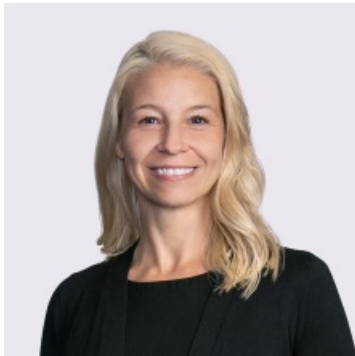


OFCCP's Focus on Construction Contractors Increasing

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The federal government's focus on the construction industry is growing as more construction companies benefit from the Infrastructure Investment and Jobs Act (IIJA). The IIJA was signed into law by President Joe Biden on Nov. 15, 2021, and is funneling millions of dollars into infrastructure improvement projects.

Now, the government is increasing focus on the companies receiving the benefit of those federal dollars, and the Office of Federal Contract Compliance Programs (OFCCP) is increasing the number of construction contractors it audits.

The construction industry should monitor OFCCP's regulatory requirements for construction contractors, the new Mega Project Program (which may mean big changes for contractors), and OFCCP's June 2023 audit list, among other developments.

OFCCP Requirements

OFCCP's affirmative action requirements for construction contractors have been in place for decades. Construction contractors must comply with the agency's "Sixteen Affirmative Action Steps," a list of mandatory actions found in OFCCP's regulations and the [Construction Contractors Technical Assistance Guide](#). The 16 steps include requirements related to five major categories:

1. Recruitment practices;
2. Training;
3. Implementation of the equal employment opportunity policy;
4. Analyzing personnel activity; and
5. Solicitations/contracts with subcontractors.

Construction contractors are to pursue participation goals established for women and minorities on construction sites. OFCCP sets the participation goals, and contractors must evaluate the race and gender makeup of their workforce annually to determine how their workforce compares. Importantly, OFCCP's rules prohibit contractors from setting a quota or making employment decisions based on race or gender. Contractors are encouraged to achieve the aspirational goals by complying with the 16 steps.

Diversity recruitment, a cornerstone of affirmative action, is also one of the most frequently cited violations in an OFCCP audit. Many construction contractors rely almost exclusively on unions to fill construction jobs, and many contractors are unaware of their requirement to separately engage in diversity recruitment. Construction contractors may work closely with the unions to engage diversity organizations specializing in placing female, minority, veteran, and disability construction workers, but the obligation to demonstrate compliance falls on the contractor in an OFCCP audit.

Additionally, contractors must perform an analysis of its personnel activity, conforming with the Uniform Guidelines on Employee Selection Procedures, to ensure one race or gender is

not adversely impacted by the contractor's hiring practices. This requires the contractor to not only solicit and maintain the gender and race of its employees, but to also track its applicants – both referrals and off-the-street applicants – including demographic information.

Other requirements include, but are not limited to, posting required notices in employee areas, including notices in contract documents, and notifying OFCCP of certain subcontracts within 10 days. OFCCP recently launched an [online notification system](#) for employers to report subcontract awards.

Contractors with a \$50,000 and \$150,000 non-federally assisted contract must comply with OFCCP's regulations related to individuals with disabilities and protected veterans, respectively.

New Audit Advance Notice List Released in June

OFCCP has not historically audited construction contractors as often as supply and service contractors, and many construction contractors are unaware of their obligations. OFCCP is increasing the number of audits of construction contractors, however. On June 5, 2023, the agency released its most recent [construction contractor audit list](#). The new list includes 250 construction federal contractors and federally assisted contractors, including subcontractors, that the agency intends to audit. Contractors on the list will not be audited until OFCCP sends the company an official Scheduling Letter, and OFCCP does not provide a timeline for sending the Scheduling Letter. However, the list provides contractors advance notice to ensure they are in compliance before their audit letter arrives.

Mega Construction Project Program

In addition to the new audit list, OFCCP will focus on certain high-dollar projects through its [Mega Construction Project Program](#) launched in March 2023. The Mega Program includes [12 federally funded projects](#) valued at \$35 million or more and lasting at least one year.

OFCCP held a public information session in April, during which the agency confirmed it intends to work closely with the direct and subcontractors awarded these jobs throughout the life of the project. OFCCP will require the employer working on the selected Mega Projects to participate in EEO Committee meetings. The meetings will include not only OFCCP and the employer, but also relevant unions, diversity recruitment organizations, and, potentially, other relevant government enforcement agencies.

Implications

Since OFCCP is auditing more construction contractors and developing new programs to ensure compliance, now is the time for contractors to review the company's compliance program and make improvements where necessary. Noncompliant contractors may face technical or discrimination violations and, in extreme circumstances, contract cancellation and debarment.

Please reach out to your Jackson Lewis attorney if you have any questions or would like assistance with your company's affirmative action compliance or an OFCCP audit.

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