

Construction Contractors: Monitoring OFCCP's Regulatory Requirements

By Michael R. Hatcher & Lisa B. Marsh

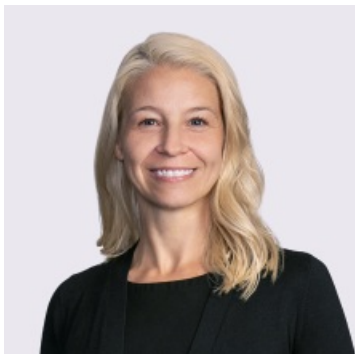
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Meet the Authors



Michael R. Hatcher

Principal
(703) 483-8328
Michael.Hatcher@jacksonlewis.com



Lisa B. Marsh

Principal
303-876-2216
Lisa.Marsh@jacksonlewis.com

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With the Office of Federal Contract Compliance Programs (OFCCP) increasing the number of construction contractors it audits, construction employers should monitor OFCCP's regulatory requirements for construction contractors, the new Mega Project Program, and OFCCP's June 2023 audit list.

Jackson Lewis P.C. - Construction Contractors: Monitoring OFCCP's Regulatory Requirements



Transcript

Alitia Faccone:

Welcome to Jackson Lewis' podcast, We Get Work™. Focused solely on workplace issues, it is our job to help employers develop proactive strategies, strong policies, and business-oriented solutions to cultivate an engaged, stable, and inclusive workforce. Our podcast identifies issues that influence and impact the workplace and its continuing evolution and helps answer the question on every employer's mind, "How will my business be impacted?"

With the OFCCP increasing the number of construction contractors at audits, construction employers should monitor the OFCCP's regulatory requirements, the new Megaproject Program, and its June 2023 audit list. On this episode of We Get Work™, we discuss how construction employers can comply with the OFCCP's affirmative action requirements.

Our host today are Lisa Marsh and Mike Hatcher. Principals in the Denver and Washington, DC region offices of Jackson Lewis. Both are members of the firm's affirmative action, OFCCP, Government Contract Compliance and Corporate Diversity Counseling Practice Groups, as well as the construction industry group. Lisa represents government and non-government contractors in

OFCCP matters, preparing for and defending audits and counseling employers on issues stemming from OFCCP regulations. Michael assists companies in developing and implementing comprehensive diversity, equity, and inclusion enhancement plans, ensuring compliance with federal, state, and local non-discrimination requirements, and conducting EEOC and DEI audits and investigations.

Lisa and Mike, the question on everyone's mind today is what are OFCCP's requirements for construction contractors and how does that impact my business?

Michael Hatcher:

Lisa, OFCCP announced a new focus on the construction industry due to the Infrastructure Investment and Jobs Act of 2021. Is the agency just looking at that act so that if I'm not working on any IIJA contracts, I could breathe a little easier?

Lisa Marsh:

Good question, and unfortunately not. So the Infrastructure Investment and Job Acts of 2021, it's very highly visible, right? We hear about it in the media, and that was part of the driver behind OFCCP's increased focus on construction contractors. So that and also the understanding by the agency, OFCCP, that it traditionally hasn't audited many construction contractors, not nearly as many as say, supply and service contractors. And as a result, many construction contractors are not aware of their obligations under the affirmative action compliance requirements. But OFCCP isn't only focusing on those jobs under that IIJA, really they are looking at all of the government contracts. And in fact, in June this year, OFCCP published a list of those companies that it intends to audit, and that included 250 construction contractors. The agency said when creating that list that they were looking at all federal construction projects of \$10,000 or more. So any federal project, not just those under IIJA, are being looked at by OFCCP.

Michael Hatcher:

Okay. So people need to pay more attention. And you mentioned that historically the agency has not audited a lot of construction contracts. Does this new focus mean they're just going to audit more companies? Does it mean they're going to pay more attention to the companies they audit and dig deeper? Or A little bit of both?

