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Overview of Equal Employment Opportunity and Affirmative Action Obligations for Federal Contractors



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Executive Order 11246 (EO 11246) prohibits race, color, religion, sex, sexual orientation, gender identity, and national origin discrimination by federal contractors and subcontractors. Furthermore, contractors meeting specific coverage thresholds are required to engage in “affirmative action” to employ and advance applicants and employees without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Section 503 of the Rehabilitation Act of 1973 (Section 503) and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (VEVRAA) also have nondiscrimination and affirmative action requirements based on disability and veteran status, respectively. The EO 11246, Section 503 and VEVRAA are enforced by the U.S. Department of Labor (DOL) through the Office of Federal Contract Compliance Programs (OFCCP).¹

EXECUTIVE ORDER 11246: AN OVERVIEW

Threshold Coverage. Federal contractors and subcontractors are required to provide equal employment opportunities if they have (i) government contracts or subcontracts in excess of \$10,000; (ii) government bills of lading; (iii) contracts or subcontracts in any amount with depositories of federal funds or with financial institutions which are issuing and paying agents for U.S. savings bonds and savings notes. 41 C.F.R. § 60-1.5.

Contract Clauses. A covered contractor must include eight equal opportunity clauses in each of its government contracts and subcontracts. The clauses are set out in 41 C.F.R. § 60-1.4(a). However, rather than setting forth verbatim each of the clauses, the contractor may incorporate the clauses by reference. 41 C.F.R. § 60-1.4(d).

Advertising Disclaimer. Employment advertisements or solicitations for employees must contain a disclaimer expressly stating that all applicants for employment will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity or national origin, (*i.e.*, “This company is an equal opportunity employer”). 41 C.F.R. § 60-1.41.

Postings. Contractors must post in conspicuous places, available to employees and applicants, an equal employment opportunity posting provided in 41 C.F.R. § 60-1.42. DOL makes available a comprehensive poster to fulfill these explicit requirements (known as “Equal Employment Opportunity is the Law”).

Written Affirmative Action Program (AAP). Service and supply contractors (or subcontractors) that employ 50 or more employees and either (i) have a federal contract of \$50,000 or more; (ii) have government bills of lading, which in any 12-month period total or can reasonably be expected to total \$50,000 or more; (iii) serve as a depository of government funds in any amount; or (iv) are financial institutions which issue and pay U.S. Savings Bonds and Savings Notes in any amount; are required to develop a written AAP for each of their establishments. 41 C.F.R. § 60-1.40.

Standard Form 100 (EEO-1). Covered prime contractors and first-tier subcontractors that employ 50 or more employees and either (i) have a federal contract, subcontract or purchase order of \$50,000 or more; (ii) serve as a depository of government funds in any amount; or (iii) are financial institutions which issue and pay U.S. Savings Bonds and Savings Notes; must annually file a Standard Form 100 (also known as “Employer Information Report EEO-1”) with the EEO-1 Joint Reporting Committee. 41 C.F.R. § 60-1.7. Standard Form 100 requests the employer’s current workforce data for all full-time and part-time employees, broken down by sex and by seven racial/ethnic identifications – White; Black; Hispanic or Latino; Native Hawaiian or Other Pacific Islander; Asian; American Indian or Alaskan Native; and Two or More Races – for each of the ten EEO-1 occupational categories.

Document Retention. Any personnel or employment record (including applicant flow data) made or kept by the contractor shall be preserved by the contractor for a period of two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a government contract of at least \$150,000, the minimum record retention period shall be one year. 41 C.F.R. § 60-1.12(a). Furthermore, a contractor subject to EO 11246’s AAP requirements must maintain a copy of its affirmative action plan and all documentation of good faith efforts for the current and preceding year. 41 C.F.R. § 60-1.12(b).

VEVRAA: AN OVERVIEW

Threshold Coverage. Federal contractors and subcontractors with a government contract or subcontract of \$150,000 or more, entered into or modified on or after December 1, 2003 are required to provide equal opportunity and take affirmative action for protected veterans (*i.e.*, “disabled veteran,” “recently separated veteran,” “active duty wartime or campaign badge veteran,” or “Armed Forces service medal veteran”) and pre-JVA veterans.² 41 C.F.R. § 60-300.4; 38 U.S.C. § 4212.³

Contract Clauses. A covered contractor must include 12 equal opportunity clauses concerning covered veterans in each of its government contracts and subcontracts. The clauses are set out in 41 C.F.R. § 60-300.5(a). However, rather than setting forth verbatim each of the clauses, the contractor may incorporate the clauses by reference to the 41 C.F.R. § 60-300.5(a) citation and inclusion of the following language in bold text, after the citation: “This contractor and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a). This regulation prohibits discrimination against qualified protected veterans and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans.” 41 C.F.R. § 60-300.5(d).

