

# DE Reveals the OFCCP's Enforcement and Compliance Strategies for the Just Completed FY2021 and OFCCP's FY2022 Enforcement "Blueprint"

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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

# AGENDA

## I. What Was OFCCP Busting in Just-Concluded FY2021?

NOTE: A few of the many numbers we present in this first section do not match OFCCP's numbers precisely because some of OFCCP's conciliation numbers do not match OFCCP's database and because OFCCP's financial numbers apparently also include USDOL Solicitor's Office Consent Decree recoveries. Moreover, OFCCP continually (silently) corrects and updates its enforcement data.

## II. Where to OFCCP for the Remainder of FY2022?

## III. The AAP Verification Initiative (a few high-points)

# I. What Was OFCCP Busting in Just-Concluded FY2021?

## Total Number of Audits

### A. Benchmark: Audit Volume

	FY2021	FY2020	FY2019
<b>Supply &amp; Service:</b>	<b>1,125</b> (down 15%)	<b>1,318</b> (down 1%)	<b>1,331</b>
<b>Construction</b>	<u><b>111</b></u> (data unstable)	<u><b>2</b></u>	<u><b>12</b></u>
<b>S&amp;S + Construction</b>	<b>1,236</b>	<b>1,320</b>	<b>1,343</b>

# I. What Was OFCCP Busting in FY2021? (con't)

## B. Violations: Number and Type

### Total Number of Alleged Violations\*

	FY2021	FY2020	FY2019
<b>Supply &amp; Service:</b>	<b>124 CAs</b> <b>11 CDs</b> <b>135</b> (down 28%)	<b>187</b>	<b>173</b>
<b>Construction:</b>	<b>0</b> (data unstable)	<b>2</b>	<b>6</b>
<b>Failure to Hire:</b>	<b>19</b> (down 72%) <b>\$5,804,253.31</b>	<b>66</b> <b>\$22,722,007.93</b>	<b>58</b> <b>\$11,702,258.61</b>
<b>Compensation:</b>	<b>18</b> (down 28%) <b>\$6,540,199.75</b> (down 10%)	<b>25</b> <b>\$7,238,325.41</b>	<b>33</b> <b>\$22,059,662.06</b>
<b>Affirmative Action:</b>	<b>111</b> (90% of CAs)	<b>124</b> (66% of CAs)	<b>121</b> (70% of CAs)

# I. What Was OFCCP Busting in FY2021? (con't)

- OFCCP's 124 FY2021 Conciliated Settlements Were Fairly Evenly distributed across all 12 months of the Year
- With a B-I-G push in September (19% of all OFCCP CAs) (the last month of the federal Fiscal Year), as usual

Oct. 2020	9 (~7%)
Nov. 2020	8 (~6%)
Dec. 2020	14 (~11%)
Jan. 2021	6 (~5%)
Feb. 2021	6 (~5%)
Mar. 2021	9 (~7%)
Apr. 2021	9 (~7%)
May 2021	9 (~7%)
Jun. 2021	14 (~14%)
Jul. 2021	10 (~12%)
Aug. 2021	7 (~6%)
Sep. 2021	23 (~19%)

# I. What Was OFCCP Busting in FY2021? (con't)

## A whopping 30 AAP VIOLATION TYPES

	<b>Violation Description:</b>	<b>Regulatory Citation:</b>	<b>Total:</b>
1.	Required contents of AAP	[41 C.F.R. 60-741.44]	41
2.	Required contents of AAP	[41 C.F.R. 60-300.44]	36
3.	Recordkeeping	[41 C.F.R. 60-1.12]	34
4.	Mandatory Job Listing	[41 C.F.R. 60-300.5(a)2-6]	25
5.	Invitation to self-identify	[41 C.F.R. 60-741.42]	22
6.	Identification of Problem Areas	[41 C.F.R. 60-2.17(b)]	21
7.	Information on impact	[41 C.F.R. 60-3.4]	19
8.	Audit-System	[41 C.F.R. 60-2.17(d)]	18
9.	Doc. of impact and validity evidence	[41 C.F.R. 60-3.15(a)]	18
10.	Invitation to self-identify	[41 C.F.R. 60-300.42]	16
11.	Recordkeeping	[41 C.F.R. 60-741.80]	14
12.	Applicability of the AAP requirement	[41 C.F.R. 60-300-40]	11
13.	Utilization goals	[41 C.F.R. 60-741.45]	10
14.	Good Faith Efforts	[41 C.F.R. 60-2.17cc]	9
15.	Gen purpose & app. of the AAP Req.	[41 C.F.R. 60-741.40]	9
16.	Recordkeeping	[41 C.F.R. 60-300.80]	9
17.	Availability of AAP	[41 C.F.R. 60-741.41]	7
18.	Scope and application	[41 C.F.R. 60-2.1]	6
19.	Job group analysis	[41 C.F.R. 60-2.12]	6
20.	Equal Opportunity Clause	[41 C.F.R. 60-741.5]	6
21.	Placement goals	[41 C.F.R. 60-2.16]	5
22.	Dissemination of non-discrimination prov.	[41 C.F.R. 60-1.35(c)]	3
23.	Placement of incumbents in job groups	[41 C.F.R. 60-2.13]	3
24.	Determine availability	[41 C.F.R. 60-2.14]	3
25.	Failure to Provide Relevant Records	[41 C.F.R. 60-1.43]	2
26.	Failure to validate tests	[41 C.F.R. 60-3.3(b)]	2
27.	Prohibitions/discrimination	[41 C.F.R. 60-741.21 (a)]	2
28.	Definition of Disability	[41 C.F.R. 60-741.2(g)]	1
29.	Medical examinations and inquiries	[41 C.F.R. 60-741.23]	1
30.	Equal Employment Policy	[41 C.F.R. 60-50.2]	1
<b>TOTAL:</b>			<b>360</b>

