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AFFIRMATIVE ACTION UPDATE

December 2014

2015 will bring a sea of change for companies that have federal government contracts or subcontracts (contractors). The Office of Federal Contract Compliance Programs (OFCCP), the agency within the U.S. Department of Labor that enforces affirmative action and equal employment opportunity laws applicable to contractors, has issued several new sets of regulations (implementing Executive Orders) that are or will become effective in 2015.

Changes include:

- New requirements, including new data collection and analysis obligations, for Affirmative Action Programs for individuals with disabilities and protected veterans.
- EEO policies must be expanded to include sexual orientation and gender identity.
- \$10.10 per hour minimum wage for construction and service contracts.
- Submission of annual pay data to OFCCP for analysis, and mandatory policies that prohibit discrimination against employees for discussing their pay (likely coming in 2015).

These and other new requirements are discussed in the articles below. In short, it is no longer “business as usual” for government contractors and subcontractors.

New AAP Year, New AAP Requirements

Affirmative Action Programs (AAPs) with a plan year starting on or after March 24, 2014, must comply with new regulations aimed at contractors’ obligations regarding individuals with disabilities (IWDs) and protected veterans. Contractors thus will need to overhaul their new AAPs for IWDs and protected veterans. Because most contractors run their AAP year on a calendar-year basis, this means a flurry of activity at the beginning of 2015.

Here are some of the biggest changes:

- **Invitation to self-identify.** Contractors must invite applicants to self-identify as IWDs and protected veterans at both the pre-offer and post-offer phases of the application process. These invitations, with respect to IWDs, must use specific language prescribed by OFCCP. Contractors also must invite their employees to self-identify as IWDs every five years.
- **Data collection.** Contractors must document and update annually several quantitative comparisons for the number of IWDs and veterans who apply for jobs and the number of IWDs and veterans they hire. Having this data will assist contractors in measuring the effectiveness of their outreach and recruitment efforts. The data must be maintained for three years to be used to spot trends.
- **Utilization goal for IWDs.** Contractors must establish a 7% utilization goal for qualified IWDs. Contractors apply the goal to each of their job groups, or to their entire workforce if they have 100 or fewer employees. Contractors must conduct an annual utilization analysis and assessment of problem areas, and establish specific action-oriented programs to address any identified problems.
- **Hiring benchmarks for veterans.** Contractors must establish annual hiring benchmarks for protected veterans.

Contractors need to be familiar with and understand these new obligations. To ensure compliance, it is imperative that new invitations to self-identify and proper data collection processes are in place by the start of the AAP year.

New Scheduling Letter for OFCCP Audits

OFFCP has revised its scheduling letter and “itemized listing,” the document that describes the data and information a contractor must provide to the OFFCP if it is selected for a compliance review. These changes, announced on September 29, may impact the way contractors maintain and internally analyze their personnel data.

Some of the major changes include:

- **Individualized compensation data.** Unlike the summary (and largely useless) compensation data previously requested, OFCCP now insists on receiving individual compensation data for all employees. This gives OFCCP unprecedented ability to analyze your compensation data, however it sees fit, in its search for disparate pay practices.
- **“Minority” data.** OFCCP no longer accepts employment-activity data (applicants, hires, promotions, and terminations) on a “minority versus non-minority” basis. Instead, the data must be broken down by particular racial/ethnic categories.
- **Compliance with the new disability and veteran regulations.** The scheduling letter calls out many of your obligations under the new AAP regulations (discussed in the article above). Not only will OFCCP ask you to provide your new data metrics (such as veteran hiring benchmarks and disability utilization rates), but you must provide the documentation to show, for example, that you have: evaluated the effectiveness of each of your recruitment and outreach efforts; set and followed a schedule to review personnel processes and the mental and physical qualifications for jobs in your company; and complied with the audit and reporting requirements.

Are you prepared to demonstrate your compliance with the new regulations? Will the more-refined data breakdown show adverse impact against a particular racial/ethnic group? How confident are you that your pay practices can withstand OFCCP scrutiny? Now may be the time to engage in an attorney-client privileged self-analysis of your personnel and pay data and compliance efforts.

