Chapter Nineteen

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Table of Contents

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I. INTRODUCTION

This Chapter provides an overview of the major requirements of these laws as they affect federal contractors and discusses the affirmative action requirements imposed on federal contractors.

II. OVERVIEW OF LAWS REQUIRING AFFIRMATIVE ACTION BY FEDERAL CONTRACTORS

A. Executive Order (EO) 11246. EO 11246 provides that contracts entered into by federal government agencies must include specific "equal opportunity clauses," one of which requires that those contracting with the government agree to "not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin" and to "take affirmative action" to ensure that applicants are employed and employees are treated during their employment without regard to their race, color, religion, sex, or national origin. *See* http://www.dol.gov/ofccp/regs/compliance/ca_11246.htm. The President signed EO 13672 which amended EO 11246 to add gender identity and sexual orientation to these protected categories. EO 13672 only applies to federal contractors and subcontractors who have covered federal contracts entered into on or after the effective date of the rules promulgated by the Secretary of Labor implementing the EO. The Final Rule was published December 9, 2014 (79 FR 72985) and took effect April 8, 2015. The Final Rule implements EO 13672 by replacing the words "sex, or national origin" with the words "sex, sexual orientation, gender identity, or national origin" throughout the EO 11246 implementing regulations. Thus, under EO 11246, the following categories are protected from discrimination in the workplace: race, color, religion, sex, sexual orientation, gender identity and national origin. The only affirmative action obligations impacted by the Final Rule are those contained in 41 CFR Part 60-1. The preamble to the Final Rule states that contractors can fulfill this requirement by including the updated Equal Opportunity Clause in new or modified subcontracts and purchase orders, ensuring that applicants and employees are treated without regard to their sexual orientation and gender identity, and by updating the equal opportunity language used in job solicitations and posting updated notices.

The Office of Federal Contract Compliance Programs (OFCCP) accepts and investigates administrative complaints from applicants or employees who believe they were subjected to discrimination. As of the effective date of EO 13672, the OFCCP will accept complaints of discrimination on the basis of sexual orientation or gender identity. The preamble to the new regulations also states that the Final Rule does not require contractors to set placement goals on the bases of sexual orientation or gender identity, nor does the rule require contractors to collect and analyze data on these bases. The Final Rule also does not diminish the DOL's position that discrimination on the basis of gender identity or transgender status is a form of sex discrimination as set out in *Macy v. Holder*, EEOC Appeal No. 0120120821 (April 20, 2012), and in the OFCCP's Directive on Gender Identity and Sex Discrimination. The OFCCP has published a Directive (2014-02) which clarifies that it will treat allegations of discrimination based on gender identity and transgender status as sex discrimination. The Directive is available on the OFCCP web site at: http://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html.

The OFCCP has also published a Notice of Proposed Rulemaking (NPRM) proposing revisions to its Sex Discrimination Guidelines. The agency has stated the proposed revisions will bring its guidelines into alignment with current law and the realities of today's workplace. The proposed revisions address, among other things, compensation discrimination, harassment, workplace accommodations for pregnancy and gender identity, and family caregiver discrimination. As of the date of publication of the SourceBook, the OFCCP had not issued final sex discrimination regulations.

1. Coverage Threshold. A contractor with $50,000 or more in one federal contract or subcontract is subject to the affirmative action requirements under the EO. If this threshold is exceeded, the employer is subject to the affirmative action obligations as well as OFCCP jurisdiction, and the OFCCP is authorized to conduct complaint investigations and compliance reviews of the employer's employment practices. Bills of lading and federal fund depositories are not exempted regardless of the amount.

2. Equal Opportunity Clauses under EO 11246. For nonexempt contracts, the EO requires the following provisions be included:

During the performance of this contract, the contractor agrees as follows:

1. The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity or national origin. 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, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

2. The contractor will, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.

3. The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under § 202 of EO 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

4. The contractor will comply with all provisions of EO No. 11246 of September 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.

5. The contractor will furnish all information and reports required by EO 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

6. In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in EO 11246 of September 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in EO 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

7. The contractor will include the provisions of paragraphs 1 through 7 in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to § 204 of EO 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: Provided, how-

ever, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.

Sec. 202 of EO 11246 as set forth in 41 C.F.R. § 60-1.4.

Incorporation by Reference. The equal opportunity clauses may be incorporated in the transaction merely by reference, perhaps by a citation to them or their implementing regulations in an agreement, or purchase order, or an addendum thereto. *See* 41 C.F.R. § 60-1.4(d). However, under the Rehabilitation Act and Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), the Equal Employment Opportunity (EEO) clause "incorporation by reference" requirements have changed; thus, to create one clause contractors should consider incorporating the EO's EEO clause within the requirements of the clause from the new disabled persons and veterans regulations.

Incorporation by Law. The equal opportunity clauses are considered to be a part of every contract and subcontract required by the affirmative action laws and Department of Labor (DOL) regulations. This is so regardless of whether the clauses are physically incorporated in such contract and regardless of whether the contract between the agency and contractor is written. *See* 41 C.F.R. § 60-1.4(e).

In *OFCCP v. Southwest Gas Corp.*, 44 Fair Emp. Prac. Cas. (BNA) 850 (DOL 1987), a gas company opposed the OFCCP on the ground that it had refused to consent to the equal opportunity clauses and the affirmative action obligations while providing utility service to federal government agencies. The administrative law judge (ALJ) found that the above regulation had the force and effect of law and was authorized by the government procurement powers. The ALJ cited to authority for the proposition that government contracts are different from contracts between ordinary parties and that where the regulations require the inclusion of a contract clause in every contract, the clause is incorporated even if it has not been expressly included in a written contract or agreed to by the parties. The ALJ found that by selling gas to the federal government, the company did so according to the ALJ terms imposed by the government. *See* the discussion regarding *OFCCP v. UPMC Braddock* in Section XI below.

