregnant or begins to physically show that she is pregnant.

To ensure compliance, COs must request a copy of the contractor's policies covered by 41 CFR Part 60-20 and examine whether the contractor implemented its employment activities and decisions in a manner consistent with Part 60-20. COs must examine the contractor's policy statement to ensure that it references the contractor's obligation to provide equal employment opportunity without regard to sex. COs must also interview contractor officials and employees regarding the implementation of the policy. The CO must include information obtained during the onsite review in the SCER in Part B III.

2H00 REVIEW OF CONTRACTOR POLICIES AND IMPLEMENTATION

This section on a CO's review of contractor policies covers eight areas: conditions of employment, distinctions based on marital status or caregiving responsibilities, bona fide occupational qualifications, employment opportunities, wage discrimination, employment advertising, employment benefits, and family and pregnancy leave.

- Conditions of Employment.* COs must examine whether contractor policies make prohibited distinctions in conditions of employment based on sex, including the basis of pregnancy, childbirth or related medical conditions, or on the basis of sex-based stereotypes, including those related to actual or perceived caregiver responsibilities. Contractors must not make employment decisions based on stereotypes about how males and females are "supposed" to look or act. Such employment decisions are a form of sex discrimination prohibited by Executive Order 11246, as amended.

Examples of discrimination based on sex stereotyping include, but are not limited to, adverse treatment of an employee or applicant for employment based on sex-based stereotypes about caregiver responsibilities. Adverse treatment of a female employee because of a gender-based assumption that she has family caretaking responsibilities and that these responsibilities will interfere with her work performance is an example of sex discrimination. Another common example is an employer paying a female employee less than a male employee for the same or similar job because the woman is married and the husband is presumed to be the "breadwinner" in the family. In contrast, decisions based solely on actual work performance are not generally discriminatory.

- Distinctions Based on Marital Status or Caregiver Responsibilities.* COs must examine written policies and conduct interviews with contractor staff and employees regarding the implementation of policies and practices to identify whether distinctions between married and unmarried people apply equally to both sexes, including distinctions between single parents and married parents based on gender. In addition, COs must assess contractor policies and practices to ensure that sex-based stereotypes about actual and perceived caregiving responsibilities are not in effect. For example, a CO may find a practice of male employees being given the opportunity to participate in high profile activities that could lead to promotion and that female employees are not given these assignments because of the stereotype that female employees must deal with day care and childrearing responsibilities.

- c. *Bona Fide Occupational Qualifications (BFOQ)*. As a part of most onsite reviews, COs examine job qualifications as stated by the contractor. Under Title VII, sex has been found to be a BFOQ in extremely rare instances. Among them are:
- *Authenticity*. Jobs involving a need for authenticity or genuineness, such as actors or models.
 - *Personal Privacy*. Jobs where the performance of essential job elements would entail substantial invasion of personal privacy (e.g., a permanent restroom attendant). This is limited to situations where the normal operation of the contractor's business depends on the employee being the same sex as its employees or customers and there is no other way to ensure privacy. This is different from customer preference. For example, a contractor cannot refuse to hire female salespeople in the belief that male customers will not accept them as well.
- d. *Employment Opportunities*.
- *Hazardous Jobs*: Contractors may not exclude women from jobs they may believe are dangerous or unsuitable for women to perform unless sex is a BFOQ.
 - *Reproductive Hazards*: OFCCP follows Title VII principles when determining whether a policy excluding women from a job because of a concern about reproductive hazards is discriminatory. If a question relating to reproductive hazards arises during a compliance evaluation, COs must discuss the issue with their supervisors.
- e. *Wage Discrimination*. COs must examine possible wage discrimination issues. Compensation discrimination encompasses discrimination in pay and benefits. It may also include discrimination in how employees earn or contractors distribute raises and bonuses. Contractors cannot make distinctions in pay, benefits, raises or bonuses, or access to earnings opportunities or better paying job opportunities on the basis of sex. Whether as a result of the desk audit analysis of compensation data or a focused review of compensation practices, if COs identify areas for investigation, they must gather additional information and conduct interviews regarding the contractor's compensation policies and practices. Section 2L has additional information on compensation.
- f. *Employment Advertising*. COs must examine the contractor's advertisements in newspapers, online and in other media. The advertisements must not express a sex preference unless the job is one for which sex is a BFOQ. It is prohibited to place ads in columns headed "male" or "female" (or "male interest" or "female interest"), or that otherwise indicate a partiality with regard to sex, because that would be an expression of preference, limitation, or specification based on sex. For example, applicants or potential applicants may perceive an advertisement for a "craftsman," as opposed to "craftsperson," as seeking male applicants only and may have the effect of only male applicants applying for the position.
- g. *Employee Benefits*. See Section 2H01, Discrimination and Harassment, for a discussion.

h. Family Leave and Pregnancy Leave. See Section 2H01, Discrimination and Harassment, for a discussion.

2H01 SEX DISCRIMINATION AND HARASSMENT

During the onsite review, COs gather information and conduct interviews to determine whether the contractor developed and implemented policy prohibiting sex discrimination in accordance with the *Sex Discrimination Guidelines*. As mentioned earlier, this type of discrimination may take many forms. OFCCP's policy is to interpret the nondiscrimination provisions of EO 11246 consistent with Title VII principles, including, of course, the nondiscrimination requirements related to pregnancy, childbirth, and related medical conditions. COs should be familiar with the applicable law in this area, such as the Family and Medical Leave Act, as well as understand how the application of policies and the absence of policies may result in discrimination and harassment.

a. Family and Medical Leave Act. The Family and Medical Leave Act (FMLA) was enacted in 1993.⁹² In part the purpose of FMLA is to address the needs of families and caregivers as affected by the demands of the workplace, specifically addressing leave issues. OFCCP and the Department's Wage and Hour Division (WHD), which enforces FMLA, entered in a MOU.⁹³ Under this MOU, OFCCP incorporates a FMLA inspection into its compliance evaluation and complaint investigation procedures, as discussed below.

b. Family Leave and Pregnancy and Disability Leave. The CO will examine the contractor's policy regarding leave in light of the prohibition of discrimination based on sex, including pregnancy, and FMLA.

- **Family Leave Required under the FMLA.** During the course of a routine compliance evaluation or complaint investigation, the CO will determine whether the FMLA notice is posted and whether written guidance about the provisions of FMLA is provided in accordance with 29 CFR 825.300. Incidents of suspected noncompliance with these provisions are referred to WHD. In addition, the CO may examine the application or use of these policies by the contractor for any adverse treatment of, or adverse impact on, any specific group protected by OFCCP's legal authorities. This is distinct from enforcing violations of family leave requirements. The FMLA requires employers of 50 or more employees to provide up to 12 weeks of unpaid, job protected leave for qualified workers for a worker's pregnancy or own serious health condition, or when a worker becomes a new parent. Covered employers are also required to provide FMLA leave to employees caring for a covered family member with a serious health condition (e.g., a mother caring for a child with cancer). Additionally, various states have their own family and medical leave laws that may provide additional leave or additional coverage.

⁹² Family Medical Leave Act, Pub. L. 103-3 (29 U.S.C. 2601).

⁹³ The MOU between OFCCP and WHD was signed in September 1993.

- **Pregnancy Disability Leave.** The CO must examine whether the contractor has a sick leave or disability leave policy (written or unwritten), and leave for conditions associated with childbirth.⁹⁴ The CO must also examine whether the contractor's leave policy, or lack thereof, has an adverse impact on employees of one sex and is not justified by business necessity.

These requirements apply regardless of whether the contractor is a covered contractor under the FMLA or whether the employee qualifies for FMLA leave.

- Employee Benefits.* The *Sex Discrimination Guidelines* state that a contractor complies with the Executive Order if its contributions for employee benefits, sometimes referred to as fringe benefits, are the same for men and women or if the resulting benefits are equal. Subsequent to the publication of the *Guidelines* in 1978, the Supreme Court has held that under Title VII an employer must provide equal contributions and equal benefits to men and women, even if doing so costs more for one sex than the other. OFCCP's policy is to interpret the nondiscrimination provisions of EO 11246 consistent with Title VII principles. COs must, therefore, obtain information to determine whether a contractor is providing equal employee benefits for men and women, regardless of cost.
- Sexual Harassment.* Although not specifically mentioned in the *Guidelines*, sexual harassment, as well as harassment based on race, color, national origin or religion, is a violation of the nondiscrimination provisions of EO 11246. During the onsite review, COs must be alert for any indications of such harassment. OFCCP follows Title VII principles when determining whether sexual harassment has occurred.
- Sex-Based Stereotyping and Caregiver Discrimination.* Differential treatment for an employment-related purpose based on sex-based stereotypes, including those related to actual or perceived caregiving responsibilities, is a violation of Title VII of the Civil Rights Act of 1964. For example, it is prohibited to deny advancement opportunities to similarly situated mothers that are provided to fathers or women without children, based on stereotypes about mothers in the workplace; it is also prohibited to deny to fathers access to family-friendly policies like workplace flexibility that employers provide to mothers, based on stereotypes about fathers' roles in care giving.
- Treatment of Pregnancy, Childbirth, or Related Medical Conditions.* Title VII, as amended, provides that women affected by pregnancy, childbirth or related medical conditions are to be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

⁹⁴ "Leave" as used here includes but is not limited to eligibility for leave, duration of leave, accrual of seniority and reinstatement rights.

2I TECHNICAL REQUIREMENTS

Contractors have an obligation to meet certain “technical” requirements such as notices and postings requirements. Although these requirements are referred to as “technical requirements,” that does not mean that they are unimportant. On the contrary, some of these requirements are extremely important and crucial to ensuring that contractors meet equal employment opportunity obligations and that failure to meet these obligations does not result in discrimination. The affirmative action clauses of EO 11246, Section 503 and Section 4212 mandate these technical requirements. Additionally, the contractor may have posting and other requirements under EO 13496.

While COs may have adequately confirmed some of these requirements during the desk audit, they verify other requirements during the onsite review. COs can provide compliance assistance to the contractor at any time during the review process in order to expedite resolution of identified problems. However, the contractor’s failure to comply with a technical requirement constitutes a violation.

If the contractor asserts that it fully corrected identified problems of a technical nature, COs must seek to confirm this assertion. For example, if a required posting under EO 11246 or EO 13496 was missing and the contractor agreed to correct this problem, the CO must conduct a visual inspection to determine that the required posting is now present. The CO must include any other outstanding technical violations in the Notice of Violations.⁹⁵

2I00 TECHNICAL REQUIREMENTS OF EO 11246, SECTION 4212 AND SECTION 503

In addition to requiring that covered contractors not discriminate against, and take affirmative action on behalf of, covered group members, the laws enforced by OFCCP contain a number of other requirements that COs must verify the contractor has met. COs must inspect the appropriate contractor records and obtain copies of them, as needed. COs must record their observations and whether the requirements were met in the SCER in Part B.

a. Technical Requirements Applicable to the EO 11246, Section 503 and Section 4212.

- Contractors must advise subcontractors, including vendors who are subcontractors, of their obligation to comply with non-discrimination obligations and develop an AAP if they meet coverage thresholds. Contractors should also insert the Equal Opportunity (EO) Clause into contracts with covered subcontractors. The clause may be included, either in its entirety or by reference, in all covered contracts and subcontracts (including purchase orders). In the absence of the clause in covered documents, it is applicable by operation of law. COs must question contractor officials as to how, and when, such notification occurs and must review a sampling of sub-contracts to determine whether they include the required clause.

⁹⁵ See Chapter 8 – Resolution of Noncompliance.

Federal Contract Compliance Manual (FCCM)

- Contractors must post notice of their EEO and affirmative action obligations in conspicuous places, available and accessible to both employees and applicants for employment. For example, EEO posters should be in break rooms, common areas for employees and areas frequented by applicants for employment. COs must conduct a visual inspection to confirm the required posting.
- Contractors must inform any labor unions or worker representative organizations with which they have a collective bargaining agreement or other agreement of the contractor's EEO and affirmative action commitments under the regulations. COs must obtain documentation that indicates the contractor provided this notice and will confirm receipt of notice with union representatives.
- Contractors must develop and maintain an AAP for each establishment. COs must confirm that the contractor is meeting this obligation. Please note that this provision applies to Corporate Management Compliance Evaluations (CMCEs) only. For a full discussion of CMCEs review Chapter 4.

b. Technical Requirements Applicable Only to EO 11246.

- The contractor must have filed a current Employer Information Report EEO-1 (EEO-1 Report). This report identifies the race, national origin and sex of the contractor's employees, by job category. COs must confirm the EEO-1 Report filing.
- Contractors must notify subcontractors, including vendors who are subcontractors, of their obligation to file an EEO-1 Report annually. COs must confirm that the contractor met this obligation.
- Advertisements and solicitations for employment must state that the contractor will consider all qualified applicants, regardless of race, color, sex, national origin or religion. COs will review a sample of such advertisements and solicitations.

c. Technical Requirements Applicable Only to Section 4212.

- The contractor is required to submit a VETS-100A Report annually.⁹⁶ The report includes the numbers of disabled and other protected veterans in the contractor's workforce by job category and hiring location. Contractors must also collect data indicating the total number of employees and covered veterans hired during the reporting period. COs must confirm the contractor filed the VETS-100A Report.⁹⁷ If it was not, COs must notify the Veterans' Employment Training Services (VETS) office at DOL.

⁹⁶ If the covered contract predates December 1, 2003, and was not modified after that date for a total contract value of more than \$100,000, the contractor is required to submit the VETS-100 form annually.

⁹⁷ Director's Alert 2011-1 creates the requirement that COs and others, as appropriate, obtain VETS-100 database user accounts and that the regions report the number of COs with active accounts to the national office.

- Under Section 4212, contractors must list employment openings with the appropriate employment service delivery system when the openings occur. Contractors must list all employment openings except for executive and top management positions, positions filled internally and jobs lasting three days or less. If possible, COs will contact the employment office (employment service delivery system) used by the contractor in advance of the onsite review and request confirmation that the contractor has listed its employment openings with that office. COs must obtain from the employment office a listing of the job orders the contractor placed, by job title and date. COs must then compare this list with the list of jobs the contractor has filled through new hires, identify any jobs not listed with the employment office, and determine whether they should have been listed.

2I01 EO 13496 REQUIREMENTS

Pursuant to Executive Order 13496 and its implementing regulations, 29 CFR. Part 471, federal contractors and subcontractors, beginning on June 21, 2010, must notify employees about their rights under the National Labor Relations Act (NLRA). Contractors with covered contracts must meet their obligations under Executive Order 13496.⁹⁸

Executive Order 13496 requires that covered contractors post notices specifying employee rights under the (NLRA). The NLRA guarantees employees the right to organize and bargain collectively with their employer, and to be free from retaliation for so doing. Contractors must post the notice conspicuously in and around their establishments, work sites, and offices so that it is prominent and employees who are covered by the NLRA and directly or indirectly (e.g., maintenance, repair, personnel, payroll work) engaged in contract-related activity can readily see it. COs must inspect employee bulletin boards and areas frequented by applicants and employees, such as break rooms, personnel offices and common areas, for the required poster. If the contractor customarily posts employee notices regarding the terms and conditions of employment electronically, then the contractor must also post the EO 13496 notice electronically. COs must verify the contractor's compliance.

EO 13496 also requires that covered contractors ensure that each subcontract and purchase order related to their federal contract(s) contains a notice of this posting obligation. COs must review a sampling of subcontracts and purchase orders to ensure that a covered contractor complies with this requirement.

There are exceptions to the posting requirements so COs must consult with the regional SOL, their supervisors or the National Office if there are questions about coverage under EO 13496.⁹⁹ If a violation of EO 13496 is not corrected, the Director of OFCCP, or a designee, refers the matter to the Director of OLMS, who may take enforcement action, as appropriate, under 29 CFR 471.13.

⁹⁸ See OFCCP Directive Number 290, issued June 15, 2010.

⁹⁹ See Executive Order 13496 Frequently Asked Questions, http://www.dol.gov/ofccp/regs/compliance/EO13496_faqs.htm (last accessed Oct. 23, 2011).

2I02 RECORDKEEPING

COs must verify that the contractor has complied with all regulatory requirements regarding personnel records. If the contractor's recordkeeping is not in conformance with 60-1.12; Part 60-3; 60-250.80; 60-300.80 and 60-741.80, the CO must record the recordkeeping violations in the SCER in Part C. Failure to preserve complete and accurate records as required by these regulations constitutes noncompliance with the contractor's obligations. If the contractor has destroyed or failed to preserve records, the CO may presume that the information would have been unfavorable to the contractor. Additionally, if a contractor's case file has multiple citations for recordkeeping violations and there is evidence of a recurrence, the CO will treat it as a repeat violation.¹⁰⁰

2J SUPPORT AND PERSONNEL ACTIVITY REQUIREMENTS

The CO's objective as a neutral fact finder is to gather data and information during the investigation to determine whether there are violations of the laws OFCCP enforces, and if so, what caused them. Once gathered, the CO must analyze the information. The CO will do this using any or all of a variety of methods, as appropriate. While the CO may choose to perform some analysis onsite, the CO will perform much of the analysis offsite, even though the onsite phase of the review is still open.

If the impact analysis conducted by the CO during the desk audit¹⁰¹ indicates an adverse IRA, there is a need for further analyses and investigation with regard to each adverse IRA. Based upon any additional data obtained during the desk audit or the onsite review, the CO may conduct a refined IRA, adverse impact analysis, additional cohort analysis, and/or appropriate statistical analyses. If the analyses indicate evidence of disparate treatment or adverse impact, or both, resulting from the employment process, personnel activity or application of selection criteria, the CO must determine whether the problem constitutes unlawful discrimination. The CO does this by examining all of the relevant information gathered during the compliance evaluation (e.g., employment data, the CO's observations, anecdotal evidence obtained during interviews) and applying the appropriate discrimination proof model to the facts of the case. If the CO determines that the contractor engaged in unlawful discrimination, the CO will record this violation finding in the SCER in Parts C and F. If, on the other hand, the determination is that no violation exists the CO records that finding in the Case Summary and Recommendations section.

2J00 ANALYZING THE SELECTION PROCESS

¹⁰⁰ See Chapter 8 – Resolution of Noncompliance.

¹⁰¹ See Chapter 10 – Analysis of EO11246 AAP: Audit of Personnel Activity and the Impact Ratio Analysis.

- a. *Identifying and Mapping the Employment Process.* The CO must determine how the contractor's selection process for the job or opportunity under examination works, including identifying all of the steps and decision points involved. The employment process usually consists of decisions and actions an employee or applicant must take such as applying for the job, as well as qualification points such as passing a test or interview in order to move to the next stage of the process. Once the CO identifies the employer's process, he or she may find it helpful to "map" or create a diagram representing the process and the points or steps in the process where the contractor can eliminate an employee or applicant from further consideration. In addition to mapping the process, the CO will need to gather information to understand when the process was instituted, why, by whom, whether there have been changes in the process and if so, when and why.
- b. *Identifying Pass/Fail Points.* If an individual must successfully navigate a certain step(s) in the process before proceeding on to the next, that step(s) is a "pass/fail point." Ideally, the CO can examine each pass/fail point to see if the contractor is disproportionately screening out members of any specific group. However, if the contractor does not eliminate individuals at separate steps throughout the process, but instead weighs their performance at each step to formulate a final decision, then the CO evaluates the process as a whole. To do this, the CO must ask the contractor to explain the importance and weight of each step in the selection decision. If an analysis of the entire selection process shows that the contractor disproportionately screens out members of a specific group the CO must attempt to determine the particular criteria that are the source of the problem.
- c. *Lack of Data:* If the contractor failed to maintain adequate data as required by 41 CFR Part 60-3, the CO must cite the contractor for this violation. If the contractor's lack of data hinders the CO's ability to determine the step or criterion that disproportionately eliminated members of the nonfavored group, then the CO must conduct the analysis based upon the "bottom line effect" or the existence of an adverse impact due to the total selection process. However, under such circumstances the CO must obtain as much information as possible about the process and make every effort to identify the step or criterion causing the problem. Below is a very basic example of the concept.

Example. A selection process consists of: 1) completing an application; 2) having a high school diploma; 3) taking a written test; and 4) participating in an interview during which the contractor accepts or rejects the applicant. In this example, applicants must demonstrate they have a high school diploma before taking the test, and must pass the test before participating in an interview. For each applicant, the CO must determine the applicant's race and/or ethnicity and sex, whether the applicant had a high school diploma, the test results, and the results of the interview including the interviewer's notes, if any. This information is used when determining the number of members within each group eliminated at each step of the process. The CO must conduct an adverse impact analysis at each stage of the selection process to determine whether adverse impact occurs.

If the contractor's application process, or any part of the process, is subject to the Internet Applicant Rule, the CO must obtain applicant data and information regarding the basic

criteria used in determining applicants for the job.¹⁰² The CO must discuss with his or her supervisor the appropriate analyses for Internet applicants.

- d. *Relevant Pools.* The relevant pool for each step of the contractor's selection process includes the individuals who made it *to that step* in the selection process compared with those who made it *through to the next step*. In the example in (c), above, if the CO is analyzing disparity in hiring rates, he or she would first consider the pool of all applicants to determine whether the high school diploma requirement is the source of the adverse impact. If the high school diploma requirement does not fully explain the disparity in hiring, the CO would next determine whether the test disproportionately eliminated members of the nonfavored group. Finally, the relevant pool for evaluating the effect of the interview would be all applicants who have a high school diploma and passed the test. Therefore, any difference in their selection rates would be attributable to the interview.

2J01 DISTINGUISHING OBJECTIVE FROM SUBJECTIVE SELECTION CRITERIA

The contractor's selection criteria fall into two broad categories: "objective criteria" and "subjective criteria."

- a. *Objective Criteria.* The central characteristic of an objective criterion is that it can be independently verified. With objective criteria, different people measuring the criteria will reach the same results because they are clearly defined or quantifiable in nature. For example, if the criterion is possession of a certain diploma or degree, whether the individual has the degree or not is an independently verifiable fact.
- b. *Subjective Criteria.* Subjective criteria require judgment in their application. Therefore, people can differ in opinion on whether a particular candidate possesses and meets such a criterion. For example, two selecting officials may easily have differing opinions on whether a candidate "has good leadership skills." In this example, if disparities exist in the application of the subjective criteria between groups, the CO would gather information to determine if the contractor applied the subjective criteria based on stereotypes. An example of this might be a statement made by hiring official that men commonly display leadership qualities that women do not.

In most cases, the CO will first analyze a contractor's use of objective criteria and the resulting impact, followed by an analysis of the contractor's use of subjective criteria and the resulting impact. Decisions based on subjective criteria involve the use of "judgment calls" by the contractor. Clearly, it can be difficult to assess whether subjective criteria are applied equally to all similarly situated applicants or candidates are tainted by prohibited stereotyping of groups. Generally, when the CO cannot attribute an adverse impact to objective criteria it is likely attributable to the use of subjective criteria. This is most likely where the CO finds that the reasons for the decision are undocumented or the contractor characterizes the decision in a subjective manner like saying that the applicant was "a good fit."

¹⁰² See Section 1G – Review of Executive Order Support Data for Acceptability.

In some instances, the CO will find that the contractor used multiple criteria when making the hiring decision. When this occurs, the CO must determine if the person selected was required to meet each criterion individually or whether the contractor balanced the criteria (e.g., assigns weight to each criterion) in reaching a decision. If meeting each criterion was a requirement, the CO must perform the appropriate analysis for each one. If the criteria are weighted, the CO must establish how they were weighted in order to determine how to conduct an analysis.

For example, a contractor gives each criterion a specific weight but one criterion is not met by a candidate. The contractor, however, selects that candidate. The CO must analyze each criterion independently to, among other things, determine the relevance of each criterion in the selection process. If, however, a contractor gives each criterion a score, and it is the cumulative score that determines whether a candidate is selected, the CO would analyze the cumulative criteria. The contractor may also refer to criteria as “minimum” or “preferred.” Minimum qualifications are usually treated as “pass/fail” whereas preferred qualifications are those that the contractor may prefer but are not necessarily required. The CO must determine whether, and how, the contractor is using this criterion in making employment decisions.

2J02 ANALYSIS OF OBJECTIVE CRITERIA

The first step in analyzing the contractor’s use of objective selection criteria is verifying that the criteria were actually used to make selections and that they were applied uniformly to all members of the favored and nonfavored groups. COs only need to consider the contractor’s stated legitimate objective criteria.

- a. Single Criterion.* To examine the application of the criterion, the CO must determine whether the same criterion was applied to each individual and that data reflecting the application of the criterion are available for all individuals in the relevant pool.
- b. Multiple Criteria.* When there are multiple criteria, or there is no summary record available to determine whether the people selected met the criteria, the CO will need to create a summary record. The CO can do this by creating a spreadsheet or a database that contains all relevant data for each individual applicant or candidate, or both. Based on the example in subsection 2J01(a) above, the spreadsheet data for each applicant would include race/ethnicity, sex, high school diploma or no diploma, test result and interview result. The spreadsheet will allow the CO to analyze the data more readily and determine whether the multiple criteria were applied uniformly to each applicant and the result of their application (e.g., the applicant or candidate was either selected or not selected).
- c. Interpreting the Results of Criteria Verification.*
 - When the review of individuals selected is complete, the CO must review the spreadsheet data to see if each selectee actually met the criteria. The CO may conclude that the contractor used the criteria if everyone met the criteria.

- If a substantial number of individuals selected do not meet a particular criterion, the CO may discount the contractor's statement that the criterion was the basis for the decision.
- If the contractor used the criterion in a non-uniform manner. This means determining whether the contractor applied the criterion differently to members of the favored group when compared to the nonfavored group. This comparison will reveal any disparate treatment.
- If the contractor applied the criterion uniformly to members of the nonfavored group and favored group, then the CO must analyze the effect of the application of the criterion for adverse impact.

2J03 ANALYSIS OF OBJECTIVE CRITERIA FOR ADVERSE IMPACT

- a. *Pool of Individuals Used for Statistical Calculation.* In an adverse impact calculation, the CO compares the number of individuals from each group (by race, ethnicity, and sex) who were assessed using the criterion at issue with the number from each group who met the criterion. This yields a “pass rate” or “selection rate” for each group, and the CO then tests the difference in pass rates between the groups for adverse impact.
- b. *Performing the Adverse Impact Calculation.* First, the CO must determine whether each objective criterion is a pass/fail requirement, (i.e., it eliminates an individual from further consideration if it is not met), or whether it is considered along with other criteria in making a final decision.
 - For each pass/fail criterion, the CO must determine whether the difference in pass rates for members of each group (by race, ethnicity, and sex) shows adverse impact.
 - When the criteria are not considered singly but are considered together in reaching a decision, the CO must determine how the contractor weighted each criterion to make a selection. Using the weights used by the contractor, the CO must determine whether this is causing the adverse impact. If it is not possible to isolate the contribution of the individual criterion to the bottom line effect, the CO will calculate the cumulative effect of all the criteria. This calculation may be appropriate when the contractor did not keep records of the effects of the individual criteria.
- c. *Measurement of Statistical Significance.* Measurement of the statistical significance of a difference in selection rates, whether by standard deviations or another method, indicates the probability that a particular disparity in those rates could or could not have occurred by chance. The greater the disparity between the percentage of a specific group (e.g., women) actually selected and the percentage of the group expected, the more likely the variation did not happen by chance but was a result of the selection factor used to screen. When there is a significant probability that the disparity in selection rates for members of a nonfavored group could not have happened by chance, this is strong evidence of adverse impact.

2J04 ANALYSIS OF SUBJECTIVE CRITERIA AND DETERMINATION OF ADVERSE IMPACT

The CO will generally undertake an analysis of subjective criteria only after first determining the effects of any objective qualifications used by the contractor. Subjective criteria are analyzed in essentially the same way as objective criteria: namely, the CO first makes a determination as to whether the contractor is actually using the stated subjective criteria (verification) and then whether the contractor is applying them to members of all groups (if not, disparate treatment may have occurred). If the contractor applied subjective criteria to all groups, then use of subjective criteria will be analyzed for adverse impact.

The CO determines this by comparing the selection rates of members of favored and nonfavored groups who met the subjective requirements to determine whether statistically significant differences exist. If the disparity in these selection rates is not significant, then it is highly unlikely that discrimination resulted from the use of the subjective criteria. If the disparity is significant, then adverse impact exists and disparate impact discrimination may have occurred. The adverse impact analysis here is the same as the analysis described in 2J03 for the objective criteria analysis.

2J05 JUSTIFICATION OF SELECTION PROCEDURES WHEN ADVERSE IMPACT IS IDENTIFIED

According to the *Uniform Guidelines on Employee Selection Procedures* (UGESP), the use of any selection procedure or criterion that has an adverse impact on hiring, promoting or other employment opportunities of members of any race, ethnic group, or sex is discriminatory unless the procedure is shown to be validated or otherwise job-related and consistent with business necessity.¹⁰³

It is the contractor's responsibility to provide validity evidence sufficient to justify each selection procedure or criterion found to have adverse impact. Validation is the demonstration of job-relatedness by showing the relationship between the selection procedure and job performance. If in conducting the analyses of the contractor's selection procedures, COs find that a selection procedure or criterion had an adverse impact, they must ask the contractor to provide all available information regarding its validation of the criterion in question. The contractor should provide information regarding the following:

- Development of the procedure and criterion, including, if the procedure is a written test, whether the contractor developed it internally or purchased it from a vendor;

¹⁰³ See 41 CFR 60-3.3A for the UGESP.

- Validity studies it conducted, including the correlation coefficient (criterion and construct validation), or how the selection criterion or test content is linked with job requirements, that is, content validation;¹⁰⁴
- Job analysis in the case of content validity studies and job information that describes how and why the selection criterion was chosen for criterion-related validity studies;¹⁰⁵ and
- Consideration given to alternative selection criterion, the reason for rejecting the alternatives considered, and any efforts made by the contractor to lessen the adverse impact.¹⁰⁶

COs must analyze this information, along with the analysis finding adverse impact caused by the use of the selection procedure and any other relevant evidence, in accordance with UGESP. Further analysis of the selection procedure or criterion at issue, or both, and their validation, will be coordinated between the Regional Office and the National Office.¹⁰⁷

2K LINKAGE AGREEMENTS

COs are required to make contact with community organizations and recruitment resources as part of their assessment of a contractor's recruitment efforts. This requires that the CO have knowledge of the resources available in the community to provide assistance to contractors in resolving employment deficiencies. OFCCP encourages and facilitates such "linkage" relationships between contractors and community recruitment resources.

2K00 LINKAGE OBJECTIVES

OFCCP's online Resources Directory may provide sources of potential linkages. The following are OFCCP's objectives with respect to facilitating and encouraging linkages:

- To increase employment opportunities available to minorities, identified race/ ethnic groups, women, individuals with disabilities and disabled and otherwise protected veterans;
- To enhance the effectiveness of OFCCP's compliance activities by providing contractors with additional recruitment sources;
- To assist federal contractors in meeting their affirmative action hiring and promotion goals; and

¹⁰⁴ See 41 CFR Part 60-3.5, 3.14 and 3.15.

¹⁰⁵ See 41 CFR Part 60-3.14A; 60-3.14B(2) and (3).

¹⁰⁶ See 41 CFR Part 60-3.3B.

¹⁰⁷ See OFCCP Directive 267 (Oct. 15, 2004) on the investigative procedures used when a test is one cause of adverse impact in hiring.

- To increase cooperation between private sector employers and community recruitment resources.

2K01 LINKAGE REQUIREMENTS

COs must seek to develop new linkages between community recruitment and referral sources and contractors that have made insufficient recruitment efforts to generate applicants that satisfy their affirmative action objectives. Before a CO urges contractors to use the resources, the CO must identify and contact organizations to affirm that they can be of assistance, and to explain what is expected of both parties.

2K02 IMPLEMENTATION UNDER EO 11246

When linkage is needed, a CO must take the following actions to establish linkage agreements during the course of the compliance evaluation:

- a. Identify those job groups in the contractor's workforce where goals were established and there was employment activity, but the goals were not met.
- b. Evaluate the contractor's good faith efforts to identify possible recruitment sources for those underutilized job groups.
- c. Contact appropriate linkage resources to obtain specific information on availability of potential applicants and potential trainees for positions in the areas of underutilization. If possible, the CO must arrange a meeting between the resource organization(s) and the contractor.
- d. When a resource appears to be a likely source of applicants or trainees, the CO will include the contractor's commitment to utilize the linkage source along with other actions in the CA.¹⁰⁸
- e. The CA will require progress reports at least semi-annually. With respect to linkages, these reports should contain:
 - Total hire activity by job group, broken out by sex, race, and other relevant covered group status; and
 - Total hire activity and number of people referred from each linkage source agreed to in the CA, and any other appropriate source, broken out by sex, race and other relevant covered group status.

2K03 WHERE LINKAGE AGREEMENTS ARE NOT REQUIRED (EO 11246 Only)

¹⁰⁸ See Chapter 8 – Resolution of Noncompliance.

The establishment of new linkages is not required if a CO finds that the contractor's utilization approximates availability for the given job group. If this is true, utilization does not appear to be a problem. Additionally, if it is determined that a current recruitment and referral source with which there is an existing linkage is no longer able to provide the needed assistance, it may be appropriate to discontinue the existing linkage. The CO will assist the contractor in establishing replacement linkages if they are needed.

2K04 LINKAGE AGREEMENTS FOR INDIVIDUALS WITH DISABILITIES AND DISABLED AND OTHERWISE PROTECTED VETERANS

Linkage arrangements involving recruitment or referral sources for individuals with disabilities, and disabled veterans and otherwise protected veterans are necessary when either or both of the following exists:

- A review of employee records, job applications and applicant flow data shows that there are few applicants who are members of these covered groups; or,
- There are no applicants, and the outreach and recruitment for people from these groups is non-existent or ineffective.

If the contractor needs new linkage relationships, the CO will follow the same steps to establish appropriate linkages for these groups as he or she would when establishing linkages to meet affirmative action goals for other groups.

2K05 CONFIRMATION OF LINKAGE AGREEMENT

At the conclusion of the compliance evaluation, the CO will provide written notices to all of the linkage resources or partners in the agreement with the contractor. A sample of a linkage letter is at Letter L-5 – Sample Linkage Letter. The contractor must be provided a copy of the letter. The CO must document the notifications in the case file.

2L COLLECTING INFORMATION

It is likely that the CO will need to review and evaluate offsite at least some of the data collected during the onsite review. For example, the CO may need to conduct analyses to determine whether disparate treatment and/or disparate impact have occurred. Therefore, the CO must gather the data necessary to conduct a proper analysis for both favored and nonfavored groups. The CO will also need to obtain all available data necessary to secure a full understanding of the contractor's employment practices and processes, including how they apply to any actions or processes the CO is examining.

Generally, the review period begins two years prior to the contractor's receipt of the Scheduling Letter and ends when the violations that were identified are corrected and remedied. This, of course, assumes that coverage is established for the full review period. The CO may need updated records and data for the period following the start of the review to update the information initially submitted by the contractor or to investigate issues first identified onsite.

For example, the CO must request data relevant to the potential discrimination issues identified at the desk audit to determine how long the violation extends and whether the violations continue to the present day. Such information is necessary for the CO to ensure that the contractor stops any identified discrimination and to determine what remedies victims need if they are to be made whole. On the other hand, the CO may need to review information relating to periods more than two years prior to the contractor's receipt of the Scheduling Letter where the potential for continuing violations exists.

The data collected should include, but not be limited to, applications for all applicants, test results, all interview notes, personnel files, policies and procedures, employment data and other relevant contractor documentation. The CO must also request employment data that the contractor had not previously submitted. For example, if a review of information indicates that the contractor did not include its entire workforce in its AAP(s),¹⁰⁹ the CO should request data and information regarding this determination. The CO will examine whether the contractor's determination not to include these workers as employees was correct or whether that decision improperly omitted or misclassified workers. If the contractor misclassified the workers or otherwise should have included them in the contractor's AAP(s), the CO must consider the employment data for these workers in the analyses.

To ensure the CO obtains all needed information, he or she makes a list of the data and other information needed from the contractor prior to departure from the onsite review. The CO must update this list, adding new items as the CO becomes aware of them, and recording when he or she received the requested or needed items.

2L00 TYPES OF EVIDENCE

The CO will obtain, review and analyze employment data, documents, policies, procedures, interview statements and observations throughout the review. An example of an observation that might be significant is the absence of women working on the loading dock. The CO will examine all the information to assess whether sufficient evidence exists to determine whether prohibited discrimination or other violation occurred during the review period. If either did occur, the CO must determine whether the discrimination or other violation is ongoing.

There are two broad types of evidence: direct evidence and circumstantial evidence. Direct evidence is evidence that, if believed, directly proves a fact. For example, an e-mail from the contractor's director instructing supervisors not to hire women into certain jobs or a statement by a manager that "we don't hire women here" would constitute direct evidence of discrimination against women. In contrast, circumstantial evidence is evidence that creates an inference or presumption of a fact. For example, data showing that the difference between the selection rates for blacks and non-minorities in the laborer job group is 3 standard deviations is circumstantial evidence of discrimination against blacks. The statistics do not *directly* prove discrimination. But if there is no non-discriminatory reason for the statistical discrepancy, discrimination against blacks will be inferred.

¹⁰⁹ An example is a contractor excluding temporary workers or independent contractors for the AAP.

The CO may use direct evidence and circumstantial evidence, either alone or in combination, to prove discrimination. The key question when determining if the contractor has engaged in discrimination is assessing whether the evidence, direct or circumstantial or both satisfies the appropriate burden of proof of discrimination.

Anecdotal evidence often supports statistical evidence of discrimination in systemic cases. Anecdotal evidence may be either direct or circumstantial, and is first-hand accounts of personal experiences with discrimination by the contractor at issue that bring “the cold numbers convincingly to life.” Documents the contractor submits may contain anecdotal evidence, or COs may obtain anecdotal evidence from interviews with managers, employees or applicants. In some cases, OFCCP may find systemic discrimination based only on anecdotal evidence that directly supports a pattern or practice of discrimination.

For example, the company president sends an e-mail to managers stating his concern that women are unable to lift heavy objects and that if women are hired for stockroom positions there will be a higher risk of on the job injuries that will impact the company’s profitability. This anecdotal evidence could support a finding of discrimination against women applicants for stockroom positions at that establishment.

2L01 PERSONNEL ACTIVITY AND SELECTION PROCESS

During the onsite review, it is imperative the CO develop an understanding of the contractor’s employment procedures and practices. This includes obtaining copies of selection policies and procedures related to areas where the CO identified potential discrimination during the desk audit. The CO can also garner crucial information from interviews of human resources personnel, selecting officials, employees (e.g., hired, promoted or terminated during the review period) and other individuals identified as participating in or being affected by the selection process such as those who were candidates for open positions but were not hired or promoted. The CO must also gather contact information from potentially knowledgeable individuals no longer employed by the contractor, if applicable.

The type of information the CO will gather depends on identified concerns; however, some examples are provided below.

- *Hiring Data.* This includes job group and/or job title identification, copies of personnel files, payroll records, job applications, job announcements, staffing requisitions, advertisements (internal and external postings), job descriptions, job status (e.g., permanent, temporary, full or part-time), minimum qualifications, preferences, applicant flow data, documentation created at each stage of the selection process (e.g., selecting officials’ interview notes, computerized screening of Internet applicants), phone screen procedures and testing information.
- *Promotions.* This includes from and/or to promotion identification, copies of personnel files, payroll records, promotion policies and procedures, internal advertisements and bid sheets, candidate flow data for eligible candidates, payroll data, documentation created at

each stage of the promotion process (e.g., officials' interview notes), phone screen procedures, and testing information.

- *Terminations.* This includes job group and/or title identification, copies of personnel files, payroll records, information regarding voluntary and involuntary terminations, termination policies and procedures, documentation of the reason for termination, exit interview notes and documentation, termination letters and contact information for terminated employees.

2L02 SELECTION PROCEDURES AND TESTING

As noted in subsection 2J05 above, the UGESP at 41 CFR 60-3.3A states that using any facially neutral selection procedure or criterion resulting in an adverse impact on hiring, promoting or other employment opportunities of members of any race, sex or ethnic group is discriminatory unless the contractor proves that its use is justified. Information that the CO will obtain to assess whether the contractor's selection procedures or criteria have an adverse impact may include:

- A written description of the selection steps and criteria applied;
- A copy of the job description(s);
- A copy of all records the contractor created to implement the selection procedures or criteria during the review period. Examples of these records include test results, individual test scores, instruction manuals related to testing or selection procedures, interview forms and interview results. When the selection process includes a battery of tests, the CO must be sure to collect the scores for each part of the battery, as well as the composite or overall scores and learn how the contractor determined them. If the contractor is administering a test at a specific location, it is often helpful to see the testing location;
- Obtain signed interview statements from the contractor representatives who administered the selection procedure during the review period. The interviews need to include information about how the contractor administered the selection procedure, when they initiated the procedure, whether the contractor made any changes to the procedure, and when and why the changes were made. Additional information would include whether the contractor validated the selection procedure;¹¹⁰ and whether there were any efforts to minimize the adverse impact. If efforts were made, COs must determine what those efforts were; and
- A copy of all job analyses or job information describing how the contractor established job requirements, and
- Copies of any validation studies conducted by the contractor.

¹¹⁰ Validation means demonstrating that using the selection procedure met the validation standards of the UGESP.

Example interview questions the CO will ask may include these areas of inquiry:

- What are the selection procedures and criteria?
- How does the contractor administer the selection procedures? Are interviews and tests conducted in similar settings? Are they conducted by multiple individuals? Who administers each procedure? Who is the decision maker for each procedure?
- How did the contractor score or rate each selection procedure or criterion, or both? Is there a passing score set for each one? Is it weighted? How was it weighed and why? Does the contractor score or rate the candidates cumulatively? If so, how?
- How does the contractor select or “pass” candidates on the selection procedure (e.g., total test score, based on performance during interview)?
- How did the contractor come to use the selection procedure? If the procedure was a test, did the contractor develop it internally or by an external contractor or vendor? Did the contractor purchase a pencil and paper test?
- If the CO has identified adverse impact at any stage of the selection process, is the use of the procedure or criterion responsible for that impact justified by business necessity? What has the contractor done to consider alternative procedures with less impact? What actions did the contractor take to validate the selection procedure or test? Are there any validation reports or studies? Did the contractor consider such reports or studies, or both?

2L03 COMPENSATION

Investigation of potential compensation discrimination presents complex and nuanced issues. The choice of the best approach for a case depends upon the underlying facts, the available data, and the contractor’s compensation system and practices. As such, OFCCP takes a case-by-case approach to analyzing compensation issues. In every case there are three key questions to be addressed, and onsite review may provide data or information necessary to answer them:

- Is there a measurable difference in compensation on the basis of sex, race, or ethnicity?¹¹¹
- Is the difference in compensation between comparative employees under the contractor’s wage or salary system?
- Is there a legitimate explanation for the difference?

¹¹¹ In situations where there is sufficient data and analytic power to use regression analysis, a measurable difference generally means a statistically significant difference, two standard deviations. In the situation of disparities in small group and/or individual compensation, a measurable difference and sufficient evidence will be determined in conformance with Title VII principles.

Federal Contract Compliance Manual (FCCM)

An onsite review may include analysis of workforce data and contractor compensation policies and practices; interviewing personnel and employees; examining payroll and Human Resource Information Systems (HRIS); and any other information necessary to understand or analyze compensation data or practices. In conducting the onsite COs examine all employment practices that have the potential to lead to compensation disparities. Prior desk audit results may assist the CO in identifying particular practices or issues to investigate.

Compensation includes any payments made to, or on behalf of, an employee as remuneration for employment, including but not limited to salary, wages, overtime pay, bonuses, commissions, vacation and holiday pay, allowances, reimbursements for expenses, expense account, insurance and other benefits, stock options, profit sharing. Compensation discrimination includes unexplained and unmerited differences in these areas but may also include discrimination in how employees earn or contractors distribute raises and bonuses. So, in examining compensation issues, COs must be mindful to include how the contractor treats fringe benefits. For example, if the contractor is not providing equal fringe benefits and/or not making equal contributions to insurance plans or pensions for men and women, this may constitute discrimination.

The compensation a group of employees or an individual employee receives may be negatively affected by denial of equal access to certain earnings opportunities. COs must examine employee access to opportunities affecting compensation such as higher paying positions, job classifications, work assignments, training, preferred or higher paid shift work, and other such opportunities. COs should also examine policies and practices that unfairly limit a group's opportunity to earn higher pay such as "glass ceiling" issues and access to overtime hours, pay increases, incentive compensation, and higher commission or desired sales territories. Differences may be observed in these and other areas:

- base salary;
- job assignment or placement;
- opportunities to receive training, promotions, and other opportunities for advancement;
- earnings opportunities; and
- access to salary increases or add-ons such as bonuses.

CO's must focus the onsite review on the information and practices relevant to the employer, industry and types of workers. For example, overtime issues are relevant to hourly and non-exempt workforces, while high level salaried positions may involve substantial bonuses, stock options and other incentive compensation. For sales employees, both commission and account or territory assignment practices may be relevant.

In addition to reviewing potential evidence of systemic pay discrimination, COs may use onsite reviews to determine if there is evidence sufficient to support an inference that individual or cohort pay differences are due to discrimination. Absolute pay differences between comparators,

without any other evidence of pretext or possible discrimination, generally are not sufficient to support an individual disparate treatment analysis.

For purposes of evaluating compensation differences, employees are similarly situated where it is reasonable to expect they should be receiving equivalent compensation absent discrimination. Relevant factors in determining similarity may include tasks performed, skills, effort, level of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others. For example, when evaluating a job assignment issue, workers are similarly situated when their qualifications are comparable, but they are assigned to jobs at different levels. Who is similarly situated for purposes of an individual analysis or review of a single specific employment decision may be determined based on different criteria than when conducting a systemic discrimination analysis. Onsite review allows COs to make assessments of similarly situated employees or jobs by observing, by conducting interviews and by reviewing documents.

OFCCP will evaluate, on a case-by-case basis, information from the contractor regarding the factors the contractor considered in making compensation decisions. A factor is an element that the contractor offers to explain differences in employee compensation under its compensation system and practices. Factors may include internal and external elements potentially affecting compensation. A factor may be a qualification or skill that the worker brings to the position such as education, experience, etc. It may also be an employment element such as position, level or function; tenure in position; performance ratings, etc.

COs will use information gathered at the onsite review to evaluate whether these factors actually explain compensation, whether they are implemented fairly and consistently, whether data regarding that factor is accurate, and whether they should be incorporated into the analysis to be conducted.

The CO must also confirm that the amount of compensation offered to individuals with disabilities and veterans with disabilities is not reduced due to them receiving a reasonable accommodation or any disability income, pension, other benefit received from another source. To verify compliance with this requirement, the CO will request the files of identified individuals with disabilities and/or disabled veterans, along with those of people without disabilities in the same job titles, and compare their compensation

2M INTERVIEWS

Based on results of the desk audit, the CO will develop an onsite investigative plan that includes interviews of contractor personnel, employees and applicants, as appropriate. The CO must meet with the contractor's staff members who are knowledgeable about the contractor's employment policies and practices. During these interviews, the CO will clarify any questions he or she may have regarding the contractor's organization, structure, corporate culture and other issues identified during the desk audit. This is also the CO's opportunity to become more familiar with the contractor's informal or unwritten policies and practices, and to compare these to written

materials and practices outlined in the AAP. Interviews with employees and applicants may provide further information regarding the application of the contractor's procedures.¹¹²

If reasonable accommodation for an interviewee is necessary, the CO will arrange for the interviewee to receive the accommodation. Additionally, if the interviewee needs a translator, the CO will arrange for this in advance of the interview or schedule the interview to ensure translation services are present.

2M00 GENERAL INTERVIEW PRINCIPLES AND PROCEDURES

Interviews may be informal or formal. An informal interview may occur during the facility inspection while a formal interview occurs during a scheduled meeting with a pre-planned list of questions.

As the onsite review proceeds, there will be continuing discussions between COs and contractor personnel. COs must document in writing the content of these discussions as soon as possible. It is a good practice for COs to review their notes of these discussions with the interviewee to ensure they accurately reflect the interviewee's statements.

a. Reason for Interview. CO initiated interviews are conducted with an identified purpose or goal. Reasons for interviews may include:

- gaining understanding of contractor policies and procedures,
- obtaining relevant general information,
- corroborating information received from other sources, and
- identifying additional areas for investigation.
- Depending on the results of the desk audit, the CO will pay specific attention to the contractor's employment practices, including compensation, hiring, termination and promotion practices. The CO will also conduct interviews with managers and employees that focus on contractor practices with regard to equal employment opportunities for minorities and women, for individuals with disabilities and for disabled and other veterans protected by Section 4212.

b. Interview Plan. As a part of the onsite plan, the CO must develop appropriate questions and identify specific individuals to interview regarding each identified potential problem area or compliance issue. Each planned interview or group of interviews should have an interview plan that indicates the topics the interview will address and spells out the initial questions the CO plans to ask. Interview plans will vary depending on whether the interviewee is a manager, other employee, unsuccessful candidate for hire, etc. If there is an individual that

¹¹² See 2C01(d) – Obtaining and Maintaining Records.

the CO identified for interview but did not interview, the CO will make a note in the case file as to why the interview did not take place.

- c. *Informing the Interviewee.* The CO will tell each interviewee, at the outset of a formal interview that:
- the CO will show the interviewee his or her statement containing the answers to the questions asked during the interview, and
 - the CO will ask the interviewee to sign his or her statement.

The CO will inform each interviewee that knowingly providing false or inaccurate information is unlawful and will explain that the following phrase is included in the interview notes where the interviewee signs:

"I have read the above and it is a true and accurate to the best of my knowledge."

In addition, each time the CO speaks with someone who is not a member of management he or she must inform the individual that the interview is kept confidential to the extent possible. The CO must inform all individuals, regardless of their position with the contractor, that it is unlawful for the contractor to intimidate them or take retaliatory action against them for participating in an interview.

- d. *Contractor's Presence at Interviews.* When the CO conducts onsite interviews with non-management personnel, the contractor does not have the right to have a representative present. When the CO conducts interviews with upper level managers and directors that speak for or make decisions on behalf of the company, the contractor may have an attorney or other representative present. The exception to this is when the manager is not speaking for management. An example may be when the manager is a member of a potentially affected group speaking about the potential discrimination or his or her personal experience or acting as a whistleblower.
- e. *Employee Representative Present at Interviews.* An employee may request that a personal representative, such as a union representative or legal counsel, accompany him or her during the interview. This is generally acceptable; however, the CO must discuss the presence of the representative with the interviewee privately to determine whether there may be a conflict of interest or whether the interviewee feels pressured into having the person present. If the individual wants the representative to be present the CO will note the representative's name and title on the documentation of the interview.

COs must be aware that, in some instances, the presence of a representative may affect confidentiality or other privileges. The CO must consult with RSOL if there are any questions about the impact of the presence of a third party on confidentiality or privileges.

- f. *Formal Interviews.* After a formal interview, the CO must ask each person to read, sign and date the CO's interview notes. At the conclusion of the interview, the CO will review the questions asked and the answers given, and obtain confirmation that any direct quotes are

accurate and that all paraphrases convey the interviewee's intended meaning. The CO will promptly type the handwritten interview notes using MS Word in order to provide the interviewee with a hard copy to sign as soon as possible after the interview. The CO must enter the following phrase above the space where the interviewee will sign:

"I have read the above and it is a true and accurate to the best of my knowledge."

If the interviewee must receive a hard copy of the interview for signature later, the CO must obtain a personal mailing address from the interviewee and a contact phone number. The CO will mail the hard copy to the interviewee. If the interviewee wants corrections made, the CO must incorporate the corrections and send a hard copy of the interview to the interviewee to sign. The CO maintains records of both the original and the corrected interview in the case file. If an interviewee refuses to sign the notes, the CO will record this and the reason(s) for refusal to sign, if known.

- g. Informal (Unplanned) Interviews.* At any point in the review process, a potential witness may approach the CO to provide information related to the review. The CO must make every effort to meet or otherwise interview the potential witness. The CO will follow the interview procedures described in this section.

If, however, the potential witness is unwilling to be interviewed and only wants to provide the information, the CO must document the conditions under which the employee provided the information. For example, the CO records that the employee provided the CO with a document, briefly describes and attaches the document to the memorandum, and indicates in the memorandum that he or she was unwilling to be interviewed. The CO must then use other means to verify the credibility of the information provided in this manner.

- h. Location of Interviews.* The CO normally conducts interviews during the onsite review phase of the compliance evaluation. However, the CO may conduct interviews via telephone, as appropriate. There may be situations when a contractor refuses to allow onsite interviews of non-managerial employees or where such employees want their interviews conducted away from the establishment. When possible, the CO will attempt to explore alternatives with the contractor or the employee, as appropriate. One possible alternative is conducting interviews during meal breaks. Other options might include interviewing an employee onsite prior to the start of work shifts, or at the end of his or her shift. A CO may also conduct interviews at an offsite location.
- i. Telephone Interviews.* The CO will conduct telephone interviews only when it is not feasible to conduct the interview in person, since the CO cannot observe the interviewee's demeanor during a telephone interview, making credibility determinations more difficult. However, when telephone interviews of employees or applicants are necessary, the CO must type the resulting notes and send a copy to the interviewee for review, revisions, as appropriate, and signature. The CO will ask whether there is anyone else present with the interviewee to address any concerns this may create.

2M01 MANAGEMENT INTERVIEWS

COs must identify the managers that played a role in making employment decisions that the COs determine, through the desk audit review or other onsite analysis, need clarification. Examples of the types of questions that a CO should ask are below.

- How did the contractor make the personnel or other decision? What procedures were used? Are these procedures customarily used? Are exceptions made to these procedures made? If so, under what circumstances or when are exceptions made?
- How were the qualification criteria evaluated?
- What was the decision process? What was your role in the process or personnel action? Were you the sole decision maker or part of a team of decision makers? What did you base the decision on and what information did you have when making the decision?
- Is the contractor making efforts to reach out to or establish linkages with groups representing veterans, individuals with disabilities, women and minorities? Describe those efforts.

2M02 EMPLOYEE INTERVIEWS

When onsite, COs must interview current employees, including those identified as possible members of an adversely affected class and members of the favored group who the contractor hired for the position at issue. The COs must also interview individuals who may have information that is relevant to potential problem areas. Examples of the types of questions that the CO should ask during these interviews are below.

- Do you know whether management uniformly applies [describe the practice or procedure under investigation]? Does management make exceptions to the process? If so, under what circumstances or when are exceptions made?
- Do you have first-hand experience with the practice or procedure? If so, explain when and under what circumstances?
- What are the duties associated with the job at issue? Are the qualifications for the job necessary or related to job performance?
- Are you aware of company policies and procedures related to EEO?
- Are you aware of any instances where the company violated EEO policies?
- Do you know anyone else who might have knowledge about this practice or procedure?

2M03 ISSUES THAT ARISE DURING THE ONSITE REVIEW

During the course of the onsite review, or while interviewing employees and managers, issues may arise that were not identified during the desk audit review. If this happens, the CO must appropriately follow-up on the new issues. For example, if the issue concerns a possible systemic violation by the contractor or is relevant to the compliance evaluation in progress, the CO must include the matter in the ongoing investigation. If the matter is one alleging an individual instance of discrimination, or if someone files a complaint during the ongoing compliance review, the CO must discuss the matter with his or her supervisor to determine how to best proceed.¹¹³

2N EXIT CONFERENCE

Upon completion of the necessary onsite review and evaluation of all information obtained, COs will discuss the tentative findings of the compliance evaluation with the contractor at the onsite exit conference. The onsite exit conference should be held with the contractor's CEO executive officer or designee at a mutually agreed upon location. The CO will reiterate to the contractor that EO 11246, Section 503, and Section 4212 prohibit intimidation or retaliation of anyone assisting or participating in the investigation.¹¹⁴ An exit conference does not mean that the onsite review is complete; therefore, COs should avoid making any statements that could lead the contractor to believe that the CO is no longer able to request a follow-up onsite or to seek additional information.

2N00 AREAS TO COVER AT THE EXIT CONFERENCE

COs must schedule the exit conference for the final day of the onsite visit. At this conference, the CO must be prepared to describe the aspects of the investigation and to discuss the tentative findings of the compliance evaluation in general terms. The CO will inform the CEO, or designee, of the next steps in the compliance evaluation process, of any outstanding or additional requests for information, and of the possibility that a PDN or NOV could be issued.

2O RETURN ONSITE VISIT AND DENIAL OF ACCESS

After the initial onsite review, a return onsite visit may be necessary if the CO identifies the need for additional data or personnel interviews. The CO must discuss this possibility with his or her supervisor.

When a second onsite visit is needed, the CO will follow the onsite procedures as described in this chapter. However, if the contractor can timely submit additional data or information without an onsite visit, the CO does not need to conduct a return onsite visit, unless the contractor fails to provide the information.

¹¹³ See also Chapter 6 – Complaint Investigations.

¹¹⁴ See also 2C00 – Prohibition Against Retaliation.

If the contractor refuses to provide the requested data or information or does not allow a follow up onsite visit, the CO will prepare an SCN for denial of access. More information on this issue is in Chapter 8, Resolution of Noncompliance.

2P INVESTIGATION SUMMARY OR REPORT WRITING

Throughout the compliance evaluation, the CO will use the SCER Part C to record potential discrimination issues that the CO identified and investigated. The CO will also use the SCER worksheets to specify:

- whether a particular issue or problem needs analysis as an individual case or a pattern or practice case, and
- whether the particular issue or problem requires a disparate treatment analysis, a disparate impact analysis, or both.

After concluding the onsite review, the CO must complete any required analyses of the data and other information that was gathered. The CO must investigate problem areas and issues until the case file contains sufficient evidence to establish whether discrimination did or did not occur. The case file should retain all evidence the CO obtained and documents the CO created, including any evidence that does not support the CO's conclusions.

2P00 SUMMARY OF FINDINGS

After completing the compliance evaluation, including all onsite and offsite analyses of the information obtained and recorded in the SCER Part C, the CO must compile a summary of findings to include in the SCER in Part F. This summary includes the findings of the case, the bases for the findings, and the CO's recommendations. The summary of findings should also include the:

- name and description of the facility;
- problem area(s) identified, if applicable;
- description of the selection or other process or practice examined (e.g., for a hiring case, the steps in the application process);
- results of any analyses conducted such as IRAs, comparative (cohort) analysis, and regression analysis;
- summary of any interviews conducted;
- relevant anecdotal evidence obtained;
- description of any violations and their bases;

Federal Contract Compliance Manual (FCCM)

- recommended corrective actions, where the CO has identified violations; and
- recommended next steps.

The summary should logically lead to the CO's conclusion about whether or not a violation occurred. The CO submits the completed SCER to his or her supervisor for approval.

Depending upon the circumstances of a particular case, it may be a good practice to conduct a follow-up meeting or teleconference with the contractor. Below is an example of why this is a good practice.

- The CO held an exit conference with the contractor at the conclusion of the onsite review. However, following offsite analysis, the CO found additional issues that need to be discussed with the contractor. More specifically, at the conclusion of the onsite, the CO told the contractor that it would be cited for failing to track the race, ethnicity and gender of job applicants passing through various phases of the selection process. However, during offsite analysis, it became clear to the CO that the contractor also discriminated in its termination activity.

After advising the contractor of its compliance evaluation findings, the CO must provide formal notification through a Predetermination Notice or Notice of Violation. COs use certified mail, return receipt requested, to provide this notice to the contractor. If requested by the contractor, a courtesy copy is sent by e-mail or facsimile. We discuss the various forms of notice in more detail in Chapter 8, Resolution of Noncompliance.

If, prior to the issuance of the notice of compliance, the contractor provides new evidence, the CO must conduct any necessary investigation and analyses to determine if the new evidence changes any of the initial findings and to ensure that the final findings are fully supported. A basic part of any additional investigation is verifying the credibility of the new evidence.

CHAPTER 3

CONSTRUCTION INDUSTRY COMPLIANCE PROGRAM

3A GENERAL

This chapter contains procedures for conducting compliance reviews of construction contractors and subcontractors, including those involved in federally assisted construction projects. The purpose of the reviews is to determine whether contractors are complying with requirements prohibiting discrimination and requiring affirmative action to ensure equal employment opportunity without regard to race, color, religion, national origin, sex, disability or covered veteran status.

3B COVERAGE

Federal construction contractors, if they have a construction contract of the requisite amount with a federal agency, are covered by Executive Order 11246 (EO 11246), as amended; the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (Section 4212); and Section 503 of the Rehabilitation Act of 1973, as amended (Section 503). These authorities also cover construction contractors if they have a contract or subcontract with a nonconstruction contractor or another construction contractor, and:

- the contract or subcontract is necessary in whole or in part to the performance of the covered contract; or
- the contractor or subcontractor performs, undertakes or assumes any portion of the contractor's obligation under a covered contract.

The Executive Order and Section 503 cover a contractor if the contract amount exceeds \$10,000; Section 4212 covers a contractor with a contract of \$100,000 or more ,or \$25,000 or more if the contract was entered into prior to December 1, 2003.

Federally assisted construction contracts and subcontracts in excess of \$10,000 are only covered by the Executive Order and not Section 503 or Section 4212.¹¹⁵

The following subsections provide COs additional guidance on the requirements of these legal authorities.

3B00 REGULATIONS APPLICABLE TO CONSTRUCTION CONTRACTORS

Regulations applicable to the affirmative action requirements of construction contractors and federally assisted construction contractors under Executive Order 11246 are published primarily in 41 CFR Part 60-4. Specific provisions in other parts of 41 CFR Chapter 60 are also applicable

¹¹⁵ Executive Order 11246, as amended, Sec. 301.

to federal and federally assisted construction contractors.¹¹⁶ The regulations implementing Section 503¹¹⁷ and Section 4212¹¹⁸ apply to contractors and subcontractors with a Federal construction contract or subcontract covered under those laws. As mentioned earlier, the regulations implementing Section 503 and Section 4212 do not apply to federally assisted construction contracts and subcontracts.

3B01 REQUIRED CONTRACT CLAUSES

Each federal contracting agency must include the equal opportunity clauses found at 41 CFR 60-1.4(a), 60-250.5, 60-300.5 and 60-741.5, in all covered prime construction contracts. Each contractor and subcontractor must include the equal opportunity and affirmative action clauses in its covered construction subcontracts.¹¹⁹

Applicants for federal assistance involving a construction contract are required to include the equal opportunity clause found at 41 CFR 60-1.4(b) in all covered federally assisted construction contracts. Moreover, each administering agency must include this clause as a condition of any grant, contract, loan, insurance or guarantee involving federally assisted construction. Federally assisted construction contractors and subcontractors are to include only the Executive Order equal opportunity clause in subcontracts.

Nonconstruction contractors must include the appropriate clauses in construction subcontracts that are necessary, in whole or in part, to the performance of a covered nonconstruction contract.

The equal opportunity clauses may be expressly included in construction contracts and subcontracts, or incorporated by reference.¹²⁰ The clauses are, however, a part of the construction contracts even if the contractor does not physically incorporate them into the contract document¹²¹ If contractors fails to include the required clauses in covered subcontracts and purchase orders, a CO shall cite this omission as a violation in the closure document.

3B02 CONSTRUCTION CONTRACT NOTICE AND SPECIFICATIONS

Bid solicitations for all federal and federally assisted construction contracts in excess of \$10,000 must include the “Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity (Executive Order 11246),” commonly referred to as the “Notice.”¹²² Among other things, the Notice sets forth the goals for minority and female participation in construction trades in covered areas, identifies the covered areas and requires that contractors provide OFCCP with specific information concerning construction subcontracts in excess of \$10,000 awarded in connection with the covered contract. In addition, the Notice must be included in:

¹¹⁶ 41 CFR Parts 60-1, 60-3, 60-20, 60-40, and 60-50.

¹¹⁷ 41 CFR Part 60-741.

¹¹⁸ 41 CFR Parts 60-250 and 60-300.

¹¹⁹ 41 CFR 60-1.4(a) and (b) at paragraph (7); 60-1.4(c); 41 CFR 60-250.5, paragraph 11; 41 CFR 60-300.5, paragraph 11; and 41 CFR 60-741.5, paragraph 11.

¹²⁰ 41 CFR 60-1.4(d), 60-250.5(d), 60-300.5(d) and 60-741.5(d).

¹²¹ 41 CFR 60-4.9, 41 CFR 60-250.5(e), 60-300.5(e) and 60-741.5(e).

¹²² 41 CFR 60-4.2(d).

- grants, contracts, subcontracts, loans, insurance or guarantees involving federally assisted construction covered by Part 60-4 as a condition of these agreements; and
- construction subcontracts contracts that are necessary in whole or in part to the performance of a covered nonconstruction contract.

The Standard Federal Equal Employment Opportunity Construction Contract Specifications (Executive Order 11246), or what are commonly known as the “Specifications,” describe the affirmative action obligations and detail the specific affirmative action steps construction contractors must implement in order to make a good faith effort to achieve the goals for minority and female participation that are listed in the bid solicitation. The Specifications must be included in:

- solicitations for offers and bids on all federal and federally assisted construction contracts in excess of \$10,000 to be performed in geographical areas designated by the director of OFCCP, in accordance with 41 CFR 60-4.6;
- grants, contracts, subcontracts, loans, insurance or gurantees involving federally assisted construction covered by Part 60-4, as a condition of these agreements;
- federal and federally assisted construction contracts in excess of \$10,000 to be performed in geographical areas designated by the director of OFCCP, in accordance with 41 CFR 60-4.6; and
- construction subcontracts in excess of \$10,000 necessary in whole or in part to the performance of nonconstruction federal contracts and subcontracts.¹²³

By operation of the Executive Order, the Notice and the Specifications discussed in this section are deemed incorporated in every solicitation or every covered contract and subcontract. This is true whether or not they are expressly incorporated in the solicitation or contract, and whether or not the contract is written.¹²⁴

3B03 SUPPORT FROM OTHER AGENCIES RELATED TO CONSTRUCTION CONTRACTORS

The CO must identify the contract(s) on which the contractor's obligations are based. The CO records this information in the case file and related correspondence. Information on contract awards may be obtained from other federal agencies.

¹²³ 41 CFR 60-4.3(a).

¹²⁴ 41 CFR 60-4.9.

Various federal, state and local government contracting offices may be able to provide notice of contract awards and help ensure that the contractors include equal opportunity and affirmative action clauses in construction contracts. For example, OFCCP has a Memorandum of Understanding with the General Services Administration that provides for information sharing on construction contract awards.¹²⁵

Other federal agencies may also have information not available from the contractor. For example, the Wage and Hour Division may be able to provide the number of employees of the contractor by reviewing payroll records certified under the Davis-Bacon Act. Other sources of interagency cooperation may include the Employment and Training Administration funded agencies, as well as employment referral and training organizations identified by DOL's Employment Training Administration Office of Apprenticeship and the Women's Bureau.

3C GENERAL PRINCIPLES APPLICABLE TO THE CONSTRUCTION INDUSTRY

The equal opportunity and affirmative action clauses prohibit discrimination based on race, color, religion, sex, national origin, disability or covered veteran status.¹²⁶ They also require that contractors take affirmative action to ensure equal employment opportunity. This section covers the use and application of goals for the participation of minorities and females by construction contractors, preconstruction conferences, and notice of subcontract awards.

3C00 GOALS

Goals serve as reasonably attainable objectives and allow contractors to measure progress toward achieving equal employment opportunity. They are not quotas. Contractors must demonstrate good faith efforts toward meeting their minority and female participation rate goals contained in the bid solicitation. These goals are determined by the Director of OFCCP and are issued in accordance with 41 CFR 60-4.6 by geographic area.

The participation rate goals are expressed as a percentage of the hours a contractor's aggregate workforce worked in each trade on all construction work performed in the geographic area. For this purpose, it does not matter whether or not the work was federal, federally assisted or non-federal. Where a contractor performs construction work in a geographic area located outside the geographic area in which it has a covered contract, the contractor shall apply the goals established for the geographic area where the work is actually performed. Goals in the second area also are applicable to federally involved and nonfederally involved construction work.

¹²⁵ As of the time the Manual was issued, the existing MOU between OFCCP and GSA was being renegotiated by the parties.

¹²⁶ 41 CFR 60-1.4(a) and (b), 41 CFR 60-250.5, 41 CFR 60-300.5 and 41 CFR 60-741.5.

- a. *Goals for Women.* The current goal for the utilization of women is 6.9% of work hours and applies to all of a contractor's construction sites regardless of where the federal or federally assisted contract is performed.¹²⁷
- b. *Minority Group Goals.* The current goals for the utilization of minorities are formulated in terms of work hours performed in a specific Standard Metropolitan Statistical Area (SMSA) or Economic Area (EA).¹²⁸ For example, ABC Company has a federal contract for construction work in SMSA X. The goals for SMSA X apply to all of ABC's construction work in SMSA X, both the federally involved and the nonfederally involved construction work. In addition, if ABC Company performs construction work in SMSA Y, it would apply the SMSA Y goals to all its construction work in SMSA Y, whether or not it had a federal or federally assisted contract in SMSA Y.

3C01 PRECONSTRUCTION CONFERENCES

Contracting and administering agencies may use preconstruction conferences to discuss any aspect of the contractual requirements of a project. The EEO, regional, district, or area office staff may participate in these conferences at the invitation of the contracting agency. The contracting agency reviews the construction contractor's nondiscrimination and affirmative action obligations, including applicable minority and female participation rate goals for the geographical area in which work is to be performed, and the contractor's for reporting and recordkeeping requirements necessary to demonstrate compliance.

3C02 NOTICE OF SUBCONTRACT AWARDS

The notice at 41 CFR 60-4.2(d) requires the contractor to notify the Director of OFCCP of the name, address, telephone number and employer identification number of each subcontractor; the estimated dollar amount of the subcontract; its estimated starting and completion dates; and the geographic area (SMSA or EA) in which the work is to be performed. This notice must be in writing and provided within 10 business days of the award of a subcontract in excess of \$10,000.

3D THE COMPLIANCE REVIEW PROCESS

COs will find that several stages are involved in a compliance review of a construction contractor. The four major stages are listed below and are discussed in detail in Sections 3E through 3R of this chapter.

- Pre-Review Preparation
- Onsite Review

¹²⁷ This goal was originally published in the Federal Register of April 7, 1978, 43 FR 14899, 14900, as Appendix A. This goal was extended indefinitely based on a notice published in the Federal Register on December 30, 1980. See 45 FR 85750, 85751 (Dec. 30, 1980).

¹²⁸ 45 FR 65979, 65984, Appendix B-80 (Oct. 3, 1980).

- Entrance Conference
 - Review of Records
 - Audit of Policies, Practices and Procedures
 - Interviews
 - Worksite Inspection
 - Identification and Investigation of Discrimination
 - Exit Conference
- Compliance Review Report
 - Notification of Compliance Review Results

The major focus of a review of a construction contractor is the contractor's trade workforce within a particular geographical area. However, unless coverage is based solely on a federally assisted construction contract, the contractor's entire workforce may be the subject of the review under the EO 11246, Section 503 and Section 4212. As noted at Section 3B, federally assisted construction contracts are subject only to the EO 11246. In auditing a contractor's compliance with these clauses in nontrade as well as trade occupations, CO must focus on any indications of potential discrimination and lack of affirmative action.

Additionally, if the contractor has 50 or more employees and a federal contract of \$50,000 or more, the compliance review will include implementation of the Section 503 AAP. If the contractor has 50 or more employees and a federal contract of \$100,000 or more, the compliance review will include implementation of the Section 4212 AAP.

3E PRE-REVIEW PREPARATION: SCHEDULING AND COORDINATION WITH OTHER AGENCIES

COs should notify the senior official at the contractor's establishment by telephone of the scheduled review. The telephone contact will include a discussion of where the review will take place, set a date for the review to begin, indicate the need for an onsite work area and confirm the location and availability of books and records that contain relevant information on the contractor's aggregate workforce in the covered area.

COs must confirm the date and time of the review by letter, sent certified mail, return receipt requested, to the senior official at the contractor's establishment with a copy to the chief executive officer at the corporate address. Mailing to both addresses is required unless the establishment and corporate offices are the same. A CO must mail the letter sufficiently in advance of the date of the review to give reasonable notice. In addition, the notification should

specify items that the contractor is to make available for inspection and copying during the review. Examples of some of the items are listed below.

- Handbooks, records, payroll records, and other relevant documents, including a list, separated by construction project, of all employees who worked during the period to be reviewed identified by race, ethnicity and sex;
- Personnel activity records on applicants, hires, promotions and separations during the period to be reviewed identified by race, ethnicity and sex;
- Payroll records for construction employees showing hourly wage, hours worked, overtime wages and overtime hours worked;
- Evidence documenting the implementation of each of the specific affirmative action standards set forth in the specifications;
- Evidence of compliance with 41 CFR Parts 60-250, 60-300 and 60-741 for covered construction contractors; and
- Evidence demonstrating that the contractor has complied with the applicable equal opportunity and affirmative action clauses.

Equally as important as scheduling is interagency coordination. OFCCP believes that interagency coordination and collaboration strengthen our enforcement efforts and maximizes the use of our resources. Consistent with this view, COs must contact the appropriate EEOC office and state and local fair employment practice agencies to notify them of the scheduled review and request any information they might have regarding complaints against the contractor.¹²⁹

If the administering agency is the Federal Highway Administration, Department of Transportation (FHWA - DOT), a DOL-DOT Memorandum of Understanding requires that DOT be notified of the scheduled review. The CO should also review DOL's enforcement database for information available from other labor agencies such as OSHA and the Wage and Hour Division.¹³⁰

To locate previous closure documents including conciliation agreements negotiated with the contractor, COs must review appropriate office files. These documents may provide useful information about potential or recurrent problem areas.

3F ONSITE REVIEW PROCESS

¹²⁹ See Letter L-1 – Sample Inquiry Letter for Requesting Complaint Data from EEOC and State and Local FEPs.

¹³⁰ U.S. Department of Labor, Data Enforcement, <http://ogesdw.dol.gov/> (last accessed Oct. 31, 2011).

The second major stage in a compliance review of a construction contractor is the onsite review. The purpose of the onsite review is to determine if the contractor complied with the requirements of EO 11246 and, as applicable, Section 503 and Section 4212. In doing this, COs will examine personnel activity, compensation data and work hours. In addition, they will evaluate the contractor's affirmative action efforts to comply with the Executive Order, Section 503 and Section 4212, if applicable. There are several activities that take place during the onsite review process and they include:

- entrance conference,
- review of records such as personnel activity, compensation and work hours,
- audit of affirmative action specifications,
- employee and supervisor interviews,
- physical inspection of the contractor's worksites,
- identification and investigation of discrimination, and
- exit conference.

Each of the activities of the onsite review process are discussed in Sections 3G through 3I of this chapter.

3G ENTRANCE CONFERENCE

The entrance conference should be attended by the contractor's CEO or his or her designee. The entrance conference is intended to provide information to the CEO and explain the purpose of the compliance review. During this conference a CO may, as appropriate:

- provide a brief explanation of the compliance review process;
- provide information on OFCCP policies, practices, rules and regulations and determine whether the contractor includes the appropriate clauses in its covered construction subcontracts and purchase orders;
- provide an estimate of the amount of time the onsite review will require;
- confirm the availability and location of the contractor's records and documentation of compliance with the affirmative action specifications;
- request cooperation for employee and supervisory interviews;
- state the need for and arrange to inspect federal and nonfederal worksites; and

- establish a tentative date for the exit conference.

3H REVIEW OF RECORDS

During the process of reviewing records as a part of the onsite review, the CO must record any matters that appear questionable. The CO should follow-up on these matters by gathering additional documentation, interviewing employees and interviewing any other relevant people.

In this section are discussions on the review of various contractor records including items such as payroll records, employment activity records, collective bargaining agreements and personnel policies.

3H00 PAYROLL RECORDS

In reviewing the contractor's payroll records, the CO should determine at least three things:

- the number of months of payroll activity to review in order to evaluate progress toward work hour participation rate goals,
 - the existence of uniformity in the assignment of employees to various project sites, and
 - the equity or lack thereof in allowing or granting overtime, and other benefits.
- a. *Number of Months to Review.* Review the contractor's payroll records for at least a six month period. This review is to evaluate progress toward attaining work hour participation rate goals for minorities and women in each trade. CO's must review payroll records to determine the percentage of work hours by minorities and women out of the total hours worked by the contractor's employees in each trade.
- b. *Uniformity of Assignment.* Evaluate the records to determine whether there is uniformity in the assignment of employees to various project sites (federal and nonfederal; commercial and residential; urban and rural). COs will determine whether certain types of projects pay more than others, and if so, whether women and minorities are provided equal opportunities for assignment to the better paying jobs.
- c. *Equitable Overtime.* Evaluate the records to determine whether overtime, incentives, bonuses and other job benefits (e.g., holiday bonuses, pay advances, loans, and profit sharing) are provided without regard to race, color, sex, religion or national origin.

3H01 EMPLOYMENT ACTIVITY RECORDS

COs must determine how the contractor processes applications, union referrals and walk-in applicants. They must determine if the contractor is disproportionately rejecting qualified minorities and women. COs must also determine the contractor's reasons for the rejections.

When selection procedures are found to have an adverse impact, COs should refer to the procedures discussed in Chapter 2 for additional guidance.¹³¹

COs will conduct an impact ratio analysis of the contractor's hiring, promotions and separations, as well as a compensation analysis when reviewing the contractor's employment activity. The findings of the analysis should be included in the Narrative Summary of the SCER, with supporting documents attached.

3H02 COLLECTIVE BARGAINING AGREEMENT (CBA)

When a contractor asserts that hiring is controlled through a union hiring hall in accordance with a CBA, the CO must review the agreement to verify the assertion. If the CBA is not clear, the CO should contact the union hall to determine the process. If the CBA does not support the contractor's claim, the CO must evaluate the contractor's good faith efforts without considering its relationship with the union hiring hall.¹³²

3H03 PERSONNEL POLICIES

As in a supply and service compliance evaluation, COs will examine the contractor's personnel policies and practices. COs will determine whether contractor policies make prohibited distinctions in the conditions of employment based on sex. Below are some areas of inquiry for COs.

- a. *Conditions of Employment.* COs must examine whether contractor policies make prohibited distinctions in conditions of employment based on sex, including on the basis of pregnancy, childbirth or related medical conditions, or on the basis of sex-based stereotypes, including those related to actual or perceived caregiver responsibilities. Contractors must not make employment decisions based on stereotypes about how males and females are "supposed" to look or act. Such employment decisions are a form of sex discrimination prohibited by Executive Order 11246, as amended.
- b. *Distinctions Based on Marital Status or Caregiver Responsibilities.* A CO should examine written policies and conduct interviews with contractor staff and employees regarding the implementation of policies and practices to identify whether distinctions between married and unmarried people apply equally to both sexes, including distinctions between single parents and married parents based on gender. In addition, the CO should assess contractor policies and practices to ensure that sex-based stereotypes about actual and perceived care giving responsibilities are not in effect.

¹³¹ COs should be aware, however, that the adverse impact guidance discussed in Chapter 2, section 2J, is based on the UGESP recordkeeping requirements for contractors with 100 or more employees. As most construction contractors have smaller workforces, they would instead be subject to the simplified recordkeeping requirements at 41 CFR 60-3.15(A)(1) that apply to contractors with less than 100 employees. COs should therefore modify their adverse impact analysis, as appropriate, depending on the size of the contractor.

¹³² See Standard Federal Equal Employment Opportunity Construction Contract Specifications (Executive Order 11246), paragraph 5, as set forth at 41 CFR 60-4.3.

- c. *Bona Fide Occupational Qualifications (BFOQ)*. As a part of most onsite visits, the CO will examine job qualifications as stated by the contractor. Under Title VII, sex has been found to be a BFOQ in extremely rare instances. Among them are:
- *Authenticity*. Jobs involving a need for authenticity or genuineness, such as actors or models.
 - *Personal Privacy*. Jobs where the performance of essential job elements would entail substantial invasion of personal privacy. This is limited to situations where the normal operation of the contractor’s business depends on the employee being the same sex as its employees or customers and there is no other way to ensure privacy. This is different from customer preference.
- d. *Employment Opportunities*. Contractors may not exclude women from jobs they may believe are dangerous or unsuitable for women to perform unless sex is a BFOQ. OFCCP follows Title VII principles when determining whether a policy excluding women from a job because of a concern about reproductive hazards is discriminatory. If a question relating to reproductive hazards arises during a compliance evaluation, the CO should discuss the issue with his or her supervisor.
- e. *Wage Discrimination*. The CO will also examine possible wage discrimination issues. Compensation discrimination encompasses discrimination in pay and benefits. It may also include discrimination in how employees earn or contractors distribute overtime, raises and bonuses. Contractors cannot make distinctions in pay, benefits, raises or bonuses on the basis of sex. Chapter 2, subsection 2L03, provides additional information on this issue.
- f. *Employment Advertising*. The CO will examine the contractor's advertisements in newspapers or other media. The advertisements must not express a sex preference unless the job is one for which sex is a BFOQ. For example, applicants or potential applicants may perceive an advertisement for a “craftsman,” as opposed to “craftsperson,” as seeking male applicants only and may have the effect of only male applicants applying for the position.
- g. *Employee Benefits*. See Chapter 2, Section 2H01, Discrimination and Harassment, for a discussion.
- h. *Family Leave and Pregnancy Leave*. See Chapter 2, Section 2H01, Discrimination and Harassment, for a discussion.

Several examples of the types of issues that COs may encounter related to a review of personnel policies are provided in Chapter 2, subsection 2H00, Review of Contractor Policies and Implementation, and subsection 2H01, Discrimination and Harassment.

3H04 DISCRIMINATION AND HARASSMENT

During the onsite review, COs will gather information and conduct interviews to determine whether the contractor developed and implemented policy prohibiting sex discrimination in accordance with the *Sex Discrimination Guidelines*. Below is a list of several legal authorities

and the types of contractor policies that are relevant to a CO determining the contractor's compliance. A detailed review of these authorities and several examples are in Chapter 2, subsection 2H01, Discrimination and Harassment.

Applicable Legal Authorities:

- Pregnancy Discrimination Act
- Family and Medical Leave Act
- Affordable Care Act

Contractor Personnel Policies:

- Family Leave and Pregnancy and Disability Leave Policies
- Employee Benefits Policies
- Sexual Harassment Policies
- Sex-Based Stereotyping and Caregiver Discrimination Policies

3I AUDIT OF AFFIRMATIVE ACTION STEPS SET FORTH IN 41 CFR 60-4.3(a) 7

An audit of the contractor's compliance with the affirmative action steps is the third of a total of seven activities in an onsite review. The others are an entrance conference, a review of records, interviews, a worksite inspection, identification and resolution of discrimination, and an exit conference.

In auditing a contractor's compliance with the affirmative action steps, COs must verify that the records, interviews and other information provided by the contractor demonstrate the contractor's compliance. For compliance review purposes, the affirmative action specifications in 41 CFR 60-4.3(a)7 are grouped into the following five major audit categories:

- recruitment practices,
- training,
- EEO policy and implementation,
- personnel operations, and
- contracting activity.

Each of these auditing categories is discussed in subsections 3I00 through 3I04, below.

These categories correspond to the organization of the Form CC-40 Standard Compliance Evaluation Report (or the Construction SCER).¹³³ The CO will evaluate the veteran and disability affirmative action requirements from Section III of the Construction SCER. The discussion below provides instructions on completing the Construction SCER.

3I00 AUDIT OF RECRUITMENT PRACTICES

The following subsections pertain directly to Part III.A of the Construction SCER and set forth the procedures for evaluating the contractor's recruitment practices.¹³⁴

a. *Recruitment Sources.* The contractor must establish and maintain a current list of recruitment sources, including sources for minorities and women. The contractor must provide written notification to these recruitment sources and to community organizations when it or its union(s) has employment opportunities available. The contractor must maintain a record of recruitment source responses. See Item III.A.I. of the Construction SCER. To evaluate the contractor's compliance with this specification, the CO will:

- Determine whether the contractor maintains a current list of recruitment sources.
- Determine whether the list is current (has been updated within the last year); whether it contains an adequate number of active, available sources; and whether the recruitment sources listed are in operation, i.e., active.
- Contact referral sources to verify that they received recruitment letters and e-mails, and to determine whether they actually made referrals.
- Interview employees and hiring supervisors to determine whether they use the list when vacancies occur.
- Review correspondence with recruitment sources. This review should:
 - Verify that the contractor sent and the recruitment sources received the letters, and that the contractor made follow-up contact.
 - Ensure that the letters contained a statement of the contractor's EEO policy and the nature of the employment opportunity.
 - Review the contractor's files, telephone logs or other evidence to determine if the contractor maintained copies or records of responses. Determine if the contractor followed-up on responses.

¹³³ See Appendix A-3 Standard Compliance Evaluation Report

¹³⁴ Refer to 41 CFR Part 60-20, Sex Discrimination Guidelines; 41 CFR Part 60-50, Religion/National Origin Guidelines; and 41 CFR 60-4.3(a) 7. b, c, d, i and j for more information.

b. *Applicant Records.* In addition to preserving any personnel and employment record as described at 41 CFR 60-1.12, the contractor should maintain a current file of the names, addresses, telephone numbers, sex, race and ethnicity of each minority and female walk-in applicant or referral from a union, recruitment source or community organization, and of the action taken with respect to each individual.¹³⁵ If an individual was sent to the union hiring hall for referral and was not referred back to the contractor by the union or, if referred, was not employed by the contractor, the documentation in the file should include the reason why the individual was not hired (or referred) and any action the contractor took.¹³⁶ The CO should fully investigate any indications of possible discriminatory practices. To evaluate the contractor's compliance with this specification, the CO should:

- Determine whether the contractor maintains a current file that lists the names, addresses, telephone numbers, sex, race and ethnicity of each walk-in applicant and each referral from a union or community source.
- Evaluate the file for active construction recruitment sources such as unions and community referral organizations.
- Interview supervisors responsible for hiring to determine the general hiring procedure and any specific procedures they use to recruit workers, including minorities and women.
- Determine what sources the contractor uses to obtain job applicants. Sources may include, for example, walk-ins, union hiring hall, newspaper advertisements, word of mouth, and recruitment and training programs.

c. *Failure of Union to Refer.* The regulations require the contractor to immediately notify the Director, in writing, when a union(s) with which it has a collective bargaining agreement has not referred to the contractor a minority or woman sent by the contractor or when the contractor has other information that the union referral process has impeded the contractor's efforts to meet its contractual EEO obligations.¹³⁷

To evaluate the contractor's compliance with this specification, the CO should determine whether the contractor took any other actions to facilitate hiring the individual such as additional written contact with the union specifically requesting referral of that individual, or attempting to hire the individual directly, without union referral. Whenever the contractor states in writing that the union has not referred minorities and women or that other union actions have impeded its affirmative action efforts; or there are allegations that the union has committed unlawful discrimination; or the CO becomes aware that union actions impede or threaten to impede the contractor's affirmative action efforts, the CO should discuss the matter with his or her supervisor as soon as possible.

¹³⁵ 41 CFR 60-4.3(a) 7.c, 60-1.12(c), and 60-3.15A.

¹³⁶ See Item III.A.2. of the Construction SCER.

¹³⁷ 41 CFR 60- 4.3(a)7.d. See Item III.A.3. of the Construction SCER.

- d. *Directing Recruitment Efforts.* In accordance with regulations, the contractor is required to engage in recruitment efforts that reach out to all demographic groups in the recruitment area, including minority, women's and community organizations, and schools with minority and female students; and engage in recruitment efforts that reach out to recruitment and training organizations for minorities and women serving the contractor's recruitment area and employment needs.¹³⁸

Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the contractor should send written notification to organizations in the recruitment area, describing the openings, screening procedures and test(s) to be used in the selection process. (See Item III.A.4. of the Construction SCER.)

To determine whether the contractor is in compliance with this specification, the CO should:

- Request written documentation of the contractor's efforts to recruit applicants for training and employment opportunities.
- Review documentation that the contractor provided timely notice to recruitment sources, including minority, women's and community organizations, at least one month prior to acceptance of applications for apprenticeship or training opportunities. The CO should also verify that appropriate sources have been contacted.

- e. *Employee Referrals.* The regulations require the contractor to encourage employees, including present minority and female employees, to recruit others for employment openings.¹³⁹ When reasonable to do so, as required by the regulations, the contractor must provide after-school, summer and vacation employment to minority and female youth both on the site and in other areas of its workforce.¹⁴⁰ To evaluate the contractor's compliance with this specification, the CO should:

- Interview minority and female employees to determine whether the contractor has encouraged them to recruit other minority individuals and women to apply for employment.
- Interview supervisors, minority and female employees to determine whether the contractor provides after-school, summer and vacation employment to minority and female youth.
- Review personnel records to verify employment of minority and female youths in after-school, summer and vacation job opportunities.

3I01 AUDIT OF TRAINING

¹³⁸ 41 CFR 60-4.3(a)7.i.

¹³⁹ 41 CFR 60-4.3(a)7.j.

¹⁴⁰ See Item III.A.5. of the Construction SCER.

The contractor shall develop on-the-job training opportunities and participate in training programs that are relevant to the contractor's employment needs and are intended to upgrade the skills of its workers. These programs and opportunities must expressly include minorities and women.¹⁴¹ Examples of possible programs and opportunities include apprenticeships and trainee programs relevant to the contractor's employment needs, especially those programs the Department of Labor funded or approved.¹⁴²

To evaluate the contractor's compliance with this specification COs must:

- Determine whether the contractor has developed and conducted any training programs, and if so, whether it has provided notice of these programs to its recruitment sources. Obtain copies of any letters informing recruitment sources or schools of training programs, including those to minority and women sources. Get the names of applicants that the contractor referred to the programs. Determine whether the contractor has employed and trained anyone below the journey level. If it has, describe what was done.
- Determine which trades are covered by formal apprenticeship programs (typically found in projects utilizing union labor) or other types of formal training programs not associated with trade unions. When either type of program is in place, a CO must determine the participation rate of minorities and women.
- When there are no formal programs for a particular trade, determine what, if anything, the contractor has done to provide on-the-job training, and the extent to which that training was made available to minorities and women.
- If the contractor provides on-the-job training, determine whether minorities and women have equal access to training in all trades. Determine whether minorities and women are performing all aspects of their trade or if the contractor is repeatedly assigning them to the same task.
- Determine whether the contractor has records of cash contributions, equipment supplied or contractor personnel provided as instructors for Office of Apprenticeship approved, or Department of Labor funded, or other training programs.
- Determine whether the contractor has records of specific hiring and training of workers from such programs. The CO should also determine the results of the contractor's efforts (e.g., number of workers trained identified by race, ethnicity and sex, hours worked, relative compensation, trade) and record the results in the report.

3I02 AUDIT OF EEO POLICY IMPLEMENTATION

¹⁴¹ 41 CFR 60-4.3(a)7e.

¹⁴² See Item III.B.1. of the Construction SCER. Refer to 41 CFR Part 60-20, 41 CFR 68-4.3(a)7.e and Part III.B of the Construction SCER.

This subsection draws from 41 CFR Part 60-20; 41 CFR Part 60-50; 41 CFR 60- 4.3(a)7, g, h, l and p and Part C of the Construction SCER for more information. It covers five areas:

- development of and dissemination of EEO policy,
- review of EEO policy,
- external dissemination of EEO policy,
- promotion policy, and
- supervisory performance.

a. *Development and Dissemination of Policy.* The contractor shall develop and disseminate its EEO policy by providing notice of its policy to unions and training programs and by requesting their help in meeting its EEO obligations. The contractor shall also include its EEO policy in any policy manual and collective bargaining agreement and publicize it in the company newspaper or annual report, if any. The contractor shall also specifically review the policy with all employees at least once each year and post it on bulletin boards accessible to all employees and applicants at each location where construction work is performed.¹⁴³

To evaluate the contractor's compliance with this specification, COs must determine whether the EEO policy contains at least the following items:

- a statement that the contractor will not discriminate against employees and applicants for employment because of race, color, religion, sex or national origin, and that it will take affirmative action to ensure that employees and applicants for employment will be employed and treated during employment, without regard to race, color, religion, sex or national origin;
- the name, telephone number and means of access to the contractor's EEO Officer;
- an assurance that this policy will be followed in all personnel actions; and
- the signature of the CEO and date.