# I. What Was OFCCP Busting in FY2021? (con't)



## EO Order AAP Violation Types (ranked by Rule OFCCP cited)

1.	Recordkeeping	[41 C.F.R. 60-1.12]	34
2.	Dissemination of non-discrimination provision	[41 C.F.R. 60-1.35(c)]	3
3.	Failure to Provide Relevant Records	[41 C.F.R. 60-1.43]	2
4.	Scope and applicability	[41 C.F.R. 60-2.1]	6
5.	Job group analysis	[41 C.F.R. 60-2.12]	6
6.	Placement of incumbents in job groups	[41 C.F.R. 60-2.13]	3
7.	Determine availability	[41 C.F.R. 60-2.14]	3
8.	Placement goals	[41 C.F.R. 60-2.16]	5
9.	Identification of Problem Areas	[41 C.F.R. 60-2.17(b)]	21
10.	Audit-System	[41 C.F.R. 60-2.17(d)]	18
11.	Good Faith Efforts	[41 C.F.R. 60-2.17cc]	9
12.	Documentation of impact and validity evidence	[41 C.F.R. 60-3.15(a)]	18
13.	Failure to validate tests	[41 C.F.R. 60-3.3(b)]	2
14.	Information on impact	[41 C.F.R. 60-3.4]	19
15.	Equal Employment Policy	[41 C.F.R. 60-50.2]	1
<b>TOTAL:</b>			<b>150</b>

## Section 503 AAP Violation Types (ranked by Rule OFCCP cited)

1.	Required contents of AAP	[41 C.F.R. 60-741.44]	41
2.	Definition of Disability	[41 C.F.R. 60-741.2(g)]	1
3.	Prohibitions/discrimination	[41 C.F.R. 60-741.21 (a)]	2
4.	Medical exams and inquiries	[41 C.F.R. 60-741.23]	1
5.	Gen purp. & app. of the AAP Req.	[41 C.F.R. 60-741.40]	9
6.	Availability of AAP	[41 C.F.R. 60-741.41]	7
7.	Invitation to self-identify	[41 C.F.R. 60-741.42]	22
8.	Utilization goals	[41 C.F.R. 60-741.45]	10
9.	Equal Opportunity Clause	[41 C.F.R. 60-741.5]	6
10.	Recordkeeping	[41 C.F.R. 60-741.80]	14
<b>TOTAL:</b>			<b>113</b>

## VEVRAA AAP Violation Types (ranked by Rule OFCCP cited)

1.	Invitation to self-identify	[41 C.F.R. 60-300.42]	16
2.	Required contents of AAP	[41 C.F.R. 60-300.44]	36
3.	Mandatory Job Listing	[41 C.F.R. 60-300.5(a)2-6]	25
4.	Recordkeeping	[41 C.F.R. 60-300.80]	9
5.	Applicability of the AAP Requirement	[41 C.F.R. 60-300-40]	11
<b>TOTAL:</b>			<b>97</b>

# I. What Was OFCCP Busting in FY2021? (con't)

- Here are three OFCCP enforcement data CHARTS we have extracted from OFCCP's Enforcement Database for FY2021 Conciliation Agreements (CA's) and re-displayed OFCCP's data as follows:
- **CHART 1: OFCCP FY2021 CAs BY DATE SETTLED**
- **CHART 2: OFCCP FY2021 CAs BY SETTLEMENT AMOUNT** (ranked highest to lowest)
- **CHART 3: OFCCP FY2021 CAs FAILURE TO HIRE, COMP, PROTECTED ACTIVITY & DISABILITY ALLEGED DISCRIMINATION SETTLEMENTS**

## II. Where to OFCCP for the Remainder of FY2022?

- More of the same
- OFCCP is still cleaning up old audits from the Obama years, a task the Trump Administration made a priority, but could not finish
- AAP-VI will badly distract OFCCP's National Office mindshare
- OFCCP will nonetheless continue to:
  - 1) Emphasize compensation in audits, even though Failure-to-Hire audits have been OFCCP's "bread and butter" for decades and OFCCP Compensation discrimination findings are few and far between and shrinking in both number (33 to 25 to 18) at OFCCP, and the value of backpay dollars collected (~\$22M to ~\$7M to ~\$6.5M) (see PPT 4, above)

