

**OFCCP's New
Emerging AAP
Delivery Portal and
AAP "Verification"
Program: *Both New
Initiatives Lack
Regulatory Authority and
Both are Unenforceable***

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Candee Chambers
DirectEmployers Association
7602 Woodland Drive, Suite 200
Indianapolis, IN 46278
Phone: (317) 874-9052



John C. Fox, Esq.
Fox, Wang & Morgan P.C.
315 University Avenue
Los Gatos, CA 95030
Phone: (408) 844-2360

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I. WHAT JUST HAPPENED?

- ❑ The Office of Management and Budget (“OMB”) approved Tuesday August 31, 2021, an OFCCP “Information Collection Request”
- ❑ OMB approved two inter-related contractor compliance initiatives for 3 years. They are what we will call:
 - the “AAP Portal Filing Initiative” (think of it as an electronic “mailbox”); and
 - the “AAP Certification Initiative” (think of it as an on-line electronic “click-the-box” certification tool)
- ❑ OFCCP officially calls it the “Affirmative Action Program Verification Interface (AAP-VI)”, or informally “AAVI”
- ❑ See Fox Blog “OFCCP’s New Emerging AAP Delivery Portal and AAP Verification Program: Much Ado About Nothing” *Both Initiatives Lack Regulatory Authority and Both are Unenforceable*

I. WHAT JUST HAPPENED? (Con't)

- ❑ Significantly, OFCCP advised OMB's Office of Information and Regulatory Affairs ("OIRA") in a lengthy April 28, 2021 Supporting Statement A that it does NOT intend to seek regulatory authority for either new Initiative

NOTE: OFCCP, like all federal agencies, needs legal authority independent of OMB's approval of both Initiatives pursuant to OMB's Paperwork Reduction Act (PRA) oversight authority. OMB's role pursuant to the PRA is only to make sure that what the federal agencies are proposing is not inappropriately burdensome on the regulated community and is consistent with the work of other federal agencies and is neither duplicative of nor in conflict with them

I. WHAT JUST HAPPENED? (Con't)

❑ Helpful OFCCP Navigational Documents

❑ OFCCP Published two “Guides:”

1. OFCCP’s User Guide for the Verification Interface (AAP-VI) (26 pages) and

2. OFCCP’s Administrative Guide for the Verification Interface (AAP-VI) (22 pages)

I. WHAT JUST HAPPENED? (Con't)

A. The “Mailbox”

- ❑ OFCCP first proposes to build an electronic portal to receive, *during OFCCP audits*, the Affirmative Action Programs (“AAPs”) for (a) Minorities and Women, (b) Individuals with a Disability, and (c) Protected Veterans which OFCCP Rules require BOTH covered federal Government contractors AND *subcontractors* to develop, maintain and then annually update

I. WHAT JUST HAPPENED? (Con't)

A. The “Mailbox” (Con't)

- Acting as a portal, AAP-VI is simply a mailbox to receive, OFCCP hopes, electronic (i.e., OFCCP will receive PDF documents through the portal) and digital copies of all three types of the above-referenced federal contractor Affirmative Action Plans
 - including Functional Affirmative Action Plans (“FAAPs”) OFCCP has summoned from Supply and Service contractors, including universities and colleges
 - but not construction contractors (since they do not develop or maintain Affirmative Action Plans)

I. WHAT JUST HAPPENED? (Con't)

A. The “Mailbox” (Con't)

- ❑ Significantly, OFCCP acknowledged in Statement A to OMB that OFCCP currently lacks regulatory authority to require electronic or digital filings
- ❑ OFCCP is hoping to turn what OFCCP describes as currently a “Best Practice” into a hard and enforceable “requirement” operating on federal contractors.
- ❑ OFCCP is simply hoping that federal contractors will “play ball” with OFCCP and exercise their discretion to do something OFCCP cannot otherwise compel federal contractors to do: file electronically.

I. WHAT JUST HAPPENED? (Con't)

A. The “Mailbox” (Con't)

- ❑ Now, many Government contractors and subcontractors can relax

There is no OFCCP proposal on the table to collect all AAPs from all covered federal Government contractors / subcontractors and have them deliver those AAPs to OFCCP's glutinous AAP portal

- ❑ Some contractors are wary of OFCCP's Portal Initiative for very legitimate reasons: First, as noted above, OFCCP lacks regulatory authority to compel covered federal Government contractors to submit AAPs for audit via electronic and/or digital means. OFCCP has always acknowledged that lack of authority (while always wishing it could compel digital deliveries)
- ❑ Contractors take comfort that OFCCP cannot compel them to provide documents in digital form because data security concerns (computer system hacking and Ransomware/surveillance/public exposure of business and customer information) have mounted to become the number one long term business concern affecting businesses in the United States

I. WHAT JUST HAPPENED? (Con't)

A. The “Mailbox” (Con't)

- ❑ As a result of OFCCP’s tardy adoption of top tier security-safeguarded computer systems, many contractors prefer to deliver their Affirmative Action Plans to OFCCP and corporate and employee file documents via PDF (“Portable Document Format”). Happily, as noted above, OFCCP has at least announced to OMB its intention to allow PDF submissions to OFCCP (through its AAP-VI)
- ❑ Moreover, many federal Government contractors prefer to ALSO accomplish delivery of AAP information via overnight delivery service or via the United States Postal System AND NOT by digital delivery (despite its relative ease)
- ❑ In so adopting these two simple document security protocols, contractors hope they will deter, or even defeat, computer hackers engaged in digital data theft, or at least slow them down