COs must also determine whether the EEO policy is posted in conspicuous places available to employees and applicants. Several places may be appropriate for posting the EEO policy and some examples include company offices, project sites and project trailers, if applicable.¹⁴⁴

Interviews of employees is important for determining if the contractor reviewed EEO policy at least annually with all employees and personnel responsible for hiring, assignments and other personnel actions. Other actions COs must take to evaluate the contractor's compliance include:

¹⁴³ See Item III.C.1. of the Construction SCER.

¹⁴⁴ 41 CFR 60-1.4 (a)(3) or (b)(3).

- determining whether unions, where applicable, and training programs have been notified and provided with a copy of the EEO policy. Obtain copies of correspondence, or other documentation of such notification; and
- reviewing as applicable, policy manuals, collective bargaining agreements, company newspapers and/or annual reports for inclusion of the contractor's EEO policy.

b. *Review of Policy.* The contractor shall review, at least annually, the company's EEO policy and affirmative action obligations with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions, including specific review of these items with all onsite supervisory personnel prior to the initiation of work at any job site. The contractor must maintain a written record of the time and place of these meetings, people attending, subject matter discussed and disposition of the subject matter.¹⁴⁵ Disposition of the subject matter may include any further action to be taken by attendees and participants. In evaluating the contractor's compliance with this specification, COs should:

- substantiate that the contractor has conducted, at least annually, a review of the contractor's EEO policy and affirmative action obligations with all employees having any responsibility for hiring, job assignment, layoff, termination or other personnel decisions, including the transferring of employees to different job sites;
- identify each job site at which the contractor has initiated work within the 12-month period prior to the start of the compliance review. Verify the date prior to the commencement of work at each such job site on which the contractor met with onsite supervisory personnel to discuss the contractor's EEO policy and affirmative action obligations; and
- review the actions taken by the contractor to resolve any problems identified.

c. *External Dissemination of Policy.* The contractor shall disseminate its EEO policy externally by including it in any advertising in the media, including media directed at minorities and women. In addition, the contractor shall provide written notification to, and shall discuss its EEO policy with, other contractors and subcontractors with which it does or anticipates doing business.¹⁴⁶ In evaluating the contractor's compliance with this specification, the CO should:

- review copies of advertisements to determine whether the contractor included its EEO policy (e.g., the EEO tag line) and whether advertisements appeared in media announcements that reach all demographic groups in the recruiting area;
- determine whether the contractor's written notification to other contractors and subcontractors with which it does or anticipates doing business is accurate and timely (at least at the start of each major contract); and

¹⁴⁵ See Item III.C.2., of the Construction SCER.

¹⁴⁶ See Item III.C.3. of the Construction SCER.

- review and verify documentation such as telephone logs, file notes, etc., on the contractor's discussion(s) with other contractors and subcontractors to determine whether the contractor's EEO policy was discussed.

d. *Promotion Policy.* At least annually, the contractor shall inventory and evaluate all current minority and women employees for promotional opportunities.¹⁴⁷ The contractor shall encourage these employees to seek or to prepare for promotional opportunities through appropriate training.¹⁴⁸ To evaluate the contractor's compliance with this specification, COs must:

- review the contractor's policies and personnel procedures regarding upgrading and promotion; determine how first-line and other supervisors are selected and how collective bargaining agreements impact company policies;
- review all promotions and the employees whom the contractor could have or should have considered;
- obtain documentation of the contractor's annual inventory and evaluation of all employees for promotional opportunities; and
- verify through interviews and a review of documentation that the contractor encouraged all employees, including minorities and women, to seek or prepare for promotional opportunities through appropriate training.

e. *Supervisory Performance.* The contractor shall conduct a review, at least annually, of all supervisors' adherence to and performance under its EEO policies and affirmative action obligations.¹⁴⁹ To evaluate the contractor's compliance with this specification, the CO should review letters, reports, performance evaluations, EEO training courses and materials and minutes of meetings. Interviews of supervisory personnel should be conducted.

3I03 AUDIT OF PERSONNEL OPERATIONS

The CO should consider four areas during an audit of personnel operations: work environment, validation, effects of personnel practices and nonsegregation of facilities and activities.¹⁵⁰ Each is discussed in turn in this section.

a. *Working Environment.* The contractor must ensure and maintain a working environment free of harassment, intimidation and coercion at all sites and in all facilities at which the contractor's employees are assigned to work. Harassment, intimidation and coercion can take many forms on the job site. These actions may be directed to minority as well as female

¹⁴⁷ 41 CFR 60-4.3(a)7.1.

¹⁴⁸ See Item III.C.4., of the Construction SCER.

¹⁴⁹ Refer to Item III.C.5., of the Construction SCER.

¹⁵⁰ Refer to 41 CFR Part 60-20; 41 CFR Part 60-50; 41 CFR 60-4.3(a)7.a, k, m and n; and Part III.D of the Construction SCER for more information.

employees. They may consist of verbal, visual or written abuse, such as insults, graffiti, posters, suggestive comments and demands, racial slurs, leering or pressure for sexual activity. They may also include physical aggressiveness such as touching, pinching, patting and shoving, or the hiding or sabotaging of tools and equipment. Whatever the action, it can create a stressful working atmosphere which impairs job performance and work relationships and often results in the victim quitting the job. During the physical inspection of the contractor's worksites, the CO should:

- look for any physical evidence of intimidation, harassment, or coercion;
- interview female and minority employees to determine whether there have been any incidents of harassment, intimidation or coercion;
- determine whether such incidents were reported to the supervisor and if so, what action was taken to resolve the problem;
- interview supervisory staff to determine whether they are aware of the contractor's obligation under this specification;
- review contractor files (minutes of meetings, memoranda, etc.) to determine whether the contractor has discussed this specification with supervisors; and
- review discharges and terminations, and where possible, interview minorities and women recently terminated, to determine if harassment or intimidation was a factor in their leaving the job.

Where possible, the contractor will assign at least two women to each construction project.¹⁵¹ The contractor shall specifically ensure that all supervisory personnel are aware of, and carry out, its obligation to maintain such a working environment, with specific attention to minorities and women working at such sites or in such facilities.¹⁵²

- b. *Validation.* The contractor must validate all tests and other selection requirements where there is an obligation to do so under 41 CFR Part 60-3.¹⁵³ COs should also refer to the discussion in Chapter 2 and to the "Questions and Answers to the Uniform Guidelines on Selection Procedures."¹⁵⁴ Procedures for identifying adverse impact resulting from employee selection procedures are in Chapter 1 and Chapter 2.
- c. *Effect of Personnel Practices.* Contractors must ensure that seniority practices, job classifications, work assignments, opportunities for overtime and other personnel practices do not have a discriminatory effect on minorities and women by monitoring all personnel and

¹⁵¹ 41 CFR 60-4.3(a)7.a.

¹⁵² See Item III.D.1., of the Construction SCER.

¹⁵³ See Item III.D.2 of the Construction SCER. Under 41 CFR 60-3.15 contractors with fewer than 100 employees are not required to make adverse impact determinations or maintain validity evidence.

¹⁵⁴ See 44 FR 11996, 12009 (Mar. 2, 1979) supplemented by 45 FR 29350 (May 2, 1980).

employment related activities to ensure that the specifications are being carried out.¹⁵⁵ In evaluating the contractor's compliance with this specification, COs will:

- determine whether the contractor's personnel policies and practices have a discriminatory effect; and
- review personnel policies and practices such as transfers that create employment opportunities, seniority practices, job classifications, work assignments (e.g., minorities and women sent only to federally or state funded projects), layoff procedures, project locations, wage rates,¹⁵⁶ overtime hours for discriminatory effects.

d. Nonsegregated Facilities and Activities. The contractor must ensure that all job sites, facilities and company activities are nonsegregated, except for separate or single user toilets and changing facilities where necessary to assure privacy between the sexes.¹⁵⁷ In evaluating the contractor's compliance, during the worksite inspection, the CO should:

- determine whether the contractor provides and maintains adequate toilet and changing facilities to ensure privacy between the sexes; and
- interview management and employees to determine whether announcements of company social/recreational activities have been posted and are made available to all employees.

3I04 AUDIT OF CONTRACTING ACTIVITY

One element of a good faith commitment to equal employment opportunity is the use of small disadvantaged businesses or disadvantaged business enterprises as subcontractors.¹⁵⁸ These efforts must be documented.

Records of all solicitations of offers for subcontracts from construction contractors and suppliers that are small disadvantaged businesses or business enterprises, including circulations of solicitations to minority and women's contractor associations, must be maintained and produced upon request.¹⁵⁹ In assessing the contractor's efforts in this regard, the CO should:

- determine whether there are solicitations to small disadvantaged businesses or disadvantaged business enterprises, and minority and female contractor associations;

¹⁵⁵ 41 CFR 60-4.3(a)7.m. See Item III.D.3. of the Construction SCER.

¹⁵⁶ COs are reminded that wage rates may be specified in Collective Bargaining Agreements.

¹⁵⁷ 41 CFR 60-4.3(a)7.n. See Item III.D.4. of the Construction SCER.

¹⁵⁸ 41 CFR 60-4.3(a)7.o. Regulations in place as of the time of the publication of this version of the FCCM refer to solicitation of offers from minority and female construction contractors and suppliers. Affirmative action programs in federal procurement are, however, no longer reserved for minority and women-owned businesses. The Small Business Administration and the Department of Transportation procurement programs are for small disadvantaged businesses disadvantaged business enterprises, including minority and women-owned businesses. Accordingly, the terms "small disadvantaged business" and "disadvantaged business enterprises" are used in this section.

¹⁵⁹ Both 41 CFR 60-4.3(a)7.o and Part III.E of the Construction SCER provide related information.

- verify that the solicitations to small disadvantaged businesses or disadvantaged business enterprises are made on the same basis as those to larger contractors.

3J INTERVIEWS

Conducting interviews is the fourth activity in a construction onsite review; interviews typically take place during the CO's worksite inspection of the contractor's federal and nonfederal projects. COs should conduct sufficient interviews of employees and supervisors to resolve any outstanding issues or questions. This includes interviewing these key groups:

- supervisors, to determine if they are aware of and adhere to the affirmative action specifications. Supervisory personnel are often the individuals to whom applicants speak concerning employment opportunities, and they are likely to make job and overtime assignments;
- current employees (non-minority males, as well as minorities and women);
- union officials, if applicable;
- applicants (nonminority males, as well as minorities and women); and
- former employees (non-minority males, minorities and women) to determine how the contractor and co-workers treated them on the job.

If the contractor has only a few women or minorities in its construction workforce, COs will make every effort to interview each one. If all the women and minority employees cannot be interviewed, COs should select a representative sampling from each trade for interview. These interviews should probe for any evidence of sexual or racial harassment.

COs will refer any complaints received from employees during these interviews related to the Davis-Bacon Act wage rates to the Department of Labor's Wage and Hour office.

3K PHYSICAL INSPECTION OF CONTRACTOR WORKSITES

The purpose of conducting an inspection of worksites is to obtain additional information regarding the contractor's compliance with the requirements including, requirements that must be implemented at such sites (e.g., posting of policy, EEO poster). In addition, a CO can document the type of work performed, the conditions under which it is performed and the makeup of the workforce performing that work, through the onsite inspection.

The CO should inspect at least one federal or federally assisted construction worksite that is related to the construction contract as a part of the compliance review and, whenever possible, nonfederally involved worksites should be inspected as well.

3K00 INVESTIGATION OF COMPLIANCE

- a. *Technical Requirements.* The CO should review bulletin boards maintained onsite to ensure that contractor's EEO policy is posted and that the required notice at 41 CFR 60-1.42 is also posted. For contractors subject to the AAP requirements of 41 CFR 60-250, 60-300 and 60-741, the CO should determine whether notice of the location and hours of availability of the written AAP(s) should also be posted. Contractors may utilize onsite bulletin boards to disseminate the invitation to self-identify.¹⁶⁰
- b. *Working Conditions.* The CO should review working conditions to determine whether there is evidence of harassment, intimidation or coercion of women or minorities including, for example, a substantial difference in the conditions available to women or minorities. When feasible, at least two women should be assigned to the project(s). Also ensure that all facilities are nonsegregated, and that where appropriate, the contractor provided separate or single-user toilet and changing facilities to ensure privacy between the sexes.
- c. *Interviews.* COs will conduct interviews with onsite supervisors and with members of each of the trades used by the contractor. Interviewees should include minorities and non minorities, men and women. They should focus interviews on determining whether or not the contractor has complied with those requirements involving interaction with minorities and women in its construction workforce. Examples are encouraging present employees, including minorities and women to recruit others;¹⁶¹ conducting an annual inventory of employees for promotional opportunities;¹⁶² and reviewing the contractor's EEO policy with management personnel and with employees.¹⁶³

3K01 COMPLIANCE WITH EXECUTIVE ORDER 13496

Executive Order 13496 requires federal contractors and subcontractors to inform employees of their rights under the National Labor Relations Act (NLRA). The NLRA guarantees employees the right to organize and bargain collectively with their employer and to be free from retaliation for doing so. Contractors must post the notice conspicuously in and around their establishments, work sites and offices so that it is prominent and readily seen by employees who are covered by the NLRA and directly or indirectly (e.g., maintenance, repair, personnel, payroll work) engaged in contract-related activity. The Office of Labor-Management Standards (OLMS) and OFCCP share enforcement responsibilities for the notice requirements. OFCCP is responsible for investigation of complaints, compliance evaluations and conciliation, and will refer violations to the OLMS for enforcement. The CO will inspect the work sites for the requisite posting(s).

3L COMPLIANCE WITH 41 CFR PART 60-20

¹⁶⁰ See 41 CFR 60-250.5(a)9, 41 CFR 60-300.5(a)4 and 60-741.5(c).

¹⁶¹ 41 CFR 60-4.3(a)7.j.

¹⁶² 41 CFR 60-4.3(a)7.1.

¹⁶³ 41 CFR 60-4.3(a)7.f.

All construction contractors, whether involved in federal or federally assisted construction work, must be able to demonstrate compliance with 41 CFR Part 60-20, the *Sex Discrimination Guidelines*. COs will refer to Chapter 2 for procedures to follow in reviewing for compliance with these guidelines. The contractor's compliance with these guidelines must be described in Section III.F. of the Construction SCER.

3M COMPLIANCE WITH 41 CFR PART 60-50

All construction contractors, whether involved in federal or federally assisted construction work, must be able to demonstrate compliance with 41 CFR Part 60-50, *Guidelines on Religion and National Origin*. The CO will refer to Chapter 2 for procedures to follow in reviewing for compliance with these requirements; they must describe the contractor's compliance with these guidelines in Section III.G. of the Construction SCER.

3N COMPLIANCE WITH SECTION 4212 AND SECTION 503

Construction contractors with a federal contract or subcontract of \$100,000 or more, (\$25,000 or more if the contract or subcontract was entered into before December 1, 2003), must comply with the requirements of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, and its implementing regulations.¹⁶⁴ Similarly, construction contractors with federal contracts or subcontracts in excess of \$10,000 must comply with the requirements of Section 503 of the Rehabilitation Act of 1973, as amended, and its implementing regulations.¹⁶⁵

The general requirements of these regulations require federal contractors to invite applicants for employment and employees to inform the contractor if he or she is an individual with a disability or a veteran belonging to one or more of the categories of veterans covered under Section 4212 who wishes to benefit under the contractor's affirmative action programs.¹⁶⁶ The invitation must state that the information is provided voluntarily, that it will be kept confidential, that refusal to provide it will not subject the applicant or employee to any adverse treatment, and that it will be used only in accordance with the laws OFCCP enforces. COs must refer to Chapters 1 and 2, for procedures on assessing contractor compliance with all requirements, they must also describe in detail the federal contractor's compliance with Section 4212 and Section 503 implementing regulations in Section III.H. of the Construction SCER.

3O IDENTIFICATION AND RESOLUTION OF EMPLOYMENT DISCRIMINATION

¹⁶⁴ 41 CFR Parts 60-250 and 60-300.

¹⁶⁵ 41 CFR Part 60-741.

¹⁶⁶ The categories of protected veterans are found at 41 CFR 60-250.1(a) and 60-300.1(a) as of the time of publication of the FCCM.

The CO may identify potential individual or systemic discrimination during the compliance review. Chapter 2 of this Manual contains a detailed description of the procedures the CO should use for gathering and analyzing facts to determine whether employment discrimination exists. These procedures are directed primarily at supply and service compliance evaluations, but the CO may adapt them for use in construction compliance reviews. The theoretical bases for proving discrimination are equally applicable to employment discrimination identified in construction compliance reviews. Remedies for employment discrimination are also found at Chapter 7.

3P EXIT CONFERENCE

The exit conference is the final activity in an onsite review. In coordination with his or her supervisor, the CO should conduct an exit conference for the construction firm's CEO and/or his or her designee at the conclusion of the onsite review. During this conference, the CO should:

- outline the preliminary results of the review;
- identify any violations and the corrective actions necessary to resolve the violations;
- inform the contractor that it will receive a written notice summarizing the violations and giving remedies required; and
- inform the contractor that he or she may resolve the violations with a Conciliation Agreement.

If the contractor disputes the violation finding, the CO should assure the contractor that OFCCP will consider any pertinent additional evidence submitted within a specified time before determining its compliance status.

3Q STANDARD CONSTRUCTION COMPLIANCE EVALUATION REPORT

The report includes a narrative summary that is organized as follows:

- a. Scope of Review.* The CO should briefly state those items covered in the pre-review, the onsite review and the project interviews.
- b. Analysis.* The CO must present an analysis of pertinent materials for each area examined including any indicators he or she identified from analyses of personnel activity and compensation. The CO must identify sources of information (e.g., interviews conducted, records examined, worksites inspected, and community contacts made). If a CO finds deficiencies, the explanation must be sufficient to permit a person who is unfamiliar with the case to understand the basis for each deficiency determination. The CO will also provide detailed narrative information on problem areas identified during the review of the contractor's below activities.

- Recruitment Practices
 - Training
 - EEO/AA Policy and Implementation
 - Personnel Operations and Leave Policies
 - Contracting Activity
 - Discrimination Violations
 - Implementation of Sex Discrimination Guidelines¹⁶⁷
 - Implementation of Guidelines on Discrimination Because of Religious or National Origin¹⁶⁸
 - Implementation of Section 503 and Section 4212
- c. Conclusions.* The CO must make a final assessment of the findings and how these relate to the contractor’s compliance status.
- d. Resolution.* If the CO identifies violations, the CO must describe the corrective action necessary to consider the contractor in compliance. Both parties must agree to specific corrective actions that the CO will include in a Conciliation Agreement, as appropriate. Otherwise the CO must issue a Show Cause Notice.¹⁶⁹
- e. Recommendations.* The CO must recommend that the contractor be found either in apparent compliance or noncompliance. Reasons to support the CO’s recommendation must be documented in the case file.

COs must use the Construction SCER to report compliance evaluation results of construction contractors. The Construction SCER aims to provide objective measures of a contractor's efforts to implement the required affirmative action obligations specified in the regulations. During an investigation the CO should use appropriate pages and worksheets from the Construction SCER. See Part V of the Construction SCER for more information.

3R NOTIFICATION OF COMPLIANCE REVIEW RESULTS AND RESOLUTION OF VIOLATIONS

¹⁶⁷ 41 CFR Part 60-20.

¹⁶⁸ 41 CFR Part 60-50.

¹⁶⁹ 41 CFR 60-4.8.

When no violations are found, a CO prepares a letter of no apparent violations, to be issued and signed by the District Director.¹⁷⁰ However, when violations are found, a Predetermination Notice or a Notice of Violation is prepared.¹⁷¹ Both are issued and signed by the District Director.

The Predetermination Notice includes full details of each deficiency and violation, including appropriate citations to the regulations, and the needed corrective actions. Contractors may voluntarily resolve violations through a Conciliation Agreement. See Sections 3S below, for a discussion of this resolution document.

3S USE OF CONCILIATION AGREEMENTS

Violations such as those listed below should be resolved in a Conciliation Agreement:

- *List of Recruitment Sources.* Failure to maintain a list of recruitment sources that includes recruitment sources for women and minorities, and failure to provide written notice to these sources and community organizations regarding job opportunities and to maintain records of their responses.¹⁷²
- *List of Applicants.* Failure to maintain a file of the names, addresses and telephone numbers of each applicant and referral, identified by sex, race and ethnicity, and the actions the contractor took.¹⁷³
- *Referrals to Unions.* If applicants are referred to a union, failure to document results of this referral and any additional action taken.¹⁷⁴
- *Impeding AA Efforts.* Failure to notify OFCCP that a union is impeding the contractor's affirmative action efforts.¹⁷⁵
- *Direction of Recruitment Efforts.* Failure to direct its recruitment to all demographic groups in the recruitment area, including women and minorities, and community organizations, schools and training organizations.¹⁷⁶
- *Training Programs.* Failure to develop on-the-job training opportunities and participate in training programs that opportunities expressly include minorities and women.¹⁷⁷

¹⁷⁰ See Letter L-4.

¹⁷¹ See Chapter 8 – Resolution of Non-Compliance.

¹⁷² 41 CFR 60-4.3(a)7.b.

¹⁷³ 41 CFR 60-4.3(a)7.c.

¹⁷⁴ 41 CFR 60-4.3(a)7.c.

¹⁷⁵ 41 CFR 60-4.3(a)7.d.

¹⁷⁶ 41 CFR 60-4.3(a)7.i.

¹⁷⁷ 41 CFR 60-4.3(a)7.e.

- *Annual Review of Specifications.* Failure to review, at least annually, the obligations under the specifications with all employees having responsibility for employment decisions.¹⁷⁸
- *Annual Review of EO/AA Performance.* Failure to conduct an annual review of its supervisors' adherence to and performance under EO/AA obligations.¹⁷⁹
- *Annual Inventory.* The contractor's failure to conduct an annual inventory and evaluation of at least the currently employed women and minorities for promotional opportunities.¹⁸⁰
- *Intimidation or Harassment.* Evidence of intimidation, harassment or coercion.¹⁸¹
- *Validation.* Failure to validate tests and selection procedures when required under 41 CFR Part 60-3.¹⁸²
- *Monitoring Personnel Activities.* Failure to monitor all personnel and employment activities to ensure nondiscriminatory effect.¹⁸³
- *Segregated Facilities.* Evidence of segregated facilities except where separate facilities are necessary to provide privacy between sexes.¹⁸⁴
- *Discrimination.* All investigations in which there is evidence of employment discrimination.

3T REVIEW COMPLETION LETTER

Letter L-4 provides a format for a Notice of Review Completion for the CO to use when he or she finds no violations. When the CO finds a violation, the CO refers to the sample Notice of Review Completion letters that are in Chapter 8. OFCCP uses Letter L-32 or Letter L-33 when major violations were voluntarily resolved in a CA. If OFCCP issued an SCN the CO should use Letter L-32. If no SCN was issued, use Letter L-33.

3U REFERRAL FOR ENFORCEMENT

If the contractor and OFCCP cannot resolve the violations through a CA, OFCCP will issue an SCN¹⁸⁵ and will recommend the case for enforcement.

¹⁷⁸ 41 CFR 60-4.3(a)7.g.

¹⁷⁹ 41 CFR 60-4.3(a)7.p.

¹⁸⁰ 41 CFR 60-4.3(a)7.l.

¹⁸¹ 41 CFR 60-4.3(a)7.a.

¹⁸² 41 CFR 60-4.3(a)7.k.

¹⁸³ 41 CFR 60-4.3(a)7.m.

¹⁸⁴ 41 CFR 60-4.3(a)7.n.

¹⁸⁵ 41 CFR 60-4.8.

CHAPTER 4 CORPORATE MANAGEMENT COMPLIANCE EVALUATIONS

4A INTRODUCTION

This chapter outlines the procedures for COs conducting Corporate Management Compliance Evaluations (CMCEs) of multi-establishment contractors subject to Executive Order 11246, as amended (EO 11246); Section 503 of the Rehabilitation Act of 1973, as amended (Section 503); and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (Section 4212).¹⁸⁶ The CMCE includes all aspects of a standard compliance evaluation but focuses predominantly on the corporate headquarters. In addition, the CMCE specifically evaluates a contractor's selection, development, and retention practices that affect advancement into middle and senior-level corporate management.

4A00 PURPOSE OF CMCEs

The purpose of a CMCE, as described at 41 CFR 60-2.30, is to determine whether individuals are encountering artificial barriers to advancement into middle and senior-level corporate management. During CMCEs, COs pay special attention to components of a contractor's employment process that affect advancement or promotion into middle and senior-level positions.

As in other compliance evaluations, the CMCE focuses on a contractor's efforts to ensure a discrimination free workplace. To ensure a thorough analysis of EEO compliance, CMCEs focus not only on personnel activity data at the corporate headquarters, but also on affirmative action policies and procedures that ensure equal employment opportunity leading to advancement throughout the organization.

Therefore, during a CMCE COs begin their analysis of middle and senior-level management positions by focusing on two areas:

- potential discrimination, and
- affirmative action.

a. Potential Discrimination. When focusing on the potential for discrimination COs are typically seeking answers to two questions:

- Does unlawful discrimination exist in the selection processes and practices for middle and senior-level management positions?
- Does unlawful discrimination exist in employee performance review procedures or in employee developmental assignments?

¹⁸⁶ Unless otherwise noted, the term "contractor" includes subcontractors.

In addition to these questions, COs are also seeking to determine whether individuals currently in these positions are treated in a nondiscriminatory manner in all aspects of their employment including assignments, total compensation, development opportunities, reasonable accommodation and any other benefits or privileges associated with their positions.

b. Affirmative Action. The obligation to ensure equal employment opportunity extends to all levels of a contractor’s activities, including the recruitment, development and selection processes for middle and senior-level management positions. The contractor’s efforts are particularly important when evaluating higher-level positions. This is so because the selection criteria for these positions often become more subjective. Moreover, the selection criteria at these levels are closely related to corporate culture and values. COs, therefore, must evaluate whether and to what extent the contractor:

- Examines its development and selection criteria and practices for middle and senior-level management positions,
- Identifies EEO problems or potential barriers to equal opportunity, and
- Devises and implements effective strategies to address identified problems within the context of its own particular corporate environment.

4A01 SCOPE OF CMCE

A CMCE is always a full review and COs use the Standard Compliance Evaluation Report (SCER), but with the addition of the CMCE-specific “Section III” which addresses those elements unique to a CMCE.¹⁸⁷ The evaluation of a corporate headquarters includes a review of the written affirmative action program (AAP) to ensure that it includes all jobs for which the headquarters has decision-making authority, regardless of where those jobs are physically located. For example, jobs for which the corporate headquarters retains decision making or approval and disapproval authority usually include senior managers of the various corporation establishments. Such jobs are often important contributors to feeder pools for middle and senior-level corporate management positions.

A CMCE can be expanded beyond the corporate headquarters if, during the course of the CMCE, the CO becomes aware that problems exist at establishments outside the corporate headquarters.¹⁸⁸ In this instance, the CO should discuss whether it would be appropriate to expand the compliance evaluation beyond the headquarters with his or her supervisor.¹⁸⁹ If they decide to expand the evaluation, the CO should contact the contractor, explain the reasons for and scope of the expansion, and request appropriate records and other evidence regarding the additional issues(s) to be investigated.

¹⁸⁷ See Section 4B – Pre-Desk Audit Actions.

¹⁸⁸ 41 CFR 60-2.30(b).

¹⁸⁹ The regional and national offices are consulted when determining whether to expand the scope of a CMCE.

For example, the CMCE may need to include an analysis of feeder pools at subordinate establishments. In determining whether to include such an analysis, the CO should consider the degree to which the contractor has historically and recently filled corporate headquarters management positions from elsewhere in the corporation and the degree to which corporate headquarters tracks and monitors the progress of key personnel in subordinate establishments. COs should refer to subsection 4H04.c, Cross-Establishment Movement, for additional information on feeder pools and related issues.

Likewise, the highest level management positions held by members of nonfavored groups may be outside the corporate headquarters. Therefore, when doing a CMCE, the CO must request data from the contractor related to other establishments, when necessary, to determine the existence and extent of a “glass ceiling” within the corporation.

Lastly, during the course of the compliance evaluation it may come to the CO’s attention that other types of compliance problems exist at locations outside the corporate headquarters. If so, then the scope of the evaluation should be expanded, as appropriate, to investigate the identified problems.

4A02 CONFIDENTIALITY

Some of the data examined during a CMCE, such as human resource development plans and total compensation packages for higher management levels, may be considered particularly sensitive by the contractor. COs must consult with the appropriate OFCCP managing officials to ensure that the appropriate steps are taken to ensure contractor confidentiality. In many cases this will include consultation with the district director.

If the contractor’s representatives express concerns about confidentiality, the CO must advise the representative that OFCCP is required to “treat information obtained during the compliance evaluation as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552.”¹⁹⁰ Exemption 4 of the FOIA at 5 U.S.C. § 522 (b)(4) protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” When submitting data and records to OFCCP, contractors should clearly identify all trade secrets and commercial or financial information it believes are exempt from disclosure. Moreover, the CO may advise the contractor that under the Trade Secrets Act, 18 U.S.C. §1905 (2000), it is a criminal offense for a government employee to release trade secrets and other forms of confidential commercial and financial information to another business or to the public unless the law authorizes such disclosure.

Other information may be exempt e.g., personnel files under Exemption 6 of the FOIA.¹⁹¹ Moreover, even if none of these exemptions apply, DOL regulations require OFCCP to notify the contractor of the FOIA request and give the contractor an opportunity to object to the

¹⁹⁰ 41 CFR 60-1.20(g).

¹⁹¹ 29 CFR Part 70.

disclosure.¹⁹² For additional information regarding the agency's treatment of confidential information review 41 CFR 60-1.20(f) and 41 CFR 60-1.20(g).

4B PRE-DESK AUDIT ACTIONS

Although several of the steps of the CMCE are common to all reviews, the actual execution and information gathering are unique to a CMCE. The CO must use the customary Supply and Service Scheduling Letter, with the attached Itemized Listing, to notify the contractor of the evaluation. When a CO is conducting a CMCE, the Regional Director or his or her designee must sign the Scheduling Letter and send it by certified mail, return receipt requested, to the corporation's CEO. The Scheduling Letter should include the name and telephone number of the CO receiving the AAP and supporting data or the appropriate supervisor if the supervisor is receiving this information.

This discussion focused on providing notice of a CMCE. The following subsections review other matters related to preparing for the desk audit.

4B00 FOLLOW-UP CONTACT WITH CONTRACTOR

Generally, within 15 calendar days after sending the Scheduling Letter, COs must contact the contractor's head of human resources to inform him or her that the compliance evaluation will be a CMCE and to explain what is involved in the evaluation. In addition, this initial contact should include:

- the identification of the CO who will be involved in the evaluation,
- the establishment of the lines of communication between the contractor and OFCCP,
- the answers to any questions the contractor may have about the information OFCCP requested in the Scheduling Letter, and
- the answers to any questions regarding the differences between a standard compliance evaluation and a CMCE.

COs should offer any technical assistance the contractor needs to ensure the efficient and effective completion of the evaluation. This may include advising the contractor of its recordkeeping requirements during the course of the evaluation.

4B01 CORPORATION BACKGROUND RESEARCH

Before starting the evaluation, the CO should gather appropriate background information about the corporation he or she will evaluate. Using an array of data sources, including the Internet, the CO should try to learn as much as possible about the corporation's operations, personnel

¹⁹² 29 CFR 70-26.

procedures and EEO compliance history in order to facilitate the process of the CMCE. Other important information that may impact the evaluation includes the history of the corporation and its product/service line(s), the corporate leadership and business trends (with specific focus on how that may impact corporate employment).

4B02 SEARCH FOR PUBLISHED REPORTS

COs should learn as much about the contractor and its industry as possible. There are several resources available but only a few are listed below.

- Industry resources such as Hoover's, Standard and Poor's, and Moody's provide comprehensive industry information, company profiles, key contact data, financial research and analysis, and news.
- Publications such as the "International Directory of Company Histories" and the "Reference Book of Corporate Managements" are sources of information on corporate histories and the backgrounds, executive leadership, labor and management actions, NAICS codes, key dates, ticker symbol, principal subsidiaries, principal divisions, principal operating units, principle competitors and other significant milestones.
- Articles on the corporation within the past two years in business oriented newspapers and periodicals, such as *The Wall Street Journal*, and *Forbes* and *Fortune* magazines.
- Corporate Web sites may contain the most current information regarding the changes in corporate management, or other pertinent information.
- Public records, including court documents on discrimination lawsuits, settlements and findings.

Subsection 4B11, Evaluation and Analysis of Corporate Information, gives details on how to use this and other research information. If a CO does not have ready access to this or other research materials, he or she may send a Request for Literature Search Letter to the DOL Library.¹⁹³

4B03 RETRIEVAL OF "FORM 10-K" REPORTS

In addition to the publication search, COs must retrieve the latest "Form 10-K" for corporations that are required to file. The Securities and Exchange Commission (SEC) requires all publicly held corporations to file a "Form 10-K" report annually. Domestic corporations must make their filings on EDGAR, SEC's Electronic Data Gathering, Analysis, and Retrieval system. Filings maintained on EDGAR are found at the Web address listed below.

<http://www.sec.gov/edgar/searchedgar/webusers.htm> (last accessed Jan. 2011)

¹⁹³ See Letter L-6 – Request for Literature Search.

Use of this information is discussed in 4B11, Evaluation and Analysis of Corporate Information.

4B04 RETRIEVAL OF EEO-1 REPORTS

As discussed elsewhere in the Manual, EEO-1 reports are required of all private employers who are:

- subject to Title VII of the Civil Rights Act of 1964 (as amended by the Equal Employment Opportunity Act of 1972) with 100 or more employees excluding state and local governments, primary and secondary school systems, institutions of higher education, Indian tribes and tax-exempt private membership clubs other than labor organizations; or
- subject to Title VII with fewer than 100 employees if the company is owned by or affiliated with another company, or there is centralized ownership, control or management so that the group legally constitutes a single enterprise, and the entire enterprise employs a total of 100 or more employees.

All federal contractors who are private employers file the report if they are not exempt under 41 CFR 60-1.5, have 50 or more employees, and:

- are prime contractors or first-tier subcontractors, and have a contract, subcontract, or purchase order amounting to \$50,000 or more; or
- serve as a depository of Government funds in any amount, or
- are financial institutions that are issuing and paying agents for U.S. Savings Bonds and Notes.

The filing deadline is set by EEOC and is generally in September each year. Only those establishments located in the District of Columbia and the 50 states are required to submit an EEO-1. No reports are filed for establishments in Puerto Rico, the Virgin Islands or other American Protectorates.

COs must retrieve a contractor's two most recent EEO-1 reports from the Equal Employment Data System (EEDS). The EEDS is designed to provide information annually on the EEO characteristics of supply and service contractors and other employers. The system contains EEO-1 data for the current fiscal year, plus the four previous fiscal years. The EEO-1 report includes the below three report types detailing various aspects of multi-establishment corporations.

- *Type 2 report.* A consolidated report that covers all employees corporate-wide, including those at headquarters and those in establishments too small to require a separate establishment report.
- *Type 3 report.* A headquarters report covering employees at the corporate headquarters location.

- *Type 4 report.* A separate report for each establishment employing 50 or more people.

Subsection 4B12, Evaluation of EEO-1 Reports, reviews the possible uses of this information. If the EEO-1 information is not available through the EEDS system, a CO should request these data from the contractor directly.

4B05 OFCCP COMPLIANCE HISTORY REPORTS

The CO must check the electronic CMS and EIS to obtain a list of prior compliance evaluations of the contractor's corporate headquarters and other establishments and to identify any issues in the reviews. This may be useful for identifying information that the CO should obtain or examine during the onsite review. If this task was a part of a previous related desk audit, the CO should review this information as part of the preparation for the onsite. If a conciliation agreement was obtained in a prior review, the onsite visit should provide an opportunity to confirm that the contractor took and appropriately maintained the corrective action. Subsection 5B03, OFCCP Compliance History Reports, reviews the use of this information.

4B06 CONTACTING EEOC, VETS AND OTHER AGENCIES

Before starting the evaluation, a CO must also seek information regarding the employment policies and practices of the contractor from the Equal Employment Opportunity Commission (EEOC), Veterans Employment and Training Service (VETS) and other EEO and labor law enforcement agencies. This information provides the CO with a better understanding of the contractor's workforce and operations, and may indicate potential problem areas.

- EEOC and State and Local Fair Employment Practices (FEP) Agencies.* Simultaneous with the sending of the Scheduling Letter, a CO must send the Standard Inquiry Letter to the appropriate district office of the EEOC, and to the appropriate state and local FEP agencies.¹⁹⁴ This letter requests information regarding discrimination complaints filed against the contractor, and any other information that may be pertinent to assess the contractor's EEO posture. After 15 calendar days the CO will follow-up by telephone with any agency that failed to reply or from which the CO needs additional information.
- Veterans Employment and Training Service and Other DOL Enforcement Agencies.* The CO must also check the VETS-100 database and contact the VETS representative at the appropriate local employment delivery service to request any information that could be pertinent to the pending review. Additionally, the CO must check the DOL Enforcement Database for closed complaints and compliance evaluations of the contractor's establishments, as well as contact other DOL enforcement agencies, such as the Occupational Safety and Health Administration (OSHA) and the Wage & Hour Division (WHD) to identify the number, types and status of any complaints that have been filed against the contractor.

¹⁹⁴ See Letter L-1 – Sample Inquiry Letter for Requesting Complaint Data from EEOC and State and local FEPs.

4B07 FOLLOW-UP AND USE OF INFORMATION ON COMPLAINTS FILED WITH OR BY OTHER AGENCIES

A CO must examine all the information regarding complaints against the contractor that he or she receives from federal, state, and local agencies in response to the Standard Inquiry Letter and enter the information on Part A, Section 1, Question 2 of the SCER. Any complaints involving management jobs or “glass ceiling” issues should also be addressed in the “Introduction” element on Part D of the SCER.

If the response does not provide enough information to determine whether a complaint involves a management job or “glass ceiling” issue, the CO should contact the responding agency for additional information.

When needed, the CO should contact the appropriate EEOC office or state or local fair employment practices agency to arrange to review relevant discrimination complaint files as part of the compliance evaluation. This can be particularly useful when, as a result of the desk audit, the CO identifies potential systemic problems in complaint areas.

After receiving the AAP and supporting data, any information the contractor provided with respect to current or past complaints must be compared with the information received from the agencies. The CO will note discrepancies and information that the contractor did not provide for possible further investigation during the review, if warranted. The contractor should be asked to explain discrepancies and to provide additional information. In conducting the desk audit, the CO should pay particular attention to any indication of a potentially broader problem in the type of activity and management area/level that was an issue in previous complaints.

4B08 RELATIONSHIP OF OFCCP COMPLIANCE ACTIVITIES TO EEO LITIGATION OR COURT ORDERS

If, during the conduct of a compliance evaluation, a CO finds that the contractor is involved in litigation or is under a court order for EEO matters, he or she should identify the EEO issues involved, the court, the parties, the case name and number and bring the matter to the attention of his or her supervisor. The field office, in consultation with the Regional Solicitor's Office, will determine whether the litigation or court order should impose any limitations on the conduct of the compliance evaluation.

4B09 REVIEW OF COMMUNITY RESOURCE FILES

If a CO is not knowledgeable about the local organizations in the area in which the corporate headquarters is located, he or she should review the field office’s community resource files to become familiar with local community groups, and introduce himself or herself to the various organizations. If the contractor is located near an Indian reservation, the CO should contact the reservation's Tribal Employment Rights Organization (TERO). Chapter 2 discusses how COs can establish relationships with local organizations representing members of covered groups.¹⁹⁵

¹⁹⁵ See Chapter 2K – Linkage Agreements.

4B10 REVIEW OF PAST OFCCP COMPLIANCE ACTIONS

Based upon the information gathered in Section 4B, Pre-Desk Audit Actions, the CO should review the contractor's compliance history to identify cases with violations involving a corporate-wide policy or practice. Examples would be violations for prior discriminatory acts, failure to conduct a self-audit, benefits, medical screening and testing. As appropriate, a CO can contact the OFCCP office that conducted the evaluation or investigation to obtain further information on the violations, their resolution, and whether they applied to management jobs. The purpose of obtaining this information is not to revisit closed compliance actions, but to determine whether the same problem could exist corporate-wide. If the information indicates a potentially corporate-wide problem, especially one that could affect management jobs, the CO should include a review of that area in the onsite plan.

4B11 EVALUATION AND ANALYSIS OF CORPORATE INFORMATION

After conducting research on the contractor as described in subsections 4B01 through 4B10 and receiving the results, COs must sort and analyze the material. Particular emphasis should be given to areas that could be relevant to the evaluation. For example, a recent acquisition or merger could have significant impact on feeder pools for management positions. While reviewing and sorting the data, COs should place the information into one of three categories:

- Corporate Organization;
- Corporate History and Trends; and
- Backgrounds of Top Corporate Officials.

The scope and purpose of each of these categories are described below.

a. Corporate Organization. This category includes information related to the organization of the entire corporation; rather than just the corporate headquarters facility. If a contractor uses an Organizational Display, as described at 41 CFR 60-2.11(b) as part of its AAP, COs should be able to compare the Organizational Display to the current corporate organizational chart. Industry directories and handbooks can provide an overview of this information, with detail often provided in the corporation's Annual Report and portions of its "10-K" filed with the SEC. Information and data related to the below questions would normally be in this category.

- What are the corporation's major components, or businesses, groups and divisions, and its subsidiaries, both domestic and foreign?
- What are the components' major functions and/or products?
- Where are the corporation's major components located?

- What percentage of total corporate personnel does each component employ (e.g., the ADC Products Group accounts for about 40% of total corporate personnel)?

This information will be helpful in identifying such factors as potential feeder pools for rotational assignments and headquarters management jobs. Also, information on the corporate organization will help OFCCP determine the degree to which willingness to relocate may impact advancement.

After receiving the contractor's desk audit submission, COs will compare the corporate structure as shown in this information with that shown in any published corporate organization charts.

b. Corporate History and Recent Trends. There are several sources for this information including industry directories and handbooks, particularly Hoover's Directories, at www.hoovers.com; specialized publications such as the "International Directory of Company Histories"; annual corporate reports and SEC submissions; newspapers and periodicals; and the corporation's Web site. COs should review these and other appropriate resources to gather information that answers these and other relevant questions.

- When was the corporation founded?
- What was its initial main business? How has this changed over time?
- Has the corporation undergone a recent merger or acquisition?
- What are its most and least profitable components over the last several years?
- Has the corporation recently undergone, or is it projecting, substantial growth or cutbacks in particular areas of its business? Is so, what are they?
- Has the corporation recently been awarded or lost major contracts? What business area(s) did the award or loss affect and how?
- What are its long-range projections for areas of business growth?

This information is relevant to a preliminary understanding of the business and economic context within which the corporation operates, and also will assist in evaluating particular corporate management issues. For example, recent mergers or major acquisitions may have caused a substantial change in the overall business mix of the corporation and in top management. Such changes may correspondingly impact corporate culture, and the skills mix that the corporation seeks in middle and senior-level management staff.

Sources of current profitability usually influence allocation of bonus pools among different business components and often indicate where growth in management opportunities is likely to occur.

c. Background of Top Officials. The corporation's Web site, annual report, Form 10-K or other sources such as the "Reference Book of Corporate Managements" may provide information

on the backgrounds of top corporate officials. This information usually includes education background, time with the corporation and the positions held.

Such information can help verify past corporate practices like the degree to which the contractor traditionally filled top positions internally versus externally. It also may help identify shifts in the type of background that top management may value like differences in the backgrounds, experiences, educational fields and/or levels of more recent entries to top management versus others.

The CO should summarize the information in this section under Part D of the SCER titled “Introduction.”

4B12 EVALUATION OF EEO-1 REPORTS

EEO-1 reports are valuable sources of information on changes in the workforce. Therefore, COs must review the total corporate-wide employment shown in the latest consolidated (Type 2) EEO-1 report. A CO should compare this with the corporate-wide employment in the preceding consolidated report to determine whether total employment is stable, growing or declining. This review also helps determine which EEO-1 categories have changed the most.

COs should use the corporate headquarters EEO-1 reports, i.e., the Type 3 reports, to conduct EEO trend analyses¹⁹⁶ on the direction of headquarters employment generally, and by EEO-1 category, including changes in nonfavored groups.

Comparisons of the participation of nonfavored groups in the two Officials and Managers (O&M) categories and the Professional category on the Type 3 report with their representation in the same categories on the Type 2 report should also be conducted by COs.

COs should review the latest individual establishment reports to identify major facility locations. A major facility is one that contains 150 or more employees, or in the case of smaller corporations where no individual facility reaches the 150 employees mark, a facility where the number of employees is at least 33% higher than the average of all facilities. COs will compare the participation of nonfavored group members in the two O&M categories and the Professional category on the headquarters’ Type 3 report with their representation in the same categories on the individual Type 4 reports for the selected establishments. Although not definitive, this can often provide a general idea of whether there appears to be considerable movement to corporate headquarters from subordinate establishments, which can help approximate the broad pool of protected group members potentially available for such movement.¹⁹⁷ The COs will also compare individual establishments and note any significant differences in the participation of members of nonfavored groups in specific categories between establishments, as well as within a given establishment from one year to the next.

¹⁹⁶ See Part A.IV of the SCER.

¹⁹⁷ See subsection 4H04c, Cross-Establishment Movement.

In addition to using Part A.IV of the SCER, COs should discuss any areas of potential concern or interest resulting from these analyses under the “Focus Level and Areas” element of Part C.III of the SCER.

4C RELATIONSHIP TO THE STANDARD DESK AUDIT

After receiving the contractor’s corporate headquarters facility AAPs, COs should review and analyze the AAPs and its support data using the desk audit procedures outlined in Chapter 1. If the contractor does not provide AAPs and/or support data on time, COs should follow the procedures outlined in Section 2C. However, in addition to the standard desk audit, the primary focus in a CMCE desk audit is analyzing professional and management level job groups to identify nonfavored groups, determine their representation, and assess the impact of policies and procedures of these groups. For example, COs must assess or determine:

- Whether there is a level(s) at which there is a marked decline in participation.
- If there is such a level(s) of decline, the types of jobs at that level(s), both generally and by major functional area (e.g., vice-president, director, senior analyst, finance, legal, sales).

Consideration is also given to the types of jobs held by nonfavored group members below that level at which there is a marked decline in participation. Whether nonfavored group members are located in likely feeder pools for the upper level jobs should also be determined. For example, COs may find that women are concentrated in office and clerical job groups. Two other areas of interest include:

- The employee development and selection policies and practices regarding jobs at the level at which participation declines, and the jobs in their probable feeder pools.
- The nature and amount of employment activity in job groups around that level.

The following sections discuss each of these considerations in detail. When conducting the analyses, it is important for the CO to remember that these considerations apply corporate-wide, not just to headquarters positions.

4D DESK AUDIT – REVIEW OF THE ORGANIZATIONAL PROFILE

For the purposes of this section, “organizational profile” is a general term encompassing the workforce analysis, organizational display, job group analysis and utilization analysis. The CO should review all of these to determine which, singly or in combination, will best provide the necessary data for these analyses.

In addition to addressing them under the appropriate regular areas of the SCER, the CO should also discuss results of the analyses conducted under this section in the “Focus Level and Areas” element of Part C.III of the SCER.

4D00 ANALYSIS OF NON-FAVORED GROUPS' MANAGEMENT LEVEL PARTICIPATION

In reviewing the organizational profile, a CO should determine whether there is a marked decline in the participation of specific groups of individuals. This section covers conducting an analysis and determining the participation rates for nonfavored groups in top and middle management.

As a general rule, a corporation selected for a CMCE should be large enough to have job groups extending beyond the standard EEO-1 categories. Therefore, the top management level may be immediately evident from a scan of the job group analysis. When this is not the case, actual job titles, in conjunction with reporting relationship to the CEO, are usually reliable indicators of the top management level.

Typical titles at top levels include Executive Vice-President, Senior Vice-President, Comptroller, Chief Financial Officer and Vice-President. Reporting relationships are usually reflected in the corporation's organizational charts. The very top level consists of individuals reporting directly to the CEO; the second level consists of those individuals who report directly to the top level managers. While the number of reporting levels regarded as "top management" varies with the size and structure of the particular corporation, more than three levels down at the headquarters establishment is usually considered middle management. People at that middle corporate level may, in turn, be top management at subordinate establishments.

Middle management is different. Again, the job group analysis may be the easiest way of determining what positions large corporations classify as middle management. However, when that is not the case, salary may be a more reliable determinant than title. It may be best for COs to use salary level, range or grade as reflected in the workforce analysis or organizational display, to identify where nonfavored group participation declines.

When management levels are still unclear, COs must obtain more information before proceeding by contacting corporate human resources and making a request for clarification. Assuming management levels are defined, COs would move to their analysis of nonfavored group participation at these levels.

- a. Analyzing Nonfavored Group Participation.* In addition to analyzing and utilizing the normal EEO trend data, COs must conduct a breakout analysis specifically of the O&M categories. COs should total the number of O&M jobs by grade, race and gender across department lines. In doing so, they must keep track of the departments in order to examine the functional distribution of jobs at a later stage. Subsection 4D01, Functional Areas, may be a useful supplement to this discussion.
- b. Identify Marked Decline.* COs must identify whether there is a level at which there is a marked decline in any group's participation. A marked decline is the highest level with proportionately fewer nonfavored group members than the level immediately below, but except in rare cases, not the level without any nonfavored group members. There may be a single level at which there is a marked decline for one or more nonfavored groups, or there may be multiple levels at which a marked decline exists for different groups (e.g., there may

be one level at which there is a marked decline of the participation of Hispanics, another level where there is a sharp decline in the participation of females, and a third at which there is a marked decline of individuals with disabilities). Marked declines also may differ by various functional areas.

The determination that there is a marked decline in nonfavored group member management participation will focus further CMCE investigation in two areas:

- At and above the grade or level where nonfavored group participation declines. At this level the focus should be on whether the incumbent nonfavored group members are treated in a nondiscriminatory manner in all aspects of their employment.
- Below the grade or level where nonfavored group participation declines. At this level the focus will be on why nonfavored group members have not advanced further. Specifically, areas to explore or questions to ask are:
 - Whether unlawful discrimination kept group members from advancing beyond that grade, either because of discrimination in the selection practice itself or because of discrimination in employee development practices or in assignment to career paths or /feeder pools for higher-graded positions.
 - Whether the contractor identified and removed any impediments to equal employment opportunity in selection procedures for higher-level positions. Such impediments might include management review procedures or contractor actions regarding formal or informal career paths and feeder pools.

4D01 FUNCTIONAL AREAS

Functional analysis is essentially analyzing whether career paths and feeder pools are determined by participation in specific functional lines. Absences of a particular group, observed in EEO categories, can often be a direct result of a functional line progression that has barriers to employment at early stages of career development (e.g., at a major aircraft manufacturing contractor, upper management may almost exclusively come from the engineering functions where there may traditionally have been fewer women). A functional analysis may also reveal more general issues such as hiring/placement disparities into certain professional categories. To conduct the appropriate analyses COs must:

- identify major functional areas,
- identify absences and concentrations in functional areas of certain groups,
- determine whether the major functional areas are "line" or "staff,"
- identify feeder pools,

- compare feeder pools to higher-level jobs, and
- examine the disparity between nonfavored and favored groups.

a. *Identify Major Functional Areas.* COs should return to the workforce analysis or organizational profile and review departmental data to determine “major functions.”

Although what is a "major function" will vary within a given corporate structure, a major function is usually headed by a manager who has either a "direct" or "second level" reporting relationship to the CEO, and typically includes or covers several departments.

Common "major functions" at a corporate headquarters include: Finance (under a Comptroller or Chief Financial Officer), Legal (under a General Counsel or similar title), Personnel or Labor Relations (under a Vice-President for Human Relations or similar title), and Marketing, Sales and Research.

b. *Absence and Concentrations in Functional Areas.* In each major functional area, COs should analyze participation in exempt jobs (managerial, professional and, as applicable, sales) to determine if particular groups are excluded or concentrated.¹⁹⁸ They should also analyze exempt jobs in any other functional areas where nonfavored groups are absent, underrepresented, or concentrated.

c. *"Line" versus "Staff."* COs must identify whether the major functional areas are "line" or "staff." A line area is one that directly contributes to the corporation's profitability, and generally focuses on a specific area; a staff area is one that primarily supports line functions.

Line jobs will vary a great deal depending on the corporation's product or service, but will include jobs and functional areas that are essential to producing and selling the product or service.

For example, at a consumer products firm, manufacturing, marketing, and sales would be major line functions; at a consulting firm, the consultants would be line jobs; and at a high-tech firm, research and engineering would be line functions. Staff functions typically include personnel, labor relations, purchasing, finance, legal, and facilities management.

While line and staff jobs are often at the same base salary, line jobs are more likely to be eligible for significant bonuses making their total compensation considerably higher. Also, the corporation is generally more likely to have promoted top management from line positions, although it is not unusual for top managers to have experience in line and staff positions.

COs must analyze the proportion of line versus staff exempt jobs in the workforce, and determine whether there is a significant difference in the workforce composition of the line

¹⁹⁸ Generally, exempt jobs are jobs or positions that are exempt from the overtime provisions of the Fair Labor Standards Act.

and staff functions. COs should note as an area requiring further investigation any concentration of a particular race or gender in staff functions. At the onsite review, the CO should then review personnel files and conduct interviews to ensure that the presence of any concentrated race/gender groups in staff positions despite having education/experience pertinent to the corporation's line functions, is not resulting from "steering" either at or after hiring.¹⁹⁹

- d. *Identification of Feeder Pools.* COs should examine the utilization analysis and the raw personnel activity data from the AAP to determine the most likely feeder pools for the jobs at and above the grades/levels where minority and female participation declines. However, it is important to remember that potential feeder pools are not necessarily limited to the headquarters workforce. Therefore, COs may need to request additional data.

The likely feeder pools are not limited to subordinate management jobs but may include professional jobs and or other positions at comparable exempt grades. Likewise feeder pools are not necessarily restricted to the functional area in which a particular management job is located, but they are most often related to them. For example, it is generally more common for someone in finance to move to a financial management position than it is for someone in engineering to do so. Consequently, for desk audit purposes, in each major functional area, COs should identify the:

- number of jobs, by favored and nonfavored group members, at and above the grades or levels where the participation of nonfavored group members declines; and
 - number of exempt jobs, by favored and nonfavored group members, below that level.
- e. *Comparison of Feeder Pool to Higher-Level Jobs.* If clustering of nonfavored groups appears at lower grade levels, COs should try to determine whether:
- *Nonfavored Group Members Hold Jobs with More Limited Advancement Potential.* There are several areas of inquiry or questions that are useful for COs when examining limited advancement potential issues. For example, COs should seek to determine whether nonfavored group members are concentrated in functional areas that have fewer higher graded jobs than those they hold? Are they underrepresented in functional areas with higher graded jobs? If so, there may be a placement problem.
 - *Nonfavored Group Members Hold Jobs with Advancement Potential, but Do Not Advance at a Rate Comparable with their Peers.* There are several areas of inquiry or questions that are useful for COs to pursue when examining this apparent disparity. For example, COs should seek to determine whether nonfavored groups are in functional areas that have a grade distribution comparable to that in other functional areas? If so, COs will need to investigate further to determine the reason why proportionally more nonfavored group members are in lower-graded jobs than their peers.

¹⁹⁹ See Section 4H – Onsite: Filling of Management Jobs.

COs should also seek to determine whether the reason for the disparity is attributable to some legitimate nondiscriminatory factor such as developmental programs, performance appraisals, assignments or other factors that are related to promotions.

- f. *Disproportion or Disparity.* As a general rule, COs should first examine the functional areas where there is the greatest disparity between the participation of nonfavored group members above the grade where nonfavored group member participation declines, as well as below the grade where nonfavored group member participation declines.

4E DESK AUDIT: AAP AND EMPLOYMENT ACTIVITY INFORMATION DURING A REVIEW OF SELECTION PROCESSES AND DEVELOPMENTAL PROGRAMS

COs must review the contractor's written AAP(s) to find information on the selection processes that may apply to positions above and below the grades/levels where participation by nonfavored groups declines. As an example, a CO would look for information on the contractor's promotion policy. If the policy is to limit management jobs to internal candidates, the corporation should also have policies and procedures for making these job openings known to potential internal candidates within corporate headquarters and outside of headquarters. Other areas where policies may indicate a problem might include the absence of employee development programs that apply to positions above and below the grades/levels where nonfavored group member participation declines. The absence of outreach efforts designed to improve access to management positions for nonfavored group members could also be a problem.

COs must also use personnel activity data from the contractor's AAP to identify the employment activities that include jobs above and below the level where nonfavored group member participation declines. This is in addition to conducting the standard impact ratio analyses (IRAs). The CO must identify the number of hires and applicants at, above and below the grade where nonfavored group member participation declines. Based on the available data, the CO will determine how jobs at and above that level are filled (e.g., hired from the outside, or promoted or transferred from within). Proper analysis may require requesting additional data and gathering information during the onsite review. Useful information related to this section is in Section 4F, Notice of Onsite Review and Follow-up Data Requests and Section 4H, Onsite: Filling of Management Jobs.

Now the CO must next compare the number of hires, promotions and transfers at, above and below the grade where nonfavored group representation declines. The CO must also identify terminations of nonfavored group members above and below the grade where their participation declines.

Once this is complete, COs must address all areas of potential concern in the "Focus Level and Areas" element of Part C.III of the SCER.

4F NOTICE OF ONSITE REVIEW AND FOLLOW-UP DATA REQUESTS

At the conclusion of a desk audit, COs should contact the contractor to schedule the onsite review and discuss any additional material they need for further analysis. The COs should include any unresolved issues identified during the desk audit in the SCER.

The CO will prepare a letter to the contractor reiterating that the evaluation is a CMCE, confirming the onsite date and listing any additional data needed. The notice will state that the onsite review will begin with an entrance conference to discuss those issues with the CEO or appropriately designated corporate officials.

The notification letter to the contractor should identify the additional information needed. When the needed information is regarding the jobs filled at or above the level where minority or female participation or both drops, the data requested should be sufficient to identify the specific jobs filled and how they were filled (e.g., by hire, by promotion, by transfer). COs should note in the data request that if the contractor filled such jobs by promotion or transfer from subordinate establishments within the corporation, the contractor should identify the originating establishment. As pertinent, COs should request any other needed activity data (such as applicant flow, and terminations) and general information (e.g., jobs in subordinate establishments included in the corporate AAP).

4G ONSITE REVIEW

A CMCE onsite review follows the same process as the standard onsite review:

- conduct entrance conference to discuss purpose of onsite review and areas of concern;
- review of documents provided by the contractor and interviews with employees and management to eliminate, revise and confirm identified areas of concern;
- identify additional information still needed for further review on areas remaining unresolved;
- conduct closing conference to address any unresolved areas of concern and discuss “next steps” in the evaluation process.

COs should review Chapter 2 for specific guidance on onsite reviews. One primary difference between the CMCE and standard onsite review is that a Regional Director may lead the opening and exit conferences in a CMCE onsite review. Another difference is that the main focus is on corporate management positions, though the scope may be broader than just the corporate headquarters facility.

4G00 ENTRANCE CONFERENCE

COs must coordinate the entrance conferences with top corporate officials and with the appropriate OFCCP Regional Office. Coordination with the regional office gives the Regional Director or his or her designee the opportunity to attend the meeting. During the entrance conference, COs must obtain any clarification needed from the corporate organization (e.g., any organization charts not obtained to date), and any missing corporate background information the corporation may be able to provide (e.g., annual reports) prior to the onsite review. For example, corporate officials should be asked to explain and provide any documentation regarding:

- What the contractor values in candidates for middle and senior-level management positions?²⁰⁰
- Whether the contractor has developed any special EEO programs that it would like for OFCCP to consider as part of its corporate evaluation.

As in any other evaluation, COs should address any questions contractors have concerning the onsite and any other part of the evaluation process. COs must remind contractors that the onsite closing conference will be only an informal, preliminary discussion, and that a formal exit conference will be scheduled when OFCCP is prepared to discuss evaluation findings after having conducted offsite analysis.²⁰¹

4G01 CORPORATE CULTURE

Each corporation has distinct characteristics, not only in terms of how it conducts its major business and the skill backgrounds it needs, but also in terms of its management style and the behaviors it tends to foster and reward among its employees. The CO should gather information that indicates or describes the contractor's corporate culture. This, in turn, may help the CO understand how the corporation makes management selection decisions. While some of this information may be found through research, including corporate self-descriptions, a CO will usually get a better picture during the onsite through interviews and observation.

- Corporate Business.* The nature of a corporation's business will tend to determine which corporate components are most essential to its profitability. For example, at a corporation that produces a fairly simple consumer product, marketing and sales are likely to be most central to profitability. On the other hand, in a corporation engaged in advanced research, engineering or scientific expertise is likely to be central to profitability. And as a general rule, employees in those functional areas (which are also usually line rather than staff positions) will have better advancement potential.
- Other Factors.* There are usually meaningful differences in predominant management style and valued employee behavior between different corporations even in the same industry. For example, one employer may value somewhat egalitarian management, while another prefers a more authoritarian approach. Or, one employer may value employee initiative and

²⁰⁰ See subsection 4G01, Corporate Culture and subsection 4H00 – General Qualification Standards.

²⁰¹ See Section 4K – Completion of Compliance Evaluation: Exit Conference, Report Writing and Notice of Evaluation; also Section 2N – Exit Conference.

creativity, while another may place a higher value on mastery of standard procedures. Or, one employer may require rotational assignments (with or without frequent relocations or international stints) to develop a broad knowledge of the business, while another may more heavily weigh depth of expertise in the business area to be managed. Such differences also can extend to matters such as acceptable dress, expectations concerning uncompensated overtime, socializing outside work hours, etc.

These and other differences are not necessarily conscious ones. However, the degree of "fit" between what a corporation values and what an employee values or learns to value can influence whether a person will advance to management and, if so, what management level he or she is likely to reach. The importance of such "fit" usually increases with management level.

4G02 INTERVIEWS

As with any review, a prime source of information will be interviews of both management and employees. Consistent with the guidance in Chapter 2, contractor representatives, including internal or external attorneys or external consultants, may be present during interviews of bona fide exempt management and supervisory employees.²⁰² However, if a CO is interviewing a management or supervisory employee who is also a complainant or potential complainant, or is being interviewed in his or her capacity as an employee rather than a management official, the CO must conduct the interview in private.

As always, there will be some common questions. However, COs should be sure to tailor interviews to the specific areas of concern being investigated. Likewise, a CO must take care to select individuals for interviews who are tailored or relevant to the areas of concern. However, one common element is that a CO should usually begin with key corporate personnel and human resources officials to discuss and develop an understanding of corporate policies and practices in the following major areas:

- the contractor's middle and senior-level management positions and how the contractor fills them;²⁰³
- the use of outside hiring to fill middle and senior management positions and how the contractor locates and screens candidates;²⁰⁴
- the use of internal hiring for these positions;
- the "pool" for these positions;²⁰⁵
- the mechanisms the contractor uses to identify and develop candidates for those positions, both at corporate headquarters and at subordinate establishments;²⁰⁶ and

²⁰² Section 3J – Interviews.

²⁰³ Subsection 4D00 – Analysis of Nonfavored Groups' Management Level Participation.

²⁰⁴ Subsection 4H01 – External Hires.

²⁰⁵ Subsections 4D01 – Functional Areas; Subsection 5H02- Internal Development.

- the reward systems, both monetary and non-monetary, the contractor uses to retain key personnel.²⁰⁷

The CO should also ask for all documentation, whether written or electronic, of policies and practices relevant to these areas that the contractor has not already provided. This includes any personnel and human resource manuals, supervisory and employee handbooks and any other internal publications that might be relevant.

4H ONSITE: FILLING OF MANAGEMENT JOBS

As previously indicated, COs will have requested data on the hires, promotions and transfers into jobs at, above and below the level where the participation of nonfavored group members declines. COs will review this data to determine which methods the corporation used to fill jobs at each grade/level during the data period, and then conduct the appropriate analysis. Although the process of analysis is essentially the same as for any review, there are certain elements that are unique to CMCEs. The following subsections discuss the CMCE-specific factors COs may need to incorporate into the analysis. These factors apply whether the contractor fills the positions in question externally or internally.

The basics of conducting a hire or promotion analysis are not re-addressed here. However, where additional clarification is needed, these subsections include sample questions and analytical guidance. These sample questions may be viewed as guides for COs on information to research and consider or as actual “questions” to be asked of the contractor and its employees.

4H00 GENERAL QUALIFICATION STANDARDS

Corporate officials may cite any number of factors in describing what background and characteristics they look for in candidates for management positions. Among them may be a degree in a particular subject area or having an advanced degree, tenure with the corporation, successful profit and loss experience, international stints, and broad knowledge of the business or corporation. Whatever factors the contractor cites, COs must ask sufficient follow-up questions during interviews to thoroughly define the factors and to determine why the corporation believes they are important to the specific jobs, and how the corporation believes people acquire or could acquire such characteristics. Below are some follow-up lines of questions for several common factors contractors use.

- If the contractor views advanced or specialized degrees as important for a specific management position or level of management COs could ask these follow-up questions:
 - What level or in what field(s) must the degree be? For which position(s)? Why?

²⁰⁶ Subsection 4H04 – Internal Development.

²⁰⁷ Section 4I – Onsite: Retention.

- How important is a specific college or university? Why?
 - Can a person earn an advanced degree while employed? After hours only? Are there any corporate sponsored degree or continuing education programs? How do these programs operate?
- If the contractor views time with the corporation as important COs could ask these follow-up questions:
 - How much corporate service is typical for employees at and above the management level where nonfavored group participation declines?
 - Do employees usually earn this corporate service in a specific sector(s) of the corporation? If so, why?
- If successful profit and loss responsibility is important COs could ask these follow-up questions:
 - Why is it important to the particular management job or group of jobs?
 - Are there particular areas of the business in which one is most likely to gain that experience? Least likely?
 - At what management level does one usually gain it? Does this differ among business areas?
 - Is the number of profit and loss centers increasing, decreasing or remaining about the same?
- If international stints are important COs could ask these follow-up questions:
 - What is the value of having a previous international assignment? Are the number of these assignments and their duration factors?
 - How are people selected for these opportunities?
- If the contractor views exposure to different facets of the business as critical COs could ask these follow-up questions:
 - Why is it important?
 - Does this requirement encompass particular business sectors and does the contractor consider exposure to certain sectors more valuable than others? How much “exposure” is required? Why?
 - How do employees learn that such exposure is important to advancement?

- How do employees obtain such exposure?

Likewise, interviewed employees may cite any number of factors as important to advancement, which may or may not match the factors cited by management. When disparities exist, COs must consider additional sources of information such as personnel files of individuals actually promoted into the position(s) in question. Beyond basic elements such as advanced degrees, COs should explore how employees acquire the characteristics needed to become managers, with particular attention to any corporate practices that may be informal such as mentoring, networking, high visibility special projects, or rotational assignments.

Whether formal or informal, COs must also consider selection procedures for these programs as part of the analysis. Again, COs must be sure to ask for any documentation regarding the qualification standards for the jobs he or she is examining, and any continuing education, mentoring or similar corporate program. This documentation may include, but is not limited to, personnel handbooks, job announcements, memos, participant lists and e-mails.

4H01 EXTERNAL HIRES

When externally filling management jobs, particularly higher level management jobs, contractors frequently opt not to use conventional recruitment sources, such as newspaper or trade publication advertising, but rather use executive search firms or informal referrals from current executive level employees or both.

While filling a job by hire rather than by promotion or transfer does not in itself violate any of the laws OFCCP enforces, COs must be alert to any evidence or external hiring patterns that indicate that the decision to hire from the outside discriminates on the basis of a prohibited factor.

4H02 SOURCES OF APPLICANTS AND CANDIDATES

Contractors may use various sources for hiring middle and senior-level managers. These sources may include executive search firms and referrals from employees.

a. Executive Search Firms. As part of the CMCE, COs must determine the sources of the applicants and candidates for the managerial position(s) they are evaluating, and examine the relationship the contractor has with these sources.

- *Types of Search Firms.* A contractor may maintain several different types of arrangements with executive search firms. Below are just two examples.
 - *Firm on retainer.* In this arrangement, the employer usually has a contract with the search firm under which the contractor pays the firm a basic fee for its services, with that fee supplemented for each referral hired. This type of arrangement is more common for professional or entry-management positions, where the employer anticipates a continuing need for hires in certain fields or at certain levels where there is a skills shortage internally, externally or both.

- *Firm on contingency.* In this arrangement, the firm is usually paid a fee only if a candidate it refers is hired. This type of arrangement is more common for middle to upper-level management jobs, and contractors may prefer this when they only occasionally hire from outside.
- *Unsolicited Referrals.* Contractors may sometimes hire from among unsolicited referrals from an executive search firm. In this arrangement, the firm is paid a fee only if the candidate is hired.
- *Equal Employment Opportunity and Affirmative Action Obligations in Referrals.* Contractors, under the EEO clause in its contracts, retain responsibility for ensuring that solicitations for employees placed on its behalf by a search firm or other referral source comport with all of the contractor's equal employment opportunity and affirmative action obligations.²⁰⁸

Consistent with that clause, as well as with its obligation to incorporate the EEO clause in its subcontracts, the contractor is urged to notify the search firm of its EEO obligations, including that the firm, in seeking candidates on its behalf, must actively seek to include qualified nonfavored group members among those recruited and referred for listed jobs.

- *Monitoring Referrals:* Contractors using search firms must monitor referrals received by gender, minority group and, when possible, protected veteran and disability status as part of its internal auditing and reporting systems under 41 CFR 60-2.17(d), 60-250.44(h), 300.44(h) and 60-741.44(h). A contractor should ask its search firm how it locates and selects candidates if the search firm fails to refer women, minorities, individuals with disabilities or protected veterans.

A contractor is not relieved of its obligations related to recruitment by using a search firm; it must ensure that any firm acting as its agent carries out the contractor's affirmative action and nondiscrimination obligations.

- b. *Employee Referrals:* Contractors may use employee referrals as a source for new hires. However, as with search firms, the use of employee referrals does not relieve a contractor of its obligations related to recruitment. For example, if a contractor has established a goal for a job group and the contractor relies on employee referrals to recruit that group, the contractor could make clear to employees that it desires referrals of a diverse group of qualified candidates. The contractor might also supplement employee referrals with other sources of qualified applicants for the jobs involved, such as through linkages.

²⁰⁸ See 41 CFR 60-1.4(a)(2); 41 CFR 60-3.10(a) ("The use of an employment agency does not relieve an employer or labor organization or other user of its responsibilities under Federal law to provide equal employment opportunity [under UGESP].").

A contractor's exclusive use of employee referrals may be discriminatory where there is evidence that the intent behind that reliance is to exclude underrepresented group members from consideration for certain jobs. Reliance on employee referrals may also be discriminatory when such reliance has a disparate impact on a particular gender, race or ethnic group, and is not job-related and consistent with business necessity.

4H03 SAMPLE QUESTIONS AND ANALYSIS FOR VARIOUS SEARCH SOURCES

If, in the course of a CMCE, a CO finds that a particular search firm may be discriminating in its recruitment or referral practices, he or she must inform his or her supervisor. As appropriate, OFCCP coordinates with EEOC to investigate the executive search firm under Section 703(b) of the Civil Rights Act of 1964, as amended. This section covers the referral practices of employment agencies. Moreover, if a contractor knowingly uses a search firm that discriminates the contractor will be found in violation of the Executive Order.

A CO engaged with a contractor using an executive search firm may want to ask several questions to understand that relationship. Some sample questions for the contractor are below.

- Have you used executive or other search firms? When and how often? Which firms do you use most? Identify the positions or types of positions (e.g., fields, levels) for which you have used search firms?
- Have you informed those firms of your EEO/AA policy? How? When?
- Who is responsible for monitoring search firm referrals to ensure that the firm complies with equal employment opportunity and affirmative action requirements? How is monitoring accomplished?
- What is the racial, ethnic, and gender composition of those who the contractor hired from among search firm referrals? What efforts did the search firm make to ensure a diverse candidate pool?

COs must conduct an analysis of the information and data received from contractors on their sources of applicants and candidates. For each job filled with a referral from a search firm, the CO should determine, when possible:

- The qualifications the search firm used to refer a candidate.
- The extent to which the contractor approved these qualifications or the amount of input the contractor had in the process to refer a candidate.
- The total pool of candidates who met the requirements to be referred, by race, sex, known disability or protected veteran status, and the total number of applicants actually referred by race, sex, known disability or protected veteran status.
- The status of the selectee as a member of an underrepresented group.

- The presence of members of underrepresented groups among the referrals made by the search firm.
- The existence of members of underrepresented groups as applicants for the job from other external sources.
- The existence of internal candidates for the job identified by race, sex, known disability and protected veteran status.

A CO engaged with a contractor using employee referrals may want to ask several questions to understand that process. Some sample questions for the contractor are below.

- How much, or to what degree, do you rely upon employee referrals for middle and senior-level management positions? Is this practice formal or informal?
- What is the typical relationship between the employee making the referral and the person being referred (e.g., used to work together, went to the same school, met through a professional association, belong to the same club, a neighbor, a relative, a personal friend)?
- Do you receive employee referrals of nonfavored group member candidates, as well as others? How many were referred by race, gender, ethnicity, known disability or protected veteran status? To whom were the nonfavored group members referred? Were any of the individuals referred hired?
- Do you inform employees that the corporation is actively interested in referrals of underrepresented individuals? How are they informed? When are they informed?
- Do you provide a reward or bonus for referring a candidate that is ultimately hired?

When collecting and analyzing employee referral data, COs must remember that information on whether a person was an employee referral will not necessarily be in an applicant log. If no referrals are shown on a log, the CO needs to examine a sample of the files of people hired at the same level involved. Information on the employment application, interview notes may provide an indication of the source of the applicant or candidate. The CO may also be able to obtain relevant information through interviews of successful candidates (e.g., those hired or promoted into the job title at issue).

4H04 INTERNAL DEVELOPMENT

If not already provided, the CO must request documents on the contractor's promotion, training and transfer policies and procedures. With this information, the CO should discuss the procedures with human resources and other appropriate corporate officials. In particular, the CO must clarify how they apply to headquarters positions at, above and below the management level where nonfavored group member participation declines. The CO must also clarify how these procedures apply to movement from subordinate establishments to corporate headquarters and vice versa.

For most corporate management positions, particularly at the higher senior levels, placement through internal movement like promotions and transfers rather than by new hire is generally the rule. Therefore, in order to conduct a proper analysis, it is important that the CO fully understand the various elements that can affect internal placement, particularly those unique to a CMCE such as succession plans. Further, the higher the management level, the less likely it is that the contractor will include the jobs in any formal job announcement system the contractor may have, and the more likely it is that the contractor includes the jobs in some kind of formal or informal succession planning.²⁰⁹ Below are several sample questions that COs may find helpful.

- How do you make promotion and transfer opportunities known to potential candidates? Is the process the same in all functional areas? Are there differences in the process for positions at the upper management levels?
- Do you make openings at corporate headquarters known to employees in subordinate establishments as well as to employees at headquarters? How? How do employees at subordinate establishments express an interest in being considered for an opening at corporate headquarters?
- Do you make openings at subordinate establishments known to employees at corporate headquarters? Who is responsible for doing so? How is it done? What is the process by which employees at the corporate headquarters express an interest in being considered for openings at subordinate establishments?
- How many employees applied for positions at the corporate headquarters? Identify these employees by race and sex, and identify how many were hired?

The CO should review promotion and transfer actions for conformity with the corporation's stated policies and practices. The CO should also interview the contractor's current, former and new employees regarding their understanding of, and experiences with, the corporation's promotion and transfer practices at the corporate, regional and subordinate establishment levels.

The CO should examine personnel files of managers at and above the level where nonfavored group member participation declines.

a. Succession and Related Planning

The vast majority of corporations engage in some form of planning for future management and personnel needs. These plans go under many different names, such as "human resource development plans," "succession plans," "business plans," "management reviews," "replacement tables," "developmental needs assessment," "high-potentials," "fast-track," and "promotion rosters." The scope and detail of the plans may vary considerably. Areas where there may be the greatest variance include:

²⁰⁹ See subsection 4H04a – Succession Planning.

- The depth of the plan or how deep into the organizational structure the plan reaches.
- The degree of centralization or the degree of control exercised by corporate headquarters exercise compared to the regional headquarters or subordinate establishments.
- The degree of formality involved with the plan (e.g., the existence of a written plan, the use of regular plan reviews).
- The degree the plan is affected by standard performance appraisal or other personnel processes.

When succession planning is explicit or more formal there may be more specificity and several contingent options when implementing the plan. For example, an explicit plan may specify that a specific person is ready to step into the job or position as a permanent replacement for the incumbent, if necessary. It will also have contingencies should that person be unable or unavailable to assume the position. If no one is currently ready to assume the position permanently, most formal plans still provide a way forward by:

- designating a person who could take over until a permanent replacement is developed; or
- designating one or more persons who could be a permanent replacement, given additional developmental experiences or training or both. The plan would also identify needed training and experiences, how long it will take, and other appropriate detail.

In addition, to this level of specificity, a corporation may identify:

- A pool of employees (either specific, named individuals or a description of an employee group such as the number of employees currently in feeder jobs) the contractor considers to have a high-potential to develop into middle to senior-level managers; and
- A broader pool of employees the contractor considers promotable (either specific, named individuals or a description of an employee group such as the number of employees currently in feeder jobs).

The identification of employees, whether for a particular job or generally, is usually fluid, i.e., people may move onto or off of lists depending on shifting business needs, changes in personnel or individual job performance.

COs may want to ask specific questions about succession planning to determine if all qualified candidates are considered and whether employees with potential have access to training and other developmental opportunities. Several sample questions are below.

- Does the corporation have a succession plan to fill particular management positions should there be one or more vacancies?
- Which management jobs or management level are covered by a succession plan?
- What does the corporation's plan cover? Does the succession plan include both short and long-term planning, i.e., people who are currently ready to assume the position and those who may be ready after further developmental experiences and training?
- Are candidates in regional headquarters or other subordinate establishments considered when designating possible successors? If they are, explain how non-headquarters and headquarters candidates are identified?
- Are there written materials describing the plan and offering guidance on selection and development of candidates? Who developed the plan? Are employees advised of the plan?
- If the succession plan identifies specific individuals as potential successors for certain jobs, does the permanent successor most often come from among those identified? What are some examples?
- When is the plan reviewed and modified? Who is responsible for the review?
- What is the representation by race, gender, ethnicity, protected veteran status and individuals with disabilities, among those identified as potential permanent successors?
- How does the representation of members of protected groups who are identified as potential permanent successors for management jobs compare to their representation in the total candidate pool (e.g., in feeder jobs) for those jobs?
 - If the proportion of one or more of these groups in the succession plan is well below their proportion in the total candidate pool, what is the reason for this discrepancy?
 - What steps do you take to rectify the problem and recruit and/ prepare more group members to be manager successors? Who (by group member status) has graduated from a succession planning system into management?
- What, if any, developmental experiences does the corporation require or prefer (e.g., onsite training, offsite training, rotational assignments, special projects)? Are there any individual development plans?
- Does the corporation have any policies or practices for identifying people below the management level with a high potential for advancement?

- How does the process work? How are the individuals identified? What factors are used? Does a person need to be “sponsored” by a current manager? Why or why not?
- What is the lowest level at which an employee will be considered for succession?
- Are there any written materials describing the process, offering guidance on selecting and developing participants?
- How closely and how often does corporate headquarters monitor the process? Does the monitoring include ensuring that affirmative actions are taken to guarantee equal employment opportunity in all aspects of succession planning and management development?
- What is the representation by race, gender, ethnicity, protected veteran status and individuals with disabilities among those identified as "high-potential" versus those eligible to be so identified?
- If the proportion of representation by race, gender, ethnicity, protected veteran status and individuals with disabilities is well below their proportion of those eligible, what, if any, analysis was done and what were the findings?

When the contractor has succession planning programs and there is a disparity in the proportions of representation by race, gender, ethnicity, protected veteran status and individuals with disabilities included in the candidate pool, COs must determine the reasons for the disparity. In order to do so, COs must explore several areas and follow-up including:

- If there is EEO monitoring and an explanation is offered for a disparity, COs should verify the explanation in the course of examining data and files concerning internal mobility, and through interviews with selected employees and managers.
- If there is no EEO monitoring or no explanation is offered for a disparity, COs should analyze the disparity based on the information provided concerning the scope of the program and the criteria for inclusion. A few examples may be:
 - Where there is multi-establishment participation in the succession planning program, do any establishments have a particularly large gap between the percentage representation by race, gender, ethnicity, protected veteran status and individuals with disabilities in the program, as compared with the percentage of identified group members eligible for inclusion (e.g., in feeder jobs)?
 - Were the selection criteria for inclusion in the program uniformly applied?

b. Movement Within Headquarters

- *Transfers within Headquarters.* As with lateral cross-establishment moves, transfers within headquarters may represent planned rotational assignments. Based on information already gathered, COs should identify those moves within headquarters that appear to meet that definition. Also, if the data permits, COs should identify instances in which people transferring were subsequently promoted. When those transfers or promotions are into the level at, above or below the level where minority or female participation or both declines, COs should incorporate the information into the analysis and interview the employees and selecting officials involved to confirm the reason(s) for each move and how it was initiated.
- *Promotions within Headquarters.* When beginning to determine the frequency, types and paths to internal promotions within headquarters, COs must first make several determinations:
 - What is the typical grade increment involved (e.g., one grade increase, two)?
 - To what extent do promotions tend to remain within broad functional areas (e.g., finance, engineering, personnel)?
 - To what extent do promotions cross functional areas (e.g., from engineering into personnel)?
 - Are there any patterns that stand out regarding functional or cross-functional promotions (e.g., promotions are functional up to a certain level, then switch to cross-functional, or vice versa)?

When there is considerable cross-functional movement, a refined IRA may be useful for focusing the investigation. For example, if employees typically progress in one grade increments, promotions by favored and nonfavored group status at each relevant grade may be compared with incumbency by favored and nonfavored group status in the next lower grade.

When movement is predominantly within function the COs should identify functions where promotions occurred. COs should evaluate whether nonfavored group members were not promoted even though there was good participation of nonfavored group members in the source grade. COs should pay particular note to any functional areas they identified at the desk audit with the greatest disproportion between the participation of nonfavored group members above and below the grade where their participation declines in the workforce as a whole.

When some functions have concentrations of favored or nonfavored group members and other functions have underrepresentation of favored or nonfavored group members, these employees are likely to stay in these positions. This is most likely when movement is primarily within function. Contractors should examine a sample of their files on nonfavored group members in the concentrated personnel areas to identify for any placement problems.

For example, if nonfavored group members are heavily concentrated in staff positions in a "high-tech" firm, the contractor should determine whether any of them have technical backgrounds that would have qualified them for line functions? If so, did they start in staff or move into staff position later? In either case, the contractor should determine why?

- *Average Time in Grade or Corporate Service.* One way for COs to evaluate whether nonfavored group members are progressing in the managerial ranks is to look at the average time they spend in their current pay grade in comparison to members of the favored group in the same grade. COs can also extend this comparison to corporate service or tenure. COs should refine the focus their inquiry if nonfavored group members spend considerably more time in the same grade than their counterparts. To do so, COs may focus on the possible reasons for the differences. For example, they can seek to determine whether nonfavored group members hold the type of jobs that limit opportunities, or whether the contractor passes over nonfavored group members for promotion. Alternatively, the analysis may show that nonfavored group members have less time in a grade than their peers. If this is the case, service time may be an explanatory factor for nonfavored group members not advancing to higher positions.
- *"Typical" Career Paths.* COs should ask whether promotions show repetitive patterns that appear to represent "typical" career paths within major functional areas. For example, in the functional area of purchasing, COs may want to explore whether promotions tend to be from being a Buyer, to becoming a Purchasing Supervisor, and then to a Purchasing Manager. In sales, COs may want to determine whether the typical career path is from Account Executive III to II to I, to Area Sales Manager, and then to District Sales Manager. When these progressions appear, COs should compare the representation of nonfavored and favored group members with the feeder titles of the composition of those promoted.

c. *Cross-Establishment Movement*

- *Movement to Headquarters from Subordinate Establishments.* Early in the corporate management evaluation, COs must determine the degree to which the contractor fills management openings at corporate headquarters by promotion or transfer from subordinate establishments rather than from within headquarters itself. This balance may vary depending on the management level or functional area. For example, at lower management levels, promotions or transfers may be predominantly within headquarters, while at higher levels they may come predominantly from outside headquarters.

Such information will assist COs in identifying feeder pools for management jobs and, therefore, may influence whether COs expand the evaluation to include one or more subordinate establishments.²¹⁰

²¹⁰ See Subsection 4A01 – Scope of CMCEs.

- *Movement from Headquarters to Subordinate Establishments.* Promotions and transfers out of headquarters to subordinate establishments also may be relevant, particularly in situations where the contractor views exposure to different operating business components as important to advancement to or above the level where nonfavored group member participation declines.
- *Rotational Assignments.* Cross-establishment transfers, whether into or out of headquarters, or between non-headquarters establishments, may represent planned rotational assignments as a part of a formal or informal development program.

As with the choice to fill a job by hire or promotion, the choice to fill it by transfer rather than promotion, or from a subordinate establishment rather than within headquarters, is itself a selection decision. While that decision may appear to be EEO neutral, COs should be alert for any pattern that suggests a correlation with a prohibited factor. Sample questions that may be helpful on this and related points are below.

- Is work experience in subordinate establishments important to advancing to corporate management positions? In what fields? Is working at corporate headquarters important to advancing to senior management at subordinate establishments?
- When during an employee's career is a cross-establishment move generally made?
- Are cross-establishment moves ever part of a formal career planning process? How does this fit into long-term succession planning?
- Are rotations through the corporation's overseas locations a 'preferred' or 'required' qualification for moving into senior management positions, either officially or unofficially?
- What happens if an employee refuses a job offer requiring relocation? Are the effects of refusing to relocate on career prospects the same for all employees who refuse to relocate?

COs must review any written material on corporate policies related to promotions and transfers, as well as the data requested earlier on promotions and transfers to management jobs at, above and below the level where nonfavored group member participation declines. At a minimum, the data in the sample analysis should include:

- the date of the promotion or transfer,
- the race and gender information,
- the disability or protected veteran status or both, when known,
- the job title, grade and department, and

- the establishment from which and to which the promotion or transfer occurred, if it is not within corporate headquarters.

d. *Promotions and Transfers into Headquarters versus within Headquarters.* COs must determine the extent to which feeder pools for headquarters positions are internal and external to headquarters. COs must separate promotions from subordinate establishments into headquarters from promotions within headquarters. COs should do the same with transfers.

CO should ask or seek to determine how, at given grades or types of functions, the volume of promotions and transfers into headquarters compares with the volume within headquarters.

e. *Promotions and Transfers into Headquarters from Subordinate Establishments.* If subordinate establishments are an important feeder pool, COs must examine the participation of nonfavored group members in this pool. For promotions and transfers from subordinate establishments into headquarters, COs must note the grade level and originating establishment.

COs should ask several questions related to promotions and transfers into headquarters to identify potential problems:

- How does the majority of the movement into headquarters occur? Is it from only a few establishments? Are these establishments part of a particular intermediate business group?
- How does the participation of nonfavored group members in exempt positions in establishments from which promotions or transfers, or both, occurred compare to their participation in exempt positions in other establishments?

f. *Performance Appraisals.* Performance appraisals are an important and essential management tool. This tool can inform promotion and other decisions. The vast majority of corporations have a formal performance appraisal process for exempt staff. These processes differ in a number of ways, among them:

- The frequency performance appraisals are conducted, although most are conducted annually.²¹¹
- The degree to which the employee being appraised contributes to the process. For example, in some instances, the process begins with the employee giving a written self-evaluation of his or her progress against performance goals established in the last appraisal cycle. Sometimes this includes indicating what his or her goals are for the coming year.

²¹¹ If a regular appraisal cycle is supplemented by a "benchmark", a longer term career assessment process such as career reviews at the 3rd and 7th years of employment may take place. The career assessment processes may be a component of succession planning. More on succession planning is in subsection 4H04.

- The manner in which the appraisers express the evaluation ratings. Some use only numeric values and others may use a narrative.²¹²
- The requirement that employees sign their appraisals and whether employee comments are permitted.
- The level of the individual responsible for reviewing the appraisal.

Corporations link appraisals to wage increases, bonuses and promotions. Section 4H touches on issues related to promotions and Section 4I reviews issues related to wages and bonuses. COs will want to know whether the corporation gives employees in the same grade level who receive a given rating the same percentage raise. COs will also want to know when a formula is used for determining raises and bonuses, and how heavily the rating is weighted. COs may find the below sample questions on performance appraisals useful.

- What is the corporation’s performance appraisal process for exempt staff? Does the corporation use the same appraisal process for all exempt staff? Is the process different for the various levels or grades in the company?
- Does the corporation use a numeric or narrative appraisal rating? If neither of these is used, describe your rating method.
- What are the highest and lowest scores for the corporation’s numeric rating system? What is the range of acceptable scores? How is the range of acceptable scores established? When was the range established and when was it last modified?
- What score or performance rating does an employee generally need for promotion?
- Are there any written guidelines or training on how to administer the appraisal? Describe the guidelines the corporation provides to the rating official. Is reference made to EEO? If so, explain.
- How often are your employees appraised? Who appraises them and who approves the ratings? What is the degree of employee input?
- Is career planning included in your process? Is this planning short term, long term or both?
- Are "benchmark" or career interval appraisals used?

²¹² For example, an “outstanding” rating may be valued at 4 points or assigned the number 4, while an “unacceptable” rating may be valued at zero. A narrative rating would consist of a brief overview summarizing an employee’s level of performance and accomplishments to substantiate a particular rating. Still other corporations may use both numeric and narrative forms of evaluation. Be aware that appraisal factors for supervisors and managers typically differ from those for professionals and, the higher level the manager, the less likely it is that the appraisal is only numeric.

- Does the corporation monitor appraisal results for EEO? If so, how? What have been the results?
- Are raises, including bonuses and promotions, based on appraisals? If so, what is the relationship?

After gaining a better understanding to the appraisal system and the use of employee ratings, COs should analyze this information. For example, if a CO learns that a numeric system is used, the CO should determine the average rating for the nonfavored group at the grade level just below where nonfavored group member representation declines. If the average appraisal rating is substantially lower for nonfavored group members, the CO must determine if the contractor's EEO audit offers any reasons or explanations. Other areas of inquiry include determining:

- what actions the contractor took to eliminate the disparity, and
- whether the disparity is traceable to certain functional areas.

If the corporation uses a narrative system, then the CO would explore any differences in the tone between appraisals of nonfavored and favored group members.

- g. Visibility.* One element of career advancement can be the amount and type of exposure to senior corporate management through assignment to special projects, task forces, corporate committees or through appointment to special assistant and executive assistant type positions.

Being assigned special projects and working on teams and group are ways employees gain increased visibility within the corporation. There is considerable variation in the degree to which corporations use special projects, working groups and teams. Some projects may be more desirable than others in terms of opportunities for skills development and visibility. In some industries, this difference will be fairly clear simply because of the nature of the industry, or the corporation may have a formalized structure. For others, COs may need to rely on employee and management interviews as well as any group award program maintained by the contractor that may reflect projects that were particularly desirable.²¹³

COs will want to compare the nonfavored and favored group composition of special project teams and task forces with the nonfavored and favored group composition of the jobs or functional areas from which members were or reasonably could be drawn. Below are several sample questions that can result in useful information on opportunity and participation of nonfavored group members on teams and groups.

- Does the corporation make much use of special projects, and teams and working groups? If so, in what areas of the business?
- How are members selected and by whom?

²¹³ See Section 4I01 – Recognition: Awards and Honors.

