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presents

What's New at the OFCCP: New Rules and Regulations Affecting Federal Contractors

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Topics for discussion

- What the Office of Federal Contract Compliance Programs ("OFCCP") is
- What laws the OFCCP enforces
- New Rules and Regulations
- Best Practices
- Your questions

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WHAT IS THE OFCCP?

- It is a stand-alone program that reports directly to the Secretary of Labor.
- It administers and enforces three equal employment opportunity laws:
 - Executive Order 11246, as amended
 - Section 503 of the Rehabilitation Act of 1973, as amended
 - Vietnam Era Veterans' Readjustment Assistance Act of 1974 (38 U.S.C. § 4212) ("VEVRAA")
- It also shares responsibility with the EEOC for enforcing Title I of the ADA.

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OFCCP's enforcement Procedures

- The OFCCP provides information and technical assistance to Federal government contractors and subcontractors to help them comply with the law.
- It monitors contract compliance through periodic compliance reports.
- It investigates complaints of discrimination by applicants or employees of Federal contractors.
- It imposes sanctions for violations, which may include debarment, or the loss of a company's federal contracts.

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Executive Order 11246

- Made the Secretary of Labor responsible for administering the order's non-discrimination and affirmative action provisions.
- Entities subject to the requirements of EO 11246
 - Businesses or organizations that hold a Federal contract, subcontract, or federally assisted construction contract in excess of \$10,000.
 - Has Federal contracts or subcontracts that total in excess of \$10,000 in any 12-month period.

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Executive Order 11246

- Prohibits discrimination by Federal contractors against applicants and employees on the basis of race, color, religion, sex, **sexual orientation, gender identity**, or national origin.
- Religious organizations are exempt from the non-discrimination requirements with respect to the employment of individuals of a particular religion.

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Executive Order 11246

- Requires contractors to:

- Take affirmative action to ensure that applicants are employed, and employees are treated, without regard to any of the protected classes.
- Post in conspicuous places notices informing employees and job applicants of this nondiscrimination policy.
- Include statements in all job postings or advertisements that all qualified applicants will be considered without regard to any protected class.

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Executive Order 11246

- Requires Contractors to:

- Include provisions setting out all of these obligations in all subcontracts and purchase orders, so that the provisions are binding upon each subcontractor or vendor.

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Executive Order 11246

- OFCCP may receive and investigate complaints by employees or applicants of a Government contractor or subcontractor that allege discrimination on the basis of a protected class.
 - OFCCP generally keeps complaints filed against federal contractors where there appears to be a pattern of discrimination that affects a group of employees or applicants.
 - It also generally keeps complaints that allege violations of **pay transparency rule**, sexual orientation or gender identity, disability or protected veteran status.
 - Refers other complaints to the EEOC for investigation.

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OFCCP Complaint Procedure

- OFCCP investigates complaints using same procedures and legal standards as EEOC – investigation, cause determination, conciliation, notice of right to sue letter, etc.



Executive Order 11246

- Sanctions and penalties for non-compliance with nondiscrimination clause of Federal contracts include:
 - Recommendation that the EEOC or DOJ institute proceedings under Title VII of the Civil Rights Act of 1964;
 - Cancel, terminate, or suspend the contracts of non-compliant contractors or subcontractors; and
 - Blacklist contractors from receiving any future government contracts.



New Rules and Regulations Concerning Executive Order 11246

- **Executive Order 13665** was signed by President Obama on **April 8, 2014**. This Executive Order prohibits:
 - Discharging or discriminating against employees or applicants who inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant.
 - Pay secrecy policies.



Pay Transparency rule

- Final rule becomes effective on **January 11, 2016**.
- Rule only applies to employers that enter into a new covered federal contract or subcontract or modify an existing covered federal contract or subcontract on or after that date.
- Final rule includes a broad definition of “compensation.” In addition to an employee’s paycheck or salary, it also includes bonuses, paid leave, benefits, etc.



Pay Transparency rule

Defenses to alleged violations:

1. “Workplace rule” – situations in which a contractor disciplines an employee for a violation of a consistently and uniformly applied workplace rule, so long as that rule does not prohibit employees from discussing or disclosing compensation information.

