



# Creating the Proper Footprint and Architecture for Your AAPs in a Changing, Modern Workplace Setting, Including Remote, Foreign and Overseas Employees

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# Today's Presenters



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# Two Questions Frame the Discussion:

1. What is an “OFCCP establishment”?
  - KORS develop AAPs by “establishment”
  - OFCCP audits by “establishment”
2. Into which AAP do all the employees go?

## **Background:** OFCCP Rules Answer Only the Second Question

- 1972 vintage OFCCP Rules *41 CFR § 60-2.1*
  - *Republished with changes in 2000*
- *Why?* Everyone in 1972 intuitively understood what an establishment was

# Two Questions Frame the Discussion (con't)

Since then, much change in Corporate Organizational Structures

- ❑ Matrix personnel systems
- ❑ Decentralization of operations
- ❑ One World
  - Ex-Patriate Employees in U.S. AAPs?
  - Employees recruited in China working in U.S. in U.S. AAPs?
  - Employees recruited in U.S. working in China in U.S. AAPs?
- ❑ Covid-19 Work from Anywhere Policies

# Two Questions Frame the Discussion (con't)

- A funny 1972 OFCCP Rule 41 CFR § 60-1.5(c) “Exempts” certain federal **contracts** (not employees) from OFCCP’s Rules for “**Work Outside the United States**” if:
  - work performed outside the U.S.
  - by employees not recruited within the U.S.

# Two Questions Frame the Discussion (con't)

Lots of questions:

- ❑ How many employees have to work outside U.S. and not be recruited within U.S. to qualify the “contract” for exemption
  - But what if the Kor has a second federal contract?
- ❑ What if employees working on the federal contract were recruited in Mexico, but work 51% or more of their time in U.S.?
  - Does the employee now “work” in the U.S.?
- ❑ What happens in the real world?

# Two Questions Frame the Discussion (con't)

OFCCP has four Rules as to where contractors must place employees in AAPs for Minorities & Women: 41 CFR Section 60-2.1

- ❑ “Traditional” brick & mortar AAP establishments
- ❑ FAAPs (“Functional Affirmative Action Plans”)
- ❑ Follow the Manager Rule
  - *41 CFR § 60-2.1(d) (1)*
    - What if an employee in London recruited in U.S. reports to a manager in U.S.
  - Corporate Initiative
    - *41 CFR § 60-2.1(d)(3)*
      - *What if a Detroit manager selects an employee who works in Ottawa?*

# Two Questions Frame the Discussion (con't)

So, what is an AAP Establishment?

❑ OFCCP's Rules do not define

❑ Real World:

- Not the 2-element EEO-1 “establishment” definition
  - Employees
  - Street address
- OFCCP practice (no writing on this) is a 3-element definition:
  - Employees
  - Street addresses
  - Onsite HR authority controlling (but then LOTS of questions pop up):
    - Hiring only?
    - Promotion only?
    - Involuntary terminations only?
    - Compensation decisions?
    - Terms and conditions?
- OFCCP is (illegally) trying to expand “audit establishments” to nearby establishments