



September 2016

EQUAL EMPLOYMENT OPPORTUNITY

Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance

Why GAO Did This Study

OFCCP is charged with ensuring that about 200,000 federal contractor establishments refrain from discrimination and take affirmative action to provide equal employment opportunities for certain protected classes of workers. GAO was asked to review OFCCP practices.

In this report, GAO (1) assessed how OFCCP conducts supply and service compliance evaluations, including the methodology, resources, and results, and (2) evaluated OFCCP outreach, assistance, and guidance efforts to assist contractors in complying with the requirements it enforces. GAO analyzed both OFCCP Information System data and a nongeneralizable sample of 43 case files and reviewed relevant federal laws, executive orders, regulations, guidance, and agency documents. GAO also interviewed a nongeneralizable sample of 24 contractors with and without experience with a compliance evaluation; managers and staff in OFCCP's headquarters and all six regional offices; and representatives of national organizations representing contractors and protected workers' interests.

What GAO Recommends

GAO is making six recommendations to DOL, including that OFCCP develop a contractor selection process that reflects contractor noncompliance risk, develop a mechanism to monitor contractors' compliance with AAP requirements, and review and assess the clarity of its contractor guidance. DOL agreed with GAO's recommendations.

View [GAO-16-750](#). For more information, contact Cindy Brown Barnes at (202) 512-7215 or brownbarnesc@gao.gov.

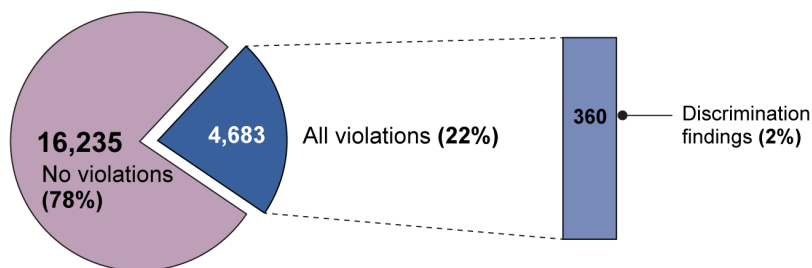
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What GAO Found

Since 2010, most compliance evaluations conducted by the Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) of federal supply and service contractors identified no violations; however, the methods used may not focus evaluations on contractors posing the greatest risk. OFCCP relies on compliance evaluations to detect equal employment violations by federal contractors and conducts evaluations for about 2 percent of federal contractor establishments annually. Since 2010, about 78 percent of evaluations found no violations and about 2 percent had discrimination findings (see figure). However, when it selects contractors for evaluations, OFCCP does not use a generalizable sample that would allow for conclusions about the federal contractor population. Therefore, it does not have reasonable assurance that it is focusing its compliance efforts on those contractors with the greatest risk of noncompliance. During evaluations, OFCCP requested and reviewed documents related to contractors' equal employment efforts, including their Affirmative Action Program (AAP), which outlines contractors' compliance efforts. In 2015, close to 85 percent of evaluated contractor establishments did not submit their AAP within 30 days of OFCCP's request and were granted extensions in some cases. This suggests that OFCCP processes do not ensure that all contractors are complying with their obligation to complete and annually update an AAP.

Figure: Findings of Federal Contractor Nondiscrimination Compliance Evaluations From Fiscal Years 2010-2015



Source: Office of Federal Contract Compliance Program data. | GAO-16-750

Since 2012, OFCCP's outreach and compliance assistance activities to assist contractors and other stakeholders, such as protected workers and industry groups, have declined as the agency refocused its activities on enforcement, and some stakeholders said guidance could be clearer. Outreach activities, such as community group presentations and job fair participation, decreased more than 80 percent from 2012 to 2014. Some stakeholders told GAO that workers, applicants, and contractors may benefit from more outreach activities. OFCCP's compliance assistance activities, such as seminars, for contractors—are down 30 percent since 2012. Many contractors told GAO they do not feel comfortable contacting OFCCP for assistance and hire third party support to help comply with federal nondiscrimination and affirmative action requirements. While contractors generally found OFCCP guidance helpful, both stakeholders and contractors said the guidance could be clearer to help them understand the requirements. Without clear guidance, contractors may not be able to understand their equal employment obligations.

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Abbreviations

AAP	Affirmative Action Program
ACE	Active Case Enforcement
ACM	Active Case Management
ARB	Administrative Review Board
CSAL	Corporate Scheduling Announcement Letter
DFARS	Defense Federal Acquisition Regulation Supplement
DOL	Department of Labor
EEOC	Equal Employment Opportunity Commission
FAQs	Frequently Asked Questions
FAR	Federal Acquisition Regulation
FPDS-NG	Federal Procurement Data System-Next Generation
FKGL	Flesch-Kincaid Grade-Level
FTE	full-time-equivalent
MOU	memorandum of understanding
OFCCP	Office of Federal Contract Compliance Programs
OMB	Office of Management and Budget
VETS	Veteran's Employment and Training Service
VEVRAA	Vietnam Era Veterans' Readjustment Assistance Act of 1974

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September 22, 2016

The Honorable John Kline
Chairman
Committee on Education and the Workforce
House of Representatives

The Honorable Tim Walberg
Chairman
Subcommittee on Workforce Protections
Committee on Education and the Workforce
House of Representatives

The Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) is responsible for ensuring that about 200,000 federal contractor establishments comply with federal equal employment opportunity and affirmative action requirements. Under an executive order and other federal laws and regulations, covered federal contractors and subcontractors are prohibited from discriminating and are required to take affirmative action to: (1) ensure that all applicants and employees are treated without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin, and (2) employ or advance in employment qualified individuals with disabilities and, qualified covered veterans.¹ These requirements affect about one out of every four U.S. workers.

Since fiscal year 2011, OFCCP has changed its enforcement practices and updated its regulations to, among other things, reflect recently issued amendments to Executive Order 11246 that established new nondiscrimination requirements, and to increase contractors' collection of data on workers' and applicants' veteran and disability status. Protected worker advocacy organizations have lauded OFCCP's efforts and many

¹OFCCP enforces Executive Order 11246; Section 503 of the Rehabilitation Act of 1973; and the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, all as amended, which apply to federal contractors and subcontractors if they meet specific criteria, including contract dollar amount and employee count thresholds. OFCCP's implementing regulations for Executive Order 11246 and these laws may be found at 41 C.F.R. pts. 60-1 to 60-999.

of these changes. However, other stakeholders, including some in the federal contracting community, are concerned OFCCP's efforts are imposing excessive compliance burdens on contractors, including what they perceive as overly broad and unnecessary document and data requests, as well as unreasonably numerous and lengthy compliance evaluations.² You asked us to review OFCCP's enforcement and compliance assistance activities. In this report, we (1) assess how OFCCP conducts compliance evaluations for supply and service contractors, including the methodology, resources, and results of these activities, and (2) evaluate OFCCP stakeholder outreach, guidance, and assistance to contractors in complying with the requirements it enforces.³

To assess how OFCCP conducts compliance evaluations of supply and service contractors, we reviewed 6 years of OFCCP data (from fiscal years 2010 through 2015) on evaluations and enforcement, including the number of cases referred to the DOL's Office of the Solicitor for administrative enforcement proceedings.⁴ We analyzed a nongeneralizable sample of 43 randomly selected files of compliance evaluation cases generally closed in fiscal years 2013 through 2015, ensuring representation from the six OFCCP regions and a variety of outcomes with respect to how cases were closed and types of violations identified.⁵ We reviewed agency policy, procedures, and operating plans

²For purposes of this report, stakeholders we spoke with include representatives of industry groups and civil rights/advocacy groups. We spoke with 14 industry groups and 13 civil rights/advocacy groups. Unless otherwise mentioned, the use of the term stakeholders is referring to both the industry and civil rights/advocacy groups.

³OFCCP conducts compliance evaluations of both construction and supply and service contractors, as well as investigations of federal contractor equal employment opportunity discrimination complaints. For purposes of this report, when we refer to compliance evaluations, we are referring to OFCCP supply and service contractor compliance evaluations. We limited our scope to supply and service evaluations because they make up the majority of enforcement activities. In addition, for ease of reference we generally refer only to contractors in this report, although certain subcontractors may also be subject to federal equal employment and affirmative action requirements.

⁴We reviewed data over the last 6 years to include evaluations since OFCCP implemented an updated compliance evaluations process in fiscal year 2011 and 1 year before the implementation of the updated process.

⁵For evaluations closed with discrimination findings or resolved through litigation, we expanded the fiscal years from which we randomly selected from due to the longer timelines associated with these types of cases. There were 15 cases selected using an expanded timeframe.

used to conduct and oversee the compliance evaluation process and assessed them against standards for internal control in federal government.⁶ We assessed the reliability of the OFCCP Information System data—used to select our case files and to analyze trends in how OFCCP conducts compliance evaluations—by (1) performing electronic testing of required data elements, (2) reviewing existing information about the data and the system that produced them, such as data dictionaries, and (3) interviewing agency officials knowledgeable about the data.⁷ We determined that the data were sufficiently reliable for the purposes of this report.

We also interviewed a nongeneralizable sample of 24 contractors—4 in each of OFCCP’s 6 regions—to gather their views on how compliance evaluations were conducted and the consistency of the process. These contractors were selected to represent contractors that have experienced a compliance evaluation and contractors that have not yet experienced an evaluation. We also interviewed representatives from 14 national employer organizations representing the interests of contractors and 13 civil rights advocates and organizations representing protected groups, such as veterans, individuals with disabilities, and working women, to obtain the perspectives of job seekers and workers who may benefit from OFCCP enforcement activities. In addition, we examined prior reviews of OFCCP by GAO, DOL’s Office of Inspector General, and others, and interviewed managers and staff in OFCCP’s headquarters, all six regions, and one district or area office in each region.⁸ The district or area offices were selected to reflect a range of workloads and geographic diversity.

⁶GAO, *Standards for Internal Control in the Federal Government*, [GAO/AIMD-00-21.3.1](#) (Washington, D.C.: November 1999). GAO has revised and reissued *Standards for Internal Control in the Federal Government*, with the new revision effective as of October 1, 2015. [GAO-14-704G](#) (Washington, D.C.: September 2014).

⁷The OFCCP Information System is a set of automated tools used to collect data, track, plan, and report on the compliance evaluations and complaint investigations that OFCCP uses in its enforcement efforts.

⁸We interviewed managers and staff in OFCCP’s headquarters and all six regions (Philadelphia, Pennsylvania; Chicago, Illinois; New York City, New York; San Francisco, California; Atlanta, Georgia; and Dallas Texas). We also interviewed OFCCP managers and staff in one district office in each region (Philadelphia, Pennsylvania; Indianapolis, Indiana; Mountainside, New Jersey; Orange, California; Columbia, South Carolina; and New Orleans, Louisiana).

To evaluate OFCCP stakeholder outreach, guidance, and assistance to contractors in complying with applicable requirements, we relied on various approaches. We reviewed relevant federal laws, executive orders, regulations, and guidance. We also interviewed contractors and representatives of employer organizations, as well as managers and staff in OFCCP's headquarters and field offices as described above. We reviewed agency policies and procedures for providing outreach, assistance, and guidance to contractors and evaluated them against standards for internal control in the federal government. To estimate the reading level at which OFCCP guidance materials were written, we evaluated the language in 25 available contractor frequently asked questions guidance materials identified from the OFCCP website using the Flesch-Kincaid Grade-Level (FKGL) automated readability tool.⁹

We conducted our work from February 2015 to September 2016 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

Office of Federal Contract Compliance Programs

⁹We selected and used one of many widely available automated readability tools, the Flesch-Kincaid Grade-Level (FKGL) test. The FKGL tool was developed by the U.S. Navy based on the Flesch Reading Ease test, which is one of the most widely-used, tested, and reliable formulas for calculating readability. The FKGL tool was developed primarily for adults and has been tested extensively on adult materials. It uses core measures of word length and sentence length to estimate the grade level at which the content is written. The version we used was included in the word processing software Microsoft Word.

Legal and Regulatory Framework

Summary of the Laws and Executive Order Enforced by the Office of Federal Contract Compliance Programs (OFCCP)

Executive Order 11246, first issued in 1965 and amended several times over the years, prohibits covered federal contractors from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity or national origin. It also requires these contractors to take affirmative action to ensure that equal opportunity is provided in employment without regard to these protected characteristics. In addition, Executive Order 11246 prohibits covered contractors from, under certain circumstances, taking adverse employment actions against applicants and employees for asking about, discussing, or sharing information about their pay or the pay of their co-workers.

Section 503 of the Rehabilitation Act of 1973 requires covered federal contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. OFCCP regulations provide that covered contractors' obligations include the duty to refrain from discriminating in employment against qualified individuals on the basis of disability.

OFCCP enforces the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, which require covered contractors to take affirmative action to employ and advance in employment qualified covered veterans. OFCCP regulations provide that covered contractors' obligations include the duty to refrain from discriminating in employment against employees or applicants based on their status as protected veterans.