Notification of Job Openings. Contractors must list all employment openings, except top management openings, positions filled from within the contractor's organization and positions lasting three days or less, with the appropriate employment service delivery system where the opening occurs (e.g., state workforce agency job bank). 41 C.F.R. § 60-300.5(a)(2), (6).

Postings. Contractors must post in conspicuous places, available to employees and applicants, a VEVRAA posting as provided in 41 C.F.R. § 60-300.5(a) (9). DOL's "EEO is the Law" poster fulfills these explicit requirements.

Written Affirmative Action Program. Federal contractors or subcontractors with (i) 50 or more employees and (ii) a government contract for \$150,000 or more are required to develop a written AAP for each of their establishments. 41 C.F.R. § 60-300.40.

Hiring Benchmark. Contractors must establish an annual hiring benchmark to assess the effectiveness of the contractor's effort to recruit and employ protected veterans. Contractors can establish their benchmark by using one of two methods. They may choose to establish a benchmark equal to the national percentage of veterans in the civilian labor force, currently at seven percent, or establish their own benchmark. When contractors create their own benchmark, however, they must consider: (1) the data from the U.S. Bureau of Labor Statistics and Veterans' Employment and Training Service (VETS); (2) the applicant and hiring ratio for the previous year; (3) the contractor's assessment of outreach and recruitment efforts; and (4) any other factors that would affect the availability of qualified protected veterans, such as the nature of job openings or its location. Both methods require contractors to document their hiring benchmark. 41 C.F.R. § 60-300.45.

Invitation to Self-Identify. Contractors must invite an applicant to self-identify as a protected veteran during the pre-offer and post-offer stages of the application process. The pre-offer invitation may be included in the application materials but must be provided to applicants prior to making an offer of employment. The rule provides sample invitations that contractors may use. The invitations must state that the information is being requested on a voluntary basis and that it will be kept confidential. 41 C.F.R. § 60-300.42; Appendix B to Part 60-300 Sample Invitation to Self-Identify.

VETS-4212. In addition, any contractor who receives contracts or subcontracts from the Federal Government in the amount of \$150,000 or more for contracts entered into or modified on or after December 1, 2003 must annually file a Federal Contractor Veterans' Employment Report (VETS-4212) with DOL's Office of VETS.⁴ The contractor must report the number of employees in its workforce who are disabled veterans, recently separated veterans, Armed Forces service medal veterans, and other protected veterans by hiring location and broken

down into the 10 EEO-1 job categories. Employers also must report the total number of new hires during the period covered by the report and the number of new employees hired during the previous 12 months who are disabled veterans, recently separated veterans, Armed Forces service medal veterans, and other protected veterans; broken down into the ten EEO-1 job categories. Contractors must also report the maximum number and minimum number of employees of the contractor at each hiring location during the period covered.

Document Retention. Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a government contract of at least \$150,000, the minimum record retention period shall be one year. 41 C.F.R. § 60-300.80(a). Contractors are required to maintain specified comparisons pertaining to applicants and hires for three years. 41 C.F.R. § 60-300.80(b).

SECTION 503 OF THE REHABILITATION ACT OF 1973: AN OVERVIEW

Threshold Coverage. Federal contractors and subcontractors with government contracts in excess of \$15,000 are required to take affirmative action to employ and advance in employment qualified individuals with disabilities. 29 U.S.C. § 793(a); 41 C.F.R. § 60-741(b).⁵

Contract Clauses. A covered contractor must include seven affirmative action clauses concerning disabled individuals in each of its contracts and subcontracts. The clauses are set out in 41 C.F.R. § 60-741.5(a). However, rather than setting forth verbatim each of the clauses, the contractor may incorporate the clauses by reference to the 41 C.F.R. § 60-741.5(a) citation and inclusion of the following language in bold text, after the citation: “This contractor and subcontractor shall abide by the requirements of 41 CFR 60-741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.” 41 C.F.R. § 60-741.5(d).

