

Federal Contractors Have Until June 29 for 2023 Certification

March 21, 2023 By Matt Nusbaum

It is “that time” again, apparently. On **March 31, 2023** the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) will open the “Contractor Portal” and allow contractors to begin certifying their compliance with the agency’s affirmative action requirements. Contractors will have until **June 29, 2023** to complete their certification.

Since BCGi [last reported](#) on the new AAP certification requirements, the agency has been busy making use of their new cache of data, giving us a bit more insight into the agency’s thinking and how they intend to use the information you provide.

In short, they intend to use it to identify “new” entities to audit, as in, new to the OFCCP. For decades their primary “look” into the federal contracting world was through the federal procurement database and EEO-1 reporting. However, the procurement database is really only good for identifying *prime* federal contractors, leaving the agency largely in the dark about qualifying federal subcontractors.

And while the EEO-1 does contain a box users can check if their organization is a federal contractor subject to the OFCCP’s jurisdiction, that information relies on self-reporting, which can be inherently unreliable, again, in particular when it comes to subcontractors (not to mention the fact that only first-tier subcontractors are required to check that box).

So the OFCCP has taken matters into its own hands and created the Contractor Portal and the attendant obligation for federal contractors to annually certify their compliance (or non-compliance) with the OFCCP’s affirmative action regulations. Contractors had to certify in the new system for the first time in 2022 and it was, in a word, confusing.

But in case anyone had any doubt about what the agency was trying to accomplish, the OFCCP went ahead and let everyone know by quickly integrating data from what is commonly referred to as the Affirmative Action Plan Verification Initiative (AAP-VI) into their audit selection system. The agency then [built an entire new Corporate Scheduling Announcement List \(CSAL\)](#) based on that data. Specifically, the agency tried to isolate organizations that the agency believes should have certified but did not, and the insane few who checked the box indicating that the organization was out of compliance.

One thing was always clear from the beginning: If you check the “audit me” box, you will be audited. That should not have been a surprise to the organizations the checked the second box indicating that the contractor should be preparing AAPs but is not.

But now another clear point has emerged: If the OFCCP believes your organization should have certified (likely based largely on EEO-1 and federal procurement data, but potentially other data gleaned from OFCCP investigations) but failed to do so, that is another ticket to Audit Town. At BCGi, we believe the agency has a few issues there, but we will discuss that in further detail below.

The question on most people's minds right now involves how *else* the agency intends to use this data. The answer? Any and every way they can.

2023 Certification Issues for New Filers

If you are new to the game and have never certified your organization's compliance with the OFCCP's affirmative action regulations, your first step is to determine whether or not your organization *should have* certified last year but did not, or if your organization is truly a "new" federal contractor.

If you are a "new" contractor, that doesn't necessarily mean this is your organization's first ride on the merry-go-round. It could simply be that there was some period during which the OFCCP did not have jurisdiction (your organization was not required to prepare AAPs) and now they do again. Either way, you're in the fold now and are required to respond to the OFCCP's annual survey.

When logging in for the first time you will be required to create an account for your organization. You will need your organization's Employer Identification Number(s) (EIN), EEO-1 headquarter/company number(s), and EEO-1 establishment/unit number(s) for each "parent company." If your organization consists of multiple entities, make sure to have this information for each one that is subject to AAP requirements.

From there you'll be taken to a page that the OFCCP populates based on the information you provide at registration showing business names, DUNS numbers, and NAICS codes.

Make sure you register and certify for all entities. The OFCCP will then populate the Contractor Portal with entity information they have from EEO-1 filings and present them to you to certify compliance at each location.

That information will likely be inaccurate because EEO-1 reporting and AAP preparation have some fundamentally different rules. And the OFCCP will pressure you *heavily* to edit and update that information to reflect your current AAP structure instead of your EEO-1 reporting structure. But updating the OFCCP's data **is absolutely not required** and could be against your organization's interests.

You see, as it stands, the OFCCP did not update their regulations to add a certification requirement. Instead, they created what is basically an elaborate survey. Your only obligation is to get to the question that the OFCCP is authorized to ask, and check a box.

And those boxes are for answers that contain the words, “as applicable.” For example, “Entity has developed and maintained affirmative action programs at each establishment, *as applicable*, and/or for each functional or business unit” (emphasis added). If your organization prepares AAPs as required, that statement would be true for your actual establishments, and would be equally true for any other establishment that the OFCCP might decide to ask you about. Not your establishment? Not a problem, because you’re certifying that you prepare AAPs for it “as applicable.”

Unless and until you edit the establishment data the OFCCP presents to you in the Portal, you and your organization has not taken “ownership” of that data for these purposes. That information was filed to meet EEO-1 reporting requirements, not AAP requirements, and your organization never said it represented the way you prepare your AAPs. And here is the key part—the OFCCP is not authorized to make you to provide them information on your AAP “locations,” how you structure your affirmative action program unless and until you appeal to the agency for permission to prepare “functional” AAPs. They can ask, and they are asking real hard, but they **cannot require it**, period.