I. WHAT JUST HAPPENED? (Con't)

A. The “Mailbox” (Con't)

- ❑ **Punchline:** Absent OFCCP’s issuance of a regulation requiring digital document filings, no covered federal Government contractor currently has a regulatory duty to supply digitally readable copies of their AAPs to OFCCP or to deliver their AAPs to OFCCP via OFCCP’s coming digital AAP filing portal
- ❑ Rather, contractors may continue to mail their AAPs into OFCCP in paper form as contractors have done in a long-lasting tradition for coming up on 50 years now (since 1972 when the Nixon Administration first created AAPs for Minorities and Women)

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative

1. Background

- The second new “certification” OFCCP is seeking to unveil consists of two parts:

Click #1: a representation (not a “certification”) as to the status of the company’s AAPs which seeks to force an answer to one of three prompted answers, and

Click #2: a “Declaration” causing you to “affirm” (or certify) two things:

(1) that the information in your AAPs “is true and correct to the best of my knowledge,” and

(2) that you will not change your AAP after you affirm your declaration

NOTE: Mechanically, you can also accomplish the “certification” (i.e., “affirmation”) *en masse*: see page 26 of these Power points

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative

1. Background (Con't)

- ❑ OFCCP intends to have contractors and subcontractors register into the AAP-VI platform, create an account for the company and then create a separate page for **each** AAP establishment within the contractor's company (or companies) which is a covered federal Government contractor or subcontractor
- ❑ Example: If a company/institution has 100 AAP establishments, OFCCP will thus want the company/institution to:
 - ❑ create 100 AAP establishment profiles (one-time set-up), one for each establishment, and then, thereafter: see page 28 of these Power points
 - ❑ annually obtain 100 "representations" and 100 "Declarations" (one for each establishment)

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

1. Background (Con't)

- ❑ OFCCP envisions an annual certification on a date certain OFCCP will specify for all of a contractor's AAPs. OFCCP has not yet specified that date, and of course, must do so, at any rate as it has done for the EEO-1 filing and for AAP submissions to the agency, via Rulemaking to make its "certification requirement" legally enforceable
- ❑ OFCCP's Supplemental Statement A is the document where OFCCP discusses its thinking favoring an annual simultaneous filing date for all AAP establishments certifications (but does not elaborate)

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

- ❑ The portal's AAP-VI name is unfortunate in that it does not track the language OFCCP uses on the AAP "certification" forms it has created within the AAP-Verification Initiative or the "certification" language the U.S. Government Services Administration ("GSA") has used for many years in its SAM (System for Award Management) (federal contract (not including subcontracts) and federal grant bid and award software)
- ❑ Here are the three different covered federal Government contractor "certifications" OFCCP wants contractors to accomplish via two click-boxes

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

- ❑ Click #1: OFCCP first asks contractors/subcontractors to now certify to OFCCP answers to the same questions SAM asks, when a company is bidding on a federal contract. OFCCP claims it will require a covered federal Government contractor/subcontractor to pick (via a click box) one of the **following** 3 statements OFCCP will present in its AAP-VI software portal. Click #1 will select one of three “representations” (aka certifications in OFCCP’s mind) to report EACH YEAR the status of your AAPs at each establishment:
 1. “It has developed and maintained affirmative action programs at each establishment, as applicable, and/or for each functional or business unit. See 41 CFR Chapter 60.” *[This is a good answer from OFCCP’s perspective.]*

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

2. “It has been party to a qualifying federal contract or subcontract for 120 days or more and has not developed and maintained affirmative action programs at each establishment, as applicable. See 41 CFR Chapter 60.” *[This is a bad answer from OFCCP’s perspective.]*
3. “It became a covered federal contractor or subcontractor within the past 120 days and therefore has not yet developed applicable affirmative action programs. See 41 CFR Chapter 60.” *[This is a good answer from OFCCP’s perspective, for the moment...until AAPs are due to be developed and maintained at and after the 120-day mark after one’s covered federal Government contract/subcontract becomes legally effective]*

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

- ❑ Note the verbs of the representation OFCCP asks covered federal Government contractors to make: “developed and maintained.” By the way, that is language right out of 41 CFR Section 60-2.1 “Who must develop affirmative action programs” and 41 CFR Section 60-1.12 (b)
- ❑ While these words are undefined in OFCCP’s submission to OMB, let alone the OFCCP Rule it never proposed and never published - but should have proposed - presumably OFCCP will argue that “developed” means pursuant to OFCCP’s Rules given the reference to 41 CFR Section 60. Similarly, OFCCP will likely argue that the word “maintained” means that the covered entity must keep its AAPs in its possession for the regulatorily required length of time per 41 CFR Section 60-1.12 (OFCCP’s Recordkeeping Rules)