Source: GAO analysis of relevant federal requirements| GAO-16-750

In 1941, President Roosevelt issued Executive Order 8802, which required federal agencies to include in all defense contracts a provision prohibiting contractors from discriminating against any worker because of race, color, creed, or national origin. President Johnson expanded these obligations in 1965 when he issued Executive Order 11246, which required a broader range of federal contractors and subcontractors to refrain from discrimination and to take affirmative action to provide equal employment opportunity to all employees and job applicants, regardless of race, creed, color, or national origin.¹⁰ Executive Order 11246, which generally applies to federal contracts and subcontracts of over \$10,000, has been amended several times over the years and now includes sex, sexual orientation, and gender identity.¹¹ In the early 1970s, federal contractors' equal employment responsibilities were expanded by statute to include persons with disabilities by Section 503 of the Rehabilitation Act of 1973 (Section 503), and certain veterans by the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA).¹² The Section 503 requirements generally apply to federal contracts and subcontracts that exceed \$15,000, while the VEVRAA requirements generally apply to federal contracts and subcontracts in the amount of \$150,000 or more. Contractors' compliance with these requirements is currently overseen by the DOL's OFCCP, which has issued a number of regulations to implement Executive Order 11246, Section 503, and VEVRAA. (See appendix I for more information on the laws and executive order enforced by OFCCP.)

Whether a particular contractor is subject to Executive Order 11246, Section 503, or VEVRAA, and if so, what specific requirements apply, may vary depending on factors such as the size of the contract, the type of contract, and the number of employees who work for a contractor. In general, OFCCP's regulations require covered contractors to comply with

¹⁰Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sep. 28, 1965).

¹¹A current version of Executive Order 11246, incorporating subsequent amendments, is available at: <http://www.dol.gov/ofccp/regs/statutes/eo11246.htm>.

¹²Pub. L. No. 93-112, § 503, 87 Stat. 355, 393 (codified as amended at 29 U.S.C. § 793); Pub. L. No. 93-508, §§ 401-403, 88 Stat. 1578, 1592-94 (codified as amended at 38 U.S.C. §§ 4211-4212). In general, disabled veterans, recently separated veterans, active duty wartime or campaign badge veterans, and Armed Forces service medal veterans are protected veterans under VEVRAA.

certain recordkeeping and reporting requirements (see fig. 1 for selected examples of such requirements under Executive Order 11246). For example, among other things, OFCCP's regulations generally require that covered contractors:

- Prepare and maintain an Affirmative Action Program (AAP). Generally, covered non-construction contractors that have 50 or more employees and a contract above a certain threshold amount are required to prepare an AAP within 120 days of the commencement of the contract, and annually review and update the AAP.¹³
- Maintain personnel or employment records.¹⁴
- Post certain equal employment opportunity notices.¹⁵
- Allow OFCCP access to their premises during normal business hours for the purpose of conducting on-site investigations, and to permit OFCCP to inspect any records relevant to the matter under investigation.¹⁶

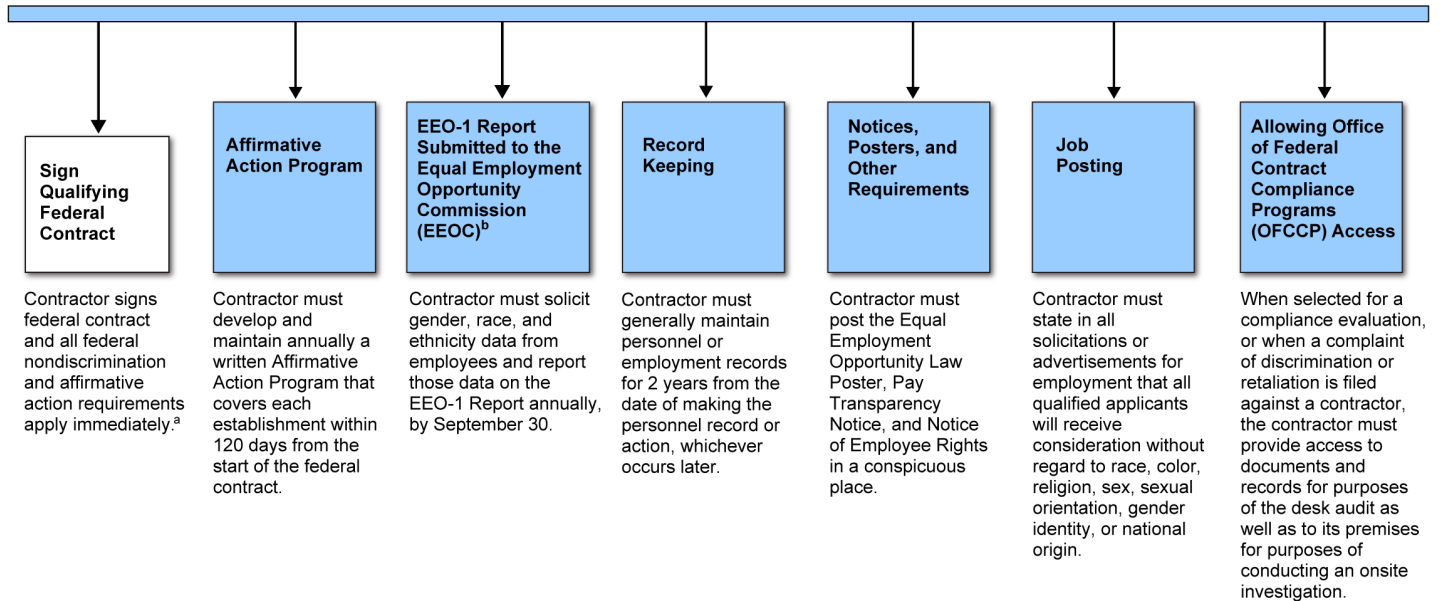
¹³Under Executive Order 11246 and Section 503, this threshold is \$50,000. Under VEVRAA, all contractors with 50 or more employees that are otherwise covered under VEVRAA must prepare and maintain an AAP. See generally 41 C.F.R. §§ 60-2.1 to 60-2.35 (Executive Order 11246), 41 C.F.R. §§ 60-300.40 to 60-300.45 (VEVRAA), and 41 C.F.R. 60-741.40 to 60-741.47 (Section 503).

¹⁴41 C.F.R. § 60-1.12 (Executive Order 11246); 41 C.F.R. § 60-300.80 (VEVRAA); 41 C.F.R. § 60-741.80 (Section 503).

¹⁵41 C.F.R. §§ 60-1.4(1), (3), 60-1.42 (Executive Order 11246); 41 C.F.R. § 60-300.5 (VEVRAA); 41 C.F.R. § 60-741.5 (Section 503).

¹⁶41 C.F.R. § 60-1.43 (Executive Order 11246); 41 C.F.R. § 60-300.81 (VEVRAA); 41 C.F.R. § 60-741.81 (Section 503).

Figure 1: Selected Equal Employment and Affirmative Action Recordkeeping, Reporting, and Access Requirements for a Federal Supply and Services Contractor Under Executive Order 11246



Source: GAO analysis of relevant federal requirements. | GAO-16-750

Note: This figure shows selected requirements of Executive Order 11246 and its associated regulations. Although not shown here, similar requirements exist with respect to individuals with disabilities and protected veterans under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 and Section 503 of the Rehabilitation Act of 1973, and those statutes' associated regulations. Not every requirement applies to every contractor; whether these requirements apply depends on various factors, including number of employees and contract size.

^aThe requirements shown in this figure apply to contractors with 50 or more employees and a contract of \$50,000 or more.

^bThe EEO-1 Report, also known as the Standard Form 100, is a joint report used by the EEOC and OFCCP to collect certain employment data from employers.

In addition, OFCCP's Executive Order 11246 regulations generally require contractors with 50 or more employees and one or more contracts of \$50,000 or more to annually submit an Employer Information Report EEO-1 (EEO-1 Report).¹⁷ The EEO-1 Report, also known as the Standard Form 100, is a joint report used by the Equal Employment Opportunity

¹⁷41 C.F.R. § 60-1.7.

Commission (EEOC) and OFCCP to collect certain employment data from employers.¹⁸

In addition, federal contractors subject to VEVRAA must annually report to the DOL's Veteran's Employment and Training Service (VETS) the number of employees and new hires who are qualified covered veterans.¹⁹

In recent years OFCCP made a number of changes to its regulations implementing Executive Order 11246, Section 503, and VEVRAA. Specifically:

- In 2013, OFCCP revised and updated its VEVRAA regulations and its Section 503 regulations.²⁰ Among other things, the revised regulations require certain contractors to establish annual hiring benchmarks for protected veterans, measure their workforce against an OFCCP-established utilization goal for people with disabilities, and invite applicants to self-identify as protected veterans or people with disabilities at the preoffer phase of the application process.
- Executive Order 13665, issued on April 8, 2014, amended Executive Order 11246 to prohibit discrimination against workers and job applicants who share information about their pay and compensation,

¹⁸EEOC collects data pursuant to requirements under Title VII of the Civil Rights Act of 1964, as amended, and its implementing regulations. 42 U.S.C. § 2000e-8(c); 29 C.F.R. pt. 1602. EEOC regulations generally require private employers with more than 100 employees to annually report data on the gender, race, and ethnicity of their employees.

¹⁹38 U.S.C. § 4212(d). Under VETS regulations, this form is called the Federal Contractor Veterans' Employment Report VETS-4212. 41 C.F.R. pt. 61-300.

²⁰Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Special Disabled Veterans, Veterans of the Vietnam Era, Disabled Veterans, Recently Separated Veterans, Active Duty Wartime or Campaign Badge Veterans, and Armed Forces Service Medal Veterans, 78 Fed. Reg. 58,614 (Sept. 24, 2013) (removing 41 C.F.R. pt. 60-250 and revising 41 C.F.R. pt. 60-300); Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 78 Fed. Reg. 58,682 (Sept. 24, 2013) (revising 41 C.F.R. pt. 60-741). These final rules took effect March 24, 2014.

and on September 11, 2015, OFCCP issued a final rule implementing those changes.²¹

- Executive Order 11246 was further amended by Executive Order 13672, issued on July 21, 2014, to prohibit federal contractors and subcontractors from discriminating on the basis of sexual orientation or gender identity, and OFCCP published a final rule implementing those changes on December 9, 2014.²²
- On June 15, 2016, OFCCP issued a final rule updating its regulations related to discrimination on the basis of sex.²³

OFCCP and EEOC have also recently proposed collecting additional compensation data from certain contractors through the EEO-1 Report.²⁴

Other Federal Obligations of Federal Contractors

Federal contractors may also be subject to various other requirements imposed by federal laws, executive orders, or regulations pertaining to a variety of areas such as accounting, labor, and ethics.²⁵ For example, federal contractors may be subject to certain wage requirements under the Davis-Bacon Act and related acts and certain financial requirements under Executive Order 13494, Economy in Government Contracting, among others. For additional information on selected federal

²¹See Exec. Order No. 13,665, 79 Fed. Reg. 20,749 (Apr. 11, 2014) and Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 80 Fed. Reg. 54,934 (Sept. 11, 2015). The final rule took effect January 11, 2016.

²²See Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 23, 2014) and Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors, 79 Fed. Reg. 72,985 (Dec. 9, 2014) (revising 41 C.F.R. pts. 60-1, 60-2, 60-4, and 60-50). The final rule took effect April 8, 2015.

²³Discrimination on the Basis of Sex, 81 Fed. Reg. 39,108 (June 15, 2016). The final rule took effect August 15, 2016.

²⁴OFCCP has published a proposed rule, and EEOC has submitted a revised information collection request to OMB. See Government Contractors, Requirement to Report Summary Data on Employee Compensation, 79 Fed. Reg. 46,562 (Aug. 8, 2014) and Agency Information Collection Activities; Notice of Submission for OMB Review, Final Comment Request: Revision of the Employer Information Report (EEO-1), 81 Fed. Reg. 45,479 (July 14, 2016). OFCCP does not plan to pursue its proposed rule if EEOC's information collection request is approved, according to OFCCP officials.

²⁵In addition, federal contractors may also be subject to applicable state or local requirements.

OFCCP Operations and
Compliance Evaluation
Process

requirements related to labor and employment that may apply to federal contractors, see appendix II.

In fiscal year 2016, OFCCP operated with an annual budget of about \$105 million and is authorized 615 full-time-equivalent (FTE) staff positions. OFCCP's office in Washington, D.C., directs the nationwide enforcement of equal employment opportunity requirements among federal contractors. Field staff in OFCCP's 6 regional offices and 48 district and area offices manage and carry out the agency's activities. From fiscal years 2011 through 2016, OFCCP staffing levels have decreased from 755 to 615 FTE staff positions, which is close to a 19 percent decrease.²⁶ During this time, OFCCP's budget has increased slightly from about \$105 million to about \$105.5 million, which is less than a 1 percent increase.²⁷

OFCCP uses two approaches to ensure compliance with federal equal employment and affirmative action requirements—enforcement and compliance assistance. OFCCP's enforcement program—primarily conducting contractor compliance evaluations—represents the preponderance of agency activity and is carried out primarily by using compliance officers to evaluate contractors, according to agency officials.²⁸ Since OFCCP can only evaluate a small fraction of federal contractors each year, the agency also carries out compliance assistance efforts, which generally include outreach, compliance assistance to contractors, and guidance.

²⁶In fiscal years 2014 and 2015, OFCCP exercised Voluntary Early Retirement Authority and Voluntary Separation Incentive Payments to reduce its overall staffing level in response to federal budget pressures, according to OFCCP officials.

²⁷During this period OFCCP's budget fluctuated with a low of close to \$100 million in fiscal year 2013.