NOTE: Litigation settlements through the Solicitor's Office not included in OFCCP's Conciliation Agreement numbers

## II. Where to OFCCP for the Remainder of FY2022? (con't)

- OFCCP will continue to: (con't)
  - 2) Undertake every compensation audit incorrectly for the several reasons we have previously discussed many times in many places:
    - OFCCP looks at “current pay;” ALWAYS WRONG under Title VII & EO 11246. OFCCP **should** be looking at ONLY **pay decisions** made during the last 2 years before the OFCCP audit Scheduling Letter, such as:
      - Pay decision at initial point of hire (as to those hired within the last 2 years)
      - Increased pay upon promotion (as to those promoted in the last 2 years)
      - Any other wealth distributions (bonuses/incentives/stock/financial perks; etc.) which company decided (in the last 2 years) to distribute

All pay analyses (private or OFCCP) analyzing **current pay** are “junk” analyses as to Title VII/EO 11246 legal standards (they produce False Positives & False Negatives)

## II. Where to OFCCP for the Remainder of FY2022? (con't)

- OFCCP will continue to (con't):
  - Consolidate jobs which are NOT “similarly situated”
  - Not analyze all of the “major factors” which affect pay
    - Hard STOP: if all the “major” factors affecting pay are NOT digitized OFCCP/you cannot undertake valid regression analysis without all the data (junk-in; junk-out)
  - Analyze similarly situated employee groupings too small to make for meaningful statistical analyses
- 3) Undertake remote audits (at least through April 2022, unless moratorium on office work is revoked)

## II. Where to OFCCP for the Remainder of FY2022? (con't)

- OFCCP will continue to (con't):
  - 4) Suffer very low productivity (audit production at an all-time low; OFCCP is currently rarely heard from as to new policy initiatives. We could barely keep up with the reading in the Obama and Trump Administrations)
  - 5) Will move way from its “audit-lite” “Focused Reviews” and “Compliance Check” reviews of contractors to full fledged Compliance Reviews
    - OFCCP should asterisk its volume reports of “audit lites”
  - 6) Continue to prey upon contractors which hire entry-level production laborers in high volume (especially “Evergreen”), low paid jobs where documentation of “Disposition Codes” is always a challenge

## II. Where to OFCCP for the Remainder of FY2022? (con't)

- OFCCP will continue to (con't):
  - 7) Operate with < 451 employees until February 18, 2022, as we discussed in this [Week in Review story](#)
  - 8) Hope and dream for OFCCP's Pie-in-the-Sky ~1/3<sup>rd</sup> more FY2022 Budget Proposal (from \$106M to \$141M) to buy many things, including the hire of 188 additional employees (which is NOT going to happen).
    - Above Week in Review story explains why
  - 9) Turn its attention to regulatory reform to start changing fundamental OFCCP operating systems and locking the hands of any potentially incoming Republicans controlling OFCCP's purse strings following the mid-term elections or taking back the White House in 2024

### III. The AAP Verification Initiative (a few high-points)

We are not going to describe the AAP verification Initiative today.

DE Members: Please refer to the DE Members Webinar Candee Chambers and John Fox taught in detail on Thursday October 7, 2021

Members of the public may view John Fox's September 7, 2021 Blog [OFCCP's New Emerging AAP Delivery Portal and AAP "Verification" Program: Much Ado About Nothing](#)

THERE ARE THREE THINGS TO KNOW TODAY

### III. The AAP Verification Initiative (a few high-points)

- 1) It is unenforceable as we discussed in this DE Week in Review [Blog](#)
  - Must undergo Administrative Procedure Act Rulemaking process, including public Notice and Comment period, and has not
  - One contractor survey reveals many major companies are simply not going to participate in OFCCP's AAP certification request

What is unenforceable? The asserted “requirements” to:

- 1) “certify” you have AAPs for each AAP establishment
- 2) “certify” those AAPs meet OFCCP's standards
- 3) “affirm your understanding” that you cannot change the AAPs
- 4) file AAPs electronically for OFCCP audits

### III. The AAP Verification Initiative (a few high-points) (con't)

- 2) You do not have to have a “perfect” AAP to certify it if your company chooses to voluntarily comply
  - “Good Faith Efforts” or “trying hard in good faith” is not the legal standard describing what your certified AAP must look like
  - The “Good Faith Efforts” standard applies ONLY to EO 11246 Goals attainment (not as to what is an acceptable AAP) and does not even exist as a concept in any form as to Section 503 and VEVRAA AAPs (you will not find the words GFE in OFCCP’s 503 and VEVRAA Rules)
  - A “good old-fashioned college try” also does not cut it

### III. The AAP Verification Initiative (a few high-points) (con't)

2) You do not have to have a “perfect” AAP (con't)

Witness: OFCCP “accepted” for audit purposes in FY2021, alone, over 300 AAPs which failed to meet the standards set out in OFCCP’s AAP construction of AAP Rules.