- What special projects, teams and working groups are currently operating? What is the favored and nonfavored group composition of each?
- Are selections monitored to ensure equal opportunity for all eligible nonfavored group members? If so, by whom? Have there been any cases where a concern was raised, and if so, how was it handled?

h. Corporate Committees. Most boards of directors appoint standing committees to monitor and keep the board informed on a specific subject area. In many cases, these committees may simply reflect functions. The appointment to these committees is usually non-discretionary and based solely on position. It can be useful for COs to know the composition of such committees in order to understand the nonfavored group composition corporate-wide of such positions.

There may also be special purpose committees that draw from a wider range of positions and levels within the corporation. Serving on these committees often provide members career enhancing opportunities through exposure to corporate leadership, networking, mentoring relationships and broadening knowledge of the corporation. COs should examine nonfavored group member participation. COs should compare the membership for each committee with those eligible for such membership. For functional and position-based committees, COs should ensure that all qualifying employees are included as members and determine the reasons for any discrepancies.

i. Special Assistants and Executive Assistants. People holding such positions, particularly ones reporting directly to senior corporate management regardless of actual title, may be on a "fast-track" to middle management positions by offering the incumbent enhanced developmental opportunities. In some cases there may not be formal guidance on the creation or appointment of employees to these positions, therefore, interviews can be critical to gathering useful information.

In addition to other sources of information on these positions COs should review the organizational profile for any special assistant and executive assistant type of positions. Note that if such titles are nonexempt, or relatively low-level exempt, the incumbents may be in support staff rather than "fast track" positions.

j. Assignments in Particular Industries and Lines of Work. In some industries a number of people may share the same or very similar titles and yet differ substantially in the career growth potential offered by their assignments. For example, in sales positions, some product lines may offer higher commission potential than others. Some territories may have been worked extensively, and thus offer primarily opportunities for renewal or upgrade of orders. Others may be relatively un-worked and thus offer much opportunity for new business. For account managers, the dollar volume and growth potential of accounts managed are important to advancement.

After identifying distinctions between favorable and less favorable assignments, COs should determine if nonfavored group members are underrepresented in the former and concentrated in the latter. COs should determine how the corporation makes assignments, particularly for

the most and least valuable. They should ask if these assignments are monitored to ensure equal opportunity for all eligible employees. It is also important to know if there is a formal structure that defines the value of these assignments.

4H05 MANAGEMENT TRAINING AND EXECUTIVE DEVELOPMENT

A CMCE should cover both management training and executive development programs. The success of new and high potential employees is influenced by how quickly they learn people-oriented management skills that complement their expert or technical knowledge. Management training is a source of the key skills, best practices and behaviors of effective managers like leadership, delegation, motivation, empowerment, communication and vision. Possessing these skills and traits increase the likelihood of being promoted or transferred into corporate management or other leadership positions. If a corporation offers any management training, COs must determine how it is delivered, who is eligible to participate, who makes the decisions, and how the decisions are made by the corporation. Other relevant questions are:

- Is the training a requirement for a management position? Has the corporation placed any people directly into management without such training? If so, what is their nonfavored or favored group status?
- How does an employee learn of the training? How is an employee selected for it?
- Who monitors participation in training to ensure equal opportunity for all eligible employees?
- What is the composition of the nonfavored and favored groups based on the individuals participating in training over the last year (or evaluation period)?
- How does that composition compare with the nonfavored and favored group composition of those eligible to participate in training?
- If there is a substantial difference between the proportion of nonfavored group members eligible and those participating, what cause was found?
- Does the training include any segments on EEO or diversity management? Up to what level do managers attend?

Executive development programs can be internal, external or both. These programs represent a substantial investment by the corporation in the development of people viewed as potential senior executives. They generally prepare middle-management executives to become more effective leaders and change agents within the company. Because the number of participants is typically small, it may be most useful to look at who participated at some point in their career rather than only who participated during the evaluation period. COs may want to specifically ask the below questions.

- What level manager is eligible? Are there, or have there been, any exceptions to the eligibility level (e.g., have managers below the designated level ever been able to participate in the program)? If so, who authorized those exceptions and why?
- How are people selected for executive development programs? By whom? Are selections monitored to ensure equal opportunity for all eligible employees? Have there been any cases where someone raised a concern, and if so, how did the corporation handle it?
- Among the eligible managers, can you identify who participated in the executive development program by nonfavored and favored group status? If nonfavored group members participated were their training programs comparable in type, school, duration, and other relevant areas to those attended by their favored group peers?
- If nonfavored group members have not participated, are there plans to have them do so? Did their predecessor participate? At what point in his or her career? To what program?

4H06 MENTORING AND NETWORKING

In addition to formal management development programs, many senior managers report having had mentors, at some point in their career, who served as role models, translators of corporate culture or advocates. Because these relationships are generally informal, and may be initiated by either the potential mentor or "mentee", interviews may be the only way to determine if:

- mentoring exists at the management levels under review;
- mentoring is a informal or formal program with policies and guidelines; and
- mentoring carries weight or is value-added in the career advancement process.

COs should also find ways to determine if there are any potential concerns regarding participation of nonfavored group members.

In addition to examining the role and importance of mentoring in career advancement, COs must also consider networking. As used here, networking is the establishment of contacts beyond one's immediate work setting or level, or both, that confer a business benefit. Some corporations have established groups that provide a formal opportunity for managers at a given level to network across division and often establishment lines. If the corporation has such a group, COs should determine the level of managers eligible to join, and ensure that any nonfavored group member managers at that level or above are offered membership on the same basis as their peers. Other networking opportunities may be found in outside professional associations and/or social clubs. If the corporation supports membership in such outside organizations COs should ensure that eligible nonfavored group member managers receive such support on the same basis as their peers.

Unlike formal networking, informal networking is generally interacting across establishment or functional lines with peers and higher level managers. If a corporation does not formally

disseminate information on job openings or does so only up to a certain level, networking may be the prime source of information about job openings, particularly those at other establishments. Also, contacts established over time can contribute to career enhancing assignments on work projects involving other departments or establishments.

Although the general assumption is that informal networking is a matter of employee initiative, some corporations affirmatively encourage the development of such contacts among groups not currently well represented in management jobs by, for example, sponsoring meetings or establishing committees that bring together group members from different functions, establishments or management levels.

COs do have certain things to consider when evaluating the role of networking such as:

- Do internal formal networking groups exist? How and by whom are they administered?
- Who is eligible for membership? How and by whom is membership extended or approved? Who monitors membership to ensure equal opportunity for all eligible employees?
- Have there been any potential concerns regarding participation of nonfavored group members? If so, how were they handled?
- Does the corporation encourage or sponsor participation in external networking groups? If so, which ones and what form does the corporate 'support' take?
- Does the corporation ensure that all eligible employees know about this option? How?
- Who monitors the program(s) to ensure all eligible employees have equal opportunity to participate and receive the same support? Have there been any potential concerns regarding eligible nonfavored group members? If so, how were they handled?
- Does the corporation promote informal networking opportunities? How? Are there specific target groups?

4I ONSITE: RETENTION

A major way a corporation retains key personnel at all levels of its workforce is by paying a competitive salary for the type of work involved and offering benefits at least comparable to those offered by other corporations in its industry. Corporations may additionally have honor and award systems to recognize, reward and thereby encourage high performance.

4I00 OVERVIEW OF TOTAL COMPENSATION PACKAGES

Fair pay is a critical issue for workers and their families, and a cornerstone of OFCCP's equal employment protections. As such, identifying and remedying compensation discrimination has long been an important goal of OFCCP compliance efforts. The Executive Order and the implementing regulations specifically require contractors to ensure pay equity. They place federal contractors under affirmative duties to maintain data, conduct internal review and monitoring of pay practices for potential discrimination, and comply with Title VII's ban on discrimination in the paying of wages, salaries, and other forms of compensation.²¹⁴ Nevertheless, Bureau of Labor Statistics data and numerous research studies indicate that unexplained disparities in compensation on the basis of sex and race continue to exist.

OFCCP follows Title VII principles in investigating and analyzing compensation discrimination. While the approach set forth above in chapters 1 and 2 for analyzing compensation applies, there are additional complexities in typical corporate compensation programs for high level jobs. As in any other compensation analysis, the objective is to ensure that eligible nonfavored group members receive compensation and benefits to the same extent, and under the same standards, as their similarly situated peers. If not already provided, the first step should be to request any formal policies the corporation has regarding each such type of compensation. In addition to reviewing the policies, the CO will probably need to use interviews to determine at what level employees become eligible to receive each type, and what if any, exceptions the corporation made for people below the specified level.

When investigating compensation cases at the corporate management level COs must have an understanding of the compensation structure. As management level increases, it is likely that total compensation goes well beyond the base salary typically reflected in a workforce analysis.

Similarly, COs will find that benefits go well beyond what is standard for other employees. At higher management levels base salary is often supplemented or, for top managers, exceeded by other forms of compensation like cash bonuses, stock awards and stock options. Standard benefits are usually supplemented by what are often referred to as perquisites or "perks". Perks are numerous and varied, some examples are the use of corporate cars, concierge service that offers discounted services, free trips, access to the corporate plane, and housing subsidies or allowances.

Upper level management compensation, benefits and perks are normally specialized and closely held within the corporation. Therefore, it is usually necessary to interview the person in charge of compensation and benefits at the corporate level, identify who maintains the data and, if necessary, interview the secretary or some official who may have recordkeeping responsibility for the corporation.

a. Bonuses. As used here, bonuses refer to those that are predominantly exclusive to the management level. An addition to base salary, bonuses may be granted in cash, stock or in some combination thereof. Corporations most often distribute bonuses annually, usually

²¹⁴ 41 CFR. §§ 60-1.4; 60-1.12; 60-2.17(b)-(d).

soon after the end of a corporation's fiscal year or performance appraisal cycle. Corporations may distribute bonuses as a lump sum, or over a specified period of time, in which case, COs should consider the totality of the award in the analysis. In a multi-establishment corporation, it is fairly typical for the bonus "pot" to be allocated to component business groups in some proportion to their contribution to corporate profitability over the bonus period. Those business groups, in turn, may similarly allocate their bonus "pot" to their component establishments. Bonuses thus provide an incentive for managers to improve profitability. This incentive tends to increase as a larger proportion of a manager's compensation comes from bonuses rather than from base salary or other forms of compensation.

Cash bonuses are most often a percentage of base salary. When reviewing potential compensation issues where cash bonuses are involved, some areas COs should consider include:

- the level or salary grade at which employees become eligible for cash bonuses;
- the history of bonuses being granted to employees below this level;
- the role of corporate headquarters in allocating cash bonuses;
- the role of intermediate headquarters and subordinate establishments in allocating bonuses;
- the standard the corporation uses to determine whether an employee receives a cash bonus;
- the individuals, including their specific roles, determining who is eligible, what standards to apply, and the amount of the bonus;
- the levels of review and approval in the process; and
- the existence of safeguards that ensure that all eligible employees are given equal consideration in the allocation of cash bonuses.

In addition to exploring these areas, COs should ask questions to gather information on the consideration and representation of members of nonfavored groups during the bonus process. Below are a few sample questions.

- What proportion of those eligible, separated by nonfavored and favored group status, received a cash bonus?
- If the proportion of eligible nonfavored group members receiving such bonuses is lower than that of eligible favored group members, did the contractor review these allocations to ensure nondiscrimination? What were the findings or results?

- What is the average cash bonus separated by nonfavored and favored group status?²¹⁵
- If the average cash bonus nonfavored group members received is lower than what favored group members received, did the contractor review allocations to ensure nondiscrimination? What were the findings or results?

b. *Stock.* Corporate stock plans can be a particularly strong incentive to improve corporate performance, since such improved performance usually increases the stock's share price and thus increases the value of any given number of shares of corporate stock an employee holds.

Employers may sometimes use company stock as a bonus but may also use it as a way to retain key employees or to provide an incentive for a given action. The corporation also may offer employees the option to purchase corporate stock on favorable terms. If the corporation has not already provided it, COs should request any written policies and procedures regarding use of stock as a management incentive.

- *Stock Awards – One-time Bonuses:* Corporations occasionally pay bonuses, in whole or in part, in corporate stock. This may be an outright grant, usually annual, of a certain number of shares of stock at the market value at the time of the grant. More often, however, a stock award is vested over a number of years.
- *Stock Awards – Vested.* The term “vested” is more commonly associated with time-in-company required to begin accruing retirement and/or health benefits, it can also be applicable in this content.

A stock award is vested when an employee, instead of immediately receiving a given number of shares, receives those shares after a given number of years (the “vesting period”). For example, the corporation may award a person 300 shares of stock, with 100 shares allocated immediately, and the remaining 200 to be allocated at the end of three years. Such vested stock awards provide an incentive for the recipient to remain with the corporation, since he or she will not receive the remaining stock if he or she leaves.

Vesting also may be for a specific limited purpose. For example, a stock award may be conditional on an employee action, such as completing a particular project by a given date. In this case, the stock is “awarded” but it is not allocated until the employee timely completes the project.

- *Stock Options.* This non-cash form of compensation offers the employee the ability to choose to buy or not to buy a given number of shares of stock at a specified price within a specified period of time. Stock options are issued as a private contract between the employer and employee. Because they cannot be exercised immediately, employers use stock options as a way to retain employees. The option to purchase stock may have conditions or limitations such as limited transferability and vesting

²¹⁵ This may be expressed as the average percentage of base salary.

requirements. Unless the company performs poorly, employees generally expect to sell the stock at a higher market price and make a profit.

For example, an employee is offered an option to buy 100 shares of corporate stock at \$30 a share (its current market price) at any time within the next five years. If the stock goes down, the employee simply does not exercise the option to buy. If it goes up, however, say to \$50 a share, and the employee exercises his or her option and has an immediate profit of \$20 a share or \$2,000.

When evaluating stock as a part of compensation there are several things to consider. For any area of potential compensation concern where stock appears to be a factor, COs must determine, for each year:

- the form in which the corporation gave the stock;
- the eligibility criteria;
- the extent the same form of stock was given to all eligible employees in the same manner, at the same time and with the same value;
- the change in stock type between years; and
- the consistency, or lack thereof, in the change in stock type for all eligible employees.

In addition to the above considerations, COs must ask specific questions when reviewing stock given during the last award cycle:

- What proportion of those eligible, by nonfavored and favored group status, received stock?
- If the proportion of eligible nonfavored group members receiving such an award is lower than that of eligible favored group members, did the corporation review these allocations to ensure nondiscrimination? What were the findings or results?
- What is the average stock award by nonfavored and favored group status?
- If the average stock award received by nonfavored group members is lower than that received by favored group members, did the corporation review these allocations to ensure nondiscrimination? What were the findings or results?

Finally, if the corporation awarded vested stock to keep favored group members with the corporation, COs should review data on terminations to determine if there were any nonfavored group members in similar positions who left the corporation around the same time. If so, COs should determine whether this group received vested stock. If not, COs should then determine whether they should have under the corporation's criteria for receiving such stock. When there is a finding of discrimination in the awarding of stock, there are

some special considerations to be applied to the remedy. These are identified in Appendix A-6, Special Remedial Considerations Applicable to Stock.

- c. *Perquisites*. Called "perks," these are privileges that corporations may provide employees as they reach a certain management level. "Perks" generally are benefits that have cash value like a corporate car, that save time like accounting or tax services, that offer a convenience like the use of corporate plane, and that protect key personnel like paid medical exams.

As with other compensation elements, COs must determine whether the corporation offers perks, what they offer, how it decides who is eligible for a given perk, and if the proportion of eligible nonfavored group members receiving each perk is lower than that of eligible favored group members. COs must also ask if the corporation reviews its allocations of perks to ensure nondiscrimination and obtain the findings or results of the reviews.

4I01 RECOGNITION: AWARDS AND HONORS

Corporations may offer any number of incentive awards or honors, with or without accompanying money. Often these are for meritorious achievement, whether individually or as part of a team on a particular project during a year. They also can be for superior performance generally, and be granted in conjunction with an annual performance appraisal. In the latter case, when people have reached the top of the salary range for their jobs, cash awards may be used instead of a permanent increase to base salary to reward high performance.

There are several things to consider when reviewing awards and honors. If not already provided, COs must request written policies and procedures covering all such programs. For each existing program, COs must determine:

- Who is eligible to receive an award or honor, or both? What eligibility criteria were used?
- Who, listed by favored and nonfavored group status, received an award or honor? What are the reasons each person received the award or honor? Were any nonfavored group members recommended for an award or honor, or both, who did not receive one? Why?
- If the proportion of eligible nonfavored group members receiving the honor or award, or both, was lower than that of favored group members, were the awards reviewed to ensure nondiscrimination? What were the findings or results?
- If the award was accompanied by money, and the amount of money varied, what was the average amount received by the favored group and the nonfavored group? If the average amount was lower for nonfavored group members than for favored group members, did the corporation review these awards to ensure nondiscrimination? What were the findings or results?

4J ONSITE: TERMINATIONS

Generally, the higher the job level, the less likely it is that a person's separation from the corporation is recorded as an involuntary termination, regardless of the circumstances surrounding his or her departure. Above a certain management level, if a corporation determines that an employee is not performing as expected, he or she may be offered the opportunity to resign. Therefore, it would not be unexpected to find that the records show all middle and senior-level management terminations as voluntary.

Many terminations, of course, will be genuinely voluntary, some for reasons such as "better job opportunity," "to spend more time with my family." Such departures, however, may have been influenced by any number of factors, such as a perception of lack of promotion prospects, that may or may not have EEO implications.

Even absent statistical disparity, COs should review involuntary terminations of nonfavored group member managers as well as a sample of voluntary ones. COs must conduct the analysis itself in the same manner as any termination analysis, complete with interviews.

4K COMPLETION OF COMPLIANCE EVALUATION: EXIT CONFERENCE, REPORT WRITING AND NOTICE OF EVALUATION

In a CMCE, the Regional Director or Deputy Regional Director, or both, will conduct an exit conference with top corporate officials. The purpose of the meeting is to:

- present and discuss any violation findings and required remedies to be incorporated in a Notice of Violations; and
- identify and discuss any particularly creative or innovative efforts the corporation made to ensure equal opportunity for nonfavored group members to advance to middle and senior-level management positions.

As noted in subsection 4A00, a CMCE includes all elements of a standard compliance evaluation, but with a special emphasis on the issues discussed in this chapter. Accordingly, COs must complete the SCER to document their evaluation findings but they must pay particular attention to the CMCE-specific supplemental Part D of the SCER that addresses issues unique to a CMCE.

4K00 NOTICE OF EVALUATION COMPLETION

As in any other compliance evaluation, COs send the corporation a notice of compliance evaluation completion, using the evaluation completion notices and procedures found at Letter L-4, Notice of Closing Compliance Evaluation No Violations Found.

Note that if the CO finds violations and an agreement that addresses a corporate-wide issue is necessary to bring the corporation into compliance, that agreement should require that the corporation implement the appropriate remedial action at all corporate establishments. If, during an evaluation of a subordinate establishment conducted after the effective date of that agreement, OFCCP discovers that this establishment has not fully implemented the agreement, a follow-up of the corporate evaluation may be necessary.

CHAPTER 5

FUNCTIONAL AFFIRMATIVE ACTION PROGRAM COMPLIANCE EVALUATIONS

5A INTRODUCTION

Multi-establishment federal supply and service contractors are allowed to develop affirmative action programs (AAPs) organized around distinct business functions or lines of business, rather than AAPs based on the contractor's establishments.²¹⁶ A contractor is permitted to develop AAPs for its functional or business units, referred to as functional affirmative action program or FAAP, only after reaching an agreement with OFCCP.²¹⁷

This chapter provides guidance on evaluating a multi-establishment contractor's compliance with its nondiscrimination and affirmative action obligations under FAAPs.

5A00 APPLICABILITY OF CHAPTER

This chapter applies only to multi-establishment contractors with approved FAAP Agreements. Implementation of a FAAP Agreement occurs only with the written approval of the OFCCP Director, or his or her designee. Ongoing compliance evaluations of establishments will not be affected by a contractor's request to enter into a FAAP Agreement. If a contractor's establishment is selected for evaluation prior to the finalization of a FAAP Agreement, OFCCP will still move forward with the establishment-based compliance evaluation.

5A01 PURPOSE OF THE FAAP

Functional AAPs are designed to provide contractors the option of creating an AAP that better fits their business needs. Any multi-establishment supply and service contractor subject to AAP requirements may request an agreement with OFCCP that allows for the development and use of a FAAP. Some multi-establishment contractors may find it appropriate to develop AAPs based solely on functional or business units, while others may elect to use a combination of functional and establishment based AAPs. Participation in the FAAP program is optional for contractors. The FAAP Agreement cannot be construed to limit or restrict how the OFCCP conducts its compliance evaluations.

5A02 RELATIONSHIP TO STANDARD COMPLIANCE EVALUATIONS

A FAAP compliance evaluation is a full compliance review that includes all aspects of a standard compliance evaluation.²¹⁸ However, all AAP components are based on functional or

²¹⁶ This is in accordance with 65 Fed. Reg. 68022 (published Nov. 13, 2000). This notice added 41 CFR 60-2.1(d)(4), a new regulatory provision.

²¹⁷ A FAAP agreement addresses only the development of AAPs along functional lines. It does not address how OFCCP will conduct its compliance evaluations.

²¹⁸ A FAAP must include the components that are prescribed in 41 CFR Part 60-2.

business units rather than an establishment. If OFCCP selects the corporate headquarters unit for review, the FAAP compliance evaluation may be designated a CMCE. COs responsible for conducting FAAP compliance evaluations follow the procedures in Chapter 1 of this Manual on the procedures for conducting a desk audit, Chapter 2 on conducting an onsite review, and Chapter 4 on conducting a CMCE but with only a few differences. These differences are explained below in Sections 5B through 5E.

5A03 RELATIONSHIP TO THE STANDARD COMPLIANCE EVALUATION REPORT (SCER)

In conducting a compliance evaluation, including a desk audit and onsite review, COs complete the applicable sections of the SCER. It may be necessary for COs to indicate the functional unit for which the finding is made. Some sections of the SCER may not be applicable in every compliance evaluation.²¹⁹

5A04 OFCCP PARTICIPANTS IN FAAP COMPLIANCE EVALUATIONS

OFCCP conducts FAAP reviews under the National Office's direction and oversight. The National Office compliance evaluation team schedules FAAP reviews and may coordinate data gathering and onsite activities with regional offices, as needed. Regional office staff members may participate in the compliance evaluation as agreed upon with the Director of DPO.

5B PRE-DESK AUDIT ACTIONS

COs will follow the same steps as required in Chapter 1, Section 1B – Pre-Desk Audit Actions. This section explains the various steps and actions that COs must take prior to starting a compliance evaluation. The steps include contacting the contractor, setting up appropriate case files and logs and obtaining relevant information about the contractor from other EEO and Department of Labor enforcement agencies such as WHD and OSHA. The following sections review the necessary variances in these steps when COs are conducting a FAAP compliance evaluation.

5B00 CREATION AND MAINTENANCE OF THE CASE FILE

COs must prepare and maintain an electronic case Chronology Log for each FAAP compliance evaluation.²²⁰ They complete the Chronology Log as directed in Chapter 1, Section 1B01, of this Manual.

COs must create and maintain a case file for each scheduled compliance evaluation. The case file should generally consist of the items detailed in subsection 1B02 on creating a case file and possibly a complaint form. For a FAAP compliance review, the case file should also include a copy of the approved FAAP Agreement as signed by the Director of OFCCP. This information

²¹⁹ See Appendices A-1 – SCER and A2 – SCER Instructions.

²²⁰ See Figure F-1 – Case Chronology Log.

should be included in the case file in Folder 1. COs will provide a cross reference in the case file for the location of the documentation supporting the FAAP Agreement.

5B01 SENDING THE SCHEDULING LETTER AND ITEMIZED LIST

The Director of the FAAP Unit signs the Scheduling Letter and Itemized Listing for a FAAP compliance evaluation and sends it by certified mail to the corporate CEO.²²¹ The Director also mails a copy of the Scheduling Letter and Itemized Listing to the managing official of the functional or business unit selected for review and the contact person the FAAP Agreement identifies. The Itemized Listing requests only data supporting the functional or business unit selected for review. Prior to sending the Scheduling Letter notifying a functional or business unit of a scheduled compliance evaluation, COs must contact the managing official identified in the FAAP Agreement to ensure that the functional or business unit still exists and to verify the name, title, mailing address and phone number of the managing official. The National Office must also be notified if the functional or business unit no longer exist because the FAAP agreement can be terminated in this instance.²²²

It is important to note that the contractor may also have standard establishment-based AAPs covering the remainder of its workforce. OFCCP will schedule compliance evaluations in accordance with the standard scheduling system for those areas of the workforce that are subject to establishment-based AAPs.

5B02 FOLLOW-UP CONTACT WITH CONTRACTOR

Within 15 calendar days after sending the Scheduling Letter and Itemized Listing, a CO must contact the contractor's representative to ensure that the contractor understands the requirements outlined in these items. If there are questions, the CO will provide technical assistance to clarify the requirements and the compliance evaluation process.

5B03 OFCCP COMPLIANCE HISTORY REPORTS

COs must check OFCCP's Case Management System (CMS) and Executive Information System (EIS) to obtain a list of prior compliance evaluations of the functional or business unit, corporation and its other related establishments. They should also review historical files contained in Folder 6 of the case file located in their respective field offices. Checking to determine if the prior evaluations identified any issues is an important preparatory step. If issues are identified in the historical files, COs must review the record to determine how they were resolved. These previously identified issues may provide useful information and possible indicators of current problem areas. If a prior review of this unit resulted in a Conciliation Agreement (CA), the onsite visit should provide an opportunity to confirm that the contractor took, and appropriately maintained, the required corrective action.

²²¹ See Figures F-2 – OFCCP Scheduling Letter and Itemized Listing.

²²² Directive 305, Functional Affirmative Action Programs (December 17, 2012). This Directive rescinded Directive 296 issued on June 14, 2011.

5B04 CONTACTING EEOC, VETS AND OTHER AGENCIES

As discussed in Chapter 1, simultaneous with the mailing of the Scheduling Letter, COs will also seek information on the contractor's employment policies and practices from the Equal Employment Opportunity Commission (EEOC), Veterans Employment and Training Service (VETS), state employment services, and other EEO and labor law enforcement agencies. Such information helps to provide a better understanding of the contractor's workforce and operations, and may indicate potential problem areas.

Because of the nature of a FAAP compliance evaluation the job groups or titles, or both, that are under review may be located in multiple establishments and in different locations. COs should determine the extent to which they need to establish contacts with the identified agencies in each location to ensure that he or she obtains enough information to assist in assessing the contractor's compliance and affirmative action efforts.

5B05 GATHERING EEO INFORMATION

COs will gather information to determine the scope of the information needed to establish whether there are any contractor employment practices that are relevant to the FAAP compliance evaluation. Additionally, COs should be aware of local and national community resources available to establish linkages, if required.

5C DESK AUDIT

Initially, COs will determine whether the Functional AAP is in accordance with the FAAP Agreement. This assessment should include, but is not limited to, determining if:

- the appropriate functional or business unit is covered,
- the functional or business unit continues to be a discrete autonomous function, and
- the functional or business unit includes the number of employees covered by the FAAP Agreement.

If a CO conducting a FAAP compliance evaluation finds problems, he or she should contact the contractor for clarification or additional information before proceeding with the desk audit. If significant changes have occurred, such that the functional or business unit scheduled for review no longer exists or has substantially decreased or increased in size, the CO should notify his or her supervisor to discuss the issue. The National Office must also be notified.

COs will conduct the desk audit as described in Chapter 1 of this Manual in Sections 1C through 1R with the exception that COs will organize the data by functional or business units. In some instances, during a FAAP compliance evaluation, COs will not have sufficient data to perform a trend analysis in accordance with subsection in Chapter 1 on EEO trend analysis. However, they should conduct all other analyses required in a desk audit. COs should complete all applicable

sections of the SCER and further investigate identified problems areas and indicators of adverse impact during the onsite review.

In conducting analyses of employment decisions like hiring, terminations, promotions and compensation, COs should examine the data by function and business unit and job group and job title or any combination thereof.

5D ONSITE

When conducting a FAAP compliance evaluation it may be necessary to conduct onsite visits to more than one location to evaluate the business functions or lines of business under review. In such circumstances, COs and their supervisors will determine the onsite visits that will be conducted and the composition of each onsite team. COs will conduct the onsite review as described in Chapter 2 of this Manual using the SCER to record investigative findings and conclusions.

5E COMPLIANCE EVALUATION COMPLETION

If the offsite analysis of the data that the COs obtained during the desk audit and onsite review result in no violations being found, the COs should close the FAAP compliance evaluation. However, if there are findings of discrimination or other violations, COs should proceed in accordance with Chapter 8 and the issuance of a Predetermination Notice (PDN) or Notice of Violation (NOV), as warranted.²²³

COs must follow Chapter 8 in each FAAP compliance evaluation that results in a finding of a violation. If a CO issues a Conciliation Agreement to correct identified violations, then the CA, closing documents and letters must clearly reflect that the CO conducted a compliance evaluation of a FAAP and support data, and indicate the limited scope of the evaluation. As previously noted, the contractor may also have a standard AAP(s) covering the remainder of its workforce and employment actions that OFCCP did not review as a part of the FAAP review.²²⁴

²²³ See Chapter 8 – Resolution of Noncompliance.

²²⁴ See Chapter 7 – Employment Discrimination Remedies; Chapter 8 – Resolution of Noncompliance; and Letters L-27 – Pre-determination Notice and L-28 – Notice of Violation.

CHAPTER 6 COMPLAINT INVESTIGATION

6A INTRODUCTION

This chapter outlines the procedures for processing and conducting investigations of complaints alleging discrimination in employment by federal contractors. Preparing for and investigating a complaint differs from conducting a compliance evaluation as discussed in Chapter 2. The difference is that this investigation is primarily focused on the specific allegations in the complaints. This chapter includes the general principles of complaint processing and investigation planning. It, therefore, focuses on the CO's responsibilities related to investigating and resolving complaints. It describes the CO's responsibility to evaluate the allegations in a complaint to determine the legal and analytical framework for addressing each allegation, to identify data and information to obtain during an investigation, to conduct appropriate analyses and to develop and provide notification of findings. The chapter also discusses conciliation efforts and enforcement actions.

6B BASES OF COMPLAINT ALLEGATIONS

Employees and applicants may file complaints with OFCCP under any of the laws OFCCP enforces. However, OFCCP processes some complaints in coordination with the Equal Employment Opportunity Commission (EEOC). Specifically, the EO 11246 regulation at 41 CFR Part 60-1.24(a) states that OFCCP may refer appropriate complaints to the EEOC for processing under Title VII of the Civil Rights Act of 1964, as amended. In keeping with a Memorandum of Understanding (MOU)²²⁵ between OFCCP and the EEOC, OFCCP will generally refer individual complaints alleging employment discrimination in violation of EO 11246 to the EEOC.

OFCCP retains EO 11246 *class and systemic* discrimination complaints. Whenever a complainant files a complaint of employment discrimination with OFCCP under EO 11246 and the allegations in the complaint also fall within the jurisdiction of Title VII, the complaint is dual filed. OFCCP acts as EEOC's agent for the purposes of receiving, investigating and processing the Title VII component of dual filed complaints. OFCCP processes these complaints in a manner consistent with Title VII principles of liability and relief.

²²⁵ The MOU between OFCCP and the EEOC was first entered into on May 20, 1970, it was revised in 1974, and revised again in 1981 as published at 46 FR 7435 (Jan. 23, 1981). The 1981 MOU was revised in 1999 as published at 64 FR.17664 (Apr. 12, 1999), and most recently updated in November 2011 as published at 76 FR 71029 (Nov. 7, 2011).

OFCCP investigates individual and class complaints filed under Section 4212 and Section 503. In 41 CFR Part 60-742,²²⁶ the regulation describes procedures applicable to complaints of employment discrimination based on disability filed against contractors when the complaints fall within the jurisdiction of both Section 503 and Title I of the Americans with Disabilities Act of 1990, as amended (ADA). If a complaint is dual filed under both Section 503 and the ADA, OFCCP uses legal standards for determining liability, as well as damages and remedies, consistent with those applied under the ADA in determining whether a contractor committed an unlawful employment practice. When proceeding with an investigation and resolution of a dual filed complaint, OFCCP is acting as EEOC's agent. OFCCP also follows ADA principles when investigating Section 503 allegations that are not dual filed.

Complainants may also file complaints alleging retaliation or interference. OFCCP's regulations prohibit interference and intimidation, including threats, coercion, harassment and discrimination of any individual exercising his or her rights under OFCCP enforced laws and any other federal, state or local law requiring equal opportunity. OFCCP investigates all such allegations.

OFCCP also investigates complaints filed under Executive Order 13496, which requires contractors to provide notice to their employees of their rights under federal labor laws. OFCCP and the Office of Labor-Management Standards (OLMS) share enforcement authority for EO 13496.²²⁷

6C COMPLAINT PROCESSING

The OFCCP's regional offices are responsible for implementing complaint intake procedures and policies.²²⁸ These offices "perfect" the complaint for investigation. COs investigating a complaint may also assist with perfecting complaint allegations. This chapter does not cover regional or other administrative matters except as they may directly involve COs.

6C00 RECEIPT OF COMPLAINTS

If a regional office receives a complaint regarding a contractor or contractor's establishment that is in a different geographic jurisdiction, that office will immediately send the complaint to the appropriate office. Complainants filing under Section 4212 may also file through the Department of Labor's Veteran's Employment and Training Service (VETS) or through the Local Veterans' Employment Representative (LVER) at the local employment service office,

²²⁶ If a complaint that alleges a violation of Section 503 (which does not include affirmative action obligations) and also raises an allegation of individual discrimination based on race, color, religion, sex, national origin or age (over which OFCCP does not have jurisdiction), the complaint will be referred to the EEOC.

²²⁷ See Directive, Verification Procedures Under E.O. 13496: Notification of Employee Rights under Federal Labor Laws, Number 290 (June 15, 2010).

²²⁸ The regulations at 41CFR 60-1.21 to 60-1.24; 60-250.61; 60-300.61; 60-741.61 and 60-742.5 address timeliness issues and the initial processing of a complaint. Further discussion of regional office processing of complaints is in the Administrative Practice Binder.

who will transfer the complaint to OFCCP.²²⁹ The OFCCP office receiving the complaint will immediately date stamp the complaint and enter the date and time it arrived into office records before forwarding it to the appropriate regional office. COs use this date to determine whether the complainant filed on time.

Regional offices should encourage complainants to complete a Form CC-4.²³⁰ Complainants can find the form on the OFCCP Web site where it is available in several languages. COs, if after reviewing a complaint, need clarification or additional information from the complainant they should contact the complainant immediately.

6C01 WHO MAY FILE A COMPLAINT

Any individual, group or third party may file a complaint. In some instances, complainants may file anonymously. Depending on the specificity or individual nature of a complaint, the regional office will determine whether OFCCP will proceed with an investigation or whether additional information regarding the complainant or alleged victim is needed in order to proceed.

When it is not necessary to identify an individual complainant or alleged victim, OFCCP will take appropriate action to protect the identity of the complainant or alleged victim. For example, if a complainant alleges that the application of a specific policy disparately impacts women, it may not be necessary to share the complainant's identity with the contractor.

6C02 COMPLAINT PERFECTION

The regional office will completely perfect the complaint within 10 calendar days of receiving the complaint, unless the regional office shows good cause. The regional office will conduct the perfecting of the complaint to determine timeliness, contract coverage and which allegations fall within the agency's jurisdiction. The regional office must determine jurisdiction as expeditiously as possible. As noted above, COs investigating a complaint may contribute to the perfection process.

A complaint shall include certain basic information such as:

- the name, address and telephone number of the complainant;
- the name and address of the contractor allegedly committing the discrimination;
- the description of the alleged discriminatory acts; and
- the information pertinent to the investigation and resolution of the complaint.

²²⁹ If the complainant files with VETS or the LVER and alleges discrimination prohibited by Section 4212, OFCCP will use the date the complaint arrived at that office.

²³⁰ See Figure F-4 – Complaint Form.

The complainant or his or her representative must sign the complaint.²³¹ Section 503 also requires the alleged victim to submit evidence proving he or she is disabled, has a history of a disability or is regarded as having a disability. Section 4212 requires the alleged victim to submit evidence that he or she is a veteran protected under 41 CFR 60-250.1(a) or 41 CFR 60-300.1(a).

The scope of complaints under EO 11246 is different from complaints filed under Section 503 and Section 4212. EO 11246 complaints must allege discrimination. Complainants filing under Section 503 or Section 4212 may allege a violation of the law or its implementing regulation. For example, a complainant could allege affirmative action or recordkeeping violations as well as discrimination under one or both of these authorities.

Upon perfecting a complaint, the regional office will assign the complaint to the field office in the jurisdiction of the establishment where the alleged discrimination occurred.

6C03 CASE FILE

a. *Maintenance of the Case File.* Upon receiving a complaint to investigate, a CO establishes a case file. COs should maintain all documents, correspondence, interview notes and records of contact, including e-mails and telephone calls, pertaining to the complaint in this file. When the investigation is complete, the case file should contain sufficient documentation to support either an enforcement recommendation based on a finding of a violation(s) or a decision to close the complaint investigation based on a finding of no violation. Regarding the maintenance of records, COs should follow the general principles below:

- Date all telephone, e-mail and written communications; identify who participated in the communication by name and position; and accurately reflect any agreed upon commitments.
- Keep documents from the complainant, contractor or others in their original condition. COs should make copies and label documents as copies if they need to make alterations to or notes on a document.
- Use the case file to document and maintain interview statements, whether the interview is conducted in person or by telephone or some other electronic means. COs should record statements or observations as soon as possible after the conclusion of the interview or observation. The interview statement must note the name and title or position of the person conducting the interview, the name and position of the person interviewed, when and where the interview took place and the names of any other people who may have been present (e.g., legal counsel, a personal representative).
- Record newly obtained information or observations in clearly legible writing or, preferably, in an electronic format. COs should type handwritten notes for the case file.

²³¹ See 41 CFR 60-1.23, 60-250.61, 60-300.61 and 60-741.61.

- Create and clearly label a section in the case file for supporting evidence for any conclusions the CO draws regarding the complaint allegations. Supporting evidence may include CO notes, worksheets, contractor data and any other materials relating to an allegation.
- Keep all records and information regarding a complaint investigation confidential.

b. *Case File Contents.* The case file will contain seven separate files labeled as follows and containing the listed contents.²³² COs should cross reference the files as appropriate.

1. *Complaint and Data Submitted by the Complainant.* This file will contain the CC-4 Form and any documentation or information the complainant submitted, including the envelope used to mail the complaint form. Documents may include: letter of complaint, list of witnesses, supporting documents, etc. These items should be on the right side of the file folder.

On the left side of the file folder, the CO should place a copy of the CC-58 report for the establishment that he or she obtained from Case Management System (CMS). Underneath this form, the CO should include any CMS extension requests and responses.

2. *Case Chronology, Correspondence and Meeting Notes.* This file contains all correspondence and any attachments. This includes any materials from contacts with the contractor, union, witnesses, consultants, etc. It may also include memos to file, but not investigative notes the CO prepared and used in reaching factual and legal determinations. Correspondence should be in chronological order with the most recent on top.

The Chronology Log CC-53 will be attached to the left side of the file and placed on top. The CO shall maintain the Case Chronology Log electronically, as described in subsection 1B01 of this Manual.²³³ The CO should place the Quality Assurance Complaint Investigation Form CC-75 on the left side under the log.

3. *Investigative Material.* This file will contain the investigative materials. The CO should index and tab the materials. The file should contain the following materials:

- investigative plan;
- investigative report;
- interview statements;
- investigative notes;

²³² See Appendix A-8 – Complaint File Index.

²³³ See Figure F-1 Case Chronology Log.

- statistical evidence;
- comparative evidence; and
- anecdotal evidence.

These materials may be voluminous. If so, the CO may appropriately label, tab and index separate folders to contain the materials.

4. *Medical/Veteran Documentation:* This file, organized with an index and tabs, will contain the medical and veteran documentation. The documents should have labels clearly stating the source of the information (e.g., complainant, contractor third party). The file should contain:

- Medical releases;
- Medical and/or disabled veteran status (e.g., DD-214);
- Medical coverage information;
- Diagnosis or medical description of disabling condition;
- Work restrictions; and
- For veterans, coverage information as needed (e.g., Armed Forces campaign badge information).

The CO must label and treat File 4 Medical/Veteran Documentation as “confidential.”

5. *Legal:* This file will contain any documents related to legal activity, including:

- Notice of Investigation Report (place on top);
- Conciliation Agreement (on top of report, when complete);
- Solicitor’s Opinion;
- Joint Review Committee meeting notes and reports;²³⁴
- Freedom of Information Act and Privacy Act determinations;

²³⁴ The Joint Review Committee (JRC) is a committee – consisting of District Office staff members working on the complaint, Regional Office staff members and representative(s) of the Solicitor’s Office – that discusses the complaint investigation and findings.

- Enforcement recommendations; and
 - Jurisdictional and contract coverage information (on the bottom).
6. *Employment Handbooks, Collective Bargaining Agreement (if applicable) and Miscellaneous.* On the right side of this file, organized by an index and tabs, will be copies of any relevant collective bargaining agreements, employee handbooks, fringe benefits and leave policy materials and any similar contractor materials. The CO should place any items that are not otherwise listed and contained in other case file sections here.
 7. *Historical Review Results.* This file will contain copies of any available closure letters and documents from previous complaint investigations of this establishment. The CO should note pertinent information regarding compliance evaluations of the establishment here as well as include the closure letter for the current investigation.

The District Office should maintain the historical file indefinitely. If the District Office conducts another investigation of the establishment, this file becomes a part of the new investigative file. If the District Office is going to retire the case file, the District Office should remove and retain the historical file while filing the remainder of the case file.

- c. *Applies to Enforcement and Non-Enforcement Cases.* The CO should maintain this case file format for enforcement and non-enforcement cases. For enforcement cases, the CO should transmit the file with a Transmittal Memorandum as described in Chapter 8. It is particularly important that the CO maintain all records, except drafts, in the case file in enforcement cases. The CO should not include drafts of OFCCP memoranda, for example, Notification of Results of Investigation (NORI), Conciliation Agreement (CA), that have a later version.

6C04 CORRESPONDENCE

The CO should address all letters concerning a complaint to the senior official at the appropriate contractor establishment with a copy for the CEO at the corporate address, except when the contractor is a single location establishment. The CO should send the letters by certified mail, return receipt requested.

6C05 COUNSEL OR OTHER REPRESENTATION

A contractor or complainant may designate an attorney or other representative as his or her contact person with OFCCP prior to or during a complaint investigation. Such designation shall be at the initiation of the contractor or complainant.

- a. *Written Designation.* The designation of a representative must be in writing by the contractor or complainant to an OFCCP District or Regional Director. The complainant or senior official of the contractor, respectively, must sign the letter. If the field office receives notification of the designation in another form other than in writing, the CO should contact the requester (contractor or complainant) and advise them of the necessary letter. The correspondence should provide the name, address and telephone number of the representative. In addition, the correspondence should clearly describe the extent of the

representative's authority, specifically:

- if all contacts, including routine contacts to make appointments or to clarify submitted data or other information, should go through the representative;
- if the representative has the authority to negotiate settlements for the contractor or complainant; and
- if the CO should mail correspondence to the representative only, or if he or she should mail copies to the contractor or complainant as well.

The CO should send to highest ranking management official a courtesy copy of all substantive documents that this Manual requires to be mailed.

b. Duration of Designation. Unless the contractor or complainant indicated otherwise in the written designation letter, the designation shall only be for the duration of the complaint investigation and any applicable enforcement period.

6C06 TIMELY COMPLETION OF INVESTIGATION

The field office must complete the investigation within 60 calendar days after the regional office has sent the complaint. The field office must take all necessary steps to complete the investigation within the 60 calendar days of the investigating office's receipt. The Regional Director may grant an extension of this period if the field office shows good cause. The granted extension can be for no more than 120 calendar days for completion of the complaint investigation and no more than 60 calendar days for conciliation efforts. Examples of good cause include but are not limited to complex legal issues, unavailability of witnesses, untimely responses from contractor or the number of complainants.

6C07 OFCCP CASE MANAGEMENT SYSTEM

The CMS tracks and monitors the processing of complaints that victims have filed with OFCCP. COs have specific responsibilities for entering data and information into the automated system. These responsibilities begin with the receipt of the assigned complaint by the regional office and end when the CO closes the complaint file. The COs can find specific instructions in the CMS Manual.

6D PROVIDING THE CONTRACTOR A COPY OF THE COMPLAINT

COs will provide a copy of the complaint to the contractor upon completing perfection of the complaint. The regional office should complete perfection within 10 calendar days of receipt of the complaint. The CO should send a copy of the complaint along with notice of receipt of the complaint to the contractor, except in extenuating circumstances as discussed in 6D01 below.²³⁵

²³⁵ See Section 6D01 for further discussion and L-7.

As provided below, when necessary and appropriate, OFCCP may redact specific information from the complaint.

6D00 REVIEW OF COMPLAINT BEFORE RELEASE

- a. Copy of Complaint.* The CO will normally provide the contractor with a full copy of the complaint except to the extent it contains the following types of information. The CO will delete the following information so that the remaining text reads as smoothly as possible.
- The name and other information that would easily identify someone other than the complainant who might suffer retaliation, be construed as an informer, or suffer embarrassment or other unwarranted invasion of privacy.
 - Obscene, inflammatory or libelous language.
 - Names and allegations against more than one company. The CO should delete the name and allegations against company #1, from the complaint copy provided to company #2, and vice versa.
 - Identifying characteristics of individuals in a third party complaint (e.g., description of unique characteristics, unique job title or position) if the individual has not signed the complaint or authorized release of his or her identity.
- b. Summary of Complaint.* If the necessary deletions are extensive, the CO may prepare a complaint summary to forward to the contractor. If the CO uses a summary, the CO may obtain a redrafted complaint to submit to the contractor prior to the onsite investigation.

6D01 RELEASING COPY OF THE COMPLAINT

- a. General.* The CO may send correspondence related to the complaint via certified mail, return receipt requested, facsimile or e-mail. If by facsimile or e-mail transmission, the CO should take steps to ensure confidentiality. The CO should maintain documentation that certifies the correspondence was received.
- b. Notice to Contractor.* Upon receiving the assigned complaint from the regional office, the CO must send a copy of the complaint to the contractor.²³⁶
- c. Confirmation to the Complainant.* When the CO transmits the complaint to the contractor, the CO must also send written notice of the transmittal to the complainant.²³⁷

6E TYPES OF COMPLAINT ALLEGATIONS

²³⁶ See Letter L-7 – Letter to Contractor.

²³⁷ See Letter L-8 – Letter to Complainant.

This section generally discusses the types of complaint allegations that OFCCP may receive and the investigative approach to take. The CO must first determine the investigative framework (e.g., data to obtain, interviews to conduct, records to review, analyses to perform) to use in addressing the complaint allegations in order to develop the investigative plan, which is discussed in Section 6F – Investigative Plan.

6E00 APPROACH TO INVESTIGATING COMPLAINT ALLEGATIONS

In conducting a complaint investigation, the CO is a neutral fact finder. A complaint is essentially a statement of allegation(s) of discrimination or other violations. The CO conducts an investigation to determine if there is sufficient pertinent evidence to support that a violation occurred or not, in light of the allegation(s) in the complaint. In preparing for and conducting the investigation, the CO must exercise objectivity and thoroughness. The CO must conduct each investigation in an atmosphere of open mindedness and fairness to both parties. The CO should display professional conduct at all times.

- a. Relationship to Compliance Evaluations.* The CO may complete a complaint investigation with or without a compliance evaluation. If upon evaluating the complaint allegations, or at any time during the investigation of the complaint, the CO obtains information that class, systemic or other issues may be more appropriately addressed by conducting a compliance evaluation (full review, focused review or compliance check), the CO should discuss this issue with his or her supervisor, and obtain national office review and approval prior to expanding the investigation into a compliance evaluation.
- b. Investigative Priority.* The CO should act expeditiously on any complaint that alleges immediate and irreparable harm. For example, a complaint alleging the threat of termination in retaliation for filing a complaint with OFCCP (or for assisting in an OFCCP compliance evaluation, complaint investigation or enforcement action) requires immediate action.

6E01 INITIAL STEPS

Initial steps needed to proceed with the investigation involve determining whether the complainant provided sufficient information to support the allegations. A complaint should provide sufficient information to describe the alleged acts of discrimination and provide factual assertions that, if proven to be true, would constitute discrimination or a violation of the regulations. When reviewing the complaint allegations, a CO may need to discuss the allegations with the complainant to ensure they have sufficient information to understand the complaint allegations.

- a. Initial Interview with the Complainant.* The information on the complaint form is not always sufficient to determine the basis for the allegation(s) of discrimination. Whether the need for clarification is apparent or not, the CO should contact each complainant before going onsite to establish a mutually agreeable time and place to conduct an interview. The CO should conduct the interview in person unless compelling circumstances preclude doing so. In these instances, the CO may conduct the interview by telephone. If the complainant resides outside the area covered by the field office, the CO and his or her supervisor should coordinate with the regional office where the complainant is located. If no personal

interview takes place at anytime during the investigation, the CO should record this fact and the reason for it.

The CO should prepare an interview plan containing specific questions tailored to obtain more detailed information regarding the allegations and identification of sources of evidence necessary to support or refute the complainant's allegations. Examples of the types of information to consider are:

- Name(s) of contractor official(s) who participated in the alleged discrimination, and those who were decision makers involved in the alleged adverse action;
- Name(s) of employee(s) who may have witnessed the alleged act(s) of discrimination;
- Detailed circumstances surrounding the act(s) (e.g., dates, locations, description of actions taken or failure to take action when needed, possible witnesses);
- Description of the contractor's personnel policies and practices related to the employment action at issue;
- Explanation of why the complainant believes that the act(s) was discriminatory;
- Explanation from the contractor to the complainant for any action taken by the contractor;
- Documentation related to the allegation(s) of discrimination, such as personnel policies, job advertisements, job descriptions, written disciplinary warnings, performance appraisals, etc.; and
- Data and documents necessary to conduct appropriate comparative or statistical analyses.

b. Assessing the Complaint Allegations. The CO's initial steps should include a preliminary assessment of the complaint allegation(s) to determine the validity of the complaint (e.g., is the complainant protected, was there opportunity for the discrimination to have occurred, was the contractor aware of the complainant's protected status, was there an adverse action). Because each complaint is based on a unique set of factual circumstances, the CO should gain an understanding of the nature of each allegation and why the complainant(s) believes that discrimination occurred. By first assessing the allegation(s) and identifying the areas for further investigation, the CO will be able to develop an investigative plan tailored to the particular allegation(s) and circumstances described in the complaint.

6E02 INVESTIGATIVE FRAMEWORK

a. Initial Assessment. When the regional office transmits a complaint to a CO for investigation, it will include all attachments and a transmittal letter. The regional office letter acknowledging the complaint and the complaint form will indicate under which program(s) the complainant filed (i.e., EO 11246, Section 503 and/or Section 4212) and the basis for the complaint (race, color, religion, sex, national origin, disability or status as a protected

veteran).²³⁸ The CO will need to assess the specific allegation(s) accepted by OFCCP for investigation to determine the framework appropriate for investigating and resolving each allegation. This may require different approaches for each allegation.

- b. *Multiple Allegations.* If there are multiple allegations, the CO will need to determine which framework is appropriate to use in investigating, analyzing and resolving each specific allegation. The CO should develop the investigative plan to reflect each specific allegation and the approach to investigating and resolving each.

6E03 PATTERN OR PRACTICE ALLEGATIONS

Under the three nondiscrimination laws OFCCP enforces, a complaint may raise allegations of a pattern or practice of employment discrimination. The complaint may state these allegations in terms of disparate treatment or disparate impact. COs should note that the allegation may warrant examination using both the disparate treatment and the disparate impact frameworks. These legal theories are generally discussed below.

- a. *Disparate Treatment.* Disparate treatment discrimination occurs when a contractor treats an individual or group differently because of its race, color, religion, sex, national origin, disability or status as a protected veteran. Intent to discriminate is a necessary element in this type of employment discrimination. Disparate treatment complaints may include allegations of different treatment with regard to employment actions such as hiring, terminations, promotions, compensation, application of selection criteria, family and pregnancy leave issues or the denial of equal benefits and opportunities, or possibly both.
- b. *Disparate Impact:* Disparate impact occurs when a facially neutral policy or procedure, including selection procedures, has an adverse impact and it is not justified by business necessity and its relationship to the job. For example, a complainant may allege that leave policy negatively impacts people with disabilities or caregivers, or both, because of their gender.

Pattern and practice discrimination is based on the notion that an employer routinely engages in discrimination or that discrimination is just of part of how the employer conducts his business. The discrimination, therefore, is systemic and affects groups or classes of individuals. In short, pattern and practice discrimination requires proof of systemic discrimination in the workforce that goes beyond isolated individual incidents.

6E04 HARASSMENT: HOSTILE ENVIRONMENT

Harassment on the basis of race, color, religion, sex, national origin, disability or veteran status may take a variety of forms including offensive remarks about an individual, harassing or derogatory speech or actions that are not directed at a specific individual, and other such forms of negative (or different) treatment on one or more of the prohibited bases. Harassment is illegal

²³⁸ If the complaint alleges noncompliance with Executive Order 13496, the CO should follow the procedures described in Directive Number 290, June 15, 2010.

when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as termination or transfer of the victim of harassment). The harasser may be the victim's supervisor, a supervisor in another area, a co-worker or a third party (such as a client or customer).

6E05 RETALIATION AND INTERFERENCE

OFCCP applies the same concepts, standards and analyses as EEOC when assessing possible retaliation under EO 11246, Section 503 and Section 4212. However, it is important to note that while the laws OFCCP and EEOC enforce all prohibit retaliation, OFCCP's regulations provide broader protection against interference with an individual's use of his or her protections under the laws OFCCP enforces. Retaliation includes adverse employment actions such as termination, demotion or failure to hire, that a contractor might take because a person has filed a discrimination complaint, opposed an act of discrimination, or participated in any way in an activity related to the administration or enforcement of any OFCCP enforced laws. The complainant may be an applicant, employee, former employee or person closely associated with an individual who filed a discrimination complaint, opposed an act of discrimination or participated in a protected activity.

A complaint for investigation may contain an allegation that retaliation or interference occurred, or the allegation may arise during the course of an investigation. If a complainant makes an allegation of retaliation in addition to another allegation of discrimination, a finding that the underlying discrimination did not occur will not defeat the allegation of retaliation. The CO must investigate any allegation of retaliation or interference and make an independent finding as to whether sufficient evidence supports it.

6E06 ALLEGATIONS SPECIFIC TO EO 11246

EO 11246 prohibits employment discrimination on the basis of race, color, religion, sex or national origin. The regional office assigns EO 11246 complaints involving class or systemic issues to a field office for investigation. Complaints may include allegations of a pattern or practice of discrimination (disparate treatment or disparate impact); harassment or hostile environment allegations; or denial of reasonable accommodation on the basis of religion. EO 11246 complaints may also raise allegations of employment discrimination based on one or more of these reasons: race, color, religion, sex or national origin. The regional office will generally refer individual complaints alleging employment discrimination in violation of EO 11246, as amended, to EEOC pursuant to the EEOC and OFCCP Memorandum of Understanding.

6E07 ALLEGATIONS SPECIFIC TO DISABILITY COMPLAINTS

Section 503 prohibits employment discrimination on the basis of disability. The regional office will assign disability complaints to a field office for investigation. Complaints may include a variety of allegations that require determination of the legal and analytical approaches to be used in conducting the complaint investigation. Allegations may raise issues of pattern or practice discrimination (disparate treatment or disparate impact allegations); harassment or hostile environment; denial of reasonable accommodation on the basis of disability, including

accessibility issues; the use of medical inquiries, examinations and mental and physical job qualification standards; or issues regarding pregnancy disability leave. In examining complaint allegations filed by a protected veteran, the CO should also determine if the complaint raises issues under Section 503 and Section 4212. Complainants filing under Section 503 or Section 4212 based on disability may also allege any violation of the law or its implementing regulation unrelated to discrimination.²³⁹

If in evaluating the complaint allegations the CO determines that the allegation is in regard to human immunodeficiency virus (HIV) or acquired immune deficiency syndrome (AIDS), the CO will identify the issue in the CMS for tracking purposes. The CO will also bring the issue to the attention of his or her supervisor for discussion regarding possible approaches to investigating and resolving the complaint.

41 CFR Part 60-742 of the regulations delineates procedures for complaints of employment discrimination based on disability filed against contractors when the complaints fall within the jurisdiction of both Section 503 and the ADA. These disability complaints are “dual filed” under both Section 503 and the ADA.²⁴⁰

- a. *Not Making Reasonable Accommodation.* An issue unique to disability complaints relates to the provision of reasonable accommodation on the basis of disability. A reasonable accommodation can include changes in the work environment or in the way things are usually done to help a qualified individual with a disability or disabled veteran apply for a job, perform the duties of a job or enjoy the benefits and privileges of employment. Reasonable accommodation may include a variety of modifications including things such as making the workplace accessible for individuals with mobility impairments, and providing a reader or interpreter for someone who is blind or hearing impaired. The law requires that the contractor provide requested reasonable accommodations to a qualified employee or job applicant with a known disability, unless doing so would cause the contractor undue hardship.
- b. *Other Denial of Reasonable Accommodation Allegations.* A complainant may also allege that the establishment is not physically accessible. If requested as a reasonable accommodation, contractors are responsible under Title I of the ADA for making their facilities accessible to and useable by qualified applicants and employees with disabilities, unless this would cause undue hardship. Reasonable accommodation may also include ensuring applicants with disabilities have equal opportunities either by making the online application system accessible to them or providing them an accommodation in the application process that ensures their application will be considered in the same timely fashion as applications made through the online system. (See subsection 2F04 – Additional Requirements.)
- c. *Undue Hardship Defense.* Undue hardship is a defense used by a contractor to explain why it did not provide a specific reasonable accommodation. The contractor must prove that

²³⁹ See subsection 6E08 – Allegations Specific to Section 4212 (Non-Disability) Complaints.

²⁴⁰ 41 CFR 60-742.5 - Processing of Complaints Filed with OFCCP.

providing the accommodation would have caused significant difficulty or expense for the contractor.

- d. Medical Inquiries and Examinations.* Section 503 and Section 4212 generally prohibit employers from asking applicants disability-related questions (i.e., questions that are likely to elicit information about a disability) and from conducting medical examinations of applicants before making a conditional job offer. After the contractor makes a conditional job offer, but before commencing work, the contractor may ask disability-related questions and require medical examinations, regardless of whether they are related to the job, as long as the contractor does this for all entering employees. Once the employee has commenced working, such inquiries must be job-related and consistent with business necessity.
- e. Confidentiality Issues.* A complainant may allege that the contractor breached confidentiality of medical records. Whenever a contractor inquires into an applicant's or employee's physical or mental condition or conducts a medical examination, the contractor should keep all resulting information in a separate, confidential file. The contractor may make the file available to supervisors and managers, first aid and safety personnel, and government officials investigating compliance issues.
- f. Mental and Physical Job Qualification Standards.* Contractors subject to Section 503 or Section 4212 may not use qualification standards, tests or other selection criteria that exclude a disabled veteran, individual with a disability or class or individuals with disabilities from an employment opportunity, unless the selection criteria is job-related and consistent with business necessity. A selection criterion that concerns only the performance of a marginal function is not consistent with business necessity, and the contractor may not exclude an individual with a disability simply because a disability prevents him or her from performing a marginal function. A selection criterion that is consistent with business necessity may not be used to exclude an individual on the basis of disability if the individual could satisfy the criterion with the provision of a reasonable accommodation.²⁴¹
- g. Relationship or Association with an Individual with a Disability.* A complaint may allege that the contractor discriminated against a qualified applicant or employee because of the known disability of an individual with whom the applicant or employee has a relationship or association. The complainant making such an allegation need not have a disability or allege that the contractor regarded him or her as having a disability. Rather, the complainant need only allege that he or she was denied an equal employment opportunity or benefit because of his or her relationship with one or more persons who have a disability. Most often, the individual with whom the complainant has a relationship will be a family member, such as a child, spouse or parent, but the law applies equally to business, social and other types of relationships.

²⁴¹ 41 CFR 60-300.21(g) and 60-741.21(g). In addition to this nondiscrimination requirement, which applies to all types of selection criteria, contractors subject to the affirmative action requirements of Section 503 or Section 4212 have an obligation to periodically evaluate the impact of any mental and physical job qualification(s) to determine if their use tends to screen out qualified individuals with disabilities or disabled veterans. See 41 CFR 60-300.44(c) and 60-741.44(c).

6E08 ALLEGATIONS SPECIFIC TO SECTION 4212 (NON-DISABILITY) COMPLAINTS

In reviewing a complaint filed under Section 4212 and in discussing it with the complainant, the CO should clearly distinguish whether the complainant believes the alleged discriminatory treatment was based on his or her status as a covered veteran, or based on a disabling condition attributable to his or her veteran status. Complainants filing under Section 4212 may also allege any violation of the law or its implementing regulations unrelated to discrimination. This will help the CO determine the analytical framework for the investigation. If the allegation is based on the complainant's status as a disabled veteran, the CO should follow the procedures for a disability complaint.²⁴²

Complaints alleging discrimination on the basis of status as a protected veteran may also include veteran-related issues that OFCCP is unable to address. When perfecting the complaint, the regional office will refer these allegations to the appropriate enforcement office. If the complainant raises these allegations at a later point in the process, the CO may refer the complaint allegation to the appropriate office or work in coordination with the other enforcement office, as appropriate.²⁴³ For example, a complainant may indicate that he or she has a reemployment issue that falls under the Uniformed Services Employment and Reemployment Rights Act (USERRA), which is administered by the U.S. Department of Labor's Veterans' Employment and Training Service (VETS).

- a. *Veteran Status.* Section 4212 prohibits employment discrimination on the basis of one's status as a protected veteran. The regulations specify the specific protected categories of veterans. The complaint may contain allegations of disparate treatment or disparate impact, or both; and/or harassment, including a hostile work environment.
- b. *Job Listing Requirement.* A technical requirement unique to Section 4212 is the job listing requirement. Under Section 4212, contractors must list employment openings with the appropriate employment service delivery system where the openings occur. Contractors should list all employment openings with the exception of those for executive and top management positions, positions filled internally and those lasting three days or less.

6E09 TECHNICAL AND RECORDKEEPING REQUIREMENTS

Some complaints may also contain allegations that the contractor has not met technical and recordkeeping requirements (e.g., the complainant may allege that the contractor has violated EO 11246, EO 13496 or both by failing to post required notices), or in conducting a complaint investigation the CO may find that technical and/or recordkeeping violations exist. If so, the CO should conduct appropriate inspections and examine records to discuss these concerns with the

²⁴² See subsection 6E07 – Allegations Specific to Disability Complaints.

²⁴³ See MOU between OFCCP and VETS, dated May 20, 1997, that addresses the agencies' coordinated efforts in serving veterans.

contractor. If the contractor does not correct these violations, the CO should prepare a Conciliation Agreement to address these violations.²⁴⁴

6E10 NOVEL ISSUES

Novel issues are those that are unfamiliar, unique or fall outside the norm. COs may encounter novel issues in the course of complaint investigations, as well as compliance evaluations.²⁴⁵ When reviewing complaint allegations, the CO should identify whether the complaint raises any novel issues (e.g., associational claims of discrimination, third party claims involving allegations of sexual harassment, retaliation or dual-race discrimination). In these instances, the CO should discuss the identified novel issues with his or her supervisor before proceeding.

6F INVESTIGATIVE PLAN

Once the CO identifies the analytical framework needed to investigate the complainant's allegations,²⁴⁶ the CO must develop the investigative plan. The investigative plan will serve as a checklist or "road map" for the investigation. While the plan may not identify every step along the way, the plan should contain the major actions to take. The plan should incorporate the investigative framework for each allegation; list the data to obtain, and identify the interviews to conduct (and specific questions to ask). The investigative plan should reflect the logistics for the onsite investigation such as the OFCCP staff members who will participate in the onsite review and the dates for the onsite review.

6F00 DEVELOPMENT OF THE INVESTIGATIVE PLAN

a. Contents of the Plan. The Plan should include a complete list of the allegations in the complaint and a summary list of all interviewees, data and information needs. Specific to each allegation, the elements the CO should include in the Plan are as follows:

- Statement of the allegation and the nature of the allegation (e.g., pattern or practice, different treatment in promotional opportunity, denial of reasonable accommodation, harassment);
- Interview of the complainant regarding the specifics of the allegation(s);
- Interviews of management officials (listed by name or position) and the issues to address;
- Interviews of non-management individuals (listed by name or position) and the issues to address;
- Interviews of witnesses the complainant has identified and the issues to address;

²⁴⁴ See Chapters 1 and 2 for discussions on technical and recordkeeping requirements.

²⁴⁵ See subsection 1A07 – Novel Issues.

²⁴⁶ See subsections 6E02 through 6E10.

- Specific records and materials to review and analyze;
- Analyses to conduct;
- Onsite visit (agreed upon date); and
- Contact with third parties, when appropriate.

6F01 DOCUMENTARY EVIDENCE AND RECORDS

In the initial stage of the complaint investigation, the CO should take steps to gather information about the contractor's complaint and compliance evaluation history.

- a. Historical Documentation.* The CO should query the EIS to determine if there have been any prior compliance or complaint investigations of the contractor establishment. The CO will need to obtain and review copies of any investigative reports, closure letters, Conciliation Agreements or other documentation generated as a result of such complaint investigation.

The CO should also contact and make a written request to the EEOC and other Fair Employment Practice (FEP) agencies (e.g., Division of Human Rights, Department of Justice, State Department of Labor, VETS) inquiring whether there are any complaints against the contractor. If obtained, this CO should include this information in the case file and incorporate it, as appropriate, in the investigative plan.

If the complainant indicates that he or she has filed an EEO grievance or complaint with the contractor or union, the CO should obtain a copy of the grievance or complaint from the complainant. Upon making a data request of the contractor, the CO should request any documentation related to the grievance/complaint, complaint investigation and, if applicable, contractor findings and remedy.

If the CO finds that the EEOC is conducting an ongoing investigation, the CO should obtain adequate information to determine whether the EEOC has exercised jurisdiction over all of the allegations over which OFCCP would also have jurisdiction and is proceeding with an investigation of the same. Upon verifying this information, the CO should discuss this with his or her supervisor.

- b. Policies and Practices.* The CO should obtain copies of all documents that explain any policy or practice bearing on the allegations in the complaint. If a practice at issue is in writing or the written material is not current, the CO should request that the contractor provide a written statement of facts or conditions currently in effect or identify a manager or supervisor who can discuss the practice.
- c. Relevance.* The CO should obtain copies of any written materials that are relevant to the complaint. The nature of the complaint allegations will determine the nature of which documents the CO needs to obtain.

For example, in a complaint alleging discriminatory discharge on the basis of disability, which the contractor states was due to poor performance, the CO would obtain documents such as the following: copies of policies and procedures for performance evaluations and terminations; a copy of the complainant's personnel file, including his or her performance evaluations; and copies of other similarly situated employees' files and performance evaluations, in order to conduct a comparative analysis. A similarly situated employee could be a non-disabled individual who received a poor performance rating and was, or was not, subject to discharge.

6G ONSITE INVESTIGATIONS

Before going onsite, the CO should ensure that he or she has fully reviewed the complaint and the contractor's compliance history and developed an Investigative Plan. The CO should provide written notice of the onsite investigation to the contractor. During the onsite investigation, the CO and other OFCCP staff members should follow the investigative plan. However, the CO should make appropriate changes to the investigative plan and implement these changes if he or she learns new information during the investigation indicating that other issues may exist. For example, a complainant may raise an allegation of retaliation during the course of the investigation that was not in the original complaint. If the CO has any concerns about making changes to the investigative plan or approach, the CO should discuss these concerns with his or her supervisor.

6G00 NOTIFYING THE CONTRACTOR OF THE ONSITE INVESTIGATION

When the investigative plan is complete, the CO should make an arrangement with the contractor for the onsite visit. Generally, the onsite investigation should at a minimum consist of a lead CO and another CO to assist in fact finding. The CO should telephone the contractor and speak with the individual who will represent the contractor during the onsite visit. The CO should advise the representative that:

- An entrance conference with the facility's senior officer or designee will take place in order for the CO to outline the investigative process, to explain what will be done onsite, and to estimate how many days the onsite investigation may take;
- Identified records should be available for review and should be as specific as possible; and
- Management employees, by name and position or title, requested to be available for interviews.

The CO should establish a mutually agreeable date for beginning the visit. A letter confirming the onsite investigation date or dates must be sent.²⁴⁷

²⁴⁷ See Letter L-10 – Confirmation of Onsite Investigation.

6G01 ONSITE INVESTIGATION

- a. *General.* The CO must conduct the onsite investigation in a manner that conveys the objectivity and fact finding intent of the CO. The focus of the CO's activity must be on the complainant's allegations and any contractor actions that gave rise to them. The interviews and review of records should provide information clearly related to the issues raised in the complaint. The CO will make note of any other compliance concerns that he or she observes or is aware of. (See further discussion below.)

For each onsite investigation, the CO will use the appropriate framework to address the allegation(s) by gathering data and information and by conducting interviews. The Investigative Plan should reflect the data to obtain and the interviews to conduct. The CO should follow this "road map" to conduct the onsite investigation.

- b. *Entrance Conference.* The entrance conference with the facility's senior official or designee sets the stage for the entire investigation. It is important for the CO – as a neutral fact finder – to be well organized and nonjudgmental. The CO should discuss: the investigative process (including what will actually occur onsite), an estimate of the length of the visit and a mutually agreeable date and time for an exit conference. Since the CO previously provided the contractor with a copy of the complaint and informed the contractor of the relevant law(s), there may be no need for the CO to repeat that information. However, the CO should be prepared to respond to any questions regarding the complaint allegations and should ensure that the contractor understands the allegations.

The CO should inform the contractor that EO 11246, Section 503 and Section 4212 implementing regulations prohibit interference and intimidation, including threats, coercion, harassment and discrimination of any individual in the exercise of his or her rights protected under OFCCP enforced laws. Such protected rights include filing a complaint; assisting or participating in an investigation, compliance evaluation, hearing or any other activity related to the administration of the EO 11246, Section 503 and Section 4212 or other EEO laws; opposing any act or practice that violates any of these EEO laws; or exercising any other right afforded them by these laws.

- c. *Facility Inspection.* If appropriate, the CO should conduct an inspection of the contractor's establishment during the early stages of the onsite investigation. By inspecting the establishment/facility, the CO will be able to observe the layout of the facility, what work employees may perform in the location, whether there may have been possible witnesses to an event, whether there are physical accessibility issues or whether there is any display of graffiti, inappropriate materials, etc. The CO should note, and possibly diagram, any physical setting/location identified in the complaint. The CO should also note other observations, as appropriate. For example, in investigating a class complaint alleging discrimination on the basis of sex, the CO should note the presence or absence of women in the work area or job positions at issue. When appropriate, the CO may photograph the location he or she is inspecting. If the contractor objects to the CO taking photographs, the CO should discuss the matter with his or her supervisor.
- d. *Required Notices and Postings (EO 11246 and EO 13496).* During the onsite investigation

of a complaint, the CO also has the opportunity to verify that the contractor is in compliance with required notices and postings. EO 11246 requires that the contractor conspicuously display the *Equal Opportunity is the Law* poster that notifies applicants and employees that federal law protects applicants and employees against discrimination. EO 13496 requires that the contractor post notice of employee rights under the National Labor Relations Act (NLRA). The NLRA guarantees employees the right to organize and bargain collectively with their employer. The CO should inspect such areas as break rooms, personnel offices, common areas and employee bulletin boards for the required postings.

- e. *Prohibition against Retaliation:* In conducting a complaint investigation, the CO should inform contractor officials, employees and applicants, as well as other people who may be a part of the investigation that the law prohibits the contractor from retaliating because of their involvement in the process. Retaliation is a form of discrimination in which a contractor takes an adverse action, harasses, intimidates, threatens or coerces an individual because he or she filed a complaint of discrimination; opposed any act made unlawful under the laws enforced by OFCCP; or participated in an investigation, compliance evaluation, hearing or any other activity related to the administration or enforcement of any OFCCP enforced laws.²⁴⁸

6G02 DATA GATHERING

- a. *General.* The nature of the specific allegation(s) to be investigated will determine the data and information the CO should gather. Certain data will be common to most investigations, such as applicable personnel policies, collective bargaining agreement, data regarding the employment practice in question, the personnel files of the complainant and comparators, etc. The CO's Investigative Plan should identify what information he or she will need to address each allegation. However, the CO may identify additional information, documentation or records to obtain. Provided below, by type of allegation, are general guidelines for data gathering.
- b. *Pattern or Practice*
 - 1. *Disparate Treatment.* The CO will gather data regarding the specific employment action (e.g., use of a selection procedure), or the loss of benefit or opportunity at issue, in order to identify similarly situated individuals (applicants, candidates or employees) to the complainant(s) and whether the comparative group received more favorable treatment. The type of data needed will depend on the specific allegation. If a complainant indicates that there is an EEO grievance or complaint on file, the CO should request these records. Additionally, the CO should request copies of any grievances others have filed that raise similar issues. The CO will need other data and information including copies of any applicable policies and procedures.

Data related to employment actions may include: applicant flow, hiring, termination, promotion, compensation data, etc. In examining selection procedures, the CO may also

²⁴⁸ See 41 CFR 60-1.32, 60-250.69, 60-300.69 and 60-741.69.

need to analyze data that reflects the application of specific selection criteria (e.g., a structured interview). In addition to hiring or promotion data (who was hired or promoted and who was not), the CO should also include data such as whether the selection procedure is pass/fail or a score is used (cut-off score or weighted), and the results of the selection procedure (i.e., who advanced from the interview and who did not.)

2. *Disparate Impact*: The CO should examine employment data (e.g., applicant flow, hiring, termination, promotion, compensation data) as appropriate to the allegation. Additionally, the CO should obtain and review any policies applicable to the action in question (e.g., written policies regarding eligibility for promotion or increases in compensation). The CO will examine data regarding the specific employment action or use of selection procedure to identify individuals (applicants, candidates or employees) who are similarly situated to the complainant(s). The CO may also need to analyze data that reflects the application of a specific selection procedure. For example if the complaint alleges that a pencil and paper test has as a disparate impact as a selection criterion, the data needed may include not only hiring or promotion data such as who was hired or promoted and who was not, but it may also include data and information relevant to whether the contractor validated the selection procedure and how, and a description of how the selection procedure was applied to applicants and employees, as appropriate. A copy of the validation study should also be included.
- c. *Harassment: Hostile Environment*. The CO should gather copies of relevant policies and procedures and make observations of environmental conditions (e.g., if the location of an incident is identified, observe the location and determine whether there may have been possible witnesses to the incident). The CO should request copies of any internal grievance or complaint(s) on file regarding the alleged harassment or other incidents of alleged harassment, and any documentation indicating how the contractor responded to any incidents. If it is alleged that the contractor took action against the complainant, the CO should also review the complainant's personnel records and other pertinent documents.
- d. *Retaliation and Interference*. The CO should gather data and information regarding the activity that the complainant alleges was the cause for the retaliation. Because a retaliatory action can include any number of actions, including harassment, the CO will need to identify the policies and procedures at issue and obtain these for review. The CO may also need data to conduct a comparative analysis if the complainant alleges that the retaliatory act was an adverse employment action (e.g., terminated, demoted, not hired) or the contractor treated the complainant differently than other individuals.
- e. *Allegations Specific to EO 11246*. Under EO 11246, a complaint may contain allegations of harassment, retaliation, or a pattern or practice of discrimination. The CO should gather data accordingly. If a complaint raises an allegation of denial of accommodation on the basis of religion, the CO should ask the contractor whether and how it made accommodation to the religious observances and practices of its employees and obtain any relevant policies and records. If the contractor denied an accommodation, the CO should ask why. If the contractor reports that no one requested an accommodation, the CO should review procedures available for evaluating such requests. The CO should review employee files and

be alert for any pattern of discipline or terminations based on refusal to work on certain days for religious observances. Allegations of national origin discrimination may sometimes be closely linked to discrimination on the basis of religion. The CO should examine the factual situation to determine whether it gives rise to both forms of discrimination.

- f. Allegations Specific to Disability Complaints.* Under Section 503, a complaint may contain allegations of a pattern or practice of discrimination, harassment or retaliation (see above). The CO should gather data accordingly.
1. *Not Making Reasonable Accommodation.* If the contractor denies the allegation that it did not make a required reasonable accommodation, the CO should gain a clear understanding of the job or position in question, the requested accommodation, whether the complainant can perform the job with accommodation and the contractor's response to the request for accommodation. The CO should obtain a written job description; information regarding the processing of requests for reasonable accommodation; the specific request of the complainant; other similar requests for accommodation; information or documentation regarding the complainant's disability and the requested accommodation(s); and information to confirm whether the contractor provided the requested reasonable accommodation or an alternative accommodation in a timely and appropriate manner.
 2. *Other Allegations of Not Making Reasonable Accommodation.* Depending on the nature of the complaint (e.g., the establishment is not physically accessible), the CO should gather information and make observations that may prove or disprove the allegation. This may mean physical inspection of a facility or feature of the facility (e.g., inspecting whether a testing or application kiosk is accessible to a person in a wheelchair).
 3. *Undue Hardship Defense.* When a contractor defends itself by claiming it did not provide a specific reasonable accommodation because of undue hardship, the contractor must prove that to do so would have caused significant difficulty or expense. The CO should obtain information to determine whether a contractor's assertion that an accommodation would impose an undue hardship is valid, and whether it was valid at the time the contractor denied the accommodation.
 4. *Medical Inquiries and Examinations.* The CO should determine whether the contractor makes such inquiries during the application and selection process and whether the contractor administers medical examinations. If so, the CO should obtain data for applicants who were screened out during these stages. The CO may then need to examine individual records and to conduct comparisons between successful and unsuccessful applicants to determine whether and how the contractor may have used the information, and whether any applied criterion is job-related and consistent with business necessity.
 5. *Confidentiality Issues.* The CO should examine the contractor's policy and practices regarding confidential records. The CO may need to review records and inspect the location of the records to determine if there was a breach of confidentiality.

6. *Qualification Standards, Tests and Other Selection Criteria.* The CO should determine whether the application of a qualification standard, test, or other selection criterion excluded the complainant from an employment opportunity on the basis of his or her disability. If so, the CO should gather information to determine whether the challenged selection criterion is job-related and consistent with business necessity. The CO should obtain a written job description, an explanation from the contractor, and any supporting documentation, as to how the criterion relates to the job, and factual information about how the job is actually performed. If the criterion relates to health or safety, the CO should gather information to determine whether the criterion is necessary to avoid the existence or creation of a direct threat, or is required by federal law or regulations. Should the CO determine that the criterion is consistent with business necessity, the CO should obtain information to assess whether the complainant could satisfy the selection criterion with the provision of a reasonable accommodation.
7. *Relationship or Association with an Individual with a Disability.* The data and information gathered will vary depending upon the specific nature of the allegation. For example, if the complaint alleges that the contractor denied the complainant equal access to the contractor's health insurance plan, the CO should obtain copies of the contractor's policies and procedures related to health insurance, records related to the complainant's application for insurance, and records related to the processing of that application. If the complaint alleges that the contractor did not hire or promote the complainant because of his or her association with a person with a disability, the CO would gather information and data related to the selection process, the other applicants for the job at issue (including the applicant selected), and the reasons for the non-selection of the complainant.
- g. *Allegations Specific to Veterans (Non-Disability) Complaints.* Under Section 4212, a complaint may contain allegations of a pattern or practice of discrimination, harassment or retaliation (see above). The CO should gather data accordingly.
 1. *Veteran Status.* As required by regulation, the complainant must provide documentation proving his or her status as a protected veteran. If the complaint raises class issues, the CO should obtain documentation to prove that affected class members are protected veterans.
 2. *Job Listing Requirement.* If a complaint alleges a violation of the job listing requirement, the CO should request job listings from the contractor and contact the employment office (employment service delivery system) that the contractor used and request confirmation that the contractor listed its employment openings with that office. The CO should obtain from the employment office a listing of the job orders that the contractor placed by job title and date. The CO should then compare this list with a list of jobs the contractor has filled through new hire, identify any such jobs not listed with the employment office, and determine whether they should have been listed.
- h. *Technical and Recordkeeping Requirements.* The CO should conduct appropriate

inspections and examine records to determine whether technical and/or recordkeeping violations exist.²⁴⁹

6G03 CONDUCTING INTERVIEWS

- a. *General.* This section reflects current OFCCP policies regarding the mechanics of the interview process, but it does not teach COs how to interview witnesses. Throughout the investigation, including interviewing, the CO must maintain a high degree of objectivity and professionalism.
- b. *Informing the Interviewee.* At the outset of an interview, the CO should tell each individual that after the interview, the CO will show him or her a statement containing his or her answers to the questions and will ask him or her to sign the statement. The CO should inform each interviewee that knowingly providing false or inaccurate information is unlawful and explain that the following phrase will be in the interview notes where CO will ask the interviewee to sign: "I have read the above and it is true." Additionally, in each instance when a CO speaks with non-management individuals (informal or formal) the CO should inform the individual that the interview will be kept confidential to the extent possible and that it is against the law for the contractor to take any retaliatory action or to intimidate him or her for participating in the interview.
- c. *Interview Notes.* The CO should start with a list of questions or an interview outline he or she developed prior to the onsite visit. This list, with the interviewee's responses, comprises the "interview notes." The CO should add notes to document follow-up questions and answers that arise as the interview progresses. The CO should enter the following phrase above the space where the interviewee will sign: "I have read the above and it is true." At the conclusion of the interview, the CO should review the questions and answers and confirm that direct quotes are accurate or that a paraphrase conveys the intended meaning. The CO will expeditiously type (electronic record) handwritten notes from the interview to provide the interviewee with a hard copy to sign as soon as possible. The CO should obtain a personal mailing address and a telephone number from the interviewee in case the CO needs to contact the interviewee later or needs to mail a hard copy of the interview to the interviewee (for signature). In any instance, if the interviewee indicates that the notes need corrections, the CO will incorporate the corrections and send a hard copy of the interview to the interviewee to sign. The CO should maintain records of the original (electronic record) and the corrected interview in the case file. If an interviewee refuses to sign the notes, the CO should record this along with the reason(s) for refusal to sign.
- d. *Management and Supervisory Officials and Witnesses.* "Management" or "supervisory" employees refer to bona fide executive employees. When these employees interview, they may be speaking not only for themselves, but also for the contractor. On the other hand, a management employee who is filing a complaint about his or her own employment is not speaking on behalf of the contractor. Contractor representatives, including attorneys, may be present at interviews of management and supervisory employees when such employees are

²⁴⁹ See Chapter 2 Desk Audit, Section 2I: Technical Requirements.

speaking in their official capacity. In conducting such interviews in the presence of a contractor representative, the CO should explain that the presence of the representative means that the contractor acknowledges that the interviewee speaks on its behalf and that his or her statements regarding policies and actions may be fairly treated as those of the contractor. The CO should state in the interview notes the fact that he or she gave this explanation. The CO should make sure that the contractor representative does not try to speak for, influence or correct the responses of the interviewees.

- e. *Contractor's Presence at Interviews.* When the CO conducts onsite interviews with non-management personnel, the contractor does not have the right to have a representative present. When the CO conducts interviews with management personnel, the contractor may have an attorney or other representative present. The exception to this is when the manager is the complainant or a member of a potential affected class speaking about his or her personal experience, rather than speaking on behalf of the management. It is the policy of OFCCP to conduct private interviews with contractor employees who are not management or supervisory employees. This helps to ensure that such employees are free from any possible intimidation or retaliation. If a contractor objects to the CO's attempt to privately interview employees on its premises, the CO should conduct the interviews away from the contractor's facility.
- f. *Employee Representative Present at Interviews.* An employee may request that a representative accompany them in the interview (e.g., a union representative or legal counsel). Generally, this is acceptable. The CO should note the person's name and title on the interview documentation. Initially, the CO should discuss this with the interviewee privately to determine whether there may be a conflict of interest or whether the contractor is coercing the interviewee to have the person present. If the representative attends the interview, the interviewee may have waived confidentiality. The CO should note this discussion with the interviewee in the interview statement. The CO is advised to contact his or her regional solicitor if additional guidance is needed on whether confidentiality was waived under these circumstances.
- g. *CO is Unable to Conduct Interview.* If the CO is unable to conduct an interview, he or she should add a memorandum to the file explaining who was supposed to be interviewed, and why the interview did not occur. For example, the complainant may identify a potential witness to the alleged harassment, but the potential witness indicates to the CO that he or she was, in fact, not a witness to the alleged conduct and does not want to submit to an interview.

6G04 INTERVIEW QUESTIONS

- a. *General.* In order to gain an understanding of the issues, the CO should prepare open ended questions to ask interviewees (e.g., ask interviewee to explain and describe their observations and experiences related to the issues). When appropriate, the CO should also ask direct and follow up questions. The investigative plan should include a structure (e.g., a list of interview questions or an interview outline) for the interviews the CO will conduct with contractor officials, the complainant and witnesses. The CO should develop interview questions that will elicit responses to explain the factual circumstances surrounding the allegation (e.g., who was involved and who witnessed the actions; what actions were taken;

where did the events occur; how decisions were reached; and why were specific actions taken). The CO should develop interview questions to ensure that he or she identifies and obtains all relevant documentation.

The CO should confirm and verify information obtained in interviews. For example, the CO may interview two witnesses and each witness provides a similar description of an incident that occurred in the break room; however, a supervisor provides a different description of the incident. One of the interviewee's statements indicated that some employees were clocking out at the time of the incident. Employees enter the break room to clock out. The CO should review sign out forms for the day and time in question in order to identify other possible witnesses. The CO should then interview these other possible witnesses and review any documentation that may provide confirmation or not.

The following sections provide additional guidance for developing interview questions specific to the type of allegation the CO is investigating.

b. Pattern or Practice:

1. *Disparate Treatment.* The CO should ask interview questions designed to determine established policies and procedures and any deviations that may have occurred in the application of the policies and procedures. In addition, the interview questions should seek to identify people who were similarly situated to the complainant but may have been treated differently. Interview questions should also cover the criteria used at each selection stage and the people who applied them at each stage.
2. *Disparate Impact.* If the complaint alleges that a specific policy or practice has a disparate impact, the CO should develop questions for appropriate contractor officials to gain an understanding of the development and application of the policy or practice in question. The CO should develop the interview questions to ensure that the CO identifies and obtains all relevant documentation.

c. Harassment: Hostile Environment. The CO should develop questions to assist in understanding the specifics of the alleged incident(s); applicable policies and all relevant documentation; other similar incidents; possible witnesses to the alleged discriminatory action(s); contractor response to alleged harassment, etc.

For example: The complainant alleged that a drawing, including a derogatory depiction and remark, making fun of a physically impaired person was posted on a wall in the break room. The complainant observed the drawing during his lunch break. The CO should ask the complainant to identify possible witnesses to interview but should also make a random selection of other employees to interview who may have had the opportunity to observe the drawing. The CO should develop questions for possible witnesses and contractor staff members to gather information confirming or disaffirming whether the drawing was posted; whether the poster contributed to a hostile environment; and, if so, whether the contractor took immediate and appropriate action to remedy the identified harm and to prevent future harassment.

COs should note that in conducting interviews and recording the information obtained during an investigation of an allegation of harassment they should fully and accurately document any harassing or derogatory remarks, statements or actions. This is necessary to ensure that the CO can make a determination whether the words or actions were severe enough to constitute harassment. The CO must not rephrase the interviewee's statements or make use of euphemisms. It is also important to note that witnesses may provide statements that are in direct conflict with each other. When the statements are given confidentially, it is important to make sufficient efforts to confirm and verify testimony whenever possible, while maintaining confidentiality.

- d. Retaliation and Interference.* The CO should develop questions to determine whether the complainant participated in a protected activity or opposed prohibited activity; whether the complainant was subjected to adverse action or treatment; whether there is a connection between the protected activity and the adverse action or treatment (e.g., close proximity in time or other evidence such as the complainant was treated differently than others in a similar situation);. The CO should examine contractor assertions for credibility. If the contractor makes an assertion that there is a legitimate, nondiscriminatory reason for any adverse action, the CO should examine the action accordingly.

For example: The CO finds evidence supporting that the complainant participated in a protected activity (e.g., filed an EEO complaint), and the complainant was subjected to adverse action (e.g., demotion) shortly after the complainant's supervisor received notice of the complaint. The contractor asserts that the complainant was demoted because of poor performance and not because of having filed the complaint. For this example, the CO should review any pertinent policy regarding demotions, review the complainant's personnel record to determine whether the complainant's work performance was rated poorly and whether the complainant received any required notice that he or she would be subject to demotion. The CO should also examine other employees' personnel files to determine if similarly situated employees were treated in the same or similar manner. The CO should interview the supervisor who took the adverse action, interview other contractor officials regarding policy governing demotions and applicable procedures, and interview witnesses, as appropriate.

- e. Allegations Specific to EO 11246.* Under EO 11246, a complaint may contain allegations of harassment, retaliation, or a pattern or practice of discrimination. These are addressed above. An allegation unique to EO 11246 is the denial of a request for a reasonable accommodation on the basis of religion. In this instance, the CO should interview employees and applicants to determine whether requests were made for accommodations and how the contractor responded. Witnesses may identify other employees or former employees that the CO will also want to interview. The CO should develop questions that address the following: policy and procedures that apply to requests for reasonable accommodation; how the contractor documents requests; whether the contractor denied requests and the reasons for denial; whether the contractor considered an alternative accommodation, etc.
- f. Allegations Specific to Disability Complaints.* Under Section 503, a complaint may contain allegations of harassment, retaliation, or a pattern or practice of discrimination. These are addressed above.

1. *Not Making Reasonable Accommodation.* COs should develop interview questions regarding the functions of the job or position in question, the requested accommodation, whether the complainant can perform the job with accommodation and the contractor's response to the request for accommodation. The CO should interview the complainant as to the complainant's disability, work limitations and the accommodation(s) requested. The CO should interview contractor officials as to whether the contractor provided the requested reasonable accommodation or an alternative accommodation. The CO should also question whether the contractor responded to other similar requests for accommodation. The CO may also need to interview medical personnel regarding the condition at issue and the potential accommodation.
2. *Other Potential Allegations of Not Making Reasonable Accommodation.* If the complaint alleges that the establishment is not physically accessible or the online application system is inaccessible, the CO should conduct interviews of employees and/or applicants who may need accommodation. The CO should also interview contractor officials regarding the policies and procedures for addressing accommodation requests in this regard.
3. *Undue Hardship Defense.* The CO should obtain information to determine whether there is support for a contractor's assertion that an accommodation would impose an undue hardship on the contractor. In examining the contractor's assertion, the CO should look at such factors as:
 - business necessity, and
 - financial cost and expenses.²⁵⁰
4. *Medical Inquiries and Examinations.* The CO should interview contractor officials to determine applicable policies and procedures, including how and when the contractor makes and records medical inquiries. The CO should also question how and when the provider conducts medical examinations and how the contractor uses the information obtained from the examination. The CO should interview the providers of any medical examinations to verify instructions the contractors gave to them and identify how they reported results.
5. *Confidentiality Issues.* The CO should examine the contractor's policy and practices regarding records that are to be kept confidential. Interviews may be necessary to determine whether the contractor breached confidentiality.
6. *Qualification Standards, Tests and Other Selection Criteria.* Contractors subject to Section 503 or Section 4212 may not use qualification standards, tests or other selection criteria that exclude a disabled veteran, individual with a disability or class or individuals with disabilities from an employment opportunity, unless the selection criteria is job-related and consistent with business necessity. A selection criterion that concerns only the performance of a marginal function is not consistent with business necessity, and the

²⁵⁰ A complete list of the five factors is in the agency's regulations at 41 CFR 60-741.3(w).

contractor may not exclude an individual with a disability simply because a disability prevents him or her from performing a marginal function. A selection criterion that is consistent with business necessity may not be used to exclude an individual on the basis of disability if the individual could satisfy the criterion with the provision of a reasonable accommodation.²⁵¹

7. *Relationship or Association with an Individual with a Disability.* The CO should interview the complainant to determine that he or she has a relationship or association with an individual with a disability, and the reason(s) for his or her belief that contractor discriminated against him or her because of that relationship or association. The CO should also obtain an explanation from the contractor regarding the reason for the employment action or decision that is the subject of the complaint and information regarding any relevant policies or practices. If the contractor denies knowledge of the complainant's relationship with an individual with a disability, the CO should examine the credibility of the statements made and seek possible witnesses who could confirm or disaffirm whether the contractor knew of the complainant's relationship.

g. *Allegations Specific to Veterans (Non-Disability) Complaints:* Under Section 4212, a complaint may contain allegations of harassment, retaliation, or a pattern or practice of discrimination. These are addressed above.