²⁸In addition to conducting compliance evaluations, OFCCP also conducts investigations in response to complaints. Responding to complaints accounts for close to 16 percent of OFCCP's enforcement activities, according to OFCCP officials. In this report, we have focused only on the compliance evaluation component of OFCCP's enforcement activities. OFCCP's regulations regarding its enforcement and complaint procedures may be found at 41 C.F.R. §§ 60-1.20 to 60-1.35 (Executive Order 11246); 41 C.F.R. §§ 60-300.60 to 60-300.70 (VEVRAA); and 41.C.F.R. §§ 60-741.60 to 60-741.70 (Section 503).

During its compliance evaluations, OFCCP reviews the selected contractor's hiring, promotion, compensation, termination, and other employment practices. OFCCP conducts evaluations at the federal contractor establishment level—the facility or unit which produces the goods or services, such as a factory, office, or store for the federal contractor. If OFCCP determines that a business is subject to OFCCP's jurisdiction because of a federal contract, it may determine that all of the business's establishments or facilities are subject to the federal nondiscrimination and affirmative action requirements, regardless of where the federal contract is held.²⁹ However, a business that is determined to be a separate corporate entity from the federal contractor would not be subject to OFCCP's jurisdiction.³⁰ OFCCP selects contractor establishments for evaluations by developing, on a regular basis, a scheduling list using federal and commercial business databases, and

²⁹Executive Order 11246 provides that every contract, except those exempted by DOL, shall include the nondiscrimination and affirmative action requirements, and that DOL may provide by rule, regulation, or order for the exemption of facilities of a contractor that are "in all respects separate and distinct from activities of the contractor related to the performance of the contract." See 41 C.F.R. § 60-1.5(b)(2). According to OFCCP officials, DOL and courts interpret the executive order as requiring that all of a contractor's facilities are subject to OFCCP's requirements unless OFCCP grants a "separate facility waiver." See, e.g., *Trinity Indus., Inc. v. Herman*, 173 F.3d 527, 530 (4th Cir. 1999). In determining whether to grant a "separate facility waiver," OFCCP considers a variety of factors, including whether any work at the facility directly or indirectly supports or contributes to the satisfaction of the work performed on the contract, whether any costs associated with operating the facility are charged to the contract, and whether employees who normally work at the facility are required to perform work related to the contract at another facility. See OFCCP Separate Facility Exemption/Waiver Directive (DIR 2002-01). Similar waiver provisions exist under OFCCP's VEVRAA and Section 503 regulations; see 41 C.F.R. § 60-300.4(b)(3) and 41 C.F.R. § 60-741.4(b)(3).

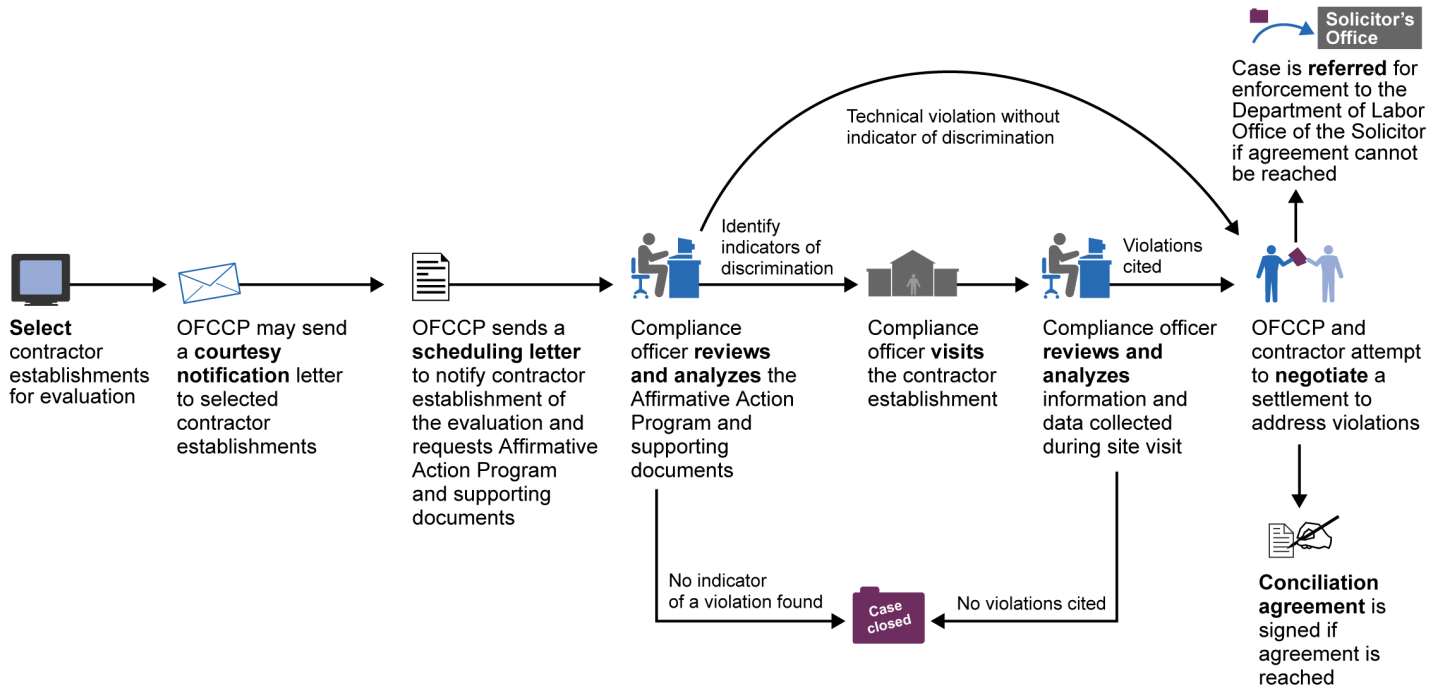
³⁰To make this determination, OFCCP uses the "single entity test," which considers a number of factors, including whether the entities have common ownership, whether the entities have common directors and/or officers, and whether one entity has de facto day-to-day control over the other through policies, management, or supervision of the entity's operations.

other factors.³¹ The total number of contractors to be reviewed each year is determined based on OFCCP's region and district office staffing levels. The final scheduling list is typically distributed to each district office based on the contractor establishments' physical location within the district office's jurisdiction and is sorted using any of a number of neutrally applied factors, such as alphabetical order, employee count at the establishment, contract value, or contract expiration date.³² When a contractor establishment is selected for evaluation, OFCCP typically provides a courtesy advance notice through a Corporate Scheduling Announcement Letter (CSAL) informing the establishment that they have been selected to undergo a compliance evaluation during the upcoming selection cycle. Once a contractor is scheduled for an evaluation, a "scheduling letter" is sent requesting the AAP—which outlines the contractor's compliance plan—and supporting data. Then, a compliance officer conducts a comprehensive desk audit, which is an off-site review of the submitted materials. If necessary, the compliance officer conducts an on-site review and further off-site analysis to make a final determination as to whether the contractor has committed any violations. (see fig. 2).

³¹ OFCCP's process for identifying establishments under its jurisdiction is an extensive process that requires pulling information from multiple information sources, such as federal acquisition and procurement databases, EEO-1 Reports, Dun & Bradstreet data, and U.S. Census Bureau data. There is no single database or other information source that OFCCP can use to establish its compliance evaluation scheduling list. For example, the Federal Procurement Data System-Next Generation (FPDS-NG) can be used to identify companies that have been awarded government contracts; however, it does not identify which companies have more than 50 employees. Similarly, FPDS-NG does not identify all establishments that belong to the same corporate family as the companies that hold government contracts. While the EEO-1 Report identifies federal contract establishments with employee counts, it does so through voluntary disclosure and the data are not available until after the EEO-1 data collection is complete, so the information is outdated, according to OFCCP officials. Additionally, the EEO-1 Report does not contain information about the contract to confirm that the contractor meets OFCCP jurisdictional thresholds such as contract number and contract value, according to OFCCP officials. To develop its scheduling list, OFCCP combines information from multiple disparate sources.

³² OFCCP may consider staff workload when distributing the scheduling list, according to agency officials. Officials may also transfer cases across offices to balance workload.

Figure 2: Typical Office of Federal Contract Compliance Programs (OFCCP) Compliance Evaluation Process



Source: GAO analysis of OFCCP documents. | GAO-16-750

Selected Office of Federal Contract Compliance Programs (OFCCP) Active Case Enforcement Principles

1. All contractors selected for a compliance review will be required to submit their Affirmative Action Program (AAP)—outlining their plan for compliance—and supporting documentation to OFCCP.
2. A comprehensive desk audit will be performed in every compliance evaluation to ensure the contractor's compliance with Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act, all as amended.
3. Indicators of potential discrimination may be of an individual and/or class (i.e., two or more victims) nature.
4. Contractor establishments that have undergone a compliance evaluation will be exempted from the scheduling of another compliance evaluation for 24 months from the date of closure of the compliance evaluation.

Source: OFCCP DIR 2011-01. | GAO-16-750

As part of its enforcement efforts, OFCCP changed its compliance evaluations process in December 2010 from what it called Active Case Management (ACM) to Active Case Enforcement (ACE). According to the OFCCP directive outlining ACE procedures for conducting compliance evaluations, ACM proved to be of limited utility because it did not allow OFCCP to effectively use all of its investigative tools, such as offsite review of records.³³ To address this limitation, OFCCP implemented the new ACE process, which requires evaluations of each selected contractor that are more comprehensive. This more comprehensive evaluation process includes, among other things, a determination of whether there are indicators of potential discrimination or violations that will require an onsite investigation. In addition to statistical and anecdotal evidence of discrimination, indicators of potential discrimination or other violations also include, but are not limited to: patterns of individual discrimination, patterns of systemic discrimination, patterns of major technical violations such as recordkeeping deficiencies, or failure to maintain an AAP.³⁴

OFCCP and EEOC

OFCCP is only one of the federal agencies responsible for enforcing equal opportunity laws and regulations. The EEOC enforces Title VII of the Civil Rights Act of 1964, as amended, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin. EEOC also is responsible for enforcing other federal laws that prohibit discrimination in employment based on age and disability, among other

³³Prior to ACE, there was a compliance evaluation step called an “abbreviated desk audit” where the compliance officer would look for indicators of discrimination and if there were none, the officer would close the case without assessing the AAP for potential affirmative action, record keeping or other technical violations, according to agency officials. The implementation of ACE removed the “abbreviated desk audit” and required a “full desk audit” in every case.

³⁴The final determination of discrimination is made on a case-by-case basis, based on multiple factors. To look for indicators of potential discrimination, OFCCP uses tools to conduct common statistical tests to identify the favored group from among those available in the analysis and conduct comparisons with the disfavored group, such as comparing the percentage of hires among the disfavored group to the percentage of hires among the favored group.

characteristics.³⁵ EEOC and OFCCP have some shared activities and have established a memorandum of understanding (MOU) and coordination regulations to minimize any duplication of effort. For example, under the MOU, individual complaints filed with OFCCP alleging discrimination under Title VII are generally referred to EEOC.³⁶ In addition, when EEOC receives a complaint not within its purview, but over which it believes OFCCP has jurisdiction, it will refer the complaint to OFCCP. Under the coordination regulations, OFCCP generally acts as EEOC's agent in investigating complaints of employment discrimination brought by certain persons with disabilities.³⁷

OFCCP's Compliance Evaluations Have a Number of Weaknesses that Impact the Effectiveness of its Enforcement Efforts

OFCCP's weak compliance evaluation selection process, reliance on voluntary compliance, and lack of staff training create several challenges to its enforcement efforts. While OFCCP conducted compliance evaluations for about 2 percent of all contractors in its jurisdiction, it is not able to determine the extent contractors are complying with equal employment opportunity requirements because of weaknesses in the contractor selection process. Instead, OFCCP relies on federal contractors to voluntarily comply with equal employment opportunity requirements, and some contractors may not be completing certain required activities. Further, the way OFCCP assigns compliance evaluations to district or area offices may result in geographic imbalances. Some industry groups and contractors we spoke with also

³⁵ For example, EEOC enforces the Age Discrimination in Employment Act of 1967 and Title I of the Americans with Disabilities Act of 1990, among other laws.

³⁶ Under the MOU, all complaints of employment discrimination filed with OFCCP alleging a Title VII basis (race, color, religion, sex, national origin, or retaliation) shall be received as complaints simultaneously dual-filed under Title VII. OFCCP acts as EEOC's agent for the purposes of receiving the Title VII component of these complaints. When OFCCP receives such a complaint and determines that the employer is not a federal contractor subject to Executive Order 11246, it shall transfer the complaint to EEOC. OFCCP will retain, investigate, process, and resolve complaints alleging discrimination of a systemic or class nature on a Title VII basis in dual-filed complaints. See Coordination of Functions; Memorandum of Understanding, 76 Fed. Reg. 71,029 (Nov. 16, 2011). According to OFCCP officials, EEOC and OFCCP are currently revising the MOU.

³⁷ See 29 C.F.R. pt. 1641 and 41 C.F.R. pt. 60-742. These regulations establish procedures for processing and resolving complaints of employment discrimination filed against employers holding government contracts or subcontracts, where the complaints fall within the jurisdiction of both Section 503 (generally enforced by OFCCP) and the Americans with Disabilities Act of 1990 (generally enforced by EEOC).

reported variation in how OFCCP conducts compliance evaluations. We found that these reported inconsistent practices may be attributed in part to a lack of timely and continuing training for compliance officers. When OFCCP finds violations during compliance evaluations, it often resolves those violations with conciliation agreements that outline remedial action that contractors agree to take.