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

- ❑ Click #2: The second link will then call for you to affirm, among other things, that:
 - “I certify that the information that has been provided as part of our Affirmative Action Plan (AAP) certification is true and correct to the best of my knowledge. I also understand that any attempt to refuse to submit an AAP certification, alteration or falsification of required records or information and any substantial or material violation may result in the institution of administrative or judicial enforcement proceedings....”
- ❑ See screenshot at p. 26 of these PPTs taken from OFCCP’s fuzzy image in its User’s Guide (which we have sharpened to make legible) depicting the coming certification process it hopes will unfold within its coming AAP-VI portal

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

- ❑ **SURPRISE! OFCCP has included a third certification**, to be mechanically accomplished via the second (“affirmation”) click, obtaining the filing entity’s “affirmation” that it understands that it may NOT alter or update any active AAP *FOLLOWING* that contractor’s affirmation that it has developed its AAP in conformity with OFCCP’s Rules of AAP construction and has maintained all of its active AAPs. See screenshot at p. 26 of these Power points

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

- ❑ Here is the specific Declaration language to be made in AAP-VI:
 - **“I also understand that I will not be able to edit my Affirmative Action Plan after I click the submit button.”** *(emphasis added)*
- ❑ This attempt to “tie-the-contractor’s hands” from freely and unilaterally altering and/or correcting its AAPs when it chooses to do so, just like any other corporate document, throws a jab at those unknown and unnamed AAP vendors rumored to prepare only, what are oftentimes called, “skinny AAPs” or “boilerplate AAPs”

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

- ❑ “Skinny AAPs”/” boilerplate AAPs are those not sufficiently fully baked to count as a “reasonable AAP submission” as OFCCP defines that concept in its Federal Contract Compliance Manual. Perhaps the AAP is “skinny” because it is missing major component parts. However, it is more likely that it is “skinny” or “boilerplate” because it is not customized to the AAP establishment in question, but rather contains only rote language and analyses created for one lead AAP and then duplicated uncritically and tattooed into all of a contractor’s AAPs across the country regardless of geographic location or the work of the contractor’s various offices and plants

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

- ❑ It is rumored that some AAP vendors develop these skinny/boilerplate AAPs and then trade them out for an upgraded version once the contractor/subcontractor receives notice of a coming audit by way of OFCCP's periodic CSAL notices
- ❑ OFCCP has complained for years that it receives AAPs which it believes were altered, often in significant ways, in the days immediately before the contractor or subcontractor placed its AAPs on file with OFCCP for use in an announced OFCCP audit
- ❑ OFCCP's concern about this practice has been that it wants to create a "level playing field" among government contractors

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

5 CERTIFY AAP

The **Submit AAP Certification** page is where you will begin the certification process for your AAP. The page will display after logging in with your contractor Login.gov account.

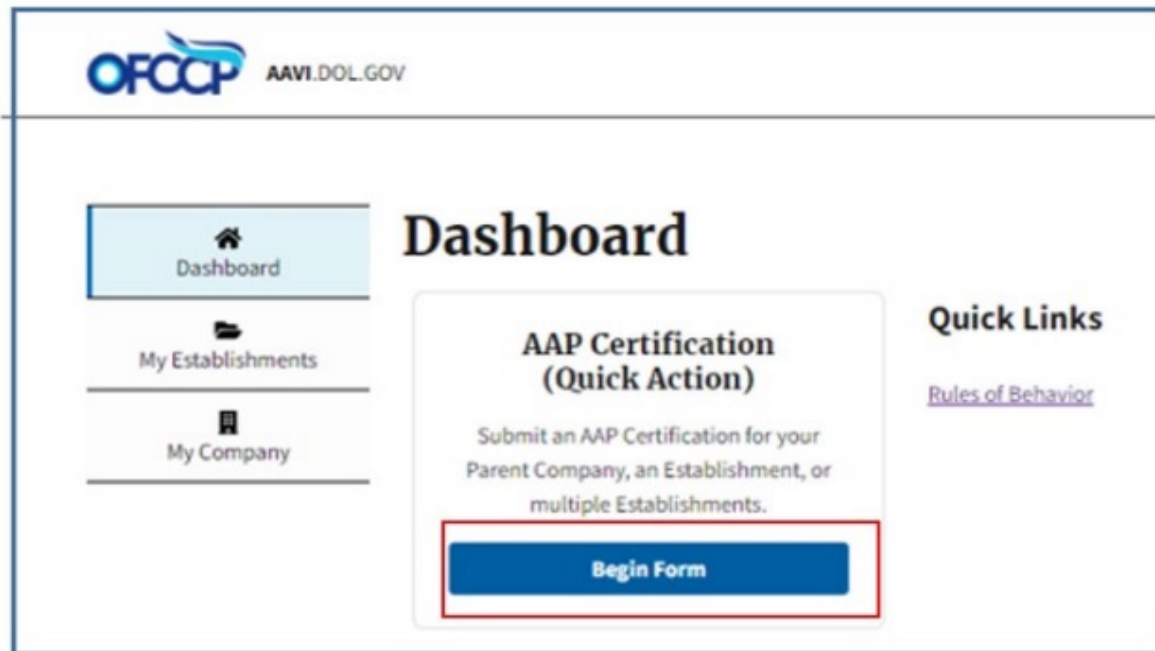


Figure 21: Sample of Submit an AAP Certification Page

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

5.1 AAP: SAM QUESTIONS & DECLARATION PAGE

The System for Award Management (SAM) is used by federal contractors interested in doing business with the Federal Government.