The job listing requirement is unique to Section 4212 and state employment services have special responsibilities regarding covered veterans.²⁵² The local offices usually have a representative who deals primarily with veterans' matters. The CO should request any pertinent information regarding both the complainant and the contractor from the local employment service veterans' representative. Additionally, each regional office has a VETS office. The CO should contact the VETS office, in accordance with regional procedures, to obtain any information that may be pertinent to the complaint. For example, the complainant may have contacted the VETS office prior to filing the complaint; as a consequence, the VETS office may have useful information based on its contact with the complainant and possibly the contractor as well.

h. *Technical and Recordkeeping Requirements.* The CO should conduct interviews of contractor officials responsible for meeting the technical obligations and for creating and maintaining records. Interview questions should seek to determine who is responsible for meeting these obligations, whether there are policies applicable to the obligation, and whether there were deviations from the policy. If the contractor did not comply with an obligation, the CO should question responsible parties to determine why the contractor did not meet the obligation.

²⁵¹ 41 CFR 60-300.21(g) and 60-741.21(g). In addition to this nondiscrimination requirement, which applies to all types of selection criteria, contractors subject to the affirmative action requirements of Section 503 or Section 4212 have an obligation to periodically evaluate the impact of any mental and physical job qualification(s) to determine if their use tends to screen out qualified individuals with disabilities or disabled veterans. See 41 CFR 60-300.44(c) and 60-741.44(c).

²⁵² 41 CFR 60-250.44 and 41 CFR 60-300.44.

6G05 REVIEW OF RECORDS

The CO should review the records to address the allegations raised in the complaint. Section 6G02 addresses the types of data and records that the CO should obtain. The nature of the allegations and the applicable legal theories will determine the types of analyses the CO should conduct using the data obtained during the onsite visit.

6G06 EXIT CONFERENCE

Upon completing the onsite investigation, the CO should conduct an exit conference with the facility's senior official or designee (preferably the same person who was at the entrance conference). At this meeting, the CO should present a summary of any observed violations and should document any rebuttal arguments made by the contractor. The CO should emphasize that the findings are preliminary and that OFCCP will not draw final conclusions until the CO can complete analyses of all the data, and can affirm or refute each allegation. The CO should inform the contractor of the approximate length of time it will take to complete the offsite analysis, prepare the investigative report, and issue the Notification of Results of Investigation. The CO should also remind the contractor that the law prohibits retaliation and interference. COs should also inform contractors that the exit interview is not necessarily the end of the fact-finding and that more information may be requested, if necessary.

6H CONDUCTING ANALYSES AND THE INVESTIGATIVE REPORT

The CO must write an investigative report in all instances in which the CO has conducted an onsite investigation. See Appendix A-10 – Investigative Report for the format of this report. In writing this report, the CO should not express personal opinions and should not include matters unrelated to the issues of the complaint. Upon completing the investigation, the CO will analyze all data and information that explains, describes or clarifies the incident or the application of the policy, procedure or practice at issue. The CO will analyze all comparative and statistical data using the appropriate analytical framework for addressing the allegation. The results of the analyses and a description of any direct, circumstantial and anecdotal evidence either refuting or supporting the allegations will be included in the investigative report. The CO will make factual findings and cite the support for the findings with regard to each allegation. The CO will also make a determination of whether there is sufficient evidence to support that discrimination occurred. The investigative report should also include a discussion of the contractor's defenses and the COs assessment of the merits of those defenses.

6I USE OF A NOTIFICATION OF RESULTS OF INVESTIGATION

The CO prepares a Notification of Results of Investigation (NORI) to report the results of OFCCP's investigation of the complaint allegations. If the investigation does not result in a finding of discrimination, OFCCP issues a no-violation NORI. For complaints that are considered dual filed under Section 503/ADA and EO 11246/Title VII, the CO will issue a Notice of Right-to-Sue, also referred to as Notice, along with the no-violation NORI. Each Notice issued will also include the document entitled, Information Related to Filing Suit under

Title VII and the ADA.²⁵³ If at any time the CO is informed of a resolution of the complaint satisfactory to the complainant, and the CO did not identify compliance issues, the NORI will not be prepared. In dual filed cases under Section 503/ADA and EO11246/Title VII, if OFCCP issues a violation NORI, it will not issue a Notice of Right-to-Sue.

6I00 SIGNATURES AND PROCEDURES

The CO should prepare the NORI for the signature of the Regional Director or his or her designee. After being signed, the original NORI will remain in the case file. The CO will send copies of the NORI to the complainant and the contractor with a letter of transmittal, sent certified mail, return receipt requested. The CO will provide copies of the NORI to the regional office. The CO should annotate the chronology log to reflect the transmission and as appropriate the receipt of the document.

6I01 NOTICE TO LABOR UNION VIOLATION

When the remedy for a finding of a violation would require a change in or otherwise affect a collective bargaining agreement (CBA) between the contractor and a union or require the award of retroactive seniority where seniority is governed by a CBA, the union will be notified of the particular violation, and will be invited to participate in its conciliation.²⁵⁴

6J RESOLUTION OF THE COMPLAINT

6J00 SETTLEMENT BEFORE COMPLETION OF INVESTIGATION

- a. Initiating Settlement.* The CO should be prepared to discuss settlement at any stage of the investigation as long as there is sufficient evidence to support that there is a violation, and the settlement will provide a just resolution of the violations. Before engaging in conciliation discussions, the CO should advise the contractor that there is no prejudice to the position of the contractor for participating in conciliation sessions prior to completion of the investigation, or for not participating in the discussions; and the contractor should not construe the government's participation in conciliation sessions as a waiver of the government's right to proceed to a formal NORI if the conciliation sessions are unsuccessful. The CO should provide his or her supervisor with all relevant information to assist in determining whether it is appropriate to enter conciliation discussions.
- b. Complainant Notification of Resolution.* If at any time prior to the completion of an investigation the CO receives notification that the contractor and complainant – the only alleged victim – have resolved the complaint to the complainant's satisfaction and the CO has not received any data or information indicating unresolved compliance concerns, the OFCCP may close the case. The CO should confirm that the contractor and complainant have resolved all of the complaint allegations and that no one has forced or coerced the

²⁵³ See Appendix A-11 – Information Related to Filing Suit under Title VII and Title I of the ADA.

²⁵⁴ See Chapter 8 – Resolution of Noncompliance.

complainant into stating that the complaint is resolved.²⁵⁵

6J01 PRIOR TO ISSUING A NO VIOLATION NORI

- a. *Contact with the Complainant.* If the complaint investigation results in a proposed finding of “no violation,” the CO must contact the complainant prior to the issuance of a NORI. The CO will inform the complainant of the no violation finding, the factual findings, the types of records reviewed, and whether all of the witnesses the complainant and OFCCP identified were interviewed. The discussion regarding witnesses and witness statements should be in general terms without identifying specific witnesses or their statements. This contact will give the complainant an opportunity, prior to the completion of the investigation, to introduce new or previously unconsidered evidence. This contact may be in person or by telephone, but the CO must document when and how he or she made the contact. The documentation must also identify the issues discussed, the complainant’s response and any additional investigation the CO conducted as a result of this contact. If needed, the compliance officer may give the complainant 10 business days to provide additional material before issuing the NORI.
- b. *Request for Release of Documents.* The CO must not release to any party any documents provided by any other party, the internal investigative report or interview transcripts. Based on Exemption 7A of the Freedom of Information Act (FOIA) (5 U.S.C. Section 552), OFCCP does not release records from an open investigation other than those provided by the requesting party itself.

6J02 CLOSURE OF COMPLAINT WITH NO VIOLATION NORI

- a. *Complaint Not Dual Filed under ADA and/or Title VII.* If a complaint involves only EO 11246, Section 503 and/or Section 4212 allegations that are not dual filed under the ADA and/or Title VII, and there is no violation finding, the CO may release the NORI upon completion of the investigation.²⁵⁶
- b. *Complaints Dual Filed Under Section 503/ADA and EO 11246/Title VII.* If a complaint is dual filed under Section 503 and the ADA or under EO 11246 and Title VII, and there is no violation finding, the CO may release the NORI upon completion of the investigation. The Notice of Right-to-Sue will accompany the notification.²⁵⁷

6J03 CLOSURE OF COMPLAINT AND ISSUANCE OF “NOTICE OF RIGHT-TO-SUE” UPON REQUEST

- a. *Notice Upon Request.* If a complainant requests a Notice of Right-to-Sue in writing before

²⁵⁵ See Letters L-11 – Letter to the Contractor Confirming Complaint Resolution; and L-12 – Letter to the Complainant Confirming Complaint Resolution.

²⁵⁶ See Letter L-13 – Notification: No Violation NORI.

²⁵⁷ See Letter L-14 – Notification – No Violation NORI, Notice of Right to Sue under Title I of the ADA or Title VII of the Civil Rights Act of 1964 and Appendix A-11 – Information Related to Filing Suit under Title VII and Title I of the ADA.

180 calendar days have passed and the Regional Director (or designee) can foresee that the investigation will extend beyond the 180th day, the Regional Director (or designee) will issue the Notice within 10 calendar days to the complainant. The Regional Director (or designee) should send copies to the complainant's attorney (if any), the contractor and the appropriate EEOC field office. If a complaint investigation remains open after 180 calendar days from the complaint filing date, the same procedure applies. The Regional Director (or designee) should send copies to the complainant's attorney (if any), the contractor and the appropriate EEOC field office.²⁵⁸

Consistent with Title VII and the ADA procedures set forth at 29 CFR 1601.28, issuance of a Notice of Right-to-Sue upon request immediately terminates further OFCCP processing of the Title VII/ADA component of the complaint unless it is determined at that time or at a later time that it would effectuate the purposes of Title VII/ADA to further process the Title VII/ADA component of the complaint. Upon issuance of the Notice, the Regional Director (or designee) can continue the complaint investigation or close the complaint without issuing a finding, noting his or her decision on the Notice.

6J04 NOTICE ISSUED UPON ADMINISTRATIVE CLOSURE

OFCCP must administratively close the complaint investigation for several reasons, including:

- Lack of jurisdiction;
- Complainant did not file timely;
- Complainant failed to provide requested necessary information, failed to appear or refused to be available for necessary interviews or conferences, or otherwise refused to cooperate to the extent that OFCCP is unable to complete its investigation of the complaint; or
- CO cannot locate or complainant failed to respond to notification sent to last known address within reasonable timeframe (60 calendar days).

With dual filed complaints that are administratively closed, the Regional Director or designee will issue the Notice of Right-to-Sue to the complainant and send copies of the Notice to the contractor and the appropriate EEOC field office when the:

- Complainant failed to provide requested necessary information, failed to appear or refused to be available for necessary interviews or conferences, or otherwise refused to cooperate to the extent that OFCCP is unable to complete its investigation of the complaint; or

²⁵⁸ See Letter L-15 Notice of Right-to-Sue under Title I of the ADA or Title VII (Issued on Request); and Appendix A-11 – Information Related to Filing Suit under Title VII and Title I of the ADA.

- CO cannot locate or complainant failed to respond to notification sent to last known address within reasonable timeframe (60 calendar days).

There are several helpful references that supplement this section: Letter L-16 Notice of Right-to-Sue under Title I of the ADA or Title VII Dismissal; and Appendix A-11 - Information Related to Filing Suit under Title VII and Title I of the ADA.

6J05 SETTLEMENT AFTER COMPLETION OF INVESTIGATION

The NORI invites the contractor to resolve the complaint through conciliation by informal means. The CO should telephone the contractor within five business days of its receipt of the NORI to arrange the conciliation meeting.²⁵⁹

- Conciliation Meeting.* The conciliation meeting is the method by which OFCCP attempts to obtain voluntary compliance. The complainant is not a party to the conciliation. However, the CO should keep the complainant informed of the progress of any discussions and meetings, in order to gather further input and to discuss proposed settlements.
- Reasonable Settlement.* If the field office believes it has arrived at a reasonable settlement, which the complainant accepts, the contractor will acknowledge its responsibility to fulfill the settlement by signing a CA.²⁶⁰

If the complainant will not accept what the field office considers to be a reasonable settlement, the field office may cease its efforts on behalf of the complainant, but must nevertheless obtain from the contractor correction of any policies or practices which caused the discrimination. The steps in accomplishing this are as follows:

1. Request that the contractor submit in writing, a full statement of its agreed upon settlement to be maintained in the case file;
 2. Notify the complainant, in writing, of the full details of the settlement and request a written reply accepting or rejecting the settlement; and
 3. If the field office considers the offered settlement to be reasonable, and the complainant persists in refusing to accept it, the office will cease its efforts on behalf of the complainant and close the case file. The office will obtain from the contractor a Conciliation Agreement resolving all discriminatory policies and practices.²⁶¹
- Seeking Punitive Damages as EEOC's Agent.* In accordance with 41 CFR Part 60-742 and the MOU with the EEOC, OFCCP will act as EEOC's agent for obtaining relief for all aggrieved people covered by a dual filed Section 503/ADA complaint or an EO 11246/Title VII complaint, respectively. The field office will attempt conciliation to obtain relief for victims who have suffered pecuniary losses and intangible injuries. The Regional Director

²⁵⁹ See Letter L-17 – Notification: Violation Notification of Results of Investigation.

²⁶⁰ See Chapter 8 – Resolution of Noncompliance.

²⁶¹ See Chapter 8 – Resolution of Noncompliance.

shall be involved in the conciliation process for cases involving potential compensatory and punitive damages. When potential punitive damages are involved, the Regional Director must consult with the Regional Solicitor and the Director of Program Operations.

6K ENFORCEMENT

If any matter raised in the NORI violation cannot be resolved through conciliation with the contractor, OFCCP should recommend it for enforcement.²⁶²

²⁶² See Chapter 8 – Resolution of Noncompliance.

CHAPTER 7

EMPLOYMENT DISCRIMINATION REMEDIES

7A INTRODUCTION

This chapter contains methods for designing remedies for employment discrimination. It does not address the investigative steps of a compliance review. The process to follow in investigating potential discrimination is set out in Chapter 2 of this Manual and the Standard Compliance Evaluation Report (SCER) that is appended to this Manual.

7A00 APPLICABILITY

This chapter is applicable to designing employment discrimination remedies under Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793); and the Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212).

7A01 RELATIONSHIP TO SCER

During the investigative phase of the compliance review, the CO completes the SCER Part C – Problems Identified. Once the CO completes the investigation and has analyzed all the information, the CO determines in consultation with his or her supervisor whether there are findings of discrimination that require a CA. Then the CO completes the SCER Part F – Summary of Findings.

7A02 PROCESS

When the CO concludes that there was employment discrimination, and when the contractor's response is insufficient or is pretextual, the CO in consultation with his or her supervisor will offer to conciliate a settlement with the contractor. Prior to this offer, the CO will design a remedy to present during the settlement meeting. Management will review OFCCP's proposed remedy prior to presentation to the contractor. If the contractor and CO in coordination with his or her supervisor cannot reach a settlement, OFCCP may recommend enforcement.

7A03 APPLICABLE LAW

CO's must design employment discrimination remedies in a manner consistent with Title VII principles. Remedies for disability discrimination or discrimination against disabled veterans will be consistent with Americans with Disabilities Act principles.

7B TIMELINESS AND CONTINUING VIOLATION

As a general rule, one seeking to remedy a discriminatory act must assert his or her rights within the periods established by the statute or other laws establishing the rights. Under OFCCP procedures, for an act of discrimination discovered during a compliance review to be a violation of Executive Order 11246, Section 503 or Section 4212, it must have taken place within two years prior to the initiation of the compliance evaluation (Figure F-2 Scheduling Letter), unless the violation is part of a continuing violation. Complaints filed under EO 11246 are timely if the complainant filed it within 180 calendar days of the alleged discriminatory act, except for good cause shown, in which case the Director may waive the filing deadline (41 CFR 60-1.21). Complaints filed under Section 4212 and Section 503 are timely if the complainant filed it within 300 calendar days of the alleged discriminatory act, except for good cause shown, in which case the Director may waive the filing deadline.²⁶³

7B00 CONTINUING VIOLATION

The courts developed the continuing violation concept to address the fact that some employment practices are not discrete incidents, beginning and ending at particular points in time. For example, a policy or practice of paying lower wages to women than to men for the same or similar work is discriminatory, and the contractor repeats the violation each time the contractor pays the women. When evaluating such violations, the courts will consider the entire time period during which the violations occurred or the time period since the effective date of the law, whichever is later. For example, a continuing violation which is grounded in racial discrimination is actionable from the date the continuing practice began or the effective date of EO 11246 (September, 1965), whichever is later. This is provided, of course, that the other requirements of coverage are met.

In compensation cases, contractors will be in violation of Executive Order 11246 any time they pay wages, benefits, or other compensation that result in whole or in part from application of any discriminatory decision or practice.

a. Application of Continuing Violation Theory. OFCCP applies the continuing violation theory in compliance reviews and complaint investigations. The theory is applicable to the following situations:

1. *Series of Individual Discriminatory Acts.* A continuing violation may occur when the discrimination involves a series of closely related acts. The acts must be sufficiently related to form a pattern of discrimination. The last of these acts must have occurred within the two-year period preceding the initiation of the compliance review (Scheduling Letter) or, in the instance of a complaint investigation, within the 180-day period or 300-day period from the filing date of the complaint.
2. *Maintenance of a Discriminatory Policy or System.* A continuing violation may occur when a contractor maintains a discriminatory policy or practice into the two-year, 180-day period or 300-day period. The violation may focus on one particular employment practice, such as promotions or compensation, or it may deal with discrimination in a

²⁶³ 41 CFR 60-250.61, 41 CFR 60-300.61, 41 CFR 60-741.61.

series of areas including initial placement, promotions, transfers and salary. It is not necessary under this theory for OFCCP to show that a discrete act representing the alleged discriminatory policy occurred during the two-year period, 180-day period or 300-day period. It is sufficient to show that the policy or system continued into the period, and that if there had been a personnel action, the policy or system would have been applied in the allegedly discriminatory manner.

- b. Remedies Under a Continuing Violation.* Once the CO establishes that there is a continuing violation by showing a series of related acts, one of which occurred within the liability period or a continuing employment policy that extended into the liability period, then the contractor must remedy all acts that are part of the continuing violation since the effective date of the law under which relief is sought or from the start of the violation, whichever is later. This is so whether they occurred within or outside of the two-year or 180-day period.

7C REMEDIES

Remedy represents a separate and distinct phase of the investigation. While the CO should be thinking about remedy throughout the investigation and trying to obtain the information necessary to determine the appropriate remedy, the CO should reserve conclusions about the final definition of remedy until he or she has sufficient information to make a finding that there has been discrimination. This normally does not occur until after the CO presents the contractor with the preliminary findings, the contractor submits its response and the CO determines that the contractor's response does not adequately explain the alleged discrimination. The issues of the remedy phase of an investigation are very different from the issues of the violation phase. After establishing discrimination, the CO should begin identifying specific remedies. The remedy must address how to:

- Make the discrimination victims whole;
- Stop the violation; and
- Prevent the violation from recurring.

The remedy for a discrimination finding is in the CA. See Chapter 8 of this Manual for a discussion of the specific elements of a CA.

7C00 DESIGNING THE REMEDY

There is much more flexibility in designing remedies than there is in proving discrimination. The CO frequently develops remedies through negotiation and compromise. There are, however, general guidelines for designing remedies. The CO should always seek a complete remedy. A complete remedy will correct the causes of the discrimination and make the victims of discrimination whole.

7C01 CORRECTIVE REMEDIES

Part of a complete remedy is the corrective remedy. Corrective remedies stop the violation and protect against its recurrence. For example, to correct hiring discrimination caused by treating applicants differently during a subjective interview, corrective remedies could include stopping the use of the discriminatory interviews, substituting legitimate objective criteria (i.e., objective criteria with no unjustified adverse impact) and establishing a monitoring system to ensure that the contractor applies the criteria in a nondiscriminatory fashion.

If an unvalidated or invalid test has an adverse impact then corrective action would include eliminating the use of the test, continued use of the test in a manner that eliminates its adverse impact (e.g., changing the cut-off score) or validating the test in compliance with the *Uniform Guidelines on Employee Selection Procedures* (UGESP), thereby demonstrating its job-relatedness.

7C02 MAKE-WHOLE RELIEF

- a. *General Principles.* Make-whole relief means simply that the contractor restores the victim of discrimination to the position, both economically and in terms of status that he or she would have occupied had the discrimination not occurred. This usually involves placing the person in his or her rightful place. This means placing the person in the job the person would have occupied with the seniority he or she would have had if not for the discrimination. For example, if the contractor discriminated against women in hiring for an entry-level maintenance position, make-whole relief would include placing a certain number of class members into entry-level maintenance positions as they become available. If the discrimination resulted in termination from employment, the affected class members should be reinstated to their prior positions. In addition to rightful placement, make-whole relief includes all economic benefits the victim would have received had the discrimination not occurred. This would normally include things such as back pay with interest, retirement contributions, vacation credits, sick leave credits, payment for medical expenses that would have been paid by the employer's medical plan, missed training and any other employment benefits denied to the victim.
- b. *Case Law Precedent.* In construing what constitutes make-whole relief, OFCCP follows Title VII principles.

7C03 FRONT PAY

Front pay is appropriate whenever the contractor cannot place the victim immediately into his or her rightful place. Front pay is the difference between the victim's current pay and the pay associated with his or her rightful place. There are a number of circumstances that can prevent immediate achievement of rightful place, including the absence of a vacancy, training required before beginning in the position, etc. When front pay is appropriate, the victim must start receiving the earnings associated with his or her rightful place from the date of settlement until the contractor places him or her in the position at issue or his or her position pay is equal to the rate it should be in his or her rightful place.

7C04 RETROACTIVE SENIORITY

- a. *Seniority as an Element of Make-Whole Relief.* Seniority is often a critical component of relief. Without seniority an individual who the contractor hires or promotes as a remedy for past discrimination may not have protection against layoff or demotion. If the contractor had hired or promoted him or her at the time the discriminatory act occurred, he or she would have had additional years of seniority and would be less vulnerable to layoff as a result. Therefore, requiring hiring or promotion as a remedy without also requiring an adjustment of seniority does not really make the victim whole. Similarly, in many situations, employers award promotions in whole or in part based upon the bidder's seniority. Merely placing a victim in the workforce without the seniority to which he or she is entitled will delay his or her attainment of his or her rightful place. Victims must receive all relevant seniority, such as job seniority where relevant in addition to plant seniority.
- b. *Competitive and Noncompetitive Seniority.* There are two types of seniority: competitive and non-competitive seniority. Competitive seniority may include seniority for the purposes of shift preference, vacation schedules, promotions, job bidding, layoffs, raises or training. When retroactive competitive seniority is fashioned as a form of relief, the employees who were not victims could effectively lose out in bidding for jobs or be in greater danger of layoff, etc., to those who received retroactive seniority. On the other hand, there are some types of noncompetitive seniority matters (e.g., accrued leave, retirement computation) that when remedied for individual victims, do not create the same concerns as remedying for competitive seniority issues.
- c. *Nonunion Seniority.* Some nonunion contractors operate under a system in which seniority is used in both the competitive and noncompetitive context. In other words, even without a union contract, promotions and layoffs, etc., are decided on the basis of seniority. In these situations, the victim is clearly entitled to obtain retroactive competitive seniority.
- d. *Union Involvement.* When part of the remedy includes retroactive seniority, and a union agreement governs seniority, it is important to involve the union in the conciliation discussions on seniority. Although OFCCP generally does not have jurisdiction over unions, if the union consents to retroactive seniority in the CA, the agreement will be enforceable. If the union is not involved in the conciliation efforts or does not consent, the seniority relief may not be enforceable. If the union refuses to participate in the conciliation process or agree to seniority relief, the CO and his or her supervisor in coordination with their regional office should consult their local Office of the Solicitor.
- e. *Procedures When Union is Involved.*
 1. *Union Participates and Consents.* OFCCP will invite the union to participate in conciliation of a violation that requires a retroactive seniority remedy. The CO will make every effort to involve the union in the conciliation process and get its consent to the award of retroactive seniority. While OFCCP usually cannot compel the union to participate, if the union does participate voluntarily and agrees to the seniority remedy, then OFCCP can enforce the remedy. If the CO invites the union to participate in the conciliation of seniority issues, its role is limited to those issues. The union should not be involved in other remedy areas (e.g., in determining back pay, changing the selection process).

2. *Union Refuses to Participate or Consent.* If the union declines to participate in conciliation or otherwise does not consent to an award of retroactive seniority, OFCCP may not be able to enforce any retroactive seniority relief. OFCCP should seek to lay the groundwork to defend its insistence upon seniority relief. In other words, OFCCP should not agree to the usual boilerplate language that says that the contractor does not admit to violating one or more of EO 11246, Section 503 or Section 4212. Instead, the CA should recite the factual bases for OFCCP’s findings of violation. Under these circumstances (a) the nonadmissions clause is not included in the CA, and (b) paragraph 1 of the General Provisions of the CA will note that the union was invited to participate, but declined to do so or to otherwise consent to an award of retroactive seniority, as applicable. (See Chapter 8.)
3. *Contractor Refuses to Sign.* If a contractor refuses to sign a CA for any reason, including the fact that the CA does not contain the nonadmission language, OFCCP should inform the contractor that this failure to conciliate will result in referral for enforcement.²⁶⁴

f. Other Methods for Addressing Retroactive Seniority

1. *Bifurcation.* One method to avoid union objection is to bifurcate the competitive and noncompetitive seniority issues. Since the union most likely will not object to the award of noncompetitive seniority, this may be a viable option for resolution.
2. *Cash Buy-Outs.* To address competitive seniority issues, some contractors propose a cash buy-out of employee seniority rights. In other words, the contractor offers a lump sum payment to each identified victim of discrimination in exchange for a waiver of his or her entitlement to competitive seniority. Seniority buy-outs are technically possible, but the CO must carefully craft and review such proposals’ fairness; many may not be acceptable. The CO in coordination with his or her supervisor must forward offers of seniority buy-outs to the National Office, DPO, for review and approval.

g. Novel Issue. OFCCP has determined that a contractor’s refusal to provide retroactive seniority relief where it is appropriate, to be a novel issue. If a case presents this novel issue, the CO, in coordination with his or her supervisor must contact DPO in the National Office.

7C05 OTHER REMEDIES AFFECTING A UNION AGREEMENT

The CO should use the procedures described in Section 7C04 immediately above for other remedies (besides retroactive seniority) that require a change in or otherwise affect a union agreement.

7C06 BACK PAY

a. Back Pay Required. Back pay is normally part of any make-whole remedy. The U.S. Supreme Court stated in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, (1975), that “...given

²⁶⁴ See Chapter 8 – Resolution of Noncompliance.

a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.” Given this stringent standard, it would be rare for the victim not to receive back pay.

- b. *Elements of Back Pay.* Back pay should reflect total earnings lost by the victim due to the discriminatory employment action, practice or procedure. Many elements of compensation, in addition to salary or wages, are normally part of a back pay award (e.g., overtime, premium pay and shift differentials, incentive pay, raises, bonuses, lost sales commissions, cost-of-living increases, tips, medical and life insurance, fringe benefits, pensions, stock options, and awards).
- c. *Benefits.* For the benefits portion of the back pay, the CO should gather information about when the benefits became effective (e.g., what is the waiting period) and the monetary value of the benefits. Benefits can be calculated as a monetary figure (e.g., employer paid premiums, plus employer contributions to a retirement account amount to X per year) or as a percentage of wages or salary (e.g., 20 percent of the total compensation package).
- d. *Deductions and Offsets.*
 1. *Interim Earnings.* If a victim earned money from employment elsewhere during the interim (i.e., substituting for employment with the contractor), this amount is deductible from total back pay. Not all financial compensation received by the victim during the back pay period, however, constitutes “interim earnings.” For example, if an employee had both earnings from a full-time job and a part-time job and could have continued in the part-time job even absent the discrimination, the earnings from the part-time job are not deemed interim earnings and are not subtracted from back pay. Additionally, unemployment and workers compensation payments do not constitute interim earnings.
 2. *Mitigation.* Mitigation refers to the duty of the victim to use reasonable diligence in seeking alternative employment during the back pay period. Contractors may seek to reduce back pay awards by the amount the victim could have earned with reasonable diligence, less expenses reasonably incurred in looking for alternative employment (e.g., cost to prepare a resume, gas and parking fees incurred when going for an interview). Reasonable diligence does not mean that the person had to be successful in obtaining other employment, only that he or she must make a reasonable effort. The victim only needs to accept employment that is substantially equivalent to or the same as that sought or held with the employer. The victim does not need to relocate to accept alternative employment.
 3. *Burden of Proof.* The contractor bears the burden of proving the amount of interim earnings or the failure of the victim to take reasonable steps to mitigate back pay loss.
- e. *Periods of Unavailability.* Back pay awards do not include periods when the victim would not have been employed even without discrimination (e.g., during periods of incarceration).
- f. *Interest on Back Pay.*

1. *Purpose and Rate of Interest.* The purpose of payment of interest on back pay awards is to compensate the victim(s) for the loss of the use of his or her money. OFCCP's regulations require the contractor to calculate interest on back pay at the same percentage rate as the Internal Revenue Service's underpayment formula. Interest on back pay must be compounded quarterly in EO 11246, Section 4212 and Section 503 cases. (See 41 CFR 60-1.26(a)(2), 41 CFR 60-250.65(a)(1); 41 CFR 60-300.65(a)(1) and 41 CFR 60-741.65(a)(1).)
 2. *Rate Adjustments.* The IRS may adjust its rate quarterly. The interest rates applicable to various periods may be issued in OFCCP directives but they are also available on the Internal Revenue Service Web site at www.irs.gov. The IRS site should be the primary source for this information.
- g. *Withholding of Taxes.* Contractors may withhold all applicable federal, state and local income taxes; FICA (social security); and FUTA (unemployment insurance) taxes from employment discrimination settlement payments. The contractor's payments of back pay, front pay and lump sum payments made in place of lost fringe benefits are "wages" subject to such tax withholding. The contractor must supply the victim(s) with a Form W-2 showing the wage component of the settlement and the amount of taxes withheld. Note, however:
1. *FICA.* FICA requires an employer as well as an employee contribution. The employer should not pay its FICA obligation out of a settlement; the employer share must be paid on top of the negotiated back pay.
 2. *FUTA.* In almost all states, FUTA (unemployment insurance) taxes are an expense paid only by the employer (i.e., there is no matching employee contribution). Therefore, the employer should not take an offset or deduction for FUTA when computing back pay awards unless the particular state where the affected party was or would have been employed required employers to withhold FUTA taxes from employees' wages or salaries during the time period for which the employer is calculating a back pay award.
 3. *Interest.* Interest included in a settlement, if separately stated, is not subject to either FICA or FUTA. While interest is taxable as income to the recipient, just as interest on a bank savings account would be taxable, it is not subject to withholding by the employer. The contractor, however, must supply the victims with the Form 1099 stating the interest component of the settlement.
 4. *Benefits.* Since employer contributions to most fringe benefits, such as the employer paid portion of health insurance premiums or pension funds, are not taxable (whether retroactive or not), they are not subject to withholding.

7C07 TIME LIMITS FOR RELIEF

- a. *Two Year Limit.* The victim can obtain back pay for a period beginning two years prior to the date the Scheduling Letter was sent to contractor via return receipt mail, or two years before the victim filed the complaint. If the discriminatory acts took place less than two years before the Scheduling Letter was sent or the filing of the complaint, back pay is due

from the date of violation forward. Back pay continues from these events until a CA or other voluntary correction stops the discriminatory actions, or until the contractor makes a bona fide offer of the position denied. Total back pay can, therefore, be for more than two years.

- b. *Bona Fide Offer.* Under appropriate circumstances, the rejection of a bona fide offer of the position previously denied by the contractor terminates the further accrual of back pay liability. However, interest continues to accrue until settlement on the back pay losses prior to the bona fide offer. A bona fide offer does not require the claimant to waive any rights or remedies to which he or she is entitled. For example, the parties may disagree on whether retroactive seniority is appropriate, but as long as the contractor offers to place the claimant in the same job (including shift and location) that the contractor had without requiring that the claimant waive any right to seniority, the offer is bona fide. Under these circumstances, the parties can agree to litigate or arbitrate the seniority issue at a later date. If the victim accepts the offer, back pay is still due up to acceptance, and front pay continues to accrue for losses suffered as a result of missed promotional opportunities or increased risk of layoff. If the victim rejects a bona fide offer, he or she is not disqualified from receiving back pay; back pay merely cuts off at the date of the offer.
- c. *Continuing Violation.* If the CO finds a continuing violation,²⁶⁵ the contractor should provide remedies, except for back pay, for the entire period of the violation but not earlier than the effective date of EO 11246, Section 503 or Section 4212, as appropriate. Victims affected by a continuing violation can recover back pay for the effects of the violation that occur within the period beginning two years prior to the scheduling notice even when the specific act affecting them occurred outside the two year period. The effective dates of the laws administered by OFCCP are:
- Executive Order 11246 – October 24, 1965
 - Executive Order 11375 (adds sex as a prohibited factor) – October 14, 1968
 - Section 503 of the Rehabilitation Act – September 26, 1973
 - Vietnam Era Veterans’ Readjustment Assistance Act (Section 4212) – December 3, 1974

7C08 CALCULATION OF INDIVIDUAL BACK PAY AWARDS

In some cases it may be feasible to calculate individual back pay awards. When it is not, the formula relief method will be used as described in section 7C11. When individual relief is feasible, the CO determines the amount of back pay the contractor will award to victims by calculating, as accurately as possible; the pay the victims would have received if not for the discrimination. The most common way to reconstruct pay is to identify members of the favored group for comparison with affected members of the nonfavored group (or an individual without a disability in a Section 503 case). Proper comparators are those who were hired, promoted, etc., at about the same time the victims of the discrimination should have been hired, promoted, etc.

²⁶⁵ See subsection 7B00.

The CO then traces comparators' pay history. In promotion and compensation cases, the difference between the pay received by the victims and that by the comparators within the appropriate time frame constitutes the back pay due the victims. For hiring cases, the difference between the pay received by the comparators and that by the victims if they exercised reasonable diligence to find alternative employment within the appropriate time frame constitutes back pay due the victims. If there are gaps in the comparators' employment during the back pay period (e.g., the comparators quit, had a lengthy illness), the CO should make a reasonable estimate of the amount of wages the comparators would have made without the break in service.

7C09 REMEDIES IN A PATTERN OR PRACTICE CASE

There are two models used to remedy pattern or practice problems:

- Victim-specific or individual remedies; and
- Formula relief.

The initial step in fashioning pattern or practice relief is to determine which remedy model to use. The models are different approaches to relief. The CO should not interchange the elements of the two approaches when providing relief (i.e., if adopting a victim-specific approach, the total amount of back pay is not based on a formula and if adopting a formula, potential victims are not excluded from the class because they have not been shown to be actual victims). OFCCP makes the decision about which model to apply.

7C10 VICTIM-SPECIFIC REMEDIES

- Approach.* The victim-specific model, which provides make-whole relief for identified victims of the discrimination, is used infrequently. Individualized relief should be sought when it is feasible to identify individual victims and to calculate their losses.
- Remedy Phases.* There are two stages to the remedy phase: (1) identifying the specific class members entitled to relief; and (2) determining the exact remedy to which each victim is entitled.
- Identifying Victims.* The first step in the process is to identify potential victims of the discriminatory policy or practice. In other words, the CO must define the group or class of individuals for whom he or she is seeking relief. These could include for example: all blacks who failed an unvalidated pass-fail test; all Hispanics who were eligible for supervisory positions, but were not promoted; or all women who were denied reinstatement following maternity leave. At the liability phase, the CO will most likely have defined this class on the basis of the violations identified. In other words, once the CO has established the time period of the violation and the nature of the violation, and the minorities or women or both who were adversely affected are set forth, the minorities or women or both who are presumptively entitled to a remedy are for all intents and purposes defined. In defining the group at this point, the CO should refer only to what he or she has determined to be the minimum objective qualifications the contractor actually imposed.

The CO should not evaluate comparative (“relative”) qualifications at this stage. At this stage the “class” consists of all who met the minimum objective qualifications.

- d. *Computing Lost Earnings.* The CO should gather information to compute the individual’s specific losses depending on whether it is a failure to hire, wrongful termination, failure to promote, or discriminatory compensation. This information will include, but is not limited to, wages for position, interim raises, promotion potential (i.e., the earnings associated with all of the promotions the person would have received had they not been discriminated against in the first place), overtime and shift differential, and any other additions to wages or salary such as bonuses or benefits. The CO should also gather information supporting appropriate non-monetary relief that may include such relief as priority promotions, training, counseling, and EEO counseling for supervisors.
- e. *Contractor’s Response.*
 1. *Contractor’s Burden.* The CO must inform the contractor of the names of the class members for whom the CO is seeking relief and the amount of back pay and other forms of make-whole relief necessary to fully remedy the class. All members of the class are presumed to be victims of discrimination and, thus, each member is entitled to relief unless the contractor shows that he or she is not. To show that an individual is not a victim, the employer must prove that there is a nondiscriminatory explanation for its treatment of the individual. This is a heavy burden. Once the CO has established that a class member was an actual victim of discrimination, the contractor may produce evidence about the amount of make-whole relief to which the victim is entitled.
 2. *Level of Proof Required.* Proof means more than just suggesting or offering some evidence of a nondiscriminatory reason. It means the contractor must convincingly demonstrate that it is most probable that the nondiscriminatory reason was the only reason for its less favorable treatment of the alleged victim.
 3. *Common Contractor Responses.* Some reasons which contractors commonly advance as nondiscriminatory include:
 - The individuals in question were not qualified under standards actually applied. (These may or may not be the same as stated standards.)
 - The contractor selected a better qualified candidate.
 - There was no vacancy within the time period that the application was active.
 - There is something in the candidate’s background that caused rejection (e.g., a poor work record).
- f. *Evaluation of Contractor’s Response.* Once the CO has given the contractor the opportunity to prove that each identified victim is not entitled to relief, the CO must weigh the proof. The contractor must convincingly demonstrate that a given person would have been treated in exactly the same manner even in the absence of discrimination. Each person the

contractor cannot eliminate from the class by this method is considered to be an actual, identified victim of the discrimination and entitled to full relief.

- g. *Identification of Vacancies.* If the CO is proceeding on a victim specific basis, he or she should consider all vacancies or job opportunities denied to the victims (not merely some portion of them). In other words, once the CO has established a pattern of discrimination with regard to a particular type of employment action, the CO presumes each relevant employment decision the contractor made during the actionable period to have been discriminatory.
- h. *Shortfall.* Some contractors have argued that COs should limit their consideration of the denied opportunities to those vacancies that constituted a “shortfall.” When a contractor talks about shortfall vacancies, it refers to the difference between the number of opportunities that were actually awarded to minorities and women, versus the number of opportunities which one would have expected them to get based on their percentage in the relevant pool. For example, suppose a contractor has filled 100 vacancies. The applicant pool for those vacancies consisted of 100 whites and 100 blacks. However, the employer hired only 10 blacks and 90 whites. The CO has now found a violation and informs the contractor that the class for whom relief is being sought consists of the 90 black rejected applicants. The contractor might contend that, if it had hired 50 blacks, OFCCP would have found no violation. Therefore, under the shortfall vacancy argument, OFCCP may only seek reinstatement for 40 of the 90 rejected applicants – the difference between the 10 the contractor actually hired and the 50 it would have been expected to hire absent discrimination. Under the victim-specific model, OFCCP rejects this argument (it is also rejected when using the formula-relief model). Once discrimination has been established, all 90 of the rejected black applicants are presumed to be entitled to reinstatement.
- i. *Individual Remedies.* The CO must then determine make-whole relief for each individual who has not been eliminated from the class by the contractor's proof that he or she was not the victim of discrimination. The CO should tailor the precise remedy to the situation of each victim. The CO should be sure to consider all the different types of harm that the victim has suffered. For example, the passage of time since the violation may mean that victims are less interested in reinstatement or hiring because they have built new careers. On the other hand, if very little time has passed since the violation occurred, and monetary damages are small, reinstatement or preferential hiring may be the most important remedy.

7C11 PREFERRED METHOD FOR DETERMINING RELIEF: FORMULA RELIEF

- a. *When Used.* The CO must seek individualized relief whenever it is feasible to identify individual victims of discrimination and to calculate their losses. However, the CO should pursue formula relief wherever it is impossible or impractical to determine individual relief; that is, when the number of actual victims of discrimination is so large that case-by-case determinations would be unduly burdensome, or when reconstruction of the employment decision the contractor would have made absent discrimination involves mere speculation (such as when there are no lines of progression). Sometimes the CO knows the identity of the victims, but it is so difficult to trace their losses that the CO can only estimate them.

Perhaps the most common situation when the CO may wish to resort to a formula to determine relief is when the number of class members exceeds the number of vacancies.

- b. Definition.* Formula relief is a mechanism by which the CO determines the compensation for the loss suffered by a particular class and then divides the financial compensation (usually, though not necessarily, pro rata) among all the members of that class. Under a formula it is possible that some individuals will receive less than their total losses and some will receive more. This is the consequence of approximating losses in a situation where it is unrealistic to precisely compute individual losses.
- c. Measuring Losses.* Once the CO has decided to go forward with formula relief rather than victim-specific relief, he or she can begin the next step of the remedy phase. This includes an attempt to measure the loss which the class has suffered.

 - 1. Shortfall Method.* If the CO selected the formula method because the number of class members exceeds the total number of opportunities, a “shortfall vacancies” approach may be considered for computing the amount of back pay for the class. For example, assume a situation where there are 50 black and 50 white applicants, all of whom possess the required qualifications, seeking 20 jobs. Nineteen whites were hired. The difference between the actual number of blacks hired (1) and the expected number of black hires (10) represents the shortfall (9). Shortfall vacancies do not limit the number of individuals entitled to relief. Instead, the contractor distributes the amount of money attributable to those vacancies to the whole class. In this example, the CO would compute the earnings attributable to the nine shortfall positions for the entire period, and distribute these to the 49 qualified black applicants who the contractor had not selected. Shortfall vacancies do not represent a cap on OFCCP’s entitlement to relief. They are a compromise figure utilized as part of an approximation of class wide loss.
 - 2. Averaging Method.* Not all formulas require the CO to look at shortfalls. There are other reasons to use a formula other than the fact that there are more victims than vacancies. For example, suppose there is a case in which the major claim is that the contractor placed the hired men and women into sex segregated departments. In such a situation, the CO may want to compare the average salary earned by men with a given level of seniority, to the average salary earned by women with the same seniority. The difference in average salary defines the measure of back pay to be awarded to each woman in that seniority group. The formula devised should be designed to address the particular violation found.
 - 3. Computing Earnings.* Because the formula approach represents a compromise, it is extremely important to account fully for all the earnings attributable to a particular vacancy in computing losses such as: interest, interim raises, promotion potential (i.e., the earnings associated with all of the promotions the persons would have received had they not been discriminated against in the first place), overtime and shift differential, and any other additions to wages or salary such as bonuses or benefits. Generally, the CO should use averages. For example, the overtime calculation in a hiring case should reflect the average overtime that people hired into the job during the review period worked. Similarly, the CO should base promotions on average time to promotions.

4. *Distribution of Remedy.* When using the formula approach, the agreed upon remedy is shared by all members of the class. The CO divides the amount of money that represents the group's lost wages among the members of the class either on a pro rata basis or some other equitable basis. The CO may decide on a method of distribution based upon the facts of the case. For example, if the CO identified an incumbent class that was denied promotions or assigned to lower paying jobs, the contractor controlled their interim earnings. In that situation, a distribution based upon the number of months in the employer's workforce might be most appropriate. With a rejected applicant class, the CO might decide that a simple per capita distribution makes more sense.
5. *Nonmonetary Relief.* In addition to monetary relief for class members, the CO should also consider requiring nonmonetary remedies such as: preferential hiring or promotion goals, red circling, special training programs and EEO counseling for supervisors. With formula relief, it is difficult to provide reinstatement or retroactive promotion because, by using the formula, no individual is tied to any particular opportunity. However, the CO may create a preferential hiring or promotion list consisting of the members of the class and from which the contractor must make all selections to fill vacancies until the number of class members hired is equal to the shortfall. The contractor must hire class members before non-class members.

7C12 NOTIFICATION TO CLASS MEMBERS

The CA or other settlement document must guarantee that all class members are aware of their rights under the agreement and specify the procedures through which those rights will be protected, including counseling when appropriate. Normally, the contractor must notify all class members of their rights. That notice must include the terms and conditions under which the contractor is tendering an employment offer, including the specific amount of back pay, the retroactive seniority, as well as all other appropriate benefits.

7C13 LIABILITY OF A SUCCESSOR EMPLOYER

- a. In determining whether a successor employer is liable for the discriminatory acts of its predecessor, OFCCP follows Title VII case law. The federal courts have held that such liability must be judged on a case-by-case basis considering the "MacMillan" factors (*EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086 (6th Cir. 1974)).
- b. The CO should direct requests for a determination of successor liability to DPO in the National Office. The request should include the contractor's responses, with supporting documentation, to the "MacMillan" factors described in Appendix A-13.

CHAPTER 8 RESOLUTION OF NONCOMPLIANCE

8A INTRODUCTION

This chapter outlines the procedures and documents OFCCP uses to resolve violations COs find during compliance evaluations and complaint investigations. These procedures and documents cover both affirmative action and discrimination violations and apply to all three OFCCP programs: Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793; and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212.

8A00 APPLICABILITY

COs should consult this chapter whenever they find noncompliance. Unless otherwise specified, the guidelines in this chapter apply to both supply and service and construction contractors.

8A01 REMEDIES

If a CO identifies violations during a compliance evaluation or complaint investigation, the CO must secure remedies or sanctions, or both, to bring the contractor into compliance. COs design remedies for three reasons: to correct the violation, to prevent recurrence of the violation, and to make the victims whole. For a complete discussion of remedies and sanctions, see Chapter 7 of this Manual. Distinctions between remedies and sanctions are discussed below.

- a. *Remedy.* Remedies are legally required actions to eliminate the effects of discrimination that include, for example, back pay or reinstatement. Remedies may also be taken or imposed to rectify noncompliance with affirmative action standards. Remember, remedies are corrective, not punitive, and are established in a Conciliation Agreement (CA).
- b. *Sanctions.* In contrast to remedies, sanctions may be appropriate when a contractor fails to agree to acceptable remedies or fails to implement acceptable remedies for noncompliance. Examples of sanctions may include termination of a contract or debarment. Sanctions may also be appropriate, when a violation is egregious or repetitive, or both. Sanctions can only be imposed after an opportunity for a hearing.²⁶⁶

8A02 PREPARATION OF DOCUMENTS

COs are responsible for preparing all the documents in this chapter for their compliance evaluations or complaint investigations. To initiate the resolution process, a CO must review the findings and the bases for each of the findings with his or her immediate supervisor. The CO then submits the recommendation and draft documents to the supervisor for review and forwarding, through the appropriate channels, to the appropriate signatory official. All

²⁶⁶ 41 CFR 60-1.26(b), 41 CFR 60-250.66, 41 CFR 60-300.66, 41 CFR 60-741.66.

documents require a signature by the appropriate OFCCP official.²⁶⁷ Most notices discussed in this chapter require a CO to send the contractor a courtesy copy by e-mail or facsimile and by certified mail, return receipt requested.

8A03 COMPUTATION OF TIME

When computing the contractor's response date, the CO should begin counting from the day after the date on the return receipt requested form. If the response is received on a Saturday, Sunday or federal holiday, the actual date of receipt would be the next business day. If a CO does not receive a return receipt within 5 calendar days of mailing, the CO should contact the contractor to confirm the date of receipt and count the days from that date.

8A04 ORGANIZATION OF THIS CHAPTER

This chapter contains thirteen sections, Sections A through M. Section A provides basic terms that may be useful and Section B is the first substantive section in this chapter. Section B is an overview of the application of Show Cause Notices (SCNs) at various steps in compliance evaluations and complaint investigations, and the documents used to notify contractors and issue an SCN. Section B also reviews the notices used when a CO finds a violation during a compliance evaluation such as a Predetermination Notice (PDN) and a Notice of Violation (NOV). The Manual reviews documents used during compliance investigations, such as a Notice of Results of Investigation (NORI) and a Notification of Right-to-Sue, in this section. Among the other documents reviewed here are CAs, documents needed during the monitoring of CAs, and the notice to labor unions when a CA affects a Collective Bargaining Agreement (CBA).

Section C specifically focuses on the notice to unions, while Section D is dedicated to a full discussion of SCNs. Other section topics are listed below.

- Section E: Predetermination Notices
- Section F: Notice of Violations
- Section G: Conciliation
- Section H: Conciliation Agreements
- Section I: Post Conciliation Agreement Actions
- Section J: The 15-Day Notice
- Section K: Enforcement Recommendations
- Section L: Pre and Post Referral Issues Resulting in Enforcement Proceedings
- Section M: Types of Enforcement Proceedings

²⁶⁷ See the "Signature Authority" section for each document for the official designated authority to sign specific documents. Information on signature authority for CAs is also in subsection 8H03.

8B OVERVIEW OF RESOLUTION AND ENFORCEMENT PROCEDURES AND DOCUMENTS

This section contains flow charts showing the normal sequence of documents COs use in compliance evaluations and complaint investigations. There is a chart for each of the following topics:

- Use of a SCN at Desk Audit (Supply & Service Compliance Evaluations);
- Use of documents in the Onsite and Offsite Phases of Compliance Evaluations (Supply & Service, and Construction);
- Use of documents in Complaint Investigations; and
- Use of documents in Monitoring Conciliation Agreements (CAs).

The text accompanying these charts references the sections of this Manual where there are detailed discussions of the particular types of violations and of the relevant notices or resolution documents. This includes the location of the sample letters, notices or documents.

8B00 GENERAL USE OF A SHOW CAUSE NOTICE

As used in this section, the term SCN includes, as appropriate, an Amended Show Cause Notice (ASCN). An ASCN is used when a CO issues an SCN to the contractor and later finds additional unresolved violations, or finds that some but not all violations were cited in error. The ASCN identifies all the unresolved or current violations.²⁶⁸

Also be aware that if a contractor properly asserts in response to an SCN or ASCN that the CO erroneously issued the notice, the CO must send a letter to the contractor or its representative rescinding the SCN or ASCN.²⁶⁹

8B01 USE OF A SHOW CAUSE NOTICE AT THE DESK AUDIT (Supply & Service Compliance Evaluations)

COs must recommend issuance of an SCN, as described in Section 8D, at the desk audit stage if the contractor:

- fails to submit an AAP as required by one or more of the following authorities: EO 11246, Section 503, or Section 4212;²⁷⁰
- fails to submit an acceptable AAP as required by one or more of the following authorities: EO 11246, Section 503, or Section 4212;²⁷¹

²⁶⁸ See subsection 8D04 – When to Use an Amended Show Cause Notice.

²⁶⁹ See subsection 8D08 – Rescission of a Show Cause Notice.

²⁷⁰ See Section 1C – Receipt of AAPs and Support Data, subsection 8D01 – When a Show Cause Notice is Required, and Letter L-18 – Show Cause Notice: Failure to Submit EO 11246, Section 503 or Section 4212 AAPs.

- fails to submit employment activity data or other information requested in the Scheduling Letter;²⁷² or
- fails to submit acceptable employment activity data and then fails to correct it.²⁷³

The SCN allows the contractor 30 calendar days from receiving the notice to resolve the violation. Specific actions will be taken by the CO, as described below, depending on whether the contractor resolves the violations.

- *Contractor Does Not Resolve Violation.* If the violation is not resolved within the 30-day show cause period, or during a reasonable extension, the CO should recommend enforcement. Enforcement is discussed in detail in Section 8K, Enforcement Recommendation.
- *Contractor Resolves Violation.* If the contractor resolves the violations within the 30-day show cause period by, for example, submitting a reasonable EO 11246, Section 503 or Section 4212 AAP, the review continues with a review of the AAP or moves to the onsite phase. Upon completion of the review, the CO must state the desk audit violation, along with any other violation the CO identified onsite and offsite, and agreed upon a remedy in a CA.²⁷⁴

²⁷¹ See subsections 8D01– When a Show Cause Notice is Required, Section 1F – Review of AAPs for Acceptability, and Letters L-19 – Show Cause Notice: Failure to Submit an Acceptable EO 11246, Section 503 or Section 4212, and L-19a – Sample Enclosure to Letter L-19.

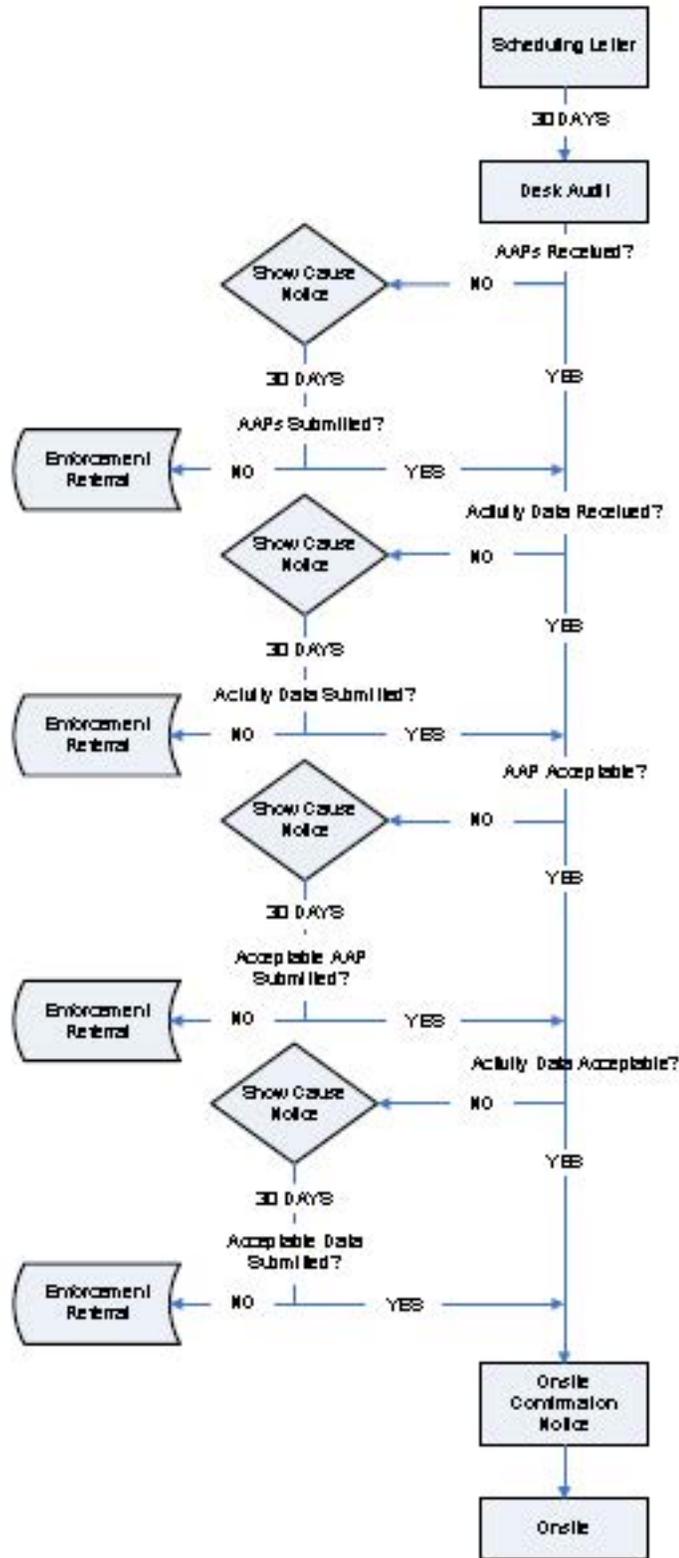
²⁷² See Section 1C – Receipt of AAPs and Support Data for Desk Audit, subsection 8D01 – When a Show Cause Notice is Required, and Letter L-20 – Show Cause Notice: Failure to Submit Employment Activity and/or Compensation Data for Desk Audit.

²⁷³ See Section 1G – Review of Executive Order Support Data for Acceptability, Section 1H – Review of Section 503 and Section 4212 Support Data for Acceptability, subsection 8D01 – When a Show Cause Notice is Required, and Letter L-21– Show Cause Notice: Failure to Submit Corrected Employment Activity and/or Compensation Data for Desk Audit.

²⁷⁴ See subsection 8D07(b) – Contractor Response: Resolution in CA.

USE OF SHOW CAUSE NOTICE AT DESK AUDIT

(Supply and Service Compliance Evaluation)



8B02 DOCUMENTS USED IN THE ONSITE AND OFFSITE PHASES OF COMPLIANCE EVALUATIONS (Supply & Service and Construction)

Based on the nature of the issue or violation in the onsite and offsite phases, in both Supply & Service and construction evaluations, COs will use different forms or documents. Below is a review of the use of SCNs, PDNs, NOVs and notices to labor unions in various situations.

- a. *Denial of Access.* If a contractor denies access to its premises, records or other information necessary to conduct an onsite or offsite review, the CO must issue an SCN or proceed directly to an enforcement recommendation.²⁷⁵
- b. *Interference with OFCCP.* If a contractor's representative harasses or intimidates a representative of OFCCP during the course of an onsite or offsite review or unreasonably interferes with the review process, the CO must issue an SCN or proceed directly to an enforcement recommendation.²⁷⁶
- c. *Finding of a Violation.* If the CO identifies a violation under any of OFCCP's three laws during an onsite or offsite review, the type of notice the CO must issue depends on the nature of the violations.
 - *Pattern or practice employment discrimination violation.* If the CO identifies a pattern or practice of employment discrimination the following notices may be appropriate:
 - *Predetermination Notice.* A CO may issue a PDN to the contractor that describes the pattern or practice issue as well as any other violations found and offers the contractor the opportunity to respond.²⁷⁷ A PDN is not required; OFCCP may proceed directly to an NOV incorporating the pattern or practice finding.
 - *Notice of Violation.* If the contractor does not adequately respond to the preliminary pattern or practice finding, or where OFCCP chooses to proceed without first issuing a PDN, a CO issues an NOV.²⁷⁸ This notice incorporates both the pattern or practice finding and any other violation and invites the contractor to participate in the conciliation process.
 - *Nonpattern or nonpractice employment discrimination violation.* If all violations a CO identifies are nonpattern or nonpractice, such as those involving individual instances of discrimination or affirmative action, the CO typically does not use a PDN. Rather, the CO gives the contractor an initial written notice of the findings in an NOV.

²⁷⁵ See subsection 8D01– When a Show Cause Notice is Required.

²⁷⁶ See subsection 8D02 – When a Show Cause Notice is Not Required.

²⁷⁷ See Section 8E – Predetermination Notice; Letter L-27– Predetermination Notice.

²⁷⁸ See Section 8F – Notice of Violation; Letter L-28 – Notice of Violation.

- d. *Notice to Labor Union.* If a proposed remedy for a violation included in an NOV requires a change in or otherwise affects a provision of a CBA between the contractor and a labor union, or requires the award of retroactive seniority where the CBA governs, the CO must notify the union of the violation and invite the union to participate in the conciliation.²⁷⁹
- e. *Unresolved Violation.* If, after issuing an NOV, reasonable conciliation efforts to resolve all violations fail, the CO issues an SCN for unresolved violations.²⁸⁰ The SCN allows the contractor 30 calendar days from receipt of the notice to resolve the violations.
- *Contractor Does Not Resolve Violation.* If the contractor does not resolve the violations within the 30-day show cause period, or with a reasonable extension, the CO must recommend enforcement.
 - *Contractor Resolves Violation.* A CA must include resolution of any material violations of any of OFCCP's three programs.²⁸¹ When a contractor executes a CA, the CO uses the Notice of Review Completion – Major Deficiencies Resolved in a CA letter. If the CO issues an SCN, the CO uses Letter L-32, Closure Letter for Substantive Violations (with a Rescission of a Show Cause Notice). If the CO does not issue a SCN, the CO uses Letter L-33, Closure Letter for Substantive Violations (no Show Cause Notice issued).

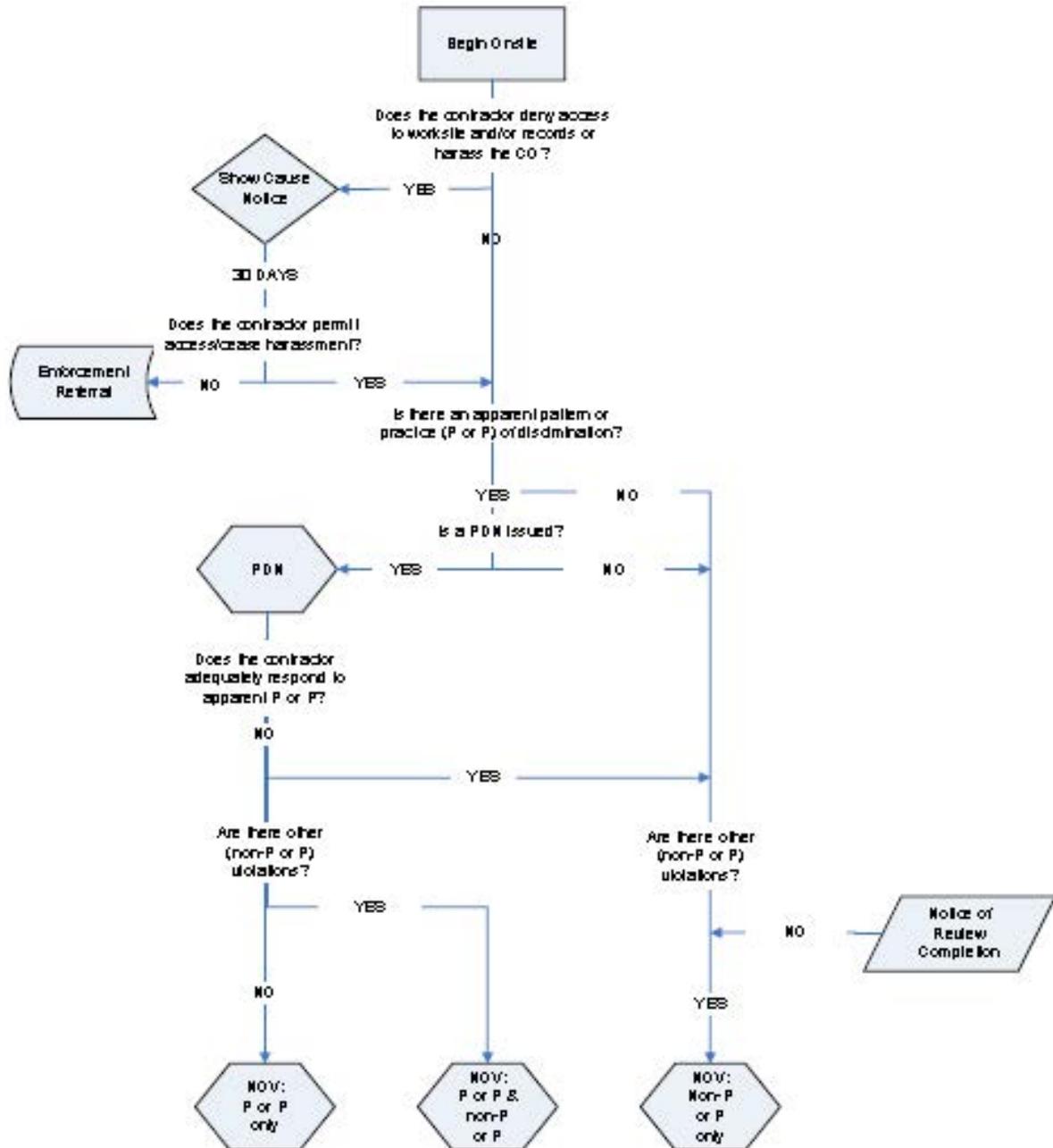
²⁷⁹ See Section 8C – Notice to Labor Union.

²⁸⁰ See subsection 8D01– When a Show Cause Notice is Required, Letter L-22 – Show Cause Notice: Unresolved Violations, and Letter L-22a – Sample Enclosure to Letter L-22.

²⁸¹ See Section 8H – Conciliation Agreements.

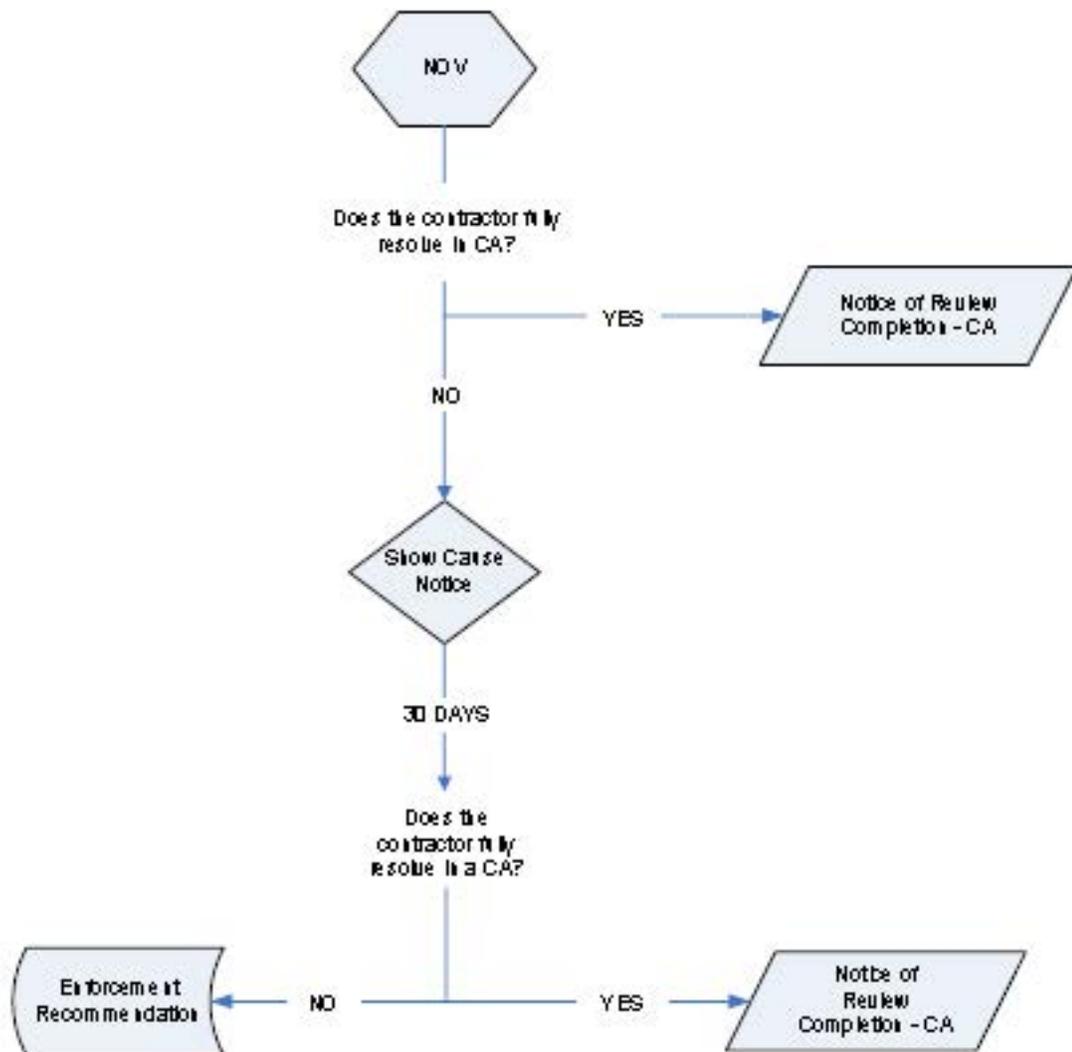
ONSITE/OFFSITE COMPLIANCE EVALUATIONS

(Supply and Service and Construction)



ONSITE/OFFSITE COMPLIANCE EVALUATIONS

(Supply and Service and Construction)
(continued)



8B03 DOCUMENTS USED IN COMPLAINT INVESTIGATIONS

Based on the nature of the issue or violation in a complaint investigation, COs will use different forms or documents. Below is a review of the use of SCNs, NORIs, Notification of Right-to-Sue and notices to labor unions in various situations.

- a. *Denial of Access.* If a contractor denies access to its premises, records or other information necessary to conduct an investigation of a complaint, OFCCP may issue an SCN or proceed directly to an enforcement recommendation.²⁸²
- b. *Interference with OFCCP.* If a contractor's representative intimidates or harasses a representative of OFCCP during the course of a complaint investigation or unreasonably interferes with the investigation, a CO may issue an SCN or proceed directly to an enforcement recommendation.
- c. *Transmittal of Investigation Findings.* COs transmit the findings of a complaint investigation to the complainant and the contractor through the NORI. The contractor and complainant are issued a NORI-Violation if a complaint investigation results in a finding of a violation and the complaint is not resolved.²⁸³ In this notice, OFCCP offers to meet with the contractor to attempt to resolve the violations through conciliation. If the CO finds "no violation," he or she issues the contractor and complainant a NORI-No Violation.²⁸⁴
- d. *Notification of Right-to-Sue.* If a complaint is dual filed under Section 503 of the Rehabilitation Act, as amended, and the Americans with Disabilities Act, as amended; or under EO 11246, as amended, and Title VII of the Civil Rights Act of 1964, as amended, and there is no violation finding, the Notice of Right-to-Sue accompanies the notification of closure.²⁸⁵ In addition, if a complainant requests a Notice of Right-to-Sue in writing before 180 calendar days passes and the Regional Director (or designee) can foresee that the investigation will extend beyond the 180th day, the Regional Director (or designee) will issue the notice within 10 calendar days to the complainant.²⁸⁶
- e. *Notice to Labor Union.* If make-whole relief for the complainant requires a change in or otherwise affects a provision of a CBA between the contractor and a labor union, COs notify the union of the violation and invite the union to participate in the conciliation.²⁸⁷ An example of make-whole relief that might require a change in the CBA is an award of retroactive seniority.
- f. *Conciliation Agreement.* This binding agreement is the result of negotiations between the CO and contractor to resolve findings of noncompliance.

²⁸² See subsection 8D01 and 8D02.

²⁸³ See Letter L-17– Notification of Results of Investigation: Notification of Violation.

²⁸⁴ See Letters L-13 – Notification of Results of Investigation: Notification of No Violation, and Letter L-14 – Notification of Results of Investigation and Notice of Right-to-Sue Under Title 1 of the ADA or Title VII of the Civil Rights Act of 1964.

²⁸⁵ See subsection 6J02 – Closure of Complaint with No Violation.

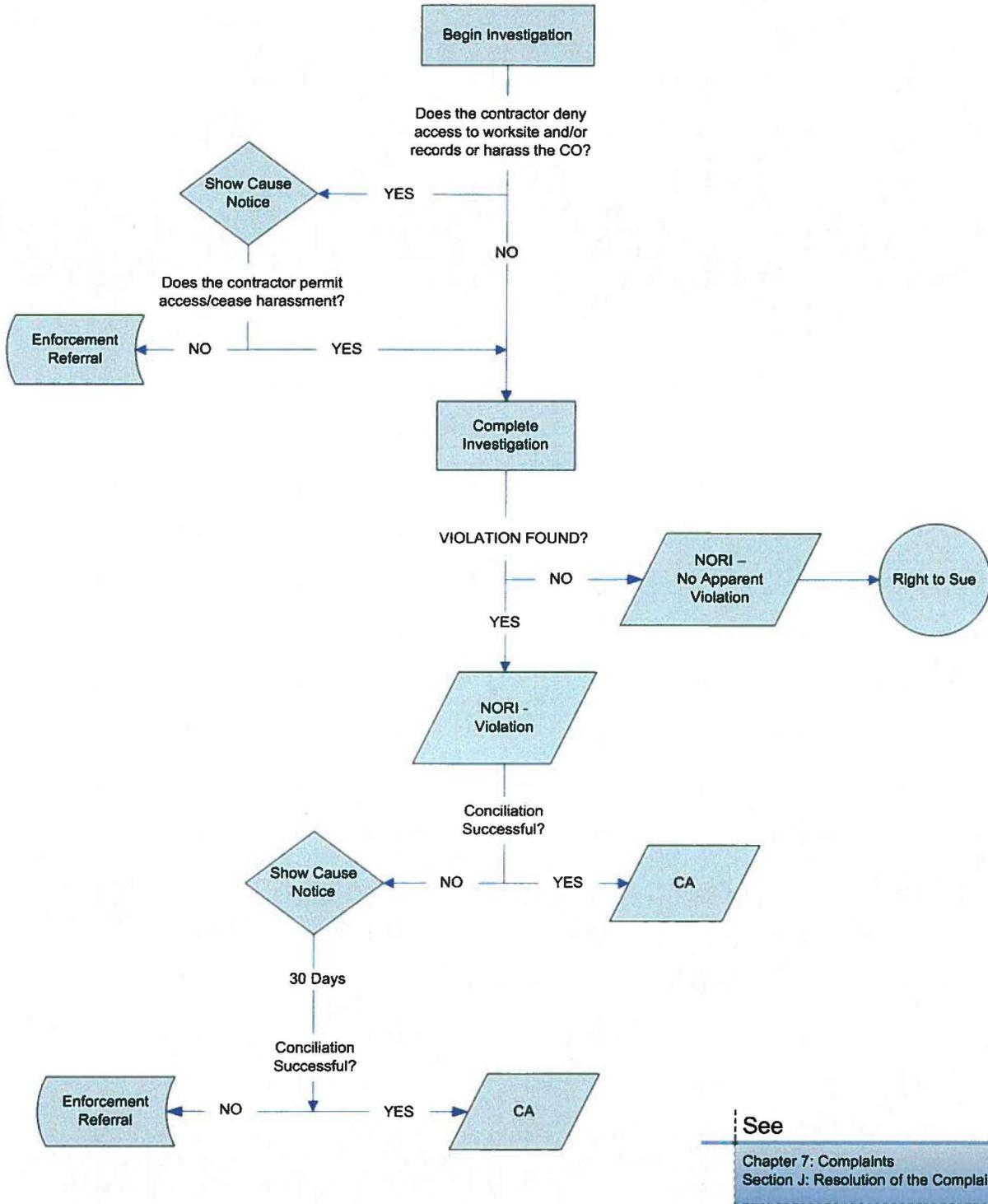
²⁸⁶ See subsection 6J03 – Closure of Complaint and Issuance of "Notice of Right-to-Sue."

²⁸⁷ See Section 8C – Notice to Labor Union.

- *Conciliation Successful.* The contractor must resolve any finding of violation in a complaint investigation, whether individual or class, under any of the three OFCCP programs in a CA.
- *Conciliation Unsuccessful.* If after reasonable time and effort OFCCP and the contractor cannot agree to the resolution of the identified violation, the CO must issue a SCN. If the contractor and OFCCP do not reach a settlement within the 30 calendar day show cause period, or reasonable extensions thereof, the CO must recommend enforcement.²⁸⁸

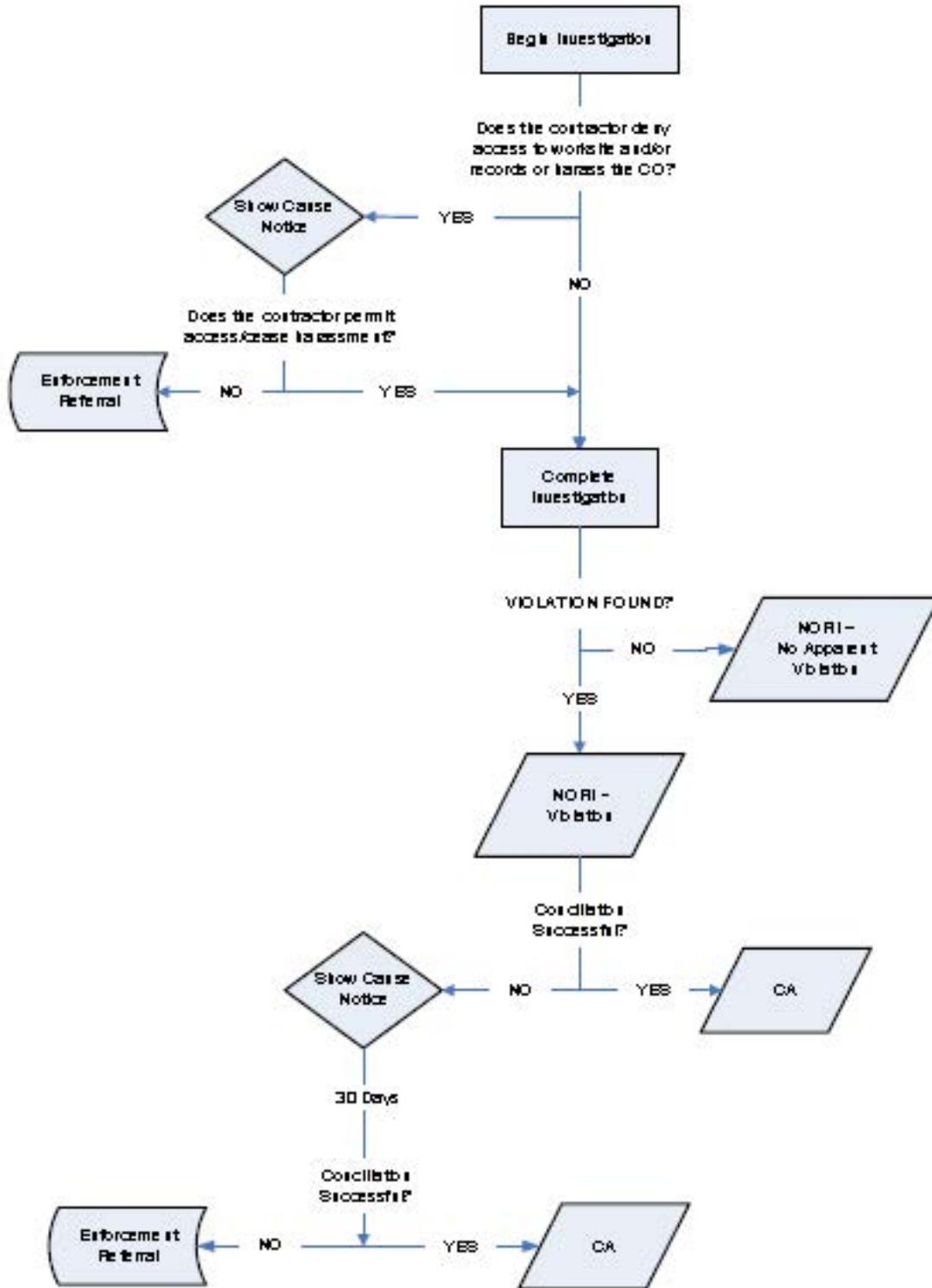
²⁸⁸ See Section 8K – Enforcement Recommendations.

COMPLAINT INVESTIGATION (EO 11246 & Section 503)



COMPLAINT INVESTIGATION

(Section 4212)



8B04 DOCUMENTS USED IN MONITORING CONCILIATION AGREEMENTS

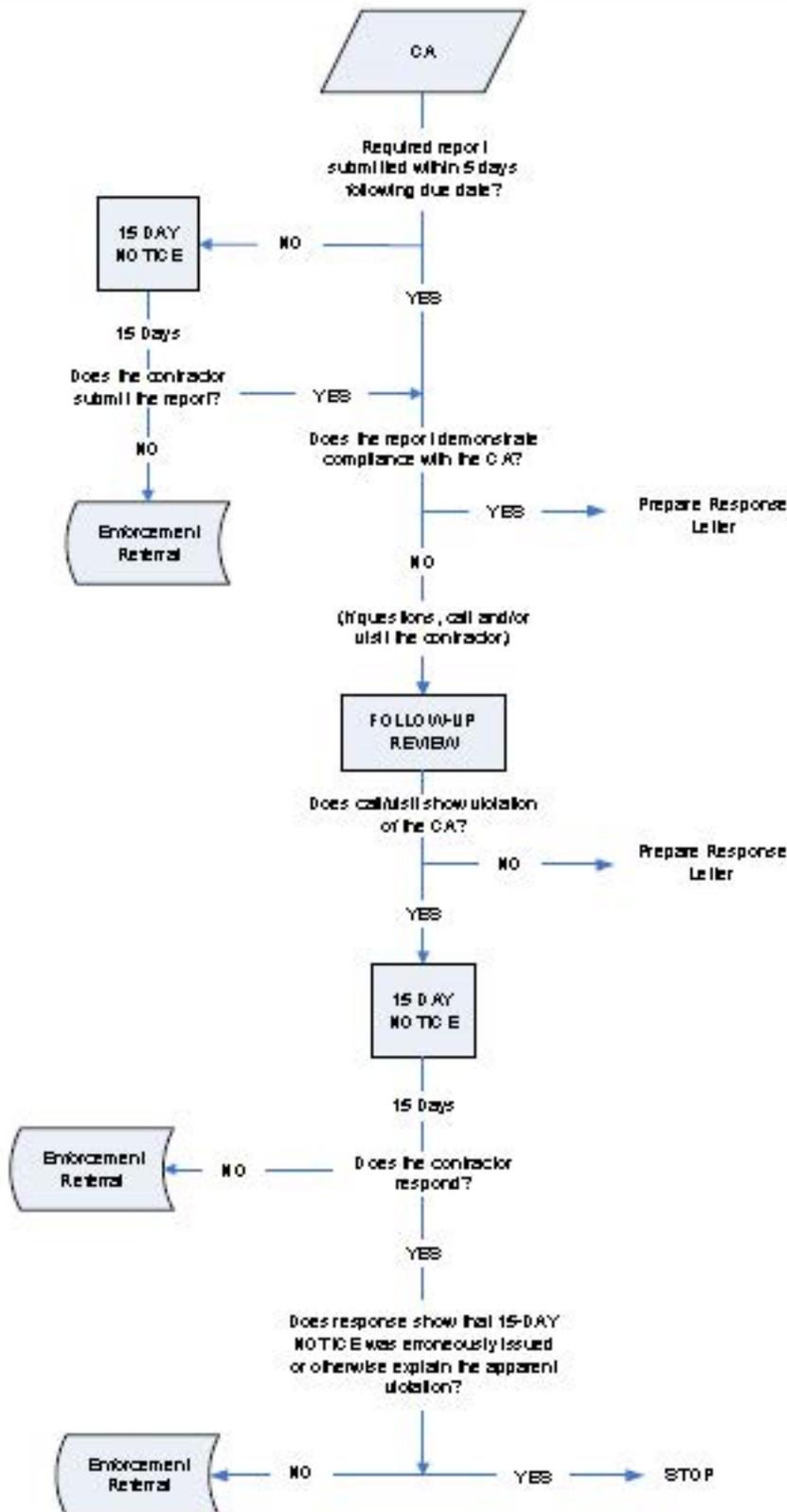
Once executed, a CA is monitored by the CO and the contractor submits progress reports for review. This subsection reviews the documents involved in monitoring a CA such as a 15-Day Notice.

- a. *Contractor Does Not Submit a Progress Report.* If a contractor fails to submit a progress report due under a CA or if the CO's review of such a report shows a violation of the CA, the contractor has violated or breached the CA. The following actions are taken:
- *No Irreparable Injury.* In a no irreparable harm case, the CO issues the contractor a 15-Day Notice. The Notice provides 15 calendar days for the contractor to respond. The notice states the violations and summarizes the supporting evidence. The CO sends the notice by e-mail or facsimile and certified mail, return receipt requested.²⁸⁹
 - *Irreparable Injury.* When the CO alleges irreparable injury as a result of a CA violation, the CO does not issue a 15-Day Notice. Rather, OFCCP verbally informs the contractor of OFCCP's intent to proceed immediately to enforcement. This verbal notice is then followed by a written confirmation the CO sends by e-mail or facsimile and certified mail, return receipt requested. The Regional Director gives verbal notification. Prior to giving verbal notification, the Regional Director will obtain appropriate approval.²⁹⁰
- b. *Enforcement Recommendation.* If the contractor does not demonstrate in writing that it is in compliance with the CA or if contractor does not resolve the breach within the 15 calendar day period, or reasonable extensions thereof, the CO must recommend the matter for enforcement. In such a situation, there is no need for the CO to issue an SCN. Also, in enforcement proceedings alleging a breach of CA, the agency seeks enforcement of the terms of the CA and is not required to present proof of the original violations that led to the CA.

²⁸⁹ See subsection 8J01– Procedure Where No Irreparable Injury Exists.

²⁹⁰ See subsection 8J02 – Procedure Where Irreparable Injury Exists.

CONCILIATION AGREEMENT (CA) MONITORING



8C NOTICE TO THE LABOR UNION OF A PROPOSED REMEDY

This section reviews when a notice to the labor union of a remedy that affects a CBA is required and the timing for COs providing that notice. It also provides COs information and tools related to the:

- content of the notice,
- addressees for the notice,
- signatory on the notice, and
- union responses to the notice.

The first subsection reviews the use of a notice to the union.

8C00 WHEN TO USE A NOTICE TO THE LABOR UNION

Notice to a labor union is required when a CO proposes a remedy that affects the CBA. When a CO proposes a remedy for a violation that is identified in the course of a compliance evaluation or complaint investigation that requires a change in or otherwise affects a CBA between the contractor and a labor union, they must notify the union in writing of the violation and invite the union to participate in the conciliation process. A remedy affecting a CBA is one requiring the modification, deletion or exception to an existing provision, or the addition of a new provision. The following are examples of some remedies that may impact the terms of a current CBA:

- retroactive seniority;
- temporary suspension of promotion or transfer provisions, or both; or
- institution of or modification to a job posting process that applies to a workforce, job group or position covered by the CBA.

The CO sends this notice to the union at the same time he or she sends the NOV to the contractor in a compliance evaluation. The CO sends the notice to the union at the same time he or she sends the NORI to the contractor in a complaint investigation.

8C01 CONTENTS OF THE LABOR UNION NOTICE

If the proposed remedy affects a CBA, a CO's written notice to the union will:

- state the violation;
- describe the portions of the proposed remedy which may affect the CBA; and
- invite the union to participate in negotiation of the portion(s) of the proposed remedy that may impact the CBA.

8C02 WHO RECEIVES THE LABOR UNION NOTICE

The CO sends the notice to the president of the applicable union local by e-mail or facsimile and by certified mail, return receipt requested; a copy of the notice is also sent to the contractor.

8C03 SIGNATURE AUTHORITY

The Regional Director, or his or her designee, has signature authority for the notice to the union.

8C04 UNION'S RESPONSE TO THE NOTICE

Subsections 7C04 and 7C05 provide further background and guidance on union involvement in the conciliation process.²⁹¹ Although Subsection 7C04 deals specifically with retroactive seniority as a remedy affecting a CBA, the description of procedures there are equally applicable to other remedies affecting a CBA. Below are the two typical union responses in the conciliation context:

- a. *Union Participation in Conciliation.* If the union agrees to participate in conciliation, then it may participate on issues affecting the CBA. If conciliation is successful, the CO should ask the president of the union local to sign the CA.²⁹²
- b. *Union Refuses to Participate or Refuses to Sign CA.* If the union refuses to participate in conciliation, or participates but will not agree to the proposed relief affecting the CBA by signing the CA, the CO will not include the non-admissions clause in the CA. The non-admissions clause is in paragraph 3 of standard CA text, as described in subsection 8H01. Under such circumstances, the CO shall amend paragraph 1 of the standard CA text to reference that the union was invited to participate and its refusal to participate or to sign.²⁹³

8D SHOW CAUSE NOTICE

A SCN is a letter issued to the contractor ordering it to show cause why enforcement proceedings should not be instituted. The SCN requires the contractor to come into compliance within 30 calendar days or the CO will recommend the commencement of enforcement proceedings.

8D00 PROGRAM APPLICABILITY

SCNs pertain to violations of EO 11246,²⁹⁴ Section 503,²⁹⁵ and Section 4212.²⁹⁶

²⁹¹ COs may also find it helpful to consult their regional SOL on these issues.

²⁹² See subsection 8H03 – Signature Authority.

²⁹³ See subsection 8H01 – Contents of a Conciliation Agreement.

²⁹⁴ See 41 CFR 60-1.28, 60-2.2(c) and 60-4.8.

²⁹⁵ See 41 CFR 60-741.64.

²⁹⁶ See 41 CFR 250.64 and 300.64.

8D01 WHEN A SHOW CAUSE NOTICE IS REQUIRED

As a general rule, COs must issue an SCN whenever a contractor violates EO 11246, Section 503, Section 4212 or their implementing regulations in order to proceed with an enforcement action. In certain circumstances, OFCCP may proceed directly to enforcement without issuing an SCN. This is discussed later in subsection 8D02, When a Show Cause Notice is Not Required.

COs issue SCNs in all cases after conciliation fails; however, SCNs can be issued to a supply and service contractor at the Desk Audit stage. COs issue an SCN at the Desk Audit stage when the contractor fails to provide the records, information or data requested in the scheduling letter. For example, a CO must issue an SCN when a contractor:

- fails to submit an AAP required by one or more of the authorities enforced by OFCCP: EO 11246, Section 503 or Section 4212;²⁹⁷
- fails to submit an AAP that substantially complies with regulatory requirements under one or more of the authorities enforced by OFCCP: EO 11246, Section 503 or Section 4212;²⁹⁸
- fails to submit employment activity or compensation data, or both;²⁹⁹ or
- fails to submit corrected data after providing employment activity data or compensation data, or both, that are incomplete or inaccurate.³⁰⁰

COs also issue an SCN when a contractor refuses to provide access to its premises for an onsite review.³⁰¹

8D02 WHEN A SHOW CAUSE NOTICE IS NOT REQUIRED

OFCCP may proceed directly to an enforcement recommendation without issuing an SCN in certain situations such as when a contractor intimidates or harasses an OFCCP agent or unreasonably interferes with a complaint investigation or compliance review. If the CO believes that the circumstances warrant moving directly to an enforcement recommendation without issuing an SCN, his or her District Director must seek the approval of the Regional Director.

A CO is not required to issue an SCN when a contractor violates a CA. Under such circumstances, OFCCP shall issue a 15-Day Notice.³⁰²

²⁹⁷ See Section 1C – Receipt of AAPs and Support Data, and Letter L-18– Show Cause Notice: Failure to Submit EO11246, Section 503 or Section 4212 AAPs.

²⁹⁸ See Section 1F – Review of AAPs for Acceptability, Letter L-19 – Show Cause Notice: Failure to Submit EO11246, Section 503 or Section 4212 AAPs That Satisfy Regulatory Requirements, and Letter L-19a – Sample Enclosure to Letter L-19.

²⁹⁹ See Subsection 2C02 and Letter L-20 – Show Cause Notice: Failure to Submit Employment Activity and/or Compensation Data for Desk Audit.

³⁰⁰ See Subsections 2G01 and Letter L-21 – Show Cause Notice: Failure to Submit Corrected Employment Activity and/or Compensation Data.

³⁰¹ See Letter L-25 – Show Cause Notice: Denial of Access.

³⁰² See Section 8J –The 15-Day Notice.

8D03 CONTENTS OF A SHOW CAUSE NOTICE

An SCN, including an ASCN, may have two parts, the notice and an enclosure; each is described below.