Weakness in OFCCP’s Process for Selecting Contractors for Compliance Evaluations Makes it Challenging to Know the Extent to Which Equal Opportunity Requirements Are Followed

Since fiscal year 2010, OFCCP has not found violations in the vast majority of its compliance evaluations. For example, in fiscal year 2015 OFCCP did not find violations in 83 percent of its evaluations and found discrimination in about 1 percent of evaluations (see table 1).

Table 1: Types of Violations Cited by the Office of Federal Contract Compliance Programs (OFCCP) as a Result of Compliance Evaluations in Fiscal Years 2010-2015

Types of violation cited, if any	Number of cases (percent)					
	2010	2011	2012	2013	2014	2015
No violations	3,673 (83)	2,559 (74)	2,342 (67)	2,706 (73)	2,996 (86)	1,958 (83)
All violations	772 (17)	905 (26)	1,154 (33)	990 (27)	475 (14)	387 (17)
Discrimination findings	71 (2)	76 (2)	88 (3)	54 (1)	39 (1)	32 (1)

Source: Office of Federal Contract Compliance Program data. | GAO-16-750

Note: “All violations” includes both findings of discrimination against protected workers or applicants and technical violations of regulatory requirements that do not result in a finding of discrimination, such as violations of the reporting, posting, or record keeping requirements. OFCCP is unable to accurately count technical violations because of known limitations in its violations coding, which they are working to address, according to agency officials.

In 2015, OFCCP conducted 2,345 compliance evaluations, which represents about 2 percent of federal contractor establishments in its jurisdiction. OFCCP has been conducting evaluations that are more comprehensive—every evaluation includes a comprehensive analysis of contractors’ AAPs and supporting documentation—under Active Case Enforcement since December 16, 2010. However, the number of evaluations has decreased by 47 percent since that time.

The process used by OFCCP to select contractors for compliance evaluations cannot ensure that contractors with the highest risk of not

following equal employment opportunity and affirmative action requirements will be selected. OFCCP's contractor selection process is nonrandom and does not produce a generalizable sample of contractors for evaluation.³⁸ As a result, OFCCP is not able to draw conclusions about noncompliance risk in the overall federal contractor population. While the selection process includes consideration of a number of neutrally applied factors, such as alphabetical order, employee count at the establishment, contract value, or contract expiration date, OFCCP is not able to identify which of these factors, or any factors, are associated with risk of noncompliance due to the use of nonrandom selection of contractors for review. Given these limitations, OFCCP is unable to quantify the extent to which federal contractors in its jurisdiction are noncompliant, and does not have reasonable assurance that it is focusing its efforts on those contractors at greatest risk of not following equal employment opportunity or affirmative action requirements. Standards for internal control in the federal government state that internal controls should provide for an assessment of the risks the agency faces from both external and internal sources.³⁹ Past efforts by OFCCP to develop a model for identifying factors associated with noncompliance did not prove useful when put into practice, according to agency officials, in part because the model was developed with a nonrandom set of contractor establishments selected from prior OFCCP compliance reviews. OFCCP is currently working to identify potential noncompliance risk in the federal contractor population, although it has not yet incorporated these factors into its selection process.

OFCCP Relies on Voluntary Compliance with Requirements

OFCCP relies significantly on voluntary compliance by federal contractors because it is unable to conduct compliance evaluations for the tens of thousands of establishments in its jurisdiction. However, this approach

³⁸OFCCP's process for selecting contractors for compliance evaluations must comply with applicable Fourth Amendment requirements for administrative searches. In general, to be consistent with the Fourth Amendment, the agency must select a contractor based on: (1) specific evidence of an existing violation, (2) reasonable legislative or administrative standards that have been met with respect to that particular contractor, or (3) an administrative plan containing specific neutral criteria. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), *United States v. Mississippi Power & Light Co.*, 638 F.2d 899 (5th Cir. 1981). According to OFCCP officials, a neutral selection is not necessarily random.

³⁹[GAO/AIMD-00-21.3.1](#).

cannot ensure that contractors are complying with basic requirements like developing and maintaining an AAP. OFCCP typically provides establishments selected for a compliance evaluation with a courtesy advance notice through a CSAL before providing them with a scheduling letter when their evaluation has been initiated. The scheduling letter includes a request for the establishment to submit data, including the AAP, within 30 days.⁴⁰ However, according to OFCCP compliance evaluation data, in 2015, close to 85 percent of contractor establishments did not submit an AAP within 30 days of receiving a scheduling letter, as requested, and OFCCP officials said that it was not unusual for establishments to request an extension.⁴¹ By signing a qualifying federal contract, covered contractors are required to develop an AAP within 120 days of contract commencement and update it annually.⁴² However, OFCCP has no process for ensuring that the tens of thousands of establishments that have signed a qualifying federal contract have developed an AAP within 120 days of the commencement of the contract, or updated it annually. Standards for internal control in the federal government state that internal control activities help ensure that management's directives are carried out and that they be effective and efficient in accomplishing the agency's control objectives.⁴³ Because OFCCP does not have a mechanism to ensure that these contractors are implementing this requirement, it has no assurance that this agency objective is being accomplished. Implementing a mechanism, such as by

⁴⁰The CSAL also provides an invitation to contractors to utilize the various compliance assistance resources and activities provided by OFCCP through its website and regional offices.

⁴¹According to OFCCP officials, if a contractor does not comply with the scheduling letter request, their ultimate recourse is to initiate administrative enforcement proceedings with the Office of the Solicitor.

⁴²As previously mentioned, only contractors that meet the applicable thresholds are required to comply with the AAP requirements. In general, under Executive Order 11246 and Section 503, the AAP requirements apply to contractors with 50 or more employees and a contract of \$50,000 or more; under VEVRAA, the AAP requirements apply to contractors with 50 or more employees and a contract of \$150,000 or more. Under OFCCP's regulations, agencies shall require each bidder or prospective contractor to state, in the bid or in writing at the outset of negotiations for the contract, whether it has developed and has on file AAPs at each establishment, among other things. 41 C.F.R. § 60-1.7(b)(1). However, OFCCP is not able to verify the actual development of the AAP or whether it is being updated annually, according to OFCCP officials.

⁴³[GAO/AIMD-00-21.3.1](#).

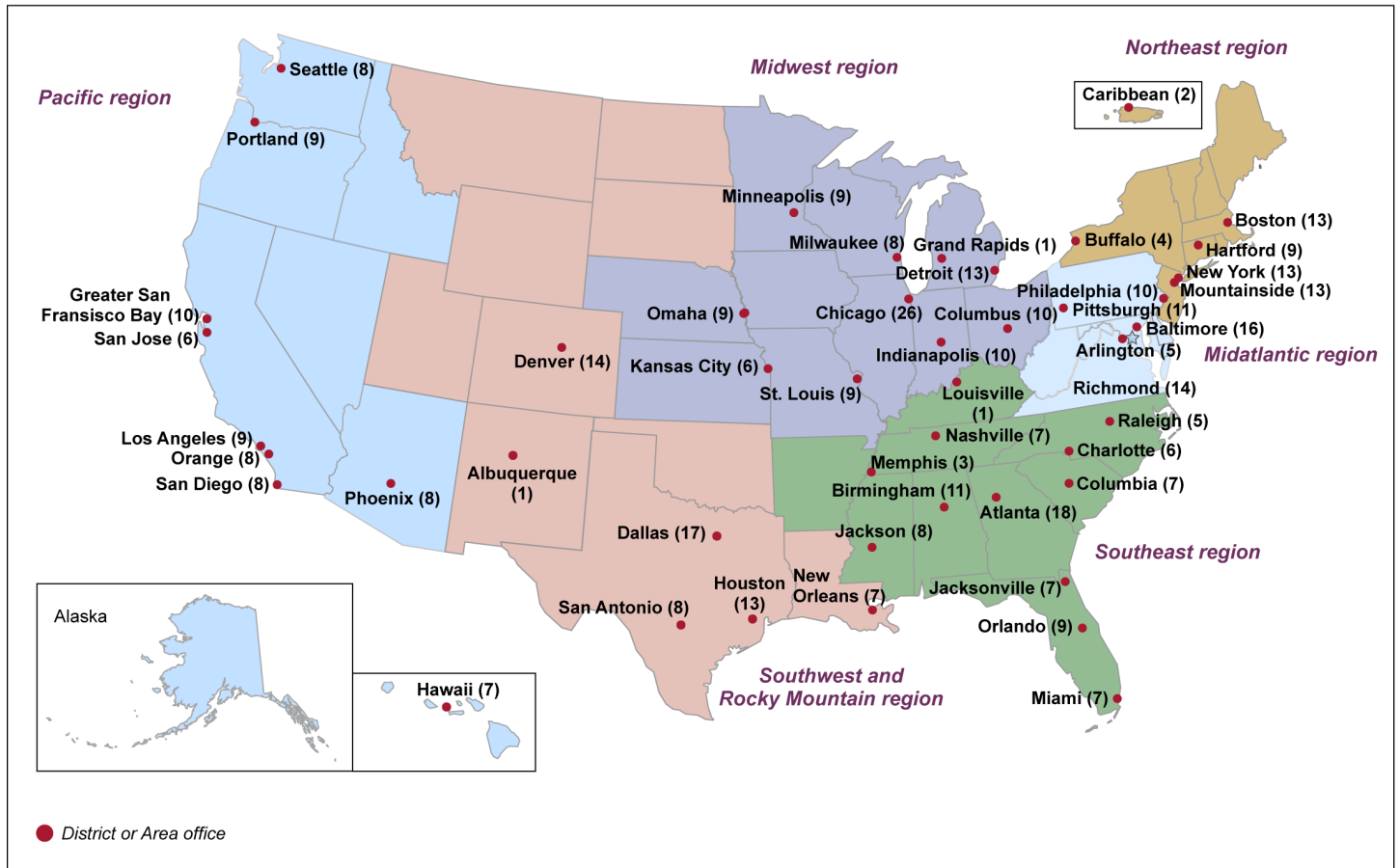
allowing contractors to submit their AAPs electronically or certify that they have completed annual updates, could provide OFCCP reasonable assurance that contractors are complying with this requirement, which is a central component of OFCCP's efforts to prevent discrimination and ensure covered contractors take affirmative action to ensure equal employment opportunities for protected workers.⁴⁴

OFCCP's Compliance Evaluation Assignment Process May Result in Geographic Imbalances

OFCCP emphasizes the geographic location of compliance officers and contractor establishments when distributing its scheduling list, which may result in geographic imbalances. OFCCP distributes its scheduling list—or assigns compliance evaluations to OFCCP district or area offices—based on the number of compliance evaluation officers located in each district and the physical address of the contractor establishments. In fiscal year 2015, there were approximately 433 compliance officers spread across OFCCP's 48 district and area offices (see figure 3). In accordance with OFCCP's distribution method, the physical address of each establishment determines which OFCCP district or area office conducts the evaluation. OFCCP officials said they do this to minimize potential travel costs in the event that a compliance evaluation should require an onsite visit from a compliance officer. However, agency officials have not updated the way they distribute the scheduling list to reflect a steadily declining percentage of evaluations that require onsite visits. Specifically, in 2015, 25 percent of evaluations required onsite visits, according to agency officials. OFCCP officials told us that they have had success in assigning most specialized evaluations examining a contractor's functional or business unit to district or area offices irrespective of geographic location.

⁴⁴Implementing such a mechanism may require the agency to initiate rulemaking and/or comply with the Paperwork Reduction Act of 1980. Under the Paperwork Reduction Act, before collecting information from 10 or more non-federal entities, federal agencies are required to follow certain procedures, including publishing the information collection for public comment and obtaining approval from the Office of Management and Budget. In addition, federal agency rulemaking may be subject to requirements under various statutes and executive orders, such as the notice and comment process set forth by the Administrative Procedure Act.

Figure 3: Compliance Officer Distribution Across 48 Office of Federal Contract Compliance Programs (OFCCP) District and Area Offices



Source: GAO analysis of OFCCP data. | GAO-16-750

Note: OFCCP also has an office in Guam, but its staff report to the Hawaii Area Office and are included in the compliance officer total for the Hawaii Area Office, according to OFCCP officials. OFCCP also has an office in Las Vegas, Nevada, but its staff report to the Phoenix District Office and are included in the compliance officer total for the Phoenix District Office, according to OFCCP officials.

Further, OFCCP officials acknowledge that they have not aligned the current geographic distribution of compliance officers across district and area offices with the national distribution of contractors. OFCCP officials told us that the large variation in the number of compliance officers in

each office—ranging from 1 to 26—was due to differing attrition levels across offices.⁴⁵ OFCCP is trying to resolve this issue by changing how new compliance officer positions are allocated in the field in response to attrition. However, it is not yet known how long this action might take and it does not address the decreasing extent to which OFCCP has used onsite visits during compliance reviews. Standards for internal control in the federal government state that management of human capital, which includes maintaining continuity and providing personnel the right structure for operational success, helps ensure that directives are carried out and are effective and efficient in accomplishing the agency’s objectives, which for OFCCP is ensuring federal contractor compliance with nondiscrimination requirements.⁴⁶ However, the lack of a timely response to changes in human capital or changes to the scheduling process to avert the necessity of human capital changes, may impact the effectiveness of the scheduling list distribution process, and the proportion of contractors OFCCP evaluates in a given district office will be driven primarily by the number of compliance officers in that district, and not by relevant risk factors.