EEO Policy Expanded to Sexual Orientation and Gender Identity

On December 3, the Department of Labor issued new regulations that prohibit discrimination based on, and require treatment of applicants and employees without regard to, sexual orientation or gender identity. The regulations become effective in April 2015 and will apply to federal contractors with contracts entered into or modified after the effective date. The rule, which implements an Executive Order signed by President Obama this past July, amends the existing regulations under Executive Order 11246 by substituting the phrase “sex, sexual orientation, gender identity, or national origin” for “sex or national origin.” As a result, contractors who enter into new or modified contracts after the effective date must include the updated EO Clause in their new or modified subcontracts and purchase orders, and update their EEO policies and EEO language used in job solicitations.

\$10.10 Minimum Wage for Construction and Service Contractors

Employers that enter into construction or service contracts, which are solicited after January 1, 2015 (including replacement of expiring contracts), are subject to new regulations requiring that workers be paid at least \$10.10 per hour while performing on or in connection with contract. Tipped workers must be paid a cash wage of at least \$4.90 per hour. In successive years the Secretary of Labor will determine additional percentage increases based on the Consumer Price Index.

In addition to these pay obligations, contractors must also include the contract clause in lower-tiered subcontracts and provide notice to all workers performing on or in connection with a covered contract. The new minimum wage requirements do NOT apply to contracts for the manufacturing or furnishing of goods (materials, supplies, or equipment) to the federal government.

Coming Soon: New Rules to Submit Pay Data and Prohibit Discrimination for Discussing Pay

Equal Pay Reports

In August 2014, OFCCP proposed new regulations requiring contractors with more than 100 employees to submit an annual Equal Pay Report. Covered employers would submit electronically three pieces of information related to employee compensation:

- (1) Total number of workers within a specific EEO-1 job category by race/ethnicity and sex.
- (2) Total W-2 wages, defined as the total individual W-2 wages for all workers in the job category, by race/ethnicity and sex.
- (3) Total hours worked, defined as the number of hours worked by all employees in the job category, by race/ethnicity and sex.

OFCCP would then analyze the data and direct enforcement resources toward contractors whose summary data suggests potential pay violations. OFCCP would also release aggregate summary data on the race and gender pay gap by industry and EEO-1 category to enable contractors to review their pay data using the same metrics as OFCCP and take voluntary compliance measures.

Discrimination Policies

In September 2014, OFCCP issued proposed regulations that would preclude contractors from firing or otherwise discriminating against any employee or applicant for discussing, disclosing, or inquiring about their compensation or that of another employee or applicant. OFCCP's stated objective is to "level the playing field by increasing transparency and giving these workers a much needed tool to fight pay discrimination."

The proposed rule would require contractors to incorporate the nondiscrimination provision into their existing employee manuals or handbooks, and disseminate the nondiscrimination provision to employees and to job applicants. The rule does allow an exception where an employee makes the disclosure based on information obtained in the course of performing his or her essential job functions, such as a payroll clerk or human resources manager.

Bottom Line

The comment period for these regulations is still open. After considering comments, OFCCP will issue final regulations, presumably in early 2015.

Do you know what the Equal Pay Report you will have to submit to OFCCP will show? Contractors would be wise to conduct an attorney-client privileged analysis of their pay data, in the way OFCCP will analyze it, to see if it raises any red flags. For contractors that make pay adjustments at the beginning of the year, now may be the last chance to scrutinize and, if necessary, remedy any imbalances before submitting an Equal Pay Report in 2015.

TRICARE Moratorium

Earlier this year, OFCCP issued a Directive establishing a five-year moratorium on enforcement of affirmative action obligations required of TRICARE subcontractors. (TRICARE is a Department of Defense healthcare program that provides civilian health benefits for military personnel and their families.) The moratorium applies to health-care entities that participate in TRICARE under a prime contract between the Department of Defense TRICARE Management Activity and one of the prime managed-care contractors, unless they also have a direct contract with a federal agency or a separate non-health-care-related federal subcontract. OFCCP intends to provide extensive outreach and technical assistance on compliance to TRICARE subcontractors during the moratorium.