1. **Navigate to the SAM Question tab.**
2. **Select the checkbox pertaining to the correct SAM statement that best describes your AAP requirements.**
 - **It has developed and maintained affirmative action programs at each establishment, as applicable. See 41 CFR Chapter 60.**
 - **It has been party to a qualifying federal contract or subcontract for 120 days or more and has not developed and maintained applicable affirmative action programs at each establishment, as applicable. See 41 CFR Chapter 60.**
 - **It became a covered federal contractor or subcontractor within the past 120 days and therefore has not yet developed applicable affirmative action programs. See 41 CFR Chapter 60.**
3. **Affirm that the information you are submitting is true and accurate by selecting the checkbox for the Declaration Statement.**
4. **Once you have completed this component, select the Continue button to go to Step 2.**

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

Step 1 of 2: SAM Questions and Declaration Statement

SAM Questions

The offeror represents that:

- It has developed and maintained affirmative action programs at each establishment, as applicable, or for each functional or business unit. See 41 CFR Chapter 60.
- It has been party to a qualifying federal contract or subcontract for 120 days or more and has not developed and maintained applicable affirmative action programs at each establishment, as applicable. See 41 CFR Chapter 60.
- It became a covered federal contractor or subcontractor within the past 120 days and therefore has not yet developed applicable affirmative action programs. See 41 CFR Chapter 60.

Declaration Statement

The offeror represents that:

I certify that the information that has been provided as part of our Affirmative Action Plan (AAP) certification is true and correct to the best of my knowledge. I also understand that any attempt to refuse to submit an AAP certification, alteration or falsification of required records or information and any substantial or material violation may result in the institution of administrative or judicial enforcement proceedings [CFR 60-1.26, CFR 60-300.65, CFR 60-741.65]

I also understand that I will not be able to edit my Affirmative Action Plan(s), after I click the submit button.

I affirm this declaration



Figure 22: Sample of the SAM Question and Declaration page

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

5.2 ESTABLISHMENTS SELECTION

The next step will be to select your existing establishment. A list of establishments pending certification will be displayed.

- 1. Check the box of the establishment requiring certification on the left side of the table.**
- 2. Check the box next to Establishment Name to select all establishments listed if needed.**
- 3. Once the establishment(s) requiring certification are selected, click the Submit Certification button.**

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

Step 2 of 2: Establishments

[← Previous Step](#)



Have you updated your Establishment records?

Before submitting your AAP Certification, navigate to your [Dashboard](#) to update Establishment details or create new Establishment records

The following are establishment record(s) linked to your profile which have not yet been certified. Please select the Establishment(s) you would like to certify based on the responses from the prior screen.

<input type="checkbox"/>	Establishment Name	Unit Number	Physical Address
<input type="checkbox"/>	Test Company Inc	4740W0LO	300 Constitution Ave N.W. Washington, DC, DC 20003 United States

Figure 23: Sample of the Establishments page

Submit Certification

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

5.3 SUBMIT CERTIFICATION

The next page will ask confirmation of certification and list the selected establishments. Click **Execute Action** to certify or **Cancel** to be redirected to a link that will take you back to the Dashboard.