3. Government Contracts and Contractors under EO 11246. A "government contract" is an agreement with a contracting agency for the furnishing of supplies or services, or the use of real or personal property, including lease arrangements. "Services" include, but are not limited to, utilities, construction, transportation, research, insurance, and fund depositories. The term also includes any "federally assisted construction contract" or agreement for construction work paid in whole or in part with funds obtained from the federal government or borrowed on credit of the government pursuant to any federal program involving a grant, contract, loan, insurance, or guaranty undertaken pursuant to any such program. Government contractors are any persons who hold a government contract. 41 C.F.R. § 60-1.3.

Examples:

- **Leases as Government Contracts.** The leasing of space to a federal government agency is a covered contract. *See OFCCP v. Coldwell, Banker & Co.*, 1987 WL 774229, 44 Fair Empl. Prac. Cas. (BNA) 850 (DOL 1987). A lease from a federal government agency may also be covered. *See Crown Central Petroleum Corp. v. Kleppe*, 424 F. Supp. 744 (D. Md. 1976).
- ***Utility Services as Government Contracts.*** Power companies are covered by the EO because they supply power to the federal government. *See United States v. New Orleans Public Service Inc*., 553 F.2d 459 (5th Cir. 1977), *vacated on other grounds*, 436 U.S. 942 (1978), *aff'd on subsequent appeal after remand*, 638 F.2d 899 (5th Cir. 1981).
- **Financial Institution Operations as Government Contracts.** Financial institutions, which serve as depositories of federal government funds in any amount, are subject to the re-

quirements of the EO. 41 C.F.R. § 60-1.5. The OFCCP regulations state that financial institutions which issue and redeem United States Savings Bonds are covered by EO 11246. However, as of January 1, 2012, U.S. Savings Bonds may only be purchased from the U.S. Treasury, thus financial institutions can no longer act as issuing agents.

The OFCCP takes the position that financial institutions which subscribe to the federal deposit insurance program are federal contractors and, therefore, they must maintain an Affirmative Action Plan (AAP). Of course, these institutions can be federal contractors if they have other contracts which satisfy the OFCCP regulations.

- **State Agency or Municipal Contracts as Government Contracts.** Contracts with a state agency or municipality are not covered by the EO; however, some states and municipalities have public contractor laws or ordinances that mirror the requirements of the federal affirmative action laws.

4. Subcontracts and Subcontractors. "Subcontract" means any agreement or arrangement between a contractor and any person for the furnishing of supplies, services, or the use of real or personal property that, in whole or in part, *are necessary to the performance* of a federal contract, or under which any portion of the contractor's obligation under a federal contract is performed, undertaken, or assumed.

a. Unwitting Coverage under EO 11246. Subcontractors may unwittingly find themselves covered due to their dealings with companies furnishing services or supplies to the federal government. In *OFCCP v. Monongahela Railroad Co.*, No. 85-OFC-2, 1986 WL 802025 (1986), a railroad company hauled coal to a utility that furnished power to federal government agencies. The coal was then co-mingled with that of other coal suppliers in providing power, and the federal government used only 0.4 percent of the electricity generated. The judge held that the "type of service" was necessary to the performance of the utility's contract to supply electricity to the government, creating "subcontractor" status for the railroad.

b. Subcontractors' Performance "Necessary" to Primary Obligations under EO 11246. In *OFCCP v. Loffland Bros. Co.*, No. OEO 75-1, 1984 WL 484538 (1984), the OFCCP asserted that Loffland was a subcontractor by virtue of contracts with major oil companies to drill for oil on land leased from the federal government. The oil companies had an obligation to explore the land but had no obligation to drill, except when so directed by the Secretary of Interior. As there was no evidence that the Secretary of Interior had directed that drilling take place, the Secretary of Labor held that there was no evidence that "the drilling contracts between Loffland and various federal leaseholders were necessary to the performance of the leaseholder's government contracts." *Id.* at *10. There was also no evidence whereby the oil extracted from the wells drilled by Loffland could be "traced" to the satisfaction of a federal contract. Thus, Loffland was not a covered subcontractor.

c. Subcontractors and the Relationship to Procurement Purposes. In *Liberty Mutual Insurance Company v. Friedman*, 639 F.2d 164 (4th Cir. 1981), Liberty Mutual challenged the assertion of EO coverage over it for underwriting workers' compensation insurance for any companies that had government contracts. Although the services provided by Liberty Mutual may have fit within the broad regulations, the court held that the regulations could not properly apply to the situation. The court focused on the sources for the authorization for the EO, and on the general procurement powers of Congress and the general purpose of providing an economic and efficient system for procuring personal property and services. The court held that there was no grant of legislative authority under which the OFCCP could validly impose the requirements of the EO upon Liberty Mutual. The relationship of its services was not sufficiently connected to valid procurement objectives.[1]

5. Corporate-Wide Coverage under EO 11246. A nonexempt contract will subject all of the operations of a contractor to the contractual obligations of the "equal opportunity clauses." The

1 The same "contract" and "subcontract" definitions apply under the Rehabilitation Act and VEVRAA.

Secretary of Labor may exempt facilities that are separate and distinct from the activities related to performance of the government contract. 41 C.F.R. § 60 1.5(b)(2). Such facilities, however, are covered absent a successful application for exemption. In *OFCCP v. Interco*, *Inc.*, No. 86-OFC-2 (1987), *consent decree entered* 1989 WL 1003982 (July 31, 1989), the OFCCP successfully imposed affirmative action obligations on a separate division of a corporation (Devon Apparel), where another division (International Shoe) was a federal contractor. International Shoe separately acquired Devon through a purchase of assets and liabilities; Devon's day-to-day operations were conducted in an independent manner. Nevertheless, the two divisions were part of a single corporate entity that received oversight from the same officers and directors and, according to the OFCCP, both were covered by the EO. The OFCCP also takes the position that a separate corporate entity sharing common ownership and deemed to be under "common control" with a nonexempt contractor is subject to the same equal opportunity clauses as the contractor.