Reported Inconsistencies in Compliance Evaluations May Be Exacerbated by Lack of Training

Some industry groups and contractors we spoke with reported variation in how OFCCP conducts compliance evaluations. About half of the 14 industry groups and several contractors we spoke with said that regional compliance evaluation activities were inconsistent across offices. For example, one contractor we interviewed said there was uncertainty in the compliance evaluation process due to inconsistency among the regions. Specifically, the contractor described a situation where different OFCCP district offices interpreted nondiscrimination language on identical purchase orders used nationally by the contractor’s establishments as noncompliant for different reasons. The contractor, who implemented many of its nondiscrimination policies and practices nationally, told us he finds understanding how to ensure uniform compliance untenable under such conditions. Similarly, a contractor that responded to a 2015 OFCCP customer experience survey observed that while OFCCP’s regulatory language is the same nationwide, the interpretations vary depending on

⁴⁵OFCCP’s workforce has declined about 19 percent since fiscal year 2011.

⁴⁶[GAO/AIMD-00-21.3.1](#).

the region or district office.⁴⁷ OFCCP officials noted that while a contractor may have identical policies and practices across its establishments, the specific activities and circumstances at each establishment, such as significant hiring or promotion activity at one establishment, might result in different compliance evaluation findings.

OFCCP has taken recent steps to improve the quality and consistency of compliance evaluations across its offices. In 2014, OFCCP issued a revised Federal Contract Compliance Manual to provide both new and experienced compliance officers with the procedural framework for executing quality and timely compliance evaluations and complaint investigations.⁴⁸ OFCCP implemented the revisions to the manual to support the more comprehensive compliance evaluation process under ACE and with the intent of creating a greater level of consistency across regions. However, the manual acknowledges that there may be minor and infrequent differences between regions and offices because some discretion remains with compliance officers and their supervisors. In 2015, OFCCP created a work group to propose additional changes and updates to the manual, according to agency officials. OFCCP is currently updating the manual to incorporate recent regulatory and procedural changes. OFCCP also reported that its internal quality assurance program, which audits 10 percent of closed cases quarterly, showed measurable improvement in the consistency of its casework and the ability to systematically identify areas for improvement and training. Since fiscal year 2012, OFCCP reported reducing compliance evaluation major deficiencies—errors impacting the ability to identify discrimination—from 26 to 2 percent. Similarly, OFCCP reported reducing technical deficiencies—procedural errors not impacting the ability to identify discrimination—from over 40 to 22 percent. OFCCP field office staff may

⁴⁷OFCCP conducted a survey of federal contractors whose compliance evaluations were closed between fiscal year 2011 and July 17, 2015. They received a response rate of only 7 percent. Therefore, the responses should not be generalized to the population. Among those who did complete the survey, they identified issues related to the consistency of compliance evaluations across regional and district offices, including narrative responses that compliance officers were not consistent in their requests for information.

⁴⁸The Federal Contract Compliance Manual is used by OFCCP compliance officers as a procedural manual, and it may also provide contractors and subcontractors more transparency and clarity about basic OFCCP procedures and processes. OFCCP plans to publish a revised edition of the manual to reflect regulatory changes and capture new agency initiatives, directives, internal guidance, and certain policies.

also coordinate across district offices to improve compliance evaluation consistency, according to agency officials. For example, in one region, district offices hold conference calls to share information across offices to improve the consistency of the evaluation process.

Lack of training to help compliance officers maintain the skills needed to conduct compliance evaluations could also lead to inconsistent practices across offices. Beginning in 2013, OFCCP began focusing its compliance officer professional training primarily on building knowledge about and skills related to recent regulatory changes.⁴⁹ OFCCP officials have developed a multiyear training plan that includes resuming a more general training schedule once the agency is past building the necessary knowledge and skills for compliance officers related to recent regulatory changes. In the interim, without access to essential professional training, some compliance officers may not have the skills to address the range of issues and topics that are part of compliance evaluations, which could result in inconsistent practices. For example, compliance officers we spoke to in one district office were concerned that the lack of ongoing professional training limited their ability to correctly and consistently conduct compliance evaluations. In some regions we visited, management addressed this challenge by pairing compliance officers with less expertise in particular issues with more experienced compliance officers. GAO guidance on assessing federal strategic training and development efforts also recommends that in planning training and development efforts, agencies address employees' career development issues as well as skill-specific training needs.⁵⁰ In addition, standards for internal control in the federal government state effective management of human capital is essential to ensuring that management's directives are carried out and that training should be aimed at developing and retaining employee skills.⁵¹

OFCCP also may not be providing timely training for new compliance officers. Since 2010, OFCCP has provided new compliance officers with

⁴⁹Since 2013, OFCCP conducted over 23 staff webinars focused on regulatory changes, according to agency officials.

⁵⁰See GAO, *Human Capital: A Guide for Assessing Strategic Training and Development Efforts in the Federal Government*, [GAO-04-546G](#) (Washington, D.C.: March 2004).

⁵¹[GAO/AIMD-00-21.3.1](#).

its Basic Compliance Officer Training package, which consists of 16 courses covering the entire compliance evaluation process. However, according to agency officials, budget constraints have made it difficult to hold timely centralized training for new compliance officers. In half of the regions we visited, compliance officers or management officials we spoke with noted that this training is not provided in a timely manner after being hired. For example, one compliance officer told us he or she worked for 8 months before receiving formal training. Standards for internal control in the federal government state that a factor in fostering a positive control environment is all personnel possessing and maintaining a level of competence that allows them to accomplish their assigned duties and management providing needed training.⁵² In addition, GAO guidance on assessing federal strategic training and development efforts recommends that an agency consider both the suitability and timeliness of the selection of employees for training and development given employees' current duties and existing skills and competencies.⁵³ OFCCP officials told us that in the absence of timely formal training, compliance officers may rely on other development opportunities, such as on-the-job training. In one district office, compliance officers we spoke with explained that the lack of uniform, timely training made compliance officers feel unprepared when they began their job. Before receiving formal training, the compliance officer told us newly hired compliance officers may rely on informal, non-standardized, on-the-job training led by the regional or district office management that may promote inconsistent practices. While structured on-the-job learning experiences can be an appropriate means of staff development, the content of these experiences may vary across regions and district offices and lead some compliance officers to feel unprepared to do their jobs, potentially further exacerbating any inconsistencies in compliance evaluations.

Most Violations Are Resolved Through Conciliation Agreements

Between fiscal years 2010 and 2015, OFCCP resolved 99 percent of violations with conciliation agreements—agreements between OFCCP and the contractor—that outline remedial action that contractors agree to take to correct violations. In conciliation agreements resolving violations, contractors may be required to take a range of remedies—including

⁵²GAO/AIMD-00-21.3.1.

⁵³GAO-04-546G.

corrective remedies and make-whole relief—depending on the facts of the case (see table 2 for data on some of the remedies used to address discrimination findings).⁵⁴ Specifically:

- Some corrective remedies include injunctive-type action designed to stop the discriminatory conduct, such as requiring the contractor to stop using discriminatory interviews or tests and implement self-monitoring procedures. For example, in one case file we reviewed, a social services organization that failed to implement a tracking system for applicants, hires, promotions, and terminations, was required as part of the conciliation agreement to implement such a tracking system and retain support data for at least two years.
- The conciliation agreements also may include monetary and other relief, including back pay, job offers, promotion, and retroactive seniority designed to make the victims of employment discrimination whole (see table 2). For example, in one case file we reviewed, a veterans’ health care services company that OFCCP found to have discriminated against applicants based on their race was required to extend job opportunities to affected Black applicants currently interested in employment and provide financial remuneration to all Black applicants identified as victims of discrimination.

Table 2: Remedies Included in Conciliation Agreements to Address Federal Contractor Discrimination Findings, Fiscal Years 2010-2015

Remedy	2010	2011	2012	2013	2014	2015
Amount of back pay and number of beneficiaries	\$10 million	\$12 million	\$11 million	\$8 million	\$12 million	\$6 million
	for about 12,400 people	for about 15,200 people	for about 30,900 people	for about 9,300 people	for about 23,000 people	for about 16,000 people
Job opportunities obtained	1,478	1,433	3,482	1,453	1,267	530

Source: Office of Federal Contract Compliance Programs (OFCCP) data. | GAO-16-750

Note: Total amount of back pay rounded to the nearest million.

⁵⁴OFCCP officials said the case management system is unable to thoroughly track the specific non-monetary remedies that are included in conciliation agreements. The 2017 OFCCP Congressional Budget Justification includes a goal to systematically track OFCCP activities and outcomes related to conciliation agreement monitoring to allow OFCCP to monitor, evaluate and improve its effectiveness in finding victims and delivering to them the remedies that it negotiates in conciliation agreements.

**Summary of Office of the Solicitor
Administrative Enforcement Procedures**

Department of Labor (DOL) Office of Administrative Law Judges: A contractor cited for violating equal employment opportunity and affirmative action requirements may have a formal hearing before a DOL administrative law judge. The administrative law judge issues a Recommended Decision and Order that, if favorable to the Office of Federal Contract Compliance Programs (OFCCP), may include contractor remedies for the violation. Any party may file an exception to the recommendation of the DOL administrative law judge with the Administrative Review Board (ARB). There was an average of fewer than four cases filed with an administrative law judge per year since fiscal year 2010.

DOL Administrative Review Board: The ARB is the internal DOL appellate body that issues the final agency decision. The ARB issues a Decision and Order that, if favorable to OFCCP, enjoins the violations, requires the contractor to provide remedies, or imposes sanctions, as appropriate. There was an average of fewer than one case appealed to the ARB per year since fiscal year 2010.

Federal District Court: If OFCCP wins before the administrative review board, the contractor can appeal to federal district court. The district court decision may be appealed to the applicable Court of Appeals. There was an average of fewer than one district court appeal per year since fiscal year 2010.

Source: DOL, Office of the Solicitor. | GAO-16-750

OFCCP compliance officers are responsible for monitoring the implementation of these remedies during the monitoring and reporting period set forth in the conciliation agreement to demonstrate progress toward rectifying the violation. If the contractor is not demonstrating progress, OFCCP may open an investigation into compliance with terms of the agreement, according to agency officials.

While OFCCP resolved most citations for violations through conciliation agreements, since 2010, OFCCP has referred a small number of cases to the DOL Office of the Solicitor for enforcement through administrative enforcement proceedings, according to data we reviewed. Additionally, OFCCP may refer a case to the Office of the Solicitor in certain other circumstances, such as when an establishment has denied compliance officers access to information or their facilities. When referred a case, the Office of the Solicitor generally reviews the case and may take further action through administrative enforcement procedures.⁵⁵

One of the sanctions that may be imposed through administrative enforcement proceedings is debarment, meaning the companies or individuals are declared ineligible to receive future federal contracts.⁵⁶ According to OFCCP officials, debarments are infrequent because they view them as a last resort. There was an average of fewer than one debarment per year since fiscal year 2010. OFCCP officials told us they prefer to obtain compliance through conciliation agreements over debarment because contractors who are debarred are no longer under OFCCP's jurisdiction and not subject to the worker protection requirements the agency oversees. Although rare, OFCCP can also bypass the administrative enforcement procedures and refer cases to the Department of Justice for litigation.

⁵⁵See 41 C.F.R. pt. 60-30 and 29 C.F.R. pt. 18, subpt. B.

⁵⁶Debarment may be imposed for an indefinite period, or it may be imposed for a fixed period of not less than 6 months (no more than 3 years under VEVRAA and Section 503). 41 C.F.R. §§ 60-1.27(b), 60-300.66(b), 60-741.66(b). OFCCP regulations also establish procedures by which a debarred contractor can be reinstated. 41 C.F.R. §§ 60-1.31, 60-300.68, 60-741.68.

OFCCP's operating plan emphasizes the importance of timely completion of compliance evaluations to effectively obtain relief for affected employees and applicants, although compliance evaluation processing times are lengthy. In 2015, OFCCP's average processing days for cases without violations was well over 6 months at 247 days (median was 172). The average processing days for cases with nondiscrimination violations was over a year at 402 days (median was 309), and the average processing days for cases with findings of discrimination were 1,487 (median was 1,188).⁵⁷ Some contractors and industry groups we spoke with noted concerns with the resources devoted to lengthy and expansive compliance evaluations. For example, one contractor told us an ongoing yearlong evaluation was consuming a great deal of company resources and was uncertain as to when OFCCP would close the evaluation. OFCCP officials told us contractors' delays in providing AAPs extends the length of compliance evaluations. OFCCP's 2015 timeliness measures for case closure were based on case type: 120 days for cases with no violations, 180 days for cases with violations but no findings of discrimination, and 900 days for cases with findings of discrimination. In fiscal year 2015, OFCCP closed 32 percent of cases without violations within 120 days, and 16 percent of cases with violations but no finding of discrimination within 180 days. OFCCP has since revised its measures and begun benchmarking a new median-day goal, beginning with fiscal year 2016, to address concerns about incentives to close cases prematurely.⁵⁸

⁵⁷Data on processing days for discrimination cases includes both supply and service and construction cases.

⁵⁸OFCCP's fiscal year 2016 timeliness measures for median days to process a case are also based on case type: 140 days for cases with no violations, 300 days for cases with violations but no findings of discrimination, and 900 days for cases with findings of discrimination.