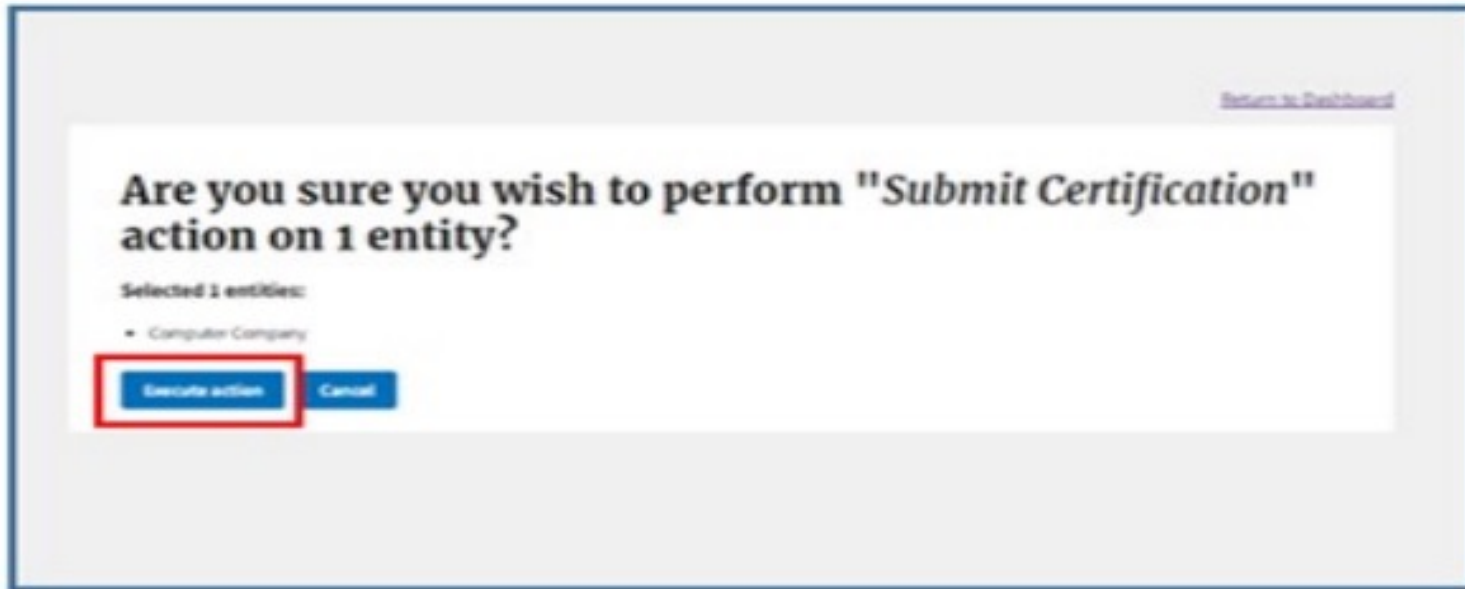


Figure 24: Sample of Submit Certification page

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

- By the way, if the AAP "Certification Initiative" indeed comes to fruition, the inclusion of covered federal Government subcontractors in the certification "requirement" will create the first-ever database of subcontractors AND will be the first-ever AAP completion certifications the federal government has asked covered federal Government subcontractors to make (since subcontractors operate outside the GSA SAM federal contract and grant bid system)

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

- ❑ Currently and historically, the federal government and OFCCP have NOT had a comprehensive or reliable database of covered federal Government “subcontractors” subject to OFCCP’s Rules
- ❑ If subcontractors choose to comply with OFCCP’s AAP Certification Initiative, they will build that first-ever such database, certification-by-certification...a process which will also reveal, for the first-time in history, which companies are “covered federal Government subcontractors”

I. WHAT JUST HAPPENED? (Con't)

B. The AAP Certification Initiative (Con't)

- ❑ **WARNING:** Companies and institutions need to be very careful, however, before creating admissions against interest that they are federal “subcontractors.” This is a highly litigated definition with no fewer than seven major case law decisions which define it and have dramatically limited it in the last three decades
- ❑ Unlike OFCCP’s often overly-expansive explanations of what a “subcontractor” is in its view, federal court decisions and USDOL’s Office of the Solicitor agree that **only** those subcontracts for goods or services which are **“legally” necessary** (repeat: legally necessary) to a prime contract or some other covered federal Government subcontract are federal “Government” “subcontracts” subjecting those contracts to OFCCP’s jurisdiction

II. TIMING

- ❑ OFCCP has not yet created or opened its portal
- ❑ Timing is uncertain: could be up to six months from now, or longer
- ❑ **First**, OFCCP will not launch either initiative until 90 days after OFCCP launches its portal
- ❑ **Second**, before OFCCP may open its portal to federal contractors/subcontractors subject to audit to deliver their AAPs through OFCCP's portal (if they choose to do so) OFCCP needs to double back to OMB to request a change to all of OFCCP's audit Scheduling Letters to cause them to direct the submission of AAPs to OFCCP's coming portal

II. TIMING (Con't)

- ❑ NOTE: ***if*** OFCCP now realizes that it needs to issue a Notice of Proposed Rulemaking to enforce either of these initiatives, read the responsive public comments and then publish a Final Rule, then you will need to add another year to your calculated timeline
- ❑ So, this is going to be a while
- ❑ “Not this calendar year” is a very safe bet (only 85 calendar days left, including many holidays and a possible government shutdown December 3rd)
- ❑ Spring 2022?
- ❑ Spring 2023, if Rulemaking?

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE

- ❑ **OFCCP cannot compel covered federal contractors to verify that they have created AAPs and that they comply with OFCCP's Rules of AAP construction**
- ❑ Well, surprise, OFCCP does not have that regulatory authority now (or historically)
- ❑ We will get to that, but contractors must remember that GSA and SAM DO HAVE THE LEGAL AUTHORITY TO REQUIRE A CONTRACT BIDDER TO "CERTIFY" AAP COMPLIANCE AT THE TIME OF THEIR BID
- ❑ And, that has been true for many, many years

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE (Con't)

- ❑ **First: OFCCP'S Claimed Regulatory Authority to Compel VEVRAA AAP Verifications Does Not Exist**
- ❑ Let's review what OFCCP told the Office of Management and Budget ("OMB") its (OFCCP's) regulatory authority was to compel "verifications" of AAPs for Protected Veterans pursuant to VEVRAA (38 USC Section 4212) and its OFCCP implementing Rules at 41 CFR Section 60-300 and following

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE (Con't)

- ❑ OK, here it is:

“CFR Citation: ***41 CFR 60-300.40(c)***”

- ❑ However, what **41 CFR Section 60-300.40(c)** says in fact is:

“§ 60-300.40 Applicability of the affirmative action program requirement.