In *OFCCP v. Manheim Auctions Inc*., DOL OALJ, No. 2011-OFC-00005, 2011 WL 2848587 (June 14, 2011), an ALJ found that a wholesale automotive remarketer that had no federal contracts but had more than 50 employees operated as a "single entity" with a subsidiary, which had multiple federal contracts but employed fewer than 50 individuals, making both companies subject to recordkeeping and AAP requirements enforced by the OFCCP. The ALJ found that Manheim Auctions Inc. had a degree of common ownership over its subsidiary and that both companies shared common directors and officers. The ALJ also found that Manheim exercised de facto control over the subsidiary, in part, by managing the subsidiary's funding. Additionally, the ALJ found that both companies shared a "unity of personnel policies [emanating] from a common source," because both shared the same human resources department, employees who moved from one entity to another maintained their seniority, and Manheim took control of the subsidiary's EEO-1 reporting requirements. The ALJ found that the subsidiary was dependent on Manheim for its "continuity of operations" because Manheim retained the power to strip the subsidiary of its federal contract responsibilities – a power Manheim exercised when it retained (in December 2010) a different company to perform contract duties formerly handled by the subsidiary and left the subsidiary with no employees. The parties subsequently entered into a Consent Decree in resolution of the OFCCP's claims, which was approved by the Administrative Review Board (ARB) on September 13, 2011. *See In re Manheim, Inc.,* 2011 WL 4915765 (DOL ARB Sep. 13, 2011).

B. Rehabilitation Act of 1973.

1. Affirmative Action. Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, provides that contracts with the federal government for the procurement of personal property and nonpersonal services in excess of $10,000 (including construction) entered into by federal government departments and agencies must include specific "equal opportunity clauses." One of these clauses requires that contractors take affirmative action to employ and advance in employment qualified disabled individuals. This law is also enforced by the OFCCP and disabled individuals may file complaints with that agency.

On September 24, 2013, the OFCCP published a Final Rule revising its regulations implementing § 503 of the Rehabilitation Act. The revised regulations took effect March 24, 2014. Current contractors with a written AAP already in place on the effective date may maintain that AAP until the end of their AAP year and delay their compliance with the AAP requirements of Subpart C of the Final Rule until the start of their next AAP cycle. The threshold for coverage under § 503 remains a single contract or subcontract of $10,000 or more. Federal contractors with 50 employees and a single contract or subcontract of $50,000 or more must develop a written AAP, which is also the same as under the prior regulations.

2. Revised Regulations. The new regulations significantly change the Rehabilitation Act obligations for federal contractors. Some of the more significant changes implemented in the new regulations include:

- Revising the definition of disability and its component parts to be consistent with the chang-

es made by the Americans with Disabilities Act Amendments Act (ADAAA) and the Equal Employment Opportunity Commission (EEOC) regulations interpreting the ADAAA. Thus, under the new regulations, disability is defined as: (a) a physical or mental impairment that substantially limits a major life activity; (b) a record of such an impairment; or (c) being regarded as having such an impairment. *See* 41 C.F.R. § 60. 741.2.

- Revising the mandatory EEO clause which must appear in applicable subcontracts. The new regulations provide the exact verbiage which must appear in the subcontracts.
- Requiring contractors to post the mandatory EEO poster in a conspicuous place for applicants and employees, including online.
- Requiring contractors to invite all applicants to self-identify as individuals with disabilities before and after an offer of employment, and extend similar invitations to employees. The OFCCP has issued a self-identification form which contractors must use.
- Requiring contractors to engage in outreach and recruitment efforts as to disabled persons.
- Establishing a seven percent Utilization Goal for disabled persons for each AAP job group at each facility.
- Requiring contractors to collect data on the following: the number of applicants who identify as an individual with a disability; the total number of job openings and total number of jobs filled; the total number of applicants for all jobs; the number of individuals with disabilities hired; and the total number of applicants hired.
- Imposing a new three-year recordkeeping requirement for the data collection and outreach and recruitment efforts, discussed above.

3. Coordination with the American with Disabilities Act (ADA). The procedures by which a contractor employs disabled individuals (and disabled veterans) have been made consistent with the ADA's limitation on pre-employment medical inquiries. 41 C.F.R. § 741.42.

C. Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA). VEVRAA, 38 U.S.C. § 4212, generally requires employers with federal contracts or subcontracts that meet the threshold amount specified in the statute to take affirmative action to employ and advance in employment qualified covered veterans, to provide information regarding job openings to certain state or federal agencies, and to fulfill certain reporting obligations.

1. History of Amendments to VEVRAA. Until Congress passed the Veterans Employment Opportunities Act of 1998 (VEOA), § 4212 applied to contractors and subcontractors with contracts of more than $10,000. In addition, only "special disabled veterans" and "veterans of the Vietnam era" were protected under the section.

