

AbilityOne OIG Audits are Ramping-Up! Is Your Nonprofit Agency Ready for an Audit?



(November 11, 2020): If you run a nonprofit company that contracts with the federal government through the AbilityOne Program, then you should be aware that inadequate compliance policies could put your nonprofit in danger of facing allegations of waste, fraud, abuse, and mismanagement, onerous audits and investigations, and even civil liability. Under the AbilityOne Program, the federal government assigns contracts for the procurement of goods and services to qualified nonprofit agencies that meet designated requirements for direct labor performed by blind and other severely disabled individuals. The AbilityOne Program is intended to advantage the disabled by giving them the opportunity of a living wage while also reducing expenditures otherwise devoted to transfer payments for unemployed disabled persons. The AbilityOne Program is in fact designed to generate additional tax revenue by increasing the taxable income of the disabled through wages paid out under program contracts.

I. Background of the AbilityOne Program:

The AbilityOne Program traces its origins to the New Deal era when Congress passed the **Wagner-O'Day Act** in 1938, which established the **Committee on Blind-Made Products** for overseeing the procurement of goods made in part using the labor of blind persons. The **Javitz-Wagner-O'Day Act of 1971** (JWOD) expanded upon the original legislation by extending its coverage not only to the blind but other severely disabled individuals as well. The legislation also authorized the federal government to utilize AbilityOne program contracts for the procurement of services in addition to goods.

AbilityOne works with a group of special nonprofit organizations that assist in the distribution of AbilityOne contracts. In its formative years, the AbilityOne Committee relied on the **National Industries for the Blind** (NIB) to help administer the program. Today the NIB has been joined by SourceAmerica and the **American Federation for the Blind** (AFB) in a collaborative oversight role with AbilityOne. These organizations are designated as central nonprofit agencies (CNAs) that help monitor qualified nonprofits receiving contracts from the procurement list and otherwise facilitate AbilityOne's distribution of product and service orders at a fair market price. [\[1\]](#)

The AbilityOne program, which has since been reconstituted as a Commission with independent

agency oversight, now serves as the nation's largest indirect employer of disabled individuals through its contracts with hundreds of qualified nonprofit agencies. Its contracts are in the aggregate worth up to \$3 billion, and they provide employment and training opportunities to some 45,000 disabled individuals. [2]

II. Rise of the AbilityOne Commission OIG:

As an independent agency, the AbilityOne Commission has been vested with investigatory and audit authority through an Office of Inspector General (OIG) under the Appropriations Act of 2016, which amended the 1978 Inspector General Act. The IG Act authorizes sweeping powers for inspector generals at federal agencies to initiate audits and investigations for the purpose of detecting waste, fraud, abuse, and mismanagement involving agency programs. The statute mandates that the inspector general have access to all records, reports, audits, documents, and other materials relating to the inspector general's responsibilities while further empowering the inspector general to issue subpoenas and administer oaths, affirmations, and affidavits. [3]

To safeguard against audits, investigations, and even potential lawsuits, nonprofit agencies must adhere to the full range of compliance mechanisms available to AbilityOne. These mechanisms serve two ends, that AbilityOne programs both help the federal government fulfill its procurement orders and encourage employment and training of blind and severely disabled individuals. The AbilityOne oversight framework centers upon rules regarding direct labor hours performed by disabled individuals. The JWOD implementing regulation requires that nonprofits maintain direct labor hour records for each employee, whether disabled or not, as well as separate files on the visual acuity and normal competitive employment viability of blind workers. [4] Maintaining records of direct labor hours for each employee helps to fulfill one of the most important provisions in the AbilityOne oversight framework, which is the ratio of overall direct labor hours (ODLH) of disabled to non-disabled employees. **Nonprofit agencies must ensure that blind or other severely disabled individuals perform at least 75% of all ODLH per fiscal year.** A NPA with disabled employees working fewer than 75% of direct labor hours contravenes the purpose of the AbilityOne program and may face probation or even exclusion from the program. [5] The AbilityOne OIG is equipped with a number of tools at its disposal to ensure compliance in addition to those powers granted under the IG Statute. Recent enforcement efforts taken by the AbilityOne OIG have included:

- ***Issuing policy guidance highlighting the importance of regulatory compliance.***
- ***Conducting site inspections of nonprofit agencies funded, in part, by AbilityOne programs.***
- ***Reviewing annual certifications submitted by nonprofit agencies.***
- ***Providing training to nonprofit agencies on their obligations as a federal contractor / agency receiving federal funding.***

As discussed in its Fiscal Year 2019 report on the top management and performance challenges facing AbilityOne, the OIG stated that it would need additional resources to carry out these oversight functions, an indication that in the future the OIG could, with enough funding, even more aggressively utilize these tools to target uniform compliance across the Commission's entire contracting network. [6] What does this mean? In the short run, it means that this relatively new enforcement branch is working through its outstanding audit and investigative duties. In the long run, it means that nonprofit agencies participating in the AbilityOne program should expect to be audited and may be facing significant penalties if they are not in compliance with their program obligations.

III. The AbilityOne OIG is Actively Making False Claims Act Referrals to the U.S. Department of Justice (DOJ):

As we have recently seen the AbilityOne OIG is actively making referrals to Department of Justice (DOJ) prosecutors around the country. Importantly, a number of the referrals being made are for alleged violations of the civil False Claims Act.[7] The civil False Claims Act is the primary civil fraud enforcement tool utilized by the federal government. It is an extraordinarily useful statute for government prosecutors, both in terms of ease of use and in terms of the damages that may be recovered by the government. Under Section 3729 of the civil False Claims Act, a person or entity may be in violation of the statute if the individual or entity:

"(1) Knowingly presents or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) Knowingly makes, uses or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) Conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) Has possession, custody or control of property or money used or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) Authorized to make or deliver a document certifying receipt of property used or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) Knowingly buys or receives as a pledge of an obligation or debt, public property

from an officer or employee of the Government or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) Knowingly makes, uses or causes to be made or used, a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government . . ."

False Claims Act cases are prosecuted by the DOJ Civil Division in Washington, D.C. and by "Affirmative Civil Enforcement" (ACE) Coordinators appointed in each of the 94 U.S. Attorney's Offices around the country. It is essential to keep in mind that the civil False Claims Act does **not** cover mistakes, accidents or mere negligence.

Unfortunately, the line separating a "mistake" from a non-intentional wrongful claim that could give rise to an action under the False Claims Act is not always easy to discern. A person or entity found to have violated this statute may be liable for both civil penalties and treble damages. The amount of civil penalties that may be imposed for each false claim depends on when each was made:

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For claims or statements made on or after August 1, 2016, but before January 1, 2017, the minimum penalty which may be assessed under 31 U.S.C. 3729 is \$10,781 and the maximum penalty is \$21,563.

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For claims or statement made on or after January 15, 2017, but before June 19, 2020, the new minimum was raised to \$11,181 to the maximum penalty is raised to \$22,363.

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For claims or statement made on or after June 19, 2020, the new minimum was raised to \$11,665 and the maximum penalty was raised to \$23,331

IV. Is Your Nonprofit Agency Facing an AbilityOne-Related False Claims Act Investigation?

Federal prosecutors are actively employing the False Claims Act to target nonprofit agencies that purportedly misrepresent their overall direct labor hours (ODLH) associated with AbilityOne-related set-aside contracts for the employment of blind workers. These lawsuits can result in settlements costing nonprofits hundreds of thousands or even millions of dollars. Notably, False Claims Act liability isn't limited only to alleged misrepresentations in annual ODLH certifications. In one recent case, the Justice Department recovered almost \$2 million in a settlement with a nonprofit agency over allegations that it misrepresented its ratio of disabled to non-disabled employees in order to attract AbilityOne contracts. [8]

Nonprofit agencies that contract with AbilityOne must be aware of their potential liability under the False Claims Act if their actual direct labor hours or other specified employee allocation ratios fail to match up with annual certifications or prior agreements and communications made with AbilityOne. The agencies most vulnerable to lawsuit are therefore not always what the legislative nomenclature characterizes as ***"at risk agencies."*** ***An "at risk" agency is classified as one with ODLH below 75%, while a high risk agency has ODLH below 60%.*** [9] At risk or high risk agencies do not necessarily misrepresent underlying deficiencies in their ODLH compliance. Agencies alleged to have engaged in fraud or other misconduct, by contrast, do tend to have known, deliberately ignored or been recklessly ignorant of their failure to comply with ODLH requirements. This failure may be reflected in the nonprofit agencies periodic ODLH compliance certification sheets. Nonprofit agencies not engaged in fraud but still prone to deficient compliance, such as those with below required ODLH, can still be subject to probation or even debarment from the government's procurement list

