

Federal Contractor Affirmative Action Compliance Checklist

This document is intended to provide companies that provide supplies or services¹ for government contracts an overview of affirmative action compliance requirements. For more specific questions and analysis, please contact your labor and employment counsel.

The following compliance requirements apply to a federal contractor or subcontractor (including its subsidiaries or affiliates²) with 50 or more employees and government contracts or subcontracts of \$50,000 or more, unless otherwise stated³. All requirements apply equally to any subcontractors whose work is necessary to the performance of the federal contract that generates the initial compliance requirements, except as otherwise noted.

CHECKLIST FOR DETERMINING AFFIRMATIVE ACTION OBLIGATIONS

CONTRACTOR:



Does the company, including its subsidiaries or affiliates, have a contract with the Federal Government?
Yes___ No___

1. Is the amount of the contract \$50,000 or more? Yes___ No___
If yes, affirmative action obligations under Executive Order 11246 and Section 503 of the Rehabilitation Act of 1973 (Section 503) apply.
2. Is the amount of the contract \$150,000 or more? Yes___ No___
If yes, affirmative action obligations under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) also apply.
3. If there is no dollar value on the contract, are the purchases or sales of services or goods in a year expected to exceed \$50,000? Yes___ No___
If yes, then the affirmative action obligations under #1 applies.

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1. Construction contractors' affirmative action plans (AAP) differ significantly from supply and service contractors.
 2. The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has developed a 27-point questionnaire to determine whether companies are considered single or related entities for jurisdictional purposes. Centralized employment decisions are a key indicator of single employer status, although other factors are also considered.
 3. The basic compliance requirements related to the Vietnam Era Veterans' Readjustment Assistance Act arise when the contractor has a contract of \$150,000, regardless of the number of employees, and affirmative action plans are required with a \$150,000 contract and 50 employees. Other laws, including Executive Orders, apply where the contractor has a contract in the amount of \$500,000 or \$1 million. In addition, contractors with a contract of \$5 million or more must establish a Business Code of Conduct policy and complaint reporting procedure, which typically includes a hotline reporting system. Further, some obligations attach to Federal Government contracts and subcontracts before the contract level reaches the \$50,000 or \$150,000 thresholds. For example, at \$10,000, the Equal Opportunity clause must be incorporated, which now includes non-discrimination provisions for gender identity and sexual orientation.

SUBCONTRACTOR:



1. Does the company have a contract to provide goods or services to a Federal Government contractor or subcontractor? Yes___ No___
2. Does the subcontract provide goods or services necessary to the performance of the ultimate federal contract? Yes___ No___
If yes, the company is a federal subcontractor.
3. Is the amount of the subcontract \$50,000 or more (or are purchases or sales and services in a year expected to exceed \$50,000)? Yes___ No___
If yes, affirmative action obligations under Executive Order 11246 and Section 503 apply.
4. Is the amount of a single qualifying subcontract \$150,000 or more? Yes___ No___
If yes, affirmative action obligations under VEVRAA also apply.

EXTENT OF OBLIGATIONS

Federal contractors and subcontractors have virtually the same compliance requirements. The Company's obligations as a government contractor/subcontractor can be generally divided into seven main areas: (1) preparation and annual updating of the affirmative action plans; (2) preparation of and submission of reports to the government; (3) recordkeeping, posting, and training requirements; (4) contract clause requirements; (5) compliance with a higher minimum wage and paid leave provisions; (6) participation in compliance audits; and (7) participation in complaint investigations.



1. PREPARING ANNUAL AFFIRMATIVE ACTION PLANS (AAPs)

The basic elements of an Executive Order 11246 AAP include:

- a) Data collection and record keeping, including providing compliant voluntary self-identification forms to applicants and employees;
- b) Taking an annual "snapshot" of the representation of minorities and females within each establishment's workforce, by job group;
- c) Conducting a job group analysis to identify and group jobs which are similar and will be used for statistical comparison (job groups are defined as groups of jobs with similar content, wage rates and opportunities);
- d) Conducting a statistical availability/utilization analysis by job group to compare the representation of minorities and females with the internal and external availability and establishing placement goals where the categories are under-represented;
- e) Preparing an applicant flow log (covering 12 months prior to the snapshot) that includes applicants' race and sex (Section 503 and VEVRAA AAPs also require a log that includes disability and protected veteran status);
- f) Conducting statistical adverse impact analyses for personnel activity for hiring, promotions and terminations for the 12-month period prior to the snapshot. Statistically significant adverse impact may result in financial liability, including back pay and the requirement to engage in preferential hiring or promotion;
- g) Conducting a compensation self-audit, recommended annually, by job group or job title, race and sex; and
- h) Annually reviewing goal attainment. (Section 503 and VEVRAA AAPs require analysis of the applicable goals and benchmarks for individuals with a disability and protected veterans).

Additional obligations include supervisor training, internal dissemination of the AAPs, posting requirements and a mandatory equal opportunity contract clause for all subcontracts and purchase orders and other requirements.