In the VEOA, Congress raised the minimum contract amount to $25,000 and expanded the application of § 4212 to include other protected veterans. Effective January 3, 2006, the OFCCP revised its VEVRAA regulations to conform to the requirements of the VEOA. In the Veterans Benefits and Health Care Improvement Act (VBHCIA), Congress added recently separated veterans to those groups of veterans protected under VEVRAA. In the Jobs for Veterans Act (JVA), Congress raised the minimum contract amount to $100,000 and changed the categories of veterans that are covered under § 4212. In addition, the JVA changed the manner in which federal contractors are to comply with the requirement to list job openings with the state employment security agency.

In a rule effective December 5, 2008, the DOL revised the VEVRAA regulations to incorporate amendments to the VEVRAA made by the VBHCIA. The rule revised 41 C.F.R. Part 61-250 to include "recently separated veterans" in the definitions section of the regulation. The term "recently separated veterans" means any veteran during the three-year period beginning on the date of the veteran's discharge or release from active duty with respect to contracts entered into on or after December 1, 2003. For all contracts entered into prior to December 1, 2003, the term

"recently separated veterans" means any veteran during the one-year period beginning on the date of the veteran's discharge or release from active duty.

The rule also revised Part 61-250 to provide clarification regarding which set of regulations contractors should use. The DOL has published two sets of regulations to implement the reporting requirements under the VEVRAA. Part 61-250 applied to government contracts of $25,000 or more that were entered into before December 1, 2003, and required contractors to use the VETS-100 Report form to provide the required information.

The regulations located at 41 C.F.R. Part 61-300, published by the DOL in May 2008, implemented the amendments to the VEVRAA made by JVA. The regulations in Part 61-300 required contractors to use the VETS-100A Report form to provide the required information on their employment of covered veterans. These regulations applied to contracts entered into or modified on or after December 1, 2003.

The 2008 rule reiterated that the regulations in Part 61-250 applied to any contract or subcontract of at least $25,000 entered into before December 1, 2003. It also clarified that the regulations in Part 61-300, not the Part 61-250 regulations, applied to such a contract if it was modified on or after December 1, 2003 and the contract as modified was for $100,000 or more. The preamble to the 2008 rule stated that this should help contractors determine whether the reporting requirements in Part 61-250 and/or the reporting requirements in Part 61-300 apply to their contracts.

In September 2013, the OFCCP issued new regulations under VEVRAA which amended Part 60-300 and rescinded Part 61-250. Thus, the contract date of December 1, 2003, is no longer relevant. The details of these new VEVRAA regulations will be discussed below.

2. Coverage under the VEVRAA. The contractor is covered by EEO and affirmative action obligations if the contract is for $100,000 or more and it employs 50 or more employees.

3. Type of Contract Covered. The VEVRAA covers contracts with the federal government for the procurement of personal property and nonpersonal services (including construction). The following contracts are not covered by VEVRAA: contracts that do not meet the statutory threshold amount; contracts for work that is performed outside the United States; and contracts with state or local governments, except for the specific government entity that participates in work on or under the contract.

4. Protected Veteran. Under the 2013 regulations the OFCCP modified the veteran categories. No longer are the categories classified as "covered" but rather they are collectively referred to as "protected." The protected veterans are: disabled veterans; recently separated veterans; Armed Forces Service Medal veterans; and Active Duty Wartime or Campaign Badge veterans. While Vietnam Era Veterans, special disabled veterans and "other protected veterans" are not considered protected veterans under VEVRAA for affirmative action purposes, the new regulations still allow for such veterans to file discrimination complaints with the OFCCP against contractors.

5. Requirements of VEVRAA. Section 4212 requires covered contractors and subcontractors to take affirmative steps to employ qualified protected veterans.

a. Written AAPs. The threshold for AAP coverage is a contract of $100,000 or more. Therefore, under § 4212, each employer that has a federal contract (or subcontract) of $100,000 or more *and* 50 or more employees must prepare, implement, and maintain a written AAP covering each of its establishments.

b. VETS 4212 Report. All contractors and subcontractors with contracts of $100,000 or more must file a VETS 4212 report, formerly known as the VETS 100A Report. In September 2014, the Veterans' Employment and Training Service (VETS) issued its final regulations under the new VEVRAA rules. Under the VETS regulations, the VETS-100A report was changed to the "VETS-4212 Report." The new report will eliminate the need to identify veteran categories for employees and new hires. This report must be filed annually on or before September 30.

c. VEVRAA Requirements Applicable to All Contractors. VEVRAA and its implementing regulations require all contractors to refrain from discrimination in employment against protected veterans and include a specific equal employment opportunity clause in their nonexempt contracts and subcontracts.

6. Coverage under the Rehabilitation Act and VEVRAA. Generally, the same principles are used in determining contractor or subcontractor status under the Rehabilitation Act and VEVRAA, as used under EO 11246.

7. Revised VEVRAA Regulations. On September 24, 2013, the OFCCP published its Final Rule revising the VEVRAA regulations. The revised regulations were effective March 24, 2014. Current contractors with a written AAP already in place on the effective date may maintain that AAP until the end of their AAP year and delay their compliance with the AAP requirements of Subpart C of the Final Rule until the start of their next AAP cycle. The regulations amend 41 C.F.R. Part 60-300 and rescind 41 C.F.R. Part 60-250, which regulates contractors with unmodified contracts of $25,000 or more entered into on or before December 1, 2003. The new regulations add a provision to permit any "pre-JVA veteran" who would have been protected solely by Part 250 to file discrimination and retaliation complaints with the OFCCP. Some of the significant regulatory changes are as follows:

a. Definition of Protected Veteran. The definition of protected veteran has been modified over the years. The new regulation provides four protected veteran categories: disabled veteran; recently separated veteran; Armed Forces service medal veteran; and active duty wartime or campaign badge veteran. The last category replaces the "other veteran" category used by prior regulations.