Lisa Marsh:

Yeah, a little bit of both. Really OFCCP is looking to audit more construction contractors, so we can expect to see more audits. Now, as I mentioned, many construction contractors aren't aware that they have affirmative action obligations. So in fact, let's take a quick step back and make sure all of our listeners know who OFCCP is and why they should care. So employers that are working on construction contracts of \$10,000 or more that are either direct or subcontractors with the federal government, or if those projects are funded in whole or in part by the federal government, those are referred to as federally assisted construction contracts, they are covered by OFCCP's

affirmative action requirements.

So a common example of a federally-assisted contract is one with a State Department of Transportation, but the funds are funneled down to the employers through the United States Department of Transportation. So that funding goes to the state DOT to the employer. Really no matter what kind of contract a company has, the same requirements apply, and these requirements really can be quite extensive. So these audits that OFCCP does, OFCCP is the Office of Federal Contract Compliance Programs, it's an agency within the US Department of Labor that audits contractors to make sure they're meeting their affirmative action obligations, OFCCP audits a certain percentage of contractors every year to make sure that they're meeting their technical obligations. And there are many, which we're going to talk about soon. But also OFCCP is looking for potential evidence of discrimination. So these audits can result in potential violations, whether that be technical violations or even discrimination violations, which can result in monetary liability. So OFCCP has said that they want to audit more construction contractors to make sure that those employers that are receiving federal dollars are actually in compliance with their obligations.

Michael Hatcher:

Thanks. You mentioned that OFCCP has come up with a list of people they plan to audit, and I've heard of something called, I think it's CSAL, capital C, capital S, capital A, capital L. Can you tell us what that is and how a company would know if they're on the list?

Lisa Marsh:

Yeah, so the CSAL, that's one of the acronyms that we use in our world, it refers to the Corporate Scheduling Announcement List. And this is a list that's published by OFCCP and it's on its website and anyone can go and check for it on the website. This list is published. It includes all of the companies that the OFCCP intends to audit. Companies can go and check for their name. And of course, if they're on that list, the first thing they want to do is really start to prepare and figure out, "Are we meeting those compliance requirements that are set out by OFCCP?"

Michael Hatcher:

Does every company that's on the list get audited or is it just a list of, "Hey, we might be coming for you"?

Lisa Marsh:

Yeah, it is virtually guaranteed that every company on the list is going to get audited. However, there's really no guarantee when that will come. So that's one of the hard parts for contractors, because I actually have heard of some companies this year that received an audit letter. So there's a scheduling letter, an audit letter that sent from OFCCP that actually starts the audit. And then the companies have 30 days from receiving that letter to actually submit their audit, their affirmative action materials to OFCCP. So if you're on that list, the CSAL list, that is advanced

notice, your audit hasn't started and your audit won't actually start until you receive the scheduling letter. However, there are some companies, like I was mentioning before, this year that received a scheduling letter and they were actually on the list last year or even from 2021. So you know you'll get audited if you're on the list, but you've got that advanced time and notice to prepare. You just don't know when you're going to get that letter.

Michael Hatcher:

What should companies be thinking? If they find out they're on the list, what should they be doing to prepare in advance of the audit letter?

Lisa Marsh:

So there are lots of companies out there that don't realize that there are actually quite a bit of extensive requirements out there for construction contractors. And so the first step if a company finds themselves on that list is to actually go and look at what are the requirements. So there is a Construction Contractor Technical Assistance Guide that the agency, OFCCP, has put together and published on its website. It's a great guide that really spells out some of the technical obligations, and it includes what we refer to as the 16 affirmative action steps for construction contractors. There are 16 steps that require various steps that a contractor must take such as engaging in diversity and recruitment outreach, making sure it is tracking any applicants. Lots of requirements in that document, the 16 affirmative action steps, that many contractors just aren't aware that they're supposed to be doing. And when they get audited, unfortunately not being aware that those were requirements isn't going to be enough to get that contractor out of potential consequences for not complying.