EXAMPLE: Disciplining employees for taking a three-hour lunch, even though they discussed their compensation the entire time. Discipline is for exceeding allotted meal period, not discussing compensation.



Pay Transparency rule

2. “Essential job functions” – employees such as HR managers who are authorized access to compensation information to perform routinely assigned business tasks, such as responding to a federal complaint or charge.



Pay Transparency rule

- OFCCP will analyze alleged discrimination in violation of new rule using the causation frameworks used in discrimination cases, including the “motivating factor” and “determinative factor” frameworks.
- Final Rule does not require contractors to make any additional disclosures about what they pay their employees.
- Contractors are required to incorporate a new nondiscrimination provision in their existing employee handbooks.

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New Rules and Regulations Concerning Executive Order 11246

- **Executive Order 13672**, which was signed by President Obama on **July 21, 2014**, modifies Executive Order 11246 by adding sexual orientation and gender identity to race, color, religion, sex, and national origin as protected classes.
- On December 9, 2014, the Department of Labor published the Final Rule, which took effect on **April 8, 2015**.

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Sexual Orientation and Gender Identity

- Title VII of the Civil Rights Act of 1964 does not expressly cover sexual orientation or gender identity.
- Some courts have held that discrimination on the basis of gender identity is unlawful sex discrimination. Smith v. City of Salem, 378 F. 3d 566, 574 (6th Cir. 2005).
- EEOC has found that discrimination on the basis of gender identity is considered unlawful sex discrimination. Macy v. Holder, EEOC Appeal No. 0120120821 (Apr. 20, 2012).

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Sexual Orientation and Gender Identity

- But, other courts have held that gender identity and sexual orientation are not protected by Title VII. Etsitty v. Utah Transit Auth., 502 F. 3d 1215, 1221 (10th Cir. 2007); Bibby v. Philadelphia Coca Cola Bottling Co., 260 F. 3d 257, 260 (3d Cir. 2001); Eure v. Sage Corp.; 61 F. Supp. 3d 651, 662-63 (W.D. Tex. 2014).



Sexual Orientation and Gender Identity

- For sexual orientation complaints, the contract or subcontract must have been entered into or modified on or after April 8, 2015.
- For gender identity complaints, OFCCP has jurisdiction to investigate complaints even if the contract or subcontract pre-dates April 8, 2015.



SEXUAL ORIENTATION AND GENDER IDENTITY

- Final rule does not require contractors to compile any information or to conduct any data analysis with respect to sexual orientation or gender identity.
- EO 13672 does not change existing religious exemption to EO 11246, which allows religious organizations to prefer to employ only members of a particular faith. The law does not allow religious organizations covered by EO 11246 to discriminate in employment on the basis of race, color, sex, sexual orientation, gender identity, or national origin.



Section 503 of the Rehabilitation Act of 1973

- Contractors and subcontractors having contracts with the Federal government in excess of \$10,000 are covered.
- Section 503 prohibits Federal contractors from discriminating against qualified individuals with disabilities (closely tracking the protections of the Americans with Disabilities Act Amendments Act (ADAAA) of 2008).
- Employers also must take affirmative action to hire, retain, and promote qualified individuals with disabilities.



Section 503 of the Rehabilitation Act of 1973

- Prohibited actions under Section 503:
 - Segregating employees with disabilities.
 - Using qualification standards, tests and other selection criteria that screen out or tend to screen out on the basis of disability.
 - Reducing the compensation offered to a person with a disability because of income from a disability-related pension or other disability-related benefit the individual receives from another source.
 - Denying a disabled individual equal access to insurance.



Section 503 of the Rehabilitation Act of 1973

- Affirmative actions that employers must take include:
 - Including Section 503 language in all contracts, either verbatim or by reference.
 - Posting notices of employee and applicant rights under Section 503.
 - Making reasonable accommodations for disabled employees and applicants.
 - Inviting applicants to self-identify as having a disability.
 - Developing internal procedures to communicate to employees the employer's affirmative action obligations.