- a. *Notice.* The Notice itself, which states the consequences under the regulations, of not coming into compliance.
- b. *Enclosure.* An enclosure states the violation and the required remedies. The statement of the violation should include appropriate regulatory citations. COs are reminded that if a particular violation is not specifically named in the regulations, it is sufficient to clearly describe the violation and cite, as applicable. This approach also applies to the nondiscrimination and affirmative action provisions of the appropriate EEO clauses. The appropriate format of an SCN will depend on the particular situation. Subsection 8D01, which lists violations for which COs should issue an SCN, includes references to the letters that provide the format for each type of violation.

8D04 WHEN TO USE AN AMENDED SHOW CAUSE NOTICE

When a CO issues an SCN and subsequently identifies additional violations, the CO must issue an ASCN incorporating all violations, including the original ones. The CO may issue more than one ASCN. For example:

- *Supply and Service Contractors.* If a CO issues an SCN at desk audit for failure to submit an EO 11246 AAP, and the contractor then submits an unreasonable EO 11246 AAP, the CO may issue an ASCN citing both the initial failure to submit and the subsequent unreasonable submission. If the contractor then submits a reasonable EO 11246 AAP, but the CO identifies additional violations during the onsite review, the CO may issue a second ASCN citing all violations to date.³⁰³

Just as an ASCN includes all violations, including those the CO cited in the original SCN, the CO uses a single CA to resolve all violations regardless of when in the review the CO identified a particular violation.

A sample ASCN is given in Letter L-24. An ASCN is sent to the same people as an SCN, has the same signature authority as the original SCN unless the Regional Director delegates otherwise; and follows the same procedures concerning contractor responses.³⁰⁴

8D05 WHO RECEIVES A SHOW CAUSE NOTICE OR AMENDED SHOW CAUSE NOTICE

³⁰³ The second ASCN is issued after issuing, as applicable, a Predetermination Notice or a Notice of Violation or both. Additional information on this is in Sections 8E and 8F.

³⁰⁴ See subsections 8D05, 8D06, and 8D07.

COs address the SCN, including an ASCN, to the top official at the establishment of the corporation unless the establishment and corporate office are the same. A copy of the SCN is sent to the CEO. If the contractor submits a written request that the CO provide a copy of the review or investigation correspondence to an outside representative such as an outside counsel or consultant, the CO will also send a copy to the designated representative.³⁰⁵ When the CO provides a copy to a corporate CEO, other contractor official or a designated representative, the CO should include a "cc:" line on all copies indicating the people to whom he or she sent the Notice.

COs always send SCNs or ASCNs by e-mail or facsimile and certified mail, return receipt requested.

8D06 SIGNATURE AUTHORITY

The Regional Directors, or their designees, have signature authority for an SCN and ASCN.

8D07 CONTRACTOR'S RESPONSE

This subsection covers the period of time the contractor has to respond to an SCN and ASCN, and resolution of the violations through a CA.

- a. *Period for Response.* The contractor has 30 calendar days from the date it receives the SCN or ASCN to either adequately respond to or resolve the violations the CO specified in the Notice.
- b. *Resolution in CA.* Because violations generating an SCN or ASCN are usually significant, a Conciliation Agreement is used to show how the violations were resolved. This is the case unless the contractor is able to demonstrate that it is exempt from OFCCP's requirements or that OFCCP's allegations are incorrect. The contractor may, therefore, take any of the following actions in response to an SCN or ASCN:
 - *Contractor Resolves the Violation.* The contractor may resolve a violation by:
 - entering into a written CA that remedies the violation, including the provision of make-whole relief for any victims of discrimination;³⁰⁶
 - demonstrating that it is exempt from OFCCP's requirements;
 - demonstrating that OFCCP's allegations are incorrect.
 - *Contractor Does Not Resolve the Violation.* If the contractor does not resolve all of the violations stated in the SCN or ASCN, the CO will normally recommend the initiation of enforcement proceedings as described in Section 8K of the chapter. Under these

³⁰⁵ See subsection 2B00(b).

³⁰⁶ See Section 7B.

circumstances, the Regional Director must authorize any decision not to refer the contractor for enforcement and must document the reason for the decision in the case file.

8D08 RESCISSION OF A SHOW CAUSE NOTICE

This subsection reviews when a CO can rescind an SCN, the contents of the rescission, who signs the notices and who should receive notice. Each item is reviewed below.

- a. *When to Use an SCN Rescission Letter.* A Show Cause Notice will not be rescinded merely because the contractor agrees to comply in the future or corrects violations. See 41 CFR 60-1.20 (b), 604.8 and *Castillo v. Usery*, 14 Fair Empl. Prac. Cas. 1240, 1247 (N.D.Cal. 1976). A CO may rescind an SCN or ASCN only if the SCN or ASCN was issued erroneously, for example:
 - the contractor demonstrates that it is exempt from OFCCP's requirements; or
 - the contractor demonstrates that each of OFCCP's allegations is incorrect.
- b. *Contents.* The notice rescinding the SCN or ASCN acknowledges that the Notice was issued and the date it was issued, the authority under which it was issued, and that it was subsequently determined that the SCN or ASCN was erroneously issued and is being rescinded for one of the above reasons, or other appropriate reason. Letter L-26 provides a sample format for rescinding an SCN or ASCN.
- c. *Who Receives the Rescission Letter.* COs send the letter rescinding an SCN or ASCN to the same people who received the original notice.
- d. *Signature Authority.* The Regional Director, or his or her designee, signs the letter rescinding an SCN or ASCN.

8E PREDETERMINATION NOTICE

A PDN is the letter a CO may use to notify the contractor of the preliminary finding that the contractor engaged in a pattern or practice of discrimination. The PDN states the basis for the preliminary findings and offers the contractor the opportunity to respond. This Section covers when COs use a PDN, the contents of the notice, who receives the notices, and who has signature authority for issuing the notice.

8E00 USE OF A PREDETERMINATION NOTICE

COs may use the PDN in pattern or practice cases following compliance evaluations conducted under EO 11246, Section 503 and Section 4212. COs should not use the PDN if there are only

recordkeeping or affirmative action deficiencies such as a failure to meet the standards for AAP acceptability;³⁰⁷

A PDN is not typically used where there are only individual discrimination violations.

After a CO identifies a potentially discriminatory employment pattern or practice, the CO must investigate the matter until the file contains sufficient information to establish discrimination absent an adequate explanation by the contractor. At that point, the CO may notify the contractor of the alleged discrimination through a PDN, or may proceed directly to issuing an NOV, in consultation with their supervisor.

8E01 CONTENTS OF A PREDETERMINATION NOTICE

The PDN typically has three parts: a description of the pattern or practice of discrimination, a list of other unresolved violations and an offer of an opportunity to respond to the PDN. These three parts are described in more detail below. Letter L-27, Predetermination Notice, is a sample form letter for a PDN.

- a. Description of the Discrimination.* In this, the first part of the PDN, a CO describes the discrimination, identifies the affected class, identifies the employment action giving rise to the finding of a violation and identifies the basis for the liability determination (e.g., disparate treatment in the selection of minority technicians). The PDN should also include facts and the results of analyses that support the alleged violation and recommended remedies.
- b. Other Unresolved Issues.* After describing the discrimination, a CO identifies and addresses other unresolved AAP deficiencies, for example, minor deficiencies that did not result in an “unacceptable AAP” finding. A CO also identifies and addresses recordkeeping and technical violations like the contractor’s failure to post required notices.
- c. Offer the Contractor the Opportunity to Respond.* The PDN offers the contractor an opportunity to respond in writing by a specific date. In determining how much time to allow, a CO must consider the complexity of the issues, the length of the review and the amount of information the contractor has already provided during the compliance evaluation and offsite review. The time allowed, however, should not normally exceed 30 calendar days.

If after the receipt of a PDN, the contractor does not respond by the indicated date, or obtain an extension, the CO will issue an NOV.³⁰⁸ The NOV will indicate that the contractor did not rebut the pattern or practice issue.

8E02 WHO RECEIVES A PREDETERMINATION NOTICE

COs address PDNs to the top official at the establishment with a copy to the CEO of the corporation unless the establishment and corporate office are the same. If the contractor submits

³⁰⁷ See Sections 1F and 1H, and Letter L-27 – Predetermination Notice.

³⁰⁸ See Section 8F.

a written request asking that the CO send a copy to an outside representative like an attorney or consultant, the CO will also send a copy to the designated representative. If the contractor requests that the CO provide the representative with the document, the CO should send a copy to the top official at the establishment and the CEO. When the CO provides copies to a corporate CEO, another contractor official or a designated representative, the CO will include a “cc:” line on all copies indicating the people to whom the Notice was sent.

COs always send a PDN by e-mail or facsimile and certified mail, return receipt requested.

8E03 SIGNATURE AUTHORITY

The Regional Director or his or her designee has signature authority for a PDN.

8E04 CONTRACTOR’S RESPONSE TO A PREDETERMINATION NOTICE

If the contractor does respond to the PDN, the CO should review the presented information. If there are issues requiring further investigation, the CO should request and analyze the additional information needed. The CO may conduct further investigation onsite or through an offsite review of records. The CO should not only consider whether the contractor’s response is a nondiscriminatory explanation for the observed results, but also whether the response is pretext. A pretextual response may exist, for example, when the response is a logical explanation but it is not an accurate reflection of why the contractor behaved as it did. In evaluating the response, the CO should remember that unsupported contractor assertions, or assertions that the CO previously fully considered, are not sufficient to rebut findings of discrimination.

A contractor may respond to the PDN in one of three ways: with a full rebuttal of all the issues, with a partial rebuttal, or with an inadequate rebuttal.

- a. Contractor Adequately Rebutts.* If the contractor's response adequately rebuts all the issues the PDN raised, and there are no other remaining issues, the CO will acknowledge acceptance of the response and issue an appropriate closure document.³⁰⁹
- b. Some Issues Rebutted.* If the contractor's response adequately rebuts some, but not all of the preliminary findings raised in the PDN, the CO should issue an NOV accepting the response in those areas where it was sufficient but will address the remaining findings of violations with recommended corrective actions.
- c. All Issues Inadequately Rebutted.* If the contractor's response does not rebut any of the issues raised in the PDN, the CO should acknowledge the response, explain that it did not sufficiently rebut the preliminary finding and give an explanation, as appropriate, and incorporate the PDN’s findings and recommended corrective actions into an NOV.

³⁰⁹ See Letter L-4 – Notice of Closing: No Violation Found.

8F NOTICE OF VIOLATION

An NOV is a letter to a contractor notifying it that during a compliance evaluation a CO found violations of one or more of the authorities enforced by OFCCP; specifically, EO 11246, Section 503 or Section 4212. The NOV also notifies the contractor that it must take corrective actions to resolve the violations. The CO must include all violations requiring corrective action, including violations of technical requirements, along with the recommended corrective actions. The NOV will cite the contractor's failure to adequately justify its actions and note that OFCCP's investigation did not identify nondiscriminatory reasons to account for its findings.

8F00 WHEN TO USE A NOTICE OF VIOLATION

The NOV letter identifies the violations and describes the recommended corrective actions. COs issue an NOV when there is a pattern or practice violation, or if other violations are found.

- a. *NOV for a Pattern or Practice Violation.* An NOV is issued when OFCCP determines, based on its investigation, that sufficient evidence of a pattern or practice violation exists. Where the CO has previously issued a PDN, the CO issues an NOV where the contractor does not respond to the PDN or its response does not substantially alter a CO's preliminary determination of pattern or practice employment discrimination.³¹⁰
- b. *NOV for Other Violations.* An NOV is issued when a CO identifies other violations, that are not pattern or practice issues, during the review. Examples of other violations include individual discrimination, lack of recordkeeping and lack of outreach and recruitment.

8F01 CONTENTS OF A NOTICE OF VIOLATION

NOVs, issued by COs, initiate the conciliation and resolution process. The NOV should request that the contractor contact the appropriate field office within 5 business days of receipt of the NOV. The NOV should identify the CO or other representative who the contractor should contact and provide the contact information, including telephone numbers. Letter L-28, Notice of Violation, is a sample form letter for an NOV. NOVs issued by COs for pattern or practice violations must:

1. *Restate the Problem.* Restate the problem, with any modifications resulting from the contractor's response. Include specific facts and, where applicable, the results of analyses that support the violations.
2. *Analyze the Response.* Analyze the contractor's response, giving the reasons why it does not substantially alter OFCCP's preliminary determination.

³¹⁰ See 8E00 – Use of a Predetermination Notice, “After a CO identifies a potentially discriminatory employment pattern or practice, the CO must investigate the matter until the file contains sufficient information to establish discrimination absent an adequate explanation by the contractor. At that point, the CO may notify the contractor of the alleged discrimination through a PDN, or may proceed directly to issuing an NOV, in consultation with their supervisor.”

3. *Describe Remedy.* Describe the proposed remedy in class terms. Include scope of relief (e.g., all minorities rejected for Technician positions since (date) will be made whole by providing), the type of relief (e.g., job offers, back pay) and, when relevant, the time period involved (e.g., back pay from date of application to date of settlement).
4. *Cease Discrimination.* Specifically require termination of the identified discriminatory practice(s) if the contractor has not already terminated the practice.
5. *Require Conciliation Agreement.* Indicate that a Conciliation Agreement must incorporate the resolution of the pattern or practice violation (and any other violations included in the Notice).

COs also issue NOVs for violations other than pattern or practices violations and they must include a complete description of each nonpattern or nonpractice violation and deficiency, and a statement of the required corrective actions or remedies. The notice should state that a CA must include the resolution of the findings.

8F02 WHO RECEIVES THE NOTICE OF VIOLATION

COs address an NOV to the top official at the establishment with a copy to the CEO of the corporation, unless the establishment and corporate office are the same. If the contractor has requested in writing that the CO provide a copy of the review or investigation correspondence to an outside representative, the CO will also send a copy to the designated representative. When the CO provides copies to a corporate CEO, other contractor official, or a designated representative, the CO will include a “cc:” line on all copies indicating the people to whom the CO sent the Notice.

The CO always sends an NOV via e-mail or facsimile, and certified mail, return receipt requested.

8F03 SIGNATURE AUTHORITY

The Regional Director, or his or her designee, has signature authority for an NOV.

8F04 CONTRACTOR’S RESPONSE TO A NOTICE OF VIOLATION

If the contractor responds to the NOV, the CO should review and evaluate the response. See 8E04 above for further guidance on evaluating the contractor’s response. If any unresolved violations remain, the CO will initiate conciliation.

8G CONCILIATION

Conciliation is a negotiation between a CO and a contractor to resolve findings of noncompliance. This Section provides general information on conciliation while Section H provides COs specific information on CAs.

8G00 BACKGROUND

A compliance evaluation is complete when the CO issues a closure letter to the contractor. Of course, if the CO found violations, the contractor must correct the violations before a CO can issue a closure letter. COs use the conciliation process to resolve violations with the contractor.

8G01 GENERAL

After a CO issues an NOV, he or she will attempt to reach an acceptable resolution of the violation findings through voluntary conciliation efforts with the contractor. Conciliation discussions may involve various methods of communication including the exchange of letters and e-mails, telephone conferences and in-person meetings. If these negotiations are successful, the CO will document the terms of the settlement in a formal CA. However, if in the opinion of the CO, the contractor fails to agree to a reasonable settlement, fails to do so in a timely fashion, or fails to negotiate in good faith, OFCCP may recommend the case for enforcement. In such circumstances, the CO must prepare a “recommendation to refer for enforcement” package and submit it to the Regional Office.

8H CONCILIATION AGREEMENTS

The CO uses CAs to resolve material or major substantive violations of any of OFCCP's three programs. Figure F-5, Standard Text for Conciliation Agreement, provides sample CA language.

8H00 WHEN TO USE A CONCILIATION AGREEMENT

The CO must normally use a CA whenever he or she properly issues an SCN. However, the following circumstances require resolution in a CA irrespective of whether a CO issued an SCN:

1. if a CO finds, in a compliance evaluation or complaint investigation, that the contractor discriminated, whether on an individual, or as a pattern or practice;
2. if a supply and service contractor did not submit an AAP pursuant to one or more of OFCCP's authorities; specifically, EO 11246, Section 503 or Section 4212;
3. if a supply and service contractor's employment activity data, provided based on a desk audit request, or the EO 11246 AAP that the contractor submitted do not reflect an acceptable effort;
4. if any contractor failed to demonstrate good faith effort, including situations where a supply and service contractor deviates substantially from its EO 11246, Section 503 and/or Section 4212 AAP,³¹¹ or where a construction contractor fails to adequately

³¹¹ See 41 CFR 60-2.2(c)(1).

document its implementation of its affirmative action obligations and refuses to remedy those violations.³¹²

8H01 CONTENTS OF A CONCILIATION AGREEMENT

All CAs use the format described in this Section. It consists of a section captioned “Heading” followed by three parts:

- Part I contains General Provisions, including a Mandatory Enforcement Clause;
- Part II contains Specific Provisions such as a description of the violations and remedies involved in the particular review or investigation; and
- Part III contains Reporting requirements on the implementation of remedies specified in Part II.

CAs may be modified under certain circumstances and with certain prior approvals. Following is a discussion of when and how CAs may be modified, changes to the format of CAs, and provisions and clauses often found in CAs. Addenda A and B contain sample CA Agreements for compensation, hiring, recordkeeping, access, and other issues.

a. Modifications to CA Format – General Provisions.

- *Mandatory Enforcement Clause.* COs cannot modify the Mandatory Enforcement Clause in any way without the express prior approval of the Director of OFCCP.³¹³
- *Nonadmissions Clause.* COs must omit this clause³¹⁴ if a remedy in Part II of the CA affects a collective bargaining agreement (CBA) and the union did not sign the CA. When this is the case, at the end of paragraph 1 of the standard CA text the CO should add, as applicable:
 - *Union Refuses to Participate in Conciliation of the CBA Issue.* On [insert date], Local [insert union number] of the [insert name of union] was invited to participate in conciliation of remedy items [insert remedy numbers from the CA] which affect the above identified union’s collective bargaining agreement with [insert name of contractor], but on [insert the date] declined to do so.
 - *Union Participates But Does Not Sign the CA.* On [insert date] Local [insert local number] of the [insert name of union] participated in conciliation of remedy items [insert remedy numbers from CA] which affect the above identified union’s collective bargaining agreement with [name of contractor], but on [insert date] declined to become a signatory to this Agreement.

³¹² See Chapter 3– Construction Industry Compliance Program.

³¹³ See paragraph 9 of CA standard text in subsection 8H01.

³¹⁴ See paragraph 3 of standard CA text, subsection 8H01(e).

- *General Provisions.* Regional Directors have the authority to modify the General Provisions of a CA, other than the Mandatory Enforcement Clause, when necessary to fit the particular situation. No modification by the Regional Director can change the meaning or intent of the Mandatory Enforcement Clause. The Regional Director must obtain appropriate approval for any such modifications, except those noted in Subsection 8H01(a), Nonadmissions Clause, before signing the CA.
- b. Modifications to CA Format – Specific Provisions and Reporting.* These two sections are intrinsically unique to the particular review or investigation and the CO should tailor the CA appropriately.
- c. No Restrictions on Publicizing.* No provision of a CA may preclude OFCCP from issuing a press release or otherwise publicizing the results of compliance actions.
- d. Standard CA Language.* The materials on the next four pages provide the standard text of a CA in the right column, and comments on that text in the left column.

Comments

Heading: Each CA will be headed:

**If a union is a party to the CA, add its full name to the heading*

Part I – General Provisions: This will be the first section of each CA.

***If a union is a party to the CA, add its full name and in parentheses, if desired, an abbreviation of its name for use in the rest of the CA. If, per the note immediately below, OFCCP invited a union to be a party, but the union refused, see 8C04 for language to add to paragraph.*

****Paragraph 3 is called a NON-ADMISSIONS CLAUSE. Use when the contractor refuses to admit to the violations set forth in Part II of the CA UNLESS the CA requires a change in a collective bargaining*

Standard Text

Conciliation Agreement
Between the
U.S. Department of Labor Office of Federal Contract Compliance
Programs
and
[Legal Name of Contractor]
[Legal Name and address of establishment
covered by the Agreement]*

PART I – General Provisions

1. This Agreement is between the Office of Federal Contract Compliance Programs (hereinafter OFCCP) and [*name and address of contractor*] (hereinafter [*abbreviation, if desired, of contractor's name*]).**
2. The violations identified in this Agreement were found during a [*as applicable, compliance evaluation or complaint investigation*] of [*name of contractor*] which began on [*date*] [*add as applicable: and they were specified in a Notice of Violation, Show Cause Notice, Amended Show Cause Notice issued (date)*]. OFCCP alleges that [*name of contractor*] has violated [*as applicable: Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; and/or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended*] and its implementing regulations at 41 CFR Chapter 60 due to the specific violations cited in Part II below.
- 3.*** This Agreement does not constitute an admission by [*name of contractor*] of any violation of [*as applicable: Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; and/or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended*] and its implementing regulations.

Comments

agreement (CBA) between the contractor and a labor union or requires the award of retroactive seniority where seniority is governed by a CBA and the union declines to sign the CA (see Subsections 7C06 and 8C04).

**For employee interviews, "normal business hours" means the hours during which the employees to be interviewed are at work (e.g., evening hours if the employees work on an evening shift).*

Standard Text

4. The provisions of this agreement will become part of [name of contractor] AAP. Subject to performance by [name of contractor] of all promises and representations contained herein and in its AAP, all named violations in regard to the compliance of [name of contractor] with all OFCCP programs will be deemed resolved. However, [name of contractor] is advised that the commitments contained in this Agreement do not preclude future determinations of noncompliance based on a finding that the commitments are not sufficient to achieve compliance.
5. [Name of contractor] agrees that OFCCP may review compliance with this Agreement. As part of such review, OFCCP may require written reports, inspect the premises, interview witnesses, and examine and copy documents, as may be relevant to the matter under investigation and pertinent to [name of contractor]'s compliance. [Name of contractor] shall permit access to its premises during normal business hours* for these purposes.
6. Nothing herein is intended to relieve [name of contractor] from the obligation to comply with the requirements of Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; and/or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, and their implementing regulations, or any other equal employment statute or executive order or its implementing regulations.

Comments

Standard Text

**If a DD is signing, change Regional to District, and say ". . . unless the Regional Director or Director.... "*

*** If the CA involves back pay, the back pay should be disbursed following this 45 day period.*

**** Paragraph 9 is called the MANDATORY ENFORCEMENT CLAUSE. This clause implements 41 CFR 60-1.34, which requires OFCCP to issue a 15-Day Notice (unless irreparable injury is involved, see Subsection 8J02) when OFCCP concludes that a CA has been violated. If during the 15-day period, the contractor cannot demonstrate in writing that it did not violate the CA, OFCCP may initiate enforcement proceedings without issuing a Show Cause Notice.*

7. *[Name of contractor]* agrees that there will be no retaliation of any kind against any beneficiary of this Agreement or against any person who has provided information or assistance, or who files a complaint, or who participates in any manner in any proceedings under Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; and/or, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended.

8. This Agreement will be deemed to have been accepted by the Government on the date of the signature by the Regional* Director for OFCCP, unless the Director, OFCCP, indicates otherwise within 45 calendar days of the Regional* Director's signature on this Agreement.**

9.*** If at any time in the future, OFCCP believes that *[name of contractor]* has violated any portion of this Agreement during the term of this Agreement, *[name of contractor]* will be promptly notified of that fact in writing. This notification will include a statement of the facts and circumstances relied upon in forming that belief. In addition, the notification will provide *[name of contractor]* with 15 calendar days from receipt of the notification to respond in writing, except where OFCCP alleges that such a delay would result in irreparable injury.

Enforcement proceedings for violation of this Agreement may be initiated at any time after the 15-day period has elapsed (or sooner, if irreparable injury is alleged) without issuing a Show Cause Notice.

Where OFCCP believes that *[name of contractor]* has violated this Conciliation Agreement, OFCCP may seek enforcement of this Agreement itself and shall not be required to present proof of the underlying violations resolved by this Agreement.

Liability for violation of this Agreement may subject *[name of contractor]* to sanctions set forth in *[as applicable, Section 209 of the Executive Order, 41 CFR 60-250.66, 41 CFR 60-300.66 and/or 41 CFR 60-741.66]* and/or other appropriate relief.

Comments

Standard Text

Part II – Specific Provisions: This will be the second part of each CA and will describe each violation and the required remedy. See Subsection 7C and 8F.

As applicable, describe additional violation/remedy items numbered consecutively.

Part III – Reporting. This will be the third part of each CA and will describe the content, period to be covered and due date of each report that the contractor will file. See Subsection 8HO1.

As applicable, describe additional reports numbered consecutively.

PART II – Specific Provisions

1. VIOLATION:

REMEDY:

2. VIOLATION:

REMEDY:

Part III – Reporting

1. [Name of contractor] agrees to retain records pertinent to the violations cited in Part II above, and to the reports submitted in compliance with Paragraph 2, below. These records shall include data and information underlying the required reports, specifically, but not limited to all applications and personnel records. The records will be retained until the expiration of this Agreement or consistent with regulatory requirements, whichever is later.

2. [Name of contractor] agrees to furnish the OFCCP [name and address of OFCCP office] with the following reports:

[Fill in specific information regarding the due dates and items to be submitted with each report.]

3. This Conciliation Agreement shall remain in effect until the review and acceptance by OFCCP of [name of contractor]’s final progress report.

Additional Instructions for Completing the CA Template

e. Contents of Part II - Specific Provisions.

1. *VIOLATION*

- *Description of the Violation.* The description of the violation must be specific enough for a reader unfamiliar with the case to understand the problem. For example: "ABC's workforce analysis listed job titles by EEO-1 category rather than by department or other similar organizational unit as required by 41 CFR 60-2.11(a);" not "ABC's workforce analysis did not meet the requirements of 41 CFR 60-2.11(a)." Note that if the violation involved issues other than strictly written AAP issues, then the violation statement must provide a brief description of the circumstances giving rise to the violation. See, for example, the violation statements in Letter L-28.
- *Regulatory Citations.* Citations of the relevant portion of the regulations will support each violation. There must be a full and accurate description and citation of the regulation. However, if the regulations do not specifically name a particular violation (for example, racial harassment), it is sufficient for the CO to describe the violation clearly and to cite, as applicable, the nondiscrimination and/or affirmative action provisions of the appropriate EEO/AA clauses.

2. *REMEDY*

- *Description of the Remedy.* A specific description of the remedies the contractor and CO agreed upon will follow the listing of each violation, including dates for completion and a commitment not to repeat the violation. The CO should phrase remedies specifically enough for the contractor's implementation of the remedy to be auditable. For example:
 - "ABC's workforce analysis in future AAPs will list job titles within ABC's departments." COs should not use "ABC's workforce analysis in future AAPs will meet the requirements of 41 CFR 60-2.11(a)."
 - "ABC will list all Drafting openings with DEF and XYZ referral sources." COs should not use "ABC will make a good faith effort to recruit more minorities for Drafting jobs."
- *Corrective Actions are Linked to the Violations.* The CA should include all identified violations, including those that the contractor has already corrected. As with any other violation, the CO should include the date of correction and the contractor's commitment to not repeating the violation. For example, if a CO issued an SCN for failure to submit an EO 11246 AAP for desk audit and the contractor later submits the AAP, the CA would include: the violation, the date the CO received the AAP and the contractor's commitment to submit future AAPs within 30 calendar days of receiving the CO's request.

f. Contents of Part III – Reporting.

1. *REPORTING*

- *When Required.* The contractor must report all remedies that involve future commitments or obligations. The contractor does not need to report on remedies that they have already implemented when the CO prepared the CA, unless such reporting is essential to ensure that the contractor will not repeat the violation.
- *Contents of Reports.* All reporting requirements shall specify the period for the report to cover and its contents. The description of the report contents must be sufficiently detailed to ensure that the information the contractor submits will enable the CO to thoroughly review the contractor's compliance with the CA provisions.
- *Dates of Reports.* Reporting requirements must include the dates by which the contractor should submit the reports. This includes situations where the timing of the reported event is unpredictable (e.g., an offer of the "next" Technical Illustrator opening). In such cases, the contractor should report on specified dates whether any such opening has occurred and, if so, the action the contractor took.

The specified date of the last report must be sufficiently in advance of the expiration date of the CA to permit the CO to evaluate that report, with appropriate follow-up if the evaluation raises questions about the contractor's full implementation of the CA.

- *Frequency of Reports.* Reporting should be frequent enough to enable a thorough review of the contractor's compliance with the CA provisions. However, except in unusual circumstances, the CA should not normally require reports more frequently than semi-annually.
- *Contractor Retention of Data.* For all reporting requirements, the contractor must retain records pertinent to violations that the CA resolves and to reports the contractor submitted following the CA, including the underlying data and information on which the reports are based, until the expiration date of the CA or consistent with regulatory requirements, whichever is later. For example, a contractor is required by 41 CFR 60-3.15 to retain data on components of a selection process that has adverse impact for at least two years after the elimination of that impact.
- *Monitoring.* See Section 8I for a discussion on monitoring reports the contractor submits under a CA.

8H02 TERMINATION DATE

Conciliation Agreements shall have termination dates based on the minimum time necessary for contractors to correct all violations and for OFCCP to verify such correction.

The time period in a CA should be sufficient to ensure that the contractor can accomplish all of its corrective actions. While full correction of all violations should be possible within one or two years under most CAs, some remedies may require a longer time period. For example, if the CA requires make-whole relief for discrimination and that relief includes extending job offers as openings occur, the CA termination date could be extended until the contractor has made all the job offers and has paid all the back pay or front pay, or both.

8H03 SIGNATURE AUTHORITY

The following people must sign and date a CA:

- the contractor's top establishment official, however, if the establishment is a corporate or intermediate headquarters, the CA top official's designee may sign; and any additional contractor officials that the contractor wishes;
 - the union local's top official and any additional union officials the union wishes, if the union is a party to the CA;
 - the CO who conducted or led the compliance evaluation or complaint investigation;
 - the Assistant District Director, if applicable;
 - the District Director; and
 - the Regional Director, unless the authority is otherwise delegated.
- a. Delegation of Regional Director's Authority.* Regional Directors have the authority to sign all CAs. However, a Regional Director may delegate signature authority to a District Director or other designee for CAs involving only affirmative action issues, individual discrimination issues, pattern or practice discrimination claims or both in which the class does not exceed ten people and back pay does not exceed \$25,000.
- b. Notice of Review Completion.* After the required signatures are obtained on the CA, the CO will issue the contractor a "Notice of Review Completion – Major Violations Resolved in a Conciliation Agreement." If the CO issued a Show Cause Notice (SCN), the CO should use sample form Letter L-32. If the CO did not issue an SCN, the CO should use Letter L-33.

8I POST CONCILIATION AGREEMENT ACTIONS

This Section reviews the actions required after all the parties properly execute a CA. The CO and contractor have continuing obligations and duties, including maintaining all evidence of the violations in the CA, and evaluating and reporting on progress. These and other responsibilities are discussed in the following subsections.

8I00 RETENTION OF EVIDENCE OF VIOLATIONS

The CO will retain all evidence regarding violations resolved in a CA in the case file so that he or she can readily retrieve it and use it if there would be enforcement proceedings. See subsection 8H01(g)(1), Contractor Retention of Data, for the contractor's obligation to retain records pertinent to violations and to reports submitted.

8I01 EVALUATION OF PROGRESS REPORTS

COs have different responsibilities if a required progress report is not received when compared to when a report is received from the contractor.

- a. Progress Report Not Received by a CO.* If a CO does not receive a required progress report when due, the CO will contact the contractor to determine if it is en route. If it is en route, the CO allows 5 calendar days for it to arrive. If the CO does not believe it is en route or if it does not arrive within 5 calendar days, the CO will issue a 15-Day Notice for violation of the CA.³¹⁵
- b. Progress Reports Received by a CO.* When a CO receives a progress report, the CO must evaluate the contents of the report and determine whether the report is acceptable or whether the CO needs additional information. The CO normally evaluates a progress report within 15 calendar days of receiving it from the contractor. This evaluation must include an assessment of the report's completeness as well as the analysis of the received items. If the CO needs additional information, the CO, in consultation with his or her supervisor, will determine how to best obtain the information (e.g., by phone, mail, an onsite visit or review) and will so notify the contractor. The CO records the results of the evaluation on the Progress Report Analysis and Evaluation Spreadsheet and prepares a letter, using Letter L-31, notifying the contractor of the results. The CO evaluates each report submitted under the CA on its own Progress Report Analysis and Evaluation Spreadsheet. In addition, the CO records any questions raised by the evaluation on the Summary of Progress Report Sheet.
- c. Questions Raised by a Progress Report Evaluation.* If the evaluation of a progress report raises questions about the contractor's implementation of the provisions of a CA, OFCCP may contact the contractor to obtain clarification of the report or schedule an onsite visit, or both.

If the onsite visit is limited to the evaluation of the implementation of a CA issue, the CO will prepare a narrative report describing the results of the investigation and recommending whether the contractor is in violation of the CA. If the CO conducts a follow-up compliance evaluation, the CO will prepare a SCER (see Appendix A-1 and A-2, or A-3, as appropriate), with special emphasis on findings and recommendations on the CA implementation question. If the onsite is proposed as the result of identifying possible new violations resulting from the evaluating the implementation of the CA, the CO should contact his or her supervisor and consult with the National Office, the Division of Program Operations, before engaging in the evaluation.

³¹⁵ See Section 8J and Letter L-29 and L-29a.

- d. Contractor Maintenance of Records.* In response to an inquiry or during an onsite visit, the contractor must be prepared to furnish the underlying records or information on which the contractor based the report. If a CO requests copies of this data, the contractor may provide the copies, allow the CO to use its equipment to make the copies, loan the documents to the CO for offsite copying, or make other appropriate arrangements with the CO. A failure to maintain or furnish this data is a violation of the CA.³¹⁶
- e. Notification of Results.* If, after obtaining and evaluating contractor evidence relevant to fulfillment of CA commitments, a CO concludes that the contractor did not violate the provisions of the CA, the CO will notify the contractor in writing. If the evaluation was part of a follow-up review, this Notice can be included in the applicable standard close out letter. If, however, OFCCP concludes that the contractor violated the CA, see Subsection 8I02, Violation of a Conciliation Agreement.
- f. Retention of Progress Reports and Evaluations.* The CO will retain progress reports and a copy of his or her corresponding analysis and evaluations in the case file. Copies of correspondence sent to the contractor acknowledging the report must be filed in the case file.

8I02 VIOLATION OF A CONCILIATION AGREEMENT

The violation of a CA may occur during the term of the agreement or after the expiration of the agreement.

- a. Violation During the Term of a CA.* If a CO determines that a contractor violated the provisions of a CA prior to the expiration of the CA, the procedures set out at 41 CFR 60-1.34 require the CO to send the contractor a 15-Day Notice.³¹⁷ The Regional Director or his or her designee signs the 15-Day Notice. Prior to issuing a 15-Day Notice, the CO must obtain appropriate approval.
- b. Repetition of Violation After Expiration of a CA.* If the CO finds a violation after the CA has expired, the CO should discuss the available options with SOL.
- If the CO finds that, following expiration of a CA, the contractor repeated any of the violations addressed in the CA (e.g., see Appendix A-1, Part A.I (1)(b) of the SCER on Recurrence of Past Problems), the CO should discuss the option of pursuing an enforcement action rather than a second CA.
 - If the CO and SOL decide to remedy these violations, along with any new violation, through a second CA, the CA will have a minimum term of 4 years but may be longer if it is necessary to ensure full implementation of remedy or in unusual circumstances. It will also have at least one compliance evaluation before the CA expires to ensure that the contractor is fulfilling or has fulfilled its terms.

³¹⁶ See Subsection 8J02 – Procedure Where Irreparable Injury Exists.

³¹⁷ See Section 8J; however, where irreparable injury is involved, see specific procedures in 8J02.

8J THE 15-DAY NOTICE

This Section reviews the proper use of a 15-Day Notice, the different procedures used when irreparable injury and no such injury exist, who signs and who receives the Notice, and how contractors respond to the Notice.

8J00 WHEN TO USE A 15-DAY NOTICE

When a CO finds that the contractor violated the CA, the CO should issue a 15-Day Notice to the contractor, unless the victim alleges irreparable injury. In the case of irreparable harm, the response is as described in subsection 8J02 below.

8J01 PROCEDURES WHERE NO IRREPARABLE INJURY EXISTS

The 15-Day Notice in this instance includes a cover letter and an enclosure citing the provisions of the CA the contractor violated and the bases for the findings.³¹⁸ It will give the contractor 15 calendar days from receipt of the Notice to demonstrate, through a written presentation of facts and evidence, that it is in compliance with the provisions cited in the CA.³¹⁹

8J02 PROCEDURE WHERE IRREPARABLE INJURY EXISTS

Irreparable injury may occur when a violation of a CA is either in progress or expected, and the contractor would not be able to readily correct it if allowed to proceed during the 15 business days response time normally allowed. For example:

- Employees are experiencing severe harassment or retaliation.
- The contractor has a CA commitment to offer a victim of discrimination a unique job (one unlikely to open again in the foreseeable future), such an opening occurs and the contractor is about to fill it with someone other than the victim.

When a victim alleges irreparable injury, the CO will not issue a 15-Day Notice. Instead, after obtaining RSOL clearance, the Regional Director shall attempt to notify the top establishment official by telephone that OFCCP intends to proceed directly to enforcement.³²⁰

After oral notice of breach of the CA and irreparable injury, the CO must immediately send a confirmation letter, cleared by RSOL, that cites the provisions of the CA the contractor violated, the bases for the findings, the reason for the irreparable injury allegation and OFCCP's intent to proceed directly to enforcement.

8J03 WHO RECEIVES THE 15-DAY NOTICE

The CO addresses a 15-Day Notice, and the letter of confirmation referenced in subsection 8J02, to the top official at the establishment with a copy to the CEO of the corporation, unless the

³¹⁸ See Letter L-29 and L-29a.

³¹⁹ 41 CFR 60-1.34(a), Violation of a Conciliation Agreement; 41 CFR 60-741.63, Violations of Conciliation Agreements; 41 CFR 60-250.63, Violation of Conciliation Agreements; and 41 CFR 60-300.63, Violation of Conciliation Agreements.

³²⁰ See 41 CFR 60-1.34(a), 41 CFR 60-741.63(a)(1), 41 CFR 60-250.63(a)(1) and 41 CFR 60-300.63(a)(1).

establishment and corporate office are the same. If the contractor requested, in writing, that the CO provide a copy of the review or investigation correspondence to an outside representative such as an outside counsel or consultant, the CO will also send a copy to the designated representative. If the CO provides copies to a corporate CEO, other contractor official and/or a designated representative, the CO will include a “cc:” line on all copies indicating the people to whom the CO sent the Notice.

The CO always sends a 15-Day Notice via e-mail or facsimile, and certified mail, return receipt requested.

8J04 SIGNATURE AUTHORITY

The Regional Director has signature authority for a 15-Day Notice and may not further delegate this authority. DDs will send a proposed 15-Day Notice to the Regional Director, along with a copy of the CA that the contractor has violated and documentation pertaining to the CA provisions violated. Unless the contractor demonstrates that the CO’s findings are incorrect, the CO refers the matter to RSOL for enforcement as described in Section 8K on Enforcement.

8J05 CONTRACTOR’S RESPONSE TO THE 15-DAY NOTICE

The contractor has 15 calendar days from the date it receives the 15-Day Notice to respond. If the contractor does not respond within the 15-day period, or reasonable extensions thereof, the CO refers the case for enforcement.

If the contractor does respond, OFCCP will evaluate whether the response shows that the CO erroneously issued the 15-Day Notice or otherwise explains the violations. If so, the CO will either rescind the 15-Day Notice or otherwise resolve the matter with the contractor. If not, the CO will formally refer the case to SOL. SOL, with the CO’s assistance, will attempt to negotiate a consent decree that includes all appropriate remedies. If the contractor is unwilling to enter into a consent decree, SOL will treat the case as a normal enforcement referral as described in Section 8L on Stopping Enforcement Proceedings.

8K ENFORCEMENT RECOMMENDATIONS

Making an enforcement recommendation means seeking approval to refer the case to SOL for either administrative or judicial enforcement. Before a case can move to enforcement certain administrative and procedural actions must occur. This chapter reviews those steps and procedures.

8K00 WHEN TO MAKE OR SEEK APPROVAL OF AN ENFORCEMENT RECOMMENDATIONS

COs should make an enforcement recommendation when the contractor, with or without an SCN:

- refuses to submit required AAPs and support data under one or more of the following: EO 11246, Section 503 or Section 4212;
- refuses to provide access to its premises for an onsite review;

- refuses to provide access to necessary information; or
- harasses or intimidates a CO or agent of OFCCP (e.g., an OFCCP or SOL employee acting on behalf of the agency).

An enforcement recommendation should be made in other situations including when:

- an SCN is not resolved within 30 calendar days, or reasonable extensions thereof.
- A settlement negotiation fails to resolve violations specified in the NORI within 15 calendar days, or reasonable extensions thereof, in a complaint investigation.
- a contractor is not negotiating in good faith, and it is unlikely an agreement will be reached.
- a 15-Day Notice of violation of the CA, with no irreparable injury involved, is not resolved within 15 calendar days, or reasonable extensions thereof.
- a violation of a CA involves irreparable injury.

8K01 CONTENTS IN A COMPLIANCE EVALUATION FILE

- a. *General.* A compliance evaluation case file that OFCCP submits for enforcement consists of a brief cover memorandum, a Transmittal Memorandum and the standard compliance evaluation case file. The case file must contain every document OFCCP collected and/or generated in the course of the evaluation, including all e-mails, statistical analyses including spreadsheets properly labeled and dated, mitigation data, interview statements and detailed descriptions of the employment processes or practices at issue. The case file must include a table of contents or index that identifies all of the contents and their location within the file, tabs and labels. The case file OFCCP submits to RSOL for enforcement should be an exact copy of the original case file and contain all of the documents in the original case file.³²¹ The file is sent to the RO for transmittal to the RSOL. If needed, the RO can create and maintain a copy of the file at this point. The original file will remain in the field office responsible for conducting the compliance evaluation.
- b. *Cover Memorandum.* The cover memorandum is typically one page. It contains a brief statement of all the violations at issue, and indicates which violations were at impasse when the conciliation process terminated (e.g., jurisdiction, whether there was a violation, the amount of back pay).
- c. *Transmittal Memorandum.* Appendix A-14 describes the contents of the Transmittal Memorandum. The Transmittal Memorandum must be a stand-alone document that contains all of the information supporting why SOL and DPO should ultimately approve the

³²¹ In addition, a copy of the enforcement memo and list of supporting documents and tabs will be sent to DPO, Branch of Enforcement and Appeals when the file is referred to RSOL.

enforcement recommendation. It should include any strengths or weaknesses the CO uncovered during the course of the investigation or review, citations to relevant supporting documentation in the case file, contractor's response to the alleged violations, OFCCP's assessment of those responses and a history of the conciliation efforts, including any offers the CO and contractor exchanged. It should not be a Memorandum that consists solely of conclusory statements or summary information, but instead be a report explaining why SOL or DPO, or both, should pursue the case for enforcement. Every fact in the Transmittal Memorandum must contain a reference to the location of the back-up information or documents in the case file that verify the fact.

8K02 CONTENTS IN A COMPLAINT INVESTIGATION

- a. *General.* A complaint investigation case file that OFCCP submits for enforcement consists of a cover memorandum and the standard complaint investigation case file. The case file must include a table of contents or index identifying all of the contents and their location within the file, tabs and labels. Regional SOLs are provided an exact a copy of the original case file.
- b. *Cover Memorandum.* The cover memorandum is typically one page. It must request enforcement, briefly state the program under which the victim filed the complaint, state the allegations and basis for the complaint, state the violation(s), and the results of conciliation. This includes the issues at impasse when conciliation terminated.
- c. *Transmittal Memorandum.* The Transmittal Memorandum for a complaint investigation is similar in content to the Transmittal Memorandum description above.

8K03 WHO RECEIVES THE ENFORCEMENT RECOMMENDATIONS

The CO submits the enforcement recommendation and case file simultaneously to RSOL and DPO. It must contain all of the documents in the original case file including applications. The CO sends a copy of the cover memorandum and the transmittal memorandum to DPO as well as the completed SCER (compliance evaluations) or Investigative Report (complaint investigations). Upon receipt, DPO is responsible for forwarding a copy of the enforcement recommendation and supporting documents to NSOL; specifically, the Associate Solicitor, Civil Rights and Labor Management Division, Office of the Solicitor, U.S. Department of Labor, Room N-2474, 200 Constitution Ave., N.W., Washington, D.C. 20210.

If DPO uncovers deficiencies during its preliminary review of an enforcement recommendation, it rejects the enforcement referral and returns it to the appropriate Regional Office for further action or to correct the deficiencies, or both. Examples of deficiencies that may result in rejection include lack of jurisdiction, no evidence of consultation with RSOL prior to referral, and incorrect citation of a violation. DPO concurrently informs NSOL to notify the appropriate RSOL of this action. Furthermore, should RSOL or NSOL, or both, have any concerns regarding the merits of the enforcement referral, the appropriate SOL office will notify the Regional Office to discuss the issues associated with the referral. If NSOL or RSOL, or both, reject an enforcement referral, it must explain in writing the reasons for the rejection.

8K04 SIGNATURE AUTHORITY

The applicable Regional Director has signature authority for an enforcement recommendation and cannot delegate this authority further. The originating District Office will prepare the cover memorandum and transmittal memorandum, as appropriate, for the Regional Director's signature.

8L PRE AND POST REFERRAL ISSUES RESULTING IN ENFORCEMENT PROCEEDINGS

This section reviews pre and post-referrals to the SOL as ways of stopping an enforcement action.

8L00 PRE-REFERRAL TO SOL

Efforts to reach a voluntary resolution of the noncompliance should continue up until the time the CO refers the matter to SOL. Settlement negotiations, however, may not unduly delay an enforcement recommendation. For example, an enforcement recommendation is appropriate as soon as it becomes clear that the contractor is not negotiating in good faith.

8L01 POST-REFERRAL TO SOL

Once a CO refers a matter to SOL for enforcement, settlement negotiations between the contractor and the CO must end. The SOL will conduct all further negotiations with input from the CO and other agency officials. When, as a result of negotiations between SOL and the contractor, they reach an agreement, SOL may incorporate the agreed-upon remedies in a Consent Decree (CD) and file the CD simultaneously with an administrative complaint if it was not already done. An Administrative Law Judge (ALJ) must approve the terms of the CD. The ALJ's Order approving the CD is the final administrative order in the case. The contractor will send progress reports that the CD requires to the appropriate field office working with SOL to evaluate the contractor's compliance with the CD.

8M TYPES OF ENFORCEMENT PROCEEDINGS

Once a CO refers a case to SOL for enforcement, SOL determines whether the case is litigation worthy and, in the process of doing so, may seek additional information on the case from the CO. The SOL also makes a recommendation to the Director of OFCCP on whether an enforcement proceeding should be administrative or judicial.

8M00 ADMINISTRATIVE ENFORCEMENT PROCEEDINGS

SOL normally initiates administrative enforcement proceedings unless circumstances warrant referral to the Department of Justice (DOJ) for judicial proceedings. The SOL's filing of an Administrative Complaint with the Office of Administrative Law Judges (ALJ) initiates administrative enforcement proceedings. An ALJ conducts an administrative hearing on the Complaint under the procedures set forth in 41 CFR Part 60-30.

8M01 JUDICIAL ENFORCEMENT PROCEEDINGS

The SOL may refer a case to the DOJ for judicial enforcement proceedings when circumstances so warrant and the Director of OFCCP concurs. For example, SOL may need an injunction against a sole source contractor since cancellation of federal contracts may not be practical or

the Director of OFCCP may request that SOL make a referral to DOJ of a case for judicial enforcement.

The SOL may make referrals to the DOJ for judicial enforcement at any stage in the enforcement process without proceeding through conciliation efforts.³²² DOJ initiates judicial enforcement proceedings when the Attorney General files a complaint on behalf of the Department of Labor in federal district court. As with any other federal court case, the losing party may appeal to the circuit court of appeals, and the losing party in the court of appeals may request review by filing a “writ of certiorari” with the U.S. Supreme Court.

³²² See 41 CFR 60-1.26(a)(2).

KEY WORDS AND PHRASES

Accessibility

The extent to which applicants and employees with disabilities can readily approach and use a contractor's facilities, amenities, and programs – including, but not limited to, work areas, employee lounge areas and online application systems.

Accommodation

See definitions of "Reasonable Accommodation" and "Religious Accommodation."

Active Case Enforcement (ACE)

The procedures for conducting Supply & Service (S&S) compliance evaluations scheduled from the Federal Contractor Scheduling System (FCSS). Directive 295, issued December 16, 2010, established the ACE procedures. These procedures replaced the Active Case Management procedures established in 2003 and later rescinded by Directive 292 in December 2010.

Active Case Management (ACM)

A tiered compliance review process whereby the compliance officer (CO) may close supply and service compliance evaluations after the desk audit if the CO does not find indicators of systemic discrimination. Process in effect until rescinded, and replaced by ACE.

Administering Agency

Any department, agency or establishment in the executive branch of the government, including any wholly owned government corporation that administers a program involving federally assisted construction contracts. See 41 CFR 60-1.3.

Administrative Complaint

A document filed by the Solicitor's Office on behalf of OFCCP with the Office of Administrative Law Judges that begins an administrative enforcement proceeding under Executive Order 11246, Section 503, and/or Section 4212.

Administrative Law Judge (ALJ)

The presiding official at an administrative enforcement proceeding under Executive Order 11246, Section 503, and/or Section 4212. See 41 CFR Part 60-30, 41 CFR 60-1.26(b), 60-250.65(b), 60-300.65(b), and 60-741.65(b).

Administrative Procedure Act

A law enacted by Congress in 1946. It establishes basic requirements to which an administrative process must conform. It includes standards for rulemaking, for certain formal adjudication and for court reviews of certain administrative actions. See 5 U.S.C. 500 *et seq.*

Adverse Impact

As defined by UGESP at 41 CFR 60-3.16B, a substantially different rate of selection in hiring, promotion, transferring, training or other employment decision which works to the disadvantage of the members of a race, sex or ethnic group identified in 41 CFR 60-3.4. See the related term “Disparate Impact.”

Affected Class

A group of people sharing common traits or characteristics (e.g., the same race, gender, ethnicity), who are the victims of systemic discrimination.

Affirmative Action

Actions, policies and procedures to which a contractor commits itself that are designed to achieve equal employment opportunity. Affirmative action obligations entail thorough, systematic efforts to prevent discrimination from occurring and to detect it and eliminate it as promptly as possible. Affirmative Action obligations also require contractors to ensure equal opportunity in their recruitment and outreach efforts.

Affirmative Action Program (AAP)

A management tool designed to ensure equal employment opportunity. The requirements for an affirmative action program that satisfies Executive Order 11246, Section 503 and Section 4212, are set forth in 41 CFR Parts 60-2; 60-741, Subpart C; 60-250, Subpart C; or 60-300, Subpart C. These include requiring a contractor to annually detail the affirmative steps it has taken and will take in the future to ensure equal employment opportunity.

American Indian/Alaskan Native (not Hispanic or Latino)

As defined by OMB’s *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity*, a person with origins in any of the original peoples of North and South America (including Central America), and who maintains cultural identification through tribal affiliation or has community recognition as an American Indian or Alaskan Native.

Americans with Disabilities Act (ADA)(Title I)

Title I of the ADA (42 U.S.C. 12101, *et seq*) prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals on the basis of disability in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments. The ADA's nondiscrimination standards also apply to federal sector employees under Section 501 and federal contractors under Section 503 of the Rehabilitation Act, as amended, and its implementing rules.

Amended Show Cause Notice (ASCN)

A letter from OFCCP to the contractor that is used when a CO issues an Show Cause Notice (SCN) to the contractor and later finds additional unresolved violations, or finds that some but not all violations were cited in error. The ASCN identifies all the unresolved or current violations.

Anecdotal Evidence

Oral or written narrative or data that indirectly supports a finding of discrimination. For example, data showing that the contractor has not hired an African American in the job at issue in the past three years or interview statements from affected applicants, current employees, or selecting officials that imply that discrimination occurred. Anecdotal evidence is often contrasted to statistical evidence or direct evidence. See definitions of "Statistical Evidence" and "Direct Evidence."

Anti-nepotism Policy

A policy or practice that limits the simultaneous employment of two or more members of the same family.

Applicant

The precise definition of "applicant" depends upon the contractor's recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application, or might be expressed orally, depending upon the contractor's practice. See Question and Answer 15 to the Adoption of Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures.

Applicant Flow Data (Log)

A chronological compilation of applicants (including Internet applicants) for employment or promotion showing each individual, categorized by race, sex and ethnic group, who

applied for each job title (or group of jobs requiring similar qualifications) during a specific period.

Apprenticeship (Contractor or Industry Specific)

A system of agreement, written or implied, that uses practical experience to train a person in a recognized trade or craft in accordance with specified standards.

Armed Forces Service Medal Veteran

Any veteran who, while serving on active duty in the U.S. military, ground, naval or air service, participated in a United States military operation for which an Armed Forces Service Medal was awarded pursuant to Executive Order 12985 (61 FR 1209). See 41 CFR 60-300.2(r).

Asian (not Hispanic or Latino)

As defined by OMB's *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity* (1997), a person with origins in any of the original peoples of the Far East, Southeast Asia or the Indian subcontinent. This area includes, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand and Vietnam. However, under the regulations in part 60-2, the category is called "Asian/Pacific Islander" and contractors may use either Asian or Asian/Pacific Islander in developing their AAPs.

Availability

As described in 41 CFR 60-2.14, an estimate of the number of qualified minorities or women available for employment in a given job group, expressed as a percentage of all qualified people available for employment in the given job group. The purpose of the availability determination is to establish a benchmark against which the demographic composition of the contractor's incumbent workforce can be compared in order to determine whether barriers to equal employment opportunity may exist within particular job groups.

Back Pay

Lost earnings caused by a contractor's discriminatory employment practices or procedures. Lost earnings include but are not limited to: salary, wages, overtime, premium pay and shift differentials, incentive pay, raises, bonuses, lost sales commissions, cost-of-living increases, tips, medical and life insurance, fringe benefits, pensions, stock options and awards.

Bargaining Agreement

Also referred to as “collective bargaining agreement” and sometimes known as a “labor-management agreement” or “union contract.” These terms refer to an agreement between an employer and a union establishing wages, hours and other terms and conditions of employment for employees in the bargaining unit represented by the union.

Basic Qualifications

For the purpose of defining an Internet applicant, “basic qualifications” mean qualifications:³²³

- (i) (A) That the contractor advertises (e.g., posts on its Web site a description of the job and the qualifications involved) to potential applicants that they must possess in order to be considered for the position, or
(B) For which the contractor established criteria in advance by making and maintaining a record of such qualifications for the position prior to considering any expression of interest for that particular position if the contractor does not advertise for the position but instead uses an alternative device to find individuals for consideration (e.g., through an external resume database), and
- (ii) That meet all of the following three conditions:
 - (A) The qualification must be noncomparative features of a job seeker. For example, three years’ experience in a particular position is a noncomparative qualification; a qualification that an individual have one of the top five number of years’ experience among a pool of job seekers is a comparative qualification.
 - (B) The qualifications must be objective; they do not depend on the contractor’s subjective judgment. For example, “a Bachelor’s degree in Accounting” is objective if a third-party, with the contractor’s technical knowledge, would be able to evaluate whether the job seeker possesses the qualification without more information about the contractor’s judgment.
 - (C) The qualifications must be relevant to performance of the particular position and enable the contractor to accomplish business-related goals.

Black or African American (not Hispanic or Latino)

As defined by OMB’s *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity* (1997) an individual, not of Hispanic origin, with origins in any of the black racial groups of Africa.

³²³ See 41 CFR 60-1.3, section 4 of definition of Internet applicant.

Bona Fide Occupational Qualification (BFOQ)

A defense to the general prohibition of discrimination in employment on the basis of sex, religion or national origin that permits an employer to limit a particular job to members of one sex, religion or national origin group. Race cannot be used as a BFOQ.

The BFOQ defense is very narrow, but has been successfully used in the gender context when privacy concerns are implicated. For example, a women's prison may be able to demonstrate a female BFOQ for the hiring of a guard to perform body searches of female prisoners.

Bona Fide Seniority, Merit or Incentive System

An employer may lawfully compensate employees differently on the basis of a bona fide seniority, merit, or incentive system. A seniority system rewards employees according to the length of their employment. A merit system rewards employees for exceptional job performance. An incentive system provides compensation on the basis of the quality or quantity of production. To be a bona fide system, it must not have been adopted with discriminatory intent; it must be based on predetermined criteria; it must have been communicated to employees; and it must have been applied consistently and evenhandedly to employees of both sexes.

Bumping Rights

The rights of one employee to displace another employee during a layoff, reduction-in-force or other employment action as defined in a collective bargaining or other binding agreement.

Business Necessity

A defense used by an employer when it uses an employment practice, such as a selection criterion, that is facially neutral and consistently applied, but which excludes members of one sex, race, national origin or religious group at a substantially higher rate than members of other groups (thus creating adverse impact). The employer must prove that a requirement that causes adverse impact is job-related and consistent with business necessity. Business necessity may also have to be proven when an employer uses a qualification standard that screens out an individual because of his or her disability, such as an uncorrected vision test or standard. OFCCP uses Title VII, UGESP and ADA standards, as appropriate, when evaluating a contractor's assertion of a business necessity defense.

Caregiver Discrimination

Being a working parent or another type of caregiver is not a protected characteristic under Title VII, the ADA, or the laws enforced by OFCCP. However, there are circumstances

in which discrimination against caregivers may constitute unlawful disparate treatment or disparate impact based on a protected characteristic such as sex, or race. Discrimination against a caregiver due to his or her association with an individual with a disability may be a violation of Section 503.

Case Management System (CMS)

An automated system designed to track and monitor compliance evaluations or complaint investigations of establishments or functional units. Field offices have specific responsibilities to add information into this automated system. Specific instructions are found in the online Case Management System Manual.

Caucasian (not Hispanic or Latino)

Referred to as “white” by OMB in the *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity* (1997) “White” is a person having origins in any of the original peoples of Europe, the Middle East, or North Africa.

Circumstantial Evidence

Also referred to as inferential or indirect evidence. A method of proof relying on comparative evidence or other evidence giving rise to an inference of discrimination. Circumstantial evidence typically involves an extra (inferential) step to draw a conclusion about whether discrimination has occurred. It can include [statistical evidence](#), suspicious or ambiguous timing, statements or behavior, or any other bits and pieces of evidence that collectively support an inference of discrimination.

Civilian Labor Force

The aggregate of people classified as employed and as unemployed in accordance with the criteria established by the Bureau of the Census and the U.S. Department of Commerce. See "Employed" and "Unemployed."

Class Complaint

A complaint brought by one or more complainants on behalf of a group (consisting of two or more) who have a common claim against a federal contractor.

Coercion

The practice of forcing another party to behave in an involuntary manner (whether through action or inaction) by use of threats, intimidation or some other forms of pressure or force.

Cohort Analysis

A non-statistical comparison of the treatment of similarly situated individuals, small groups of applicants or employees.

Collateral Estoppel

A bar to relitigating an issue that has already been litigated between the same parties or certain closely related people (sometimes known as privies). Under collateral estoppel, when an issue has been contested and finally resolved in litigation involving the parties, that resolution of the issue is binding on future litigation involving the two parties (or their privies).

Collective Bargaining Agreement

See definition of "Bargaining Agreement."

Complaint

A written document filed with OFCCP by, or on behalf of, one or more employees, applicants or former employees that alleges that such individuals have been the victim of discrimination and/or retaliation that is prohibited by the laws enforced by OFCCP, or under Section 503 or VEVRAA, alleges a violation of the pertinent Act or regulations.

Compliance Check

A compliance evaluation procedure that involves a determination of whether the contractor has maintained appropriate records consistent with the regulations at 41 CFR Parts 60-1.12, 60-250.80, 60-300.80, and 60-741.80. The contractor has the option of providing the documents either onsite or offsite. 41 CFR § 60-1.20(a)(3), 60-250.60(a)(3), 60-300.60(a)(3) and 60-741.60(a)(3).

Compliance Evaluation

The investigation and review process used by OFCCP to determine if a federal contractor is complying with the nondiscriminatory and affirmative action employment obligations outlined in 41 CFR Chapter 60. A compliance evaluation consists of any one or any combination of the following investigative procedures: compliance review, offsite review of records, compliance check or focused review. See 41 CFR 60-1.20(a), 60-250.60(a), 60-300.60(a) and 60-741.60(a).

Compliance Officer (CO)

A career ladder professional position typically located in an OFCCP district or area office, but also found in some regional offices. The career ladder includes entry level, journey level and senior level positions. As one moves up the career ladder, the CO demonstrates greater responsibility and independence in his or her work, recommendations and assignments. At each level, the CO will work individually or in teams conducting compliance evaluations, complaint investigations and monitoring

federal contractors. In addition, COs provide compliance assistance to community groups and federal contractors.

As used in this Manual, all references to the term CO include any OFCCP employee that is responsible for the tasks or activities described.

Compliance Review

A comprehensive analysis and evaluation of the hiring and employment practices of the contractor, including the contractor's written affirmative action program (AAP), and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages: desk audit, onsite review and offsite analysis. See 41 CFR 60-1.20(a)(1), 60-250.60(a)(1), 60-300.60(a)(1) and 60-741.60(a)(1).

Conciliation

Efforts between OFCCP and a contractor to resolve findings of noncompliance.

Conciliation Agreement (CA)

A binding written agreement between a contractor and OFCCP that details specific contractor commitments, actions, or both to resolve the violations set forth in the agreement.

Construction Contract

Any contract for the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings or highways, or other changes or improvements to real property, including facilities providing utility services.

Construction Site

The general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, or repair and any temporary location or facility at which a contractor, subcontractor, or other participating party meets a demand or performs a function relating to the contract or subcontract. 41 CFR 60-1.3 (defining "Site of construction").

Construction Work

The construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings or highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection and other onsite functions incidental to the actual construction. 41 CFR 60-1.3.

Constructive Discharge

The involuntary resignation of an employee as a result of an employer making the employee's working conditions so intolerable that a reasonable person would have felt compelled to resign. OFCCP will find that an employee was constructively discharged in violation of the Executive Order 11246, Section 503 or Section 4212 when it finds that: 1) a reasonable person in the employee's position would have found the working conditions so intolerable as to compel resignation; 2) the employer's conduct created the intolerable conditions and was motivated by retaliation, or based on race, color, sex, religion, national origin, disability or status as a protected veteran; and 3) the employee's involuntary resignation resulted from the intolerable working conditions.

Continuing Violation

A continuing violation may be found to exist when it is determined that multiple related actions comprise a single act of discrimination, e.g., a hostile work environment or a contractor maintains over time a discriminatory policy or system. A continuing violation exists where: 1) at least one of the actions occurred within the liability period and the other actions are related or so similar in nature as to show a pattern or practice of employment discrimination; or 2) the contractor maintains a discriminatory policy or practice into the liability period. Continuing violations may be, but do not have to be, systemic in nature.

Contract

See definition under "Government Contract" or "Subcontract" or "Federally Assisted Construction Contract" as defined below.

Contract Cancellation

The termination of a federal contract before its expiration date by order of the appropriate government authorities. Contract cancellation is one of the sanctions authorized, in appropriate cases, for violations of the EO 11246, Section 503 or Section 4212. Compare with "Debarment" and "Contract Suspension."

Contract Suspension

The temporary interruption of a federal contract by order of the appropriate government authorities. Contract suspension is one of the sanctions authorized, in appropriate cases, for violation of EO 11246, Section 503 or Section 4212. Compare with "Contract Cancellation" and "Debarment."

Contracting Agency

Any department, agency, establishment or instrumentality of the United States (under Executive Order 11246, limited to the Executive branch of the government), including any wholly owned government corporation, [that enters into a Government Contract or

Subcontract or Federally Assisted Construction Contract or Subcontract]. 41 CFR 60-1.3, 60-250.2, 60-300.2, and 60-741.2.

Contractor

“Contractor” means, unless otherwise indicated, a “prime contractor” or “subcontractor.” “Prime contractor” means any person holding a contract and, for the purposes of [the enforcement provisions], any person who has held a contract subject to [EO 11246, Section 503 or Section 4212]. “Subcontractor” means any person holding a subcontract and, for the purposes of [the enforcement provisions], any person who has held a subcontract subject to [EO 11246, Section 503 or Section 4212]. The term “first-tier subcontractor” refers to a subcontractor holding a subcontract with a prime contractor. 41 CFR 60-1.3. See definitions of “Government Contract,” “Subcontract,” and “Federally Assisted Construction Contract.”

Covered Area

With respect to a federal or federally assisted construction contractor, the geographical area, Economic Area (EA), or Standard Metropolitan Statistical Area (SMSA), as designated in the Federal Register by the Secretary of Labor, where a federal or federally assisted construction project is being performed. See 45 FR 65976, 65984, and Appendix B-80, October 3, 1980.

Criteria Identification/Criteria Verification

The process of obtaining the contractor's stated criteria for a selection decision(s) (usually through interviewing selection officials and examining any relevant contractor documents), and then determining whether the stated criteria account for or sufficiently explain the actual selection decisions (usually through reviewing applications/files of people selected and not selected).

Davis-Bacon Act

The Davis-Bacon Act, as amended, requires that each contract over \$2,000 to which the United States or the District of Columbia is a party for the construction, alteration or repair of public buildings or public works shall contain a clause setting forth the minimum wages to be paid to various classes of laborers and mechanics employed under the contract. Under the provisions of the Act, contractors or their subcontractors are to pay workers employed directly upon the site of the work no less than the locally prevailing wages and fringe benefits paid on projects of a similar character. The Davis-Bacon Act directs the Secretary of Labor to determine such local prevailing wage rates.

Debarment

A declaration that a contractor ineligible for the award of future contracts. Debarment is one of the sanctions that may be imposed upon a contractor who is found to be in violation of the EO 11246, Section 503 or Section 4212.

Deficiency

Any failure to fulfill a requirement of the EO 11246, Section 503 or Section 4212, including any failure to comply with the implementing rules, regulations and orders of OFCCP. See the definition of "Violation."

Deposition

A type of pretrial discovery. (See the definition of "Discovery.") Generally, a deposition is an oral examination of a party or potential witness in the litigation, under oath, which is taken by an opposing party and accurately recorded.

Direct Evidence of Discrimination

Proof of a discriminatory reason for an employment decision that does not use inference or presumption. Direct evidence includes statements made by a decisionmaker that are related to a contested employment decision and reflect the alleged discriminatory animus or attitude. The burden of proof in Title VII discrimination cases (including mixed-motives cases) may be met through direct or circumstantial evidence, and there is no distinction between the weight and value of either type of evidence.

Director

The Director of the Office of Federal Contract Compliance Programs (OFCCP), United States Department of Labor (DOL).

Disability

1) A physical or mental impairment that substantially limits one or more of an individual's major life activities; 2) having a record of such an impairment; or 3) being regarded as having such an impairment.

Disabled Veteran

For the purpose of 41 CFR Part 60-300 a "disabled veteran" means:³²⁴

(a) A veteran of the U.S. military, ground, naval or air service who is entitled to compensation (or who, but for the receipt of military retirement pay, would be

³²⁴ 41 CFR 60-300.2(n). See also 41 CFR 60-250.2(n)(1)(defining the corresponding term "special disabled veteran," a narrower term which is used in Part 60-250).

entitled to compensation) under laws administered by the Secretary of Veterans Affairs, or

- (b) A person who was discharged or released from active duty because of service-connected disability.

Disadvantaged Business Enterprise (DBE)

As defined by the Small Business Administration, DBEs are for-profit small business concerns where socially and economically disadvantaged individuals own at least 51% interest and also control management and daily business operations. African Americans, Hispanics, Native Americans, Asian-Pacific and Subcontinent Asian Americans, and women are presumed to be socially and economically disadvantaged. Other individuals can also qualify as socially and economically disadvantaged on a case-by-case basis.

Discovery

The process by which the parties litigating (through their attorneys) obtain information about the case from each other before the trial begins. Tools of discovery include: depositions, written interrogatories, requests for production of documents or things, requests for physical and mental examinations, requests for admissions of fact, and request for inspection of premises (e.g., a plant tour). See "Deposition."

Discrimination

See the definitions of "Disparate Impact," "Disparate Treatment," "Harassment," and "Retaliation." Discrimination also includes failure to provide "Religious Accommodation" or "Reasonable Accommodation" for an individual with a disability.

Disparate Impact

A theory of employment discrimination that focuses on the effect of a practice or policy. Disparate impact discrimination occurs when a contractor's use of a facially neutral policy or selection procedure (e.g., a test, an interview, a degree requirement, a leave or hours policy) disqualifies members of a protected class at a substantially higher rate than others and is not justified by business necessity and job-relatedness. Intent to discriminate is not necessary in this type of employment discrimination. The disparate impact theory may be used to analyze both objective and subjective selection standards.

Disparate Treatment

A theory of employment discrimination. Disparate treatment discrimination occurs when a contractor treats an individual or group differently on the basis of a prohibited factor (race, color, religion, sex, national origin, disability, protected activity or status as a protected veteran). Intent to discriminate is a necessary element in this type of employment discrimination..

Dodge Report

The McGraw-Hill Dodge Report is a monthly list of all construction projects (federal and nonfederal). The Dodge Report is sent to the OFCCP field offices. It may be used for identifying reviews and mega construction projects.

D-U-N-S Number

An identification number assigned to a business by Dun & Bradstreet (D&B).

Economic Area (EA)

Geographic areas, as set by OMB, that have close economic ties throughout the area.

EEO Policy

A statement made by the employer/contractor to commit to the principles of equal opportunity employment.

EEO-1 Report

The *Employer Information Report EEO-1*. An annual report filed with the Joint Reporting Committee (composed of OFCCP and EEOC) by certain employers subject to the Executive Order and/or to Title VII of the Civil Rights Act of 1964, as amended. This report details the sex, race, and ethnic composition of an employer's workforce by job category. Also termed Standard Form 100.

EEO-3 Report

The *Equal Employment Opportunity Local Union Report EEO-3*, formerly the Local Union Report, collects labor force data from Referral Unions subject to Title VII of the Civil Rights Act of 1964, as amended, with 100 or more employees within 50 U.S. states and District of Columbia. The report provide information on their employment totals, employees' job category and sex and race/ethnic groups as of December 31 of the preceding year of the survey year. The EEO-3 survey is conducted biennially in every even-numbered year.

EEO-4 Report

The *Equal Employment Opportunity Local Union Report EEO-4*, formally known as the *State and Local Government Report*, collects information in odd-numbered years from

State and local governments. All States and all other political jurisdictions with 100 or more employees must file this report.

EEO-5 Report

The *Elementary-Secondary Staff Information Report EEO-5* is a joint requirement of the EEOC and the Office for Civil Rights (OCR) of the Department of Education. It is conducted biennially, in the even numbered years, and covers all public elementary and secondary school districts with 100 or more employees in the United States.

Employed, Census definition of

In the reports the U.S. Census Bureau issues using data from the American Community Survey (ACS), the following individuals are counted as “employed:”

All civilians 16-years-old and over who were either:

- (a) "at work," meaning they performed at least some work during the reference week as paid employees or in their business or profession, or on their farm, or who worked 15 hours or more as unpaid workers on a family farm or in a family business; or
- (b) "with a job but not at work," meaning they did not work during the reference week but had jobs or businesses from which they were temporarily absent due to illness, bad weather, industrial dispute, vacation or other personal reasons.

Generally excluded from the category of “employed” are people whose only activity consisted of unpaid work around the house or volunteer work for religious, charitable and similar organizations, or people on layoff. Also excluded are all institutionalized people and people on active duty in the United States Armed Forces.

Employee (using the “common law agency test”)

OFCCP generally uses the “common law agency” test for determining who is an employee under OFCCP programs, unless otherwise defined in agency regulations or reports. The "common law agency" test generally relates to whether the employer controls the means and manner of the worker's performance. This determination requires consideration of all circumstances in the relationship between the parties such as: the skill required for the job, who provides required equipment or tools, the location of the work, the duration of the relationship between the parties, the right to assign additional projects, scheduling work hours, the method of payment, the provision of employee benefits and the tax treatment of the hired party. See [*Nationwide Mut. Ins. Co. v. Darden*](#), 503 U.S. 318, 323-24 (1992).

Employment Agency

Any person or entity that, with or without compensation, regularly works to procure employees for a contractor or to procure for individuals opportunities to work for a contractor. Also includes an agent of such a person or entity.

Employment Offer

A contractor's offer of employment to an individual, usually for a specific job.

Employer Identification Number (EIN)

A nine-digit number assigned to a company by the Internal Revenue Service for tax and other identification purposes.

Enforcement

This term typically refers to an administrative or judicial action to compel compliance with Executive Order 11246, Section 503, or Section 4212 and their implementing regulations, or performance of a conciliation agreement or consent decree.

Equal Employment Opportunity Commission (EEOC)

A federal agency responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, genetic information or participation in protected activity (e.g., filing a complaint of discrimination).

Equal Opportunity Clause

The contract clauses published at 41 CFR 60-1.4(a),(b), 41 CFR 60-250.5(a), 41 CFR 60-300.5(a) and 41 CFR 60-741.5(a) outline contractors' responsibilities under Executive Order 11246, Section 503 and Section 4212. By operation of [those laws], the equal opportunity clause [is] considered to be a part of every [covered] contract and subcontract...whether or not it is physically incorporated in such contract and whether or not there is a written contract between the agency and the contractor. 41 CFR 60-1.4(e); 41 CFR 250.5 (e); 41 CFR 60-300.5(e); 41 CFR 741.5 (e).

Essential Functions

The term "essential functions" is defined and discussed at 41 CFR 60-741.2(u):

(1) In general. The term essential functions means fundamental job duties of the employment position the individual with a disability holds or desires. The term essential functions does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

- (i) The function may be essential because the reason the position exists is to perform that function;
- (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or
- (iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

- (i) The contractor's judgment as to which functions are essential;
- (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
- (iii) The amount of time spent on the job performing the function;
- (iv) The consequences of not requiring the incumbent to perform the function;
- (v) The terms of a collective bargaining agreement;
- (vi) The work experience of past incumbents in the job; and/or
- (vii) The current work experience of incumbents in similar jobs.

Establishment

A facility or unit that produces goods or services, such as a factory, office, store, or mine. In most instances, the unit is a physically separate facility at a single location. In appropriate circumstances, OFCCP may consider as an establishment several facilities located at two or more sites when the facilities are in the same labor market or recruiting area. The determination as to whether it is appropriate to group facilities as a single establishment will be made by OFCCP on a case-by-case basis.

Executive Order 11246

Executive Order 11246 (30 Fed. Reg. 12319)(Sep. 24, 1965) was amended by Executive Order 11375 (32 Fed. Reg. 14303), Executive Order 12086 (43 Fed. Reg. 46501), and Executive Order 13279 (67 Fed. Reg. 77141). All references to "Executive Order 11246," "EO 11246," or the "Order" include these amendments.

Executive Order 11246 Complaint

A complaint filed on the bases of race, color, religion, sex and/or national origin with OFCCP.

Exempt Contract

Any government contract or subcontract that is not subject to some or all obligations under one or more of the laws enforced by OFCCP. Most contracts meeting specified dollar thresholds are covered, but there are a few exemptions and waiver provisions. See [41 CFR 60-1.3, 60-1.5](#) (coverage and exemptions under EO 11246); 41 CFR [60-250.4, 60-300.4](#) (coverage and waivers under Section 4212); 41 CFR [60-741.4](#) (coverage and waivers under Section 503).

Exempt Jobs

Jobs that are exempt from the overtime requirements of the Fair Labor Standards Act. The term is generally used to refer to managerial, professional and, as applicable, sales positions.

Expert Witness

A person such as a doctor or statistician selected by the court or a party on account of his or her knowledge or skill, to examine, estimate and ascertain pertinent information and make a report (testimony) of his or her findings and opinions.

Facially Neutral

An employment practice, policy or selection procedure is facially neutral if it does not reference a protected characteristic such as sex (including pregnancy) or race. A contractor's facially neutral policy (e.g., excluding applicants from employment based on certain criminal conduct or lack of a high school degree) may disproportionately impact some protected individuals and violate the law if not job-related and consistent with business necessity (disparate impact liability).

Family and Medical Leave Act (FMLA)

The FMLA is designed to help employees balance their work and family responsibilities by taking reasonable unpaid leave for certain family and medical reasons. It provides certain employees with up to 12 workweeks of unpaid, job-protected leave a year, and requires continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave. The FMLA is enforced by the U.S. Department of Labor's Wage and Hour Division.

Favored Group

The group with the highest selection rate when calculating the impact ratio or level of statistical disparity or both.

Federally Assisted Construction Contract

Any agreement or modification thereof which is paid for in whole or in part with funds obtained from the government or borrowed on the credit of the government pursuant to any federal program involving a grant, contract, loan, insurance or guarantee, or undertaken pursuant to any federal program involving such grant, contract, loan, insurance or guarantee, or any application or modification thereof approved by the government for a grant, contract, loan, insurance or guarantee under which the applicant for funds itself participates in the construction work. 41 CFR 60-1.3.

Field Office

Any office outside of the National Office and its Divisions that is responsible for the tasks or activities described in the Federal Contractor Compliance Manual (FCCM or Manual).

Fifteen (15) Day Notice

See definition of "Notice of Alleged Noncompliance."

First-tier Subcontractor

A subcontractor holding a subcontract with a prime contractor.

Focused Review

An onsite review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices. See 41 CFR 60-1.20(a)(4), 60-250.60(a)(4), 60-300.60(a)(4) and 60-741.60(a)(4).

Focus Job Area

A unit of an establishment's workforce (e.g., seniority unit, department, line of progression, job title) identified at the desk audit as a potential problem area for further investigation onsite. For example: a unit where minorities or women are concentrated, underrepresented or restricted from working because of their race or sex.

Formal Training

A structured program designed to develop an individual's job- related skills and abilities. Typically classroom training, as well as on-the-job training, falls into this category.

Formula Relief

A method used in systemic discrimination cases for calculating a total amount of back pay for an affected class of discrimination victims that is then divided (pro rata or otherwise) among all members of that class. *Compare to* "Individual Relief.

Fringe Benefits

Benefits that an employer provides to employees in addition to paying their wages or salary. Examples include: profit sharing, bonus plans, stock options or awards, educational stipends, leave (e.g., annual vacation days, personal days, sick leave), life and health insurance, long-term and short-term disability benefits, severance benefits, pension or other retirement benefits, and early retirement incentives. Guidance regarding sex discrimination and benefits is available at 29 CFR 1604.9.

Front Pay

Compensation for estimated future economic loss; generally calculated based on the difference between the discrimination victim's current pay (or for a rejected applicant, the pay he or she should have received) and the pay associated with his or her rightful place. Front pay runs from the time of the settlement; e.g., Conciliation Agreement or final administrative or court order, to a certain time in the future (usually when the victim attains his or her rightful place) that is set by the settlement or final order.

Functional Affirmative Action Program (FAAP)

The development and preparation of an AAP based on clearly distinct functional or business units within a corporate structure as opposed to an AAP based solely on an establishment's physical location.

Gender Based Discrimination

See definition of "Sex Discrimination."

Goals for Supply and Service Contractors, Placement

Percentage annual placement goal[s] [for an underutilized job group that is] at least equal to the availability figure[s] derived for minorities or women, as appropriate, for that job group. 41 CFR 60-2.16(c); see also 41 CFR 60-2.14, 60-2.15.

Goals for Construction Contractors, Participation

Participation goals for minorities and women expressed as a percentage of the hours worked by the contractor's aggregate workforce, by trade, in the geographic area(s) where a federal or federally assisted construction project is located. See 41 CFR 60-4.6.

Good-Faith Efforts

This term refers to a contractor's appropriate efforts to meet its goals by removing identified barriers, expanding employment opportunities, and producing measurable results. See 41 CFR 60-2.16(a), 60-2.17(c), and 60-4.2(d)(2).

Government

Except where otherwise indicated, the government of the United States of America.

Government Contract

Any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services. The term “personal property” includes supplies, and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements). The term “nonpersonal services” as used in this section includes, but is not limited to, the following services: utility, construction, transportation, research, insurance and fund depository.

The term "Government Contract" does not include:

- (a) agreements in which the parties stand in the relationship of employer and employee, and
- (b) federally assisted construction contracts.

Harassment

Harassment is unwelcome conduct that is based on a protected characteristic (race, color, religion, sex, national origin, disability, veteran status, or protected activity). Harassment can take the form of slurs, graffiti, offensive or derogatory comments, or other verbal or physical conduct. Sexual harassment may include unwelcome sexual advances, requests for sexual favors, and other conduct of a sexual nature. Harassment is illegal if it is so frequent or severe that it creates a hostile or offensive work environment or if it results in an adverse employment decision (such as the victim being fired or demoted).

Hispanic or Latino

As defined by OMB’s *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity* (1997) , a person of Cuban, Mexican, Puerto Rican, South or Central American or other Spanish culture or origin, regardless of race.

Immediate Labor Area

The geographic area from which employees reasonably may commute to the contractor's establishment. It may include one or more contiguous cities, counties, Metropolitan Statistical Areas (MSAs) or parts thereof.

Impact Ratio Analysis (IRA)

The Impact Ratio Analysis is a method for identifying personnel activity that should be investigated further. The IRA is a comparison of the selection rates of different racial, ethnic, and gender groups within an identified applicant or candidate pool. If the selection rate for one group is less than 80% of that of the group with the highest rate, then the IRA is adverse and further investigation or analysis is needed.

Individual Relief

The assessment of make-whole relief for identified victim(s) of discrimination on an individualized basis. This method is generally used to calculate back pay in those individual or small group discrimination cases where the victims of discrimination, and the losses they incurred, can be determined with specificity. *Compare to* “Formula Relief.”

Individual with a Disability

A person with a disability. See “disability.”

Injunctive Relief

A court order requiring a person (including a contractor) to perform, or to refrain from performing, one or more designated acts. For example, an order obtained by OFCCP directing a contractor to cease asking specific discriminatory questions on its job application is a form of injunctive relief.

Internet Applicant, for the purposes of EO 11246

Any individual as to whom the following four criteria are satisfied:

- (i) The individual submits an expression of interest in employment through the Internet or related electronic data technologies;
 - (ii) The contractor considers the individual for employment in a particular position;
 - (iii) The individual's expression of interest indicates the individual possesses the basic qualifications for the position; and,
 - (iv) The individual at no point in the contractor's selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.
- 41 CFR 60-1.3. NOTE: the Internet Applicant definition does not apply to the Section 503/VEVRAA programs or to Title VII.

Invitation to Self-Identify

An invitation by the contractor, extended to employees and applicants for employment, to identify their race, national origin, gender, disability and/or protected veteran status. All information obtained in response to such an invitation must be kept confidential in accordance with 41 CFR 60-250.42, 60-300.42 or 60-741.42.

Job Area

Any sub-unit of a workforce sector (e.g., department, job group, job title).

Job Area Acceptance Range (JAAR)

The JAAR is an analytical tool used to analyze the distribution of employees in a workforce by comparing the actual percentage of minorities and women in a job area to their percentage in the relevant segment of the contractor's workforce.

Job Categories

The ten designated categories of the EEO-1 report: officials and managers (divided into executive/senior level and mid/first level), professionals, technicians, sales workers, office and clerical, craft workers (skilled), operatives (semi-skilled), laborers (unskilled), and service workers.

Job Description

A written statement detailing the duties of a particular job title.

Job Group

One or more group(s) of jobs having similar content, wage rates and opportunities. See 41 CFR 60-2.12.

Journey Worker

One who has completed an apprenticeship program or otherwise possesses the full skills and licenses of workers in his or her trade. Historically referred to as “journeyman.”

Labor Area

Geographic area used in calculating availability. The area may vary from local to nationwide.

Layoff

The process by which workers are removed from the active payroll to the inactive payroll during, for example, a reduction-in-force (RIF).

Let, Let a Contract

The awarding of a contract to the prime contractor.

Line of Progression

A series of related jobs in a promotional sequence, generally starting with lower-paying jobs with less responsibility and progressing to higher-paying jobs with greater responsibility. Often, the lower-level jobs provide required training for movement to the higher-level jobs.

Linkage

The connection between contractors and appropriate recruitment and training sources. Linkage agreements between contractors and recruitment and training sources are a tool that may assist the contractor in meeting its affirmative action goals and obligations and are often embodied in a CA.

Major Life Activities

A key term used in the definition of “disability” in the Rehabilitation Act and the ADA. The ADA Amendments Act of 2008 expanded the definition of “major life activities” to encompass “major bodily functions.” 42 U.S.C. 12102(2). Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. 42 U.S.C. 12102(2).

Make-Whole Relief

Remedy for discrimination that restore the victim of discrimination to his or her rightful place, i.e., the position, both economically and in terms of employment status that he or she would have occupied had the discrimination not taken place. Common elements of make-whole relief include an award of the position the individual was wrongfully denied, back pay with interest and retroactive seniority.

Mandatory Job Listing (MJJ)

The Section 4212 affirmative action obligation of covered employers to list suitable job openings with the appropriate employment service delivery system where the opening occurs. See 41 CFR 250.5 and 41 CFR 60-300.5.

Maternity Leave

Childbirth-related absence from work by a woman that does not directly depend on her medical condition. The term includes leave for non-disability related care and nurturing following the birth of a child. Distinguish from "pregnancy disability leave," but see Manual Section 2H01.

Mega Project

A large construction project spanning more than one year, with a value of \$25 million or more, and that will have a major employment and economic impact on a community.

Minorities

Minorities include men and women who are black, Hispanic, Asian or Pacific Islander, American Indian or Alaskan Native. As used in this Manual, the term may mean these groups in the aggregate or an individual group. See 41 CFR 60-4.3(a), section 1d of Equal Opportunity clause.

Minority-Owned Business Enterprise (MBE)

As defined by the Small Business Administration, MBE is a for-profit enterprise, regardless of size, physically located in the United States or its trust territories, which is owned, operated, and controlled by minority group members. Minority ownership must be 51 percent to qualify, whether the business is publicly or privately held. If publicly held, 51 percent of its stock must be held by the minority group members.

Mixed Issues

A complaint filed on one or more bases (EO 11246, Section 503 and/or Section 4212).

MOU (Memorandum of Understanding)

A written agreement between two or more entities, which often serves to memorialize the intent and purpose of the parties' working relationship.

National Origin

EO 11246 and Title VII prohibit employer actions that have the purpose or effect of discriminating against persons on the basis of protected characteristics such as national origin, which includes: actual or *perceived* birthplace, ancestry, culture, accent, or linguistic characteristics common to a specific ethnic group; marriage or association with persons of a national origin group; membership or association with specific ethnic promotion groups; attendance or participation in schools, churches, temples or mosques

generally associated with a national origin group; or a surname associated with a national origin group.

Native Hawaiian/Other Pacific Islander

As defined by OMB's *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity* (1997), a person with origins in any of the original peoples of Hawaii, Guam, Samoa or other Pacific Islands. Under the regulations at 41 CFR part 60-2, Pacific Islanders are combined with Asians. In the 1997 OMB guidance, an Asian is defined as a person having origins in any of the original peoples of the Far East, Southeast Asia, or the Indian subcontinent including, for example, Cambodia, China, India, Japan, Korea, Malaysia, Pakistan, the Philippine Islands, Thailand, and Vietnam.

New Hire

A worker added to an establishment's payroll for the first time. Compare with "Rehire."

Noncompliance

A contractor's failure to adhere to the conditions set out in the contract's equal opportunity clauses and/or the regulations implementing those clauses (41 CFR Chapter 60) and/or failure to correct violations.

Nonfavored Group

The race, ethnic, or gender group(s) with the lower selection rates as compared to the group with the highest selection rate when calculating the impact ratio and/or the level of the statistical disparity. See 41 CFR 60-3.4D.

Normal Business Hours

For purposes of access to a contractor's premises, the hours during which employees to be interviewed are at work, regardless of the time of day or night. Also used to indicate the regular business hours during which Section 503 and Section 4212 AAPs are available for inspection by employees and applicants for employment.

North American Industry Classification System (NAICS)

The North American Industry Classification System (NAICS) is the standardized system used by federal agencies in classifying business establishments for the collection, analysis and publication of statistical data related to the business economy of the U.S. NAICS was developed under the auspices of the Office of Management and Budget (OMB), and adopted in 1997 to replace the Standard Industrial Classification (SIC) system.

Notice of Alleged Noncompliance (15-Day Notice)

A letter from OFCCP informing the contractor that the agency believes the contractor has violated the terms of a Conciliation Agreement and that enforcement proceedings may be initiated unless the contractor demonstrates within 15 calendar days from its receipt of the letter that it has not violated its commitments under the Agreement.

Notice of Results of Investigation (NORI)

A letter from OFCCP notifying the contractor that the agency has found violations of the Executive Order, Section 503, or Section 4212 during a complaint investigation, and inviting the contractor to join the agency in resolving the complaint through conciliation.

Notice of Violation (NOV)

A letter from OFCCP notifying the contractor that the agency has found violations of the Executive Order, Section 503 and/or Section 4212 during a compliance evaluation, the remedies that are required to resolve those violations, and invites conciliation.

O*NET (Occupational Information Network)

An electronic database maintained by the Employment and Training Administration (ETA), U.S. Department of Labor, that classifies occupations in the US economy based on their duties and commonly required qualifications.

Objective Criterion

A selection criterion is objective if it is fixed and measurable, for example, the requirement of a high school degree rather than a “good education”). The central characteristic of an objective criterion is that it can be independently verified, i.e., different people measuring objective criteria will reach the same results. Compare with "Subjective Criterion."

Offsite Review of Records

An analysis and evaluation of the AAP (or any part thereof) and supporting documentation, and other documents related to the contractor’s personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of EO 11246, Section 503 and/or Section 4212. See 41 CFR § 60-1.20(a)(2), 60-250.60(a)(2), 60-300.60(a)(2) and 60-741.60(a)(2).

On-the-Job Training (OJT)

An employer sanctioned training program, usually at the employer's worksite, conducted either under close supervision or with assistance, and designed to teach and qualify an individual to perform a job or element(s) of a job.

Order

Generally, a short-hand term meaning Executive Order 11246, as amended. The term also is used in phrases dealing with decisions in litigation matters (e.g., Final Decision and Order, Court Order).

Organizational Unit

A department, division, branch, section or other organizational entity of a contractor that operates as a single unit under a common head.

Other Protected Veteran

For the purpose of 41 CFR Part 60-250, “other protected veteran” means a person who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized, under laws administered by the Department of Defense. 41 CFR 60-250.2(q)

For the purpose of 41 CFR Part 60-300, “other protected veteran” means a veteran who served on active duty in the U.S. military, ground, naval or air service during a war or in a campaign or expedition for which a campaign badge has been authorized, under the laws administered by the Department of Defense. 41 CFR 60-300.2(p). (Veteran means a person who served in the active military, naval, or air service of the United States, and who was discharged or released therefrom under conditions other than dishonorable. 41 CFR 60-300.2(z).)

Pacific Islander (not Hispanic or Latino)

See "Native Hawaiian/Other Pacific Islander."

Parental Leave

Absence from work by a parent to care for a child.

Pattern or Practice Discrimination

Also known as “systemic discrimination,” this type of discrimination involves statistical and/or other evidence that demonstrates that discrimination is standard operating procedure – the regular rather than the unusual practice. The proof of the pattern or practice supports an inference that any particular employment decision, during the period in which the discriminatory policy was in force, was made in pursuit of that policy or practice.

Perfection (of a Complaint)

Perfection is the initial process used to determine whether OFCCP has jurisdiction over a complaint filed with the agency. Perfection includes assessing whether a complaint is complete, filed within established timeframes, and the allegation(s) fall within the agency's jurisdiction (meaning that the company is a federal contractor or subcontractor and that the allegations assert a violation under the laws enforced by OFCCP). Once a complaint is perfected, it is assigned to a CO for investigation.