OFCCP Outreach and Compliance Assistance Activities Have Decreased and Stakeholders Reported Need for Improvement

Outreach Activities and Compliance Assistance Have Decreased Since 2012 and Contractors Often Use Third Parties for Compliance Support

Outreach

Prior to 2014, OFCCP focused its outreach on conducting a wide range of outreach events that furthered its mission through informing protected workers and applicants of their rights. Those events included:

- developing stakeholder relationships through contact with, and presentations to, industry and community groups;
- participating in job fairs;
- using tools and technologies to engage workers and communities through its website, and other communication strategies; and
- translating OFCCP products into various languages.

These activities took place at both the national and regional level. In one region, an official described an event designed to link contractors with workers protected under OFCCP requirements that was attended by 200 contractors and 10-15 community-based organizations.

Since 2012, OFCCP significantly decreased the number of outreach events it conducted to assist stakeholders from 1,257 activities in 2012 to 204 activities in 2014, a decrease of over 80 percent. This is because, over the past 4 years, OFCCP's outreach goals have evolved toward refocusing its outreach program and supporting the agency's enforcement

role. Specifically, in 2014, OFCCP made a strategic decision to further advance effective enforcement and regulatory reform as its highest priorities and outreach as a lower priority. DOL's 2014-2018 Strategic Plan states that strengthening enforcement is part of a multi-year effort to restore OFCCP as a premier civil rights agency. Officials also noted budget constraints as an additional factor contributing to the decrease in events. Under the agency's new focus, for example, OFCCP now considers efforts to work closely and strategically with community-based organizations to identify workers who were harmed by discrimination as community outreach, in addition to typical outreach activities.

Stakeholders we spoke with identified areas where OFCCP outreach activities could be improved. Of the 27 stakeholders we spoke with:

- 14 stakeholders said OFCCP could better leverage existing resources to conduct outreach to protected workers and job seekers; and
- 6 of these 14 stakeholders identified outreach to veterans, disabled persons, and the Lesbian, Gay, Bisexual, and Transgender community as areas where OFCCP should increase its focus.

For example, an official from one civil rights advocacy group said the extent to which OFCCP has reached out to veterans about resources available to them has been limited. This official was aware of veterans who were unaware of their protections under VEVRAA. Another industry group official said that it would be helpful if OFCCP worked with unions to improve hiring of women and minorities. A few groups we spoke with acknowledged OFCCP's resource constraints, but by decreasing outreach efforts, OFCCP may not be reaching the preponderance of workers, applicants, and most federal contractors. Standards for internal control in the federal government state that management should ensure there are adequate means of communicating with, and obtaining information from, external stakeholders that may have a significant impact on the agency achieving its goals.⁵⁹ However, without improvement in outreach efforts, OFCCP may not be able to educate employees of federal contractors about their rights and contractors about their obligations, which is critical to OFCCP's mission.

⁵⁹ [GAO/AIMD-00-21.3.1](#).

Regarding OFCCP's outreach efforts to communicate information on recent regulatory changes and the updated enforcement process, 11 stakeholders and 3 contractors told us they did not think OFCCP's efforts had been effective. Of these, 9 stakeholders said that they would like OFCCP to provide more opportunities for their involvement and input in the policy process. For example, one industry group official told us that when OFCCP was updating the VEVRAA and Section 503 regulations, the listening sessions were held too late. OFCCP officials, however, said that in addition to holding six listening sessions, OFCCP routinely met with industry liaison groups to provide members with compliance assistance and agency updates. Further, officials told us that the final regulations were revised significantly based on contractor feedback.

Compliance Assistance

OFCCP conducts a variety of compliance assistance events; however the number of events has decreased since 2012. According to OFCCP officials, in fiscal year 2016, compliance assistance is available and delivered on-demand to contractors and covers a variety of topics, including understanding the laws and executive order that OFCCP enforces, clarifying regulatory changes, and preparing an affirmative action program, among others. Compliance assistance includes seminars, one-on-one meetings, and webinars designed specifically for contractors. For example, OFCCP recently conducted three webinars for contractors related to the final rule prohibiting pay secrecy policies and actions, and it plans to conduct other webinars on new regulatory changes and policies.⁶⁰ Similarly, officials in one district office described providing videoconference compliance assistance to a group of contractors who were going to be operating in the region in the aftermath of Hurricane Sandy.

OFCCP's compliance assistance also includes a "Help Desk" and an email inquiry process that contractors can use for compliance issues. OFCCP officials said OFCCP received 903 emails and 2,239 phone calls through its tools in fiscal year 2015; however, a significant portion of the

⁶⁰Executive Order 13665, signed on April 8, 2014, amended Executive Order 11246 to include a prohibition on discrimination against employees and job applicants for inquiring about, disclosing, or discussing pay under certain circumstances. DOL issued a final rule implementing this Executive Order on September 11, 2015, which took effect January 11, 2016. Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, 80 Fed. Reg. 54,934 (Sept. 11, 2015).

phone calls were from potential victims of discrimination. While OFCCP conducts a variety of compliance assistance activities, the number of compliance assistance events decreased by more than 30 percent since 2012. OFCCP noted budget constraints as one reason for the decrease.

Of the 24 contractors we spoke with, 20 told us that they use third-party support, such as consultants and attorneys knowledgeable about the relevant federal laws, executive orders, regulations, and processes, to help them understand the applicable requirements, interpret guidance materials, and develop their AAP. Stakeholders and contractors also identified various reasons for not using OFCCP compliance assistance, including:

- fear that asking OFCCP for assistance would call attention to them and possibly make them a target for future OFCCP enforcement actions, such as compliance evaluations; and
- having their own resources, such as third party assistance, or not needing OFCCP assistance.

OFCCP officials noted that while some contractors may be hesitant to contact them, there are no ramifications for contacting OFCCP to ask questions. They added that no compliance evaluation had ever been initiated as a result of a call or written inquiry received by OFCCP's Help Desk.

Multiple industry groups and contractors we spoke with said complying with federal equal employment and affirmative action requirements is challenging:

- *Some industry groups and contractors we spoke with believe data collection and new documentation requirements are extensive and have increased.* Ten industry groups and ten contractors we spoke with said that OFCCP data collection and documentation requirements are extensive and new data collection requirements have been particularly problematic. For example, updates to the Section 503 and VEVRAA regulations have increased data collection and analysis requirements for contractors, who must compile and retain certain records for three years, including data on the number of applicants known to be protected veterans or to have disabilities, the total number of applicants hired, and the total number of individuals with disabilities and protected veterans hired. To comply with these requirements, some contractors we spoke with said they needed to update their human resource information systems, forms, and

practices. However, OFCCP officials told us that the collection of data required by the Section 503 and VEVRAA regulations is needed by contractors to review and assess their effectiveness at recruiting protected workers, as well as create accountability. Further, they said parts of the regulations as originally proposed were scaled back or eliminated to address cost and burden concerns. In OFCCP's fiscal year 2017 budget justification, OFCCP states that focusing on providing access to compliance assistance and resources to help minimize burden and support contractor compliance is one of its priorities.

- *Some industry groups and a few contractors we spoke with find compliance activities overly burdensome and challenging.* Nine industry groups and two contractors we spoke with reported being overwhelmed by the magnitude of recent regulatory changes and specifically the extent of additional requirements. One industry group official said its members struggle with managing a compliance program with hundreds of locations, tens of thousands of employees, and multiple OFCCP evaluations each year. Another industry group official spoke of the burden for a small company, which may have only one person devoted to human resources management as a small part of their overall responsibilities.
- *Some industry groups and a few contractors we spoke with reported that compliance costs and resources are significant or have increased due in part to the cost of additional data collection requirements and the need to hire additional staff or consultants.* Thirteen industry groups and four contractors we spoke with had concerns with increasing costs and resources required to comply with OFCCP requirements. One industry group official said that while a large federal contractor may have in-house expertise to handle most compliance evaluations, it may need outside legal counsel for a particular evaluation if it does not have experience in a particular area. This official also said other contractors rely on outside counsel for all of their OFCCP compliance work. Charges for these types of services are significant, according to this official. For example, the official told us that an economic consultant may charge \$200-400 per hour, and legal counsel may charge \$600-700 per hour. In another example, an official of an industry group representing contractors said that the cost of complying with data requests can reach from the thousands to tens of thousands of dollars. OFCCP officials estimate that the cost of developing a new AAP is between \$3,000 and \$4,000.

OFCCP's operating plan states that providing compliance assistance to contractors to educate them about their nondiscrimination and affirmative

action obligations is needed to achieve its mission. However, without increased contractor utilization of OFCCP compliance assistance, federal contractors may face challenges in complying with federal equal employment and affirmative action requirements, all to the potential detriment of protected workers.

OFCCP Has Ongoing Efforts to Update Guidance Materials

OFCCP provides contractors with access to a variety of guidance materials. These materials, which appear on OFCCP's website, identify and explain Executive Order 11246, VEVRAA, and Section 503, and provide information that interprets their implementing regulations. OFCCP's guidance materials include Frequently Asked Questions (FAQs), contractor guides, and infographics.⁶¹ OFCCP uses guidance documents to explain how the agency interprets regulations and to provide information when additional clarification is needed. To develop the guidance, OFCCP officials said the agency reviews and discusses the types of inquiries it receives and processes that information to identify broad trends or areas where better guidance, education, or website navigability may assist contractors with understanding their obligations and workers with understanding their rights.

However, no contractor guides are currently available on OFCCP's website. Contractor guides typically assist contractors in understanding OFCCP compliance processes and policies. OFCCP removed these guides from the website in order to update them based on the final rules promulgated by OFCCP since 2013.⁶² According to OFCCP officials, the guides being updated include one for supply and service contractors, one for construction contractors, and one for new and small contractors. Although OFCCP reports in its fiscal year 2017 budget justification that focusing on developing stakeholder guidance is one of its priorities, the guides have been unavailable on the website for over 2 years and contractors must look for answers to their questions elsewhere. OFCCP

⁶¹OFCCP refers to these contractor guidance documents as technical assistance guides.

⁶²In 2013, OFCCP promulgated final rules updating its regulations under Section 503 and VEVRAA. In 2014, OFCCP issued a final rule implementing Executive Order 13672 expanding coverage of Executive Order 11246 to sexual orientation and gender identity, and in 2015 OFCCP issued a final rule implementing Executive Order 13665, Non Retaliation for Disclosure of Compensation Information. In 2016, OFCCP issued a final rule updating its regulations related to discrimination on the basis of sex.

officials told us that it will take time to develop the new guides, and the cost of developing them is not a dedicated part of their budget. To address the lack of available guidance materials, between 2013 and 2015, OFCCP delivered nearly 30 external training sessions focused on regulatory changes and updates, according to agency officials.

More than half of the contractors we spoke with said the OFCCP guidance is generally helpful, with some citing the FAQs as particularly helpful. However, many stakeholders, including 10 industry groups, 3 civil rights advocacy groups, and 6 contractors, told us the guidance is too general and lacks the specificity needed to understand the requirements. One contractor found FAQs, webinars, and Powerpoints helpful, but said that sometimes the materials were too general and ambiguous. For example, another contractor said that under the new regulations the contractor is required to revise its Equal Employment Opportunity “tag line.”⁶³ This contractor said that OFCCP eventually provided a sample tag line, but initially only provided FAQs that were not illustrative. Another contractor said that OFCCP guidance is sometimes open to interpretation and does not always provide a clear answer. For example, one guidance document stated that an activity “should” be conducted, but the OFCCP compliance officer interpreted it as the activity “must” be conducted.

Seven contractors and one industry group official told us that OFCCP’s guidance may sometimes be conflicting and could be simplified. For example, one contractor had questions for OFCCP on its guidance related to protected veterans. OFCCP initially provided a response but later offered a different response from the original one. Another official representing a contractor said that the guidance is written for an audience familiar with the materials and well steeped in the issues, and noted that the materials are not written for human resource generalists typically employed by small contractors. Nine stakeholders and three contractors told us they needed more guidance. For example, one stakeholder said that contractors would like to see guidance that is more specific to certain industries or situations. Another stakeholder said that smaller and

⁶³Under existing federal regulations, contractors are required to state in all solicitations or advertisements for employment that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin. Recent revisions to OFCCP’s regulations require that contractors add language regarding disability, protected veteran status, sexual orientation, and gender identity.

medium sized companies need more specific guidance on how to comply because they do not have the money to pay for predeveloped software that may be used to prepare AAPs.

According to the Plain Writing Act of 2010, plain writing is clear, concise, well-organized, and consistent with other best practices appropriate to the subject or field and intended audience.⁶⁴ Although the Plain Writing Act does not specify a particular standard, the experiences of contractors we spoke to indicate that OFCCP's guidance may not accomplish the purpose stated in the act to improve the effectiveness and accountability of federal agencies to the public by promoting clear government communication that the public can understand and use. The Office of Management and Budget (OMB) memorandum providing guidance on implementing the act states that plain writing avoids jargon, redundancy, ambiguity, and obscurity and can assist the public in complying with applicable requirements simply because people better understand what they are supposed to do. Plain writing can be essential to the successful achievement of legislative and administrative goals, and it promotes the rule of law, according to the OMB guidance. OFCCP officials told us they recently spent 2 years updating the agency's FAQs and directives to be more consistent with the OMB guidance after stakeholders complained that they contained excessive jargon.

