

# OFCCP's Proposed Directive Encourages Contractors to Consider FAAPs as an Alternative to Establishment-Based AAPs



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Tuesday, September 18, 2018

On September 11, 2018, the Office of Federal Contract Compliance Programs (OFCCP) published a notice in the [Federal Register](#) and a draft of a revised directive to “establish policies and procedures for requesting and maintaining FAAP Agreements.” The revised directive and notice suggest that OFCCP is seeking to increase functional affirmative action program (FAAP) participation. In fact, OFCCP has stated that FAAPs may offer a solution for today’s workforce and “encourages all contractors who need to develop an affirmative action program (AAP) to consider using a FAAP.” But contractors may want to carefully consider whether a FAAP agreement with OFCCP is right for them.

## What Is a FAAP?

A FAAP is an alternative form of AAP development offered by OFCCP for multi-

establishment contractors that may find it more practical to prepare AAPs based on business function or line of business rather than establishment. Under OFCCP's FAAP directive, contractors may combine employees in the same function (e.g., sales) or business division (e.g., jet engines) to create plans that span across establishments located in different cities, states, or regions.

Contractors interested in preparing a FAAP must apply for and enter into a FAAP agreement with OFCCP. Contractors may request FAAPs covering all employees if it makes sense both business-wise and from an equal employment opportunity/affirmative action perspective, or they may mix and match, using some FAAPs and some traditional establishment-based AAPs. Every employee must be included in an affirmative action plan.

Directive 2013-01, effective April 28, 2016, was the last modification to the FAAP program and set forth the applicable requirements. Note that FAAP agreements are only available to supply and service contractors and subcontractors, not construction contractors.

## **What Is OFCCP Offering in the New FAAP Proposal?**

As a revamp of Directive 2013-01, the agency's new FAAP proposed directive proposes revisions to FAAP requirements. The proposed directive, on its face, looks more favorable to contractors, but the nuances are complex.

Below are some of the revisions proposed by the new directive:

- *Contractors will not be required to update FAAP agreements on an annual basis.* This sounds good, except there is a requirement to modify a FAAP agreement with every merger, acquisition, reorganization, and/or downsizing that occurs during the term of the FAAP agreement, if it affects the AAP structure. The contractor must notify OFCCP within 60 days of the effective date of the change. For some employers, this requirement could result in more frequent updates than once a year and could result in the release of highly confidential, proprietary information before a company is ready to make a public announcement. Note that the new proposed certification requirement for traditional establishment AAPs will only require annual updates.
- *Failure to submit a timely modification notice to OFCCP could trigger a compliance evaluation, and repeated failures could lead to the termination of a contractor's FAAP agreement.* This requirement allows OFCCP to step outside of its normal scheduled review process and conduct a review for untimely modification notices.
- *The exemption period for a FAAP unit that has completed a compliance review will be expanded from 24 months to 36 months from the date OFCCP closed the previous evaluation.* The scheduling methodology accompanying OFCCP's September 7, 2018, [corporate scheduling announcement letters \(CSALs\)](#) explain that OFCCP will [be](#) permitting a five-year moratorium on scheduling reviews after an OFCCP evaluation is closed. Therefore, contractors using FAAPs have a lesser moratorium on scheduling than facility based-AAPs, which could potentially result in more scheduling for contractors with FAAPs.
- *FAAP agreements will last for five years rather than three years.* For contractors

that expect few changes over time, this expanded period before certification expires may be beneficial. But as indicated above, for large employers that buy, sell, merge, and restructure, the length of the FAAP agreement creates more administrative hassle of reporting modifications to OFCCP as they occur.

- *The new directive is silent regarding any requirement that contractors with an approved FAAP agreement must be audited at least once during the term of the agreement.* Employers may see this as a plus, but given other changes in the proposed directive and the limited number of current FAAP agreements, it is likely that most contractors with a FAAP agreement will undergo at least one compliance evaluation at a FAAP unit during the course of a five-year agreement.
- *OFCCP has made it easier to apply for a FAAP by removing the three-year waiting period for reapplying for a FAAP following the termination of an agreement and eliminating consideration of a contractor's equal employment compliance history when deciding whether to approve a FAAP request.* OFCCP is clearly trying to make the FAAP program more appealing to employers.

## **To FAAP, or Not to FAAP: That Is the Question**

Employers that are on the fence as to whether a FAAP agreement may be more practical may want to consider the following:

- On September 7, 2018, OFCCP sent CSALs to 66 FAAP functional units. According to the notice in the *Federal Register*, OFCCP currently only has 71 FAAP agreements in effect. If only one unit of a contractor is audited and next year's data matches this year's CSALs, the chances of a compliance review in the next fiscal year is practically guaranteed.
- FAAPs normally include employees who work at different facilities located in states across the region or the country. If OFCCP conducts an on-site visit, it will have access to even more records than at the desk audit stage and will also interview managers and employees at all of the locations covered by the FAAP.
- Many employers with FAAPs also end up preparing establishment AAPs since not all employees belong in the FAAPs based on function or business line. Because of this, human resources may need to closely monitor who belongs in each plan. Maintaining a FAAP may be more complicated than maintaining establishment AAPs.
- Once a contractor opts in to a FAAP agreement, it has to take action to get out. Contractors requesting, modifying, certifying, or terminating a FAAP agreement must follow the procedures outlined in the directive. And if an employer is in an open compliance evaluation when its FAAP is set to expire, OFCCP may extend the terms of an existing FAAP agreement until the evaluation is completed. This would keep all of the other FAAP units open to selection for review.

Comments on the proposed FAAP directive must be submitted on or before November 13, 2018, to [www.regulations.com](http://www.regulations.com).

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