So why not update it for the OFCCP? Because once you do, you arguably create an obligation for yourself to update it annually to accurately reflect the way you prepare your AAPs. In other words, you will then “own” the data and be responsible for it.

If you are unsure how to proceed, feel free to reach out to us at BCGi@Biddle.com and we will help walk you through it.

2023 Certification for “Delinquent” Filers

There is a significant population of federal contractor organizations out there that the OFCCP considers to be “delinquent” when it comes to their AAP certification obligation. The OFCCP believes that based on information they have indicating your organization *should* certify, but their records indicate that no certification has taken place.

For some, this is genuine and as straightforward as it looks. The organization either is a federal contractor and should have certified but did not, or the organization was a federal contractor but is no longer and has no obligation to certify.

If your organization is not required to certify this year, it would probably be a good idea to “certify” that with the OFCCP. A good way to do that might be to use the [“Contact Us” page](#) in the OFCCP’s Contractor Portal. The tool requires you to provide

EIN, so if you need to report your “non-obligation” to the OFCCP for multiple entities, be sure to send a message on behalf of each EIN under your umbrella and simply inform the agency that the organization has held qualifying federal contracts in the past but no longer does so.

If, however, your organization *is* “delinquent,” understand two things. First, the OFCCP is going to be putting an eye on your organization and paying very close attention to your 2023 certification. Which brings us to the second thing—the OFCCP *still* does not have the authority to require you to provide them with your AAP structure by updating the EEO-1 data they populate for you in the portal (see above for discussion of first-time filers). The OFCCP might make you feel like a criminal, which in turn is intended to make you feel like you need to “make it up to them.” You do not.

And you’re not a “criminal.” In fact, you haven’t violated any of the OFCCP’s AAP requirements, so don’t let them get too heavy-handed with you talking about “violations.” You failed to respond to a [survey](#). That’s it. As noted above, the OFCCP declined to do the hard work of integrating this requirement into their regulations.

However, the OFCCP appears to be using this “violation” as justification for placing contractors on their audit list and it is questionable whether and to what extent they can do that without violating the U.S. Constitution. You see, the OFCCP generally must select contractors for review through an “administratively neutral” process. And the AAP-VI requirement is likely far too new, unpredictable, and unreliable to qualify there.

The agency is likely falling back on their authority to initiate an investigation based on information of potential wrongdoing, much like how the EEOC can initiate a Commissioner Charge or a Directed Investigation. The thing is that the OFCCP usually doesn’t invoke that authority, and unless your organization “certified” last year checking the second box, the AAP-VI data simply is not enough to indicate whether or not there are potential EEO/AA violations.

But let’s be clear about one thing—failing to certify is **not** an EEO/AA violation. It is not a substantive violation at all. At best, it is a technical violation, like not properly displaying the “EEO is the Law” poster (now the “Know Your Rights” poster after the [recent update](#)).

The remedy for failing to certify should be to certify properly on an ongoing basis. Whether or not it is justification for receiving an audit letter is unclear. That is not stopping the OFCCP from sending them, though, so if this sounds like your situation, we highly recommend you seek out competent legal advice, preferably before that audit letter arrives in your inbox.

There are some contractors in the unique position of having *thought* they certified for their organization, but it turns out the “missed” some locations. This is where the OFCCP opens a bag of spiders.

As noted, the OFCCP simply does not have the authority to compel contractors to provide information regarding their AAP structures *unless* the organization applies to prepare AAPs by function rather than by location. So to the extent that the OFCCP tries to schedule an audit for a location they believe should have been certified but was not, they could run into problems.

If the locations were “missed” because the contractor did not provide information for that location, that’s on the OFCCP, not the contractor, assuming you did not edit that data. If you did, “ownership” effectively transfers to you and you’re on the hook for keeping that information accurate, complete, and up-to-date (at least at the time of annual certification). But if you did not edit the data the OFCCP provided and they are now trying to claim that you should have, more specifically that it was a violation for you not to have, they have no foundation on which to stand. None.

And there are some organizations out there, complicated organizations with lots of associated entities, reorganization activity, etc. that might have simply forgotten to certify under one of their many EINs. If that is the case, the OFCCP has more solid ground to stand on. Whether or not you want to challenge the OFCCP’s jurisdiction should be determined though competent legal counsel.

Issues for ALL 2023 Filers

Regardless of how your 2022 certification went (or not), contractors will need to complete their 2023 certification no later than June 29, 2023. So what, if anything, has changed?

Well, the OFCCP’s Contractor Portal [user guide](#) indicates that it has not been updated since August, 2022, so if there are any changes to the process, they were not significant enough to warrant a user guide update.

Their other guidance documents—[registration](#) and [certification](#) infographics and [Frequently Asked Questions](#)—do not indicate when they were last updated, so the OFCCP could have changed just about anything there without necessarily drawing much attention. BCGi has run some comparisons between the current FAQs and past iterations of the OFCCP’s FAQ page and has, so far, not identified any substantive changes other than the occasional clarification and/or addition of FAQs for specific circumstances (such as educational institutions with federal grants but no qualifying *contracts*).