- See page 6 of these PPTs for the list of 30 different AAP violations contractors suffered when OFCCP ordered up 360 changes to AAPs contractors thought met muster and which OFCCP accepted for audit, and then thereafter during the audit alleged violations of OFCCP’s construction of AAP Rules

### III. The AAP Verification Initiative (a few high-points) (con't)

2) You do not have to have a “perfect” AAP (con't)

Rather than guessing as to what is required, let's look at OFCCP's Rules, and if those are silent on the issue of what is an “acceptable” AAP for contractors to present to OFCCP (they are), let's then look at OFCCP's Federal Contract Compliance Manual (“FCCM”) (which reveals the answer)

- While the FCCM does not have the force and effect of law and is NOT enforceable against contractors, it is the OFCCP Director's instructions to her employees as to how THEY will and must proceed

### III. The AAP Verification Initiative (a few high-points) (con't)

2) You do not have to have a “perfect” AAP (con't)

**The answer in a nutshell:** OFCCP’s FCCM creates the concept of an “acceptable” AAP...that is, one which has all of the necessary “ingredients” in OFCCP’s Rules (i.e., regulations) required to be in an AAP (for Minorities and Women per EO 11246, Section 503 and for VEVRAA)

Remember that word “ingredients”

### III. The AAP Verification Initiative (a few high-points) (con't)



### III. The AAP Verification Initiative (a few high-points) (con't)

2) You do not have to have a “perfect” AAP (con't)

Remember, you are being asked to certify the existence of AAPs under all three of OFCCP's enforcement programs

The FCCM advises OFCCP's Compliance Officers that they may receive into OFCCP for review *an “acceptable” AAP, that is one which has ALL of the required ingredients as long as no required ingredient is missing.* The AAP need not be accurate or perfect (EEO-1 Rules are different, BTW).

Your AAPs simply have to be “complete,” even if deeply flawed or even if they contain erroneous or unrefined data

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability

- Section IE of the Federal Contract Compliance Manual (“FCCM”) - the section that addresses the Compliance Officer’s (“CO”) review of the AAP and Itemized Listing data - says the CO must first determine that the submitted AAP is current. Once the CO confirms that the AAP is current, the CO must then review the AAP and Itemized Listing data to determine whether the contractor’s submissions include 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. If so, the CO must then determine if the AAPs contain all the **“elements required by the regulations.”**
- The FCCM then cites 41 CFR 60-2.10(b) and then 41 CFR 60-741.44 for Section 503 AAPs and 60-300.44 for VEVRAA AAPs

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### a) E.O. AAP Required Components

41 CFR 60-2.10(b) states that an E.O. AAP must include the following quantitative analyses:

(i) Organizational profile - § 60-2.11;

(ii) Job group analysis - § 60-2.12;

(iii) Placement of incumbents in job groups - § 60-2.13;

(iv) Determining availability - § 60-2.14;

(v) Comparing incumbency to availability - § 60-2.15; and

(vi) Placement goals - § 60-2.16

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### a) E.O. AAP Required Components (con't)

In addition, an affirmative action program must include the following components specified in the § 60-2.17 of this part:

- (i) Designation of responsibility for implementation;
- (ii) Identification of problem areas;
- (iii) Action-oriented programs; and
- (iv) Periodic internal audits

See the below definitions of each of the required components. If any of these components are missing, “COs must automatically consider the submission **unacceptable.**” See FCCM 1EO2  
(emphasis added)

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

- ***ORGANIZATIONAL PROFILE (includes Organizational Display and Workforce Analysis and contractors must choose one or the other)***

#### ***b) Organizational display - 60-2.11(a) and (b)***

- An organizational display is a detailed graphical or tabular chart, text, spreadsheet or similar presentation of the contractor's organizational structure. The organizational display must identify each organizational unit in the establishment, and show the relationship of each organizational unit to the other organizational units in the establishment

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### ***b) Organizational display - 60-2.11(a) and (b)*** (con't)

- An organizational unit is any component that is part of the contractor's corporate structure. In a more traditional organization, an organizational unit might be a department, division, section, branch, group or similar component. In a less traditional organization, an organizational unit might be a project team, job family, or similar component. The term includes an umbrella unit (such as a department) that contains a number of subordinate units, and it separately includes each of the subordinate units (such as sections or branches)

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### ***b) Organizational display - 60-2.11(a) and (b)*** (con't)

- For each organizational unit, the organizational display must indicate the following:
  - i. the name of the unit;
  - ii. the job title, gender, race, and ethnicity of the unit supervisor (if the unit has a supervisor);
  - iii. the total number of male and female incumbents; and
  - iv. the total number of male and female incumbents in each of the following groups: Blacks, Hispanics, Asians/Pacific Islanders, and American Indians/Alaskan Natives

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### **c) *Workforce analysis* – 60-2.11(c)**

- 1) A workforce analysis is a listing of each job title as appears in applicable collective bargaining agreements or payroll records ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision
- 2) If there are separate work units or lines of progression within a department, a separate list must be provided for each such work unit, or line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### **c) *Workforce analysis* – 60-2.11(c) (con't)**