(c) The affirmative action program shall be reviewed and updated annually by the official designated by the contractor pursuant to § 60-300.44(i).”

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE (Con't)

- ❑ So, unfortunately for OFCCP, this regulatory citation gets nowhere close to infusing OFCCP with authority to cause covered federal Government contractors to “verify” the existence of compliant VEVRAA AAPs by way of a simple check-the-box form
- ❑ In fact, this regulatory citation misses the mark by so far, it reveals the desperation the Solicitor’s Office faced in trying to support then OFCCP Director Craig Leen’s hope of compelling these contractor verifications in some fashion
- ❑ So, OFCCP has no regulatory authority to compel contractors to accomplish a check-the-box requirement of the contractor’s AAP for Protected veterans

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE (Con't)

- ❑ **Second: OFCCP'S Claimed Regulatory Authority to Compel Section 503 AAP Verifications Does Not Exist**
- ❑ So, what did OFCCP tell OMB on OFCCP's Information Collection Request its (OFCCP's) regulatory authority was pursuant to its Section 503 Rules to cause contractors to “verify” their AAPs for Individuals with Disabilities?

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE (Con't)

- ❑ OK, here it is:

“CFR Citation: ***41 CFR 60-741.40(b)(3)***.”

- ❑ However what **41 CFR Section 60-741.40(b)(3)** says in fact is:

“41 CFR § 60-741.40 General purpose and applicability of the affirmative action program requirement.

(b) Applicability of the affirmative action program.

(3) The affirmative action program shall be reviewed and updated annually by the official designated by the contractor pursuant to § 60-741.44(i).”

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE (Con't)

- ❑ So, unfortunately for OFCCP, like the parallel VEVRAA Rule citation, this Section 503 Rule regulatory citation gets nowhere close to infusing OFCCP with authority to require covered federal Government contractors to “verify” the existence of compliant Section 503 AAPs by way of even a simple check-the-box form
- ❑ So again, without further regulatory change, OFCCP is unable to compel covered federal Government contractors to verify to OFCCP that they have properly developed and maintained their Section 503 AAPs

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE (Con't)

- ❑ **Third: OFCCP'S Claimed Regulatory Authority to Compel Executive Order 11246 AAP Verifications Does Not Exist**
- ❑ So, what did OFCCP tell OMB on OFCCP's Information Collection Request its (OFCCP's) regulatory authority was pursuant to its Executive Order 11246 Rules to cause contractors to verify their AAPs for Minorities and Women?
- ❑ So, this suddenly gets much more interesting as OFCCP put forward to OMB no fewer than three different regulatory citations it claims all independently authorize OFCCP to compel 11246 AAP verifications (which is suspicious in and-of-itself given the number of proffered justifications: unconfidently throwing everything up on the wall to see if anything will stick)

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE (Con't)

- ❑ **OK, here is the first of three citations OFCCP has put forward to justify verification of contractor AAPs for Minorities and Women:**

“CFR Citation: *****41 CFR 60-2.31***.**”

- ❑ However, what **41 CFR Section 60-2.31** says in fact is:

“**41 § 60-2.31 Program summary.**”

The affirmative action program must be summarized and updated annually. The program summary must be prepared in a format which will be prescribed by the Director and published in the Federal Register as a notice before becoming effective. Contractors and subcontractors must submit the program summary to OFCCP each year on the anniversary date of the affirmative action program.”

- ❑ **[65 FR 68042]**, Nov. 13, 2000, as amended at **85 FR 71572**, Nov. 10, 2020]

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE (Con't)

- ❑ This OFCCP Rule has been around since the Carter Administration but neither OFCCP nor OMB has ever sought to breathe life into it. It has been dormant for over 40 years
- ❑ So, relax. **You do NOT have to provide a Summary of your AAP to OFCCP**
- ❑ A “certification” is not a “summary” of the AAP in any Websters’ dictionary Also, 41 CFR Section 60-2.31 states that any AAP “Summary” is to be filed on the “anniversary date” of the AAP (not on the single date of the year for all AAP verifications of all contractors as OFCCP hopes for)

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE (Con't)

- ❑ So, this is clearly another OFCCP stretch position trying to force a suggestion that this language at 60-2.31 somehow now creates a duty on a contractor to “check a box” verifying that the contractor really does have compliant AAPs for Minorities and Women stacked up in files awaiting OFCCP’s audit Scheduling Letter
- ❑ A check-the-box certification of compliance is simply not the filing of a “Summary of the AAP” for Minorities and Women

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE (Con't)

- ❑ Here is the second of three citations OFCCP has put forward to justify verification of contractor AAPs for Minorities and Women:

“CFR Citation: ***41 CFR 60-2.32***.”

- ❑ However, what 41 CFR Section 60-2.32 says in fact is:

“41 CFR § 60-2.32 Affirmative action records.

The contractor must make available to the Office of Federal Contract Compliance Programs, upon request, records maintained pursuant to § 60-1.12 of this chapter and written or otherwise documented portions of AAPs maintained pursuant to § 60-2.10 for such purposes as may be appropriate to the fulfillment of the agency’s responsibilities under Executive Order 11246.”

