Understanding Federal Affirmative Action and EEO Requirements

Compliance Strategies for Contractors with both Service & Supply and Construction Contracts

Agenda

• Review of federal laws and the contracts triggering OFCCP jurisdiction
• Overview of EEO/AAP requirements based on contract type
• Strategy discussion for compliance with multiple obligations in a single workforce
Federal Legal Authority

OFCCP JURISDICTIONAL THRESHOLDS

OFCCP’s Legal Authority

• Executive Order 11246
  — Prohibits discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity and national origin & requires affirmative action for women and minorities

• Section 503 of the Rehabilitation Act of 1973
  — Prohibits discrimination against individuals with disabilities & requires affirmative action for qualified individuals with disabilities

• Vietnam Era Veteran Readjustment Assistance Act (“VEVRAA”)
  — Prohibits discrimination against individuals with disabilities & requires affirmative action for qualified individuals with disabilities
### Jurisdiction & Requirements: EO 11246

#### Jurisdiction & Requirements (cont.)

**• Section 503 (Individuals with Disabilities)**

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<tr>
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**Federally-Assisted Construction**

- Not Applicable
- Not Applicable
Jurisdiction & Requirements (cont.)

**VEVRAA (Protected Veterans)**

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**COVERED CONTRACTS**
Definitions of Covered Contracts

• **Service & Supply Contracts**
  – Any agreement or modification for the purchase, sale, or use of personal property or nonpersonal services
  – This includes supplies and contracts for the use of real property (such as lease agreement)

Definitions of Covered Contracts (cont.)

• **Federal Construction (aka “Direct Federal”) Contract**
  – Any contract for the construction, rehabilitation, alteration, conversion, extension, demolition or repair of buildings or highways, or other changes or improvements to real property, including facilities providing utility services
Definitions of Covered Contracts (cont.)

• **Federally Assisted Construction Contract**
  – Contracts paid for in whole or in part with funds obtained from the Government or borrowed on the credit of the Government pursuant to any Federal program involving a grant, contract, loan, insurance or guarantee, or undertaken pursuant to any Federal program involving such grant, contract, loan, insurance or guarantee, or any application of modification thereof approved by the Government for a grant, contract, loan, insurance or guarantee under which the applicant itself participates in the construction work.

Which Entities are Required to Comply with OFCCP Requirements:

**SINGLE-ENTITY TEST**
OFCCP Jurisdiction: Single Entity Coverage

• A separate business or organization without Government contracts may be covered under the laws enforced by OFCCP based on an integrated relationship or "single entity" status with a Government contractor
  – OFCCP uses a five-factor test for determining whether such a relationship exists (sometimes presented with 27 factors)
• A contractor’s obligations presumptively apply to all of its facilities unless:
  – The Deputy Assistant Secretary expressly waives or exempts a particular facility
  – “Separate Facility Waiver”

Single Entity Five-Factor Test

The single entity test requires the OFCCP to consider whether:
1. The entities have common ownership;
2. The entities have common directors and/or officers;
3. One entity has de facto day-to-day control over the other through policies, management, or supervision of the entity’s operations;
4. The personnel polices of the entities emanate from a common or centralized source; and
5. The operations of the entities are dependent on each other, e.g., services are provided principally for the benefit of one entity by another and/or both entities share management, offices, or other services
Requirements Applicable to All Covered Contracts

Nondiscrimination Requirements – Females & Minorities

EO 11246 – Nondiscrimination/ EEO

- The same requirements apply to all covered federal contractors and subcontractors
  - Coverage:
    - Service & Supply Contracts
      - Applies to all W-2 employees
    - Construction Contracts
      - Applies to all employees performing construction work, regardless of whether they are performing work on federal contracts
      - One Direct Federal Contract triggers direct federal obligations for all construction employees
Executive Order 11246 prohibits discrimination in employment on the basis of race, color, religion, sex, or national origin.

- Additionally, Executive Order 13672 amended EO 11246 to prohibit discrimination on the basis of sexual orientation or gender identity.

Nondiscrimination or equal employment opportunity (EEO) means that employment or employment-related decisions may not be made based on a protected characteristic.

- This includes training opportunities, work assignments, company-sponsored social events, etc.

General Requirements:
- EEO Tagline
- EEO Clause in Covered Subcontracts
- Notifications to Labor Organizations
- “EEO is the Law” Poster
- Non-Retaliation Requirements
- Recordkeeping Requirements
- Access to Records and Job Sites
- Comply with Employee Selection Procedures
- Reasonable Accommodation Requirements
- Outreach and Positive Recruitment Obligations
- Ensure Non-Segregated Facilities
AFFIRMATIVE ACTION REQUIREMENTS
– FEMALES & MINORITIES

Requirements Differ Based on Contract Type

- **Service & Supply Contracts**
  - Must take affirmative action for females and minorities to ensure equal employment opportunity
  - Development of an Affirmative Action Plan (AAP) including data tracking and analytics of personnel activity
  - Coverage:
    - All W-2 (non-construction) employees must be included in an AAP

- **Construction Contracts (Direct Federal & Federally-Assisted)**
  - Compliance with the 16 Affirmative Action Steps
  - Measure work crew hours against participation goals for females and minorities
  - Coverage:
    - All job sites – not just the site where federal or federally assisted construction work is being performed
    - Applies to construction workforce
Service and Supply Requirements

All non-discrimination/EEO PLUS:
• Develop annual affirmative action plans
• Submit EEO-1 Report and/or VETS-4212 Form
• Adhere to the OFCCP’s Internet Applicant Rule
• List open positions with state job services
• Implement the Uniform Guidelines on Employee Selection Procedures (UGESP)

Service and Supply Requirements (cont.)