Person

Any natural person, corporation, partnership, unincorporated association, state or local government, and any agency, instrumentality, or subdivision of such a government. 41 CFR 60-1.3. The term also includes joint ventures under the regulations implementing VEVRAA (41 CFR 60-250.2(i), 60-300.2(i)) and Section 503 (41 CFR 60-741.2(i)).

Person of Two or More Races (Not Hispanic or Latino)

As defined by the EEOC, for purposes of EEO-1 reports, as any person who identifies with more than one race category.

Personnel Practices

Practices or actions taken by management related to decisions regarding their employees (e.g., hiring, firing, layoff, promotion, transfer, demotion, compensation, salary increase, salary decrease, work assignments, benefits).

Physical & Mental Job Qualification Requirements

Physical and mental standards that an employer requires an employee or applicant to meet to qualify for the job.

Physical or Mental Impairment

Physical or mental impairment means:

- (a) Any physiological disorder, condition, cosmetic disfigurement or anatomical loss affecting one or more body systems such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, immune, circulatory, hemic and lymphatic, skin, and endocrine; or

- (b) Any mental or psychological disorder, such as such as an intellectual disability (formerly termed “mental retardation”), organic brain syndrome, emotional or mental illness and specific learning disabilities.

29 CFR 1630.2(h); see also 41 CFR 60-741.2(o).

Placement

In this Manual, placement is often used in the context of the selection or assignment of individuals in a particular job. Also see “Goals for Supply and Service Contractors, Placement.”

Pre-employment Medical Examination

A procedure or test that seeks information about an individual’s physical or mental impairments or health at the pre-offer stage of employment.

Predetermination Notice (PDN)

A letter in which OFCCP notifies the contractor of its preliminary finding that the contractor has engaged in a systemic discrimination. The PDN states the basis for the preliminary findings and offers the contractor the opportunity to respond.

Pregnancy-Disability Leave

Pregnancy and childbirth-related absence from work by a woman affected by pregnancy, childbirth or related medical conditions. It includes leave prior to childbirth when medically indicated and leave to recover from pregnancy, childbirth or related medical conditions following the birth of a child.

Pregnancy Discrimination

Discrimination based on pregnancy, childbirth, or related medical conditions that constitute unlawful sex discrimination under Title VII and EO 11246. Title VII covers employers with 15 or more employees, including state and local governments. Women who are pregnant or affected by pregnancy-related conditions must be treated in the same manner as other applicants or employees with similar abilities or limitations.

Pretext

Professed reason or motive articulated as a cover for the real (discriminatory) reason or motive.

Prevailing Wage

Under the Davis-Bacon Act (defined above), 40 U.S.C. 3141 *et seq.*, the “prevailing wage” is the combination of the basic hourly rate and any fringe benefit rates listed in a Davis-Bacon wage determination. Applicable fringe benefits include medical, pension, and life insurance coverage, among others. The Secretary, through the Wage and Hour Division, determines Davis-Bacon prevailing wage rates based on the locally prevailing wages and fringe benefits for corresponding work on similar construction, alteration, or repair projects in the area. The resulting wage determination provides the minimum rates for the different job classifications (e.g., laborer, carpenter, electrician) and is included in covered contracts.

Under the Service Contract Act (SCA), 41 U.S.C. 6701 *et seq.*, for service contracts in excess of \$2,500, the required minimum wage rates and fringe benefits for the various classes of service employees are those that the Wage and Hour Division has determined prevail in the locality, or are the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement. The resulting SCA wage determination provides the minimum rates for the different job classifications (e.g. guard, clerk, janitor) and is included in covered service contracts. The fringe benefit requirements (usually “health and welfare,” vacation, and holiday benefits) are separate and in addition to the hourly monetary wage requirement under the SCA. On covered service contracts equal to or less than \$2,500, the federal minimum wage under section 6(a)(1) of the Fair Labor Standards Act applies rather than the wage and fringe benefits rates on the local SCA wage determination.

Prima Facie Case

A legal term that refers to a party’s production of enough evidence to establish a fact or raise a presumption unless disproved or rebutted.

Problem Areas

Aspects of the contractor's employment decisions, policies or practices that appear to raise questions regarding the contractor's compliance with the Executive Order 11246, Section 503 or Section 4212.

Progression Line Charts

Written listings of a contractor's lines of progression. See definition of "Line of Progression."

Prohibited Factor

A factor prohibited by law from being used in making employment decisions. Under Executive Order 11246, as amended, the prohibited factors are race, color, religion, sex and national origin. Under Section 503, the prohibited factor is disability. Under Section 4212, various categories of veterans’ status comprise the prohibited factor.

Promotable Minorities and Women

Minorities and women who are qualified and eligible for promotion based upon legitimate selection criteria.

Promotable or Transferable

In the context of developing data for availability, those employees who are currently employed in a job group or groups that serve or could serve as a source from which selections are or could be made for other job groups.

Promotion

Any personnel action resulting in, for example, movement to a position affording higher pay, greater rank, change in job title, increase in job grade or increase in pay, requiring greater skill or responsibility, or the opportunity to attain such.

Proof of Discrimination

"Proofs" of discrimination are the factual formulations that show discrimination under a particular theory exists. These formulations describe the kinds of facts needed to show a nexus between a particular adverse action or result and a particular prohibited factor. Proof requires evidence; see "Direct Evidence," "Circumstantial Evidence," "Anecdotal Evidence," and "Statistical Evidence."

Protected Group or Category

Applicants and employees protected from discrimination based on their sex, race, national origin, color, religion, disability or status as a protected veteran.

Protected Veteran

Any veteran who is covered by 41 CFR Part 60-250 or 41 CFR Part 60-300. Protected veterans include: armed forces service medal veterans, disabled veterans, other protected veterans, recently separated veterans, special disabled veterans and veterans of the Vietnam era.

Qualified Disabled Veteran

A disabled veteran who has the ability to perform the essential functions of the employment position with or without reasonable accommodation. 41 CFR 60-300.2(o).

Qualified Individual with a Disability

The term “*qualified*,” with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. See 29 CFR 1630.3 for exceptions to this definition. 29 CFR 1630.2(m); see also 41 CFR 60-741.2(t).

Race or Color, Protected Characteristic

EO 11246 and Title VII prohibit employer actions that have the purpose or effect of discriminating against persons on the basis of protected characteristics such as race and color, which include personal characteristics associated with race such as hair texture or certain facial features; skin color and complexion; marriage to or association with a person of a certain race or color; and association with an organization or group that is generally associated with people of a certain color or race.

Reasonable Accommodation (Section 503 and Section 4212)

The term *reasonable accommodation* means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable the contractor's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by the contractor's other similarly situated employees without disabilities.

41 CFR 60-741.2(v)(1); see also 29 CFR 1630.2(o)(1); 41 CFR 60-250.2(t)(1)(definition of reasonable accommodation for “special disabled veterans”); 41 CFR 60-300.2(t)(1)(definition of reasonable accommodation for “disabled veterans”). For examples of reasonable accommodations, see 41 CFR 60-741.2(v)(2), 250.2(t)(2), and 300.2(t)(2).

Reasonable Recruitment Area

The geographical area from which the contractor usually seeks or reasonably could seek workers to fill jobs within a particular job group.

Recall

The process or action by which workers are returned to active employment from layoff.

Recently Separated Veteran

For the purpose of 41 CFR Part 60-300 (which applies to federal contractors with a government contract of \$100,000 or more that was entered into or modified after December 1, 2003), “recently separated veteran” means any veteran during the three-year period beginning on the date of such veteran’s discharge or release from active duty in the U.S. military, ground, naval or air service. 41 CFR 60-300.2(q).

For the purpose of 41 CFR Part 60-250 (which applies to federal contractors with a government contract of \$25,000 or more that was entered into prior to December 1, 2003), “recently separated veteran” means any veteran during the one-year period beginning on the date of such veteran’s discharge or release from active duty. 41 CFR 60-250.2(r).

Recruitment Source

Any person, organization or agency used to refer or provide workers for employment.

“Regarded As” Having a Disability

The ADA and Section 503 prohibit discrimination against individuals on the basis of disability. Disability is defined to include “being regarded as having” a physical or mental impairment that is not transitory (actual or expected duration of 6 months or less) and minor. See 42 USC 12102- 1(C), 3; 29 CFR 1630.2 (g) (iii); see also 29 CFR 1630.15(f). An individual is “regarded as having such an impairment” if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. 29 CFR 1630.2(l)(1). However, an individual must be covered under the first prong (“actual disability”) or second prong (“record of disability”) in order to qualify for a reasonable accommodation. See 29 CFR 1630.2(o)(4).

Regression Analysis

A statistical analysis used to evaluate the interrelated effects of independent variables (such as education, prior experience) on a dependent variable (such as hire, compensation). Regression analyses frequently are a significant element of OFCCP’s proof used in systemic discrimination cases.

Rehire

To reengage a formerly employed worker after a complete break in employment status. Compare with "Recall."

Relevant Labor Area

See the definition of “Labor Area.”

Religious Accommodation

A nondiscrimination obligation of a contractor to accommodate the sincerely held religious observances and practices of its current and prospective employees. Typical religious accommodations include, but are not limited to, permitting the wearing of religious head coverings and other religious dress at the workplace, swapping employee shifts or permitting time off to allow for religious observance and modifying an employee’s work schedule to permit observance of the employee’s Sabbath. Employers do not have to make a religious accommodation that will cause an undue hardship on the conduct of its business. See the definition of “Undue Hardship (Religious Accommodation).”

Request for Proposal (RFP)

An invitation for suppliers or service providers, often through a bidding process, to submit a proposal on a specific project.

Requisite Skills

Those minimum skills needed to perform a job satisfactorily.

Retaliation

Any adverse action against an individual because he or she filed a complaint of discrimination; opposed any act made unlawful under any of the laws enforced by OFCCP; or participated in an investigation, compliance evaluation, hearing or any other activity related to the administration or enforcement of any of the laws enforced by OFCCP.

Right of Response

The contractor's right in an enforcement proceeding to produce a legitimate, nondiscriminatory reason for its actions once OFCCP has made a prima facie showing of discrimination.

Rightful Place

The position, both economically and in terms of employment status (usually job position and seniority), that the victim of discrimination would have held if the discrimination had not occurred. See “Make-Whole Relief.”

Section 503

Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793.

Section 503 Complaint

A complaint alleging a violation of Section 503 or the implementing regulations at 41 CFR Part 60-741.

Section 4212

The Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212).

Section 4212 Complaint

A complaint alleging a violation of VEVRAA or its implementing regulations at 41 CFR Part 60-250 or 60-300.

Seniority

Length of employment as determined by the employer's policies or the applicable collective bargaining agreement. Seniority may be defined in various terms (e.g., company seniority, facility seniority, departmental seniority). Employees may have different types of seniority for different purposes, e.g., job bidding rights governed by department seniority and leave accrual rights governed by company seniority.

Sex Discrimination, Protected Characteristic

EO 11246 and Title VII prohibit employer actions that have the purpose or effect of discriminating against persons on the basis of protected characteristics such as sex, which includes, but is not limited to, pregnancy, childbirth or related medical conditions, connection with an organization or group that is generally associated with people of a certain sex and gender stereotypes.

Shortfall

The difference between the actual number of persons in the nonfavored group that were selected for the employment opportunity at issue (hires, promotions, etc.) and the number expected to have been selected in proportion to their representation in the pool of qualified candidates, absent discrimination. This concept does not generally apply to compensation discrimination cases, which revolve around wage-setting decisions, not decisions involving job opportunities.

Show Cause Notice (SCN)

A letter from OFCCP to the contractor ordering it to provide evidence demonstrating why enforcement proceedings should not be instituted. The Show Cause Notice provides that the contractor must come into compliance within 30 calendar days or OFCCP may recommend the commencement of enforcement proceedings.

Similarly Situated

The determination of which employees are similarly situated is case specific. Relevant factors in determining similarity may include tasks performed, skills, effort, level of responsibility, working conditions, job difficulty, minimum qualifications, or other objective factors. Employees are similarly situated when they are comparable on the factors relevant to the investigation even if they are not comparable on others.

Skill Inventory

A list of people, categorized by their skills, kept by a contractor to encourage maximum use of the skills of applicants or employees.

Solicitation for Subcontractors

The process a prime contractor goes through to request bidders for work on a particular project or projects.

Special Disabled Veteran

Special disabled veteran means:

- i) A veteran who is entitled to compensation (or who, but for the receipt of military retirement pay, would be entitled to compensation) under laws administered by the Department of Veterans Affairs for a disability:
 - (A) Rated at 30 percent or more; or
 - (B) Rated at 10 or 20 percent in the case of a veteran who has been determined under 38 U.S.C. 3106 to have a serious employment handicap; or
- ii) A person who was discharged or released from active duty because of a service-connected disability. 41 CFR 60-250.2(n)(1).

Standard Deviation

As an alternative to probability values, statisticians often express the divergence between actual and expected outcomes in units called standard deviations. The larger the difference in standard deviations, the smaller the probability that the difference is due to random chance factors alone.

Standard Form 100

See the definition of "EEO-1 Report."

Standard Metropolitan Statistical Area (SMSA)

Metropolitan area as set by OMB that refers to a geographical region with a relatively high population density at its core and close economic ties throughout the area.

Statistical Evidence

Mathematical analyses of disparities in selection rates, wages or other effects of employment practices between members of one race, sex, or other group and another comparable group. Statistical evidence may be used, in appropriate circumstances, to show whether a practice or policy has a disparate impact on a particular group, and/or to determine whether a prohibited factor such as race or gender played a role in an employment decision. Statistical evidence is typically required to prove systemic discrimination.

Statistically Significant

The results of statistical analyses (statistical evidence) are “statistically significant” if the probability the results occurred by chance is so small that chance can reasonably be ruled out as the cause. When the difference between actual and expected values is greater than 1.96 standard deviations, the probability the disparity occurred by chance is less than 5%. In employment discrimination cases, courts generally consider a difference of two or more standard deviations to be “statistically significant” and allow a valid statistical inference of discrimination to be drawn.

Subcontract

Any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and employee):³²⁵

- (a) for the purchase, sale or use of personal property or nonpersonal services, which in whole or in part, is necessary to the performance of any one or more government contracts; or
- (b) under which any portion of the contractor's obligation under one or more government contracts is performed, undertaken, or assumed.

Subcontractor

³²⁵ 41 CFR 60-1.3; see also 41 CFR 60-250.2(l); 41 CFR 60-300.2(l); 41 CFR 60-741.2(l).

Any person holding a subcontract (as defined above) and, [for enforcement purposes], any person who has held a subcontract subject to [Executive Order 11246, Section 503, or Section 4212]. 41 CFR 60-1.3; see also 41 CFR 60-250.2(m); 41 CFR 60-300.2(m); 41 CFR 60-741.2(m).

Subjective Criteria

Employment qualifications, selection standards or processes that require judgment in their application, such that different people applying such standards would not necessarily reach the same conclusion. (Whether an applicant is certified to operate a particular machine is objective; whether an applicant had “good machine-handling skills and experience” is subjective.” Compare to "Objective Criteria."

Subletting a Contract

The process of dividing up a contract into smaller parts and letting the work to other contractors.

Substantially Limits

See the definition found at 26 CFR 1630.2.

Support Data

Statistical data, documentation and other materials regarding a contractor’s employment policies, practices and actions used in the development, support and justification of its affirmative action program(s), or used to assess the affirmative action program’s effectiveness.

Systemic Discrimination

A pattern or practice of discrimination or an identified employment practice with a disparate impact. OFCCP defines a systemic discrimination case as meeting one of two criteria: (a) the case addresses a measurable pattern of discrimination (either based on findings from a regression analysis or based on any other appropriate aggregate analysis of data) or (b) the case addresses an identified practice applicable to multiple employees that results in discrimination (such as a practice of steering employees who are members of a protected class toward lowering paying jobs at hire). There is no specific numeric threshold used to define a systemic case.

Termination of Employment

Separation of an employee from the active and inactive payroll.

Terms and Conditions of Employment

This phrase includes all aspects of the employment relationship between an employee and his or her employer including, but not limited to, hiring, compensation, fringe benefits, leave policies, job placement, work environment, work-related rules, work assignments,

training and education, opportunities to serve on committees and decision-making bodies and opportunities for promotion.

Third Party Complaint

A complaint filed by an individual or individuals, on behalf of someone else, either an individual or a group of people. See 41 CFR 60- 250.61(b)(2), 60-300.61(b)(2), and 60-741.61(c)(2).

Title VII of the Civil Rights Act of 1964

This law makes it illegal to discriminate against an applicant or employee on the basis of race, color, religion, national origin or sex. The law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination or participated in an employment discrimination investigation or lawsuit. The law also requires that employers reasonably accommodate applicants' and employees' sincerely held religious practices, unless doing so would impose an undue hardship on the operation of the employer's business. This law is enforced by the EEOC and its principles apply to discrimination cases arising under EO 11246.

Tolling

The suspension of the running of a statute of limitations for equitable reasons. Because the Title VII 180-day limit on filing a charge with the EEOC has been held to be a statute of limitations, there have been numerous court cases discussing tolling of that limit. By comparison, the regulations for OFCCP's three programs provide for the filing of a complaint within 180 calendar days of the alleged violation unless the time for filing is extended by the Director for good cause shown. There is no similar good cause language in Title VII. The good cause authority allows the Director to waive the 180-day limit without raising questions of tolling.

Training Agency

Any person, organization or agency whose purpose is to train workers.

Transfer

Movement (usually lateral) from one position or function to another.

Underutilization

When the percentage of minorities or women employed in a particular job group is less than would be reasonable expected given their availability percentage in that particular job group. See 41 CFR 60-2.10(a)(1).

Undue Hardship (Disability)

“Undue hardship” is the only defense for failing to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability. The employer must demonstrate that the accommodation would cause “significant difficulty or expense” in light of its particular resources and circumstances. 42 U.S.C. 12111(10). Undue hardship refers not only to financial difficulty, but also to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. See 41 CFR 60-250.2(u) and 60-250 Appendix A; 41 CFR 60-300.2(u) and 60-300 Appendix A ; 41 CFR 60-741.2(w) and 60-741 Appendix A. Whether an accommodation would impose an undue hardship requires a case-by-case determination. See 41 CFR 60-741.2(w) for factors to be considered.

Undue Hardship (Religious Accommodation)

An employer is required to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless providing the accommodation would create an undue hardship. The undue hardship defense to providing religious accommodation requires a showing that the proposed accommodation in a particular case poses a “more than de minimis” cost or burden. Costs to be considered include not only direct monetary costs, but also the burden on the conduct of the employer’s business. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees’ job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee’s share of potentially hazardous or burdensome work.

Uniformly Applied

Applying employment criteria and/or processes in the same manner to all similarly situated applicants or employees.

Uniform Guidelines on Employment Selection Procedures (UGESP)

Guidelines developed by the EEOC, Department of Justice, Department of Labor and the Civil Service Commission (now the Office of Personnel Management) to provide a single set of principles that are designed to assist employers, labor organizations, employment agencies and licensing and certification boards to comply with requirements of federal law prohibiting employment practices that discriminate on grounds of race, color, religion, sex and national origin. See 41 CFR Part 60-3. Under Executive Order 11246 UGESP were promulgated as regulations with the force and effect of law.

Union Shop

A factory, business, etc., operating under a collective bargaining agreement between the employer and a labor union that requires that all employees in specific jobs are or become members of the union within a set time frame.

Validation

The demonstration of job-relatedness by showing the relationship between the selection procedure and job performance. To be validated in accordance with UGESP the validation studies must meet the technical standards set out in 41 CFR Part 60-3.

Veteran

For the purpose of 41 CFR Part 60-300, “veteran” means a person who served in the active military, naval, or air service of the United States, and who was discharged or released therefrom under conditions other than dishonorable. 41 CFR 60-300.2(z).

Veterans Benefits and Health Care Improvement Act of 2000

Signed on November 1, 2000, to add “recently separated” veterans and covers veterans separated during a one-year period beginning on the date of the veterans’ discharges or releases from active duty.

Veteran of the Vietnam Era (41 CFR Part 60-250 only)

A person who:

(1) Served on active duty for a period of more than 180 days, and was discharged or released therefrom with other than a dishonorable discharge, if any part of such active duty occurred:

- (i) In the Republic of Vietnam between February 28, 1961, and May 7, 1975; or
- (ii) Between August 5, 1964, and May 7, 1975, in all other cases; or

(2) Was discharged or released from active duty for a service-connected disability if any part of such active duty was performed:

- (i) In the Republic of Vietnam between February 28, 1961, and May 7, 1975; or
- (ii) Between August 5, 1964, and May 7, 1975, in all other cases.

41 CFR 60-250.2(p).

VETS-100 and VETS-100A Reports

The VETS-100 and VETS-100A Reports are to be completed by all non-exempt federal contractors and subcontractors with contracts or subcontracts for the furnishing of supplies and services or for the use of real or personal property. VETS-100 must be completed by contractors with contracts entered into prior to December 1, 2003, for \$25,000 or more, and not modified since to a contract of \$100,000 or more. VETS-100A must be completed by contractors with contracts entered into or modified on or after December 1, 2003, for \$100,000 or more. The Reports require that contractors report annually the numbers of various categories of veterans they employ or have newly hired by hiring location and job category.

VEVRAA

The Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212).

Victim Specific Relief

The same as "Individual Relief." The assessment of make-whole relief for identified victim(s) of discrimination on an individualized basis. This method is generally used to calculate back pay in those individual or small group discrimination cases where the victims of discrimination, and the losses they incurred, can be determined with specificity. *Compare to* "Formula Relief."

Violation

Failure to fulfill a requirement of the Executive Order 11246, Section 503 or Section 4212 or their implementing rules, regulations and orders. The terms violation and deficiency are often used interchangeably. See the definition of "Deficiency."

White

As defined by OMB's *Standards for Maintaining, Collecting, and Presenting Federal Data on Race and Ethnicity* (1997), an individual, not of Hispanic origin, with origins in any of the original peoples of Europe, North Africa or the Middle East.

Work Assignment

Something, such as a task, that is assigned. A position or post of duty to which one is assigned.

Wrongful Discharge

Generally, unlawful employment termination. The phrase "wrongful discharge" is frequently used to refer to exceptions created by the courts in some states to the

employment-at-will doctrine (see above). Courts in such states differ in the circumstances in which they will allow wrongful discharge suits challenging a termination. State law on this issue is not of direct concern to OFCCP. The Executive Order 11246, Section 503, Section 4212 and implementing regulations prohibit termination based on a prohibited factor.

38 U.S.C. 4212

The affirmative action and nondiscrimination provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended. Also referred to as "Section 4212" and "VEVRAA."

GLOSSARY OF ABBREVIATIONS

AA	Affirmative Action
AAP	Affirmative Action Program
ACE	Active Case Enforcement
ACM	Active Case Management
AD	Area Director (formerly AOD – Area Office Director)
ADA	Americans with Disabilities Act
ADAAA	ADA Amendments Act of 2008
ADD	Assistant District Director
ALJ	Administrative Law Judge
AO	Area Office, OFCCP
APA	Administrative Procedure Act
ARB	Administrative Review Board
ASCN	Amended Show Cause Notice
BFOQ	Bona Fide Occupational Qualification
BP	Back Pay
CA	Conciliation Agreement
CBA	Collective Bargaining Agreement
CBO	Community-Based Organization
CD	Consent Decree
CEO	Chief Executive Officer
CFR	Code of Federal Regulations

CMCE	Corporate Management Compliance Evaluation
CMS	Case Management System
CMSA	Consolidated Metropolitan Statistical Area
CO	Compliance Officer (formerly an Equal Opportunity Specialist or EOS)
CSAL	Corporate Scheduling Announcement Letter
D&B	Dun & Bradstreet
DBE	Disadvantaged Business Enterprise
DD	District Director
DHS	Department of Homeland Security
DO	District Office
DOJ	Department of Justice
DOL	Department of Labor
DORO	Division of Regional Operations
DPO	Division of Program Operations
DPPPD	Division of Policy, Planning and Program Development
DRD	Deputy Regional Director
DUNS	Dun and Bradstreet Universal Numbering System
EEDS	Equal Employment Data System
EEO	Equal Employment Opportunity
EEO-1	Standard Form 100 – Employer Information Report
EEOC	Equal Employment Opportunity Commission
EIN	Employer Identification Number
EO	Executive Order

EIS	Executive Information System
ETA	Employment and Training Administration
FAAP	Functional Affirmative Action Program
FCCM	Federal Contract Compliance Manual
FCSS	Federal Contractor Selection System
FEP	Fair Employment Practices Agency
FOIA	Freedom of Information Act
FPDS	Federal Procurement Data System
FR	Federal Register
GFE	Good Faith Efforts
ICE	U.S. Immigration and Customs Enforcement (formerly INS)
ILG	Industry Liaison Group
INS	Immigration and Naturalization Service (predecessor agency to ICE, above)
IRA	Impact Ratio Analysis
IRCA	Immigration Reform and Control Act of 1986
JAAR	Job Area Acceptance Range
JAN	Job Accommodation Network
JRC	Joint Reporting Committee
JVA	Jobs for Veteran Act
LOP	Line of Progression
LVER	Local Veterans' Employment Representative – See VWS
MBE	Minority Business Enterprise
MG	Minority Group

MJL	Mandatory Job Listing
MOU	Memorandum of Understanding
MSA	Metropolitan Statistical Area
MSS	Management Support Staff
NAICS	North American Industrial Classification System (replaced SIC)
NILG	National Industry Liaison Group
NO	National Office (OFCCP)
NOC	Notice of Compliance
NORI	Notice of Results of Investigation
NOV	Notice of Violation
NSOL	National Office Solicitor of Labor
ODEP	Office of Disability Employment Policy
OFCCP	Office of Federal Contract Compliance Programs
OFIS	Office of Federal Contract Compliance Information System
OJT	On-the-Job Training
PDN	Predetermination Notice
RD	Regional Director
RO	Regional Office
RSOL	Regional Solicitor of Labor
S&S	Supply and Service
SAU	Statistical Analysis Unit
SCER	Standard Compliance Evaluation Report (Supply and Service)
SCN	Show Cause Notice

SD	Standard Deviation
SEC. 503	Section 503 of the Rehabilitation Act of 1973 (29 U.S.C. 793), as amended
SES	State Employment Service
SMSA	Standard Metropolitan Statistical Area
SOL	Solicitor of Labor
SSEG	Similarly Situated Employee Group
TERO	Tribal Employment Rights Office
TITLE VI	Title VI of the Civil Rights Act of 1964, as amended
TITLE VII	Title VII of the Civil Rights Act of 1964, as amended
USC	United States Code
UGESP	Uniform Guidelines on Employee Selection Procedures
USERRA	Uniform Services Employment and Reemployment Rights Act
VES	Veterans' Employment Service
VETS	Veterans' Employment and Training Service (DOL)
VEVRAA	Vietnam Era Veterans' Readjustment Assistance Act, as amended
VPSS	Veterans Programs Services Supervisor for EDD
VWS	Veterans Workforce Specialist (formerly EDD's LVER)
WBE	Women's Business Enterprise
WEAL	Women's Equity Action League

STANDARD FORMS LIST

<u>NUMBER</u>	<u>TITLE/EXPLANATION</u>
CC-4	Complaint Form
CC-58	Complaint Report Sheet
CC-58a	Financial Payments Sheet
CC-73	Quality Audit Form for Supply and Service Review
CC-74	Quality Audit Form for Construction Review
CC-75	Quality Audit Form for Complaint Investigation
CC-104	Report of Remedies Agreed to for Identifiable Persons
CC-257	Monthly Employment Utilization Report; an optional document used by construction companies to report monthly hours worked by trade

APPENDIX A1 – A14

**APPENDIX A-1: STANDARD COMPLIANCE EVALUATION REPORT (SCER)
FORM**

Supply and Service Standard Compliance
Evaluation Report (SCER)

U.S. Department of Labor
Office of Federal Contract Compliance Programs

COMPLIANCE EVALUATION SUMMARY																				
1. ESTABLISHMENT/FUNCTIONAL UNIT NAME & ADDRESS CMS Control #				2. PARENT NAME & ADDRESS																
3. SMSA/MSA % Female	% Minor	% Black	% Hisp.	% Asian/PI	% AmInd AINat	4. COMPLAINTS INVESTIGATED DURING REVIEW: <input checked="" type="checkbox"/> =Resolved # _____ <input type="checkbox"/> # _____ <input type="checkbox"/>														
5. CONTRACT COVERAGE:																				
AWARDING AGENCY	IF SUBCONTRACTOR, NAME OF PRIME CONTRACTOR	CONTRACT OR PURCHASE ORDER #	CONTRACT DOLLAR AMOUNT	BEGIN AND END DATES																
6. COMPANY CONTACTS: Name Title Phone																				
Establishment/ Functional Unit	CEO/Dir /Mgr																			
	EEO/AA																			
Corporate	CEO																			
	EEO/AA																			
Outside Representative																				
7. BACKGROUND INFORMATION:																				
Type of Industry:																				
Specific Facility Function:																				
<table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th style="width:20%;">Total # Employees</th> <th style="width:20%;">Total # Female Employees</th> <th style="width:20%;">% Female Employees</th> <th style="width:20%;">Total # Minority Employees</th> <th style="width:20%;">% Minority Employees</th> </tr> </thead> <tbody> <tr> <td> </td> <td> </td> <td> </td> <td> </td> <td> </td> </tr> </tbody> </table>							Total # Employees	Total # Female Employees	% Female Employees	Total # Minority Employees	% Minority Employees									
Total # Employees	Total # Female Employees	% Female Employees	Total # Minority Employees	% Minority Employees																
<table border="1" style="width:100%; border-collapse: collapse;"> <thead> <tr> <th style="width:20%;">Date Scheduling Letter Received by Contractor</th> <th style="width:15%;">AAP Year</th> <th style="width:15%;">Prior Year Data Period</th> <th style="width:15%;">Current Year Data Period (if applicable)</th> <th style="width:10%;">Union</th> <th style="width:15%;">If unionized, % of unionized workforce</th> <th style="width:10%;">NAICS</th> </tr> </thead> <tbody> <tr> <td> </td> <td> </td> <td> </td> <td> </td> <td align="center"><input type="checkbox"/> Y / <input type="checkbox"/> N <input type="checkbox"/></td> <td align="right">%</td> <td> </td> </tr> </tbody> </table>							Date Scheduling Letter Received by Contractor	AAP Year	Prior Year Data Period	Current Year Data Period (if applicable)	Union	If unionized, % of unionized workforce	NAICS					<input type="checkbox"/> Y / <input type="checkbox"/> N <input type="checkbox"/>	%	
Date Scheduling Letter Received by Contractor	AAP Year	Prior Year Data Period	Current Year Data Period (if applicable)	Union	If unionized, % of unionized workforce	NAICS														
				<input type="checkbox"/> Y / <input type="checkbox"/> N <input type="checkbox"/>	%															

CASE SUMMARY AND RECOMMENDATIONS

Provide an assessment of compliance. If there are findings of violation, list all findings (discrimination and/or technical violations) to be included in a Predetermination Notice/Notice of Violation(s). For each one, provide a brief explanation of the supporting evidence, briefly describe conciliation efforts and specify the recommended corrective action(s). If there is no finding of a violation, and a closure letter is to be issued, provide a brief description of the basis for this action. Be sure to indicate all document(s) to be issued to the contractor (e.g., Predetermination Notice, Notice of Violation, Show Cause Notice, Conciliation Agreement, or closure letter). If the length of the Case Summary exceeds a page, include additional sheets as an attachment to the SCER and note the attachment here.

Onsite: Yes No If yes, state reason _____ (e.g., indicator; quality check; etc.).

	COMPLIANCE OFFICER	ASST. DIST. DIR	DIST. DIR./ REG. DIR.
Signature			
Date			

PART A: PREPARATION

I. PAST PROBLEMS / KNOWN COMPLAINTS OR ENFORCEMENT PROCEEDINGS

1. Past Problems. If there were no prior OFCCP compliance reviews or investigations of the contractor, check here and go on to item 2 below. ()

If any problems were identified in any past OFCCP compliance review or complaint investigation of the contractor's establishment under review or other contractor establishments, indicate "Yes" or "No" as applicable for part (a) below, and list the date(s) of the review/investigation and any major problems identified. At the point in this review at which you determine whether a problem has recurred, complete part (b) below.

a. Past Problems? Yes / No Explain if yes and identify source materials.

b. Recurrence? Yes / No Explain if yes.

2. Known Complaints or Enforcement Proceedings. If there are no complaints filed or pending with other agencies, e.g., EEOC, WHD, or OSHA, and no new or ongoing enforcement proceedings by any of these agencies, check here and go on to the next page. ()

If there are any such pending complaints or enforcement proceedings, for each one, list the agency involved, the basis, issue, current status and the area of the contractor's workforce it appears to concern. Add additional sheets as an attachment to the SCER, if needed. If at any point in the review you determine there is a related potential systemic problem, complete part (b) below.

a. Complaints filed.

Agency	Basis	Issue	Status	Job Group/ Department (if available)

b. Potential Discrimination? Yes / No Explain if yes.

PART A: PREPARATION
II. INITIAL REVIEW OF AAP AND SUPPORT DATA SUBMISSIONS

	INCLUDED? Indicate Y/N	ACCEPTABLE? (Text Only) Y/N	If NO, Include in PART A.III	
<i>Example- ORGANIZATIONAL PROFILE</i>	<i>Y</i>	<i>N</i>	<i>See Item 0</i>	
ORGANIZATIONAL PROFILE (Organizational Display or Workforce Analysis) 60-2.11				
JOB GROUP ANALYSIS 60-2.12				
UTILIZATION ANALYSIS				
PLACEMENT OF INCUMBENTS IN JOB GROUPS 60-2.13				
DETERMINING AVAILABILITY 60-2.14				
COMPARISON OF INCUMBENCY TO AVAILABILITY 60-2.15				
PLACEMENT GOALS 60-2.16				
ADDITIONAL REQUIRED ELEMENTS				
DESIGNATION OF RESPONSIBILITY 60-2.17(a)				
IDENTIFICATION OF PROBLEM AREAS 60-2.17(b)				
ACTION-ORIENTED PROGRAMS 60-2.17(c)				
INTERNAL AUDIT AND REPORTING SYSTEMS 60-2.17(d)				
SUPPORT DATA AND PERSONNEL ACTIVITY 60-2.17(b) and 60-3				
	PRIOR YEAR	CURR YEAR (if applic)	ACCEPTABLE? Y/N	IF NO, INCLUDE IN PART A.III
REPORT ON GOALS				
APPLICANT FLOW Internet Applicant <input type="checkbox"/>				
HIRES				
PROMOTIONS (INCLUDING POOL DATA)				
TERMINATIONS (INCLUDING INCUMBENCY DATA)				
LAYOFFS/RECALLS (IF APPLICABLE)				
COMPENSATION DATA (snapshot date (X/X/XX))				

PART A: PREPARATION

II. INITIAL REVIEW OF AAP AND SUPPORT DATA SUBMISSIONS (continued)

SECTION 503 AND VEVRAA	INCLUDED Indicate Y/N	ACCEPTABLE (text only) Indicate Y/N	If NO, include in Part A. III
EEO POLICY STATEMENT 60-250.44(a); 60-300.44(a); 60-741.44(a)			
REVIEW OF PERSONNEL PROCESSES 60-250.44(b); 60-300.44(b); 60-741.44(b)			
REVIEW OF PHYSICAL AND MENTAL JOB QUALIFICATIONS 60-250.44(c); 60-300.44(c); 60-741.44(c)			
REASONABLE ACCOMMODATION 60-250.44(d); 60-300.44(d); 60-741.44(d)			
HARASSMENT PREVENTION 60-250.44(e); 60-300.44(e); 60-741.44(e)			
EXTERNAL DISSEMINATION OF EEO POLICY 60-250.44(f); 60-300.44(f); 60-741.44(f)			
INTERNAL DISSEMINATION OF EEO POLICY 60-250.44(g); 60-300.44(g); 60-741.44(g)			
AUDIT AND REPORTING SYSTEM 60-250.44(h); 60-300.44(h); 60-741.44(h)			
ESTABLISHMENT OF RESPONSIBILITY 60-250.44(i); 60-300.44(i); 60-741.44(i)			
TRAINING TO ENSURE AAP IMPLEMENTATION 60-250.44(j); 60-300.44(j); 60-741.44(j)			

PART A: PREPARATION

III. AAP AND SUPPORT DATA SUBMISSION PROBLEMS

PROBLEM AREAS: () EO 11246 () SECTION 503 () VEVRAA

Summary of AAP Support Data Submission Problems and Actions Taken and/or Plan to Resolve (if the action is to take place during or after onsite). If investigated onsite, provide an explanation of the findings, whether the problem was resolved and what remedial action(s) was taken. (Add additional sheets as an attachment to the SCER, if needed).

Continued

#	AAP AND SUPPORT DATA PROBLEMS	Onsite <input checked="" type="checkbox"/>
0	Example: PROBLEM: Contractor’s Workforce Analysis (WFA) failed to reflect Lines of Progression. ACTION TAKEN: CO plans to provide compliance assistance to contractor on developing a WFA during onsite. FINDINGS: On X day, determined contractor did not understand how to include Lines of Progression in the WFA. RESOLUTION: On X day, CO provided contractor with compliance assistance on developing a WFA. On X date, contractor resubmitted WFA that included Lines of Progression.	<input checked="" type="checkbox"/>
1	PROBLEM: ACTION TAKEN: FINDINGS: RESOLUTION:	<input type="checkbox"/>
2		<input type="checkbox"/>
3		<input type="checkbox"/>
4		<input type="checkbox"/>
5		<input type="checkbox"/>
6		<input type="checkbox"/>

PART A: PREPARATION

IV. EEO TREND ANALYSIS

Continued

EEO TREND ANALYSIS RESULTS

1. **Trends.** Examine long-term and short-term trends of minority and female representation in: (a) the total workforce, (b) white-collar EEO categories, and (c) blue-collar EEO categories. If there are any negative trends, discuss below. If there are no negative trends, check here and go on to number 2. ()

2. **Job Category Patterns.** Determine if there are any negative trends of minority or female representation by EEO job category. If there were negative trends, explain below. If there are no negative trends check here and go on to number 3. ()

3. **Particular Group.** Determine if there are any substantial disparities in the trends of a particular minority group or of men or women of a particular minority group, either in the workforce as a whole or in specific job groups? If disparities exist, explain them below. If there are no negative trends check here () and go on the next page.

PART B: AFFIRMATIVE ACTION

I. EVALUATION OF GOOD FAITH EFFORTS - EO 11246

Identify goal areas where goals were established but not met. For each goal area, identify the job group, describe whether goals were for minorities, females or both, prior and current year, and identify the expected goal and actual goal. If there is a difference between the expected and actual goals, provide the contractor's explanation for the difference and pertinent AAP commitments. Identify additional information that will be requested, and whether the issue needs to be investigated onsite. Provide an explanation of any findings, indicating whether the problem was resolved, or not, and what remedial action(s) was taken.

Continued

#	GOAL AREA PROBLEMS	On-site <input checked="" type="checkbox"/>
0	<p><i>Example:</i> GOAL AREA (PY): Operatives (Minority). Expected #/Actual # = 20/2 EXPLANATION/COMMITMENTS: Very few minorities applied. ADDITIONAL INFO: List of recruitment sources. FINDINGS: On X day, CO reviewed and contacted the contractor's recruitment sources. The CO determined that the contractor failed to provide the recruitment sources with the vacancy information for this job group. RESOLUTION: Not resolved, see Part C.</p>	<input checked="" type="checkbox"/>
1	<p>GOAL AREA (PY/CY): EXPLANATION/COMMITMENTS: ADDITIONAL INFO: FINDINGS: RESOLUTION:</p>	<input type="checkbox"/>
2		<input type="checkbox"/>
3		<input type="checkbox"/>
4		<input type="checkbox"/>
5		<input type="checkbox"/>
6		<input type="checkbox"/>

PART B: AFFIRMATIVE ACTION

II. OTHER PROBLEMS FOR INVESTIGATION

Identify any other problems that require additional information and/or require an onsite review. Provide an explanation of any findings, indicating whether the problem was resolved, or not, and what remedial action(s) was taken.

Continued

#	PROBLEM AREAS	On-site <input checked="" type="checkbox"/>
0	<p><i>Example:</i> PROBLEM AREA: Minority employees are concentrated in laborer positions in the receiving department, yet under-represented in operative positions in the same department. Note: The job group analysis shows that laborers are the primary feeder job for operative positions. ADDITIONAL INFO: Request position descriptions, job postings, and bid lists for opportunities in the operative positions. Interview laborers, operatives and selecting officials in the receiving department. FINDINGS: Promotion issue identified in the movement of minority employees from laborer positions to operative positions. RESOLUTION: See Part C.</p>	<input type="checkbox"/>
1	<p>PROBLEM AREA: ADDITIONAL INFO: FINDINGS: RESOLUTION:</p>	<input type="checkbox"/>
2		<input type="checkbox"/>
3		<input type="checkbox"/>
4		<input type="checkbox"/>
5		<input type="checkbox"/>

PART B: AFFIRMATIVE ACTION

III. IMPLEMENTATION OF SEX DISCRIMINATION GUIDELINES, SEX DISCRIMINATION PROVISIONS OF PART 60-1, AND THE GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION AND NATIONAL ORIGIN (onsite review only)

During the onsite review, verify the contractor’s implementation of the sex discrimination provisions at 41 CFR Parts 60-1 and 60-20, and the Guidelines on Discrimination Because of Religion and National Origin at 41 CFR 60-50. If the contractor is in compliance, describe below how this determination was made (e.g., reference documentation and other evidence that was reviewed and describe statements made during interviews). If not, explain the problem, whether it has been resolved, and if so, how. If you identify a potential discrimination problem, include the issue in **Part C – Problems Identified**.

Continued

SEX DISCRIMINATION GUIDELINES, 41 CFR PART 60-20 VIOLATION? YES / NO EXPLAIN.
<p><u>Job Policies and Practices (Pregnancy)</u></p> <p>1.a. Contractor does/does not treat leave for pregnancy and pregnancy-related conditions the same as leave for disabilities related to medical conditions. Describe the policy related to leave for pregnancy, childbirth, and related medical conditions and how it is implemented. The CO must examine whether the contractor provides job-guaranteed medical leave, including paid sick leave, for women’s pregnancy, childbirth, and related medical conditions on the same terms that medical or sick leave is provided for medical conditions that are similar in their effect on employees’ ability to work.</p> <p>1.b. The Contractor does/does not have employment policies or practices under which insufficient or no medical or family leave is available. The CO must examine whether such policies or practices have an adverse impact on the basis of sex and if so, whether the contractor has shown that such policies or practices are job-related and consistent with business necessity.</p>
<p><u>Seniority System</u></p> <p>Seniority system does/does not discriminate based on sex. Explain.</p>
<p><u>Discriminatory Compensation</u></p> <p>Compensation is/is not related to or based on the sex of the employee. Explain.</p>

GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION OR NATIONAL ORIGIN, 41 CFR PART 60-50 VIOLATION? YES/ NO EXPLAIN.

60-50.2 Equal Employment and Anti-Harassment Policies. Outreach and Positive Recruitment.

1. Contractor does/does not have a policy prohibiting discrimination and harassment on the basis of religion or national origin?

2. Description of outreach efforts:

60-50.3 Accommodations to Religious Observance and Practice.

1. Contractor does/does not have a policy for ensuring accommodation for religious observance and practice?

2. If "Yes," how is it implemented?

PART B: AFFIRMATIVE ACTION

IV. IMPLEMENTATION OF SECTION 503 (DISABILITY) AND VEVRAA (VETERANS)

Continued

REQUIREMENTS	Did the contractor comply with the following requirements? If “Yes,” indicate “Y” for <i>In Compliance</i> , and explain how this was confirmed. If “No,” indicate “N” for <i>Not In Compliance</i> , and explain the problem, whether it was resolved, and if resolved, indicate how. Indicate whether the problem was resolved by placing a “Y” or “N” for <i>Resolved</i> . If potential discrimination is identified, include in Part C – Compliance Evaluation Findings .
AAP AND SUPPORT DATA SUBMISSIONS (items listed in PART A.II above)	IN COMPLIANCE? (Y/N) PROBLEM: RESOLVED? (Y/N)
AVAILABILITY OF AAPs FOR INSPECTION 60-250.41, 60-300.41, 60-741.41	IN COMPLIANCE? (Y/N) PROBLEM: RESOLVED? (Y/N)
INVITATION TO SELF-IDENTIFY 60-250.42, 60-300.42, 60-741.42	IN COMPLIANCE? (Y/N) PROBLEM: RESOLVED? (Y/N)
DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS 60-250.23, 60-300.23, 60-741.23	IN COMPLIANCE? (Y/N) PROBLEM: RESOLVED? (Y/N)
CONFIDENTIALITY REQUIREMENT 60-250.23(d), 60-300.23(d), 60-741.23(d)	IN COMPLIANCE? (Y/N) PROBLEM: RESOLVED? (Y/N)

PART B: AFFIRMATIVE ACTION

V. TECHNICAL REQUIREMENTS: EO 11246, SECTION 503, VEVRAA and EO 13496

Continued

REQUIREMENTS
Did the contractor comply with the following requirements (Yes/No)? If “Yes,” indicate how this was confirmed. If “No,” explain the problem, whether it was resolved, and if resolved, indicate how. If a technical requirement is not resolved, it must be included in Part C – Problems Identified and Part F – Summary of Findings.
Applicable under EO 11246, Section 503, and VEVRAA.
INCLUDED EO CLAUSE IN SUBCONTRACTS AND PURCHASE ORDERS (60- 1.4, 60-250.5, 60-300.5, 60-741.5)
POSTED NOTICES OF ITS OBLIGATIONS AND EEO POSTERS IN CONSPICUOUS PLACES (60- 1.4, 60-250.5, 60-300.5, 60-741.5)
NOTIFIED PARTIES WITH WHICH IT HAS A CBA OF ITS EEO OBLIGATIONS (60- 1.4, 60-250.5, 60-300.5, 60-741.5)
(CORPORATE MANAGEMENT EVALUATION ONLY) DEVELOPED AND MAINTAINED AN AAP AT EACH ESTABLISHMENT (60-2.1)
WRITTEN POLICY(IES) PROHIBITING DISCRIMINATION AND HARASSMENT ON THE BASIS OF RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, DISABILITY AND VETERAN STATUS (60-1; 60-1.4; 60-20.3(A); 60-50; 60-250.44; 60-300.44; and 60-741.44)

Applicable under EO 11246 only.
FILED CURRENT EEO-1 REPORT (60-1.7)
INCLUDED EEO LANGUAGE IN JOB ADVERTISEMENTS (60-1.4)
Applicable under Section 503 and VEVRAA only
PROVIDED NOTICE OF THE AVAILABILITY OF REASONABLE ACCOMODATION TO ENSURE ACCESS TO ONLINE APPLICATION SYSTEM (60-250.44(d); 60-300.44(d); 60-741.44(d))
Applicable under VEVRAA only.
FILED CURRENT VETS 100A (OR VETS 100, IF APPLICABLE) (60-250.60(c), 60-300.60(c))
LISTED JOB OPENINGS WITH EMPLOYMENT SERVICE DELIVERY SYSTEM (60-250.5(a), 60-300.5(a))
Applicable under EO 13496 only.
POSTED NOTICE OF EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT (Required poster and electronic posting, if applicable) (29 CFR 471.2)
INCLUDED NOTICE OF EO 13496 OBLIGATIONS IN SUBCONTRACTS (29 CFR 471, Subpart A, app. A)

PART C: PROBLEMS IDENTIFIED

Continued

Identify any problems found during the compliance evaluation. Include a discussion of the nature of the problem, relevant evidence reviewed, actions (if any) taken to resolve the problem, and whether and how the problem was resolved. Be sure to also include any findings of violation in the next section, **Part F - Summary of Findings**.

SUMMARY OF PROBLEMS, ACTIONS TAKEN AND RESOLUTION

(Add additional sheets as an attachment to the SCER, if needed)

***EXAMPLE:** The impact ratio analysis showed an adverse impact ratio(0 female hires) in the craft workers job group and a shortfall of 2. None of the 10 women who applied was hired; in contrast, 8 of the 20 men who applied were hired. The difference in selection rates is statistically significant to the level of 2.34 standard deviations. Action taken: Requested applicant and hire logs, applications, selection criteria, and position descriptions during the desk audit. Onsite observed the craft worker jobs, interviewed the selecting officials, craft worker supervisors, and individuals in the positions as well as the individuals hired. Offsite analyzed the hiring process, comparing the applications of those selected and not selected to the selection criteria; also interviewed applicants who were not selected. Of the 10 women who applied, all met the stated minimum criteria (see analysis worksheet A-1, attached); 6 were never contacted by the contractor for an interview and the 4 that were interviewed were asked if they had plans to start a family. Also interviewed the males who were not selected; of the 12 men who were not selected, all were interviewed, none were asked about their plans to begin a family. (Interview statements are found at tab A-3). A predetermination notice was prepared and sent to the contractor that detailed the preliminary findings of the investigation. The contractor did not rebut the preliminary findings; a Notice of Violations was issued followed recommending corrective actions and requiring resolution in a conciliation agreement that included make-whole relief for the 10 women who applied. Following negotiations, the contractor signed a conciliation agreement. Additional details are found in Part F – Summary of Findings.*

1	
----------	--

2	
----------	--

3	
---	--

PART D: CORPORATE MANAGEMENT EVALUATION (CMCE) NARRATIVE

<p>When conducting a CMCE, this section of the SCER must be completed in addition to the Case Summary and Recommendations (SCER pg 2). 41 CFR Section 60-2.30 is specifically applicable to CMCEs. Parts A, B, C and F of the SCER must also be completed, as appropriate to the nature and scope of the review performed. Add additional sheets as an attachment, if needed.</p> <p>Note: “protected group member” as used below refers to minorities, women, protected veterans and individuals with disabilities.</p>	
<u>Introduction:</u>	Describe the corporate background, structure, observations concerning corporate culture and values. Also describe any previous OFCCP reviews/complaints, or complaints filed with other agencies, that specifically address management jobs or “glass ceiling” issues.
<u>Corporate AAP:</u>	What positions at lower-level establishments are rolled-up into the Corporate AAP?
<u>Scope:</u>	Did the review cover only corporate headquarters or was it extended to cover one or more intermediate headquarters or lower-level establishments?
<u>Focus Level and Areas:</u>	Describe the company's pay and management structure. For each protected group (women, minorities, individuals with disabilities, and protected veterans), does the representation of protected group members decline at a certain pay or grade level? Are they concentrated in certain functional areas? Are those areas staff or line management?
<u>Outreach Efforts:</u>	To what extent does the company already have outreach, training and development programs designed to increase opportunities for protected group members entry into mid- and senior level corporate management positions? Describe any such programs and what results they have yielded to date.

<p><u>Jobs Filled at and above the Focus Level:</u></p>	<p>During the review period, what jobs have been filled at the mid- and senior corporate management levels? How were they filled (hire, promotion, transfer)? Describe external and internal opportunities.</p>
<p><u>Internal Development - Specific Programs:</u></p>	<p>Does the company have development programs/opportunities in the following areas and, if so, describe them and protected group member participation in them: 1) Succession and Related Planning; 2) Performance Appraisals; 3) Visibility (Special Projects/Task Forces; Committees; Special Assistants/Executive Assistants); 4) Management Training and Executive Development Programs; and 5) Mentoring and Networking. Identify whether any of these programs/opportunities are designed for a particular group.</p>
<p><u>Total Compensation:</u></p>	<p>Describe the compensation system including any findings with regard to 1) Bonuses; 2) Stock; 3) Perquisites; 4) Award and Honor Programs.</p>
<p><u>Terminations:</u></p>	<p>Have there been any terminations among the mid- and senior level corporate management? What are the termination policies and practices? Are they evenhandedly applied?</p>
<p><u>Conclusions:</u></p>	<p>Were any problems found? What are the reason(s) for them?</p>
<p><u>Resolution:</u></p>	<p>What commitments (whether remedial or improved good faith efforts) has the corporation made to ensure that protected group members have an equal opportunity to advance to mid- and senior level corporate management positions?</p>

**PART E: COMPLIANCE CHECK CONTROL SHEET
(TO BE INSERTED BY THE CO)**

PART F: SUMMARY OF FINDINGS
(Provide a detailed narrative of the evaluation findings.)

APPENDIX A-2: STANDARD COMPLIANCE EVALUATION REPORT (SCER) INSTRUCTIONS

OVERALL SCER STRUCTURE

This SCER is used to document the results of a compliance evaluation, including the findings of the desk audit review of the contractor's Affirmative Action Programs (AAP). It consists of a Compliance Evaluation Summary and six parts: Part A: Preparation; Part B: Affirmative Action; Part C: Problems Identified; Part D: Corporate Management Compliance Evaluation (CMCE) Narrative; Part E: Compliance Check Control Sheet; and Part F: Summary of Findings (Internal Document).

How much of the SCER is completed during each particular desk audit or onsite review or both will depend on the type of evaluation being performed, the extent of investigation required, and the data submitted by the contractor. It is important to remember that throughout the compliance evaluation you may obtain additional data and information that must be analyzed and noted on the SCER before you make a finding.

Each part of the SCER provides space for the compliance officer (CO) to enter a narrative describing any problems identified, action(s) taken to resolve the problems, any finding(s) of violation, the evidence examined and the basis for the finding(s), and recommended corrective action.

The specific parts of the SCER are:

COMPLIANCE EVALUATION SUMMARY

- Page 1. Background Information
- Page 2. Case Summary and Recommendations

PART A: PREPARATION

- I. Past Problems/Known Complaints or Enforcement Proceedings
- II. Initial Review of AAP and Support Data Submissions
- III. AAP and Support Data Submission Problems
- IV. EEO Trend Analysis

PART B: AFFIRMATIVE ACTION

- I. Evaluation of Good Faith Efforts – EO 11246
- II. Other Problems for Investigation
- III. Implementation of Sex Discrimination Provisions of Parts 60-1 and 60-20, and Guidelines on Discrimination Because of Religion and National Origin
- IV. Implementation of Section 503 and VEVRAA
- V. Technical Requirements: Executive Order 11246, Section 503, VEVRAA and Executive Order 13496

PART C: PROBLEMS IDENTIFIED

PART D: CMCE NARRATIVE

PART E: COMPLIANCE CHECK CONTROL SHEET (to be inserted)

PART F: SUMMARY OF FINDINGS (INTERNAL DOCUMENT)

INSTRUCTIONS

At the top of each page described below is a “continued” box that may be checked to indicate additional pages have been inserted for the section.

COMPLIANCE EVALUATION SUMMARY

PAGE 1: INTRODUCTION

Item 1 – Establishment Name, Address and CMS Control #: Enter the name and address of the establishment or functional unit being reviewed. Also enter the CMS Control number assigned to this review.

Item 2 – Parent Name and Address: If the establishment or functional unit being reviewed is part of a larger firm, enter the name and address of the parent firm.

Item 3 – SMSA/MSA: Enter the name of the Standard Metropolitan Statistical Area (SMSA) and Metropolitan Statistical Area (MSA) in which the establishment or functional unit is located or, if it is not in an SMSA and MSA, enter the name of the appropriate labor area in which it is located. Then enter the percent of the labor force within the named geographic area that is female and the percent that is minority (in the aggregate and by each minority group).

Item 4 – Complaints Investigated During Review: Enter the complaint number of each complaint (if any) you plan to investigate as part of the compliance evaluation. At the end of the evaluation, check [✓] those complaints that have been resolved. If, during the course of a compliance evaluation, a complaint arises and is investigated, that information will be noted here.

Item 5 – Contract Coverage: Enter the following items: awarding agency; prime contractor if evaluation is being conducted of a subcontractor; the contract or purchase order number; dollar amount of the contract; and beginning and ending dates (or indicate if contract is indefinite). There are spaces for at least three contracts. More may be referenced if necessary.

Item 6 – Company Contacts and Outside Representation: List the name, title and phone number of the corporate and establishment Chief Executive Officer (CEO) (or other

highest ranking executive), and the corporate and establishment contact persons for Equal Employment Opportunity and Affirmative Action (EEO and AA) matters. Also list the name and phone number of the outside representative (if applicable).

Item 7 – Background Information: To the degree known, this will include, but not be limited to:

- Type of Industry. (Example: Industry- construction materials.)
- Specific facility function. (Example: manufacturing A-frames.)
- Total Number of Employees at the Establishment or covered in the Functional Unit
- Total Number and Percentage of Female Employees
- Total Number and Percentage of Minority Employees
- Date Scheduling Letter was Received by Contractor
- AAP Year
- Prior AAP Year Data Period and
- Current AAP Year Data Period (if applicable)
- Union – indicate whether the facility has a union (Y/N)
- Percent of Unionized Workforce
- NAICS

PAGE 2: CASE SUMMARY AND RECOMMENDATIONS

After the evaluation has been completed, provide a brief summary of the findings (as contained in SCER Part F: Summary of Findings), including all unresolved technical and discrimination violations, and the recommendations for corrective action. For findings of violation, briefly explain the basis (evidence and analysis) for the violation and indicate the recommended appropriate corrective action and the documents that will be prepared (e.g., Notice of Violations, and Conciliation Agreement). If there is no finding of a violation and a closure letter is to be issued, provide a brief description of the basis for this recommended action. Because the Case Summary may exceed a single page, it may be drafted separately and included as an attachment to the SCER. This will be noted on the Case Summary SCER page.

Onsite Box: The CO will indicate whether an onsite occurred and, if so, the reason for the onsite.

Signature Blocks: The CO must sign and date the report in the space provided. Upon approval of the report, the Assistant District Director and District Director must also sign and date it.

PART A: PREPARATION

I. PAST PROBLEMS/KNOWN COMPLAINTS OR ENFORCEMENT PROCEEDINGS

1. **PAST PROBLEMS:** Determine whether this establishment or functional unit has been subject to past compliance evaluations or OFCCP complaint investigations. If there have been no prior evaluations or complaint investigations, check the box at the top of the page and skip to item 2 (Known Complaints or Enforcement Proceedings). If major problems were identified in previous evaluations or investigations, attach a copy of the applicable closure document. In addition, complete this Part with the following information:
 - a. **Past Problems** – Give the date of any past compliance evaluation or complaint investigation and list any major problems identified (e.g., recordkeeping, etc.).
 - b. **Recurrence** - At whatever point in the evaluation you have evidence that a past problem has recurred, describe the problem and evidence of recurrence. If you find that it did not recur, note “no” in this space.
2. **KNOWN COMPLAINTS/ENFORCEMENT PROCEEDINGS:** Review responses received from other agencies on any complaints filed, or ongoing enforcement proceedings against this establishment. If there are no such pending complaints or ongoing enforcement proceedings, state this and no further entries are needed in this part. If there are such complaints or proceedings, complete this Part as follows:
 - a. For each complaint or enforcement proceeding, indicate with what agency it was filed, its basis (including whether it is an individual or class complaint), issue, current status and the part of the workforce or establishment department it appears to concern (e.g., clerical, professional, entry-level blue-collar, etc.).
 - b. **Potential Systemic Issues** – As you review the responses from the agencies, be alert for any indications of potential systemic discrimination problems that you will investigate. Note those here.

II. INITIAL REVIEW OF AAP AND SUPPORTING DATA SUBMISSIONS

Complete this section once you have received and reviewed the contractor’s initial AAP and supporting data submission. Complete this section as follows:

Included: Review the Executive Order AAP and supporting data, and the Section 503 and VEVRAA AAP(s) to ensure that all required elements are present (complete). Beside each item, enter a “Y” for “yes” if it is included, or an “N” for “no” if it is

missing. If an element is missing, so indicate in the last column and include in Part A.III of the SCER.

Acceptable: Beside each listed element, enter a “Y” or “N” to indicate whether it is acceptable. If any element is not acceptable, list it in Part A. III of the SCER and describe the specific problem and actions taken. “Text only” refers to the desk audit review of the AAP contents for acceptability.

Prior year (PY) and current year (CY): Review the Executive Order supporting data to ensure that PY and CY, (if applicable), data was received. Enter a “Y” or “N” to indicate whether the items were received. If the contractor is not six months or more into its current AAP year, leave the CY column blank.

III. AAP AND SUPPORTING DATA SUBMISSION PROBLEMS

At the top of the page, check whether the page concerns the Executive Order AAP and supporting data, the Section 503 and VEVRAA AAP(s), or both. The CO must provide a detailed explanation of each AAP and support data problem. Each problem area must be described separately. If the problem is not resolved at the desk audit and onsite verification of compliance is necessary, the onsite box must be checked. The AAP and Supporting Data Problems description should include:

Problem Area: Provide a brief description of the identified problem.

Action Taken: The steps that were taken to resolve the problem or the steps that will be taken (Plan to Resolve) if the action is to take place during or after an onsite review.

Findings: Indicate whether problems were identified based on an offsite analysis or whether an onsite review was conducted. Note any finding(s) and briefly describe the basis for the finding(s).

Resolution: If the problem is resolved, explain how it was resolved. If the problem is not resolved, the issue must be included in Part C of the SCER.

IV. EEO TREND ANALYSIS

The EEO Trend Analysis must be used to examine employment trends and patterns in the contractor’s workforce. Specifically, the trend analysis identifies underrepresentations and concentrations of employees by EEO-1 category. Provide a narrative of the results of the EEO trend analysis as follows:

1. *Trends*

Total Workforce: Over the long – term, has the contractor’s overall workforce been relatively stable or has it been expanding or contracting? If so, how

substantial has the change been? Is the change primarily, or notably, in particular categories? What has the change been in the representation throughout the overall workforce?

Address the same questions as above concerning short-term total workforce trends.

White-Collar: Over the long and short term, what has the change been in the white-collar workforce? Have there been notable gains or losses in particular categories?

Blue-Collar: Over the long and short term, what have the changes been in the blue-collar workforce? Have there been notable gains or losses in particular categories?

2. *Job Category Patterns*: Are there any EEO-1 job categories in which a particular group (e.g., whites, females, Asians, etc.) has been persistently concentrated? Are there other categories in which particular groups appear to be substantially underrepresented?
3. *Particular Groups*: Identify any substantial disparity in the representation of a particular racial/ethnic group or of men or women of a particular minority group. Is any such disparity present either in the workforce as a whole or in certain job categories?

PART B: AFFIRMATIVE ACTION

I. EVALUATION OF GOOD FAITH EFFORTS – EO 11246

Identify goal areas where goals were established but not met. For each goal area that was not met include the following:

Goal Area: Identify job group; indicate whether goals were for minorities, females, or both; identify whether the goals were for the prior (PY), the current year (CY) or both; and identify the expected goal and actual goal.

Explanation and Commitments: If there is a difference between the expected and actual goals, provide the contractor's explanation for the difference and pertinent AAP commitments.

Additional Information: Note any information that will be requested. If an onsite is needed to obtain the information or to address the problem, check the onsite box.

Findings: Indicate whether problems were identified based on an offsite analysis or whether an onsite review was conducted. Note any finding(s) and briefly describe the basis for the finding(s).

Resolution: If the problem is resolved, explain how it was resolved. If the problem is not resolved, the issue must be included in Part C of the SCER.

II. OTHER PROBLEMS FOR INVESTIGATION

Indicate other problems identified as a result of the offsite analyses conducted as a part of the compliance evaluation. For each identified problem include the following:

Problem Area: Provide a brief description of the identified problem.

Additional Information: Note any information that will be requested. If an onsite is needed to obtain the information or to address the problem, check the onsite box.

Findings: Indicate whether problems were identified based on an offsite analysis or whether an onsite review was conducted. Note any finding(s) and briefly describe the basis for the finding(s).

Resolution: If the problem is resolved, explain how it was resolved. If the problem is not resolved, the issue must be included in Part C of the SCER.

III. IMPLEMENTATION OF SEX DISCRIMINATION PROVISIONS OF PARTS 60-1 and 60-20, AND GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION AND NATIONAL ORIGIN

During the onsite review verify the contractor's implementation of the Sex Discrimination Guidelines and the Guidelines on Discrimination Because of Religion and National Origin. For each of the specified elements, indicate what action was taken by the contractor and how this was evidenced (e.g., identify or summarize the documentation and interview statements that are responsive), and whether any problems exist. If problems exist, indicate how the problems were resolved. If there is a potential finding of discrimination, the information must be included in Part C.

IV. IMPLEMENTATION OF SECTION 503 AND VEVRAA

During the onsite review evaluate the contractor's efforts toward implementing the listed elements of its Section 503 and VEVRAA AAP(s), including such issues as providing an accessible online application process, disability-related questions, use of medical examinations, and confidentiality of records. For each of these elements indicate "Y" or "N" whether the contractor complied with the requirement and how this was evidenced (e.g., identify/summarize the documentation and/or interview statements that are responsive) and whether any problems exist, and if resolved, check "Y." If problems exist, and are unresolved, indicate "N" for not "Resolved." If "N" is indicated, there is a potential finding of discrimination that must be included in Part C of the SCER.

V. TECHNICAL REQUIREMENTS: EO 11246, SECTION 503 AND EO 13496

During the onsite review evaluate whether the listed technical requirements under EO 11246, Section 503 and VEVRAA, and EO 13496 have been met. For each of these elements, indicate whether the action was taken by the contractor and how this was evidenced (e.g., identify or summarize the CO's observation, review of the documentation and interview statements that are responsive), and whether any problems exist. If problems exist, indicate how the problems were resolved. If any technical requirements are not met despite attempts to resolve the problem, include the technical violation requiring corrective action in Part C.

PART C: PROBLEMS IDENTIFIED

Record all identified problems or areas of discrimination that have been resolved, or that require corrective action in order to be resolved. Include a description of the problem or discrimination identified, actions taken to resolve the problem (if any), and whether the problem was resolved. If the problem was not resolved and will require corrective action, the problem must be included in Part F – Summary of Findings.

PART D: CMCE NARRATIVE

When conducting a Corporate Management Compliance Evaluation, or CMCE, this form must be filled out in addition to completing all other parts of the SCER. Supplement the Case Summary and Recommendations (SCER page 2) with findings specific to a CMCE. For additional information regarding CMCEs, see Chapter 4 of the Federal Contract Compliance Manual.

PART E: COMPLIANCE CHECK CONTROL SHEET (to be inserted)

PART F: SUMMARY OF FINDINGS (INTERNAL DOCUMENT)

APPENDIX A-3: STANDARD COMPLIANCE EVALUATION REPORT

U.S. Department of Labor
Office of Federal Contract Compliance Programs

STANDARD COMPLIANCE EVALUATION REPORT
(CONSTRUCTION)

Contractor's Name: _____

Address: _____

SMSA/EA _____

NAICS CODE: _____

Telephone: _____

Contact Person and Title: _____

Does the Contractor have a parent company: Yes No

If yes, provide the name and contact information for the point of contact for the parent company:

Date of Last Review: _____

Closing Document: _____

This Review
Period:

This Review
Date:

EOS Number:

I. BACKGROUND INFORMATION

1. Describe any information regarding the contractor received from EEOC, community organizations, and other groups and organizations.

B. Employee Utilization (Determine through payroll review and supervisor/employee interviews).

1. Are any of the contractor's employees members of a union?

YES NO

2. If YES, indicate by trade the name of the union and the local number.

3. Show total overtime hours worked by minorities and women by trade.

<u>Trade</u>	<u>Total Hours</u>	<u>Minority Hours</u>	<u>Female Hours</u>
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

4. Is overtime worked in each trade distributed equitably among all employees?

5. Is the contractor engaged in both residential and commercial construction? YES NO

a. If "YES," are there wage differentials between the two types of construction? YES NO

State amounts _____

b. Are minorities and women assigned to both types of projects?

6. Show number of hours worked on each type of project by minorities and women.

	<u>Commercial</u>	<u>Residential</u>
Minorities	_____	_____
Women	_____	_____

7. Show total number of hours worked on each type of project.

Commercial _____ Residential _____

8. Do the payroll records and employee interviews reflect substantially consistent utilization of minorities and women throughout the length of the review period and on ALL the contractor's work (federally involved and nonfederally involved)?

C. Summary (Summarize findings for Sections IIA and IIB. Indicate whether contractor is deficient.)

III. AUDIT OF AFFIRMATIVE ACTION SPECIFICATIONS

(41 CFR 60-4.3(a)7.a.-p.)

A. AUDIT OF RECRUITMENT PRACTICES (SEE 3100)

SPECIFICATION	Explain what actions, if any, were taken to comply with the specification/obligation. Were the contractor's actions deficient? If yes, explain.
1. Has the contractor established and maintained a current list of recruitment sources that includes sources for minorities and women, and provided written notification to these recruitment sources and to community organizations when it or its unions had opportunities available, and maintained a record of the organizations' responses? (41 CFR 60-4.3(a)7.b.)	
2. Has the contractor maintained a current file of the names, addresses, telephone numbers, sex, race, ethnicity of each walk-in applicant or referral from a union, recruitment source, or community organization, and the action taken with respect to each individual? If such individual was sent to the union hiring hall for referral and was not referred back to the contractor by the union, or if referred, was not employed by the contractor, this will be documented in the file with the reason therefore, along with whatever additional actions the contractor may have taken. (41 CFR 60-4.3(a)7.c; 60-1,12(b); and 60-3.15A)	

A. AUDIT OF RECRUITMENT PRACTICES (CONT'D)

SPECIFICATION	Explain what actions taken to comply with the specification. Indicate whether activity is deficient.
<p>3. Has the contractor provided immediate written notification to OFCCP when the union or unions with which it has collective bargaining agreements did not refer to the contractor members of minority groups or women, or when the contractor had other information that the union referral process impeded the contractor's efforts to meet its obligations? (41 CFR 60-4.3(a)7.d.)</p>	
<p>4. Has the contractor engaged in recruitment efforts that are inclusive of minority, women, and community organizations, and to schools with minority and women students; and engaged in recruitment efforts that reach out to minority and women recruitment and training organizations serving the contractor's recruitment area employment needs? Did the contractor, no later than one month before the date for the acceptance of applications for apprenticeship or other training by any recruitment sources, send written notification to organizations such as the above, describing the openings, screening procedures and tests to be used in the selection process? (41 CFR 60-4.3(a)7.i.)</p>	

A. AUDIT OF RECRUITMENT PRACTICES (CONT'D)

<p>5. Has the contractor encouraged present minority and female employees to recruit other minority persons or women, and where reasonable, did the contractor provide after-school, summer, and vacation employment to minority and female youth both onsite and in other areas of a contractor's workforce? (41 CFR 60-4.3(a)7.j.)</p>	
--	--

B. AUDIT OF TRAINING (SEE 3101)

SPECIFICATION	Explain actions taken to comply with the specification. Indicate whether activities are deficient.
<p>1. Has the contractor developed on-the-job training opportunities or participated in training programs for recruiting areas that expressly include members of minority groups and women (including upgrading programs and apprenticeship and trainee programs relevant to the contractor's employment needs), especially those programs funded or approved by the Department of Labor? The contractor should have provided notice of these programs to the recruitment sources compiled under item A.1 above. (41 CFR 60-4.3(a)7.e.)</p>	

C. AUDIT OF EEO POLICY AND IMPLEMENTATION (SEE 3102)

SPECIFICATION	Explain what actions taken to comply with the Specification. Indicate whether activity is deficient.
<p>1. Has the contractor disseminated its EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company's EEO policy on bulletin boards accessible to all employees at each location where construction work is performed? (41 CFR 60-4.3(a)7.f.)</p>	
<p>2. Has the contractor reviewed, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination, or other employment decisions, including specific review of these items with onsite supervisory personnel (superintendents, general forepersons, etc.) prior to the initiation of construction work on any site? A written record should have been made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter. (41 CFR 60-4.3(a)7.g.)</p>	

C. AUDIT OF EEO POLICY AND IMPLEMENTATION (CONT'D)

SPECIFICATION	Explain what actions taken to comply with the specification. Indicate whether activity is deficient.
<p>3. Has the contractor disseminated its EEO policy externally by including it in any advertising in the news media, specifically including minority and women's news media, and providing written notification to and discussing the contractor's EEO policy with other contractors and subcontractors with whom the contractor did or anticipated doing business? (41 CFR 60-4.3(a)7 h.)</p>	
<p>4. Has the contractor conducted, at least annually, an inventory and evaluation of at least the currently employed minorities and women for promotional opportunities, and encouraged these employees to seek or to prepare, through appropriate training, for such opportunities? (41 CFR 60-4.3(a)7.1.)</p>	
<p>5. Has the contractor conducted a review, at least annually, of all supervisors' adherence to and performance under the contractor's EEO policies and affirmative action obligations? (41 CFR 60-4.3(a)7.p.)</p>	

D. AUDIT OF PERSONNEL OPERATIONS (SEE 3I03)

SPECIFICATION	Explain what actions taken to comply with the specification. Indicate whether activity is deficient.
<p>1. Has the contractor ensured and maintained a working environment free of harassment, intimidation and coercion at all sites and in all facilities at which the contractor's employees are assigned to work? The contractor, where possible, should have assigned two or more women to each construction project. The contractor should have specifically ensured that all supervisory personnel were aware of and carried out the contractor's obligation to maintain such a working environment, which specific attention to members of minority or women's groups working at such sites or in such facilities. (41 CFR 60-4.3(a)7.a.)</p>	
<p>2. Has the contractor maintained all required information and validated all tests and other selection requirements where there is an obligation to do so under 41 CFR Part 60-3? (41 CFR 60-4.3(a)7.k.)</p>	

D. AUDIT OF PERSONNEL OPERATIONS (CONT'D) (SEE 3103)

SPECIFICATION	Explain what actions taken to comply with the specification. Indicate whether activity is deficient.
<p>3. Has the contractor ensured that seniority practices, job classifications, work assignments and other personnel practices had no discriminatory effect, and has it continually monitored all related personnel employment activities to ensure that the EEO policy and the contractor's obligations under these specifications were being carried out? (41 CFR 60-4.3(a)7.m.)</p>	
<p>4. Has the contractor ensured that all facilities and company activities were nonsegregated, except for providing separate or single-user toilet and necessary changing facilities to assure privacy between the sexes? (41 CFR 60-4.3(a)7.n.)</p>	

E. AUDIT OF CONTRACTING ACTIVITY (SEE 3104)

SPECIFICATION	Explain activities taken to comply with the specification. Indicate whether or not activities are deficient.
<p>1. Has the contractor documented and maintained a record of all solicitations of offers for subcontracts from small disadvantaged businesses or disadvantaged business enterprises, including circulation of solicitations to contractor associations? (41 CFR 60-4.3(a)7.o.)</p>	

F. SEX DISCRIMINATION PROVISIONS OF THE SEX DISCRIMINATION GUIDELINES AND PART 60-1

<p>Has the contractor complied with CFR Part 60-20, Sex Discrimination Guidelines, and Part 60-1 ?</p>	
--	--

G. GUIDELINES ON DISCRIMINATION BECAUSE OF RELIGION OR NATIONAL ORIGIN

Has the contractor complied with 41 CFR Part 60-50, Guidelines on Discrimination Because of Religion of National Origin?

H. SECTION 503/VEVRAA(Federal contractors/subcontractors)

Has the contractor complied with 41 CFR Parts 60-250, 60-300 and 60-741, affirmative action obligations of contractors and subcontractors for covered veterans and individuals with disabilities?

IV. Physical Inspection of Contractor's Work Sites

- A. List work sites visited and indicate whether they were federal, federally assisted, or nonfederally involved projects.

(1) PROJECT NAME AND LOCATION

(2) FUNDING

- B. Summarize results of interviews. See Section 3J in the Manual.

V. Narrative Summary

(See Instructions in Manual, Section 3Q)

VI. COMPLIANCE REVIEW SUMMARY SHEET

1. Status (Check appropriate items)

a. In compliance with goals in all covered crafts
(Check, if yes)

Minority

Female

b. In compliance with all affirmative actions specifications
(Check, if yes)

c. Noncompliance

ii. Conciliation Agreement (signed on _____)

iii. Show Cause Notice (has been/will be issued on _____)

2. Date Review Completed _____

3. Hours to Complete Review

Total _____ Pre-Review _____ Onsite Review _____
Report Writing _____ Travel _____
Conciliation _____

4. Signature (compliance officer) _____ Date _____

5. Signature (module supervisor) _____ Date _____

6. Signature (approving official) _____ Date _____

APPENDIX A-4: INDEX FOR A SUPPLY AND SERVICE REVIEW
Remember to Index and Tab the Materials.

File 1: SCER and Data pertaining to SCER Findings: This file contains the SCER and data pertaining to the findings. This includes worksheets, interviews, contractor records, etc. pertinent to issues investigated. Include all relevant material bearing either for or against the conclusions reached. Cross reference other files, as applicable, for example collective bargaining agreement in file 3.

Right Side of Folder

- SCER
- Worksheets
- Supporting documents
- Interviews
- Etc.

Left Side of Folder

- Form CC-100
- Extension Requests and responses
- Contractor research form and supporting jurisdiction information

File 2: Case Chronology, Correspondence and Meeting Notes: This file will contain all correspondence including attachments submitted and meeting notes. This includes any such material resulting from contacts with the contractor, union, attorneys, consultants, Congress persons, and memos to file (not investigative notes). The closure document will be tabbed. Note a copy of the closure document is also placed in File 6.

Right Side: Correspondence - The latest correspondence must be on top and it must be in chronological order. As applicable, cross reference other files.

Left Side: Case Chronology Log – CC-53 (in chronological order and legible).

File 3: Employment Handbooks, Collective Bargaining Agreement and Miscellaneous: This file will contain a copy of any employee handbooks, collective bargaining agreements, fringe benefit information, leave policy booklets, and any other similar contractor documents. Any documents that do not fit the description of materials to be included in any other file will be placed here.

File 4: SOL Opinions, JRC Memoranda, and Post-SCER Update: This file will contain any Solicitor's (SOL) opinions and Joint Review Committee (JRC) memoranda associated with this review.

Also include in this file any material generated after the CO submits the review, for example: transmittal memoranda, additional conciliation efforts, etc. These materials are other than progress reports (file 5).

File 5: Progress Reports and Quality Audit:

This file will contain:

Right Side: Any progress reports submitted under a conciliation agreement or consent decree or other court order and OFCCP's evaluation of the report and the summary of the reports submitted.

Left Side: Quality Audit Form (CC-74)

File 6: Historical Review Results

This file will contain a copy of any available closure letters and documents generated by reviews of this establishment and the closure letter or document for the current review. If reports are required under the CA when the last report is evaluated a copy of the Summary of Progress Reports.

NOTE: The Historical file will be retained in the AO or DO indefinitely. If another review of this establishment is scheduled before this case file is retired, the Historical file will be pulled from the old case file and moved to the new file. If another review has not been scheduled, the Historical file will be pulled and retained in the AO or DO when the rest of the case is retired.

File 7: AAP and AAP Support Data

This file will contain the contractor's AAP (s) and AAP support data evaluated in this review (including the EEO-1 Reports).

APPENDIX A-5: INDEX FOR A CONSTRUCTION REVIEW
Remember to Index and Tab the Materials.

File 1: Construction SCER Findings: This file contains the SCER and data pertaining to the findings. This includes worksheets, interviews, contractor records, etc. pertinent to issues investigated. Include all relevant material bearing either for or against the conclusions reached. Cross reference other files, as applicable, for example collective bargaining agreement in file 3.

Right Side of Folder

- SCER
- Worksheets
- Supporting documents
- Interviews
- Etc.

Left Side of Folder

- Form CC-100
- Extension Requests and responses
- Contractor Research Form and supporting jurisdiction information

File 2: Case Chronology, Correspondence and Meeting Notes: This file will contain all correspondence including attachments submitted and meeting notes. This includes any such material resulting from contacts with the contractor, union, attorneys, consultants, Congress persons, and memos to file (not investigative notes). The closure document will be tabbed. Note a copy of the closure document is also placed in File 6.

Right Side: Correspondence - The latest correspondence Must be on top and it must be in chronological order. As applicable, cross reference other files.

Left Side: Case Chronology Log – CC-53 (in chronological order and legible).

File 3: Employment Handbooks, Collective Bargaining Agreement and Miscellaneous: This file will contain a copy of any employee handbooks, collective bargaining agreements, fringe benefit information, leave policy booklets, and any other similar contractor documents. Any documents that do not fit the description of materials to be included in any other file will be placed here.

File 4: SOL Opinions, JRC Memoranda, and Post-SCER Update: This file will contain any Solicitor’s (SOL) opinions and Joint Review Committee (JRC) memoranda associated with this review.

Also include in this file any material generated after the CO submits the review, for example: transmittal memoranda, additional conciliation efforts, etc. These materials are other than progress reports (file 5).

File 5: Progress Reports and Quality Audit:

This file will contain:

Right Side: Any progress reports submitted under a conciliation agreement or consent decree or other court order and OFCCP’s evaluation of the report and the summary of the reports submitted.

Left Side: Construction Quality Audit Form

File 6: Historical Review Results:

This file will contain a copy of any available closure letters and documents generated by reviews of this establishment, and the closure letter or document for the current review. If reports are required under the CA when the last report is evaluated a copy of the Summary of Progress Reports.

NOTE: The Historical file will be retained in the AO or DO indefinitely. If another review of this establishment is scheduled before this case file is retired, the Historical file will be pulled from the old case file and moved to the new file. If another review has not been scheduled, the Historical file will be pulled and retained in the AO or DO when the rest of the case is retired.

File 7: Monthly Employment Hours and Pre-Construction Conference Materials:

This file will contain the payroll hours obtained onsite and any pre-construction conference materials.

APPENDIX A-6: SPECIAL REMEDIAL CONSIDERATIONS APPLICABLE TO STOCK

(Reference Section 4I00(b))

When there is a finding of discrimination in the awarding of stock or stock options, the following considerations apply to remedy.

I. STOCK AWARDS - VESTED

When the discrimination was in the awarding of vested stock, and the vesting date has not yet occurred, the discriminatee is simply awarded the number of shares he or she would have received, absent discrimination, with the same vesting date as other stock recipients.

Example: Absent discrimination, on June 1, 2012, the victim would have received 100 shares of stock with a vesting period of three years. The remedy would be to immediately award the victim 100 shares of stock with a vesting date of June 1, 2012.

Where the vesting date has passed, the remedy will be calculated as indicated in II below, with the vesting date considered the date the victim would have received the stock, absent discrimination.

II. STOCK AWARDS - ONE-TIME BONUS

(a) Shares of Stock:

- (1) Establish the number of shares (or additional number of shares) the discriminatee would have received, absent discrimination, and the date(s) he or she would have received them.
- (2) Find the dollar value of that number of shares as of the date, absent discrimination, the discriminatee would have the shares, and the current dollar value. Take the higher of the two figures, expressed as the number of current shares.

Example: Absent discrimination, the discriminatee would have received 100 additional shares of stock. On the date he or she should have received the stock, the share price was \$20, for a total dollar value of \$2,000.

Scenario A: The stock has gone down to \$10 a share, so the 100 shares are now worth only \$1,000. The discriminatee should receive \$2,000 worth of stock at the current price; i.e., 200 shares of stock.

Scenario B: The stock has gone up to \$30 per share, so the 100 shares are now worth \$3,000. The discriminatee should receive 100 shares at the current price.

(b) Dividends:

- (1) Determine the dollar amount of stock dividends (or additional stock dividends) the discriminatee would have received, absent discrimination, and add simple interest (see Appendix 7A).

Example: Determine the dollar amount of dividends that would have been paid on the 100 shares of stock from the date the discriminatee should have received the stock to present, and add simple interest.

III. STOCK OPTIONS

When the discrimination was in the awarding of stock options, remedy will include awarding the discriminatee the number of stock options he or she would have received, absent discrimination. The period of time he or she would have had to exercise those options will be calculated from the date he or she actually receives the options.

Example: On January 1, 2001, absent discrimination, the victim would have received an option to buy 100 shares of stock at any time over the following four years. If settlement occurred on October 1, 2001, the victim would be able to exercise an option on the 100 shares of stock up until October 1, 2005.

CO's should consult with an OFCCP labor economist, or other appropriate staff member within DPO, for specific help and guidance on stock valuation.

**APPENDIX A-7: CORPORATE MANAGEMENT COMPLIANCE EVALUATION
SUPPLEMENTARY NARRATIVE REPORT
(Reference Section 4K)**

In a corporate management compliance evaluation (CMCE), the standard report will be supplemented by a narrative addressing the following major items (see Section number(s) indicated for discussion of each item):

- (a) Introduction: Corporate background, structure, observations concerning corporate culture, and values. (4B01, 4B02, 4B11, 4G01)
- (b) Corporate AAP: What positions at subordinate establishments are rolled-up into the Corporate AAP? Does this meet the intent of 41 CFR 60-2.1(d) and (e)?
- (c) Scope: Did the evaluation cover only corporate headquarters or was it extended to cover one or more intermediate headquarters or subordinate establishments? (4A01, 4H04(c))
- (d) Focus Level and Areas: Describe the company's pay and management structure. At what pay level does the representation of protected group members decline? Are protected group members concentrated in certain functional areas? Are those areas staff or line? (4D00, 4D01)
- (e) Outreach Efforts: To what extent does the company already have in place programs designed to ensure equal employment opportunity in access to mid- and senior-level management positions? Describe any such programs and what results they have yielded to date.
- (f) Jobs Filled at and above the Focus Level: During the evaluation period, what jobs have been filled around the level where protected group member participation declines? How were they filled (hire, promotion, transfer)? (4H)
 - (1) External Hires: If there were some hires, how were candidates located? If executive search firms were used, were protected group members among those referred? Hired? If employee referrals were used, were protected group members among those referred? Hired? (4H01, 4H02, 4H03) In either case, were any efforts made to expand the candidate pool?
 - (2) Internal Development - General: Where jobs were filled internally, were most by promotion? By transfer? Were most of these openings filled from within corporate headquarters or by movement into corporate from subordinate establishments? (4H04)
- (g) Internal Development - Specific Programs: In each of the areas below, does the company have the program and, if so, describe it and discuss conclusions with respect to protected group member participation. (4H05)

Federal Contract Compliance Manual (FCCM)

- (1) Succession and Related Planning (4H04(a))
- (2) Performance Appraisals (4H04(f))
- (3) Visibility (4H04(g),(h),(i)):
 - (i) Special Projects and Task Forces
 - (ii) Committees
 - (iii) Special Assistants and Executive Assistants
- (4) Management Training and Executive Development Programs (4H05)
- (5) Mentoring and Networking (4H06)
- (h) Total Compensation
 - (1) Bonuses (4I00(a))
 - (2) Stock (4I00(b))
 - (3) Perquisites (4I00(c))
 - (4) Award/Honor Programs (4I01)
- (i) Terminations (4J)
- (j) Conclusions: What reason(s) were found for protected group members not having moved beyond their current grade/level?
- (k) Resolution: What commitments (whether remedial or improved good faith efforts) has the corporation made to ensure that protected group members have an equal opportunity to advance to mid and senior- level management positions?

APPENDIX A-8: INDEX FOR A COMPLAINT FILE
Remember to Index and Tab the Materials.

File 1: Complaint and Data Submitted by Complainant: This file contains any information submitted by the complainant including the envelope. Materials include:

Right Side of Folder

- CC-4 or letter of allegations
- Complainant's witness list
- Documents provided to support the allegation
- Interview of Complainant

Left Side of Folder

- CMS forms associated with the investigation
- Extension Requests and responses

File 2: Case Chronology, Correspondence and Meeting Notes: This file will contain all correspondence (e.g. letters and e-mails), including attachments. This includes any such material resulting from contacts with the contractor, union, witnesses, consultants, etc., and memos to file (not investigative notes).

Right Side: Correspondence

The latest correspondence must be on top and it must be in chronological order. As applicable, cross reference other files.

Left Side: Case Chronology Log – CC-53 (in chronological order and legible).

File 3: Investigative Material: This file will contain all investigative material pertaining to complaint findings. Such data include:

- The investigative plan (on top)
- The investigative report (on top when complete)
- Interview (witness) statements
- Investigative notes,
- Statistical evidence
- Comparative evidence
- Anecdotal Evidence

File 4: Medical/Veterans Documentation: This file will contain any medical/veterans documentation. This includes:

- Medical release
- Medical and disabled veteran status (e.g. DD-214)
- Medical coverage information
- Diagnosis or medical description of disabling condition
- Work restrictions
- For veterans, coverage information as needed, (e.g. Armed Forces campaign badge information)

File 5: Legal: This file will contain any documents related to legal activity including:

- NORI (on top)
- Solicitor's opinions
- Joint Review Committee meeting notes and/or report
- Conciliation Agreements (on top when completed)
- Freedom of Information Act and Privacy Act determinations
- Enforcement recommendations
- Subpoenas; and
- Jurisdictional and contract coverage information (on the bottom)

File 6: Employment Handbooks, Collective Bargaining Agreement and Miscellaneous: On the right side, this file will contain copies of any employee handbooks, collective bargaining agreements, fringe benefit information, leave policy booklets, and any other similar contractor documents. Any documents that do not fit the description of materials to be included in any other file will be placed here.

Left Side:

Quality Assurance Complaint Investigation Form CC-75

File 7: Historical Review Results: This file will contain copies of any available closure letters and documents generated during previous complaint investigations of this establishment. The closure letter for the current investigation will also be included here.

APPENDIX A-9: RETALIATION AND INTERFERENCE; COMPLAINT PROCESSING OUTLINE AND CHECKLIST

OFCCP applies the same concepts, standards and analyses as EEOC when assessing possible retaliation under E.O.11246, Section 503 and VEVRAA. However, it is important to note that although the laws enforced by OFCCP and EEOC prohibit retaliation, OFCCP regulations also provide a broader protection against interference with an individual's exercise of the rights protected by the laws enforced by OFCCP.

The OFCCP implementing regulations, titled "Intimidation and Interference,"¹ state that a contractor "...shall not harass, intimidate, threaten, coerce or discriminate against any individual" because the individual has engaged in or may engage in a protected activity. This not only encompasses protection against retaliation but it also provides protection against intimidation and interference that may not give rise to a retaliation claim. As such, examine complaint allegations to determine whether Title VII principles regarding retaliation claims apply or the broader protection of OFCCP's regulations against intimidation and interference is applicable.

Additionally, there is a difference in available remedies. Compensatory and punitive damages are only available when OFCCP is acting as EEOC's agent in the processing of complaints dually filed under Title VII or the ADA.

A. RETALIATION

When processing a complaint involving an allegation of retaliation, there are three essential elements of a retaliation claim: 1) protected activity (e.g., opposition to discrimination or participation in the filing or investigation of a complaint, compliance evaluation, hearing or other activity); 2) adverse action; and 3) causal connection between the protected activity and the adverse action.

1. Protected Activity

- a. Did the Complainant oppose discrimination?
 - Did the Complainant explicitly or implicitly communicate to the contractor or another covered entity a belief that its activity constituted unlawful discrimination under E.O. 11246, Section 503, or VEVRAA?
 - If the protest was broad or ambiguous, would the complainant's protest reasonably have been interpreted as opposition to such unlawful discrimination?
 - Did someone closely associated with the Complainant oppose discrimination?

¹ See regulations at Part 60-1.32; 60-250.69; 60-300.69; and 60-741.69.

- b. Was the manner of opposition reasonable? Was the manner of opposition so disruptive that it significantly interfered with the contractor's legitimate business concerns?
 - If the manner of opposition was not reasonable, the complainant is not protected under the anti-retaliation clauses.
- c. Did the Complainant have a reasonable and good faith belief that the opposed practice violated the anti-discrimination laws?
 - If so, the complainant is protected against retaliation, even if s/he was mistaken about the unlawfulness of the challenged practices.
 - If not, the complainant is not protected under the anti-retaliation clauses.
- d. Did the Complainant participate in the statutory complaint process or did the Complainant or someone closely associated with the Complainant file a charge, or testify, assist, or participate in any manner in an investigation, proceeding, hearing, or lawsuit under the statutes enforced by the OFCCP?
 - If so, the Complainant is protected against retaliation regardless of the validity or reasonableness of the original allegation of discrimination.
 - The Complainant is protected against retaliation by a respondent for participating in statutory complaint proceedings even if that complaint involved a different covered entity.