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE (Con't)

- ❑ Unfortunately for OFCCP, this language, too, is twice insufficient to authorize OFCCP to compel AAP certifications
 - 1) a duty to “make available” both existing “records” and “documented portions of AAPs” are not check-box certifications;
 - 2) check-boxes are not “maintained pursuant to § 60-2.10”; and
 - 3) reliance on this particular Rule, and it is true of the other four Rules OFCCP identified as the source of OFCCP’s authority to compel check-box certifications as to all three of OFCCP’s enforcement programs, fails utterly under scrutiny pursuant to the strictures of the Administrative Procedure Act (APA)

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE (Con't)

- ❑ This is because each of the cited OFCCP Rules lacks sufficient detail to make clear a contractor's obligation to supply the various certifications, and when, and how, and what?
- ❑ The existing Rules OFCCP identifies make no reference to what a contractor is to certify, makes no statement of the timing of any such verification and does not specify a check-box
 - ❑ Upon contract bid? Monthly? Annually? Every five years?
 - ❑ Also, what is the form of the verification? AAP submissions? Check-the-box? Check one of three "status of AAPs" questions? Check one of four? One of five?
 - ❑ Finally, what is/are the certification question(s)?

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE (Con't)

- ❑ Under the APA (which John Fox calls “the you gotta write it down” law), federal agencies like OFCCP have to be clear and detailed in their requirements before they can hold a member of the regulated community to be in violation of unclear Rules. See Firestone Tire & Rubber Company v. OFCCP
- ❑ So, this cited OFCCP Rule at 41 CFR 60-2.32 is yet another “Hail Mary pass” hoping for gullible contractors to bite and, if not, for malleable Administrative Law Judges to agree

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE (Con't)

- ❑ **Here is the third of the three citations OFCCP has put forward** to justify verification of contractor AAPs for Minorities and Women:

“CFR Citation: *****41 CFR 60-2.10(c)***.**”

- ❑ However, what 41 CFR Section 60-2.10(c) says in fact is:

“41 CFR Section § 60-2.10 General purpose and contents of affirmative action programs.

(c) *Documentation.* Contractors must maintain and make available to OFCCP documentation of their compliance with §§ 60-2.11 through 60-2.17.”

III. THE AAP CERTIFICATION INITIATIVE IS UNENFORCEABLE (Con't)

A regulatory duty to make documentation available of compliance with each of the sections of OFCCP's Rule providing the recipe for the six major component parts of AAPs for Minorities and Women is not a command to a contractor to supply a check-the-box certification.

Shirley Wilcher made this Rule operational in 2000 as the Clinton Administration was leaving office. Rather, the intent and application of Shirley's Rule was and is to require contractors to provide OFCCP, **during a Compliance Evaluation** of AAPs for Minorities and Women, the underlying records supporting a contractor's calculations and the records supporting each of the major component analyses of an AAP for Minorities and Women. This Rule was necessary, for example, when OFCCP questioned in an audit, whether the contractor properly listed employees in its Workforce Analysis, or whether the contractor had formed its Job Groups properly, or had calculated Availability properly or had undertaken proper statistical Disparity Analyses, etc.

IV. WHAT HAPPENS IF A CONTRACTOR FAILS OR REFUSES TO COMPLY WITH EITHER OR BOTH OF OFCCP'S "VERIFICATION" INITIATIVES?

- ❑ **Finally, what happens “bad” to a Covered federal Government contractor or Subcontractor which decides to stand on its legal rights, refuses to comply with either or both of OFCCP’s electronic filing and AAP certification initiatives, for whatever good, bad or indifferent reason, and tells OFCCP to just “pound sand”?**
- ❑ **OFCCP has threatened two kinds of enforcement actions in its various writings to OMB**

IV. WHAT HAPPENS IF A CONTRACTOR FAILS OR REFUSES TO COMPLY WITH EITHER OR BOTH OF OFCCP'S "VERIFICATION" INITIATIVES?(Con't)

- ❑ **First**, OFCCP has threatened that "...contractors who (sic) fail to self-certify or who (sic) state that they have not developed an AAP as required by law would be more likely to be on the [audit selection] scheduling list than contractors that have self-certified"
- ❑ However, the contractor would then obtain a viable defense to not engage the retaliatory OFCCP audit violative of the Fourth Amendment to the U.S. Constitution (guarding against unreasonable government searches and seizures) because OFCCP will be shown to have not selected the contractor for audit pursuant to a "neutral" administrative plan
- ❑ Moreover the contractor would be able to show that OFCCP also lacked "probable cause" to believe a violation of OFCCP's Rules had occurred sufficient to comply with the Fourth Amendment since the contractor can show OFCCP had proceeded without authority under law (i.e. the needed OFCCP Rulemaking is missing). Thus OFCCP could not require contractor certifications

IV. WHAT HAPPENS IF A CONTRACTOR FAILS OR REFUSES TO COMPLY WITH EITHER OR BOTH OF OFCCP'S "VERIFICATION" INITIATIVES?(Con't)