We tested 24 available OFCCP FAQ documents with an automated grade-level readability test. According to the test, the reading level required for these guidance materials ranged from that of a high school 12th-grader to that of someone with a post-graduate degree, which demonstrates there is variation in the readability and complexity of OFCCP guidance. Thus, it seems likely that the information in these guidance materials may not be understandable to the range of contractors and human resource professionals attempting to comply with federal requirements. Standards for internal control in the federal government state that management should ensure there are adequate means of communicating with, and obtaining information from, external stakeholders that may have a significant impact on the agency achieving its goals.⁶⁵ Our interviews with contractors and stakeholder groups show

⁶⁴Pub. L. No. 111-274, 124 Stat. 2861.

⁶⁵[GAO/AIMD-00-21.3.1](#).

that many contractors do not clearly understand OFCCP compliance requirements and do not know what they are supposed to do to meet the requirements. According to OFCCP officials, FAQs may include negotiated language, technical terms, and other complex phrasing that they believe cannot be easily changed or simplified. However, in its fiscal year 2017 budget justification, the agency noted plans to issue new guidance interpreting or clarifying the application of recently finalized regulations, and to develop contractor guides to assist contractors tasked with complying with these new regulatory obligations. While OFCCP's plans may help mitigate some of the issues reported to us, without clearer guidance about the requirements, contractors may be hindered in their ability to comply with federal requirements due to a lack of understanding about the requirements.

Conclusions

Contractor compliance with federal equal employment opportunity and affirmative action requirements is increasingly important as the workforce continues to diversify and many workers face the risk of discrimination in the workplace, such as limited opportunities for hiring and promotion. OFCCP needs to ensure that contractors are complying with nondiscrimination requirements designed to promote and protect a diverse workforce, and our report identified areas for improvement. The process OFCCP uses to select contractors for compliance evaluations, its primary tool for enforcement, is not designed to focus on contractors with the greatest risk of noncompliance. OFCCP also lacks a mechanism to ensure contractors are voluntarily complying with nondiscrimination requirements by annually updating their Affirmative Action Plans (AAP). Further, without providing timely training to new compliance officers and essential ongoing professional training for all of its compliance officers, OFCCP cannot ensure consistency in its enforcement efforts across its offices.

Ensuring that contractors comply with equal employment opportunity and affirmative action requirements using effective outreach, assistance, and guidance can prevent discriminatory contractor practices at the outset. Regulatory requirements regarding contractors' nondiscrimination obligations have changed, but OFCCP has reduced the outreach and compliance assistance efforts that can help contractors understand these changes and workers understand their protections. Given that these recent regulatory updates may require contractors to significantly adjust their policies, practices, and data collection systems in order to comply with nondiscrimination requirements, it is essential that OFCCP provides effective outreach and compliance assistance, and that contractors

receive clear guidance. While enforcement has been the agency's predominant approach to achieving its mission, outreach, compliance assistance, and guidance in support of voluntary compliance provide important opportunities to extend the agency's influence beyond the few contractors that are evaluated and help OFCCP better achieve its mission.

Recommendations for Executive Action

To ensure that federal contractors are complying with equal employment opportunity requirements, we recommend that the Secretary of Labor direct the Director of OFCCP to take the following six actions:

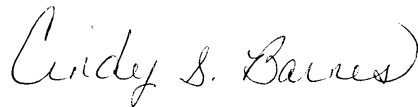
1. Make changes to the contractor scheduling list development process so that compliance efforts focus on those contractors with the greatest risk of not following equal employment opportunity and affirmative action requirements.
2. Develop a mechanism to monitor AAPs from covered federal contractors on a regular basis. Such a mechanism could include electronically collecting AAPs and contractor certification of annual updates.
3. Make changes to the current scheduling list distribution process so that it addresses changes in human capital and does not rely exclusively on geographic location.
4. Provide timely and uniform training to new staff, as well as provide continuing training opportunities to assist compliance officers in maintaining a level of competence to help ensure quality and consistency of evaluations across regions and district offices.
5. Review outreach and compliance assistance efforts and identify options for improving information provided to federal contractors and workers to enhance their understanding of nondiscrimination and affirmative action requirements to ensure equal employment opportunities for protected workers.
6. Assess existing contractor guidance for clarity to ensure that contractors have information that helps them better understand their responsibilities regarding nondiscrimination and affirmative action requirements to ensure equal employment opportunities for protected workers.

Agency Comments and Our Evaluation

We provided a draft of the report to the Department of Labor's Office of Federal Contract Compliance Programs for review and comment. DOL comments are reproduced in appendix III. In its comments, DOL indicated agreement with our recommendations and that the agency should take additional steps to strengthen oversight and improve compliance with nondiscrimination requirements. DOL also stated that actions are underway that would address some of our recommendations. We are pleased that DOL agreed with our recommendations and is taking action towards making these changes. In addition, DOL provided technical comments, which we incorporated as appropriate.

We are sending copies of this report to the appropriate congressional committees and the Secretary of Labor. In addition, the report will be available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact us at (202) 512-7215 or brownbarnesc@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix III.



Cindy Brown Barnes
Director, Education, Workforce, and Income Security Issues

Appendix I: The Laws and Executive Order Enforced by the Office of Federal Contract Compliance Programs (OFCCP)

The descriptions below provide only a summary and are not intended to be comprehensive. Although construction contracts are not included in the body of the report, they are included here. Additional details on applicable requirements and coverage can be found in the cited sources.

Executive Order 11246 (Equal Employment Opportunity):¹ Executive Order 11246—first issued in 1965 and amended by subsequent executive orders several times over the years—prohibits covered federal contractors from discriminating in employment decisions on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. It also requires these contractors to take affirmative action to ensure that equal opportunity is provided in employment without regard to these protected characteristics. In addition, Executive Order 11246 prohibits covered contractors from, under certain circumstances, taking adverse employment actions against applicants and employees for asking about, discussing, or sharing information about their pay or the pay of their co-workers.

In general, federal contractors and subcontractors, and federally-assisted construction contractors and subcontractors, who do over \$10,000 in federal government business in a year are covered by Executive Order 11246. Under OFCCP's implementing regulations, non-construction contractors with contracts of \$50,000 or more and 50 or more employees must develop and maintain a written Affirmative Action Program (AAP) that covers each of their establishments. Companies whose sole coverage comes from construction contracts or federally assisted construction contracts are not required to develop an AAP, but they must comply with a set of specific affirmative actions outlined in the regulations.

Section 503 of the Rehabilitation Act of 1973 (Section 503):² Section 503, as amended, requires covered federal contractors to take affirmative

¹Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (Sep. 28, 1965), as amended by Exec. Order No. 11,246, 30 Fed. Reg. 12,935 (Oct. 12, 1965), Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 17, 1967); Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 12, 1969); Exec. Order No. 12,086, 43 Fed. Reg. 46,501 (Oct. 10, 1978); Exec. Order No. 12,107, 44 Fed. Reg. 1055 (Jan. 3, 1979); Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002); Exec. Order No. 13,665, 79 Fed. Reg. 20,749 (Apr. 8, 2014); Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014). See also 41 C.F.R. pts. 60-1 to 60-50.

²Section 503 is codified at 29 U.S.C. § 793. See also 41 C.F.R. pt. 60-741.

action to employ and advance in employment qualified individuals with disabilities. OFCCP regulations implementing this law provide that covered contractors' obligations include the duty to refrain from discriminating in employment against qualified individuals on the basis of disability.

Federal contracts and subcontracts (including construction contracts) that exceed \$15,000, and contracts or subcontracts for indefinite quantities (unless the purchaser has reason to believe that the cost in any one year will not exceed \$15,000) are covered by Section 503.³ Under the regulations, contractors with contracts of \$50,000 or more and 50 or more employees must develop and maintain a written Section 503 Affirmative Action Program for each of their establishments.

Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA):⁴ OFCCP enforces the affirmative action provisions of the VEVRAA, as amended, which require covered contractors to take affirmative action to employ and advance in employment qualified covered veterans. Covered veterans include disabled veterans, recently separated veterans, active duty wartime or campaign badge veterans, and Armed Forces service medal veterans. OFCCP regulations implementing this law provide that covered contractors' obligations include the duty to refrain from discriminating in employment against employees or applicants based on their status as protected veterans.

Employers with federal contracts or first-tier subcontracts, including construction contracts, in the amount of \$150,000 or more are covered by

³Section 503 does not apply to federally assisted construction contractors. Section 807 of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 requires the Federal Acquisition Regulatory Council (FAR Council) to adjust the dollar thresholds in certain federal procurement laws periodically for inflation. Pub. L. No. 108-375, § 807, 118 Stat. 1811, 2010-11 (2004) (codified as amended at 41 U.S.C. § 1908). In 2010, the FAR Council implemented an adjustment for Section 503, changing the threshold amount from \$10,000 to \$15,000. See Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 75 Fed. Reg. 53,129 (Aug. 30, 2010). According to OFCCP, although the regulations do not currently reflect these inflationary adjustments, OFCCP adopted the FAR Council's adjusted thresholds for determining whether a contractor is covered by Section 503 regulatory requirements.

⁴The affirmative action provisions of VEVRAA are codified at 38 U.S.C. §§ 4211-4212. See also 41 C.F.R. part 60-300.

VEVRAA.⁵ Under the regulations, contractors with 50 or more employees must develop and maintain a written VEVRAA Affirmative Action Program for each establishment.

⁵ VEVRAA does not apply to federally assisted construction contractors. In 2015, the FAR Council made an adjustment to the VEVRAA threshold, increasing it from \$100,000 to \$150,000. See Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds, 80 Fed. Reg. 38,293 (July 2, 2015). According to OFCCP, although the regulations do not currently reflect these inflationary adjustments, OFCCP adopted the FAR Council's adjusted thresholds for determining whether a contractor is covered by VEVRAA regulatory requirements.

Appendix II: Selected Federal Laws and Executive Orders Related to Labor and Employment Specific to Federal Contractors

The list of requirements below is not intended to be comprehensive; federal contractors may be subject to other federal, state, or local requirements related to labor and employment as well as other topics.¹ Furthermore, not all of these requirements apply to all federal contractors; application of these requirements varies depending on the type and amount of the contracts they hold, among other things. Finally, these descriptions provide only a summary of key aspects of the selected laws and executive orders; additional requirements may apply that are not described here.

In addition to the laws and executive orders listed below, federal contractors are also generally subject to the Federal Acquisition Regulation (FAR).² For example, Part 22 of the FAR (Application of Labor Laws to Government Acquisitions) establishes various labor-related requirements for federal contractors. Federal contractors may also be subject to specific department and agency contracting regulations, such as the Department of Defense Federal Acquisition Regulation Supplement (DFARS). For example, if the contract is awarded by the Department of Defense, DFARS Part 222 (Application of Labor Laws to Government Acquisitions) would also apply to the contractor.

Contract Work Hours and Safety Standards Act: The Act requires certain construction and service contractors to pay laborers and mechanics employed in the performance of the contracts one and one-half times their basic rate of pay for all hours worked over 40 in a workweek.

Copeland “Anti-Kickback” Act: The Act prohibits anyone from inducing employees on federally funded or federally assisted construction

¹Our goal was to focus on requirements that primarily apply to federal contractors, excluding those requirements that apply more broadly to other entities. To that end, we provided this list to Office of Federal Contract Compliance Programs (OFCCP) officials for their review.

²The Federal Acquisition Regulation (FAR) is the principal set of rules in the Federal Acquisition System and is codified at Title 48, Chapter 1, of the Code of Federal Regulations. The FAR provides uniform policies and procedures for acquisition by executive agencies of the federal government. The regulation is prepared, issued, and maintained by the Secretary of Defense, the Administrator of General Services, and the Administrator, National Aeronautics and Space Administration. See FAR §§ 1.100, 1.101, 1.102, and 1.103(b).

contracts to give up any part of the compensation to which they are entitled.

Davis-Bacon and Related Acts: The Davis-Bacon Act generally requires the payment of local prevailing wages to mechanics and laborers on federal contracts involving the construction, alteration, or repair (including painting and decorating) of public buildings or public works. The Davis-Bacon Act requirements are incorporated into other federal statutes, referred to by the Department of Labor as the “Related Acts,” which authorize federal assistance in the form of grants, loans, insurance, or guarantees for various construction programs.

Drug-Free Workplace Act of 1988: The Drug-Free Workplace Act of 1988 requires certain federal contractors to agree to provide drug-free workplaces as a condition of receiving a contract from a federal agency.

Executive Order 13494 (Economy in Government Contracting): Under the executive order, certain labor relations costs, not directly related to a contractor’s provision of goods or services to the government, may not be allowed for reimbursement or payment by the contracting agency. However, costs incurred in maintaining a satisfactory relationship between the contractor and its employees, including costs of shop stewards and labor management committees, are allowable for payment.

Executive Order 13495 (Nondisplacement of Qualified Workers Under Service Contracts): The executive order requires that federal service contracts include a clause requiring that successor contractors give certain employees employed on a predecessor contract for the performance of the same or similar services at the same location a “right of first refusal” of employment under the successor contract in positions for which they are qualified.

Executive Order 13496 (Notification of Employee Rights Under Federal Labor Laws): The executive order generally requires federal contractors to post a notice describing the rights of employees under federal labor law.

Executive Order 13502 (Use of Project Labor Agreements for Federal Construction Projects): Under the executive order, contracting agencies may require project labor agreements for certain federal construction projects to provide structure and stability to large-scale construction projects. A project labor agreement is a pre-hire collective bargaining

agreement with one or more labor organizations that establishes the terms and conditions of employment for a specific construction project.