2. Adverse Action

- a. Did the contractor subject the Complainant to any kind of adverse treatment?
 - Adverse actions undertaken after the Complainant's employment relationship with the contractor ended, such as negative job references, can be challenged.
 - Although trivial annoyances are not actionable, more significant retaliatory treatment that is reasonably likely to deter protected activity is unlawful. There is no requirement that the adverse action materially affect the terms, conditions, or privileges of employment.

3. Causal Connection

- a. Is there direct evidence that retaliation was a motive for the adverse action?
- b. Did the company official admit that it undertook the adverse action because of the protected activity?

Federal Contract Compliance Manual (FCCM)

- c. Did the company official express bias against the Complainant based on the protected activity? If so, is there evidence linking that statement of bias to the adverse action?
 - Such a link would be established if, for example, the statement was made by the decision-maker at the time of the challenged action.
 - If there is direct evidence that retaliation was a motive for the adverse action, a violation must be found. Evidence as to any additional legitimate motive would be relevant only to relief, under a mixed-motives analysis.
- d. Is there circumstantial evidence that retaliation was the true reason for the adverse action?
- e. Is there evidence raising an inference that retaliation was the cause of the adverse action?
 - Such an inference is raised if the adverse action took place shortly after the protected activity and if the decision-maker was aware of the protected activity before undertaking the adverse action.
 - If there was a long period of time between the protected activity and the adverse action, determine whether there is other evidence raising an inference that the cause of the adverse action was retaliation.
- f. Has the contractor produced evidence of a legitimate reason for the adverse action unrelated to the protected activity?
- g. Is the contractor's explanation a pretext designed to hide retaliation?
 - Did the contractor treat similarly situated employees who did not engage in protected activity differently from the Complainant?
 - Did the contractor subject the Complainant to heightened scrutiny after s/he engaged in protected activity?
 - If, on the basis of all of the evidence, the CO is persuaded that retaliation was the true reason for the adverse action, then "cause" must be found.

B. SPECIAL REMEDIES ISSUES

- a. Is it appropriate to seek temporary or preliminary relief pending final disposition of the complaint?
- b. Is there a substantial likelihood that the challenged action will be found to constitute unlawful retaliation?

- c. Will the retaliation cause irreparable harm to the Complainant and/or the OFCCP?
- Will the Complainant likely incur irreparable harm beyond financial hardship because of the retaliation?
 - If the retaliation appears to be based on the Complainant's filing of a prior EEO complaint, will that retaliation likely cause irreparable harm to OFCCP's ability to investigate the Complainant's original complaint of discrimination?
 - If there is a substantial likelihood that the challenged action will constitute retaliation and that retaliation will cause irreparable harm to the Complainant or the OFCCP, or both, contact the Regional Solicitor's office ask about pursuing temporary or preliminary relief.
- d. If the complaint is dually filed under Title VII and the ADA or both also consider whether compensatory and punitive damages are available and appropriate?
- Compensatory and punitive damages are available for retaliation claims under all of the statutes enforced by the EEOC.
 - Punitive damages often are appropriate in retaliation claims under any of the statutes enforced by the EEOC.

C. INTERFERENCE

OFCCP regulations prohibit interference and intimidation, including threats, coercion, harassment and discrimination of any individual in the exercise of his or her rights under the laws enforced by OFCCP. Such interference may not give rise to a retaliation claim but may hinder an individual from exercising their rights, (e.g., interference by a contractor results in an individual being too intimidated to participate in an OFCCP review or investigation). The purpose of the regulation is to proscribe activities that interfere with a person's exercise of his or her rights. To examine whether a complainant's rights have been interfered with, consider:

- a. Did the contractor intimidate, coerce, harass, or discriminate against the complainant in an attempt to hinder the complainant from exercising their rights?
- b. What right under the laws enforced by OFCCP was interfered with?
- Was the complainant able to exercise the right in question at a later time?
 - Were other individual's rights affected by the contractor's actions?
- c. What harm resulted from the right(s) being interfered with?

Federal Contract Compliance Manual (FCCM)

- Remedy for resulting harm is determined on a case-by-case basis. It may include individual remedy, changes in policy and procedures or both, providing an assurance of cooperation and protection against retaliation, etc.
- d. Was the complainant subjected to an adverse employment action?
- If so, the retaliation analysis must be applied.
- e. Did interference with the complainant's right also result in hindering OFCCP from fulfilling its responsibilities?
- If so, examine whether the contractor's action (or inaction) may constitute denial of access.
 - If denial of access² has occurred, OFCCP will take the appropriate enforcement action.

² Denial of access is a separate and distinct violation of the regulations enforced by OFCCP. See the regulations at Part 60-1.43; 60-250.81; 60-300.81; and 60-741.81.

APPENDIX A-10: INVESTIGATIVE REPORT

(Name of complainant) v. (CMS #)

(Name of contractor)

1. **Basis:** Insert one or more as appropriate: Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; Americans with Disabilities Act of 1990, as amended; or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended.
2. **Contractor:** Insert the company name and address, the name of contractor's representative and that individuals contact telephone number.
3. **Contract Coverage:** Insert the contract number, agency name, date of award, duration of contract period, place of performance, and attach copy of the contract.
4. **Onsite Investigation:** Insert the date or dates.

For Each Allegation:

5. **Allegation(s):** Provide a statement of the allegation(s) under OFCCP's authority based on what the complainant alleged happened to him/her. Include the circumstances of the action as the complainant expressed them in the complaint and in the interview.
6. **Issue(s):** Identify the alleged discriminatory action(s) which gave rise to the complaint and the applicable regulatory citations.
7. **Rebuttal:** Include the contractor's explanation of what happened and why it happened, including the circumstances of the action.
8. **Findings of Fact:**
 - a. Provide a description of contractor's relevant personnel policies and practices; relevant union rules. Reference case file location of copies;
 - b. Provide the results of review of documentary evidence and records. Reference case file location of copies;
 - c. Summarize the relevant information obtained from interviews of contractor officials. Reference case file location of interview notes; and
 - d. Summarize the relevant information obtained from interviews of other witnesses. Reference case file location of interview notes.
9. **Analysis:** Provide an explanation of how and why the findings of fact confirm or refute the allegations.
10. **Conclusion:** Insert a statement as to whether the contractor has or has not committed a violation, include a citation to the appropriate regulation.
11. **Remedy:** Use this section when a violation by the contractor is found to:
 - a. Describe all the remedies the complainant should receive; and
 - b. Describe the corrective actions the contractor must take regarding its policies and practices.

APPENDIX A-11: INFORMATION RELATED TO FILING SUIT UNDER TITLE VII OF THE CIVIL RIGHTS ACT AND TITLE I OF THE ADA

This information relates to filing suit in federal or state court under federal law. If you also plan to sue claiming violations of State law, please be aware that time limits and other provisions of State law may be shorter or more limited than those described below.

PRIVATE SUIT RIGHTS – Title VII of the Civil Rights Act of 1964, as amended (Title VII) or the Americans with Disabilities Act of 1990, as amended (ADA)

In order to pursue this matter further, you must file a lawsuit against the contractor(s) named in the complaint **within 90 calendar days of receipt of Notice of Right-to-Sue**. Once this 90-day period expires, your right to sue based on the complaint covered by this Notification will be lost. If you intend to consult an attorney, you should do so promptly. Give your attorney a copy of this Notification.

Your lawsuit may be filed in U.S. District Court or a State court of competent jurisdiction. (Usually, the appropriate State court is the general civil trial court.) Whether you file in federal or state court is a matter for you to decide after talking to your attorney. Filing this Notification is not enough. You must file a “complaint” that contains a short statement of the facts of your case which shows that you are entitled to relief. Your suit may include any matter alleged in the complaint or, to the extent permitted by court decisions, matters like or related to the matters alleged in the complaint. Generally, suits are brought in the State where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the contractor has its main office. If you have simple questions, you usually can get answers from the Clerk of the court where you are bringing suit, but do not expect them to write your complaint or make legal strategy decisions for you.

PRIVATE SUIT RIGHTS – Equal Pay Act (EPA)

EPA suits must be filed in court within two years (three years for willful violations) of the alleged EPA underpayment; back pay due for violations that occurred **more than two years (three years for willful violations) before you file suit** may not be collectible. For example, if you were underpaid under the EPA for work performed from July 1, 2003 to December 1, 2003, you should file suit before July 1, 2005 (not December 1, 2005) in order to recover unpaid wages due for July 2003. This EPA time limit is separate from the 90-day filing period under Title VII or the ADA referred to above. Therefore, if you also plan to sue under Title VII or the ADA, in addition to suing on the EPA claim, suit should be filed within the Title VII/ADA 90-day period and within the two or three year EPA back pay recovery period.

ATTORNEY REPRESENTATION – Title VII and the ADA

If you cannot afford or have been unable to obtain a lawyer to represent you, the U.S. District Court having jurisdiction in your case may, in limited circumstances, help you to obtain a lawyer. Requests for such assistance must be made to the U.S. District Court in the form and manner it requires (you should be prepared to explain in detail your efforts to retain an attorney). Requests should be made well before the end of the 90-day period mentioned above, because such requests do not relieve you of the requirement to bring suit within 90 calendar days.

ATTORNEY REFERRAL AND ASSISTANCE – All Statutes

If you need help in finding a lawyer or if you have any questions about your legal rights, including advice on which the U.S. District Court can hear your case, you may contact an Office of Federal Contract Compliance Programs (OFCCP) representative at [*insert the name and phone number of OFCCP district or area office that investigated complaint*], who will coordinate with the Equal Employment Opportunity Commission (EEOC) to promptly obtain that information for you. If you need to inspect or obtain a copy of information in OFCCP's file, please request it promptly in writing and provide the OFCCP complaint number. If you file suit and want to review the complaint file, **please make your review request within six months of this Notice.** (Before filing suit, any request should be made within 90 calendar days of the date of the Notification of Results of Investigation.)

If you file suit, please send a copy of your Court complaint to [*insert the name and address of EEOC office to which a copy of the dually filed complaint was sent, and which was notified of issuance of Notice of Right-to-Sue*].

APPENDIX A-12: INTEREST RATES ON BACK PAY

OFCCP's policy is that interest on back pay is calculated from the first date that is covered by the back pay award at the same percentage rate as the Internal Revenue Service's underpayment formula on interest. Interest rates for back pay calculations are based on IRS calculations.

Periodically the IRS issues press releases giving updated information on updates to interest rates. To access recent press releases on this subject go to www.irs.gov. Go to "Search for..." at the upper left hand corner of the IRS home page and type "interest rates for underpayment" and click on "go." The list of the most recent press releases on changes in IRS interest rates will then be displayed.

METHOD OF CALCULATING COMPOUND INTEREST ON BACK PAY

In a compound interest calculation, the interest due on back pay (or any other debt) for a one time period is included in the money on which interest is figured for the next time period (i.e., you pay interest on your interest). In a simple interest calculation, on the other hand, the interest due on back pay (or any other debt) for a one time period is not included in the money on which interest is figured for the next time period (i.e., you do not pay interest on your interest.)

Title 41 CFR 60-1.26(a)(2) requires that interest on back pay be compounded quarterly in EO 11246 cases. Similarly, 41 CFR 60-250.65(a)(1) requires that interest on back pay be compounded quarterly in Section 4212 cases. Further, 41 CFR 60-741.65(a)(1) requires that interest on back pay be compounded quarterly in Section 503 cases. Therefore, in determining the amount of back pay due, first determine the amount of back pay due for each quarter. Then use column Q on the previous page to find the interest rate applicable to each quarter. For example, if the back pay period were December 4, 2009 through May 25, 2010 and \$12,000 back pay were due, distribute back pay by quarter as follows:

Back Pay Due IRS Quarterly

<u>Year</u>	<u>Quarter</u>	<u>for Quarter</u>	<u>Interest Rate</u>
2009	10/1-12/31	\$2,000	2.25%
2010	1/1-3/31	\$6,000	2.25%
2010	4/1-6/30	\$4,000	2.00%

Quarterly compound interest is applied to the average amount of back pay due during each quarter. This average is the total amount of back pay plus interest due at the beginning of each quarter, plus half the amount of back pay due for the quarter itself, plus the interest accrued during the previous quarter.

APPENDIX A-13: "MACMILLAN" FACTORS CONCERNING SUCCESSOR EMPLOYER LIABILITY

Requests for a determination of successor liability should include responses to the factors listed below. Responses should cite the source of the information and, where the source is written material, a copy of the relevant page(s) should be attached. Information on these factors may be obtained from a number of sources including Standard and Poor's and other corporate guides, trade magazines, annual reports, collective bargaining agreements, and the business section of local newspapers.

1. Whether the Successor Company had Notice of the Charge.

The date the alleged discriminatory act occurred, the date the complaint was filed, and the dates concerning the transfer (announcement date, effective date of merger, acquisition, etc.).

2. The Ability of the Predecessor to Provide Relief.

Whether the predecessor continues to operate and the extent and location of its new operations, whether the predecessor maintained any of its assets (what percentage and type), whether the transfer resulted from a bankruptcy action, whether the predecessor could provide seniority, reinstatement, hiring, back pay, etc.

3. Whether there has been a Substantial Continuity of Business Operations.

The percentage of operating assets that were transferred to the successor, the status of the predecessor's patents, trademarks and operating name, whether there are corporate officers and members of the board of directors who are common to both the predecessor and the successor, etc.

4. Whether the Successor Uses the Same Plant.

5. Whether the Successor Uses the Same or Substantially the Same Workforce.

6. Whether the Successor Uses the Same or Substantially the Same Supervisory Personnel.

7. Whether the Same Jobs Exist Under Substantially the Same Working Conditions.

Whether the organization of the departments, sections, etc., remain substantially the same, the percentage of old jobs maintained, whether personnel practices are substantially the same, and the status of any collective bargaining agreements, etc.

8. Whether the Successor Uses the Same Machinery, Equipment, and Methods of Production.

9. Whether the Successor Produces the Same Product.

**APPENDIX A-14: TRANSMITTAL MEMORANDUM
FOR AN ENFORCEMENT RECOMMENDATION
(Compliance Evaluations)**

The memorandum transmitting a recommendation for enforcement arising from a compliance review will contain the following sections:

1. CONTRACTOR'S IDENTITY

a. State the establishment's or functional unit's full name and mailing address, including the county in which it is located, and the names and titles of primary establishment or functional unit contact persons (i.e., top establishment or functional unit official, legal representative, EEO and Affirmative Action Coordinator).

b. If the establishment or functional unit is part of a multi-establishment corporation, also state the corporate name and address, the names and titles of primary contact persons (as above), and describe the relationship between the establishment/functional unit and corporation, e.g., unincorporated division or wholly owned subsidiary. The description of this relationship is critical when the establishment/functional unit itself does not hold a federal contract.

c. Give any known information on the ownership make-up of the business and its legal address in the state in which it is incorporated. This information is often available in Industrial directories or from the Secretary of State's office (corporations).

2. CONTRACTOR'S BUSINESS

Describe the contractor's main product(s), basic structure, total employment and major types of jobs.

3. PRIOR HISTORY

Indicate whether and when the establishment or functional unit or both, were previously reviewed or subjected to an OFCCP complaint investigation. Also note the outcome of any such review or investigation. Reference any relevant legal actions against the establishment or functional unit or both (e.g., pending Title VII suit, consent decree, etc.).

4. CONTRACT COVERAGE

Describe the basis for OFCCP jurisdiction. For basic coverage requirements, under the Executive Order, see 41 CFR 60-1.5(a); under Section 503, see 41 CFR 60-741.4; and under Section 4212, see 41 CFR 250.4. If a violation asserted relates to a written AAP, for the Executive Order, see 41 CFR 60-2, for Section

Federal Contract Compliance Manual (FCCM)

503, see 41 CFR 60-741.40-.45; and for Section 4212, see 41 CFR 60-250.40-.44 and 41 CFR 60-300-.40-.44.

As used below, the term federal contracts means federal prime contracts, subcontracts and federally assisted construction contracts and subcontracts.

- a. **Basic Contract Information (All Cases):** List here (or in an attachment if voluminous) all known federal contracts held by the contractor during the review period and during the period for which violations are asserted. For each such contract, give the information requested on page 2, item 5 of the Supply and Service SCER (see Appendix 2A-1) plus the goods, services, lease arrangements, etc. provided under the contract and any available information on whether there was a break or modification during the period the contract was in effect.

If coverage is based on contracts for indefinite quantities (for example, a blanket purchase order, a rate agreement, etc.) note (1) the amounts ordered in the business year(s) of the violations; and (2) the identity and location of contracting officers and others who may be able to provide copies of invoices and other documents verifying coverage.

- b. **Additional Contract Information Where Actual or Potential Coverage Dispute:** If coverage is or is anticipated to become an issue, state the grounds on which the contractor claims not to be covered, and any grounds you believe the contractor might assert. You will analyze the claim asserted and potential claim.
 - i. **Separate Entity Issue:** If the contractor claims or may claim not to be covered based on the fact it is a separate entity from the company holding the federal contract, it is critical to include information on the following factors concerning that relationship:
 - common ownership;
 - common directors and/or officers;
 - de facto exercise of control;
 - personnel policies emanating from a common source; and
 - dependency of operations.
 - ii. **Subcontract Issue:** If coverage is based on a subcontract relationship with a prime government contractor, include:
 - the identity of the prime contractor, including contracting agency and goods or services involved in the prime contract;
 - information demonstrating that the prime contractor is covered; and

Federal Contract Compliance Manual (FCCM)

- an analysis of how the subcontract meets either or both prongs of the regulatory definition of covered subcontract.

iii. **Serious Jurisdictional Question:** If a serious question about jurisdiction is present or anticipated, obtain a complete copy of at least one contract which establishes coverage for the review period and the violation period from the contracting agency or the contractor. SOL will not approve an enforcement recommendation without a complete hard copy of at least one federal contract. A copy of the contract must be included in the case file.

5. SUMMARY OF EVENTS

Indicate how the company was selected for review, and then list major review events, including current status. Major events include, for example, the date the AAP was received; the dates of the onsite; the dates of any Predetermination Notice, Notice of Violation, Show Cause Notice and 15-Day Notice; the period during which conciliation was attempted; and the date conciliation was terminated. In the case of a denial of access claim, OFCCP must show that the contractor was selected in accordance with a neutral plan.

6 LIST OF VIOLATIONS FOR WHICH ENFORCEMENT IS SOUGHT

List each violation for which enforcement is being sought under the sub-headings of "Affirmative Action" or "Discrimination."

7. ANALYSIS OF VIOLATIONS

For each violation for which enforcement is sought, give the following analysis, specifically referring to the case file location by file and page number of the relevant portions of documents and interviews.

Note, however, that violations may be grouped where to do so would result in a clearer and more succinct presentation of the case. For example, many affirmative action violations are interrelated and can more easily be described together, e.g., problems with job group formation usually result in problems with utilization analysis, underutilization determinations and goals.

- a. **Violation:** State the practice that constitutes the violation and identify the sections of the regulations and/or statutes violated. In the case of a discrimination finding, state the specific minority or gender group affected, job(s) at issue, level of disparity in standard deviations, and the shortfall. Also, identify the component(s) of the selection process that caused the adverse impact.

Federal Contract Compliance Manual (FCCM)

- b. Facts: Summarize factual findings. Reference the file and page location of data such as worksheets, statistical analyses, cohort analyses, salary analyses, medical evidence, and contractor documents which are the basis for each factual finding.
- c. Analysis: Conduct an analysis to determine why the facts lead to a conclusion of violation. Where discrimination is the issue, analysis should be done using the appropriate theory and burden of proof.

Review the contractor's position and any data provided in support of its position (referencing file location), giving the reasons (referencing supporting documentation) for concluding that the contractor has not adequately responded to evidence of violation and/or that its position is a pretext for discrimination. Also determine if there are other contractor positions that could be raised in the future, and the overall strengths and weaknesses of the case.

- d. Remedy: Describe the proposed remedy. Indicate the basis and support for the type of remedy proposed. Describe the contractor's position on remedy if this has been discussed with the contractor.
 - i. Individually-Based Back pay: If proposed remedy includes individually-based back pay, indicate the pay rate used (and if from other than payroll records, its source), the method of computation and applicable interest rates. Include or attach a summary list of back pay due with the name of each affected class member, the period covered and amount due (referencing the file location of individual computation sheets).
 - ii. Formula Relief: If proposed remedy includes formula for relief, indicate the rationale for a formula approach, the basis for calculating the total amount due, including components of the calculations, and the method of allocating the total amount among class members.
- e. Where the analysis described in this item 7 has already been prepared in narrative format (addressing all sub-items given here) in the SCER, if the SCER analysis is on word processing equipment, copy it to here. If the relevant SCER analysis is not on word processing equipment, you may conventionally copy and "cut and paste" here (as neatly as possible).
- f. SOL, JRC, RO and NO Opinions: If applicable, reference the tabbed file location of and summarize any Solicitor's, Joint Review Committee, Regional, and National Office opinions and recommendations, and the action taken respecting them.

8. CONCILIATION

Federal Contract Compliance Manual (FCCM)

Describe the conciliation efforts undertaken. Describe significant aspects of those efforts, e.g., what was offered, by whom, rationale for rejecting, and issues at impasse. Identify dates conciliation was attempted, the participant(s) and summarize the results, referencing the file location of meeting notes, pertinent correspondence, etc.

If, however, there has already been some discussion of conciliation, with respect to particular violations in item 7 above, (e.g., the contractor's position on the violation/remedy, etc.), that discussion may be referenced here in the context of total conciliation efforts.

IMPORTANT: If conciliation sessions continue after this Transmittal Memorandum is prepared, it is critical that, at a minimum, an addendum be attached updating the status of negotiations (including any additional violations resolved (see item 10 below) and referencing the file location of pertinent meeting notes and correspondence. SOL must receive all correspondence and other documents generated during these negotiations.

9. CONCLUSIONS/RECOMMENDATIONS

Indicate the action being recommended.

10. ATTACHMENT - VIOLATIONS FORMALLY CITED BUT RESOLVED

In an Attachment to the Transmittal Memorandum, list any violations cited in one or more of the following documents that have been resolved as of the date the Transmittal Memorandum is prepared: Predetermination Notice; Notice of Violation; Show Cause; Amended Show Cause Notice; and 15-Day Notice.

Briefly describe the resolution, referencing the file location of documents that provide more information on the issue and its resolution.

CONTACT PERSONNEL

List the contacts for the contractor and OFCCP.

FIGURES 1-5

FIGURE F-2: OFCCP SCHEDULING LETTER AND ITEMIZED LISTING

OMB NO. 1250-0003
Expires OMB Approved Expiration
Date

VIA CERTIFIED MAIL
(NUMBER)
RETURN RECEIPT REQUESTED

(Name of contractor official)
(Title of contractor official)
(Establishment Name)
(Street Address)
(City, State, Zip Code)

Dear (Name of contractor official):

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), selected your _____ [Insert: establishment, functional unit, or corporate headquarters] located at _____ for a _____ [Insert: compliance evaluation or corporate management compliance evaluation (CMCE)]. We are conducting this _____ [Insert: compliance evaluation or CMCE] under the authority of Executive Order 11246, Section 503 of the Rehabilitation Act of 1973,³²⁸ the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974³²⁹ and their implementing regulations in 41 CFR Chapter 60.³³⁰ In addition to determining your compliance with these authorities, we will also verify your compliance with the regulations issued by the Veterans' Employment and Training Service (VETS) requiring contractors covered under Section 4212 to file an annual report on their employment and hiring of protected veterans.³³¹

A compliance evaluation is initiated as a compliance review. The compliance review may progress in three phases: a desk audit, an on-site review, and an off-site analysis. OFCCP describes the phases of a compliance review in its regulations at 41 CFR Chapter 60.³³² For the desk audit, please submit the following information:

³²⁸ 29 U.S.C. § 793 (2006).

³²⁹ 38 U.S.C. § 4212 (2006).

³³⁰ E.O. 11246, *as amended*, 3 CFR 339 12319 (1965); Section 503 of the Rehabilitation Act of 1973, *as amended*, 29 U.S.C. 793 (2006); Vietnam Era Veterans' Readjustment Assistance Act of 1974, *as amended*, 38 U.S.C. 4212 (2006).

³³¹ The VETS regulations require Federal contractors to submit either or both the VETS-100 and the VETS-100A Federal Contractor Report on Veterans' Employment. See 41 CFR § 61-300.10.

³³² 41 CFR §§ 60-1.20(a), 60-300.60(a), and 60-741.60(a).

1. a copy of your current Executive Order Affirmative Action Program (AAP) prepared in accordance with the requirements of 41 CFR § 60-1.40, and 41 CFR § 60-2.1 through § 60-2.17;
2. a copy of your current Section 503 and Section 4212 AAPs prepared in accordance with the requirements of 41 CFR § 60-741.40 through § 60-741.44 and 41 CFR § 60-300.40 through § 60-300.44, respectively; and
3. the support data specified in the enclosed Itemized Listing.

Please submit your AAPs and the support data specified in the enclosed Itemized Listing to the address listed on page one of this letter as soon as possible, but no later than 30 days from the date you receive this letter. Pursuant to 41 CFR § 60-1.12(e), failure to preserve complete and accurate records constitutes non-compliance with your obligations as a Federal contractor or subcontractor. Once the evaluation begins, you are required to maintain all personnel and employment records described in the regulations enforced by OFCCP until the final disposition of the evaluation.³³³

We encourage you to submit your information in an electronic format to reduce the amount of time it takes to complete our evaluation of your [**Insert** establishment, functional unit, or corporate headquarters]. Should you opt to email your submissions, use email address _____.

You should be aware that OFCCP may initiate enforcement proceedings if you fail to submit AAPs and support data that represent a reasonable effort to meet the requirements of the regulations in 41 CFR Chapter 60.

Rest assured that OFCCP considers the information you provide in response to this Scheduling Letter as sensitive and confidential. Therefore, any disclosures we may make will be consistent with the provisions of the Freedom of Information Act.³³⁴

Please contact _____ at _____ if you have any questions concerning the compliance evaluation.

Sincerely,

(Name of District Director)
District Director

Enclosure (1)
Itemized Listing

³³³ 41 CFR §§ 60-1.12(a), 60-300.80(a), and 60-741.80(a).

³³⁴ 41 CFR § 60-1.20(g); Freedom of Information Act, *as amended*, 5 U.S.C. § 552 (2009).

ITEMIZED LISTING

Executive Order 11246

1. An organizational profile prepared according to 41 CFR § 60-2.11.
2. The formation of job groups (covering all jobs) consistent with criteria given in 41 CFR § 60-2.12.
3. For each job group, a statement of the percentage of minority and female incumbents as described in 41 CFR § 60-2.13.
4. For each job group, a determination of minority and female availability that considers the factors given in 41 CFR § 60-2.14(c)(1) and (c)(2).
5. For each job group, the comparison of incumbency to availability as explained in 41 CFR § 60-2.15.
6. Placement goals for each job group in which the percentage of minorities or women employed is less than would be reasonably expected given their availability as described in 41 CFR § 60-2.16.

Section 503

7. Results of the evaluation of the effectiveness of outreach and recruitment efforts that were intended to identify and recruit qualified individuals with disabilities (IWDs) as described in 41 CFR § 60-741.44(f).
8. Documentation of all actions taken to comply with the audit and reporting system requirements described in 41 CFR § 60-741.44(h).
9. Documentation of the computations or comparisons described in 41 CFR § 60-741.44(k) for the immediately preceding AAP year and, if you are six months or more into your current AAP year when you receive this listing, provide the information for at least the first six months of the current AAP year.
10. The utilization analysis evaluating the representation of IWDs in each job group, or, if appropriate, evaluating the representation of IWDs in the workforce as a whole, as provided in 41 CFR § 60-741.45. If you are six months or more into your current AAP year on the date you receive this listing, please also submit information that reflects current year progress.

Section 4212 (VEVRAA)

11. Results of the evaluation of the effectiveness of outreach and recruitment efforts that were intended to identify and recruit qualified protected veterans as described in 41 CFR § 60-300.44(f).

12. Documentation of all actions taken to comply with the audit and reporting system requirements described in 41 CFR § 60-300.44(h).

13. Documentation of the computations or comparisons described in 41 CFR § 60-300.44(k) for the immediately preceding AAP year and, if you are six months or more into your current AAP year when you receive this listing, provide the information for at least the first six months of the current AAP year.

14. Documentation of the hiring benchmark adopted, the methodology used to establish it if using the five factors described in § 60-300.45(b)(2). If you are six months or more into your current AAP year on the date you receive this listing, please also submit information that reflects current year results.

Support Data

15. Copies of your Employer Information Report EEO-1 (Standard Form 100 Rev.) for the last three years.³³⁵

16. A copy of your collective bargaining agreement(s), if applicable. Include any other documents you prepared, such as policy statements, employee notices or handbooks, etc. that implement, explain, or elaborate on the provisions of the collective bargaining agreement.

17. Information on your affirmative action goals for the immediately preceding AAP year and, where applicable (see below), progress on your goals for the current AAP year.³³⁶

For the immediately preceding AAP year, this report must include information that reflects:

- a. job group representation at the start of the AAP year, (i.e., total incumbents, total minority incumbents, and total female incumbents);
- b. the percentage placement rates (% goals) established for minorities and women at the start of the AAP year; and
- c. the actual number of placements (hires plus promotions) made during the AAP year into each job group with goals (i.e., total placements, total minority placements, and total female placements. For goals not attained, describe the specific good faith efforts made to achieve them.

If you are six months or more into your current AAP year on the date you receive this listing, please also submit information that reflects progress on goals established in your current AAP year, and describe your implementation of action-oriented programs designed to achieve these goals.³³⁷

³³⁵ 41 CFR § 60-1.7.

³³⁶ 41 CFR § 60-1.12(a), 41 CFR § 60-2.1(c) and 41 CFR § 60-2.16.

³³⁷ 41 CFR § 60-1.12 and 41 CFR § 60-2.17(c).

18. Data on your employment activity (applicants, hires, promotions, and terminations) for the immediately preceding AAP year and, if you are six months or more into your current AAP year when you receive this listing, provide the information in (a) through (c) below for at least the first six months of the current AAP year. You should present this data by job group (as defined in your AAP) or by job title.³³⁸

- a. Applicants and Hires: For each job group or job title, this analysis must consist of the total number of applicants and the total number of hires, as well as the number of African- American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaskan Native, White, and the number of female and male applicants and hires. For each job group or job title applicants for whom race and/or sex is not known, should be included in the data submitted.

However, if some of your job groups or job titles (most commonly, entry-level) are filled from the same applicant pool, you may consolidate your applicant data (but not hiring data) for those job groups or titles. For example, where applicants expressly apply for or would qualify for a broad spectrum of jobs (such as “Production,” “Office,” etc.) that includes several job groups, you may consolidate applicant data.

- b. Promotions: For each job group or job title, provide the total number of promotions by gender and race/ethnicity.³³⁹ Also, include a definition of “promotion” as used by your company and the basis on which they were compiled (e.g. promotions to the job group, from and/or within the job group, etc.). If it varies for different segments of your workforce, please define the term as used for each segment. If you present promotions by job title, include the department and job group from which and to which the person(s) was promoted.
- c. Terminations: For each job group or job title, provide the total number of employee terminations by gender and race/ethnicity. When presenting terminations by job title, include the department and job group from which the person(s) terminated.

19. Employee level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, temporary) as of the date of the workforce analysis in your AAP. Provide gender and race/ethnicity information and hire date for each employee as well as job title, EEO-1 Category and job group in a single file.³⁴⁰ Provide all requested data electronically, if maintained in an electronic format. See Note 1, below.

³³⁸ 41 CFR § 60-1.12, 41 CFR § 60-2.11-12, 41 CFR § 60-2.17(b)(2)and(d)(1), and 41 CFR §§ 60-3.4 and 3.15.

³³⁹ The term “race/ethnicity” as used throughout the Itemized Listing includes these racial and ethnic groups: African-American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaskan Native, and White.

³⁴⁰ 41 CFR § 60-2.17(b)(3) and (d).

- a. For all employees, compensation includes base salary and or wage rate, and hours worked in a typical workweek. Other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime should be identified separately for each employee.
- b. You may provide any additional data on factors used to determine employee compensation, such as education, past experience, duty location, performance ratings, department or function, and salary level/band/range/grade.
- c. Documentation and policies related to compensation practices of the contractor should also be included in the submission, particularly those that explain the factors and reasoning used to determine compensation.

20. Copies of reasonable accommodation policies, and documentation of any accommodation requests received and their resolution, if any.

21. Your most recent assessment of your personnel processes, as required by 41 CFR § 60-300.44(b) and § 60-741.44(b), including the date the assessment was performed, any actions taken or changes made as a result of the assessment, and the date of the next scheduled assessment.

22. Your most recent assessment of physical and mental qualifications, as required by 41 CFR § 60-300.44(c) and § 60-741.44(c), including the date the assessment was performed, any actions taken or changes made as a result of the assessment, and the date of the next scheduled assessment.

NOTES

NOTE 1: If any of the requested information is computerized, you must submit it in an electronic format that is complete, readable, and useable. Please use caution when submitting large electronic files. Check with the OFCCP Compliance Officer and your system administrator to ensure adherence to administrative and system guidelines.

Note 2: According to the Paperwork Reduction Act of 1995, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid OMB control number. The valid OMB control number for this information collection is 1250-0003. We estimate that the average time required to complete this information collection is 27.9 hours per response, including the time for evaluating instructions, searching existing data sources, gathering and maintaining the data needed, and completing and evaluating the collection of information.

Send any comments concerning this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to the Office of Federal Contract Compliance Programs, Room C-3325, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

FIGURE F-3: COMPLIANCE CHECK CONTROL SHEET

GENERAL INFORMATION

CMS Control #:

Establishment Name:
Street Address:
City, State, Zip Code:

Corporate Name:
Street Address:
City, State, Zip Code:

Company Contacts		Name	Title	Telephone Number
Establishment	CEO			
	EEO/AA			
Corporate	CEO			
	EEO/AA			

Outside Representation	Firm	Telephone Number

Total Employees	Total Minority	Total Female

Type of Review
 Initial Follow-Up

Multiple Facility
 Yes No

Last Review Date
 / /

DATES

Scheduling Letter Mailed	Onsite	Closure Letter Issued
/ /	/ /	/ /

FINDINGS

Inspected Items

- Information on prior year report
- Job advertisements including evidence of job listings with the appropriate employment service delivery system (e.g., local or State Employment Service)
- Accommodations for individuals with disabilities

Yes	No	N/A
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

If an item is not applicable, indicate the reason here:

RECOMMENDATION FOR CLOSURE

- If no items missing, leave blank.
- If prior year report missing (unless contractor was not covered in prior year), check under column #1.
- If job listings information missing, check under column #2.
- If accommodations information missing, check under column #3.
- If contractor refuses to grant access, check appropriate space.

	#1 Prior Year Report	#2 Job Listings	#3 Accommodations
Recordkeeping			

(Checking one of the above spaces will place the contractor into a pool for further evaluation.)

Failure to Grant Access (Explain)	
--	--

(Checking the space above will indicate the contractor will be selected for another compliance evaluation method.)

Technical Assistance Needed: Yes No

Additional Pertinent Information:

	Compliance Officer	ADD	DD
Signature			
Date			

FIGURE F-4: OFCCP COMPLAINT FORM

<p>Complaint of Discrimination in Employment Under Federal Government Contracts</p>	<p>U.S. Department of Labor Office of Federal Contract Compliance Programs</p>																			
<p>Instructions: Before completing this form, please read all instructions, including the Privacy Act statement below. Use this form to file a complaint of discrimination in employment under any of the OFCCP programs. While your response is voluntary, OFCCP relies on this information as a source for identifying potential violations of equal employment opportunity requirements in the federal contractor community. Note: Persons are not required to respond to this collection of information unless it displays a currently valid OMB control number.</p>		<p>OMB No: 1250-0002 Expires: 03/31/2014</p>																		
<p>Privacy Act Notice: The authority for collecting this information is Executive Order 11246, as amended, Sec. 503 of the Rehabilitation Act of 1973, as amended; the Vietnam Era Veterans' Readjustment Assistance Act of 1974 as amended, 38 U.S.C. 4212; Title VII of the Civil Rights Act of 1964, as amended; and/or Title I of the Americans with Disabilities Act of 1990, as amended (ADA). This information is used to process complaint and conduct investigations of alleged violations of the above Order or Acts. We will provide a copy of this complaint to the employer against whom it is filed and, when matters alleged are covered by Title VII and/or the ADA, to the U.S. Equal Employment Opportunity Commission (EEOC). The information collected may be verified with others who may have knowledge relevant to the complaint. It may be used in settlement negotiations with the employer or in the course of presenting evidence at a hearing, or may be disclosed to other agencies with jurisdiction over the complaint. Providing this information is voluntary; however failure to provide the information will restrict the action that the Department of Labor can take on your behalf and, for matters covered by Title VII or the ADA, may affect your right to sue under those laws.</p>																				
<p>Non-Retaliation: OFCCP regulations and Title VII and/or the ADA where applicable, require an employer to take all necessary steps to assure that there is no retaliation against any person who files a complaint or assists in its investigation. This includes any intimidation, threat, coercion or discrimination. Please notify OFCCP immediately if any alleged attempt at retaliation is made.</p>																				
<p>Prompt Filing: All complaints must be filed within a specified number of days following the latest occurrence of the alleged discrimination: Executive Order 11246 – 180 days; Rehabilitation and Veterans Acts – 300 days. Exceptions must be approved by the Director.</p>																				
<p>Name and address:</p> <p>Name _____</p> <p>Address _____</p> <p>City _____ State _____ Zip _____</p> <p>Telephone No. _____</p>	<p>Name and address of company you allege discriminated against you:</p> <p>Name _____</p> <p>Address _____</p> <p>City _____ State _____ Zip _____</p> <p>Telephone No. _____</p>																			
<p>Mail this form to the Department of Labor, OFCCP Regional Office:</p>	<p>Give the date(s) of the latest occurrence(s) of the alleged discriminatory act(s):</p> <p>_____</p>																			
<p>Step 1: Check the box next to the program you are filing under (i.e. Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended, or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212, or retaliation)</p>																				
<p>Step 2: Under the program, check what you believe to be the basis for the discrimination against you, such as race, sex, or national origin. If you think that there was more than one basis, more than one basis may be checked. You may also check more than one race/ethnic category.</p>																				
<p><input type="checkbox"/> Executive Order 11246, as amended. This Order covers persons alleging discrimination because of race, color, religion, sex, or national origin. If this is checked, your complaint will be dual filed as a charge under Title VII of the Civil Rights Act of 1964. I believe I was (or continue to be) discriminated against because of my:</p> <p>Bases:</p> <table style="width: 100%;"> <tr> <td><input type="checkbox"/> Race</td> <td><input type="checkbox"/> Hispanic or Latino</td> <td><input type="checkbox"/> American Indian or Alaskan Native</td> </tr> <tr> <td><input type="checkbox"/> Color</td> <td><input type="checkbox"/> Not Hispanic or Latino</td> <td><input type="checkbox"/> Asian</td> </tr> <tr> <td><input type="checkbox"/> Religion</td> <td></td> <td><input type="checkbox"/> Black or African American</td> </tr> <tr> <td><input type="checkbox"/> Sex <input type="checkbox"/> Female <input type="checkbox"/> Male</td> <td></td> <td><input type="checkbox"/> Native Hawaiian or Other Pacific Islander</td> </tr> <tr> <td><input type="checkbox"/> National Origin</td> <td></td> <td><input type="checkbox"/> White</td> </tr> <tr> <td><input type="checkbox"/> Other</td> <td></td> <td></td> </tr> </table>			<input type="checkbox"/> Race	<input type="checkbox"/> Hispanic or Latino	<input type="checkbox"/> American Indian or Alaskan Native	<input type="checkbox"/> Color	<input type="checkbox"/> Not Hispanic or Latino	<input type="checkbox"/> Asian	<input type="checkbox"/> Religion		<input type="checkbox"/> Black or African American	<input type="checkbox"/> Sex <input type="checkbox"/> Female <input type="checkbox"/> Male		<input type="checkbox"/> Native Hawaiian or Other Pacific Islander	<input type="checkbox"/> National Origin		<input type="checkbox"/> White	<input type="checkbox"/> Other		
<input type="checkbox"/> Race	<input type="checkbox"/> Hispanic or Latino	<input type="checkbox"/> American Indian or Alaskan Native																		
<input type="checkbox"/> Color	<input type="checkbox"/> Not Hispanic or Latino	<input type="checkbox"/> Asian																		
<input type="checkbox"/> Religion		<input type="checkbox"/> Black or African American																		
<input type="checkbox"/> Sex <input type="checkbox"/> Female <input type="checkbox"/> Male		<input type="checkbox"/> Native Hawaiian or Other Pacific Islander																		
<input type="checkbox"/> National Origin		<input type="checkbox"/> White																		
<input type="checkbox"/> Other																				
<p><input type="checkbox"/> Section 503 of the Rehabilitation Act of 1973, as amended. This Act covers individuals with a disability, persons with a history of physical or mental disability, and persons regarded as disabled by the employer. If this is checked, your complaint will be dual-filed as a charge under the Americans with Disabilities Act.</p> <p>Basis <input type="checkbox"/> Disability Please check if you are a veteran: <input type="checkbox"/> Yes <input type="checkbox"/> No</p>																				
<p><input type="checkbox"/> Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212. This Act covers special disabled veterans, veterans of the Vietnam Era, recently separated veterans, disabled veterans, Armed Forces service medal veterans, and other protected veterans.</p>																				
<p><input type="checkbox"/> Retaliation: It is unlawful to harass intimidate, threaten, coerce, or discriminate against any individual because he or she has filed a complaint, participated in a discrimination proceeding or otherwise opposed discrimination under any of the federal programs above.</p>																				
<p>Form CC-4</p>																				

Figure F-4 | 422

IF YOUR COMPLAINT IS BASED ON VETERAN STATUS, CHECK ONE OR MORE OF THE FOLLOWING APPLICABLE BOX(ES).

- I was discharged or released from active duty on (enter date of discharge or release) _____
- I am a veteran who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985 (61 CFR 1209).
- I served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized.
- I served on active duty for a period of more than 180 days, and was discharged or released with other than a dishonorable discharge, and the active duty occurred in the Republic of Vietnam between February 28, 1961, and May 7, 1975; or between August 5, 1964, and May 7, 1975 in all other cases.
- I was discharged or released from active duty for a service connected disability. If you have checked this box, submit medical information resulting in discharge or release with this form. (This information is available from your Master Military Record at the National Personnel Record Center, 9700 Page Boulevard, St. Louis, MO 63132.)

I am a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs. Check one of the following:

- Disability rating of 30% or more
- Disability rating at 10% or 20% and have been officially determined to have a serious employment disability
- Disability rating, but neither a or b

Step 3: Check those actions which you believe the employer took or failed to take because of your race, color, religion, sex, national origin, disability or veteran status (more than one may be checked):

Issue(s):

- | | | | |
|--------------------------------------|---------------------------------------|--|---|
| <input type="checkbox"/> Hiring | <input type="checkbox"/> Promotion | <input type="checkbox"/> Job Assignment | <input type="checkbox"/> Sabbath Day Observance |
| <input type="checkbox"/> Termination | <input type="checkbox"/> Demotion | <input type="checkbox"/> Training and Apprenticeship | <input type="checkbox"/> Intimidation |
| <input type="checkbox"/> Layoff | <input type="checkbox"/> Seniority | <input type="checkbox"/> Segregated Facilities | <input type="checkbox"/> Other _____ |
| <input type="checkbox"/> Recall | <input type="checkbox"/> Harassment | <input type="checkbox"/> Pregnancy Leave | |
| <input type="checkbox"/> Wages | <input type="checkbox"/> Job Benefits | <input type="checkbox"/> Accommodation to Disability | |

FOR EACH ISSUE, EXPLAIN IN YOUR STATEMENT BELOW HOW YOU WERE DISCRIMINATED AGAINST.

1. Do you know any other employees or applicants of your group who were treated in the same way (checked above) you allege you were?

- Yes No If yes, include their names in your statement below and explain how they were treated.

2. Do you know any other employees or applicants who are not of your group who were treated in the same way (checked above) you allege you were?

- Yes No If yes, include their names in your statement below and explain how they were treated.

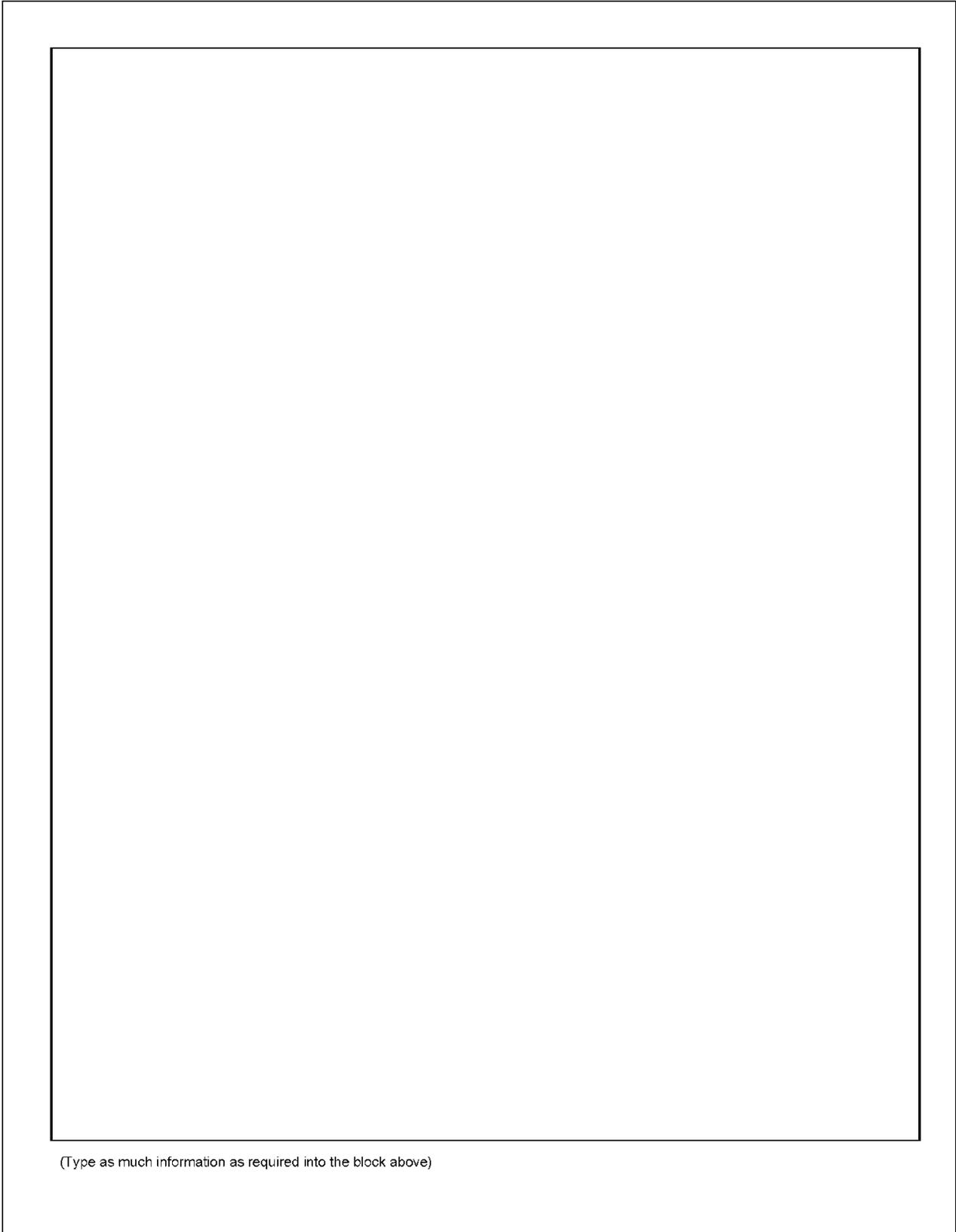
THE COMPLAINT

Describe in detail the alleged discriminatory/retaliatory act (s).

Please include:

- Why you believe the act(s) was because of your disability, veteran status, race, color, religion, sex, or national origin, and why you believe the act(s) was retaliation;
- Dates, places, names and titles of persons involved and witnesses, if any;
- What harm, if any, was caused to you or others with whom you work as a result of the alleged discriminatory act(s);
- What explanation, if any, was offered for the act(s) by the employer; and
- Any information you may have on federal contracts held by the employer.

If this is a complaint based on disability, describe the disability, your history of disability, or why you think the employer regarded you as disabled.



(Type as much information as required into the block above)

Figure F-4 | 424

If you have sought assistance in resolving this complaint from another source (another agency, a lawyer, internal grievance procedure, etc.) please indicate here and the name of the source, the date you sought assistance, and result, if any:

Name _____ Date _____
Result:

FRIEND OR RELATIVE:

Please notify OFCCP if you change your address or phone number. You may indicate a person who would know how to reach you if OFCCP is unable to reach you at your own address or phone.

Name _____

Address _____

City _____ State _____ Zip _____

Relationship _____

Telephone _____

FILED ELSEWHERE? If you have filed this complaint or a similar one elsewhere, please tell us:	ARE YOU REPRESENTED? If you are represented by an attorney or other person or organization, please tell us:
Name _____	Name _____
Address _____	Address _____
City _____ State _____ Zip _____	City _____ State _____ Zip _____
Contact _____	Contact _____
Telephone _____	Telephone _____

SIGNATURE AND VERIFICATION

I declare under penalty of perjury that the information given above is true and correct to the best of my knowledge or belief. (A willful false statement is punishable by law: 18 U.S.C. 1001.) I hereby authorize the release of any medical information needed for the investigation.

Signature of Complainant

Date

Public Burden Statement

We estimate that it will take an average of 1.28 hours to complete this complaint form, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the information. If you have any comments regarding these estimates or any other aspect of this complaint form, including suggestions for reducing this burden, send them to the Office of Federal Contract Compliance Programs Policy Division (1250-0002) 200 Constitution Avenue, N.W., Room C-3325, Washington, D.C. 20210.

DO NOT SEND THE COMPLETED FORM TO THIS OFFICE

Do not write below this line

The complainant has verified this complaint in my presence. This complaint is now the basis of an investigation under Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; and/or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212).

Name of Investigator

Title

Signature of Investigator

Date

FIGURE F-5: STANDARD TEXT FOR CONCILIATION AGREEMENT

Conciliation Agreement
Between the
U.S. Department of Labor Office of Federal Contract Compliance Programs
And
[Name of Contractor]
[Name and address of establishment
covered by the Agreement]

PART I: General Provisions

1. This Agreement is between the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), and [insert name and address of contractor].
2. The violations identified in this Agreement were found during a [insert as appropriate: compliance evaluation or complaint investigation] of [insert name of contractor] which began on [insert date] and were specified in a [insert as appropriate: Notice of Violation; Show Cause Notice; an Amended Show Cause Notice] that was issued on [insert date]. OFCCP alleges that [insert name of contractor] has violated [insert as appropriate: Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212)] and implementing regulations at 41 CFR Chapter 60 due to the specific violations cited in Part II below.
3. This Agreement does not constitute an admission by [insert name of contractor] of any violation of [insert as appropriate: Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, (38 U.S.C. 4212)] and the implementing regulations.
4. The provisions of this Agreement will become part of [insert contractor's name] AAP. Subject of the performance by [insert name of contractor] of all promises and representations contained herein and in its AAP, all named violations in regard to the compliance of [insert name of contractor] with all OFCCP programs will be deemed resolved. However, [insert name of contractor] is advised that the commitments contained in this Agreement do not preclude future determinations of noncompliance based on a finding that the commitments are not sufficient to achieve compliance.
5. [Insert name of contractor] agrees that OFCCP may review compliance with this Agreement. As part of this review, OFCCP may require written reports, inspect the premises, interview witnesses, and examine and copy documents, as may be relevant to the matter under investigation and pertinent to [insert name of contractor] compliance. [Insert name of contractor] shall permit access to its premises during normal business hours for these purposes.
6. Nothing herein is intended to relieve [insert name of contractor] from the obligation to comply with the requirements of Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, and/or the Vietnam Era Veterans Readjustment

Assistance Act of 1974, as amended (38 U.S.C. 4212), their implementing regulations, or any other equal employment statute or executive order or its implementing regulations.

7. [*Insert name of contractor*] agrees that there will be no retaliation of any kind against any beneficiary of this Agreement or against any person who has provided information or assistance, or who files a complaint, or who participates in any manner in any proceedings under Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, and/or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212).
8. This Agreement will be deemed to have been accepted by the Government on the date of the signature by the Regional Director for OFCCP, unless the Director for OFCCP indicates otherwise within 45 calendar days of the Regional Director's signature on this Agreement.
9. If at any time in the future, OFCCP believes that [*insert name of contractor*] has violated any portion of this Agreement during the term of this Agreement, [*insert name of contractor*] will be promptly notified of that fact in writing. This notification will include a statement of the facts and circumstances relied upon in forming that belief. In addition, the notification will provide [*insert name of contractor*] with 15 calendar days from receipt of the notification to respond in writing, except where OFCCP alleges that such a delay would result in irreparable injury.

Enforcement proceedings for violation of this Agreement may be initiated at any time after the 15-day period has elapsed or sooner, if irreparable injury is alleged, without issuing a Show Cause Notice.

Where OFCCP believes that [*insert name of contractor*] has violated this Conciliation Agreement, OFCCP may seek enforcement of this Agreement itself and shall not be required to present proof of the underlying violations resolved by this Agreement.

Liability for violation of this Agreement may subject [*insert name of contractor*] to sanctions set forth in [as applicable, Section 209 of the Executive Order, 41 CFR 60-250.66, 41 CFR 60-300.66 and/or 41 CFR 60-741.66 and/or other appropriate relief.

PART II: Specific Provisions

1. VIOLATION:

REMEDY:

2. VIOLATION:

REMEDY:

Part III: Reporting

1. [Insert name of contractor] agrees to retain records pertinent to the violations cited in Part II above, and to the reports submitted in compliance with Paragraph 2, below. These records shall include data and information underlying the required reports, specifically, but not limited to all applications and personnel records. The records will be retained until the expiration of this Agreement or consistent with regulatory requirements, whichever is later.
2. [Insert name of contractor] agrees to furnish the OFCCP [insert name and address of OFCCP office] with the following reports:
 - [Fill in specific information regarding the due dates and items to be submitted with each report.]
3. This Conciliation Agreement shall remain in effect until the review and acceptance by OFCCP of [insert name of contractor] final progress report.

PART IV: Signatures

This Conciliation Agreement is hereby executed by and between the Office of Federal Contract Compliance Programs and [*insert Contractor*], [*insert Contractor's Address*].

(Signature – Contractor’s Top Establishment Official)
Name
Title
Organization
City, State

DATE: _____

(Signature – Compliance Officer)
Name
Title
District Office
Region

DATE: _____

(Signature – Union’s Top Official, if applicable)
Name
Title
Organization
City, State

DATE: _____

(Signature – District Director or designee)
Name
Title
District Office
Region

DATE: _____

LETTERS L1 – L33

**LETTER L-1: SAMPLE INQUIRY LETTER FOR REQUESTING
COMPLAINT DATA FROM EEOC AND STATE AND
LOCAL FEPS**

[Date]

[Name/Title]

[Agency or Organization Name]

[Street Address]

[City, State, Zip Code]

Dear _____:

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), scheduled a compliance evaluation for *(insert name of contractor)*.

Our evaluation will assess the contractor's compliance with Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212, and the implementing regulations for these authorities. These legal authorities prohibit employment discrimination and require affirmative action to provide equal employment opportunity without regard to race, color, religion, national origin, sex, disability or status as a protected veteran.

Please forward any information you have concerning complaints, charges or litigation filed against this contractor. We are also seeking any other information you may have concerning its EEO attitudes, policies and practices of the contractor which you believe we should consider during the course of the compliance evaluation.

The evaluation will begin in approximately 30 calendar days, therefore, a prompt response to this inquiry is appreciated. Please contact me at *(insert phone number)* should you have any questions or require additional information.

Sincerely,

(insert name of compliance officer)

Compliance Officer

LETTER L-2: SAMPLE INQUIRY LETTER FOR REQUESTING JOB LISTING FROM EMPLOYMENT SERVICE

[Date]

[Name/Title]

[Agency or Organization Name]

[Street Address]

[City, State, Zip Code]

Re: Request for Job Listings

Dear *(insert name)*:

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), scheduled the below listed company for a compliance evaluation under 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 (38 U.S.C. 4212), and the implementing regulations at 41 CFR Part 60.

(insert contractor's name and mailing address)

As a part of the compliance evaluation, OFCCP must determine whether the company named above listed its suitable job openings with its local state employment office as required and the results of those listings. In order to determine the contractor's compliance with these mandatory job listing requirements, we are requesting that you provide this office with specific job orders placed with your office for the past two years, as well as any other information related to the contractor's compliance with its job listing obligations. Please contact me at *(insert phone number)* should you have any questions or require additional information.

Thank you for your cooperation.

Sincerely,

(insert name of compliance officer)

Compliance Officer

LETTER L-3

**SAMPLE INQUIRY LETTER FOR REQUESTING
INFORMATION ON PENDING REVIEW FROM
VETERANS EMPLOYMENT AND TRAINING SERVICE**

[Date]

[Name/Title]

[DOL State VETS Office]

[Street Address]

[City, State, Zip Code]

Dear (*insert name*):

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), is conducting a compliance review of (*insert name of contractor*).

As a federal contractor, this company assumed obligations and responsibilities under the laws enforced by OFCCP requiring contractors to take affirmative action to employ disabled veterans, Vietnam era veterans, and other protected veterans, and to list all employment openings as defined at (*insert as appropriate: 41 CFR 60-250.5 or 41 C.F.R. 60-300.5*) with the appropriate local office of the state employment service system.

Please provide any information you have concerning (*insert name of contractor*) compliance with its obligations including, but not limited to, information on job listings and complaints for the past year. Your information should be sent to me at the above address or by e-mail to (*insert e-mail address*).

If you have any questions, please contact me at (*insert phone number*). Thank you for your assistance in this matter.

Sincerely,

(*insert name of compliance officer*)
Compliance Officer

**LETTER L-4: NOTICE OF CLOSING: COMPLIANCE EVALUATION
(NO VIOLATIONS FOUND)**

Certified Mail, Return Receipt Requested AND Electronic Mail

[Date]

[Name of CEO]

[Title of CEO]

[Establishment Name]

[Street Address]

[City, State, Zip Code]

Dear *(insert name of contractor's official)*:

The U.S. Department of Labor, Office of Federal Compliance Programs (OFCCP), recently completed a compliance evaluation of your equal employment opportunity policies and practices at *(insert name and location of the establishment or functional unit reviewed)*.

(Select either Paragraph 1 or Paragraphs 2 and 3)

Paragraph 1:

During the compliance evaluation process we found no apparent violations of Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended (Section 503), the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (Section 4212) or Executive Order 13496. The Director of OFCCP or the Regional Director may modify this determination within 45 calendar days of the issuance of this letter.

OR

Paragraphs 2 and 3:

During the compliance evaluation process we identified and resolved the following violation(s): *[insert the technical violation(s) resolved during the compliance evaluation, including the appropriate regulatory citation and specific remedy]*. It is understood that this/these violation(s) will not recur.

There were no other apparent violations of Executive Order 11246, Section 503 or Section 4212. This determination may be modified by the Regional Director, or by the Director of OFCCP, within 45 calendar days of the issuance of this letter.

The OFCCP appreciates the cooperation of you and your staff during the conduct of the compliance review.

Sincerely,

(insert name of district director)

District Director

cc: *[insert names]*

LETTER L-5: SAMPLE LINKAGE LETTER

[Date]

[Name of Resource Head or Contact]

[Title of Resource Head or Contact]

[Resource Name]

[Street Address]

[City, State, Zip Code]

Dear (insert name):

(Select either Paragraphs 1 and 3 or Paragraphs 2 and 3)

Paragraph 1:

As we discussed on (insert date), the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), recommended and (insert name and location of the establishment reviewed) agreed to use your services to recruit applicants as part of their effort to meet their federal contractor affirmative action goals or needs as established under laws enforced by OFCCP. The specific job titles for which applicants are sought and the number of projected vacancies are listed below:

<u>Job Title</u>	<u>Projected Vacancies</u>
(job title name)	(insert #) _____
(job title name)	(insert #) _____

OR

Paragraphs 2:

During a recent compliance review the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), recommended and (insert name and location of the establishment reviewed) agreed to use your services to recruit applicants as part of their effort to meet their federal contractor affirmative action goals or needs as established under laws enforced by OFCCP. The specific job titles for which applicants are sought and the number of projected vacancies are listed below:

<u>Job Title</u>	<u>Projected Vacancies</u>
(job title name)	(insert #) _____
(job title name)	(insert #) _____

Paragraph 3:

The company is a covered federal contractor that engages in affirmative action to ensure equal employment opportunity for all applicants and employees regardless of race, color, religion, sex, national origin, disability or protected veteran status. All qualified applicants referred by you will be considered.

We request that you contact *(insert contact name)* with *(insert name of the establishment reviewed)* at *(insert phone number)* to discuss how you can assist with their employment needs.

Sincerely,

(insert name of compliance officer)
Compliance Officer

cc: *(insert name of the OFCCP regional linkage coordinator)*
(insert name of the contractor)

LETTER L-6: REQUEST FOR LITERATURE SEARCH

[Date]

Reference Librarian
U.S. Department of Labor Library
200 Constitution Avenue, N.W.
Room N-2445
Washington, D.C. 20210

Dear Reference Librarian:

I am writing to request a literature search on the below listed corporation(s) on behalf of the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP):

(insert name and address of corporate headquarters)

This search should include at least the following publications, providing the full text of any entry found:

America's Corporate Families
Directory of Corporate Affiliations
Hoover's Handbook
International Directory of Company Histories
Moody's Industrial Manual
Reference Book of Corporate Managements
Standard and Poor's Register

Please also include a list of articles published about this corporation over the last two years, including articles appearing in the following periodicals:

Business Week
Forbes
Fortune

The Daily Labor Report
The Wall Street Journal

For each publication, please specify the title of the publication, date of publication, title of the article, and the author(s). We would appreciate receiving this material within two weeks of your receipt of this letter. Please contact *(insert name and phone number of compliance officer)* if you have any questions.

Thank you for your assistance.

Sincerely,

(insert name of regional or district director)
Regional Director or District Director

**LETTER L-7: LETTER TO CONTRACTOR FORWARDING EO 11246,
SECTION 503 OR SECTION 4212 COMPLAINT**

Certified Mail, Return Receipt Requested

[Date]

[Name of CEO]

[Title of CEO]

[Establishment Name]

[Street Address]

[City, State, Zip Code]

Dear (*insert name of contractor official*):

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), received a complaint filed under the provisions of (*insert one or more of the appropriate legal authorities enforced by OFCCP*). A copy of the complaint is enclosed.

This office is assigned the complaint for investigation under the (*insert the name of one or more of the appropriate legal authorities enforced by OFCCP underlying the complaint*) and its implementing regulations at (*insert the appropriate CFR part and section citations for the complaint*). A copy of the applicable regulations is enclosed. The regulations enforced by OFCCP require that federal contractors and subcontractors covered by OFCCP's jurisdiction not discriminate based on race, color, religion, sex, national origin, disability or an individual's status as a protected veteran. They generally require federal contractors and subcontractors take affirmative action to employ and advance in employment individuals from these particular groups.

As required by our regulations, please retain full accurate records relevant to this complaint and ensure that there is no harassment, intimidation, coercion or discrimination against the complainant (*insert the appropriate citations: 41 CFR 60-741.69 and 741.80-.81; 41 CFR 60-250.69 and 250.80-.81; 41 CFR 60-300.69 and 300.80-.81; 42 CFR 60-1.32 and 1.43*).

This letter is a notice that a complaint was filed and neither prejudices the issues nor implies that your company violated any law. It is also a notice to retain information that will later permit an expeditious investigation and resolution of this matter.

You may wish to review and attempt to resolve this complaint internally, and if you are successful in resolving it to the satisfaction of the complainant, we will need verification from the complainant. However, OFCCP reserves the option to conduct its own investigation if, in its judgment, the circumstances warrant.

If you do not wish to make an attempt to resolve this matter, or you are unsuccessful in doing so, you may wish to send us a statement of position or evidence concerning the complaint. Any material you submit will be included in the case file, and will be

Federal Contract Compliance Manual (FCCM)

considered when the complaint is investigated. Please note that during such an investigation, we may need to examine your current Affirmative Action Program required under 41 CFR (*insert appropriate citations: 41 CFR 60-741.44; 41 CFR 60-250.44; 41 CFR 60-300.44; 41 CFR Part 60-2*).

If you have any questions, you may contact (*insert name of compliance officer*) at (*insert telephone number*).

Sincerely,

(*insert name of district director*)
District Director

Enclosure: Complaint of (*insert name of complainant and CMS#*)

**LETTER L-8: LETTER ACKNOWLEDGING RECEIPT OF EO 11264,
SECTION 503 AND SECTION 4212 COMPLAINT**

Certified Mail, Return Receipt Requested

[Date]

[Name of Complainant]

[Address]

[Street Address]

[City, State, Zip Code]

Re: Complaint against [insert name of company and CMS #)

Dear (insert name of complainant):

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), acknowledges our receipt of your complaint against the above federal contractor. Your complaint is assigned to this office for investigation. We notified the contractor of your complaint, provided the contractor a copy of the complaint, and advised the contractor of the opportunity to attempt to resolve the complaint if it wishes to do so. We also informed the contractor that our regulations require that all relevant records be retained, and that there be no harassment, intimidation, coercion or retaliation against you.

If the contractor and you are able to resolve your complaint to your satisfaction, please let us know immediately, preferably in writing. In the meanwhile, we will schedule your complaint for investigation.

Please be sure to keep us advised of any change in your address or telephone number. If you have any questions, you may contact (insert name of compliance officer) at (insert telephone number).

Sincerely,

(insert name of district director)

District Director

**LETTER L-9: AUTHORIZATION FOR RELEASE OF MEDICAL
INFORMATION**

Re: Complaint against [*insert name of contractor*]
 OFCCP CMS #

I hereby authorize the release to the United States Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), of any medical information needed by OFCCP in its investigation of the complaint of discrimination which I filed on (*insert date*) against the above-named contractor.

PRINTED/TYPED NAME OF PATIENT

SIGNATURE OF PATIENT

DATE

LETTER L-10: CONFIRMATION OF ONSITE INVESTIGATION

Certified Mail, Return Receipt Requested

[Date]

[Name of Contractor Official]

[Title]

[Street Address]

[City, State, Zip Code]

Re: Complaint of *(insert complainant's name and CMS #)*

Dear *(insert name of contractor official)*:

This letter confirms the telephone call of *(insert date)* between Compliance Officer *(insert name)* with the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), and *(insert name of contractor official)* scheduling the investigation of the above complaint filed under *(insert one or more of these authorities: Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended)*.

As agreed, the investigation is to begin on *(insert date)* at *(insert time and location)*. In the telephone call mentioned above, *(insert compliance officer's name and title)* requested that certain records and individuals be available during the visit. These are listed on the attachment to this letter.

If you have any questions, please contact *(insert name of compliance officer)* at *(insert telephone number)*.

Sincerely,

(insert name of district director)

District Director

Attachment

**LETTER L-11: LETTER TO CONTRACTOR CONFIRMING COMPLAINT
RESOLUTION**

Certified Mail, Return Receipt Requested

[Date]

[Name of Contractor Official]

[Title]

[Street Address]

[City, State, Zip Code]

Re: Complaint of (*insert name of complainant and CMS #*)

Dear (*insert name of contractor official*):

On behalf of the U.S. Department of Labor, Office of Federal Contract Compliance Programs, this correspondence confirms (*insert as appropriate: your letter or our telephone conversation*) of (*insert date of letter or telephone call*) in which you informed us that the above complaint was resolved to the satisfaction of the complainant. We have been in contact with the complainant who acknowledges that the parties reached a satisfactory resolution of the complaint.

We appreciate your efforts in resolving this matter.

Sincerely,

(*insert name of district director*)

District Director

LETTER L-12: LETTER TO COMPLAINANT CONFIRMING COMPLAINT RESOLUTION

Certified Mail, Return Receipt Requested

[Date]

[Name of Complainant]

[Address]

[Street Address]

[City, State, Zip Code]

Re: Complaint against (*insert the name of company and CMS #*)

Dear (*insert name of complainant*):

On behalf of the U.S. Department of Labor, Office of Federal Contract Compliance Programs, this correspondence confirms (*insert as appropriate: your letter or our telephone conversation*) of (*insert date*). During the (*insert as appropriate: in your letter or during the call*) you stated that your complaint against the above company was resolved to your satisfaction.

If you are satisfied with the resolution of your complaint, please sign on the line indicated below and return this letter to us in the enclosed stamped envelope.

Sincerely,

(*insert name of district director*)

District Director

Enclosure: Self addressed stamped envelope

There has been a satisfactory resolution to my complaint filed against (*insert name of contractor*). I have not been forced or coerced by the contractor, or any of its agents, into making this statement.

Signature _____

Date _____

**LETTER L-13: NOTIFICATION OF RESULTS OF INVESTIGATION:
NOTIFICATION OF NO VIOLATION
(EO 11246, Section 503, or Section 4212 Complaint (Not Dual
Filed))**

Certified Mail, Return Receipt Requested

[Date]

[insert Complaint No.]

COMPLAINANT

[Complainant's Name]

[Street Address]

[City, State, Zip Code]

CONTRACTOR

[Contractor Name]

[Street Address]

[City, State, Zip Code]

On *(insert date)*, the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), conducted an investigation of the allegations of *(insert type of discrimination)* made in the complaint of *(insert name of complainant)* filed on *(insert date)*. The investigation resulted in the following findings:

1. *(Insert name of contractor)* is a nonexempt government contractor subject to the requirements of *(insert one or more as appropriate: Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended (Section 503); the Vietnam Era Veterans' Readjustment Assistance Act of 1974, or as amended (VEVRAA))*.
2. *(Insert name of complainant)* is a *(insert one or more bases for alleged discrimination: sex, race, color, national origin, individual with a disability or a veteran covered by the laws enforced by OFCCP)* within the meaning of *(insert appropriate legal authority: Executive Order 11246; Section 503; VEVRAA)* and the regulations at *(insert as appropriate: 41 CFR 60-1 to 60-50; 41 CFR 60-250; 41 CFR 60-300; 41 CFR 60-741)*.
3. The complainant alleges the contractor violated its obligations under the nondiscrimination and affirmative action provisions of its federal contracts by *(insert description of employment action taken by contract: terminating, not promoting, not hiring, etc.)*.

4. The contractor's position is that the complainant was (*insert description of employment action: terminated, not hired, not promoted, etc.*) because (*insert description of the contractor's reasons or position*).
5. Our investigation indicates that the contractor (*insert description of findings/evidence related to contractor's employment actions*).
6. Based on the findings of this investigation, there was insufficient evidence that the contractor violated its obligations under the nondiscrimination and affirmative action provisions of (*insert one or more as appropriate: EO 11246; Section 503; VEVRAA*). This determination concludes the processing of this complaint by this office.

On behalf of the United States Department of Labor.

Regional Director

Date

cc: (*insert name of complainant's attorney*)
(*insert name of the contractor's attorney*)

LETTER L-14: NOTIFICATION OF RESULTS OF INVESTIGATION AND NOTICE OF RIGHT-TO-SUE UNDER TITLE I OF THE ADA OR TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: NOTIFICATION OF NO VIOLATION

Certified Mail, Return Receipt Requested

U.S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

[Complaint No.]

[Complainant's Name]
[Street Address]
[City, State, Zip Code]

“COMPLAINANT”

[Contractor's Name]
[Street Address]
[City, State, Zip Code]

“CONTRACTOR”

On *[insert date]*, the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), conducted an investigation of the allegation(s) of *[insert basis of complaint]* discrimination made in the complaint of *[insert name of complainant]*, filed on *[insert date]* pursuant to procedures for complaints of employment discrimination filed against employers holding government contracts or subcontracts. Our investigation has resulted in the following findings:

1. *[Insert name of contractor]* is a nonexempt government contractor subject to the requirements of *[insert one or more as appropriate: Executive Order 11246, as amended (EO 11246) and an employer of 15 or more persons subject to Title VII of the Civil Rights Act of 1964, as amended; Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA); Section 503 of the Rehabilitation Act of 1973, as amended (Section 503) and an employer of 15 or more persons subject to Title I of the Americans with Disabilities Act of 1990, as amended (ADA)]*.
2. *[Insert name of complainant]* is a *[insert membership in one or more protected classes: minority, woman, veteran, disabled vereran, individual with a disabled, etc.]* covered or protected by *[insert one or more as appropriate: EO 11246 and Title VII; Section 4212 or VEVRAA; Section 503 and the ADA]*.

3. The complainant alleges the contractor violated its obligations under the nondiscrimination and/or affirmative action provisions of its federal contracts and under the nondiscrimination provisions of [*insert as appropriate: Title VII or the ADA*] by [*insert a description of the adverse personnel action or practice of the employer: terminating, not promoting, paying less, etc.*].
4. The contractor's position is that the complainant was [*insert description of of the adverse personnel action or practice of the employer: terminated, not hired, etc.*] because [*insert a description of the contractor's position or defense*].
5. Our investigation indicates that the contractor [*insert a description of what the contractor did or did not do*].

The Agency's investigation found insufficient evidence that the contractor violated its obligations under the nondiscrimination and affirmative action provisions of [*insert one or more as appropriate: EO 11246, Section 4212 (VEVRAA), or Section 503*], or under the nondiscrimination provisions of the [*insert one or more as appropriate: Title VII or the ADA*]. This determination concludes the processing of this complaint by OFCCP.

On behalf of the United States Department of Labor,

[Regional Director or Designee]

[Date]

Enclosure: Information Related to Filing Suit under Title VII and the ADA
Notice of Right to Sue

cc: [*insert name of complainant's attorney*]
[*insert name of contractor's attorney*]
[*insert name of the EEOC field office contact*]

**LETTER L-15: NOTICE OF RIGHT-TO-SUE UNDER TITLE I OF THE
ADA OR TITLE VII OF THE CIVIL RIGHTS ACT OF 1964
(Issued Upon Request)**

Certified Mail, Return Receipt Requested

U.S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

TO: [Complainant's Name
and Address]

FROM: [OFCCP Office Name
and Address]

On behalf of a person whose
identity is confidential
(29 CFR 1601.7(a))

OFCCP Representative

Complaint Number:

TO THE COMPLAINANT: This is your NOTICE OF RIGHT-TO-SUE. It is issued at your request. If you intend to file a lawsuit against the employer named in your complaint, YOU MUST DO SO WITHIN NINETY (90) CALENDAR DAYS OF YOUR RECEIPT OF THIS NOTICE. OTHERWISE, YOUR RIGHT TO SUE IS LOST.

- More than 180 calendar days have elapsed since you filed your complaint.
- Less than 180 calendar days have elapsed since you filed your complaint, but it has been determined that OFCCP will be unable to complete its processing within 180 calendar days from the date you filed your complaint. (Note: This reason is not acceptable to the courts within the District of Columbia.)
- With the issuance of this Notice of Right-to-Sue, OFCCP is terminating its processing of your complaint.
- OFCCP will continue to investigate the following allegations in your complaint which are uniquely within OFCCP jurisdiction: *[list any allegation(s), not subject to ADA or Title VII, which are still under investigation].*

An information copy of this Notice has been sent to the below employer as named in your complaint.

[insert employer's name and address]

For the United States Department of Labor,

Regional Director or Designee

Date

Enclosures (2): Information Related to Filing Suit under Title VII and the ADA
 Copy of Complaint

cc: *[insert name of complainant's attorney]*
 [insert name of contractor's attorney]
 [insert name of EEOC field office contact]

LETTER L-16: NOTICE OF RIGHT-TO-SUE UNDER TITLE I OF THE ADA OR TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (Administrative Closure)

Certified Mail, Return Receipt Requested

U.S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

TO: [Complainant's Name and Address] FROM: [OFCCP Office Name and Address]

On behalf of a person whose identity is confidential (29 CFR 1601.7(a)) OFCCP Representative

Complaint Number:

TO THE COMPLAINANT: This is your NOTICE OF RIGHT-TO-SUE under Title I of the Americans with Disabilities Act of 1990, as amended [Title VII of the Civil Rights Act of 1964, as amended]. It is issued because OFCCP has dismissed your complaint for the following reason:

- You failed to provide requested necessary information, failed to appear or refused to be available for necessary interviews or conferences, or otherwise refused to cooperate to the extent that OFCCP is unable to complete its investigation of your complaint.
- OFCCP has made reasonable efforts to locate you and has been unable to do so. You have had at least 60 calendar days in which to respond to a notice sent to your last known address.

The issuance of this NOTICE OF RIGHT-TO-SUE concludes OFCCP processing of your complaint. If you wish to pursue your complaint further, you have the right to sue the employer named in your complaint in federal or state court. **IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN NINETY (90) CALENDAR DAYS OF YOUR RECEIPT OF THIS NOTICE. OTHERWISE, YOUR RIGHT TO SUE IS LOST.**

An information copy of this Notice has been sent to the following employer named in your complaint:

[insert employer's name and address]

For the United States Department of Labor,

[Regional Director or Designee]

[Date]

Enclosures (2): Information Related to Filing Suit under Title VII and the ADA
 Copy of Complaint

cc: *[insert name of complainant's attorney]*
 [insert name of the contractor's attorney]
 [insert name of the EEOC field office contact]

**LETTER L-17: NOTIFICATION OF RESULTS OF INVESTIGATION:
NOTIFICATION OF VIOLATION**

Certified Mail, Return Receipt Requested

[Complaint No.]

[Complainant's Name]
[Street]
[City, State, Zip]

COMPLAINANT

[Company Name]
[Street]
[City, State, Zip]

CONTRACTOR

On *[insert date]*, the U.S. Department of Labor, the Office of Federal Contract Compliance Programs (OFCCP), conducted an investigation of the allegation(s) of *[insert the type of discrimination]* discrimination made in the complaint of *[insert name of complainant]* filed on *[insert date]*. Our investigation has resulted in the following findings:

1. *[Insert name of contractor]* is a nonexempt government contractor subject to the requirements of *[insert one or more as appropriate: Executive Order 11246, as amended (EO 11246); Section 503 of the Rehabilitation Act of 1973, as amended (Section 503); Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA); Title VII of the Civil Rights Act of 1964, as amended (Title VII); Title I of the Americans with Disabilities Act of 1990, as amended (ADA)]*.
2. *[Insert name of complainant]* is *[insert one or more as appropriate: a minority, woman, etc.; an individual with a disability; a disabled veteran/protected veteran]* within the meaning of *[Insert one or more as appropriate: EO 11246; Section 503; VEVRAA; Title VII; the ADA]* and the regulations at 41 CFR Part *[insert one or more as appropriate: 60-1 to 60-50; 60-250 and 60-300; 60-741]*.
3. The complainant alleges the contractor violated its obligations under the nondiscrimination and affirmative action provisions of its federal contracts by *[insert description of the actions the complaint describes that are attributed to the employer, e.g., terminating, not promoting, etc.]*.
4. The contractor's position is that the complainant was *[insert the action taken against the complainant, e.g., terminated, not hired, etc.]* because *[insert a description of the contractor's position]*.

5. Our investigation indicates *[insert all specifics details relelvant to the complainant's status and the contractor's actions]*.
6. The action(s) described in Paragraph 4 violated the contractor's obligations under the regulations as follows:

[insert a list of the sections violated and describe violation].

In accordance with the regulations implementing, *[insert as appropriate: EO 11246 at 41 CFR 60-1.24(c)(2) and Title VII at 29 CFR 1601.24; Section 503 at 41 CFR 60-741.62 and ADA at 29 CFR 1601.24; VEVRAA at 41 CFR 60-250.62, 60-300.62 and ADA at 29 CFR 1601.24]* the U.S. Department of Labor, OFCCP, invites *[insert name of contractor]* to resolve this matter through conciliation by informal means. A compliance officer from this office will be in contact with *[insert name of contractor]* by *[insert date]* to begin the conciliation process.

On behalf of the United States Department of Labor.

Regional Director or Designee

Date

cc: *[insert name of the complainant's representative]*
[insert name of the contractor's representative]

**LETTER L-18: SHOW CAUSE NOTICE: FAILURE TO SUBMIT
AN EO 11246, SECTION 503 OR SECTION 4212 AAP(S)
(Supply & Service)**

Certified Mail, Return Receipt Requested AND Electronic Mail

[DATE]

[Name of Establishment CEO]

[Title of CEO]

[Establishment Name]

[Street Address]

[City, State, Zip Code]

Dear *[Name of CEO]*:

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), by letter dated *[insert date]*, requested that you submit to this office within 30 calendar days a copy of your *[insert as appropriate: establishment's or functional unit's]* Affirmative Action Programs (AAPs) and supporting documentation prepared in accordance with our regulations implementing.

- Executive Order 11246, as amended (41 CFR Part 60-2) (Executive Order)
- Section 503 of the Rehabilitation Act of 1973, as amended (41 CFR Part 60-741) (Section 503)
- The Vietnam Era Veteran's Readjustment Assistance Act of 1974, as amended (41 CFR Part 60-250 and 41 CFR Part 60-300) (Section 4212)

We have yet to receive your *[insert as appropriate: Executive Order, Section 503 or Section 4212]* AAP(s). Due to your organization's failure to submit the requested AAP(s) required under *[insert as appropriate: Executive Order, Section 503, Section 4212]*, we are issuing this Notice to Show Cause. Within 30 calendar days of receiving this Notice, you must either submit the AAP(s) and support data specified in our original request or demonstrate, in writing, why enforcement proceedings should not be initiated pursuant to *[insert as appropriate: Sections 208 and 209 of the Executive Order, as implemented by 41 CFR 60-1.26; 41 CFR 60-741.65 (Section 503); 41 CFR 60-250.65 and 41 CFR 60-300.65 (Section 4212)]*. A copy of our original request is enclosed.

The submission of the AAP(s) and support data does not preclude the identification of further violations, based either upon a finding during the desk audit or subsequent onsite review, that your AAPs do not meet the requirements of 41 CFR Part 60-2, Part 60-741 or Part 60-250 and 60-300 or that your *[insert as appropriate: establishment or functional*

unit] is not in compliance with one or more of the requirements of the Executive Order, Section 503 or Section 4212 and their implementing regulations.

Should you have any questions or wish to discuss a resolution to the issues raised herein, please contact *[insert name of compliance officer]* or *[insert appropriate pronoun: his or her]* supervisor, *[insert name of supervisor]*, at *[insert telephone number]* to schedule a meeting or telephone conference.

Sincerely,

[insert name of the regional or district director]
Regional Director or District Director

Enclosure

cc: *[insert name of the corporate CEO]*
[insert name of the designated representative]

LETTER L-19: SHOW CAUSE NOTICE: FAILURE TO SUBMIT AN ACCEPTABLE EO 11246, SECTION 503 OR SECTION 4212 AAP(S) (Supply & Service)

Certified Mail, Return Receipt Requested AND Electronic Mail

[Date]

[Name of Establishment CEO]

[Title of CEO]

[Establishment Name]

[Street Address]

[City, State, Zip Code]

Dear *[Name of CEO]*:

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), reviewed your Affirmative Action Program (AAP) and supporting documentation prepared pursuant to *[insert one or more as appropriate: Executive Order 11246, as amended, (Executive Order); Section 503 of the Rehabilitation Act of 1973, as amended (Section 503); the Vietnam Era Veteran's Readjustment Assistance Act of 1974, as amended (Section 4212)]* and submitted for desk audit. The results of this review indicate that your AAP does not meet the requirements of our regulations at *[insert one or more as appropriate: 41 CFR Part 60-2; 41 CFR 60-250.40-.44; 41 CFR 60-300.40-.44; 41 CFR 60-741.40-.45]*. Consequently, we are issuing this Notice to Show Cause why enforcement proceedings should not be initiated pursuant to *[insert one or more as appropriate: 41 CFR 60-1.26; 41 CFR 60-741.65 (Section 503) and/or 41 CFR 60-250.65 and 60-300.65 (Section 4212)]*.

The specific elements of your *[insert one or more as appropriate: Executive Order, Section 503, Section 4212]* AAP(s) which do not meet the regulatory requirements cited above are listed in the enclosure. You are required to correct these violations as indicated within 30 calendar days of your receipt of this Notice, or we shall recommend that enforcement proceedings be initiated.

Submission of a corrected *[insert one or more as appropriate: Executive Order, Section 503, Section 4212]* AAP(s) does not preclude the identification of further violations based on a finding during the desk audit or subsequent onsite review that your AAPs do not meet the requirements of *[insert one or more as appropriate: 41 CFR Part 60-2, 41 CFR Parts 60-250 and 60-300, 41 CFR Part 741]* or that your *[insert as appropriate: establishment or functional unit]* is not in compliance with the requirements of the Executive Order, Section 503, or Section 4212 and their implementing regulations.

Should you have any questions or wish to discuss a resolution to the issues raised herein, please contact *[insert name of compliance officer]* or *[insert appropriate pronoun: his or her]* supervisor, *[insert name of supervisor]*, at *[insert telephone number]* to schedule a meeting or telephone conference.

Sincerely,

[insert name of the regional or district director]
Regional Director or District Director

Enclosure

cc: *[insert name of the corporate CEO]*
[insert name of designated representative]

LETTER L-19a: SAMPLE ENCLOSURE TO LETTER L-19

1. Violation: ABC Company's affirmative action program did not include an organizational profile as required by 41 CFR 60-2.10(b)(1)(i).

Corrective Action: Develop and include in the AAP an organizational profile that depicts staffing patterns within its establishment.

2. Violation: In four of the job groups identified in ABC Company's utilization analysis as underutilized, ABC Company failed to set goals or to explain why it did not do so as required by 41 CFR 60-2.15(b). The job groups are Design Engineers (minority and women); Health Scientists (minorities); Electronic Technicians (women); and Tool and Die Makers (minorities and women).

Corrective Action: In the job groups specified above, either establish goals at least equal to availability for minorities, women, or both as noted, or explain in the AAP why such goals can not established.

**LETTER L-20: SHOW CAUSE NOTICE: FAILURE TO SUBMIT
EMPLOYMENT ACTIVITY OR COMPENSATION DATA
FOR DESK AUDIT
(Supply & Service Executive Order Compliance Evaluations)**

Certified Mail, Return Receipt Requested AND Electronic Mail

[Date]

[Name of Establishment CEO]

[Title of CEO]

[Establishment Name]

[Street Address]

[City, State, Zip Code]

Dear *[insert name of CEO]*:

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), by letter dated *[insert date]*, requested that you submit the below listed *[insert as appropriate: employment activity or compensation]* data as support data for your Affirmative Action Program (AAP) prepared pursuant to Executive Order 11246, as amended (Executive Order). The data was due to this office within 30 calendar days.

[Specify the data that were not submitted for desk audit]

The submission of this data is required by 41 CFR 1.12(c)(2). Additionally, 41 CFR 60-2.17(b), (c) and (d) require that your AAP include an analysis of your employment activity to identify and correct problem areas. This obligation cannot be adequately implemented without maintenance of the referenced data.

We have not yet received the data we requested. Consequently, we are issuing this Notice to Show Cause why enforcement proceedings should not be initiated. You are required to submit the support data as specified in our original request within 30 calendar days of your receipt of this Notice, or we will recommend that enforcement proceedings be initiated pursuant to Sections 208 and 209 of the Executive Order, as implemented by 41 CFR 60-1.26. A copy of our original request is enclosed.

The submission of these support data does not preclude the identification of additional violations based upon a finding, during the desk audit or a subsequent onsite review, that your AAPs do not meet the requirements of 41 CFR Parts 60-2, 60-741 and/or 60-250 and 60-300, or that your *[insert as appropriate: establishment or functional unit]* is not in compliance with the requirements of the Executive Order, Section 503 of the Rehabilitation Act, as amended, or the Vietnam Era Veterans Readjustment Assistance Act, as amended, and their implementing regulations, as appropriate.

Should you have any questions or wish to discuss a resolution to the issues raised herein, please contact *[insert name of compliance officer]* or *[insert appropriate pronoun: his or her]* supervisor, *[insert name of supervisor]*, at *[insert telephone number]* to schedule a meeting or telephone conference.

Sincerely,

[insert name of the regional or district director]
Regional Director or District Director

Enclosure

cc: *[insert name of the corporate CEO]*
[insert name of the designated representative]

**LETTER L-21: SHOW CAUSE NOTICE: FAILURE TO SUBMIT
CORRECTED EMPLOYMENT ACTIVITY AND/OR
COMPENSATION DATA
(Supply & Service Executive Order Compliance Evaluations)**

Certified Mail, Return Receipt Requested AND Electronic Mail

[Date]

[Name of Establishment CEO]

[Title of CEO]

[Establishment Name]

[Street Address]

[City, State, Zip Code]

Dear *[insert name of CEO]*:

On *[insert date]*, the U.S. Department of Labor, Office of Federal Contract Compliance (OFCCP), contacted you by phone to request that you resubmit certain *[insert as appropriate: employment activity or compensation]* data which we determined to be unacceptable during the desk audit of your Affirmative Action Program (AAP). The desk audit of your AAP was prepared pursuant to Executive Order 11246, as amended (Executive Order). We asked you to provide the corrected data within ten calendar days. Further, we identified the unacceptable data, stated how they are unacceptable, and specified the required correction(s).³²⁸

To date, we have not received the corrected *[insert as appropriate: employment activity or compensation]* data. Consequently, we are issuing this Notice to Show Cause why enforcement proceedings should not be initiated pursuant to 41 CFR 60-1.26. You are required to submit the corrected data, as specified above, within 30 calendar days of receiving this Notice or we will recommend initiating enforcement proceedings in accordance with 41 CFR 60-1.26.

The submission of these data does not preclude the identification of further violations based upon a finding during the desk audit, or subsequent onsite review, that your AAP(s) does not meet the requirements of 41 CFR Parts 60-2, 60-741, or 60-250 and 60-300, or that your *[insert as appropriate: establishment or functional unit]* is not in compliance or has failed to comply in the past with the requirements of the Executive Order, Section 503 of the Rehabilitation Act of 1973, as amended and/or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, and their implementing regulations.

³²⁸ For example: “. . . your data on hires and terminations are unacceptable because they are provided for the workforce as a whole, and must be resubmitted either by job group or by job title, as required by 41 CFR 60-3.4 and 3.15.”

Should you have any questions or wish to discuss a resolution to the issues raised herein, please contact *[insert name of compliance officer]* or *[insert appropriate pronoun: his or her]* supervisor, *[insert name of supervisor]*, at *[insert telephone number]* to schedule a meeting or telephone conference.

Sincerely,

[insert name of the regional or district director]

Regional Director

cc: *[insert name of the corporate CEO]*
[insert name of the designated representative]

**LETTER L-22: SHOW CAUSE NOTICE: UNRESOLVED VIOLATIONS
(Compliance Evaluations)**

Certified Mail, Return Receipt Requested AND Electronic Mail

[Date]

[Name of Establishment CEO]

[Title of CEO]

[Establishment Name]

[Street Address]

[City, State, Zip Code]

Dear *[insert name of CEO]*:

On *[insert date]*, the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), sent you a Notice of Violation based on the findings of our recent compliance evaluation of your *[insert as appropriate: establishment or functional unit]*.³²⁹ On *[insert date]*, OFCCP met with *[insert name of contractor representative]* to conciliate a resolution of the violation(s) listed in that Notice. Our conciliation efforts, however, failed to resolve the violation(s). Consequently, we are issuing this Notice to Show Cause, within 30 calendar days of your receipt of this Notice, why enforcement proceedings should not be initiated pursuant to *[insert one or more as appropriate: Sections 208 and 209 of Executive Order 11246, as amended, as implemented by 41 CFR 60-1.26; Section 503 of the Rehabilitation Act of 1973, as amended, as implemented by 41 CFR 741.64; the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, as implemented by 41 CFR 60-250.64 and 60-300-64]*.

A list of the violations at issue is enclosed. You are required to correct these violations as indicated within 30 calendar days of your receipt of this Notice or we shall recommend that enforcement proceedings be initiated.

