

THE BASICS FOR COMPANIES NEW TO THE WORLD OF “FEDERAL CONTRACTS”

What are the Federal Regulations that Describe Our Affirmative Action Obligations?

Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended and the affirmative action provisions (Section 4212) of the Vietnam Era Veterans' Readjustment Assistance Act, as amended taken together ban discrimination by Federal contractors and subcontractors. These regulations require Federal contractors and subcontractors to take affirmative action to ensure that all individuals have an equal opportunity for employment, without regard to race, color, religion, sex, national origin, disability or status as a Vietnam era or special disabled veteran.

The *basic* requirements for Federal contractors and subcontractors a (concerning Affirmative Action programs) are described in **Executive Order 11246**. The *specifics* about what must go into your Affirmative Action analyses and written narrative are laid out in regulations referred to as **41 CFR 60** (or some old hands simply refer to it as Chapter 60). The CFR in the title of these regulations stands for the “Code of Federal Regulations Pertaining to ESA” (that is the Department of Labor's Employment Standards Administration). You should read these documents. They are available online at www.dol.gov/elaws .

OFCCP requires a contractor, as a condition of having a federal contract, to engage in a *self-analysis* for the purpose of discovering any barriers to equal employment opportunity. No other Government agency conducts comparable systemic reviews of employers’ employment practices to ferret out discrimination. OFCCP also investigates complaints of discrimination. In Fiscal Year 1999, OFCCP conducted 3,833 compliance reviews.

What Kinds of “Self-Analysis” of Employment Practices are Required of Federal Contractors and Subcontractors?

- Develop an Affirmative Action Program
- Include an equal employment opportunity clause in each government contract
- Make “good faith efforts” to eradicate any “problem areas” that are found

Develop an Affirmative Action Program

The OFCCP divides corporate America into two worlds: *Construction contractors* and everyone else. Because the construction industry is so fluid, the government sets goals and specifies affirmative action which must be undertaken by Federal and federally assisted construction contractors. OFCCP issued specific national goals for women. The female goal of 6.9 percent was extended indefinitely in 1980 and remains in effect today. Construction contractors are not required to develop written affirmative action programs. The regulations enumerate the good faith steps construction contractors must take in order to increase the utilization of minorities and women in the skilled trades. You can review the regulations by going to www.dol.gov/elaws.

All non-construction (“service and supply”) contractors with 50 or more employees and government contracts of \$50,000 or more are required to develop and implement a written affirmative action program (AAP) for each establishment.

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SpeedEEO will guide you through the process of preparing the analyses required for your Affirmative Action Program. A narrative template is also available for an extra charge at SpeedEEO. By the time you’ve reviewed the analytical reports supplied by SpeedEEO and customized the written narrative to reflect your organization’s employment practices, you should be in good shape to assess your company’s employment practices with regard to discrimination. If you find “problem areas”, you should describe them and discuss the “good faith efforts” you are making address these problems and establish “goals” or placement objectives when necessary. The AAP is kept on file by the contractor and submitted to OFCCP only if the agency requests it for the purpose of conducting a compliance review.

We refer to areas of under-utilization of women or minorities as “*problem areas*”. The AAP identifies those areas, if any, in the workforce. The regulations at 41 CFR 60-2.11 (b) define under-utilization as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. When determining availability of women and minorities, contractors consider, among other factors, the presence of minorities and women having requisite skills in an area in which the contractor can reasonable recruit.

Based on the utilization analyses and the availability of qualified individuals, the contractors establish goals to reduce or overcome the under-utilization. Good faith efforts may include expanded efforts in outreach, recruitment, training and other activities to increase the pool of qualified minorities and females. The actual selection decision is to be made on a non-discriminatory basis.

The Equal Opportunity Clause

Each contracting agency in the Executive Branch of government must include the equal opportunity clause in each of its nonexempt government contracts. The equal opportunity clause requires that the contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. *American Indian or Alaskan Native, Asian or Pacific Islander, Black, and Hispanic individuals are considered minorities* for purposes of the Executive Order. This clause makes equal employment opportunity and affirmative action integral elements of a contractor’s agreement with the government. Failure to comply with the non-discrimination or affirmative action provisions is a violation of the contract.

Good Faith Efforts and “Goals”

The Executive Order calls for equal *opportunity*. It does not require, and specifically forbids the use of “quotas”, preferential hiring, or “set-asides” to achieve equal representation. In fact, the Executive Order and its supporting regulations do not authorize OFCCP to penalize contractors for not meeting goals. Rather, the goal-setting process in affirmative action planning is used to target and measure the

effectiveness of affirmative action efforts to eradicate and prevent discrimination. The numerical goals are established based on the availability of qualified applicants in the job market and/or qualified candidates in the workforce.

What Happens if We Don't Establish an Affirmative Action Program?

A contractor in violation of E.O. 11246 may have its contracts canceled, terminated, or suspended in whole or in part, and the contractor may be debarred, i.e., declared ineligible for future government contracts. However, debarment is quite rare because contractors are given the opportunity for a full evidentiary hearing. Debarments may be for an indefinite term or for a fixed term. When an indefinite term debarment is imposed, the contractor may be reinstated as soon as it has demonstrated that the violations have been remedied. A fixed-term debarment establishes a trial period during which a contractor can demonstrate its commitment and ability to establish personnel practices that are in compliance with the Executive Order.

What Government Agency Monitors Affirmative Action Programs?

The Department of Labor's Employment Standards Administration's Office of Federal Contract Compliance Programs (OFCCP) monitors Affirmative Action Programs of Federal contractors and sub contractors. OFCCP's jurisdiction covers approximately 26 million employees or nearly 22% of the total civilian workforce.