- 3) Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges
- 4) For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Hispanics, Asians/Pacific Islanders, and American Indians/Alaskan Natives. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### **c) *Workforce analysis* – 60-2.11(c) (con't)**

In addition to the regulations cited above, the FCCM 1F00 provides the following additional information regarding what constitutes an “acceptable” Workforce Analysis:

- 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

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### c) *Workforce analysis* – 60-2.11(c) (con't)

- The wage rate or salary range for each job title must be provided, although this information may be coded. Titles must be listed from the lowest-paid to highest-paid. 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

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### c) *Workforce analysis* – 60-2.11(c) (con't)

- The departments or organizational units, or both, used in the workforce analysis must be 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 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

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### ***d) Job group analysis – 60-2.12***

The job group analysis must include a list of the job titles that comprise each job group. If, pursuant to § 60-2.1(d) and (e) the job group analysis contains jobs that are located at another establishment, the job group analysis must be annotated to identify the actual location of those jobs. If the establishment at which the jobs actually are located maintains an affirmative action program, the job group analysis of that program must be annotated to identify the program in which the jobs are included

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### ***d) Job group analysis – 60-2.12 (con't)***

Except as provided in § 60-2.1(d), all jobs located at an establishment must be reported in the job group analysis of that establishment.

In addition to the information above from 60-2.12, the FCCM 1F01 provides the following additional information regarding what constitutes an “acceptable” Job Group Analysis:

- 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-1 job categories. Job titles in each job group must, as a general rule, be within the same EEO-1 job category

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### **d) *Job group analysis* – 60-2.12 (con't)**

- Use of Occupational Information Network (O\*NET). The CO may refer to the U.S. Department of Labor's Employment and 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 among 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

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### **d) *Job group analysis* – 60-2.12 (con't)**

- **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 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

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### **d) *Job group analysis* – 60-2.12 (con't)**

- **Jobs in Lines of Progression.** Contractors should separate jobs that are in lines of progression from those that are not. When transferring or hiring into jobs above entry level is rare, COs must analyze each line of progression separately. When there are lines of progression governed by strict seniority, the contractor should consider the job titles in the progression as a single job group
- **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

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### **d) Job group analysis – 60-2.12 (con't)**

- **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 the 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 (fewer than 150 employees) may use the EEO-1 job categories as their job groups

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### ***d) Job group analysis – 60-2.12 (con't)***

- Relationship Between Job Groups and Availability. The organization of jobs into groups should allow contractors to tie specific jobs to availability statistics to assess the degree to which their workforce representation approximates availability.

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### ***e) Placement of incumbents in job groups – 60-2.13***

- The contractor must separately state the percentage of minorities and the percentage of women it employs in each job group established pursuant to § 60-2.12.

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### ***f) Determining availability – 60-2.14***

The contractor must separately determine the availability of minorities and women for each job group

In determining availability, the contractor must consider at least the following factors:

- 1) The percentage of minorities or women with requisite skills in the reasonable recruitment area. The reasonable recruitment area is defined as the geographical area from which the contractor usually seeks or reasonably could seek workers to fill the positions in question
- 2) The percentage of minorities or women among those promotable, transferable, and trainable within the contractor's organization. Trainable refers to those employees within the contractor's organization who could, with appropriate training which the contractor is reasonably able to provide, become promotable or transferable during the AAP year

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### *f) Determining availability – 60-2.14 (con't)*

- The contractor must use the most current and discrete statistical information available to derive availability figures. Examples of such information include census data, data from local job service offices, and data from colleges or other training institutions
- The contractor may not draw its reasonable recruitment area in such a way as to have the effect of excluding minorities or women. For each job group, the reasonable recruitment area must be identified, with a brief explanation of the rationale for selection of that recruitment area
- The contractor may not define the pool of promotable, transferable, and trainable employees in such a way as to have the effect of excluding minorities or women. For each job group, the pool of promotable, transferable, and trainable employees must be identified with a brief explanation of the rationale for the selection of that pool

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### **f) *Determining availability* – 60-2.14 (con't)**

- Where a job group is composed of job titles with different availability rates, a composite availability figure for the job group must be calculated. The contractor must separately determine the availability for each job title within the job group and must determine the proportion of job group incumbents employed in each job title. The contractor must weigh the availability for each job title by the proportion of job group incumbents employed in that job group. The sum of the weighted availability estimates for all job titles in the job group must be the composite availability for the job group

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### ***g) Comparing incumbency to availability - 60-2.15***

- The contractor must compare the percentage of minorities and women in each job group determined pursuant to § 60-2.13 with the availability for those job groups determined pursuant to § 60-2.14
- When the percentage of minorities or women employed in a particular job group is less than would reasonably be expected given their availability percentage in that particular job group, the contractor must establish a placement goal in accordance with § 60-2.16