Postings. Contractors must post in conspicuous places, available to employees and applicants, a disability posting as provided in 41 C.F.R. § 60-741.5(a) (4). DOL’s “EEO is the Law” poster fulfills these explicit requirements.

Written Affirmative Action Program. Federal contractors or subcontractors with (i) 50 or more employees and (ii) a government contract valued at \$50,000 or more are required to develop a written AAP for each of their establishments. 41 C.F.R. § 60-741.40.

Utilization Goal. Section 503 establishes a national seven percent utilization goal, which measures the contractor’s success of hiring individuals with disabilities. Contractors are required to apply

and annually assess the utilization goal in each job group, or the contractor's entire workforce when it has 100 or fewer employees. When a contractor's job group or entire workforce falls below the utilization goal, it must assess its personnel processes, the effectiveness of its outreach and recruitment efforts, and the results of its affirmative action program audit to determine whether impediments to equal employment opportunity exist. To correct identified problems, contractors must develop and execute action-oriented programs. Non-attainment of the utilization goal is neither an admission nor a finding of discrimination. 41 C.F.R. § 60-741.45.

Invitation to Self-Identify. Contractors must invite an applicant to self-identify as an individual with a disability during the pre-offer and post-offer stages of the application process. The pre-offer invitation may be included in the application materials but must be separate from the application. These invitations must use the prescribed OFCCP Voluntary Self-Identification of Disability Form. In addition, contractors must invite their entire workforce to self-identify as an individual with a disability within the first year that the contractor is subject to the Section 503 self-identification requirement and every five years thereafter. 41 C.F.R. § 60-741.42.

Document Retention. Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a government contract of at least \$150,000, the minimum record retention period shall be one year. 41 C.F.R. § 60-741.80(a). Contractors are required to maintain specified comparisons pertaining to applicants and hires for three years. 41 C.F.R. § 60-741.80(b).

WRITTEN AFFIRMATIVE ACTION PROGRAMS

Although EO 11246, VEVRAA, and Section 503 all impose written AAP obligations on covered contractors; they each require different elements to be included in their respective written AAPs.

EO 11246 Affirmative Action Plans. Written AAPs created pursuant to EO 11246 are both statistical and narrative and must contain the following 10 components:

- An organizational profile, providing the OFCCP with a numeric depiction of the staffing pattern within a contractor's establishment, 41 C.F.R. § 60-2.11;
- A job group analysis, combining job titles within a contractor's establishment into manageable groups for purposes of statistical analysis, 41 C.F.R. § 60-2.12;
- Incumbent placement percentages, identifying the percentage of minorities and women employed within each established job group, 41 C.F.R. § 60-2.13;
- A determination of availability, estimating the number of qualified minorities or women available for employment within each established job group, 41 C.F.R. § 60-2.14;

- A comparison of incumbency and availability in each job group, identifying areas where minorities or women are under-utilized, 41 C.F.R. § 60-2.15;
- Stated placement goals, creating objectives or targets reasonably attainable by applying good faith efforts so as to measure progress towards achieving equal employment opportunity, 41 C.F.R. § 60-2.16;
- Designation of responsibility for the implementation of the AAP to an official within the contractor's organization, 41 C.F.R. § 60-2.17(a);
- Identification of problem areas, providing in-depth analyses of the workforce by organizational unit and job group, personnel activity, compensation systems, personnel procedures, and any other areas of operation to determine whether and where impediments to equal employment opportunity exist, 41 C.F.R. § 60-2.17(b);
- Stated action-oriented programs, spelling out programs designed to correct any problem areas identified by the affirmative action plan analysis and to attain established goals and objectives, 41 C.F.R. § 60-2.17(c); and
- Planned periodic internal audits, providing an auditing system that periodically measures the effectiveness of its total affirmative action program, 41 C.F.R. § 60-2.17(d).

VEVRAA Affirmative Action Plans. Written AAPs created pursuant to VEVRAA, like EO 11246 plans, are both statistical and narrative and must contain the following 11 components:

- The contractor's equal opportunity policy statement, including affirmative obligations and non-retaliation protections, 41 C.F.R. § 60-300.44(a);
- Periodic review of the contractor's personnel processes, 41 C.F.R. § 60-300.44(b);
- Periodic review of the contractor's physical and mental ob qualifications, 41 C.F.R. § 60-300.44(c);
- Reasonable accommodation efforts for physical and mental limitations, 41 C.F.R. § 60-300.44(d);
- Anti-harassment procedures, 41 C.F.R. § 60-300.44(e);
- External dissemination of policy, outreach and positive recruitment efforts, as outlined in detail in the regulations, 41 C.F.R. § 60-300.44(f);
- Internal dissemination of affirmative action policies, 41 C.F.R. § 60-300.44(g);
- An audit and reporting system measuring the effectiveness of the AAP, 41 C.F.R. § 60-300.44(h);
- Designation of responsibility for the implementation of the AAP to an official within the contractor's organization, 41 C.F.R. § 60-300.44(i);