b. Hiring Benchmarks. The new regulations require contractors to establish hiring benchmarks for protected veterans, using one of two methods. A contractor can use a benchmark equal to the national percentage of veterans in the civilian labor force (eight percent) or can establish its own benchmark based on the following five factors: (1) the average percentage of veterans in the civilian labor force in states where the contractor is located (over the preceding three years); (2) the number of veterans (over the previous four quarters) who participated in Employment Service Delivery System (ESDS) in the state; (3) the applicant ratio and hiring ratio for the previous year; (4) the contractor's recent assessment of the effectiveness of its outreach and recruitment efforts; and (5) other factors. The national percentage may be revised annually. The 2015 benchmark for protected veterans is seven percent. The VEVRAA benchmark is by AAP facility, however, § 503 Utilization Goals are by job groups.

c. Job Postings and Listings. The new regulations require contractors to list vacancies with the appropriate ESDS where the openings occur. The vacancies can be listed in any manner or format permitted by the local ESDS that will allow the agency to provide priority referrals of protected veterans. Contractors can still use third parties for posting services but the vendor must use ESDS and provide contact information. Additionally, the contractor must provide additional information to the ESDS including its status as a federal contractor, contact information for the hiring official in each location in the state, and its request for priority referrals, and must update this information annually. If the contractor uses any outside job search companies, it must also provide the contact information for those companies.

d. Notices to Employees and Applicants. The new regulations also require contractors to post the mandatory EEO poster in a conspicuous place for applicants and employees. This includes including a link on the online applicant tracking system.

e. Incorporation of EEO Clause. The new regulations revise the mandatory Equal Opportunity clause which must appear in applicable subcontracts. The new regulations provide the exact verbiage which must appear in the subcontracts.

f. Invitation to Self-Identify. The new regulations require that contractors invite persons to

identify as a protected veteran at both the pre-offer and post-offer stages in the application process. The OFCCP issued a model self-identification form.

g. AAP Contents. Contractors are required to post an equal employment opportunity policy statement on company bulletin boards and provide this notice in a form that is accessible and understandable to a disabled veteran. The regulations also require contractors to make the full AAP, absent the data metrics, available to employees for inspection.

h. Required Outreach Efforts. The new regulations require the contractor to undertake outreach and positive recruitment efforts to hire qualified protected veterans. Contractors are also required to send written notification of the company's affirmative action policy to subcontractors and request their cooperation.

i. Data Collection Analysis. The new regulations require contractors to document and update annually: (1) the total number of applicants for employment and the number of applicants who are protected veterans; (2) the total number of job openings and the number of jobs filled; and (3) the total number of applicants hired and the number of applicants hired who are protected veterans. This data must be retained for three years.

j. Recordkeeping. The new regulations impose a new three-year recordkeeping requirement for the data collection and outreach and recruitment efforts, discussed above.

k. Desk Audit. The new regulations codify the OFCCP's longstanding position that it may extend the temporal scope of the desk audit beyond the scheduling letter if necessary in order to carry out its investigation. Thus, OFCCP may request items which are not identified within the scheduling letter.

l. Pre-award Compliance Evaluation Procedure. The regulations also add a pre-award compliance evaluation procedure mirroring the procedure in the EO 11246 regulations.

III. WRITTEN AFFIRMATIVE ACTION PLANS (AAPS) FOR GOVERNMENT CONTRACTORS

A. Written AAP: The obligation to annually develop and maintain a written AAP applies to each contractor or subcontractor that has 50 or more employees and:

- Has a single contract or subcontract of $50,000 or more; or
- Has government bills of lading that in any 12-month period total, or can reasonably be expected to total, $50,000 or more; or
- Serves as a depository of government funds in any amount.

Each contractor or subcontractor meeting the above threshold must develop a written AAP program for each of its "establishments." *See* 41 C.F.R. § 60-1.40.

NOTE: The threshold is a single contract or subcontract of $100,000 or more under VEVRAA.

Blanket Purchase Agreements. In 1983, the Secretary of Labor held that the requirement for a written AAP applies to any contractor or subcontractor with a "blanket purchase agreement" that produces or can be reasonably expected to produce an aggregate of $50,000 in orders per year. *OFCCP v. Star Machinery Co.*, 1983 WL 411024, No. 83-OFCCP-4 (Sep. 21, 1983). The decision overruled a recommendation by an ALJ that individual orders be viewed as separate contracts. The Secretary of Labor found that a blanket purchase agreement was a single contract, the value of which was determined by the total amount of individual orders. The OFCCP acknowledged in a subsequent order, OFCCP Order No. 6610(a)(3), that while contracts may be aggregated for the purposes of the $10,000 coverage limit discussed above, the $50,000 threshold for written AAPs requires at least one contract of $50,000 or more. For an indefinite quantity contract, such as a blanket purchase agreement, however, the OFCCP policy is to aggregate the orders over a year in determining whether the $50,000 threshold is met.

Value of Insurance Contracts. In *OFCCP v. Safeco Insurance Co.*, 1984 WL 590403, No. 83-OFC-7 (May 25, 1984), the Secretary of Labor held that a company that underwrote a federal construction surety bond in the amount of nearly $1 million was not covered by the $50,000 formal affirmative action threshold because the bond premium totaled less than $50,000.