2. REPORTING OBLIGATIONS

- **EEO-1 Report** - file annually (also required of non-federal contractors with 100 or more employees). The company must identify its status as a federal contractor on the form. EEO-1 Reports are currently due May 17, reporting workforce data from a payroll period from October 1-December 31 of the prior year.
- **VETS-4212 Report** - file annually (formerly called VETS-100 or VETS-100A report) identifying the number of protected veterans in its employment and the number of new hires that are protected veterans, if the contractor has a covered contract of \$150,000 or more.
- **Federal Contractor Certification in OFCCP Portal** – Currently, a federal contractor or subcontractor must certify its compliance with affirmative action obligations via an OFCCP portal no later than June 30.



3. RECORDKEEPING, POSTING, AND TRAINING REQUIREMENTS

- Post all job openings (except highest-level jobs and those filled from within) with the local or state job services agency.
- Post Employees' Right to Organize poster required by Executive Order 13496 in all areas where other employee notices are displayed, including electronically.
- Post the "EEO Is the Law" poster that includes the federal contractor language.
- Post Federal Contract Minimum Wage poster, if applicable.
- Post a notice to all applicants and employees that the non-confidential portions of the AAPs for individuals with a disability and veterans are available for review upon request during normal business hours.
- Post a notice to all applicants and employees that the contractor will not discriminate against applicants or employees who disclose or discuss compensation information, using OFCCP's Pay Transparency language.
- Ensure persons responsible for recruiting and hiring are trained annually to ensure the AAP commitments are implemented.
- Maintain all employment-related records for 3 years to comply with the veterans and disability regulatory retention requirements, including pre-offer, post-offer, and all employee voluntary self-identification survey information.



4. CONTRACT CLAUSE REQUIREMENTS

Subcontracts and purchase orders related to the government contract must include the Equal Opportunity Clause ("EO Clause"), in bold, to comply with the regulations for veterans and individuals with disabilities.



5. DEFENDING COMPLIANCE AUDITS

Compliance audits require that the contractor submit to OFCCP its complete affirmative action plans for the particular establishment being audited for a desk audit, as well as additional information specified in a letter sent to the contractor 30 days in advance of the deadline. That desk audit may lead to an onsite review, including interviews of managers and employees, review of records, and frequently, identification of problem areas, both monetary and non-monetary. These onsite reviews normally take 3-5 days per establishment. When the OFCCP identifies potential affected class issues, there is a likelihood that there will be monetary liability either in the required hiring of a specified number of minorities or females, the increase in compensation of current minorities or females, or the promotion of minorities and/or females, all of which include a back pay component. OFCCP also enforces perceived disparities impacting whites or males. The duration of an audit may vary from a few weeks to several years.



6. CONTRACTOR WAGE AND PAID LEAVE REQUIREMENTS

Most contracts and subcontracts subject to the Davis Bacon and Service Contract Acts and concessions contracts with the Federal Government impose minimum wage and paid leave requirements for employees working on or in connection with the contracts. Currently the minimum wage is set at \$15.00 per hour, but it is indexed to inflation so it can change each January. Employees working on or in connection with covered contracts must also earn 1 hour of leave for each 30 hours of covered work, up to a maximum of 56 hours per year. Current PTO policies may satisfy this requirement if the provisions for use and the accrual and carryover provisions are consistent with, or more generous than, the regulations.



7. COMPLAINT INVESTIGATIONS

Complaint investigations by the OFCCP are similar to investigations of discrimination charges by the EEOC with a significant difference. While the EEOC rarely undertakes an onsite investigation and typically makes decisions based upon initial submission of written materials, the OFCCP typically conducts an onsite investigation and interviews managers and employees as well as inspects records. It also usually requires additional documentation beyond what may be required by the EEOC. In addition, the government contract obligation creates additional protected categories, such as protected veterans, sexual orientation and gender identity.

COSTS AND RISKS



1. RISKS OF AFFECTED CLASS OR OTHER MONETARY RELIEF

Statistically significant adverse impact findings, generally defined by OFCCP as personnel actions (hiring, promotions or terminations) that result in two or more standard deviations and compensation differences that are not explained by justifiable factors, are treated similarly to class actions and may result in a Conciliation Agreement that includes back pay, interest, and benefits awards, as well as mandatory salary adjustments or requirements to create a preferential hiring list of the alleged victims of hiring discrimination. Contactors may also be debarred from participation in federal contracts and may risk having contract payments withheld, although those more extreme sanctions will not occur absent a hearing.



2. DISCOVERABLE IN LITIGATION

The AAP provides a detailed and critical look at the organization, including significant employment data such as the adverse impact analyses referred to above. The AAP will likely be discoverable in litigation and may provide a source of unfavorable information to a plaintiff's lawyer. Underlying analysis, discussion and conclusions may also be discoverable, if the data is not protected by an attorney-client privilege.



3. COSTS OF COMPLIANCE

The cost of preparing and maintaining AAPs, both in terms of internal manpower and out of pocket costs, may be significant. Internal support for affirmative action compliance is often augmented by consultants or outside counsel. Defending an audit, even an audit that results in a positive outcome, is very expensive—in time and resources.



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