# III. The AAP Verification Initiative (a few high-points) (con't)

## 3) General AAP Requirements for Acceptability (con't)

### ***g) Comparing incumbency to availability - 60-2.15 (con't)***

- In addition to the above, the FCCM 1F02 states:

“Contractors use a number of methods to determine whether the 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 a general “80%” rule and declare underutilization only when the representation of minorities or women is less than 80% 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 two 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”

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### ***h) Placement goals – 60-2.16***

- Where, pursuant to § 60-2.15, a contractor is required to establish a placement goal for a particular job group, the contractor must establish a percentage annual placement goal at least equal to the availability figure derived for women or minorities, as appropriate, for that job group
- The placement goal-setting process described above contemplates that contractors will, where required, establish a single goal for all minorities. 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, a contractor may be required to establish separate goals for those groups

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### *i) Designation of responsibility – 60-2.17(a)*

- The contractor must provide for the implementation of equal employment opportunity and the affirmative action program by assigning responsibility and accountability to an official of the organization. Depending upon the size of the contractor, this may be the official's sole responsibility. He or she must have the authority, resources, support of and access to top management to ensure the effective implementation of the affirmative action program
- In addition to the above requirements from 60-2.17(a), the FCCM 1F04(a) states that, “**to be acceptable**, the AAP 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 AAP and a description of the incumbent’s duties” (emphasis added)

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### ***j) Identification of problem areas - 60-2.17(b)***

- The contractor must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. At a minimum the contractor must evaluate:
  - 1) The workforce by organizational unit and job group to determine whether there are problems of minority or female utilization (*i.e.*, employment in the unit or group), or of minority or female distribution (*i.e.*, placement in the different jobs within the unit or group);
  - 2) Personnel activity (applicant flow, hires, terminations, promotions, and other personnel actions) to determine whether there are selection disparities;
  - 3) Compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities;
  - 4) Selection, recruitment, referral, and other personnel procedures to determine whether they result in disparities in the employment or advancement of minorities or women; and
  - 5) Any other areas that might impact the success of the affirmative action program

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### ***k) Action-oriented programs – 60-2.17(c)***

- The contractor must develop and execute action-oriented programs designed to correct any problem areas identified pursuant to § 60-2.17(b) and to attain established goals and objectives. In order for these action-oriented programs to be effective, the contractor must ensure that they consist of more than following the same procedures which have previously produced inadequate results. Furthermore, a contractor must demonstrate that it has made good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### ***k) Action-oriented programs – 60-2.17(c) (con't)***

- In addition to the above language found in 60-2.17(c), the FCCM 1F04(c) states:  
“OFCCP requires 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. “Results-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

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### ***k) Action-oriented programs – 60-2.17(c) (con't)***

- In addition to the above language found in 60-2.17(c), the FCCM 1F04(c) states:

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 could include the rigid work hours, the impact or application of leave policies, the lack of recruitment, the lack of training, the absence of a career path or ladder leading to the job, a working environment hostile to women or hiring discrimination. To remedy an identified problem area, 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”

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### *1) Internal audit and reporting system – 60-2.17(d)*

- The contractor must develop and implement an auditing system that periodically measures the effectiveness of its total affirmative action program. The actions listed below are key to a successful affirmative action program:
  - 1) Monitor records of all personnel activity, including referrals, placements, transfers, promotions, terminations, and compensation, at all levels to ensure the nondiscriminatory policy is carried out;
  - 2) Require internal reporting on a scheduled basis as to the degree to which equal employment opportunity and organizational objectives are attained;
  - 3) Review report results with all levels of management; and
  - 4) Advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### *l) Internal audit and reporting system – 60-2.17(d) (con't)*

- In addition to the above requirements found in 60-2.17(d), the FCCM 1F04(d) states that “[t]he AAP 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”

# III. The AAP Verification Initiative (a few high-points) (con't)

## 3) General AAP Requirements for Acceptability (con't)

### Section 503 AAPs

For Section 503 AAPs, if one or more of the below listed Section 503 AAP and utilization goal elements is missing, “COs must automatically consider the submission unacceptable.” (emphasis added) FCCM 1E02, 1G.

- Equal employment opportunity policy statement;
- Review of personnel processes to ensure careful, thorough and systematic consideration of individuals with disabilities for job vacancies, promotion and training opportunities;
  - According to the FCCM, an “acceptable,” AAP must affirm that the contractor reviews its personnel processes periodically. FCCM 1G02.

# III. The AAP Verification Initiative (a few high-points) (con't)

## 3) General AAP Requirements for Acceptability (con't)

### **Section 503 AAPs**

- Schedule for the periodic assessment of physical and mental job qualifications, to the extent they screen out individuals with disabilities, to ensure they are job-related and consistent with business necessity;
  - According to the FCCP, an AAP must contain the contractor's schedule for the periodic review of all physical and mental job qualification standards to ensure that, to the extent they tend to screen out qualified individuals with disabilities, they are job-related and consistent with business necessity. To be acceptable, the AAP must affirm that the contractor completed a review of the physical and mental job qualification standards. FCCM 1G03.