Reinstatement of Use of Functional AAPs. On December 17, 2012, the OFCCP issued a new directive that federal contractors and subcontractors who are seeking an agreement to develop, implement, and maintain functional AAPs (FAAPs) must follow. *See* Directive Number 2013-01 Date: December 17, 2012 Functional AAPs, available at: http://www.dol.gov/ofccp/regs/compliance/directives/dir305.htm#1. This directive supersedes the OFCCP's June 14, 2011 directive addressing FAAP agreements. Generally, contractors must develop, implement and maintain an AAP for each physical location of an establishment with 50 or more employees. OFCCP regulations interpreting EO 11246 permit large companies to develop and maintain AAPs based on function or business unit instead of by establishment though FAAP agreements.

To be considered suitable for a FAAP, the functional or business unit must: (1) currently exist and operate autonomously; (2) include at least 50 employees; (3) have its own managing official; and (4) have the ability to track and maintain its own personnel activity. Under the December directive, as under the June 2011 directive, contractors must have the written approval of the director of the OFCCP before developing and using a FAAP. The new directive establishes standard application procedures for contractors seeking to use FAAP agreements. It also requires companies who have FAAP agreements to undergo a compliance evaluation during the three-year FAAP term in order to be eligible to renew the FAAP. As under the prior directive, renewals of FAAPs are not automatic. The policy directive includes more details regarding the requirements and procedure for using FAAPs.

B. Contents of an EO 11246 Written AAP. A written AAP under EO 11246 must include at least the following: assignment of affirmative action responsibility; organizational profile (organizational display or workforce analysis format); job group analysis; availability analysis; incumbency-to-availability analysis; placement goals; identification of problem areas; action-oriented programs designed to eliminate problems and achieve goals; and an internal audit and reporting system. *See* 41 C.F.R. §§ 60-2.11–2.17 and 2.31.

Organizational Profile. The OFCCP revised the regulations concerning certain written AAPs in November 2000. Pursuant to these revised regulations, the organizational profile can be in one of two forms. The employer may prepare an AAP that contains a traditional workforce analysis, a listing of jobs ranked within departments, and lines of progression on the basis of pay, showing for each job the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups: Blacks, Hispanics, Asians/Pacific Islanders, and American Indians/Alaskan Natives. Alternatively, the employer may provide an organizational display using graphs or text that shows each of the company's organizational units and their relationships to one another, and the gender, racial, and ethnic composition of each organizational unit. 41 C.F.R. § 60-2.11.[2]

Job Group Analysis. An incumbency-to-availability analysis must be conducted by "job groups" (clusters of jobs having similar content, wage rates, and opportunities). The regulations clarify the terms "similarity of content" and "similarity of opportunities," which are the two criteria most open to divergent interpretations. The regulations state "similarity of content refers to the duties and responsibilities of the job titles which make up the job group." The regulations also provide that "similarity of opportunities refers to training, transfers, promotions, pay, mobility, and other career enhancement

2 In November 2005, the EEOC modified the system used by employers to classify the race, ethnicity and job categories of their workforce on the EEO-1 Report. The revised EEO-1 Report requires reporting in seven racial and ethnic categories, and subdivides the "Officials and Managers" job category. The OFCCP's regulations regarding the race, ethnicity, and job categories used by contractors have not changed to reflect the new EEO-1 categories. The OFCCP has issued a policy statement providing that as a matter of enforcement discretion the OFCCP will not cite any contractor for noncompliance with the EO solely because it utilizes the race, ethnicity, or job categories required by the new EEO-1 Report. Further, the OFCCP will accept AAPs and supporting records that reflect the race, ethnicity, and job categories outlined in either. 41 C.F.R. Part 60-2 or the new EEO-1 Report.

opportunities offered by the jobs within the job group." 41 C.F.R. § 60-2.12(c). The regulations also require a list of job titles comprising each job group. Under the regulations, employers with fewer than 150 employees may use EEO-1 categories as job groups. 41 C.F.R. § 60.12(e).

Availability Analysis. Availability is an estimate of the number of qualified minorities or women available for employment in a given job group, expressed as a percentage of all qualified persons available for employment in the job group. 41 C.F.R. § 60-2.14(a). The factors for determining availability are: (1) the percentage of minorities or women with requisite skills in the reasonable recruitment area; and (2) the percentage of minorities or women among those promotable, transferable, and trainable within the contractor's organization. The reasonable recruitment area is the geographical area from which the contractor usually seeks or reasonably could seek workers to fill the positions in question. Trainable refers to those employees within the contractor's organization who could, with appropriate training that the contractor could reasonably provide, become promotable or transferable during the AAP year. 41 C.F.R. § 60-2.14(c). The regulations require contractors to use the most current and discrete statistical data to conduct availability analyses. Examples of such information include census data, data from local job service offices, and data from colleges and other training institutions. 41 C.F.R. § 60-2.14(d).

Incumbency-to-Availability Analysis. For job groups, the contractor must compare the percentage of minorities and females actually employed in the job group with those determined to be available by using the factors discussed above. Placement goals must be established if there are fewer minorities or females in a particular job group than would reasonably be expected given their availability. 41 C.F.R. § 60-2.15.

Placement Goals. When incumbency does not reasonably approximate availability in job groups, the employer must establish placement goals. *See* 41 C.F.R. §§ 60-2.15 and 2.16. The OFCCP now interprets this as requiring only the declaration of annual percent of placement goals that equal the availability for the underutilized job group.

C. Construction Industry. The construction industry is treated separately from other industries for the purpose of implementing affirmative action requirements. The goals for female and minority utilization in construction are issued by the OFCCP for specific geographic areas. The OFCCP has sought to implement new construction regulations for several years. To date no proposed regulations have been published.