- ❑ **Second**, OFCCP has stated to OMB (in Statement A) that OFCCP would file an enforcement action seeking debarment against a contractor refusing to comply with either or both of OFCCP's electronic filing and/or AAP certification initiatives
- ❑ However, OFCCP lacks the ability to debar a federal contractor, as do the courts. Rather, only the federal contractor can debar itself for failing to comply with a FINAL order of the courts. Debarment under OFCCP's Rules is different from every other kind of debarment in the federal contracting system in that it is NOT punitive...that is, it is not a punishment for a past bad deed

IV. WHAT HAPPENS IF A CONTRACTOR FAILS OR REFUSES TO COMPLY WITH EITHER OR BOTH OF OFCCP'S "VERIFICATION" INITIATIVES?(Con't)

- ❑ Debarment is an “incentive” to future compliance. This is because the debarment is “purged” in the language of the law, or lifted in lay parlance, immediately upon the contractor’s agreement to comply with OFCCP’s valid compliance demand
- ❑ Also, there are no financial fines or penalties (OFCCP lacks any such legal authority)
- ❑ For the lawyers reading this, OFCCP debarment is the administrative equivalent of judicial “civil contempt”: the offender has the “keys to the courthouse door” to allow it to escape punishment the moment the offender (even belatedly...after decades of litigation) agrees to comply
- ❑ OFCCP debarment, by contrast, is not “criminal contempt,” in which the offender is punished or financially sanctioned for his/her violation

V. FINALE: THE CONTRACTOR'S TWO CHOICES

- ❑ **The Contractor's choice is binary: Comply or Disobey**
- ❑ While OFCCP's two new electronic filing and AAP certification initiatives are likely still probably another 6 months away from becoming operational (18 months if OFCCP, upon reflection, goes to Rulemaking), OFCCP will eventually make it to the start line and start suggesting to/demanding of contractors that they comply with both initiatives
- ❑ Contractors will have to decide whether they want to indulge OFCCP and comply even though OFCCP, as it dishearteningly has done so often in the past, is proceeding in the absence of legal authority

V. FINALE: THE CONTRACTOR'S TWO CHOICES (Con't)

- ❑ Some contractors will say “yes” and some will say “no” to OFCCP’s initiatives
- ❑ No contractor decision will be wrong
 - Some contractors will fear delivering its AAPs via the OFCCP portal as data security fears heighten and are now nearing fever pitch in the private sector as one after another CEO and Data Security Officer are fired after data breaches and hacks occur
 - Other contractors will be repulsed at allocating OFCCP any more corporate resources or mindshare in a cost-competitive world driving attention and focus on competing vigorously and fairly in the marketplace against other well-run and efficient companies

V. FINALE: THE CONTRACTOR'S TWO CHOICES (Con't)

- ❑ Other contractors may fear that their odds of being audited will go up if they comply and put certifications on file while their odds of being audited stay the same if they do not participate in OFCCP's unauthorized certification exercise
 - For example, subcontractors which OFCCP has never heard about may not wish to come out of the darkness and into the limelight and become visible for the first time to OFCCP
 - Similarly, federal Government contractors lacking AAPs may not wish to confess that status knowing that such a report would undoubtedly trigger an avalanche of OFCCP audits which otherwise may not come

V. FINALE: THE CONTRACTOR'S TWO CHOICES (Con't)

- ❑ And, if OFCCP does not get a large budget increase to enable it to hire more staff to beef up its now all-time low staffing (now hovering just below 400 employees nationwide), none of these initiatives much matter since OFCCP will, in that circumstance, lack staff sufficient either to determine which companies did not certify and to staff a meaningful number of audits
- ❑ Some contractors will give thought, I am sorry to predict, to just misrepresenting the status of their AAPs when choosing to voluntarily certify their AAPs

V. FINALE: THE CONTRACTOR'S TWO CHOICES (Con't)

- ❑ This would be far worse than just not filing any certifications since it is a criminal and civil offense to make false or knowingly misleading statements to a federal officer, including even OFCCP's most junior Compliance Officer or when responding to an OFCCP question presented via software like AAP-VI. See 5 USC 1001. I have just never thought federal contractors looked particularly fashionable in black and white striped tops and bottoms. Not a good look
- ❑ And, OFCCP will be haunted by the thought that it should not waste its prosecutorial resources on mere paperwork violations, and should rather focus on its five most common discrimination law violations (i.e., (1) failure to hire; (2) failure to hire; (3) failure to hire; (4) failure to hire; and (5) compensation) where OFCCP has in the past made a difference in society...and can do it again...a positive difference

V. FINALE: THE CONTRACTOR'S TWO CHOICES (Con't)

“WATCHA GONNA DO?”

“WATCHA GONNA DO?”

“WATCHA GONNA DO?”

THANK YOU

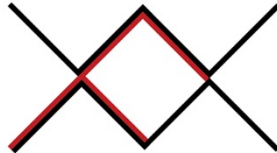
QUESTIONS?



DirectEmployers
Association

Candee Chambers

DirectEmployers Association
7602 Woodland Drive, Suite 200
Indianapolis, IN 46278
Phone: (317) 874-9052



FOX, WANG & MORGAN P.C.

John C. Fox, Esq.

Fox, Wang & Morgan P.C.
315 University Avenue
Los Gatos, CA 95030
Phone: (408) 844-2360