• AAP Structure Requirements:
  – Each establishment with 50 or more employees must have an AAP
  – Establishments with fewer than 50 employees may be:
    • In its own AAP;
    • In the AAP for the location of the personnel function that supports the establishment; OR
    • In the AAP for the location of the official to whom the employees report
Construction Contracts

AFFIRMATIVE ACTION REQUIREMENTS – FEMALES & MINORITIES

Goals for minorities and females are established as a percentage participation rate:
- These goals are applicable to the total on-site construction workforce, regardless of whether or not part of that workforce is performing work on a federal, federally assisted or non-federally related project contract or subcontract.
- The percentage goal established for female participation is 6.9% nationwide.
- Additional information and geographical goals for minorities can be found at: https://www.dol.gov/ofccp/TAguides/TAC_FedContractors_JRF_QA_508c.pdf
Construction 16 Steps

1. Ensure/maintain a work environment free of harassment, intimidation, and coercion
   – Inform on-site supervisors of the desired environment
2. Establish and maintain current lists of minority and female recruitment sources
   – Notify sources when employment opportunities are available
3. Maintain applicant recordkeeping for off-the-street applicants and referrals, and what action was taken
4. Notify OFCCP if union referral process impedes efforts to meet EEO/AA obligations
5. Develop on-the-job training opportunities

Construction 16 Steps (cont.)

6. Disseminate EEO policies
   – Include them in policy manual, CBAs, company newspaper, bulletin boards, etc.
7. Review EEO/AA obligations with those responsible for employment decisions (e.g. superintendents, general foremen)
8. Disseminate EEO policies externally
   – Advertise in news media, especially with minority and female audiences
9. Direct recruitment efforts to minority/female/community organizations, etc. with job notices
10. Encourage current minority and female employees to recruit others
11. Validate all tests under the Uniform Guidelines on Employee Selection Procedures to ensure they are lawful

12. Inventory minority and female employees for promotional opportunities annually
   – Encourage them to work toward promotions

13. Ensure that internal personnel activity (e.g., seniority practices) do not have a discriminatory effect

14. Ensure all facilities and company activities are non-segregated

15. Maintain records of solicitations of offers from prospective minority and female subcontractors

16. Conduct a review, at least annually, of supervisors’ adherence to EEO/AA obligations

Section 503 & VEVRAA Requirements – Not Applicable to Federally-Assisted Construction

**NONDISCRIMINATION & AFFIRMATIVE ACTION – INDIVIDUALS WITH DISABILITIES & PROTECTED VETERANS**
503/VEVRAA Requirements

• Many duplicative obligations:
  – EEO Tagline
  – EEO Clause in Covered Subcontracts
  – Notifications to Labor Organizations
  – “EEO is the Law” Poster
  – Non-Retaliation Requirements
  – Recordkeeping Requirements
  – Access to Records and Job Sites
  – Comply with Employee Selection Procedures
  – Reasonable Accommodation Requirements
  – Outreach and Positive Recruitment Obligations

503/VEVRAA Requirements (cont.)

• 503/VEVRAA Unique Requirements:
  – Self-ID: Disability & Veterans status
    • Pre and Post Offer for both
    • Periodic invitation to self-ID disability status
  – Measure representation against:
    • Veterans hiring benchmark
    • IWD utilization goal
  – Assessment of physical and mental qualifications
  – Outreach
    • VEVRAA job posting requirements
    • VEVRAA and IWD outreach assessment
Affirmative Action Compliance

APPLICATION TO A MIXED WORKFORCE

Affirmative Action Compliance Scenario

<table>
<thead>
<tr>
<th>Step 1: Apply Single Entity Test</th>
<th>Entity A</th>
<th>Entity B</th>
<th>Entity C</th>
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<tbody>
<tr>
<td>Step 3: Develop AAP Structure</td>
<td>Entity C</td>
<td>Entity C</td>
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<tr>
<td></td>
<td>Worksites</td>
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Direct Federal Project Site
Affirmative Action Compliance Options

**Single Entity Test – Each Entity Separate**

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<td>49 Employees</td>
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**Single Entity Test – A & B are a single entity, C is separate**

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Affirmative Action Compliance Options

Single Entity Test – B & C are a single entity, A is separate

Entity A
Service & Supply Contract

Entity B
No Fed’l Contracts

Entity C
Direct Federal & Federally-Assisted Construction Contracts

Entity C
Worksites
Federally-Assisted Project Site

Direct Federal Project Site

Single Entity Test – All are a single entity

Entity A
Service & Supply Contract

Entity B
No Fed’l Contracts

Entity C
Direct Federal & Federally-Assisted Construction Contracts

Entity C
Worksites
Federally-Assisted Project Site

Direct Federal Project Site

100 Employees
49 Employees
51 Employees
36 Employees
QUESTIONS?