D. Content of a 503 and VEVRAA AAP. The new OFCCP regulations have changed the contents of AAPs under 503 and VEVRAA. Below is a list of required items in the narratives:

1. Policy statement.
2. Review of personnel processes.
3. A schedule for the review of physical and mental job qualifications.
4. Anti-harassment section.
5. External dissemination of policy, outreach, and positive recruitment.
6. Internal dissemination of policy.
7. Assessment of external outreach and recruitment efforts.
8. Audit and reporting system.
9. Responsibility for implementation.
10. Training.
11. Data Collection Analysis.
12. Goal (503); Benchmark (VEVRAA)

NOTE: The 503 and VEVRAA narratives must be made available to applicants and employees

upon request. The data collection metrics can be omitted from the copy designated for applicant/employee review.

IV. AFFIRMATIVE ACTION: APPLICANT FLOW ANALYSIS AND ANALYSIS OF PERSONNEL PRACTICES

A. General Obligations. The Uniform Guidelines on Employee Selection Procedures, 41 C.F.R. §§ 60-3.1-60-3.18, were adopted in 1978 by the EEOC and the OFCCP. In recent years, the OFCCP has departed to some degree from its emphasis on the "bottom line" numerical compliance with goals and shifted its focus to analysis of the impact of hiring and other personnel procedures. There has also generally been an increased emphasis on analyses of the impact of hiring and other personnel procedures in EEO litigation. For contractors, this requires detailed recordkeeping and periodic statistical studies to compare the selection rates of nonminorities and minorities, as well as males and females. When substantial discrepancies in the selection rates exist, a contractor may incur significant liability

B. Adverse Impact: A "Rule of Thumb." Contractors are required to compare applicants to hires to determine if any group has been adversely impacted upon. This analysis is calculated using of the several tests, and analyzes gender and race information. When a contractor has not maintained data on adverse impact as required, the OFCCP may draw an inference of adverse impact in the selection process.

C. Other "Selection Procedures." Impact determinations must also be accomplished for promotions, transfers, and layoffs that are not based solely on seniority. The OFCCP also considers all terminations, including discharges, as "selection procedures," although this interpretation is questionable.

V. NEW COMPLIANCE REVIEW PROCEDURES

A. Active Case Enforcement vs. Active Case Management. Effective January 1, 2011, the OFCCP began using new procedures for conducting supply and service compliance reviews. Since July 25, 2003, the OFCCP has processed compliance evaluations under the Active Case Management (ACM) process. With a directive issued December 2, 2010, the OFCCP rescinded the ACM process because "it did not allow the OFCCP to effectively use all of its investigative tools." The new procedures are entitled Active Case Enforcement (ACE) procedures. Essentially, the ACE procedures will result in more onsite investigations.

The ACE directive begins with a definitions section. In this section, the following processes are defined: compliance check; compliance evaluation; compliance review; focused review; full desk audit; full compliance review; offsite review of records; and pre-award compliance evaluation. These various terms define the scope of the audit. While the OFCCP will use different terms to describe each audit, the ACE directive makes clear that all supply and service contractors selected for review will be required to submit their AAPs and supporting documentation to the OFCCP within the time specified in the scheduling letter. The next step will be a full desk audit.

B. New Scheduling Letter. The OFCCP sends its Scheduling Letter to government contractors to inform them that they have been selected for a compliance evaluation. The Letter commences the evaluation and is accompanied by an Itemized Listing of information the contractor must provide to OFCCP. On September 29, 2014, the Office of Management and Budget (OMB) approved changes the OFCCP proposed to its compliance review scheduling letter.

Each Scheduling Letter contains a list of items which must be submitted with the AAP. The new itemized listings will consist of individualized employee compensation data and revised record submission based on the new VEVRAA and Rehabilitation Act regulations. OFCCP began using the new Scheduling Letter October 2014.

C. Selection Procedure. Under the ACE procedure, the OFCCP will continue to use the neutral Federal Contractor Selection System (FCSS) to select supply and service contractor establishments for compliance evaluations. Neutral selection criteria will then be employed to designate which type of investigative procedure will be conducted for each establishment. For instance, the list will identify whether an establishment will undergo a compliance review, an offsite review of records, a compliance check, or a focused review. The directive further instructs each OFCCP regional/district/area office to schedule the establishments for review in the strict sequential order identified on the FCSS list.

D. OFCCP Cooperation with Other Agencies. In November 2011, the OFCCP and the EEOC issued an updated memorandum of understanding (MOU) that outlines how the agencies will coordinate their enforcement efforts and share information regarding discrimination claims under Title VII and EO 11246. The MOU between the EEOC and the OFCCP was last revised in 1999. The updated MOU, which was published in the November 16, 2011 Federal Register, includes updates on using contemporary office names and titles; designating a "Coordination Advocate" at both agencies; reorganizing and/or condensing language for clarity; streamlining the Compliance Coordination Committees; and clarifying the complaint/charge referral procedures.

1. Information Sharing. The MOU states that the agencies will share "any information relating to the employment policies and/or practices of employers holding government contracts or subcontracts that supports the enforcement mandates of each agency as well as their joint enforcement efforts." Examples of such information include AAPs, annual employment reports, complaints, charges, investigative files, and compliance evaluation reports and files.

Under the MOU, the OFCCP agrees to make documents available to the EEOC that relate to the enforcement or administration of any laws enforced by the EEOC, including Title VII, the Equal Pay Act (EPA), the Age Discrimination in Employment Act (ADEA), the Genetic Information Nondiscrimination Act of 2008 (GINA), the ADA and EO 12067. The EEOC agrees to make available to the OFCCP documents relating to the enforcement and administration of EO 11246, the affirmative action provisions of the VEVRAA, § 503 of the Rehabilitation Act, and EO 12067.