## III. The AAP Verification Initiative (a few high-points) (con't)

### 3) General AAP Requirements for Acceptability (con't)

#### **Section 503 AAPs**

- Reasonable accommodation to physical and mental limitations, including copies of any reasonable accommodation policies, and documentation of any accommodation requests received and their resolution;
- Procedures to ensure that employees are not harassed on the basis of disability;
- External dissemination of the contractor's EEO policy;
- Description of outreach and positive recruitment efforts, and annual assessment from the evaluation of the effectiveness of those efforts;

# III. The AAP Verification Initiative (a few high-points) (con't)

## 3) General AAP Requirements for Acceptability (con't)

### Section 503 AAPs

- The FCCM states that “[a]n acceptable AAP (emphasis added) must affirm that the contractor engages in outreach and recruitment efforts reasonably designed to effectively recruit qualified individuals with disabilities” and that “The AAP must include documentation of the contractor’s assessment of its outreach and recruitment efforts that it made over the previous 12 months. This assessment is two-fold in that the contractor must evaluate the effectiveness of each effort and it must conclude whether the totality of its efforts has been effective in identifying and recruiting individuals with disabilities. When evaluating the effectiveness of each effort, the contractor must document its determination and, at a minimum, it must include the criteria used to make the determination. One of the criteria that must be included is the data collected under 41 CFR 60-741.44(k) . . . . If, when looking at the totality of its efforts, the contractor concludes that outreach and recruitment efforts were not effective, it must identify alternative efforts that it will implement to fulfill its affirmative action obligations. COs must also ensure that the conclusion is reasonable for the AAP to be acceptable.” FCCM 1G07.

# III. The AAP Verification Initiative (a few high-points) (con't)

## 3) General AAP Requirements for Acceptability (con't)

### Section 503 AAPs

- Internal dissemination of the contractor's EEO policy;
  - According to the FCCM, “[a]n acceptable AAP (emphasis added) must address the contractor's procedures to disseminate its EEO policy internally.” FCCM 1G08.
- Description of the contractor's audit and reporting system, including documentation of all actions taken to comply with the audit and reporting system requirements;
  - According to the FCCM, “[a]n acceptable AAP (emphasis added) will also specify the frequency of reports and audits, and describe the actions taken to address deficiencies identified by the audit and reporting system.” FCCM 1G09.

# III. The AAP Verification Initiative (a few high-points) (con't)

## 3) General AAP Requirements for Acceptability (con't)

### Section 503 AAPs

- Designation of responsible official;
  - According to the FCCM, “[a]n acceptable AAP (emphasis added) must identify the official assigned responsibility for implementing the contractor’s affirmative action activities for individuals with disabilities, and describe that official’s responsibilities. The contractor must give this official the necessary senior management 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.” FCCM 1G10.

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### **Section 503 AAPs**

- Policy to train 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;
  - According to the FCCM, this section of the AAP should document that personnel have been trained to ensure that the commitments in the AAP are implemented. FCCM 1G11.
- Data collection on applicants and hires, including documentation of the computations or comparisons of applicant and hire data;

# III. The AAP Verification Initiative (a few high-points) (con't)

## 3) General AAP Requirements for Acceptability (con't)

### **Section 503 AAPs**

- Analysis of contractor's utilization of individuals with disabilities;
  - According to the FCCM, for an AAP to be considered acceptable, it must include the annual utilization goal analysis. When reviewing the AAP for acceptability, the CO must closely examine the contractor's AAP to ensure it describes the utilization goal analysis, identifies any barriers to equal opportunity employment, and includes a description of action-oriented programs that the contractor has designed to address any barriers identified. If a contractor is six months or more into its current AAP year when it receives the Scheduling Letter and Itemized Listing, it must also submit the information that shows its current year progress toward meeting the utilization goal. FCCM 1G13.

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### **Section 503 AAPs**

- Identification of problem areas; or
- Action-oriented programs designed to correct any problem areas.

Detailed definitions for each of these items can be found at 41 C.F.R. 60-741.44 (everything other than utilization goals) and 60-741.45 (re utilization goals).

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### VEVRAA AAPs

For VEVRAA AAPs, if one or more of the below listed VEVRAA AAP and hiring benchmark elements is missing, COs must automatically consider the submission **unacceptable** (emphasis added) (FCCM 1E02, 1H):

- Equal employment opportunity policy statement;
- Review of personnel processes to ensure careful, thorough and systematic consideration of protected veterans for job vacancies, promotion and training opportunities;
  - According to the FCCM, an “acceptable” AAP “must affirm that the contractor reviews its personnel processes periodically.” FCCM 1H02.