Should you have any questions or wish to discuss a resolution to the issues raised herein, please contact *[insert name of compliance officer]* or *[insert appropriate pronoun: his or her]* supervisor, *[insert name of supervisor]*, at *[insert telephone number]* to schedule a meeting or telephone conference.

Sincerely,

[insert name of the regional or district director]

Regional Director or District Director

³²⁹ If the contractor did not respond to the NOV, in the remainder of this paragraph substitute: "To date, you have not responded to that Notice or otherwise indicated your willingness to remedy those violations."

Enclosure

cc: *[insert name of corporate CEO]*
[insert name of designated representative]

LETTER L-22a: SAMPLE ENCLOSURE TO LETTER L-22

1. Violation: In violation of 41 CFR 60-1.4(a)(1), ABC Company discriminated against qualified African American applicants in its hiring and selection procedures for the Laborer positions from January 1, 2011 through December 31, 2011. During this period, the qualified pool of applicants for the Laborer positions consisted of 176 white applicants and 111 African American applicants. From that pool, 17 non-minority applicants and no African American applicants were hired. Comparison of the selection rates of non-minority and African American applicants showed adverse impact (0% African Americans hired) and a shortfall of six. The disparity in the selection rates is statistically significant to a level of 3.38 standard deviations. Analysis of the steps in the selection process showed adverse impact at each step in the process affecting African American applicants. Absent discrimination, six African American applicants would have been selected given their representation in the qualified applicant pool.

Corrective Action: ABC Company must agree to revise and maintain selection policies and procedures designed to eliminate disparate impact on African American applicants, and to ensure that all African American applicants are given an equal employment opportunity in its selection process.

ABC Company must agree to provide make-whole relief to the 111 qualified African American applicants who applied for employment from January 1, 2011 through December 31, 2011. The relief covers the Laborer position and consists of employment opportunities for six qualified African American applicants, and monetary relief (including back pay, interest, and benefits) to all African American applicants who can be located.

2. Violation: In violation of 41 CFR 60-1.4(a)(1), ABC Company discriminated against two African American female applicants who applied for promotion into Inspection jobs.

Specifically, ABC Company was unable to provide a legitimate, nondiscriminatory reason for rejecting Sandra Jones and Barbara Rogers (African American); both applicants were better qualified under ABC Company's stated selection criteria than two similarly situated white male applicants the company selected for Inspector positions on September 23, 2011. ABC Company's reason for rejecting Ms. Jones and Ms. Rogers was pretextual and the company did not equally apply it to the two white males promoted into Inspector positions. Ms. Jones and Ms. Rogers would have been promoted into Inspector positions on September 23, but for being disparately treated.

Corrective Action: ABC must make bona fide offers of employment to Ms. Rogers and Ms. Jones into the next two Inspector openings, and provide all wages, seniority

and employment related benefits they would have received had they not been subjected to discrimination. Such relief shall be retroactive to the date each would have been promoted absent the discrimination and shall include: (a) back pay, plus interest; (b) retroactive seniority; (c) all employment benefits; and (d) any other appropriate make-whole relief including all wages, seniority and employment related benefits they would have received had they not been subjected to discrimination. Such relief shall be retroactive to the date each would have been promoted absent the discrimination. Additionally, ABC Company will provide Ms. Rogers and Ms. Jones with front pay from the date this violation is resolved until they are promoted to Inspector positions or refuse bona fide promotion offers.

3. Violation: In violation of 41 CFR 60-2.17(c), ABC Company did not make good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results for females and minorities in underutilized job groups.

Corrective Action: ABC Company must agree to make good faith efforts are made to remove identified barriers, expand employment opportunities, and produce measurable results for females and minorities in underutilized job groups. To accomplish this, ABC Company must agree to the following actions:

- a. ABC Company must agree to establish a working relationship (also known as linkage) with referral organizations by taking the following actions:
 - Provide regular job listings of vacancies which have not been filled internally for all underutilized job groups; and
 - Contact the referral organization within 45 calendar days of the execution of this Agreement. The purpose of the contact is to arrange for the referral of applicants, and to provide follow-up and feedback to the recruitment sources on disposition of its referrals.
 - b. ABC Company must agree to maintain documentation that demonstrates its good faith efforts.
4. Violation: In violation of 41 CFR 60-1.12(a), ABC Company failed to collect and maintain personnel and employment records for the appropriate period. ABC Company failed to collect and maintain documentation of the application process and selection decisions and did not maintain all of the applications, interview notes, and other applicant records.

Corrective Action: ABC Company must agree to collect and maintain personnel and employment records for the appropriate period including documentation of the application process and selection decisions.

5. Violation: ABC failed to list its jobs with the State Employment Service, in violation of 41 CFR 60-250.5(a)(2) through (6) and/or 60-300.5(a)(2) through (6).

Corrective Action: ABC Company will list all suitable jobs with the Metropolis State Employment Service office. Reports to OFCCP on these listings will be required.

6. Violation: In violation of 41 CFR 60-250.44(f) and 41 CFR 60-300.44(f), ABC Company failed to take appropriate outreach and positive recruitment activities for veterans of the Vietnam era, disabled veterans, and other protected veterans.

Corrective Action: ABC Company must agree to take appropriate outreach and positive recruitment activities for veterans of the Vietnam era, disabled veterans, and other protected veterans.

- a. ABC Company must agree to establish a working relationship with referral organizations by taking the following actions:
 - Provide regular job listings of vacancies which have not been filled internally for all underutilized job groups; and
 - Contact the referral organization within 45 calendar days of the execution of this Agreement. The purpose of the contact is to arrange for the referral of applicants, and to provide follow-up and feedback to the recruitment sources on disposition of its referrals.
- b. ABC Company must agree to maintain documentation that demonstrates its good faith efforts.

**LETTER L-23: SHOW CAUSE NOTICE: UNRESOLVED VIOLATIONS
(Complaint Investigations)**

Certified Mail, Return Receipt Requested AND Electronic Mail

[Date]

[Name of Establishment CEO]

[Title of CEO]

[Establishment Name]

[Street Address]

[City, State, Zip Code]

Dear *[insert name of CEO]*:

On *[insert date]*, the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), sent you a Notice of Violation specifying violations found during our investigation of the complaint filed by *[insert complainant's name]* against your company. On *[insert date]* we met with *[insert name of contractor representative]* to conciliate a resolution of those violations. Our conciliation efforts, however, failed to resolve the violations.

Consequently, we are issuing this Notice to Show Cause, within 30 calendar days of your receipt of this Notice, why enforcement proceedings should not be initiated pursuant to *[insert one or more as appropriate: Sections 208 and 209 of Executive Order 11246, as amended, as implemented by 41 CFR 60-1.26; Section 503 of the Rehabilitation Act of 1973, as amended, as implemented by 41 CFR 60-741.64 (Section 503) and/or of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, as implemented by 41 CFR 60-250.64 and 60-300.64 (Section 4212)]*.

The violations at issue are listed in the enclosure. You are required to correct these violations within 30 calendar days of your receipt of this Notice or we shall recommend the initiation of enforcement proceedings.

Should you have any questions or wish to discuss a resolution to the issues raised herein, please contact *[insert name of compliance officer]* or *[insert appropriate pronoun: his or her]* supervisor, *[insert name of supervisor]*, at *[insert telephone number]* to schedule a meeting or telephone conference.

Sincerely,

[insert name of the regional or district director]

Regional Director or District Director

Enclosure

cc: *[insert name of corporate CEO]*
[insert name of designated representative]

**LETTER L-24: AMENDED SHOW CAUSE NOTICE FOR UNRESOLVED
VIOLATIONS
(Compliance Evaluations)**

Certified Mail, Return Receipt Requested AND Electronic Mail

[Date]

[Name of Establishment CEO]

[Title of CEO]

[Establishment Name]

[Street Address]

[City, State, Zip Code]

Dear *[insert name of CEO]*:

On *[insert date]*, the Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), issued your company a Notice to Show Cause which listed specific violations of *[insert one or more as appropriate: Executive Order 11246, as amended (Executive Order); Section 503 of the Rehabilitation Act of 1973, as amended (Section 503), the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (Section 4212)]* and offered you 30 calendar days in which to show why enforcement should not be initiated.

We have completed our subsequent review of your company's equal employment opportunity policies and practices *[Insert this language if the contractor is a construction contractor: at your construction work sites in the [insert name of geographic] area and identified additional violations of the [insert one or more as appropriate: Executive Order, Section 503, Section 4212].* Consequently, we are issuing this Amended Notice to Show Cause, within 30 calendar days of your receipt of this Notice, why enforcement proceedings should not be initiated pursuant to *[insert one or more as appropriate: Sections 208 and 209 of Executive Order, as implemented by 41 CFR 60-1.26; Section 503, as implemented by 41 CFR 60-741.64 and/or Section 4212 as implemented by 41 CFR 60-250.64 and 60-300.64].*

The enclosure lists the most recently identified violations along with those specified in the *[insert date]* Notice to Show Cause. You are required to correct these violations as indicated within 30 calendar days of your receipt of this Notice, or we shall recommend that enforcement proceedings be initiated.

Should you have any questions or wish to discuss a resolution to the issues raised herein, please contact *[insert name of compliance officer]* or *[insert appropriate pronoun: his or her supervisor, [insert name of supervisor], at [insert telephone number]* to schedule a meeting or telephone conference.

Sincerely,

[insert name of the regional or district director]
Regional Director or District Director

Enclosure

cc: *[insert name of corporate CEO]*
[insert name of designated representative]

**LETTER L-25: SHOW CAUSE NOTICE FOR DENIAL OF ACCESS
(Compliance Evaluations)**

Certified Mail, Return Receipt Requested AND Electronic Mail

[Date]

[Name of Establishment CEO]

[Title of CEO]

[Establishment Name]

[Street Address]

[City, State, Zip Code]

Dear *[insert name of CEO]*:

In our letter dated *[insert date]*, the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), requested that *[insert contractor or establishment name]* submit to the onsite portion of a compliance evaluation as described at *[insert one or more as appropriate: 41 CFR 60-1.20(a)(1)(ii); 41 CFR 60-741.60; 41 CFR 60-250.60; 41 CFR 60-300.60]* at its facility located at *[street address, city, state]*. The onsite was to begin on *[insert date]*.

On *[insert date]*, your representative *[insert name]* responded to our request by denying access to the facility. Consequently, we are issuing this Notice to Show Cause why enforcement proceedings should not be initiated pursuant to *[insert one or more as appropriate: Sections 208 and 209 of Executive Order 11246, as amended, as implemented by 41 CFR 60-1.26 and 1.28; Section 503 of the Rehabilitation Act of 1973, as amended, as implemented by 41 CFR 60-741.64 and 741.65; the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, as implemented by 41 CFR 60-250.64 and 60-300.64 and 250.65 and 300.65]*.

[Insert contractor's name] is required to allow OFCCP access to the facility so that we can conduct an onsite compliance evaluation of your facility located at *[insert location]* within 30 calendar days of your receipt of this Notice, or we shall recommend that enforcement proceedings be initiated in accordance with the above citations. In those proceedings, you will have an opportunity to request a hearing before any sanctions are imposed.

Allowing OFCCP access to the facility in order to conduct the onsite portion of the compliance evaluation does not preclude the identification of further violations, based either upon a finding during the desk audit or subsequent onsite review, that your AAPs do not meet the requirements of 41 CFR Part 60-2, Part 60-741, and Part 60-250 or that your establishment is not in compliance or has failed to comply in the past with the requirements of the Executive Order, Section 503, and 38 USC 4212 and their implementing regulations. We will not withdraw this Notice to Show Cause until all

deficiencies cited in this Notice (or subsequently identified in an Amended Show Cause Notice incorporating any additional violations found during the desk audit or onsite review) have been fully and satisfactorily resolved in a written Conciliation Agreement.

We wish to avoid enforcement proceedings, if possible. Therefore, you are asked to contact *[insert name of compliance officer]* at *[insert phone number]* within five business days of receipt of this Notice, to arrange a mutually acceptable time to conciliate a resolution of this violation.

Sincerely,

[insert name of the regional or district director]
Regional Director or District Director

Enclosure

cc: *[insert name of corporate CEO]*
[insert name of designated representative]

**LETTER L-26: RESCISSION OF AN ERRONEOUSLY ISSUED SHOW
CAUSE NOTICE**

Certified Mail, Return Receipt Requested AND electronic mail

[Date]

[Name of Establishment CEO]

[Title of CEO]

[Establishment Name]

[Street Address]

[City, State, Zip Code]

Dear *(insert name of CEO)*:

On *(insert date)*, the U.S. Department of Labor, Office of Federal Contract Compliance Programs, issued a *(insert as appropriate: Notice to Show Cause or Amended Notice to Show Cause)* to your company. Consistent with that Notice, you have 30 calendar days to show why enforcement proceedings should not be initiated pursuant to *(insert one or more as appropriate: Sections 208 and 209 of Executive Order 11246, as amended, as implemented by 41 CFR 60-1.26 and 1.28; Section 503 of the Rehabilitation Act of 1973, as amended, as implemented by 41 CFR 60-741.64 and 60-741.65; the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, as implemented by 41 CFR 60-250.64 and 250.65, and 41 CFR 60-300.64 and 300.65)*.

After issuing the Notice, we subsequently determined that it was erroneously issued because *(insert as appropriate: your company has demonstrated that it is exempt from our requirements or your company demonstrated that the allegations giving rise to the Notice are incorrect)*. Therefore, we are rescinding the *(insert as appropriate: Notice to Show Cause or the Amended Notice to Show Cause)*.

Sincerely,

(insert the name of the regional director or designee)

Regional Director or Designee

cc: *(insert the name of the corporate CEO)*
 (insert the name of the designated representative)

LETTER L-27: PREDETERMINATION NOTICE

Note: To be mailed by certified mail, return receipt requested.

[Date]

[Name of CEO]

[Title of CEO]

[Company Name]

[Street Address]

[City, State, Zip Code]

Re: Compliance Evaluation of *(insert name of contractor)*
 OFCCP No. _____

Dear (Mr. or Ms. _____):

On *(insert date)*, the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), began a compliance evaluation of *(insert name of contractor)* compliance with Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, and/or the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended and their implementing regulations at 41 Code of Federal Regulations (CFR) Chapter 60. *(Insert name of contractor)*, hereinafter referred to as the “contractor,” is a federal contractor pursuant to Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, and/or the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended, and their implementing regulations at 41 CFR Chapter 60.

The purpose of this Notice is to inform you of the findings which, if not adequately rebutted, will establish that discrimination occurred *(or is occurring)* at the contractor’s establishment.

(Present the evidence of pattern or practice discrimination)

(If there are additional violations or deficiencies, including technical violations, present them here)

Please be advised that this is a preliminary determination based on available information. You now have the opportunity to provide additional information or documentation that you believe we should consider before a final determination is made.

We ask that you respond to this Notice within 15 calendar days from receipt of this letter. If you do not respond, we will incorporate the preliminary finding(s) made in this Notice into a final Notice of Violation (NOV). You will receive the NOV by certified mail. If you have any questions, please call Compliance Officer *(insert name of compliance officer)*,

or his or her immediate supervisor, *(insert name of District Director or Assistant District Director)* at *(insert District Office or /Regional Office phone number)*.

Sincerely,

(insert name of the District Director or Assistant District Director)
District Director

cc: *[insert name of the head of establishment]*
[insert name of the designated representative]

LETTER L-28: NOTICE OF VIOLATION

Note: to be mailed by certified mail, return receipt requested.

[Date]

[Name of CEO]

[(Title of CEO]

[Company Name]

[Street Address]

[City, State, Zip Code]

Re: Compliance Evaluation of (insert name of contractor)
OFCCP No. _____

Dear Mr. or Ms. _____:

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), has completed a review of (insert name of contractor) compliance with one or more of these authorities and their implementing regulations at 41 Code of Federal Regulations (CFR) Chapter 60: Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended.

The results of this review indicate that (insert name of contractor) is not in compliance with one or more of the following: Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended. Consequently, we are issuing this Notice of Violation. The violation(s) and corrective action(s) needed are set forth below:

A. **VIOLATION(S):**

(List and Describe the Violations)

B. **CORRECTIVE ACTION(S):**

(List and Describe the Needed Corrective Actions)

In order to come into compliance, (insert name of contractor) must enter into a binding Conciliation Agreement with OFCCP that encompasses all of the corrective actions described above. It is our sincere desire to avoid enforcement proceedings. Therefore, we ask that you contact (name of District Director or Assistant District Director) or Compliance Officer (insert name of compliance officer) within five (5) business days of receiving this letter at (insert phone number), to begin conciliation and resolution of the specified violations.

Sincerely,

(insert name of the District Director)

District Director

cc: (insert name of the head of establishment)
(insert name of the designated representative)

LETTER L-29 15-DAY NOTICE: VIOLATION OF A CONCILIATION AGREEMENT

Certified Mail, Return Receipt Requested AND Electronic Mail

[Date]

[Name of Establishment CEO]

[Title of CEO]

[Establishment Name]

[Street Address]

[City, State, Zip Code]

Dear *[insert name of CEO]*:

On *[insert date]*, the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), entered into a Conciliation Agreement (Agreement) with your company. The Agreement sets forth your company's specific commitments to remedy violations found during a *[insert as appropriate: compliance review or complaint investigation]*.

We completed a review of your compliance with the Agreement on *[insert date]* that indicates that your company failed to comply with commitments set forth in the Agreement. The facts and circumstances of each violation of the Agreement are set forth in the enclosure.

Accordingly, pursuant to the Agreement referenced above *[insert one or more as appropriate: and 41 CFR 60-1.34; and 41 CFR 60-250.63 and 41 CFR 60-300.63; and 41 CFR 60-741.63]*,³³⁰ you have 15 calendar days from the date you received this Notice to demonstrate that you are in compliance with the specified provisions of the Agreement. You may demonstrate your compliance through written presentation of facts and evidence; however, if you fail to do so within the specified period, we will recommend the initiation of enforcement proceedings in accordance with 41 CFR *[insert as appropriate: 60-1.26; 60-250.65; 60-300.65, or 60-741.65]*. Should this matter proceed to enforcement, you will have an opportunity for a hearing before any sanctions are imposed.

Should you have any questions or wish to discuss this matter, please contact *[insert name of compliance officer]* or *[insert name of supervisor]*, at *[insert telephone number]*.

Sincerely,

[insert name of the regional director]

Regional Director

³³⁰ Use this citation only if a CA provision violated involves the Executive Order.

Enclosure

cc: *[insert name of the corporate CEO]*
[insert name of the designated representative]

LETTER L-29a: SAMPLE ENCLOSURE TO LETTER L-29

1. Remedy: Provide affected class members an opportunity to bid on any position in the Finishing Department, utilizing their company seniority.

Facts and Circumstances: An examination of bid postings and interviews with Finishing Department supervisors and affected class members indicates that the employees that were discriminated against were allowed to bid only on entry-level positions in the Finishing Department. The company continues to use job seniority, instead of company seniority, when determining the successful bidders for positions above the entry-level.

2. Remedy: To “red-circle” the wages of all affected class members transferring into the Finishing Department.

Facts and Circumstances: Examination of pay records indicates that the wages of employees that were discriminated against that transferred into the Finishing Department have not been red-circled.

LETTER L-30: RESCISSION OF THE 15-DAY NOTICE

Certified Mail, Return Receipt Requested AND Electronic Mail

[Date]

[Name of Establishment CEO]

[Title of CEO]

[Establishment Name]

[Street Address]

[City, State, Zip Code]

Dear *[Name of CEO]*:

On *[insert date]*, the U.S. Department of Labor, Office of Federal Contract Compliance Programs, issued your company a 15-Day Notice pursuant to *[insert as appropriate: 41 CFR 60-1.34 (Executive Order); 41 CFR 60-741.63(a)(1) (Section 503); 41 CFR 60-250.63(a)(1), 41 CFR 60-300.63(a)(1) (Section 4212)]*. We received your written reply on *[insert date]* and it stated that the allegations giving rise to the Notice were incorrect.

We examined the evidence you presented and concluded that the allegations are, in fact, incorrect. Therefore, we are rescinding the 15-Day Notice.

Sincerely,

[insert name of the regional director]

Regional Director

cc: *[insert name of corporate CEO]*
[insert name of designated representative]

LETTER L-31: PROGRESS REPORT RESPONSE LETTER

(Date)

(Name of CEO)

(Title of CEO)

(Company Name)

(Street Address)

(City, State, Zip Code)

Dear Mr. or Ms. _____:

On *[insert date]*, the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), received your progress report pursuant to a *[insert as appropriate: Conciliation Agreement or insert the name of the report causing the progress report]* entered into by *[insert name of contractor]* on *[insert date]*.

The terms of the *[insert as appropriate: Conciliation Agreement or insert the name of the appropriate report]* require that *[insert name of contractor]* submit certain items as a part of its progress report. Your submission must include *[list items here]* and you actually provided these items *[list items actually submitted]*. This office reviewed and conducted the appropriate analyses *[insert the analysis done]* on the items you submitted.

[insert one of the below paragraphs as appropriate]

#1: Use if it is a final progress report:

This is your final progress report. However, as long as *[insert contractor name]* is a federal contractor, *[insert contractor name]* is required to comply with all regulatory provisions of Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, 38 USC 4212, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, and implementing regulations at 41 CFR Chapter 60.

#2: Use if it is an interim progress report:

This is not a final progress report; therefore, we remind you that the next progress report is due on *[insert date]*. As long as *[insert contractor name]* is a federal contractor, *[insert contractor name]* is required to comply with all regulatory provisions of Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, 38 USC 4212, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, and implementing regulations at 41 CFR Chapter 60.

If you have any questions, please contact *[insert name of compliance officer]*, compliance officer, at *[insert contact information]*.

Sincerely,

(insert name of the District Director or Assistant District Director)
District Director or Assistant District Director

cc: *[insert the name of the corporate CEO]*
[insert the name of the designated representative]

**LETTER L-32: CLOSURE LETTER FOR SUBSTANTIVE VIOLATIONS
(with a Show Cause Notice)**

Certified Mail, Return Receipt Requested AND Electronic Mail

[Date]

[Name of Establishment CEO]

[Title of CEO]

[Establishment Name]

[Street Address]

[City, State, Zip Code]

Dear *[insert the name of CEO]*:

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), recently completed a compliance evaluation of your equal employment opportunity policies and practices at *[insert as appropriate: establishment or construction work sites]* in the *[insert name of geographic area]*.

On *[insert date]*, based on violations found during the evaluation, we issued your company a *[insert one or more as appropriate: Notice to Show Cause or Amended Notice to Show Cause]*. Based on this notice you had 30 calendar days to show why OFCCP should not initiate enforcement proceedings pursuant to *[insert one or more as appropriate: Sections 208 and 209(a) of Executive Order 11246, as amended; Section 503 of the Rehabilitation Act, as amended, as implemented by 41 CFR 60-741.64, or Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act, as amended, as implemented by 41 CFR 60-250.64 and 41 CFR 60-300.64]*.

However, on *[insert date]*, representatives of your company and this office reached a Conciliation Agreement that addresses each of the violations cited in the *[insert as appropriate: Notice to Show Cause or Amended Notice to Show Cause]*.

Subject to the implementation of commitments detailed in the Conciliation Agreement dated *[insert date]*, this office determined that no other apparent violations of the regulations that OFCCP enforces exist. However, the Director of OFCCP or the Regional Director may modify this determination within 45 calendar days of the signing of the Conciliation Agreement by the District Director. If OFCCP takes no action to modify the Conciliation Agreement, within the timeframe provided, the agreement is deemed approved.

This determination does not preclude a future determination of noncompliance based on a finding that the commitments in the Conciliation Agreement are insufficient to achieve compliance.

Sincerely,

[insert name of the district director]

District Director

cc: *[insert name of the corporate CEO]*
[insert name of designated representative]

**LETTER L-33: CLOSURE LETTER FOR SUBSTANTIVE VIOLATIONS
(No Show Cause Notice Issued)**

Certified Mail, Return Receipt Requested AND Electronic Mail

*[Name of Establishment CEO]
[Title of CEO]
[Establishment Name]
[Street Address]
[City, State, Zip Code]*

Dear *[Name of CEO]*:

The U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), recently completed a compliance evaluation of the equal employment opportunity policies and practices at your (*insert as appropriate*: establishment or construction work sites) in the (*insert name of geographic area*).

Subject to the implementation of commitments detailed in our Conciliation Agreement dated (*insert date*), this office determined that no other apparent violations of the regulations that OFCCP enforces exist. However, the Director of OFCCP or the Regional Director may modify this determination within 45 calendar days of the signing of the Conciliation Agreement by the District Director. If OFCCP takes no action to modify the Conciliation Agreement, within the timeframe provided, the agreement is deemed approved.

This determination does not preclude a future determination of noncompliance based on a finding that the commitments in the Conciliation Agreement are insufficient to achieve compliance.

Sincerely,

(insert name of regional director)
Regional Director

Enclosure

cc: *[insert name of the corporate CEO]
[insert name of the designated representative]*

ADDENDUM A

Model CA for Compensation

CONCILIATION AGREEMENT

Between

THE U. S. DEPARTMENT OF LABOR

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

and

[NAME OF CONTRACTOR]

PART I. PRELIMINARY STATEMENT

The Office of Federal Contract Compliance Programs (“OFCCP”) commenced a compliance evaluation of [NAME OF CONTRACTOR]’s (“CONTRACTOR”) establishment located at [FACILITY ADDRESS, CITY, STATE] on [DATE] and found that [CONTRACTOR] was not in compliance with the Executive Order 11246, as amended (“E.O. 11246”), [Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793 (“Section 503”), and/or the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended, 38 U.S.C. § 4212 (“VEVRAA”)]¹, and [its/their] implementing regulations at [41 C.F.R. Section(s) 60-1, 60-2, 60-3, 60-4, 60-250, 60-300, and/or 60-741]. OFCCP notified [CONTRACTOR] of the initial violations found and the corrective actions required in a [NOTICE OF VIOLATIONS/SHOW CAUSE NOTICE/AMENDED SHOW CAUSE NOTICE] issued on [DATE]. In the interest of resolving the violations without engaging in further legal proceedings and in exchange for the good and valuable consideration described in this document, OFCCP and [CONTRACTOR] enter this contract (“Conciliation Agreement” or “Agreement”) and agree to all the terms stated below.

PART II. GENERAL TERMS AND CONDITIONS

1. In exchange for [CONTRACTOR]’s fulfillment of all obligations in Parts III and IV of the Agreement, OFCCP agrees not to institute administrative or judicial enforcement proceedings under E.O. 11246 [Section 503, and/or VEVRAA] based on the violations described in more detail in Part III below. However, OFCCP has the right to initiate legal proceedings to enforce the Agreement itself or to correct and obtain relief for the violations described in Part III if [CONTRACTOR] violates this Agreement. Nothing in this Agreement precludes OFCCP from initiating enforcement proceedings based on future compliance evaluations or complaint investigations.

¹ Instruction: If OFCCP is not making a finding of a violation of either Section 503 of the Rehabilitation Act of 1973 (Section 503”) or the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (“VEVRAA”), the name and citation to the statute must not be included in paragraph. However, the first time in the document that these statutes are referenced, the full name of the statute must be stated, followed by the appropriate citation and then followed by the acronym in parentheses and quotation marks, i.e. (“Section 503”) and (“VEVRAA”). Thereafter, the act may be referred to by the acronym, omitting the parentheses and quotation marks.

ADDENDUM A

Model CA for Compensation

2. [CONTRACTOR] agrees that OFCCP may review its compliance with this Agreement. As part of such review, OFCCP may require written reports, inspect the premises, interview witnesses, and examine and copy documents. [CONTRACTOR] will permit access to its premises during normal business hours for these purposes and will provide OFCCP with all reports and documents requested.

3. [CONTRACTOR] understands that nothing in this Agreement relieves [CONTRACTOR] of its obligation to fully comply with the requirements of E.O. 11246, Section 503, VEVRAA, their implementing regulations, and other applicable equal employment laws.

4. [CONTRACTOR] promises not to harass, intimidate, threaten, discriminate, or otherwise retaliate against any individual because the individual: benefits from this Agreement, files a complaint or participates in any investigation or proceeding under E.O. 11246, Section 503, and/or VEVRAA, or engages in any activity listed at 41 C.F.R. § 60-1.32(a).

5. The parties understand the terms of this Agreement and enter into it voluntarily.

6. This document and its attachments contain the complete and final understanding of the parties with respect to the matters referenced herein. This Agreement contains all terms by which the parties are bound and it supersedes all prior written or oral negotiations and agreements. There will be no modifications or amendments to this Agreement unless they are in writing, signed by all parties.

7. If one or more provisions of this Agreement are rendered unlawful or unenforceable, the remaining provisions will remain in full force and effect.

8. This Agreement becomes effective on the day it is signed by the Regional Director of the _____ Region (the "Effective Date") unless the Director of OFCCP indicates otherwise within 45 calendar days of the date the Regional Director signs the Agreement.²

9. This Agreement will expire sixty (60) days after [CONTRACTOR] submits the final report required in Part IV-1.D, below, unless OFCCP notifies [CONTRACTOR] in writing prior to the expiration date that [CONTRACTOR] has not fulfilled all of its obligations under the Agreement, in which case, the Agreement is automatically extended until the date that OFCCP determines [CONTRACTOR] has met all of its obligations under the agreement.

10. If [CONTRACTOR] violates this Conciliation Agreement,

A. The procedures set forth at 41 C.F.R. § 60-1.34 will govern:

1) If OFCCP believes that [CONTRACTOR] violated any term of the Agreement while it was in effect, OFCCP will send [CONTRACTOR] a written notice stating the alleged violations and summarizing any supporting evidence.

² Instruction: The title of the District Director and appropriate District Office must be substituted for recordkeeping cases and other types of cases where no findings of discrimination are made by OFCCP.

ADDENDUM A

Model CA for Compensation

2) [CONTRACTOR] will have 15 days from receipt of such notice to demonstrate in writing that it has not violated the Conciliation Agreement, unless such a delay would result in irreparable injury to the employment rights of affected employees or applicants.

3) If [CONTRACTOR] is unable to demonstrate that it has not violated the Agreement, or if OFCCP alleges irreparable injury, enforcement proceedings may be initiated immediately without issuing a show cause notice or proceeding through any other requirement.

4) OFCCP may seek enforcement of this Agreement itself and is not required to present proof of any underlying violations resolved by this Agreement.

B. [CONTRACTOR] may be subject to the sanctions set forth in [*insert as applicable*: Section 209 of the Executive Order, 41 C.F.R. § 60-741.66, 41 C.F.R. § 60-250.66, or 41 C.F.R. § 60-300.66] and/or other appropriate relief for violation of this Agreement.

11. This Agreement does not constitute an admission by [CONTRACTOR] of any violation of E.O. 11246, Section 503, VEVRAA, or other laws, nor has there been an adjudicated finding that [CONTRACTOR] violated any laws.

PART III. SPECIFIC VIOLATIONS AND REMEDIES

1. COMPENSATION DISCRIMINATION.

A. STATEMENT OF VIOLATION. [INSERT BRIEF SUMMARY OF THE VIOLATION INCLUDING THE SECTION(S) OF E.O. 11246 (SECTION 503 AND/OR VEVRAA) AND THE REGULATIONS VIOLATED.]³

▪ STATEMENT OF VIOLATION SAMPLE:

OFCCP determined that since at least [SNAPSHOT DATE], [CONTRACTOR] has discriminated against [DISFAVORED GROUP(S) (women, Hispanics...)]⁴ in [POSITIONS/ JOB GROUPS] in compensation in violation of 41 C.F.R. 60-[1.4(a)(1), 250.5(a)(1), 300.5(a)(1), or 741.5(a)(1)].

B. OFCCP'S SPECIFIC FINDINGS. [INSERT A SUMMARY OF OFCCP'S SPECIFIC FINDINGS AT THE TIME THE CA IS NEGOTIATED.]

▪ COMPENSATION- SAMPLE:

³ Instruction: Each statement of violation and summary of OFCCP's findings needs to be tailored to the specific facts in the case. The sample language provided below and throughout Part III may not be appropriate in all cases. You should consult with SOL if you have any questions or concerns while drafting the CA.

⁴ Instruction: You must identify the specific race/or ethnicity when you have a minority class (i.e., Black or African-American, Hispanic...).

ADDENDUM A

Model CA for Compensation

OFCCP performed a multiple regression analysis which shows that since [SNAPSHOT DATE] [CONTRACTOR] has paid [CHARACTERISTIC OF DISFAVORED GROUP (race, sex, national origin...)] [POSITION]s significantly less per year than [FAVORED GROUP CHARACTERISTIC (males, whites, ...)]s [INSERT DESCRIPTION OF GROUP (with the same job, in the same grade level, in similar positions, etc.)] at the same location. OFCCP's analysis demonstrates that a statistically significant disparity in compensation remained even when legitimate factors affecting pay were taken into account. The disparity was caused by _____ [Identify policy or practice that led to the disparity. e.g., differences in setting of base pay; access to add-ons such as overtime, shift differentials, pay increases, incentive pay; access to opportunities affecting compensation, such as higher paying positions, job classifications, work assignments, training; policies and practices that limit the disfavored group's opportunity to earn higher pay, such as: "glass ceiling" issues, performance appraisal process, assignment to more desirable sales territories].

C. REMEDY FOR AFFECTED CLASS.⁵

1) Notice. Within [NUMBER] calendar days of the Effective Date of this Agreement, [CONTRACTOR] must notify the [DISFAVORED GROUP] [POSITION]s listed in Attachment ___ of the terms of this Agreement by mailing by [METHOD OF MAILING (first class, return-receipt requested, certified...)] mail to each individual in the affected class the: Notice to Affected Class (Attachment __, "Notice"), Information Verification Form (Attachment __, "Information Form"), and a postage paid return envelope. ***[DO NOT INCLUDE A RELEASE OF CLAIMS UNLESS REQUESTED BY THE CONTRACTOR.]*** [CONTRACTOR] will notify OFCCP of all letters returned as undeliverable [ON A MONTHLY/ WEEKLY BASIS OR ___ DAYS AFTER THE RESPONSE DEADLINE]. In addition, within [TIME PERIOD] after expiration of the response deadline set out in the Information Form, [CONTRACTOR] will provide OFCCP with a list of the individuals in the affected class who have not yet responded to the Notice and/or have not returned a signed Information Form. OFCCP will then attempt to obtain and provide updated addresses to [CONTRACTOR] within [TIME PERIOD] of receiving the list from [CONTRACTOR]. [CONTRACTOR] agrees to mail by [METHOD OF MAILING] first class mail a second Notice, Information Form, and postage paid return envelope to all individuals for whom updated addresses were obtained within [TIME PERIOD] of receiving the updated addresses.

⁵ Instruction for when there is a Union/CBA: Before starting settlement discussions (or as soon as OFCCP becomes aware that a union is in place at the establishment) OFCCP should consult with SOL to discuss the legal requirements for CAs when the Contractor's workforce is unionized. When a proposed remedy for a violation identified in the course of a compliance review or complaint investigation under any of OFCCP's three programs would require a change in or otherwise affect a Collective Bargaining Agreement (CBA), the union must be notified in writing and invited to participate in the conciliation process. However, SOL may be able to suggest remedies that would not require union notification and involvement.

ADDENDUM A

Model CA for Compensation

2) Eligibility. All members of the affected class (listed on Attachment __) who sign and return the Information Form to [CONTRACTOR] within [__ DAYS OF THE POSTMARKED DATE ON THE ENVELOPE CONTAINING THE NOTICE AND INFORMATION FORM] (“Eligible Class Members”) will receive a share of the monetary settlement. If an individual receives, but does not return the Information Form to [CONTRACTOR] within [NUMBER] calendar days of the postmarked date on the envelope containing the first or second Notice and Information Form, he/she will no longer be entitled to a payment under this Agreement.

Within [TIME PERIOD] after the response deadline set out in the Information Form, [CONTRACTOR] will provide OFCCP with a list of the Eligible Class Members (individuals who returned the Information Form by the deadline). Within [NUMBER] calendar days after receiving the list, OFCCP will approve the final list of Eligible Class Members or discuss with [CONTRACTOR] any issues necessary to finalize the list, such as the inclusion or exclusion of certain individuals.

3) Monetary Settlement (Backpay). [CONTRACTOR] agrees to distribute [SETTLEMENT AMOUNT] (\$ ___ in back pay and \$ ___ in interest), less legal deductions required by law from back pay only (such as federal, state and/or local taxes and the Eligible Class Members’ share of FICA taxes), [TO ALL ELIGIBLE CLASS MEMBERS ON THE FINAL APPROVED LIST IN THE AMOUNTS LISTED IN ATTACHMENT __/ IN AMOUNTS BASED ON THE FORMULA CONTAINED IN ATTACHMENT __]. [CONTRACTOR] will pay the Internal Revenue Service (“IRS”) the employer’s share of social security withholdings and will mail each Eligible Class Member an IRS W-2 Form reporting the portion of the payment representing back pay and an IRS Form 1099 for the portion of the payment representing interest. These IRS forms will be mailed at the end of the year. [CONTRACTOR] will disburse the monetary settlement within [NUMBER] calendar days after OFCCP approves the final list of Eligible Class Members.

Within [TIME]] calendar days of [CONTRACTOR]’s receipt of a check to an Eligible Class Member returned as undeliverable, [CONTRACTOR] will notify OFCCP of this fact via e-mail sent to [NAME AND EMAIL ADDRESSES OF OFCCP CONTACTS]. OFCCP will attempt to locate the Eligible Class Member and if OFCCP obtains an alternate address, [CONTRACTOR] will re-mail the check within [NUMBER] calendar days of receiving an alternate or corrected address. Any check that remains uncashed 120 days after the initial date the check was mailed to the Eligible Class Member will be void. With respect to any uncashed funds, [CONTRACTOR] will make a second distribution to all Eligible Class Members who cashed their first check. [INSERT DETAILS INCLUDING

ADDENDUM A

Model CA for Compensation

THE TIME PERIOD FOR SENDING THE CHECKS AND HOW THE AMOUNT WILL BE DIVIDED AMONG CLASS MEMBERS].⁶

4) Impact Analysis and Prospective Salary Adjustments. Within [NUMBER] days of the Effective Date of this Agreement, [CONTRACTOR] will conduct a regression analysis of compensation using the methodology described in Attachment __ for [POSITION(S)] using payroll data that is current as of [DATE].⁷ If the analysis results in a statistically significant disparity (t-statistic) of -1.96 or more, adverse to [DISFAVORED GROUP], [CONTRACTOR] agrees to increase the salaries of [DISFAVORED GROUP] using the formula set forth in Section __ of Attachment __ within [TIME PERIOD] after conducting the analysis.⁸

D. NON-MONETARY REMEDIES. [CONTRACTOR] will ensure that all employees are afforded equal employment opportunities. [CONTRACTOR] agrees to continue or to implement the corrective actions detailed below. [BELOW ARE VARIOUS OPTIONS FOR NON-MONETARY RELIEF. CHOOSE THOSE THAT ARE APPLICABLE TO THE SPECIFIC CIRCUMSTANCES.]⁹

1) Eliminate Discriminatory Compensation Practices. [CONTRACTOR] agrees to immediately cease using [IDENTIFY THE POLICY OR PRACTICE] which negatively affects the yearly compensation of [DISFAVORED GROUP] [NAME OF JOB(S)].

2) Evaluation. For the [NAME OF JOB(S)/ JOB GROUP/ GRADE LEVEL/ OR SIMILAR POSITIONS...], [CONTRACTOR] will conduct a study to evaluate whether promotion decisions, performance evaluation ratings, procedures for assigning work, the availability of training opportunities, leave policies, steering applicants into low paying jobs, and/or limiting the opportunity to transfer to better jobs have a disproportionately negative effect on the compensation of [DISFAVORED GROUP].

3) Implement Improved Policies. [CONTRACTOR] will develop and write new policies to eliminate all practices that had an adverse effect on the compensation of [DISFAVORED GROUP].

⁶ While it is ideal for the [CONTRACTOR] to disburse *all* of the settlement money to the class, contractors often object to the cost and time required to make a second disbursement when class members will receive a very small amount of money (less than \$5 each, for example). In such cases, OFCCP may agree to include a provision like the following:

If the total amount of uncashed funds would result in a payment of less than [\$__] to each Eligible Class Member who cashed the first disbursement check, [CONTRACTOR] will use those uncashed funds to provide training in equal employment opportunity to its personnel in addition to the training it is obligated to provide concerning the Revised Hiring Process described in section _____.

⁷ Instruction: Work with OFCCP's Statistician to formulate the methodology to be used for the Statistical Analysis.

⁸ Instruction: Work with OFCCP's Statistician to determine the formula to be used for any salary increases.

⁹ Instruction: Consider requiring contractor to retain an expert consultant to design and/ or conduct required studies and develop new compensation policies.

ADDENDUM A

Model CA for Compensation

▪ PERFORMANCE EVALUATIONS AND RATINGS SAMPLE:

[CONTRACTOR]'s infrequent or inconsistent ratings of employees' performance had an adverse effect on the compensation of [DISFAVORED GROUP] [POSITION]. [CONTRACTOR] will write and implement a policy requiring annual performance evaluations based on standardized criteria. [CONTRACTOR] will conduct an annual performance evaluation for each employee working as a [POSITION(s)]. Each employee's direct supervisor will evaluate the employee's performance for the purpose of providing constructive feedback and guidance to the employee, and for documenting, inter alia, the extent to which the employee has achieved his/her job goals and objectives. Supervisors are expected to identify specific examples of performance behaviors to support high or low ratings. [CONTRACTOR] will provide training to supervisors explaining rating levels and how best to document and record employees' performance. Each employee must be provided an electronic or written copy of his/her completed performance evaluation form. [CONTRACTOR] must retain an electronic or written copy of each completed evaluation form for the length of time required by 41 C.F.R. § 60- 1.12.

▪ SETTING STARTING SALARY SAMPLE:

[CONTRACTOR] will develop and write improved guidelines for determining the starting salaries to be assigned to newly hired employees. Factors included in setting starting salary may include information regarding the employee's certifications, previous experience, and the salaries of similarly situated [CONTRACTOR] peers. Employees' pre-hire salary at his or her former employer should not be the sole factor considered because prior salary can reflect race or sex-based compensation discrimination.

▪ TRACKING AND EVALUATION SAMPLE:

[CONTRACTOR] will write and implement procedures to ensure that compensation decisions are tracked and evaluated for compliance with the Revised Compensation Policy.

▪ DOCUMENT RETENTION SAMPLE:

[CONTRACTOR] will write and implement procedures to ensure that documents are retained in accordance with 41 C.F.R. 60-1.12(a) and Part 60-3.

4) Training. Within [NUMBER OF WEEKS OR MONTHS] of the Effective Date of this Agreement, [CONTRACTOR] must train all individuals involved in any way in determining compensation for [NAME OF JOB] positions on all new and revised policies, procedures, and programs developed under Part III-1.D of this Agreement.

ADDENDUM A

Model CA for Compensation

5) Self-monitoring/ Auditing. [CONTRACTOR] will monitor base salary as well as the administration of non-base compensation and benefits¹⁰ and adverse employment actions such as [OVERTIME ASSIGNMENTS/PAY, MERIT AWARDS, DISCIPLINARY ACTIONS, etc.] for any indication of statistically significant disparities based on [CHARACTERISTIC OF DISFAVORED GROUP (race, gender, national origin...)] and will investigate and remedy any such inequity that may be established.¹¹ [AND/ OR INSERT MORE SPECIFIC SELF-AUDITING PROVISIONS LIKE THE FOLLOWING:]

- [CONTRACTOR] expressly agrees to investigate any complaint or information it receives that may indicate compensation disparities.
- [CONTRACTOR] commits to self-monitor its compensation program for [POSITION(s)] on an annual basis using the methodology described in Attachment __ ("Statistical Analysis").
- [CONTRACTOR] will evaluate (1) whether the eligibility criteria for determining non-base compensation are uniformly applied without regard to race or gender and (2) whether eligible employees receive non-base compensation in nondiscriminatory amounts. In addition to the required statistical analysis and self-auditing described above, [CONTRACTOR] will conduct a statistical analysis by [GENDER, RACE...] of the non-base pay of employees in [POSITION(s)].
- If [CONTRACTOR] finds evidence that the criteria are not uniformly applied to all employees, it will create a written guidance document explaining the criteria and procedures for awarding non-base compensation and it will provide related training to all employees who make compensation decisions.
- If there is a statistically significant difference in the non-base compensation of different race or gender groups, [CONTRACTOR] agrees to adjust non-base pay to correct any disparities found.

6) Additional Corrective Actions. [INSERT RELEVANT PROVISIONS.]

For additional suggestions and model language, review the attached memo titled "Model Equitable Relief Provisions for Conciliation Agreements and Consent Decrees," which enumerates many of the equitable remedies which have proven to be highly-effective in eliminating discrimination and/or contribute to comprehensive relief.

Part IV. REPORTS REQUIRED.

¹⁰ Instruction: Base salaries or wages often make up only part of the compensation package for employees. Employee compensation can also consist of commissions, stock options, bonuses, and other payments made as remuneration for employment. Even if there are no significant disparities in base salaries, the amount of non-base compensation paid to members of a protected class still could be discriminatory.

¹¹ Instruction: For example, a disparity in overtime allocations (and consequently pay) might be remedied through increased cross-training of employees or rotating overtime assignments through different shifts and positions.

ADDENDUM A

Model CA for Compensation

1. [CONTRACTOR] must submit the documents and reports described below to: [____], District Director of OFCCP, [ADDRESS].

[INCLUDE REPORTS FROM THIS LIST TO THE EXTENT APPLICABLE. ADD OTHER REPORTS TO EXTENT NECESSARY BASED ON NON-MONETARY REMEDIES.]

A. Within [TIME PERIOD; typically “60 calendar days of the Effective Date of this Agreement”] [CONTRACTOR] must submit a copy of the written Revised Compensation Policy described in section ____.

B. Within [TIME PERIOD] of the Effective Date of this Agreement, [CONTRACTOR] must submit documentation that all managers, supervisors, and other personnel involved in making compensation decisions for [POSITION]s have received training on all new and revised policies, procedures, and programs developed under Part III-1.D of this Agreement. The documentation must include the dates of the training, the names and job titles of all attendees, an outline of the topics discussed during the training, and the name and job title of each person who conducted the training.

C. Within the prescribed timeframes, [CONTRACTOR] must submit all documents and information referenced in sections ____.¹²

D. [CONTRACTOR] must submit a progress report covering each six month period this Agreement is in effect. The first progress report will be due seven months after the Effective Date of this Agreement and must cover the six-month period beginning with the Effective Date. Each subsequent report must cover the successive six-month period, and must be submitted within 30 calendar days after the close of that six-month period. [CONTRACTOR] will submit the following in each progress report: [INSERT A LIST OF THE DATA AND ANALYSES REQUIRED BY THE PRECEDING PART, THESE MAY INCLUDE:]

1) Documentation of monetary payments to all Eligible Class Members as specified in section _____. The documentation must include the names of Eligible Class Members who were paid, and, for each Eligible Class Member, the number and the amount of the check and the date the check cleared the bank. [CONTRACTOR] must provide OFCCP with copies of all canceled checks upon request;

2) Within ten (10) days of completing the Statistical Analysis described in Section __ of the Agreement, [CONTRACTOR] will provide OFCCP, via email and/or overnight mail, the database, output, and statistical log from the Statistical Analysis; and/or

¹² Instruction: Such documents and information may include letters returned as undeliverable, a list of individuals in the affected class who have not returned a signed Information Form before the deadline, and a list of Eligible Class Members.

ADDENDUM A

Model CA for Compensation

3) [CONTRACTOR] must provide documentation describing all Salary Adjustments required by Section __ of the Agreement. The documentation must include the amount of each adjustment, the date each adjustment will be/ was made, and the [GENDER, RACE...] of each individual receiving an adjustment.

2. [CONTRACTOR] will retain all records and data pertinent to the violations resolved by this Agreement and/ or used to prepare required reports until this Agreement expires or as long as required by OFCCP's regulations, whichever date occurs later (or "whichever time period is longer").

Part V. SIGNATURES.

This Conciliation Agreement is hereby executed by and between the OFCCP and [CONTRACTOR].

[NAME of Official]
[POSITION]
[CONTRACTOR]

Date: _____

[NAME]
Regional Director
OFCCP

Date: _____

[NAME of Union Official – only if
appropriate]

Date: _____

ADDENDUM A

Model CA for Compensation

ATTACHMENT __

NOTICE TO AFFECTED CLASS

Dear [NAME]:

[CONTRACTOR] (“CONTRACTOR”) and the Department of Labor's Office of Federal Contract Compliance Programs (“OFCCP”) have entered into a Conciliation Agreement (“Agreement”) to remedy the violations of [EXECUTIVE ORDER 11246 (“E.O. 11246”), SECTION 503 OF THE REHABILITATION ACT (“SECTION 503”), VIETNAM VETERANS READJUSTMENT ASSISTANCE ACT (“VEVRAA”)] that OFCCP found during a compliance review of [CONTRACTOR]’s [LOCATION] facility. OFCCP’s analysis showed that since [SNAPSHOT DATE] [CONTRACTOR] has paid [CHARACTERISTIC OF DISFAVORED GROUP (race, sex, national origin...)] [POSITION]s significantly less per year than [FAVORED GROUP CHARACTERISTIC (males, whites...)]s with the same job at the same location. [CONTRACTOR] has not admitted to any violation of [E.O. 11246, SECTION 503, and/or VEVRAA] and there has not been any adjudicated finding that [CONTRACTOR] violated any laws. OFCCP and [CONTRACTOR] entered into the Agreement to resolve the matter without resorting to further legal proceedings.

You have been identified as one of the individuals who worked as a [POSITION]. Under the Agreement, you may be eligible to receive a payment [INSERT APPROPRIATE AMOUNT/ DESCRIPTION SUCH AS “of at least \$ _____” OR “representing a pro rata share of back pay and interest”] (less deductions required by law). Under the terms of the Agreement it may take up to [NUMBER] months from the date of this letter before you receive your payment. In order to be eligible for a payment, you must complete, sign, and return enclosed Information Verification Form. This form should be mailed as soon as possible; it *must* be postmarked to the address below no later than [TIME (typically 30-60 days)] after the date this Notice was mailed out (postmarked) for you to be entitled to participate in this settlement:

(NAME)
(POSITION)
(CONTRACTOR)
(ADDRESS)

You may use the enclosed postage-paid return envelope to return the completed and signed Information Verification Form.

If you have any questions you may call [NAME] at [CONTRACTOR] at [PHONE NUMBER], or OFCCP Compliance Officer [NAME] at [PHONE NUMBER]. Your call will be returned as soon as possible.

ADDENDUM A

Model CA for Compensation

IF YOU FAIL TO COMPLETE AND RETURN THE ENCLOSED DOCUMENT(S) TO [CONTRACTOR] WITHIN __ DAYS OF THE DATE THE ENVELOPE CONTAINING THIS NOTICE WAS POSTMARKED, YOU WILL NOT BE ELIGIBLE TO RECEIVE A PAYMENT.

Sincerely,

(NAME)

Enclosures

Information Verification Form

Release of Claims Under Executive Order 11246-[DO NOT INCLUDE A RELEASE OF CLAIMS UNLESS REQUESTED BY THE CONTRACTOR. SEE ATTACHMENT FOR A SAMPLE RELEASE.]

ADDENDUM A

Model CA for Compensation

ATTACHMENT __

INFORMATION VERIFICATION FORM

You must complete this form in order to be eligible for the monetary payment under the terms of the Conciliation Agreement (“Agreement”) between [CONTRACTOR][(“CONTRACTOR”)] and the Department of Labor’s Office of Federal Contract Compliance Programs. Please print legibly, except for the signature.

Name: _____

Address: _____

Telephone Nos.: Home _____ Cell _____ Work _____

Notify [CONTRACTOR] at the address below if your address or phone number changes within the next twelve months.

Your Social Security Number (to be used for tax purposes only): _____ - _____ - _____

For purposes of this settlement, it is necessary to verify your [GENDER and/or RACE]:

Caucasian African American Hispanic Asian Native American

Male Female

IF YOU FAIL TO COMPLETE AND RETURN THE ENCLOSED DOCUMENTS TO THE ADDRESS BELOW WITHIN __ DAYS OF THE DATE THE ENVELOPE CONTAINING THIS NOTICE WAS POSTMARKED, YOU WILL NOT BE ELIGIBLE TO RECEIVE A PAYMENT.

(NAME)

(ADDRESS)

I, (print name) _____, certify the above is true and correct.

Signature

Date

ADDENDUM A

Model CA for Compensation

ATTACHMENT __

RELEASE OF CLAIMS UNDER EXECUTIVE ORDER 11246

This Release of Claims under Executive Order 11246 ("Release") is a legal document. The document states that in return for [CONTRACTOR] ("CONTRACTOR") paying you money, you agree that you will not file any lawsuit against [CONTRACTOR] for allegedly violating Executive Order 11246 in its compensation of [INSERT GENDER, RACE OF VICTIMS] [POSITIONS]. It also says that [CONTRACTOR] does not admit it violated any laws. This Release says you had sufficient time to look at the document, to talk with others about the document, including an attorney if you choose, and that no one pressured you into signing the document. Finally, it says that if you do not sign and return the document by a certain date, you will not receive any money.

In consideration of the payment of [INSERT APPROPRIATE AMOUNT/ DESCRIPTION SUCH AS "at least \$ _____" OR "a pro rata share of back pay and interest"] (less deductions required by law) by [CONTRACTOR] to me, which I agree is acceptable, I _____ agree to the following:

print name

I.

I hereby waive, release and forever discharge [CONTRACTOR], its predecessors, successors, related entities, parents, subsidiaries, affiliates and organizations, and its and their shareholders, directors, officers, employees, agents, successors, and assigns, of and from any and all actions, causes of action, damages, liabilities, and claims arising out of or actionable under Executive Order 11246, as amended, which I or my representatives (heirs, executors, administrators, or assigns) have or may have which relate in any way to my compensation as a [POSITION] on the basis of my [RACE, GENDER, ETC] at any time prior to the date of my signature on this Release.

II.

I understand that [CONTRACTOR] denies that it treated me unlawfully or unfairly in any way and that [CONTRACTOR] entered into a Conciliation Agreement with the U.S. Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP") and agreed to make the payment described above to resolve alleged disparities in compensation and to resolve the matter without further legal proceedings in the compliance review initiated by OFCCP on [INSERT DATE]. I further agree that the payment of the aforesaid sum by [CONTRACTOR] to me is not to be construed as an admission of any liability by [CONTRACTOR].

III.

I declare that I have read this Release and that I have had a full opportunity to consider and understand its terms and to consult with my advisors and seek legal advice. I further declare that I have decided of my own free will to sign this Release.

ADDENDUM A

Model CA for Compensation

IV.

I understand that if I do not sign this Release and return it to [CONTRACTOR] [ON OR BEFORE ___ (DATE)/ WITHIN ___ DAYS OF THE DATE THE ENVELOPE CONTAINING THIS RELEASE WAS POSTMARKED], I will not be entitled to receive any payment (less deductions required by law) from [CONTRACTOR].

IN WITNESS WHEREOF, I have signed this document on this _____ day of _____, 20__.

Signature

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access, and other issues

CONCILIATION AGREEMENT

Between

THE U. S. DEPARTMENT OF LABOR

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

and

[NAME OF CONTRACTOR]

PART I. PRELIMINARY STATEMENT

The Office of Federal Contract Compliance Programs (“OFCCP”) evaluated [NAME OF CONTRACTOR]’s (“CONTRACTOR”) facility located at [FACILITY ADDRESS, CITY, STATE] and found that [CONTRACTOR] was not in compliance with the Executive Order 11246, as amended (“E.O. 11246”), [Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793 (“Section 503”), and/or the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended, 38 U.S.C. § 4212 (“VEVRAA”)]¹, and [its/their] implementing regulations at [41 C.F.R. Section(s) 60-1, 60-2, 60-3, 60-4, 60-250, 60-300, and/or 60-741]. OFCCP notified [CONTRACTOR] of the specific violations found and the corrective actions required in a [NOTICE OF VIOLATIONS/SHOW CAUSE NOTICE/AMENDED SHOW CAUSE NOTICE] issued on [DATE]. In the interest of resolving the violations without engaging in further legal proceedings and in exchange for the good and valuable consideration described in this document, OFCCP and [CONTRACTOR] enter this contract (“Conciliation Agreement” or “Agreement”) and agree to all the terms stated below.

PART II. GENERAL TERMS AND CONDITIONS

1. In exchange for [CONTRACTOR]’s fulfillment of all obligations in Parts III and IV of the Agreement, OFCCP agrees not to institute administrative or judicial enforcement proceedings under E.O. 11246 [Section 503, and/or VEVRAA] based on the violations described in more detail in Part III below. However, OFCCP has the right to initiate legal proceedings to enforce the Agreement itself or to correct and obtain relief for the violations described in Part III if [CONTRACTOR] violates this Agreement. Nothing in this Agreement precludes OFCCP from initiating enforcement proceedings based on future compliance evaluations or complaint investigations.

¹ Instruction: If OFCCP is not making a finding of a violation of either Section 503 of the Rehabilitation Act of 1973 (Section 503”) or the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (“VEVRAA”), the name and citation to the statute must not be included in paragraph. However, the first time in the document that these statutes are referenced, the full name of the statute must be stated, followed by the appropriate citation and then followed by the acronym in parentheses and quotation marks, i.e. (“Section 503”) and (“VEVRAA”). Thereafter, the act may be referred to by the acronym, omitting the parentheses and quotation marks.

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access, and other issues

2. [CONTRACTOR] agrees that OFCCP may review its compliance with this Agreement. As part of such review, OFCCP may require written reports, inspect the premises, interview witnesses, and examine and copy documents. [CONTRACTOR] will permit access to its premises during normal business hours for these purposes and will provide OFCCP with all reports and documents requested.

3. [CONTRACTOR] understands that nothing in this Agreement relieves [CONTRACTOR] of its obligation to fully comply with the requirements of E.O. 11246, Section 503, VEVRAA, their implementing regulations, and other applicable equal employment laws.

4. [CONTRACTOR] promises not to harass, intimidate, threaten, discriminate, or otherwise retaliate against any individual because the individual: benefits from this Agreement, files a complaint or participates in any investigation or proceeding under E.O. 11246, Section 503, and/or VEVRAA, or engages in any activity listed at 41 C.F.R. § 60-1.32(a).

5. The parties understand the terms of this Agreement and enter into it voluntarily.

6. This document and its attachments contain the complete and final understanding of the parties with respect to the matters referenced herein. This Agreement contains all terms by which the parties are bound and it supersedes all prior written or oral negotiations and agreements. There will be no modifications or amendments to this Agreement unless they are in writing, signed by all parties.

7. If one or more provisions of this Agreement are rendered unlawful or unenforceable, the remaining provisions will remain in full force and effect.

8. This Agreement becomes effective on the day it is signed by the Regional Director of the _____ Region (the "Effective Date") unless the Director of OFCCP indicates otherwise within 45 calendar days of the date the Regional Director signs the Agreement.²

9. This Agreement will expire sixty (60) days after [CONTRACTOR] submits the final progress report required in Part IV (D), below, unless OFCCP notifies [CONTRACTOR] in writing prior to the expiration date that [CONTRACTOR] has not fulfilled all of its obligations under the Agreement, in which case the Agreement is automatically extended until the date that OFCCP determines [CONTRACTOR] has met all of its obligations under the Agreement.

10. If [CONTRACTOR] violates this Conciliation Agreement,

A. The procedures set forth at 41 C.F.R. § 60-1.34 will govern:

1) If OFCCP believes that [CONTRACTOR] violated any term of the Agreement while it was in effect, OFCCP will send [CONTRACTOR] a written notice stating the alleged violations and summarizing any supporting evidence.

² Instruction: The title of the District Director and appropriate District Office must be substituted for recordkeeping cases and other types of cases where no findings of discrimination are made by OFCCP.

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access, and other issues

2) [CONTRACTOR] will have 15 days from receipt of such notice to demonstrate in writing that it has not violated the Conciliation Agreement, unless such a delay would result in irreparable injury to the employment rights of affected employees or applicants.

3) If [CONTRACTOR] is unable to demonstrate that it has not violated the Agreement, or if OFCCP alleges irreparable injury, enforcement proceedings may be initiated immediately without issuing a show cause notice or proceeding through any other requirement.

4) OFCCP may seek enforcement of this Agreement itself and is not required to present proof of any underlying violations resolved by this Agreement.

B. [CONTRACTOR] may be subject to the sanctions set forth in [*insert as applicable*: Section 209 of the Executive Order, 41 C.F.R. § 60-741.66, 41 C.F.R. § 60-250.66, or 41 C.F.R. § 60-300.66] and/or other appropriate relief for violation of this Agreement.

11. This Agreement does not constitute an admission by [CONTRACTOR] of any violation of E.O. 11246, Section 503, VEVRAA, or other laws, nor has there been an adjudicated finding that [CONTRACTOR] violated any laws.

PART III. SPECIFIC VIOLATIONS AND REMEDIES

1. HIRING DISCRIMINATION

A. STATEMENT OF VIOLATION. [INSERT BRIEF SUMMARY OF THE VIOLATION INCLUDING THE SECTION(S) OF E.O. 11246 (SECTION 503 AND/OR VEVRAA) AND THE REGULATIONS VIOLATED.]³

▪ **HIRING DISCRIMINATION- STATEMENT OF VIOLATION SAMPLE:**

OFCCP found that [CONTRACTOR] is not in compliance with the nondiscrimination requirements of the equal opportunity clause of E.O. 11246 § 202 and 41 C.F.R. § 60-1.4(a)(1). OFCCP's analysis of [CONTRACTOR]'s hiring process and selection procedures revealed that during the period of [DATE] through [DATE] ("review period") [CONTRACTOR] discriminated against [DISFAVORED GROUP(S)]⁴ applicants for [NAME OF JOB(S)/ POSITION(S)]. OFCCP found that there was a statistically significant disparity in the hiring of [NAME OF JOB(S)] based on [RACE, GENDER, NATIONAL ORIGIN...].

B. OFCCP'S SPECIFIC FINDINGS. [INSERT A SUMMARY OF OFCCP'S SPECIFIC FINDINGS AT THE TIME THE CA IS NEGOTIATED.]

³ Instruction: Each statement of violation and summary of OFCCP's findings needs to be tailored to the specific facts in the case. The sample language provided below and throughout Part III may not be appropriate in all cases. You should consult with SOL if you have any questions or concerns while drafting the CA.

⁴ Instruction: You must identify the specific race/or ethnicity when you have a minority class (i.e., Black or African-American, Hispanic...).

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access, and other issues

▪ HIRING DISCRIMINATION- DISPARATE IMPACT SAMPLE:

OFCCP's analysis of the applicant and hiring data demonstrates that [CONTRACTOR]'s selection process had an adverse impact on the hiring of [DISFAVORED GROUP] applicants for [NAME OF JOB(S)] positions. Of [NUMBER OF DISFAVORED GROUP] applicants, [NUMBER] or [PERCENTAGE] were hired, whereas of [NUMBER OF FAVORED GROUP] applicants, [NUMBER] or [PERCENTAGE] were hired. This resulted in a hiring shortfall of [NUMBER] [DISFAVORED GROUP] and a disparity that was statistically significant at [NUMBER] standard deviations.

OFCCP found that the disparity was caused by [CONTRACTOR'S] use of [NAME OF THE SELECTION PROCEDURE]. When analyzing the results of [SELECTION PROCEDURE], OFCCP found that [DESCRIBE RESULTS OF ANALYSIS (SHORTFALLS, STATISTICALLY SIGNIFICANT DISPARITIES)]. OFCCP further found that [CONTRACTOR] had not properly validated [SELECTION PROCEDURE] in accordance with the requirements of the Uniform Guidelines on Employee Selection Procedures, 41 C.F.R. Part 60-3. Accordingly, as a result of using [SELECTION PROCEDURE], [CONTRACTOR] discriminated against [NUMBER] [DISFAVORED GROUP] applicants who applied for [POSITION] during the review period.

▪ HIRING DISCRIMINATION- DISPARATE TREATMENT SAMPLE:

OFCCP's statistical findings indicate hiring discrimination against [DISFAVORED GROUP]. OFCCP found additional evidence that supports its hiring discrimination claim. [INSERT A DESCRIPTION OF THE ADDITIONAL EVIDENCE OFCCP FOUND. FOR EXAMPLE, OFCCP MAY HAVE FOUND: DIRECT EVIDENCE OF DISCRIMINATORY ANIMUS, INCONSISTENCIES IN THE SELECTION PROCESS- INCLUDING APPLYING A REQUIREMENT APPLICABLE ONLY TO MEMBERS OF THE DISFAVORED GROUP, AND/OR ANECDOTAL ("ME TOO") EVIDENCE.] Accordingly, OFCCP determined that [CONTRACTOR] engaged in a pattern or practice of discrimination against [NUMBER] [DISFAVORED GROUP] applicants who applied for [POSITION] during the review period.

C. REMEDY FOR AFFECTED CLASS.⁵

⁵ Instruction for when there is a Union/CBA: Before starting settlement discussions (or as soon as OFCCP becomes aware that a union is in place at the establishment) OFCCP should consult with SOL to discuss the legal requirements for CAs when the Contractor's workforce is unionized. When a proposed remedy for a violation identified in the course of a compliance review or complaint investigation under any of OFCCP's three programs would require a change in or otherwise affect a Collective Bargaining Agreement (CBA), the union must be notified in writing and invited to participate in the conciliation process. However, SOL may be able to suggest remedies that would not require union notification and involvement.

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access, and other issues

1) Notice. Within [NUMBER] calendar days of the Effective Date of this Agreement, [CONTRACTOR] must notify the [DISFAVORED GROUP] applicants listed in Attachment__ of the terms of this Agreement by mailing by [METHOD OF MAILING (first class, return-receipt requested, certified...)] mail to each individual in the affected class the: Notice to Affected Class (Attachment __, “Notice”), Information Verification & Employment Interest Form (Attachment __, “Interest Form”), and a postage paid return envelope. ***DO NOT INCLUDE A RELEASE OF CLAIMS UNLESS REQUESTED BY THE CONTRACTOR.*** [CONTRACTOR] will notify OFCCP of all letters returned as undeliverable [ON A MONTHLY/ WEEKLY BASIS OR __ DAYS AFTER THE RESPONSE DEADLINE]. In addition, within [TIME PERIOD] after expiration of the response deadline set out in the Interest Form, [CONTRACTOR] will provide OFCCP with a list of the individuals in the affected class who have not yet responded to the Notice and/or have not returned a signed Interest Form. OFCCP will then attempt to obtain and provide updated addresses to [CONTRACTOR] within [TIME PERIOD] of receiving the list from [CONTRACTOR]. [CONTRACTOR] agrees to mail by [METHOD OF MAILING] mail a second Notice, Interest Form, and postage paid return envelope to all individuals for whom updated addresses were obtained within [TIME PERIOD] of receiving the updated addresses.

2) Eligibility. All members of the affected class (listed on Attachment __) who sign and return the Interest Form to [CONTRACTOR] within [NUMBER] calendar days of the postmarked date on the envelope containing the first or second Notice and Interest Form (“Eligible Class Members”) will receive a share of the monetary settlement and, if indicating an interest in employment, will be eligible to be considered for a job pursuant to this Agreement. If an individual receives, but does not return the Interest Form to [CONTRACTOR] within [NUMBER] calendar days of the postmarked date on the envelope containing the first or second Notice and Interest Form, he/she will no longer be entitled to a payment or consideration for a job under this Agreement.

Within [TIME PERIOD] after the response deadline set out in the Interest Form, [CONTRACTOR] will provide OFCCP with a list of the Eligible Class Members (individuals who returned the Interest Form by the deadline). Within [NUMBER] calendar days after receiving the list, OFCCP will approve the final list of Eligible Class Members or discuss with [CONTRACTOR] any issues necessary to finalize the list, such as the inclusion or exclusion of certain individuals.

All Eligible Class Members are entitled to their share of the monetary settlement regardless of whether they are interested in employment with [CONTRACTOR].

3) Monetary Settlement. [CONTRACTOR] agrees to distribute [SETTLEMENT AMOUNT] (\$ ___ in back pay and \$ ___ in interest), less legal deductions required by law from back pay only (such as federal, state and/ or local taxes and the Eligible Class Members’ share of FICA taxes), [IN EQUAL SHARES

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access, and other issues

AMONG ALL ELIGIBLE CLASS MEMBERS ON THE FINAL APPROVED LIST OR IN THE AMOUNTS LISTED/ IN AMOUNTS BASED ON THE FORMULA CONTAINED IN ATTACHMENT __]. [CONTRACTOR] will pay the Internal Revenue Service (“IRS”) the employer’s share of social security withholdings and will mail each Eligible Class Member an IRS W-2 Form reporting the portion of the payment representing back pay and an IRS Form 1099 for the portion of the payment representing interest. These IRS forms will be mailed at the end of the year. [CONTRACTOR] will disburse the monetary settlement within [NUMBER] calendar days after OFCCP approves the final list of Eligible Class Members.

Within [NUMBER] calendar days of [CONTRACTOR]’s receipt of a check to an Eligible Class Member returned as undeliverable, [CONTRACTOR] will notify OFCCP of this fact via e-mail sent to [NAME AND EMAIL ADDRESSES OF OFCCP CONTACTS]. OFCCP will attempt to locate the Eligible Class Member and if OFCCP obtains an alternate address, [CONTRACTOR] will re-mail the check within [NUMBER] calendar days of receiving an alternate or corrected address. Any check that remains uncashed 120 days after the initial date the check was mailed to the Eligible Class Member will be void. With respect to any uncashed funds, [CONTRACTOR] will make a second distribution to all Eligible Class Members who cashed their first check [INSERT DETAILS INCLUDING THE TIME PERIOD FOR SENDING THE CHECKS AND HOW THE AMOUNT WILL BE DIVIDED AMONG CLASS MEMBERS].⁶

4) Employment. As positions become available, [CONTRACTOR] will consider qualified Eligible Class Members not currently employed by [CONTRACTOR] who express an interest in employment with [CONTRACTOR] until [SHORTFALL NUMBER] Eligible Class Members are hired as [POSITION]s or until the list of Eligible Class Members expressing an interest in employment is exhausted, whichever occurs first.⁷ Eligible Class Members will be considered in the order that [CONTRACTOR] receives their Interest Forms. If [CONTRACTOR] receives more than one response on any given day, those Eligible Class Members will be considered for employment based on the date of their original application. [CONTRACTOR] must initiate its hiring of Eligible Class Members within __ days [OF THE EFFECTIVE DATE OF THIS

⁶ While it is ideal for the Contractor to disburse *all* of the settlement money to the class, contractors often object to the cost and time required to make a second disbursement when class members will receive a very small amount of money (less than \$5 each, for example). In such cases, OFCCP may agree to include a provision such as the following:

If the total amount of uncashed funds would result in a payment of less than [\$__] to each Eligible Class Member who cashed the first disbursement check, [CONTRACTOR] will use those uncashed funds to provide training in equal employment opportunity to its personnel in addition to the training it is obligated to provide concerning the Revised Hiring Process described in section _____.

⁷ Instruction: Insert this sentence if you have both female and minority class members and placement issues: “[CONTRACTOR] will make its best efforts to distribute the [SHORTFALL NUMBER] hires as follows: [LIST DISTRIBUTION OF HIRES BY RACE/GENDER/ETHNICITY].”

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access, and other issues

AGREEMENT OR AFTER THE RESPONSE DEADLINE SET OUT IN THE INTEREST FORM] and must complete its hiring obligations under this section within __ [months/years] of the Effective Date of this Agreement. If [CONTRACTOR] is not able to hire [SHORTFALL NUMBER] Eligible Class Members or exhaust the list of Eligible Class Members expressing an interest in employment within __ [months/years], OFCCP may extend the term of this Agreement for up to ____ months or until [CONTRACTOR] satisfies its hiring requirement(s), whichever occurs first.

Eligible Class Members will be allowed at least two weeks to report for work after receiving a written job offer from [CONTRACTOR]. The Eligible Class Members hired into [POSITION] positions pursuant to this Agreement must be paid \$[AMOUNT] per hour or the current wage rate for the [POSITION] position, whichever is higher, and must be provided with the same benefits and opportunity to earn overtime and shift differentials as other [POSITION] employees. In addition, all Eligible Class Members hired must receive retroactive seniority⁸ using the date of their original application as their hire date for all purposes, including job retention, job bidding and benefits (or a payment of \$ ___ in lieu of retroactive seniority benefits).

D. NON-MONETARY REMEDIES. [CONTRACTOR] will ensure that all applicants are afforded equal employment opportunities. [CONTRACTOR] agrees to immediately cease using the selection procedures, practices, and/or policies which negatively affected the hiring of [DISFAVORED GROUP] applicants for [NAME OF JOB(S)] positions. [CONTRACTOR] agrees to continue and/or to implement the corrective actions detailed below.

1) Revised Hiring Process

(a) Eliminate Discriminatory Selection Procedures:

[CONTRACTOR] agrees to immediately cease use of the [NAME OF SELECTION PROCEDURES (INCLUDING TESTS)] until they are validated in accordance with 41 C.F.R. Part 60-3.

[CONTRACTOR] agrees to comply with all OFCCP regulations concerning selection procedures, including 41 C.F.R. Part 60-3.

[CONTRACTOR] will not use any selection procedure that has an adverse impact, as defined in 41 C.F.R. § 3.4D, on applicants of a particular [CHARACTERISTIC OF DISFAVORED GROUP (i.e., race, sex, national origin...)] unless it properly validates the procedure pursuant to these regulations.

(b) Review and Revisions Required: [CONTRACTOR] will revise, in writing, the practices, policies and procedures it uses to

⁸ Instruction: If the workforce at the location subject to this Agreement is unionized, a demand for retroactive seniority will usually affect the terms of the Collective Bargaining Agreement (CBA). In such cases, OFCCP should consult with SOL regarding the range of options available.

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access, and other issues

select applicants for [POSITION] positions (hereinafter “Revised Hiring Process”). Specifically, [CONTRACTOR] will:

(i) create a job description and selection process for [NAME OF JOB GROUP/ POSITION]s which describes the essential functions; the minimum qualifications including required skills and certifications; and the criteria used in each step of the hiring process, including any application screens, interviews, tests, credit checks, review of criminal history, reference checks, testing, or other selection procedure;

(ii) develop specific, job-related qualification standards for [NAME OF JOB/ POSITION]s that reflect the duties, functions, and competencies of the position to minimize the potential for [[CHARACTERISTIC OF DISFAVORED GROUP (i.e., race, sex, national origin...)] stereotyping or other unlawful discrimination;

(iii) ensure all policies and qualification standards are uniformly applied to all applicants; and

(iv) list clearly on its recruiting materials and job postings the minimum qualifications, including required skills and certifications.

(c) Recordkeeping and Retention: [CONTRACTOR] will write and implement procedures to ensure that applicants are tracked and decisions are documented at each step in the hiring process. [CONTRACTOR] will write and implement procedures to ensure that documents are retained in accordance with 41 C.F.R. 60-1.12(a) and Part 60-3.

(d) Training: Within [NUMBER OF WEEKS OR MONTHS] of the Effective Date of this Agreement, [CONTRACTOR] must train all individuals involved in any way in recruiting, selecting, or tracking applicants for [NAME OF JOB] positions on the Revised Hiring Process. The training will include instruction in: the proper implementation of the recruitment, tracking and selection procedures; neutral application of the specified qualifications and criteria that will be used at each step in the hiring process; procedures to be used to document the decisions made at each step in the hiring process; and the procedures to be used to ensure that documents are retained in accordance with 41 C.F.R. § 60-1.12(a) and Part 60-3. [CONTRACTOR] will meet with management and all individuals responsible for the selection process and review its equal employment obligations and nondiscrimination policies

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access, and other issues

related to hiring. Specific attention will be directed to ensure that [DISFAVORED GROUP] applicants, who benefit from the provisions of this agreement, are not retaliated against.

(e) Monitoring: [CONTRACTOR] agrees to monitor selection rates at each step of its selection process for [NAME OF JOB GROUP/ POSITION]s. Where it is determined that a selection procedure has an adverse impact, as defined in 41 C.F.R. § 3.4D, on the hiring of applicants of a particular race or gender, [CONTRACTOR] will eliminate the procedure, choose an alternative procedure, or validate the procedure in accordance with the UGESP codified at 41 C.F.R. Part 60-3. [CONTRACTOR] agrees to maintain and make available to OFCCP records concerning the impact of the selection process for [NAME OF JOB GROUP] at the [LOCATION] facility. This includes the number of persons hired by [DISFAVORED GROUP CHARACTERISTIC], the number of applicants who applied by [DISFAVORED GROUP CHARACTERISTIC], and the selection procedures utilized. This information will be maintained until the expiration of this Agreement or as long as required by the regulations, whichever is later.

2) Other Corrective Actions [INSERT RELEVANT PROVISIONS.]

- *For additional suggestions and model language, review the attached memo titled “Model Equitable Relief Provisions for Conciliation Agreements and Consent Decrees,” which enumerates many of the equitable remedies which have proven to be highly-effective in eliminating discrimination and/or contribute to comprehensive relief.*

2. RECORDKEEPING/ ADVERSE IMPACT ANALYSIS VIOLATIONS

A. STATEMENT OF VIOLATIONS. [CONTRACTOR] failed to collect and maintain personnel and employment records and conduct adverse impact analyses in accordance with the requirements of 41 C.F.R. § 60-1.12(a) and Part 60-3.

B. OFCCP’S SPECIFIC FINDINGS. Specifically, during the review period,

- [CONTRACTOR] failed to maintain copies of [NUMBER AND DESCRIPTION OF MISSING RECORDS];
- **AND/OR** [CONTRACTOR] failed to conduct the adverse impact analyses required by 41 C.F.R. §§ 60-3.15A and 60-3.4.
- **OR** [CONTRACTOR] failed to conduct adverse impact analyses for each group constituting more than 2% of the labor force or 2% of the applicable workforce in accordance with the requirements of 41 C.F.R. § 60-3.15A.

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access, and other issues

- **OR** [CONTRACTOR] conducted adverse impact analyses for the overall selection process and identified statistically significant adverse impact but failed to evaluate the *individual* components of the selection process for adverse impact in accordance with the requirements of 41 C.F.R. §§ 60-3.15A and 60-3.4

C. REMEDY. [CONTRACTOR] will ensure that its records are collected and maintained in accordance with the requirements of 41 C.F.R. § 60-1.12(a) and Part 60-3. [CONTRACTOR] will conduct adverse impact analyses on at least an annual basis for the purpose of determining whether adverse impact exists against applicants based on race, sex, or ethnic group in hiring, promotion, termination, and other personnel activities. These analyses will be done by job for each group constituting more than 2% of the labor force in the relevant labor area or 2% of the applicable workforce. If adverse impact is identified in the total selection process, [CONTRACTOR] will evaluate each individual component of the selection process for adverse impact. If adverse impact is found to exist in any of the individual components of the selection process, [CONTRACTOR] will validate each such component in accordance with the Uniform Guidelines on Employee Selection Procedures or utilize selection procedures which do not result in adverse impact.

3. ACCESS/ PRODUCTION VIOLATIONS

A. STATEMENT OF VIOLATIONS. [CONTRACTOR] denied OFCCP access to its facility for the purpose of a compliance review and/or failed to provide the following: [INSERT THE DOCUMENT/DATA/INFORMATION NOT PROVIDED AND INCLUDE CITATION TO THE APPLICABLE REGULATION(S)].

B. OFCCP'S SPECIFIC FINDINGS. Specifically, [STATE WHEN ACCESS AND/OR THE DOCUMENT/DATA/INFORMATION WAS REQUESTED AND THE DATE AND SUBSTANCE OF THE CONTRACTOR'S RESPONSE EITHER VERBAL OR IN WRITING].

C. REMEDY. [CONTRACTOR] will furnish all information and reports required by [EXECUTIVE ORDER 11246, SECTION 503, AND/OR VEVRAA] and by the rules, regulations and orders of the Secretary of Labor, and will permit OFCCP access to its books, records, and accounts for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

Part IV. REPORTS REQUIRED

1. [CONTRACTOR] must submit the documents and reports described below to: [____], District Director of OFCCP, [ADDRESS].

A. Within [TIME PERIOD; typically "60 calendar days of the Effective Date of this Agreement"] [CONTRACTOR] must submit a copy of the written Revised Hiring Process described in section ____.

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access, and other issues

B. Within [TIME PERIOD] of the Effective Date of this Agreement, [CONTRACTOR] must submit documentation that all managers, supervisors and other personnel involved in recruiting, selecting, or tracking applicants for [POSITION]s have been trained on the Revised Hiring Process. The documentation must include the dates of the training, the names and job titles of all attendees, an outline of the topics discussed in the training, and the name and job title of each person who conducted the training.

C. Within the prescribed timeframes, [CONTRACTOR] must submit all documents and information referenced in sections ____.⁹

D. [CONTRACTOR] must submit a progress report covering each six month period this Agreement is in effect. The first progress report will be due seven months after the Effective Date of this Agreement and must cover the six-month period beginning with the Effective Date. Each subsequent report must cover the successive six-month period, and must be submitted within 30 calendar days after the close of that six-month period. [CONTRACTOR] will submit the following in each progress report: [INSERT A LIST OF THE DATA AND ANALYSES REQUIRED BY THE PRECEDING PART, THESE MAY INCLUDE:]

- 1) Documentation of monetary payments to all Eligible Class Members as specified in section _____. The documentation must include the names of Eligible Class Members who were paid, and, for each Eligible Class Member, the number and the amount of the check and the date the check cleared the bank. [CONTRACTOR] must provide OFCCP with copies of all canceled checks upon request;
- 2) Documentation of specific hiring activity for Eligible Class Members who were hired as [POSITION]s in accordance with this Agreement, including name, date of hire, job title hired into, rate of pay and proof of retroactive seniority and benefits;
- 3) For Eligible Class Members who were considered for employment but were not hired, [CONTRACTOR] will provide the reason for non-placement along with all relevant documentation (e.g., documentation that the Eligible Class Member declined a job offer);
- 4) The total number of applicants and hires and the breakdown by race, gender and ethnic group of applicants and hires for [POSITION] positions during the reporting period, including all temporary, part time, and seasonal workers who were referred to and/or assigned to work at [CONTRACTOR] by a staffing firm or employment agency;

⁹ Instruction: Such documents and information may include letters returned as undeliverable, a list of individuals in the affected class who have not returned a signed Interest Form before the deadline, and a list of Eligible Class Members.

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access, and other issues

5) For [POSITION]s, the results of [CONTRACTOR]'s analysis as to whether its total selection process has adverse impact, as defined in 41 C.F.R. § 60-3.4D, on those members of groups set forth in 41 C.F.R. § 60-3.4B (for purposes of the adverse impact analysis, the [CONTRACTOR] must not include hires made of Eligible Class Members pursuant to this Agreement in that analysis; [CONTRACTOR] must combine the data for the current report with the data from the previous report(s) to analyze at least a 12-month period);

6) For each case where the total selection process has an adverse impact, as defined in 41 C.F.R. § 60-3.4D, the results of [CONTRACTOR]'s evaluation of the individual components of the selection process for adverse impact; and/ or

7) The actions taken by [CONTRACTOR] upon determining that any component of the selection process has an adverse impact on members of groups set forth in section __ above.

2. [CONTRACTOR] will retain all records and data pertinent to the violations resolved by this Agreement and/ or used to prepare required reports until this Agreement expires or as long as required by OFCCP's regulations, whichever date occurs later (or "whichever time period is longer").

Part V. SIGNATURES

This Conciliation Agreement is hereby executed by and between the OFCCP and [CONTRACTOR].

[NAME of Official]
[POSITION]
[CONTRACTOR]

Date: _____

[NAME]
Regional Director¹⁰
OFCCP

Date: _____

[NAME of Union Official – only if
appropriate]

Date: _____

¹⁰ Instruction: District Directors have been delegated signatory authority for CAs not containing a finding of discrimination. As to those agreements, substitute "District Director" on the signature line.

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access and other issues

ATTACHMENT ___

NOTICE TO AFFECTED CLASS

Dear [NAME]:

[CONTRACTOR] (“CONTRACTOR”) and the Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”) have entered into a Conciliation Agreement (“Agreement”) to remedy the violations of [EXECUTIVE ORDER 11246 (“E.O. 11246”), SECTION 503 OF THE REHABILITATION ACT (“SECTION 503”), VIETNAM VETERANS READJUSTMENT ASSISTANCE ACT (“VEVRAA”)] that OFCCP found during a compliance review of [CONTRACTOR]’s [LOCATION] facility. [INSERT STATEMENT OF THE VIOLATION FROM PART III OF THE CA.] [*Sample:* OFCCP’s analysis of [CONTRACTOR]’s hiring process and selection procedures revealed that during the period of [DATE] through [DATE] (“review period”) [CONTRACTOR] discriminated against [DISFAVORED GROUP(S)] applicants for [NAME OF JOB(S)/ POSITION(S)]. OFCCP found that there was a disparity in the hiring of [NAME OF JOB(S)] based on [RACE, GENDER, NATIONAL ORIGIN...].] [CONTRACTOR] has not admitted to any violation of [E.O. 11246, SECTION 503, AND/ OR VEVRAA] and there has not been any adjudicated finding that [CONTRACTOR] violated any laws. OFCCP and [CONTRACTOR] entered into the Agreement to resolve the matter without resorting to further legal proceedings. You have been identified as an individual who applied for a [POSITION] during that time period, but was not hired.

As part of this Agreement, you are eligible to receive a distribution of at least \$_____ less lawful payroll deductions. Under the terms of this Agreement it may take up to [NUMBER] months from the date of this letter before you receive your distribution. In order to be eligible for a payment, you must complete, sign, and return the enclosed Information Verification and Employment Interest Form. You should complete and mail back the form as soon as possible; it *must* be postmarked to the address below no later than [TIME PERIOD (typically 30-60 days)] after the date this Notice was mailed out (postmarked) for you to be entitled to participate in this settlement:

(NAME)
(POSITION)
(CONTRACTOR)
(ADDRESS)

You may use the enclosed postage-paid return envelope to return the completed and signed Information Verification and Employment Interest Form.

In addition to the monetary distribution, [CONTRACTOR] will be making job offers for [POSITIONS] to a limited number of individuals receiving this notification. It is not certain that you will receive a job offer. If you are still interested in employment with [CONTRACTOR], please check the appropriate box on the enclosed Information Verification and Employment Interest Form. Those receiving this notice will be considered for [POSITION] positions in the

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access and other issues

order that [CONTRACTOR] receives the Information Verification and Employment Interest Form expressing an interest in employment. All individual hired pursuant to this Agreement will be provided with retroactive seniority for purposes of benefits (or \$__ in lieu of retroactive seniority). If you have any questions you may call [NAME] at [CONTRACTOR] at [PHONE NUMBER], or OFCCP Compliance Officer [NAME] at [PHONE NUMBER]. Your call will be returned as soon as possible.

IF YOU FAIL TO COMPLETE AND RETURN THE ENCLOSED DOCUMENTS TO [CONTRACTOR] WITHIN __ DAYS OF THE DATE THE ENVELOPE CONTAINING THIS NOTICE WAS POSTMARKED, YOU WILL NOT BE ELIGIBLE TO RECEIVE A PAYMENT OR TO BE CONSIDERED FOR A JOB OFFER.

Sincerely,

(NAME)

Enclosures

Information Verification and Employment Interest Form

Release of Claims Under Executive Order 11246-**[DO NOT INCLUDE A RELEASE OF CLAIMS UNLESS REQUESTED BY THE CONTRACTOR. SEE ATTACHMENT 3 FOR A SAMPLE RELEASE.]**

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access and other issues

ATTACHMENT __

INFORMATION VERIFICATION & EMPLOYMENT INTEREST FORM

You must complete this form in order to be eligible for the monetary payment and/or employment opportunities under the terms of the Conciliation Agreement (“Agreement”) between [CONTRACTOR][(“CONTRACTOR”)] and the Department of Labor’s Office of Federal Contract Compliance Programs. Please print legibly, except for the signature.

Name: _____

Address: _____

Telephone Nos.: Home _____ Cell _____ Work _____

Notify [CONTRACTOR] at the address below if your address or phone number changes within the next twelve months.

Your Social Security Number (to be used for tax purposes only): _____ - _____ - _____

For purposes of this settlement, it is necessary to verify your [GENDER and/or RACE]:

Caucasian African American Hispanic Asian Native American

Male Female

Please indicate below whether you are currently interested in employment in a [POSITION] with [CONTRACTOR]. If you complete, sign, and return this Information Verification and Employment Interest Form, you remain eligible for the monetary payment whether or not you are interested in employment at this time.

Yes, I am still interested in employment with [CONTRACTOR] as a [POSITION].

No, I am not currently interested in employment with [CONTRACTOR] as a [POSITION].

IF YOU FAIL TO COMPLETE AND RETURN THE ENCLOSED DOCUMENTS TO THE ADDRESS BELOW WITHIN __ DAYS OF THE DATE THE ENVELOPE CONTAINING THIS NOTICE WAS POSTMARKED, YOU WILL NOT BE ELIGIBLE TO RECEIVE A PAYMENT OR TO BE CONSIDERED FOR A JOB OFFER.

(NAME)

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access and other issues
(ADDRESS)

I, _____, certify the above is true and correct.

(print name)

Signature

Date

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access and other issues

ATTACHMENT ____

RELEASE OF CLAIMS UNDER EXECUTIVE ORDER 11246

This Release of Claims under Executive Order 11246 ("Release") is a legal document. This document states that in return for [CONTRACTOR] ("CONTRACTOR") paying you money, you agree that you will not file any lawsuit against [CONTRACTOR] for allegedly violating Executive Order 11246 in connection with its selection procedures for applicants for [POSITIONS] positions. It also says that [CONTRACTOR] does not admit it violated any laws. This Release says you had sufficient time to look at the document, to talk with others about the document, including an attorney if you choose, and that no one pressured you into signing the document. Finally, it says that if you do not sign and return the document by a certain date, you will not receive any money.

In consideration of the payment of at least \$ _____ (less deductions required by law) by [CONTRACTOR] to me, which I agree is acceptable, I _____
agree to the following: print name

I.

I hereby waive, release and forever discharge [CONTRACTOR], its predecessors, successors, related entities, parents, subsidiaries, affiliates and organizations, and its and their shareholders, directors, officers, employees, agents, successors, and assigns, of and from any and all actions, causes of action, damages, liabilities, and claims arising out of or actionable under Executive Order 11246, as amended, which I or my representatives (heirs, executors, administrators, or assigns) have or may have which relate in any way to my non-selection for employment as a [POSITION] on the basis of my [RACE, GENDER, ETC] at any time through the effective date of this Release.

II.

I understand that [CONTRACTOR] denies that it treated me unlawfully or unfairly in any way and that [CONTRACTOR] entered into a Conciliation Agreement with the U.S. Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP") and agreed to make the payment described above to resolve alleged disparities in hiring and to resolve the matter without further legal proceedings in the compliance review initiated by OFCCP on [INSERT DATE]. I further agree that the payment of the aforesaid sum by [CONTRACTOR] to me is not to be construed as an admission of any liability by [CONTRACTOR].

III.

I declare that I have read this Release and that I have had a full opportunity to consider and understand its terms and to consult with my advisors and seek legal advice. I further declare that I have decided of my own free will to sign this Release.

IV.

C-1

ADDENDUM B

Model CA for Hiring, Recordkeeping, Access and other issues

I understand that if I do not sign this Release and return it to [CONTACTOR] [ON OR BEFORE ___ (DATE)/ WITHIN ___ DAYS OF THE DATE THE ENVELOPE CONTAINING THIS RELEASE WAS POSTMARKED], I will not be entitled to receive any payment (less deductions required by law) from [CONTRACTOR].

IN WITNESS WHEREOF, I have signed this document on this _____ day of _____, 20__.

Signature



OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS



The U.S. Department of Labor OFCCP

200 Constitution Avenue, NW

Washington, D.C. 20210

1-800-397-6251

ofccp-public@dol.gov

www.dol.gov/ofccp