Michael Hatcher:

Interesting. If a company's not on that list, does that mean they're safe from getting audited?

Lisa Marsh:

No. So the OFCCP publishes the list generally one or two times a year. They're not only publishing lists of construction contractors that they intend to audit, they're also publishing separate lists for other non-construction contractors. So the most recent construction contractor list that was published in June of this year, that included about 250 employers like I said. The last one that was published before then was back in 2021, and there were about 400 or so employers on there. And so, contractors certainly can expect if they're on that list to get audited. However, there are technically instances where OFCCP could audit a contractor without having put them on the CSAL. However, I will say that OFCCP generally has followed for the last several years this publishing of the CSAL list and really has stuck to that and only audited those employers that are appearing on that list.

However, there's also another way that OFCCP might come knocking at your door. OFCCP has the authority to investigate employee complaints. So if an employee at your company sends a

complaint to OFCCP, then the agency can then investigate that complaint. And what they'll be looking for is very similar to what they'd be looking for in an audit, right? They might be looking for technical compliance with the technical obligations, evidence of potential discrimination. Generally, when OFCCP audits a company, they're looking for, like I said, compliance with the technical obligations, but they're also tasked with determining whether there might be discrimination. And OFCCP audits and even employee investigations can result in potential discrimination findings.

And generally, when OFCCP is looking for discrimination, they're looking generally for discrimination in hiring and in compensation. So companies really should take advantage of finding themselves on this CSAL list by taking time to look at their personnel practices, look at their policies, and even look at their data. Is there anything within their compensation data, within their hiring data that might point to potential discrimination that OFCCP could find in an audit or in an employee investigation? And of course, we absolutely recommend when companies look into and do self-analysis into their data around hiring and compensation, we want to try to cloak that under the attorney-client privilege. So we absolutely encourage folks to get their internal counsel involved or external counsel involved to really be able to look into potential areas of concern within the data and be able to cloak that in the attorney-client privilege.

Michael Hatcher:

Thanks. I've heard something about OFCCP's Megaprojects Program, which sounds very ominous. Can you tell us a little bit about that and how that might increase contractor risks?

Lisa Marsh:

Yeah. So the Megaproject, this is a program that has actually been around for many years. But in March of this year, OFCCP announced that it revamped its Megaprojects Program, and it is something that the agency is really putting a lot of time and effort into. So the Megaprojects Program is really focused on 12 high-dollar projects. So OFCCP selected 12 projects valued at \$35 million or more and lasting at least one year. The OFCCP selected these high dollar projects really with the idea that they would have more opportunity to make a difference in the communities in which these large scale projects are located. So OFCCP has said that they're going to work closely with the direct and subcontractors on these projects throughout the life of the project. So these contractors that are working on one of these 12 Megaprojects, they can expect for OFCCP to be involved in the project from the bidding process all the way to completion.

So for example, the agency has said that they're planning to require employers on these Megaprojects to participate in EEO meetings, and those meetings would include not only the contractor, but also unions, diversity recruitment organizations, potentially other government enforcement agencies. The meetings are meant to be a meeting of the minds of those that are involved in the project about how to ensure diverse workforces reflecting the communities from which the company is recruiting and equal employment opportunity.

Michael Hatcher:

Do we know if participation in a Megaproject increases audit risks, or does the fact that a contractor might be participating in some of these collaboration meetings maybe reduce the risk of an audit?

Lisa Marsh:

There's still some details that are being worked through by OFCCP on this Megaproject Program. And the agency really hasn't told employers if there is going to be, for example, a guaranteed audit during this process. However, OFCCP has been known to focus on high-dollar contracts as part of its selection process to determine which companies it's going to audit. So I think companies working on one of these Megaprojects would be wise to consider that their company is more likely to be audited and start preparing now.