Section 503 of the Rehabilitation Act of 1973

- In addition, employers with 50 or more employees and a Federal contract of \$50,000 or more must take the following additional actions:
 - Maintain a written Affirmative Action Program (AAP).
 - Include an equal employment opportunity policy statement in the AAP
 - Post the statement on company bulletin boards
 - Indicate the CEO's attitude toward the subject matter in the statement.
 - Implement an annual audit and reporting system for the company's AAP.

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Updated Section 503 Regulations

- The OFCCP published a Final Rule modifying the Section 503 regulations on September 24, 2013. The new regulations became effective on **March 24, 2014**.
- The changes in the final rule include:
 - A variety of wording adjustments intended to bring Section 503 in line with the ADAAA's updated language and definitions (such as the new definition of "disability").
 - A new utilization goal to have individuals with disabilities comprise at least 7% of contractors' workforces (but this goal may not be used as a quota or ceiling on the number of employees with disabilities).

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Updated Section 503 Regulations

- New record-keeping requirements – to document compliance efforts; to collect and store statistics on the numbers of job applicants and employees with and without disabilities, compared to the total number of jobs opening and total number of jobs filled.
- New posting rules allowing employers to post notices electronically.
- A new provision requiring employers to state in job advertisements that they are equal opportunity employers of individuals with disabilities.

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Updated Section 503 Regulations

- A new requirement to invite job applicants to voluntarily self-identify as disabled before an offer is even made. Also, a requirement to invite employees to voluntarily self-identify themselves as disabled every five years, and remind them that they can update their disability status at any time. This data must be kept confidential and secure.
- A requirement that contractors send written notice to subcontractors of affirmative action policies and ask that they cooperate with such efforts.



Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA)

- Applies to contractors and subcontractors who have a contract for personal property and nonpersonal services (including construction) with the Federal government of \$100,000 or more, which was entered into or modified on or after December 1, 2003.



VEVRAA

- VEVRAA prohibits discrimination against covered veterans, which include:
 - Disabled veterans
 - Recently separated veterans
 - Active duty wartime or Campaign Badge veterans
 - Armed Forces Service Medal veterans



VEVRAA

Requirements for contractors:

- List open jobs with State employment agencies, and provide certain information to employment services.
 - Post notices advising employees and job applicants of their rights under VEVRAA.
 - Include an equal opportunity clause in contracts.

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VEVRAA

- Maintain an annually reviewed and updated AAP if the contractor or subcontractor has a government contract of \$100,000 or more and employs 50 or more employees.
 - Make its AAP available to employees.
 - Invite employees and job applicants to voluntarily self-identify as protected veterans.

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Updated VEVRAA Regulations

- On September 24, 2013, the OFCCP published a final rule promulgating new regulations under VEVRAA, effective **March 24, 2014**. Like the new regulations under Section 503, however, employers that already have an AAP in place may delay full compliance until the start date of their next AAP cycle.

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Updated VEVRAA Regulations

Contractors must:

- List job openings in such a way that employment service delivery systems can provide priority referrals of protected veterans to the employer.
- Invite job applicants to voluntarily self-identify as protected veterans before an offer is made, and invite voluntary self-identification post-offer for certain categories of protected veterans.
- Use specific mandated language when incorporating the required equal opportunity clause by reference in subcontracts.

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Updated VEVRAA Regulations

Contractors must:

- State in job advertisements that they are equal opportunity employers with regard to protected veteran status.
- Notify subcontractors and union officials of affirmative action policies and request their cooperation with them.
- Conduct annual self-assessments of outreach and recruitment efforts.
- Collect and retain data on the number of protected veterans who apply for jobs and who the contractor employs, versus the number of job positions advertised and filled.

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Updated VEVRAA Regulations

- The regulations also require employers to establish annual hiring benchmarks for protected veterans (either by simply using the current national percentage of veterans in the civilian labor force, published by OFCCP, or through a complicated, lengthy examination of at least five separate factors). However, unlike the utilization goal set out under the regulations for Section 503, this benchmark is not a goal, but merely a means for employers to measure the success of their recruiting and outreach programs.

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BEST PRACTICES

- Federal contractors should
 - Update employee handbooks to include new protected classifications.
 - Update covered subcontracts and purchase orders with new nondiscrimination language.
 - Train management and supervisors on nondiscrimination rules.
 - Review compliance with new utilization goals, data collection, and reporting requirements.

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Questions?