V. Conclusion -- Moving Forward with Your AbilityOne Compliance Obligations:

Management at nonprofit agencies should be mindful of their AbilityOne-related contractual obligations with respect to the reporting of work hours and the employment of blind workers. An organization's failure to meet these contractual obligation actions could conceivably result in the loss of funding, the assessment of penalties and damages, and the organization being debarred from doing business with the federal government. Additionally, nonprofit agency executives signing false certification statements may face personal liability for their role in any false statements and / or misrepresentations made to the government that resulted in wrongful claims being submitted to the government for payment. Nonprofit agency management officials should also be mindful that additional expressions of commitment made to AbilityOne for purposes of securing contracts, such as direct labor hours or employee ratios even higher than the statutory mandates, might also expose the nonprofit to fraud claims if the nonprofit fails to meet those commitments and then additionally fails to fully disclose this to AbilityOne. Finally, nonprofit management team members must ensure that their policies and procedures will facilitate an agency's compliance with its contractual obligations, duties and responsibilities as a participating agency in AbilityOne-related funding and blind worker employment programs. One of the first signs that your nonprofit agency is being investigated for possible violations of the False Claims Act is the receipt of Civil

Investigative Demand (CID) from the government. As discussed in one of our other [articles](#), a CID, it is important that you retain experienced legal counsel if your agencies is ever targeted by the government under the False Claims Act. Our attorneys have extensive experience handling False Claims Act matters and cases. ***For a free consultation, give us a call: (202) 298-8750. We represent individuals and entities nationwide in these types of cases and others brought under the False Claims Act.***



Is your nonprofit agency being audited by AbilityOne OIG? If so, give us a call. We can help. For a free consultation, call: 1 (800) 475-1906.

[1] 41 U.S.C. § 8503. The statute further mandates that the Committee maintain a procurement list for both products and services from which it assigns orders to qualified nonprofits. These nonprofits are in turn grouped into two categories, those that employ the blind and those that employ the other severely disabled. As with other agencies, the Committee is charged with issuing regulations in furtherance of its responsibilities under the statute.

[2] AbilityOne Commission. "[Ability One – Milestones](#)."

[3] 5 U.S.C. § 6. The IG Statute enumerates additional powers, including the requesting of assistance or information from other government agencies and entering contracts with outside parties to carry out its audit and investigatory functions. These powers uniformly apply to all agency IGs, including that for AbilityOne OIG.

[4] 41 C.F.R. § 51-4.3. The direct labor hours reporting rules and additional review requirements for blind individuals represent only a few of the compliance standards imposed on nonprofit agencies. The regulation includes additional requirements, such as those concerning the compensation, employment, and occupational health and safety standards prescribed by the Secretary of Labor, as well as placement programs in coordination with community services.

[5] Some exceptions for below 75% ODLH do apply, depending on the circumstances and at the discretion of the Commission. The Commission is more tolerant of relaxing the requirement if doing so still encourages the employment of disabled persons for specialized projects while also permitting the federal government to meet its procurement orders.

[6] AbilityOne OIG. [Top Management and Performance Challenges Report](#). December 2, 2019.

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[7] 31 U.S.C. § 3729.

[8] See Department of Justice. U.S. Attorney's Office for the Eastern District of Wisconsin [Press Release](#) titled: "**Wisconsin-Based Nonprofit to Pay \$1.9 Million To Settle Allegations of False Claims and Kickbacks On Federal Contracts for Blind Workers.**" September 30, 2020. In an earlier 2019 case out of the Western District of Tennessee, the government settled another False Claims Act against a different defendant for \$150,000. The [Press Release](#) announcing this settlement is titled: "**Memphis Goodwill Industries, Inc. will pay \$150,000 to the United States for claims that were in violation of the False Claims Act.**" June 19, 2019.

[9] U.S. AbilityOne Commission. "[Nonprofit Agencies Out of Compliance with Commission Regulations.](#)" Policy 51.403. March 22, 2013.