Service Contract Act: The Service Contract Act establishes minimum wage and minimum fringe benefit payment requirements for covered federal services contractors.

Walsh-Healey Act: The Act establishes minimum wage, overtime, and safety requirements for covered federal supply contractors.

Appendix III: Comments from the Department of Labor

U.S. Department of Labor

Office of Federal Contract
Compliance Programs
200 Constitution Avenue, N.W.
Washington, D.C. 20210



AUG 29 2016

Ms. Cindy Brown Barnes
Director, Education, Workforce, and Income Security
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Ms. Brown Barnes:

Thank you for the opportunity to review and comment on the Government Accountability Office's (GAO) draft report GAO-16-750, entitled "Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance."

GAO recognizes that "[c]ontractor compliance with federal equal employment opportunity and affirmative action requirements is increasingly important as the workforce continues to diversify and many workers face the risk of discrimination in the workplace." As the only agency with government-wide responsibility for ensuring that these requirements are enforced on those who do business with the Federal government, the Office of Federal Contract Compliance Programs (OFCCP) strongly agrees with GAO's view that we can and should take additional steps to strengthen our oversight of nondiscrimination requirements. We appreciate the report's recommendations for action and, in many cases, have already been working to make these changes.

OFCCP is the premier civil rights enforcement agency at the Department of Labor. We carry out the mission by enforcing Executive Order 11246 and two statutes – Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974. As amended, these three laws require covered federal contractors and subcontractors to take affirmative action to ensure equal employment opportunity and make it illegal for them to discriminate against job applicants and employees in their hiring and employment practices because of their race, color, religion, sex, sexual orientation, gender identity, national origin, disability or status as a protected veteran, or because job applicants or employees have inquired about, discussed, or disclosed their pay or that of others. OFCCP has an enormous responsibility to protect workers, promote diversity, and enforce the law.

Since 2009, OFCCP has focused on increasing its effectiveness and strengthening its relationships with other Federal civil rights agencies. For many years prior to 2009, OFCCP's enforcement focused primarily on hiring discrimination in low-wage, entry-level jobs on the basis of race or sex. Today, OFCCP's enforcement ranges from removing barriers to equal employment opportunity for veterans and individuals with disabilities, to robustly protecting systemic pay discrimination, to implementing new mandates to address LGBT discrimination and pay transparency. Even the agency's hiring discrimination cases have transformed -- increasingly spanning multiple establishments and a broader range of jobs, and addressing sex-

stereotyping job placements at hire that can lead to unequal pay for women and people of color. For example:

- The *G&K Services Co.* settlement (2015) remedied findings of pay discrimination that resulted from steering women into lower paying jobs and provided \$1.8 million in back pay to 444 women in 9 G&K facilities across the country.
- The *Fastenal* settlement (2015) remedied findings of hiring discrimination by providing class members with \$1.25 million in back pay and 171 job opportunities, and by discontinuing the use of discriminatory tests that screened out over 8,000 qualified women and African Americans at the company's Indianapolis and Atlanta distribution facilities.
- The *Savannah River Nuclear Solutions* settlement (2015) remedied findings of pay discrimination on the basis of race and sex in STEM occupations at the company's facility in Aiken, South Carolina, including \$234,895 in back pay to 72 female and African-American workers.
- The *Constructora Santiago* settlement (2014) provided back wages and proper bathroom and changing facilities for female construction workers in Puerto Rico who faced sexual harassment, received unequal pay, and even lacked access to a restroom on their jobsite.

Despite challenging budgetary constraints and a shrinking workforce, OFCCP has become far better managed and more effective by improving quality and accountability, and by changing how the agency conducts its work. Since 2009, OFCCP has executed an aggressive regulatory agenda to achieve meaningful results for workers while minimizing, to the extent possible, the cost to contractors; updated sub-regulatory guidance to conform with current agency policies and practices, and to support contractor compliance; invested heavily in staff development to keep pace with the regulatory changes and with the need to conduct compliance evaluations in an increasingly complex labor market; significantly expanded the scope of its communications and education efforts, facilitating both voluntary compliance by contractors and outreach to workers, including groups with limited English proficiency; implemented a robust quality assurance program; significantly reduced its rate of aged cases through close monitoring of staff workload; improved and streamlined the administrative and financial management of the agency; and built partnerships with its sister agencies at DOL and across the Federal government to enhance its efforts.

This turnaround, however, has not been without its challenges. We appreciate that GAO recognizes the steps OFCCP has taken to improve the consistency of compliance evaluations across its regional and district offices. OFCCP plans to carry forward this effort by devoting resources in FY 2017 to continue extensive training of its staff, following the recent period of significant regulatory reform. Not every compliance evaluation, however, will be identical or involve the same complexity. Even a contractor with the same policies across multiple establishments may carry out those policies differently, resulting in different compliance evaluation interpretations and findings.

We also appreciate that GAO recognizes OFCCP's emphasis on completing compliance evaluations timely. Though it has been a challenge to define what constitutes "timely" given the increasing complexity of OFCCP compliance evaluations compared to prior years, half of

OFCCP's compliance evaluations are now completed in less than 180 days, though more complex cases, particularly those with findings of systemic discrimination, take longer. Federal contractor compliance with record keeping, affirmative action and self-monitoring requirements help OFCCP process cases more quickly, as untimely submission of Affirmative Action Programs (AAPs) and supporting documentation during compliance evaluations contributes to longer processing times.

Our responses to the draft report's specific recommendations are set forth below. Because the scope of the draft report is limited to compliance evaluations of supply and service contractors (and excludes compliance evaluations of construction contractors and investigations of individual complaints), our responses are also limited to compliance evaluations of supply and service contractors. (See, *e.g.*, page 2, footnote 3; and page 10, footnote 29.)

1. Make changes to the contractor scheduling list development process. Over the last several years, OFCCP has worked to improve its ability to identify federal contractor establishments under its jurisdiction and has made vast improvements in the quality of its scheduling list, and as a result has substantially reduced administrative closures from lack of jurisdiction that are inefficient both for OFCCP and for federal contractors undergoing a compliance evaluation. Despite past difficulties in identifying reliable factors to select those contractors at the greatest of risk of noncompliance while adhering to the neutrality requirements of the Fourth Amendment, OFCCP is committed to improving its scheduling process and is continuing to explore ways to do so as well as making more efficient use of its resources. Additionally, the recently proposed EEO-1 pay data collection would provide more detailed information on federal contractor compensation disparity patterns, which we anticipate will further strengthen OFCCP's selection process. The agency is committed to improving its ability to focus on contractors with the greatest risk of noncompliance, but also embraces its mission to ensure compliance broadly by deterring noncompliance.
2. Develop a mechanism to monitor AAPs. The draft report encourages OFCCP to develop a mechanism to monitor AAPs from covered federal contractors on a regular basis, including the possibility of collecting AAPs annually and requiring contractor certification of annual AAP updates. The agency agrees with this recommendation and will fully explore the operational implications and funding requirements.
3. Make changes to the scheduling list distribution process. OFCCP is committed to improving the scheduling list distribution process by exploring the logistics of non-geographically based compliance evaluations in its review of contractors with Functional Affirmative Action Programs. We will also explore establishment based cross-regional case transfers, and will continue to implement improved case distribution approaches in future scheduling lists.
4. Provide timely and uniform training to new staff and continuing training to existing staff. OFCCP is already taking concrete steps in this area. The agency developed a training plan in FY 2016 that will help it assess employee training needs, address the needs of compliance officers at various stages of their careers, and ensure continuous

improvement by incorporating observations made during the quality audit review process. Consistent with this plan, OFCCP conducted a training needs assessment in FY 2016 to identify the performance requirements and competencies needed by agency staff in order to achieve the agency's mission. Based primarily on the results of this needs assessment, OFCCP will develop a comprehensive instructional plan and schedule for compliance officers and staff training. The resulting "Compliance Officer Continuous Education Success Program" will be a structured, three-year program designed to ensure that compliance officers receive timely and consistent instruction. To address concerns about the depth of the training, OFCCP is formalizing its use of training-related work groups. These work groups, comprised of volunteer staff, experienced compliance officers, and managers from the national, regional, and district offices, will ensure that training is responsive to employee needs. Consistent with our resources, OFCCP will leverage several different instruction methods, including instructor-led classroom training, virtual presentations, facilitated case study reviews, recorded lectures, recorded demonstrations/simulations (videos), and self-paced, web-based training.

Since February 2013, OFCCP has not hired any new compliance officers but has invested in significant training opportunities for current employees, including a week-long basic skills training for newer and less experienced compliance officers provided in March, 2013. The basic training curriculum was composed of 16 courses, covering a range of areas including the scheduling process, supply and service evaluations, construction evaluations, complaint investigations, theories of discrimination, conducting witness interviews, and a review of the Federal Contract Compliance Manual.

In addition, from 2011 through July 2016, OFCCP has conducted more than 100 webinars focused on building staff knowledge and skills, relating to regulatory changes and general enforcement; and each region periodically provides as-needed training. Moreover, since 2014, OFCCP has been implementing the Front Line Manager Leadership Development Program to enhance managers' leadership and technical skills. And in FY 2016, each of OFCCP's six regions has hosted an all-staff regional training to further hone the staff's technical skills.

5. Review and identify options for improving outreach and compliance assistance efforts. OFCCP concurs with the recommendation that the agency review its outreach and compliance assistance efforts and identify options for improving the information provided to federal contractors and workers to enhance their understanding of discrimination prevention and affirmative action requirements to ensure equal employment opportunities for protected workers. The agency has an existing plan for expanding its stakeholder engagement practices. Contingent on resource availability, the expansion will include a series of dialogues and consultations with federal contractors to determine what additional guidance is needed to support contractor compliance with OFCCP's regulations. OFCCP will also consider additional opportunities to build upon previous outreach that has included live and virtual events (e.g., focus groups, listening sessions, round tables, etc.) and will continue to explore ways to disseminate promising practices and highlight contractors that implement proactive strategies to prevent employment discrimination and enhance affirmative action efforts. These, and other,

ongoing efforts will continue to ensure that OFCCP's guidance materials provide reliable, relevant, and useful compliance information.

OFCCP believes that some contractors and/or consultants, though not all, are not effectively using OFCCP's existing resources. In FY 2015, OFCCP's Help Desk received more than 3,000 emails and calls, but the majority of the users were not contractors. Our existing plan for expanding our stakeholder engagement practices should increase contractor awareness of these resources. However, when contractors have engaged with OFCCP and provided feedback, the agency has used that information to improve the compliance assistance that it provides. One example is the agency's engagement in early 2016 with a group of contractors and consultants to explore their experiences, including challenges, using the EEO Tabulation (EEO Tab). The EEO Tab is a compilation of census data that OFCCP makes available to contractors to assist them with determining the availability of certain types of workers within their local area, and developing their affirmative action programs. This early engagement with contractors is helping inform how the agency will handle the upcoming release of the new EEO Tab.

6. Assess existing contractor guidance. OFCCP also concurs with the recommendation that the agency assess existing contractor guidance for clarity to ensure that contractors have information that helps them understand their responsibilities regarding discrimination prevention and affirmative action requirements. Over the years, OFCCP has demonstrated its commitment to quality guidance in several ways, including increasing the amount of online resources and tools made available to agency stakeholders, revising outdated regulations and guidance, and reflecting a consideration of stakeholder input in its regulations, guidance documents, and published responses to stakeholder frequently asked questions or FAQs. For example, in a July 26, 2016, *U.S. News & World Report* article, Governor Tom Ridge credited OFCCP's good work listening to contractors when crafting its Section 503 rule with allowing him to set aside his apprehensions about the rulemaking process and its transparency. As he stated, "To their credit, OFCCP listened to the concerns of contractors and provided additional time to implement the new requirements. And they decreased an employer's burden on recordkeeping, too."

Similarly, in 2011, OFCCP engaged contractors in listening sessions on proposed changes to the agency's Scheduling Letter and considered comments submitted during the public comment period on OFCCP's proposals. In short, the Scheduling Letter provides contractors that are scheduled for a compliance evaluation with notice that specific records must be produced within 30 days for examination by OFCCP. This examination of the requested records is the first step in the compliance evaluation process and allows OFCCP to refine its lines of inquiry. During the reauthorization process for the letter, many of the contractor comments focused on the cost of complying with the proposed data production. After considering their concerns, OFCCP removed or revised several provisions to reduce the recurring cost of its proposal.

In conclusion, OFCCP appreciates GAO's affirmation of our mission to ensure that contractors are complying with nondiscrimination requirements designed to promote and protect a diverse workforce. We thank you for the opportunity to review the draft report and to provide comments on the recommended actions we can take to further that mission.

Sincerely,



Patricia A. Shiu
Director

Appendix IV: GAO Contact and Staff Acknowledgments

GAO Contact

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Staff Acknowledgments

In addition to the contact named above, Blake Ainsworth (Assistant Director), Amber Yancey-Carroll (Analyst-in-Charge), Brandon Booth, Sarah Cornetto, Holly Dye, Brandon Kruse, Arthur T. Merriam Jr., Jean McSween, Mimi Nguyen, and Rosemary Torres Lerma made significant contributions to this report.

Also contributing to this report were Carl Barden, Timothy Bober, Sheila McCoy, John Mingus, Almeta Spencer, and Williams T. Woods.

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