# III. The AAP Verification Initiative (a few high-points) (con't)

## 3) General AAP Requirements for Acceptability (con't)

### VEVRAA AAPs

- Schedule for the periodic review of physical and mental job qualifications to ensure they are job-related and consistent with business necessity;
  - According to the FCCM, “[a]n AAP must contain the contractor’s schedule for the review of all physical and mental job qualification standards to ensure that, to the extent they tend to screen out qualified disabled veterans, they are job-related and consistent with business necessity. **To be acceptable**, the AAP must affirm that the contractor completed a review of the physical and mental job qualification standards.” FCCM 1H03

# III. The AAP Verification Initiative (a few high-points) (con't)

## 3) General AAP Requirements for Acceptability (con't)

### VEVRAA AAPs

- According to the FCCM, an acceptable AAP must affirm that the contractor engages in outreach and recruitment efforts reasonably designed to effectively recruit qualified protected veterans. The AAP must include documentation of the contractor's assessment of its outreach and recruitment efforts that the contractor made over the previous 12 months. This assessment is twofold in that the contractor must evaluate the effectiveness of each effort, and conclude whether the totality of its efforts has been effective in identifying and recruiting individuals with disabilities. When evaluating the effectiveness of each effort, the contractor must document its determination and, at a minimum, include the criteria used to make the determination. One of the criteria that must be included is the data collected under 41 CFR 60-300.44(k) . . . . If, when looking at the totality of its efforts, the contractor concludes that outreach and recruitment efforts were not effective, it must identify alternative efforts that it will implement to fulfill its affirmative action obligations. **COs must also ensure that the conclusion is reasonable for the AAP to be acceptable.** (emphasis added) FCCM 1H07.

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### VEVRAA AAPs

- Internal dissemination of the contractor's EEO policy;
  - According to the FCCM, “[a]n acceptable AAP (emphasis added) must address the contractor's procedures to disseminate its EEO policy internally.” FCCM 1H08.
- Description of the contractor's audit and reporting system, including documentation of all actions taken to comply with the audit and reporting system requirements;
- Designation of responsible official;

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### VEVRAA AAPs

- According to the FCCM, “[a]n acceptable AAP (emphasis added) must identify the official assigned responsibility for implementing the contractor’s affirmative action activities for individuals with disabilities, and describe that official’s responsibilities. The contractor must give this official the necessary senior management 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.” FCCM 1H10.

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### **VEVRAA AAPs**

- Policy to train 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;
  
- According to the FCCM, this section of the AAP should document that personnel have been trained to ensure that the commitments in the AAP are implemented. FCCM 1H11.

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 3) General AAP Requirements for Acceptability (con't)

##### **VEVRAA AAPs**

- Data collection on applicants and hires, including documentation of the computations or comparisons of applicant and hire data; or
- Documentation of the annual hiring benchmark established by the contractor.

Definitions/requirements for each of these can be found at [41 C.F.R. 60-300.44](#) (everything other than hiring benchmarks) and [41 C.F.R. 60-300.45](#) (discussing documentation for hiring benchmarks).

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 4) You Can Update Your AAP at Point of Audit

Your “affirmation” (it is not a “certification”) does not limit you from updating your AAP post-certification and supplying it to OFCCP for audit

- Do not feel like you are doing something “wrong” to update your AAP if you find better or different data at the time of any ensuing audit post-certification to OFCCP that you have an AAP in place within your company
  - the affirmation of your understanding of an unenforceable requirement does not bind you to the understanding
  - companies constantly update their data records. Almost all contractors review their AAPs once OFCCP schedules an audit and update/refine any data which a closer and post-production review reveals may need refinement

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 4) You Can Update your AAP at Point of Audit (con't)

- Remember, too, OFCCP reported to the Office of Management and Budget that it takes contractors only a few paltry hours to prepare their annual AAPs. So, contractors cannot be faulted for not having perfect AAPs in the modest hours OFCCP has allocated to the task, suggesting OFCCP was not expecting much
  - Do not lie to or mislead OFCCP (in writing or orally) about whether you updated or refined the data in the AAP you submit for audit.
  - 5 U.S.C. Section 1001 makes it a criminal & civil offense to make a false or knowingly misleading statement/writing to a federal officer

### III. The AAP Verification Initiative (a few high-points) (con't)

#### 4) You Can Update your AAP at Point of Audit (con't)

- Be transparent. Go ahead and submit both your “certified” and your updated/refined AAP to OFCCP, if you wish. (I suggest you do so)

That will avoid three potential problems:

- 1) Your transparency will not tear the trust between you and OFCCP
- 2) OFCCP will not be able to cite your company for a non-compliant AAP since you will have tendered a compliant AAP to start the audit
  - Conciliation Agreements are used to “cure” violations of OFCCP’s Rules. Here, there will be nothing for OFCCP to cure. OFCCP will have received a compliant AAP to start the audit. There will be no need for a CA since the issue was cured pre-audit. And, you were not required to have a “perfect” AAP to certify (even if the certification and affirmation were enforceable)
- 3) You will avoid perturbing OFCCP with a late-delivered audit-ready AAP since otherwise OFCCP has to “start over” and commence a fresh audit, in effect. Perturbs them greatly!

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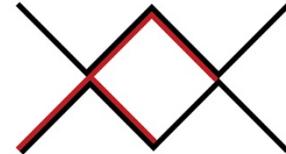
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DirectEmployers  
Association

**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