It appears that the AAP-VI process will be largely the same.

Except returning users will be coming back to a set of data that may or may not reflect their actual AAP structure. It is unclear at this point whether and to what extent the OFCCP will populate the Portal with more recent EEO-1 data, simply go with what was left there last year, or some combination of the two. Regardless, if you have not provided the data the OFCCP uses in the Portal for AAP purposes, you do not own the accuracy of that data and have no obligation to laboriously turn the OFCCP's inaccurate assumptions into accurate information.

If you did update your data last year at the OFCCP's prodding, you now arguably have an obligation to keep that information up-to-date and complete. But if the OFCCP adds to that data with additional information from recent EEO-1 filings, *that* data belongs to them and you have no obligation to do anything other than click into each location, check a box, and go home.

If you are brand new and the OFCCP does not have sufficient information to create a "parent company" profile for you, you might have to provide that information for your headquarters location, because this is necessary to get to the question that the OFCCP is authorized to ask. But you are not required to data-enter all of your locations.

Pay very close attention to the OFCCP's use of language in their guidance documents. Particularly, be on the lookout for words like "must," and "shall." And you will need to look closely because those words are surprisingly rare. Most of the time, the OFCCP is saying that your organization "should" do things like provide detailed information about your AAP structure. But words matter, and "should" is not the same as "must."

And don't be overwhelmed by the sheer volume of "asking" going on here by the OFCCP. They are *asking* you to do quite a lot, and they sometimes ask so forcefully that it seems like a legal requirement. But it's usually pretty easy to tell when the OFCCP is hiding the ball.

For example, here is one of the OFCCP's Contractor Portal FAQs:

8. Are contractors required to update their establishment list, or simply confirm that the 2018 EEO-1 information pre-populated in the OFCCP Contractor Portal is accurate?

Note that the question itself is worded to give the contractor only two options: update their establishment list; or "simply" confirm that the 2018 EEO-1 information is accurate for these purposes. The agency does not have the authority to enforce the first option, updating your establishment list as provided by the OFCCP. And the agency provides no method for "simply" confirming that the EEO-1 data is correct.

Because, make no mistake, by simply clicking into each location provided by the OFCCP, checking box 1, and certifying that the information *you provided* is accurate, you are **not** “confirming” that the EEO-1 data the OFCCP populated your establishment list with is accurate for these purposes.

In this FAQ the agency is trying to trick the reader into believing that if they don't update the data the OFCCP provided, that is the same as certifying its accuracy for these purposes, but it is not. Not by a country mile. At the end of the process you are only certifying that the “certification is true and correct to the best of my knowledge” and that you “understand that the penalty for making false statements with respect to this certification is prescribed in 18 U.S.C. 1001” (it is punishable by fine or imprisonment).

Again, the agency is playing fast-and-loose here asking you to confirm that the “certification” is true and accurate. How can it possibly be true and accurate if you click in to a location that isn't even yours? Those magic little words, “as applicable.”

You are only certifying the accuracy of the data and information *you provided* to the OFCCP, not information you supplied to the Joint Reporting Committee for EEO-1 (not AAP) purposes. You are not certifying the accuracy of the OFCCP's establishment information unless you edit that information. And not correcting the agency's likely false assumptions here is not your responsibility, so the agency cannot infer *anything* about your AAP structure based on your AAP-VI certification (unless you touched that data).

BCGi's recommendation remains the same if your organization prepares AAPs as required. Create an account for every EIN under your organization's umbrellas, log in for each, click into whatever location(s) the OFCCP presents, check box one, confirm, and call it a day.

If your organization is not preparing AAPs but is required to do so, drop us a line right now at BCGi@Biddle.com and we'll see if we can find some professionals to help you out.

Looking Ahead

The OFCCP is not done finding uses for the AAP-VI. As the platform and requirement mature the agency will be able to do more with AAP-VI. Their goal is to eventually build their own, relatively accurate database of federal contractor employers that is better than the patchwork quilt they can put together from current federal sources.

But the Portal is a larger platform that the OFCCP wants to use to manage audits, and likely all communications between the agency and contractors eventually.

Whether the OFCCP will eventually require all contractors to simply upload all of their annual AAPs to the agency directly remains to be seen. That would likely require a revision to the agency's regulations, though, so we should not be caught by surprise when and if that comes to pass.

More likely, we think that the OFCCP is going to want to flesh-out their survey a bit and one very interesting way they could do that is to require contractors to *notify* the OFCCP if and when they fall out of federal contractor status. And that might actually be a good thing, though the agency would likely want to verify that somehow before just blanketly removing a contractor from their audit pool.

What you find when you log in to certify this year may or may not be surprising. Just keep in mind that you are only responsible for the information you provide *for these purposes*. Your obligations regarding your EEO-1 data ended when you filed those reports. If the OFCCP wants to show it to you, state loudly that they think this is also your AAP structure, then assume that it is unless you say otherwise, they are making asses of themselves, not you and me.

If you have any questions or concerns about the AAP-VI or any other OFCCP requirement, feel free to reach out to us at BCGi@Biddle.com.