Michael Hatcher:

If a contractor has not done a lot of federal contracting or has never undergone an OFCCP audit, can you tell us, I don't know, three or four things that maybe someone should watch out for just because of their inexperience, as I call them, traps for the unwary, things you might be able to address relatively easily if only you had thought about it being a problem?

Lisa Marsh:

Yeah. Often I find that construction contractors who have a unionized construction workforce often assume that they don't have to do things like participate in diversity recruitment and outreach, or keep track of applicant demographic information like race, gender, disability, potentially veteran status depending on the contract. The companies generally think that, "Okay, the union is actually responsible for sending me the workers, shouldn't the union have to take care of all of that?" And the answer is that unions aren't the ones that are being audited by OFCCP. OFCCP's regulations require that employers do the things like engage in good faith outreach and recruitment and keep documentation of that. So that's not saying companies can't work with those unions to participate in some of these really great diversity organizations that are out there like Association of Minority Contractors or Women in Construction. But the responsibility for demonstrating that this outreach is occurring is going to fall on the employer being audited.

Michael Hatcher:

What about the participation goals? This is something I've heard from contractors who say that if they have goals pursuant to their affirmative action plan, then they can still use race or gender, if that's one of their goals, as a tie breaker. They know they can't use race and gender generally, but it's okay to use it as a tiebreaker in order to meet their goals. Is that true?

Lisa Marsh:

No, absolutely not. Never. Government contractors cannot make any employment decisions based on race, gender, or any other protected category. And this is more important than ever to talk

about, right? We want to make sure that we're clear on this. Even those contractors who have affirmative action obligations and have a participation goal, that company still cannot just go and hire a woman just because she's a woman, of course, you mentioned that, because in that situation, a man might have a claim of discrimination and may be successful if the company can't prove that they didn't take gender into account. OFCCP's regulations and Title VII of the Civil Rights Act prohibit discrimination on the base of race or gender. It doesn't just protect women or minorities. So even as a tiebreaker, employers cannot be taken into account, race, or gender for any sort of hiring or other employment decision. And I'll tell you, Mike, I've heard the same kind of question, and I have yet to see an instance where a tiebreaker is needed, where two candidates are exactly equal. There is always a job-related reason for which one candidate is more qualified than the other.

Michael Hatcher:

At least arguably. And if you're a plaintiff's lawyer, you can make that argument. Well, getting down to some brass tacks here. If a company gets an audit letter, off the CSAL list or due to an employee complaint, what are the first things they should do? And is there a difference depending on how the audit originates?

Lisa Marsh:

Yeah, so if the company gets a scheduling letter, an audit letter, first things first, check the 16 affirmative action steps. Take a look at the Construction Technical Assistance Guide and see where there are holes and compliance that need to be filled. And if there are, fill them. OFCCP is going to check on all of it. Use this time with even a bit of advance notice, right? If you didn't catch yourself on the CSAL list and take advantage of that advance notice, if you get a scheduling letter, you've got 30 days to submit your audit, check and see where you might have holes. And even in that time, if you see a hole, you need to fill it and start getting into compliance.

As part of the scheduling letter, there's going to be data and information and documentation that you're going to need to start gathering to send into OFCCP within that 30-day timeframe. And so, we want to take a look at the data that's going to be submitted, the documentation, see whether there are any potential issues that you can uncover, and make sure that for any, like I said, missing documentation, missing bits of compliance, get into compliance, and really work with your team to make sure you have everything that you can possibly get together to send into OFCCP as part of the audit.

Michael Hatcher:

Thank you. That was a really interesting conversation. I learned a lot. Hopefully, everybody who's listening to the podcast will learn something. At least I think it'll be especially helpful for those who have not previously undergone an OFCCP audit.

Lisa Marsh:

Yeah. Great. Thanks so much. It was great talking with you.

Michael Hatcher:

Good chatting. Thanks.

Alitia Faccone:

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