- Training for all personnel involved in recruitment, screening, selection, promotion discipline, and other related processes, 41 C.F.R. § 60-300.44(j); and
- Data collection analysis documenting the following computations pertaining to applicants and hires on an annual basis: (1) number of applicants who self-identified as protected veterans, or are otherwise known as protected veterans; (2) total number of job openings and total number of jobs filled; (3) total number of applicants for all jobs; (4) the number of protected veterans hired; and (5) the total number of applicants hired, 41 C.F.R. § 60-300.44(k).

Section 503 Affirmative Action Plans. Written AAPs created pursuant to Section 503 contain many of the same elements as those created pursuant to VEVRAA. Because there are such significant similarities between the written AAP requirements of VEVRAA and Section 503, it is possible to develop a single written AAP to comply with both laws. 41 C.F.R. § 60-300.44(a)-(k).

It should also be noted that VEVRAA and Section 503 require that the written AAP be made available for inspection by applicants and employees, while EO 11246 does not include such a requirement. 41 C.F.R. §§ 60-250.41; 60-300.41; 60-741.41.

NON-COMPLIANCE PENALTIES

In the event of the contractor's non-compliance with the nondiscrimination clauses, or any of the rules, regulations, or orders enforcing EO 11246, VEVRAA, or the Rehabilitation Act, the contractor and subcontractor may be subject to sanctions, penalties, and liabilities. Among the consequences of non-compliance are the following:

- Contractor may be debarred and declared ineligible for any future government contracts;
- Contract may be canceled, terminated, or suspended in whole or in part;
- For subcontractors, liability may exist if debarment causes the prime contractor to be in breach of the prime contract; and
- Where a violation is material, the U.S. Department of Justice (DOJ) may bring suit to enforce the regulations or enjoin non-compliance; DOJ is also authorized to bring a criminal action for the furnishing of false information to DOL.

The OFCCP will generally enter into mediation, conciliation, or settlement for any violations before a contract is canceled or terminated.

CONTACT INFORMATION

Should you have any questions about OFCCP's regulations or require information about any employment-related matters, please contact:



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Endnotes

¹This document provides an overview highlighting significant obligations for federal contractors and subcontractors but should not be construed as providing legal advice or opinions. You should consult an attorney for obtaining legal advice on the intricacies of these obligations.

²The regulations found at 41 C.F.R. Part 60-250 have been rescinded in their entirety. However, veterans that were formerly protected only under Part 60-250 are still protected from discrimination under the revised 41 C.F.R Part 60-300.

³ In 2015, the Federal Acquisition Regulation ("FAR") implemented an adjustment to the VEVRAA threshold increasing the amount from \$100,000 to \$150,000. See "Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds," 80 Fed. Reg. 38293 (2015); FAR 22.1303(a); FAR 52.222-35. Although OFCCP's regulations at 41 C.F.R. 60 Part 300 do not currently reflect this inflationary adjustment, OFCCP adopted the FAR Council's adjusted threshold for determining whether a contractor is covered by VEVRAA regulatory requirements. Executive Order 11246 is not subject to inflationary adjustment by the FAR Council. See <http://www.dol.gov/ofccp/taguides/Jurisdiction.htm>.

⁴Previously known as VETS-100 Report. See 79 Fed. Reg. 57467 (2014); FAR 52.222-37.

⁵In 2010, the FAR implemented an adjustment for Section 503 changing the threshold amount from \$10,000 to \$15,000. See "Federal Acquisition Regulation; Inflation Adjustment of Acquisition-Related Thresholds," 75 Fed. Reg. 53129 (2010); FAR 22.1408(a); FAR 52.222-36. Although OFCCP's regulations at 41 CFR 60 Part 741 do not currently reflect this inflationary adjustment, OFCCP adopted the FAR Council's adjusted threshold for determining whether a contractor is covered by Section 503 regulatory requirements. See <http://www.dol.gov/ofccp/taguides/Jurisdiction.htm>.