2. Confidentiality. When the EEOC provides information to the OFCCP, the confidentiality requirements of §§ 706(b) and 709(e) of Title VII apply to that information. If the OFCCP receives the same information from an independent source, Title VII's confidentiality provisions will not apply. The OFCCP will, however, comply with the confidentiality requirements imposed by the Trade Secrets Act or the Privacy Act. When the OFCCP obtains information from its processing of the Title VII component of a dual filed charge, or when the OFCCP creates documents that exclusively concern the Title VII component of a dual filed charge, the OFCCP will observe any confidentiality requirements imposed on such information by the Trade Secrets Act, the Privacy Act, and §§ 706(b) and 709(e) of the Civil Rights Act.

3. Compliance Coordination Committees. The MOU states that the OFCCP and the EEOC will establish procedures for notification and consultation at various stages of their compliance activities to develop potential joint enforcement initiatives, increase efficiency, ensure coordination and minimize duplication. Such procedures include the establishment of ongoing Compliance Coordination Committees and requirements for notification of each other when the agencies resolve a charge or complaint.

4. Procedures. The MOU sets forth procedures for the receipt, investigation, processing, and resolution of complaints filed with the OFCCP as well as dual-filed complaints/charges. Additionally, the MOU states that the OFCCP will retain, investigate, process, and resolve allegations of discrimination of a systemic or class nature on a Title VII basis in dual filed complaints/charges. The OFCCP will refer to the EEOC individual allegations of Title VII violations. The MOU also provides that if an individual who has already filed an OFCCP complaint/charge that is dual-filed under Title VII subsequently files a Title VII charge with the EEOC covering the same facts and issues, the EEOC will forward the charge to the OFCCP for consolidated processing.

5. Coordination Advocate. The MOU requires each agency to designate a "coordination advocate" to assist with understanding and complying with the updated MOU.

E. Desk Audit to Onsite Investigation to Audit Closure. During the desk audit, the OFCCP will determine whether there are "indicators of potential discrimination or violation" which will require an onsite investigation. In the past, the OFCCP considered statistical and anecdotal evidence to determine whether "indicators" exist. However, under the ACE procedure, indicators of potential discrimination and/or violations will also include: patterns of individual discrimination; patterns of systemic discrimination; patterns of major technical violations, such as recordkeeping deficiencies or the failure to maintain an AAP; and noncompliance with other labor and employment laws, such as wage and hour laws. In addition, an onsite investigation may occur if the OFCCP determines that the submitted AAP or supporting documentation is insufficient to determine compliance. If no indicators are found, the OFCCP may close the review. However, if the compliance review has been designated by the national office as a "quality control review" or "focused review," the compliance officer must conduct an onsite investigation even in the absence of indicators. During an onsite investigation, the OFCCP will examine data and documentation relating to the indicator, but the ACE procedures make clear that the scope of an onsite is not limited to the indicators. In addition, during an onsite review, the OFCCP will determine the contractor's compliance with EO 13496 (the mandated posting which informs employees of their rights to organize, discussed below).

VI. AFFIRMATIVE ACTION REQUIREMENTS – CONSEQUENCES OF NONCOMPLIANCE

A. Enforcement Procedures Under EO 11246. The requirements of the affirmative action laws are enforced by the OFCCP in administrative proceedings. If a compliance evaluation results in a determination of a violation that cannot be resolved through conciliation, the OFCCP may refer the matter to the Department of Justice or EEOC for enforcement. Alternatively, the OFCCP may institute administrative enforcement proceedings seeking an injunction against violations, appropriate relief (including affected class and individual back pay relief) cancellation of the government contract(s), debarment from future contracts, or debarment from future government contracts for a fixed period.

B. Liability for Violating the Nondiscrimination Clause Under EO 11246. In *OFCCP v. Bank of America*, Case No. 1997-OFC-16, 2010 WL 9102169 (January 21, 2010) (Recommended Decision and Order), the ALJ found that Bank of America discriminated against African-American applicants for certain entry-level jobs, relying upon statistical evidence developed by the OFCCP that showed a significant adverse impact against African-American applicants. The ALJ rejected the employer's argument that the OFCCP could not rely on statistical analysis alone but must also offer anecdotal evidence of intentional discrimination. The ALJ also held that the bank's failure to retain records as required by law without justification did not lessen the statistical disparities found by the OFCCP's expert. The ALJ retained jurisdiction over the case to determine what remedies should be provided by the bank. In April 2010, the ARB rejected the bank's request for interlocutory review of the ALJ's opinion. *OFCCP v. Bank of America,* ARB Case No. 10-048, 2010 WL 1776983 (ARB April 29, 2010). According to the ARB, the bank failed to establish a sufficient basis for departing from its general rule against accepting interlocutory appeals because the appeal did not raise "controlling questions of law." *Id.* at *11. Because the ARB has rejected the appeal, the ALJ will rule on damages.

C. Fixed Term Debarments for Noncompliance with the OFCCP Rules. The OFCCP may now impose "fixed term" or indefinite term debarments. Once debarred, a contractor can reapply for contract work after taking remedial measures. The OFCCP announced that it believes fixed term sanctions are necessary to ensure that recalcitrant federal contractors will come into and remain in compliance with the OFCCP regulations.

D. Contractor's Disclosure of Employment and Labor Violations. On July 31, 2014, EO 13673 was issued. It will require prospective federal contractors to report violations of employment and labor laws, including, but not limited to, the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), and Title VII violations. In turn, federal agencies will consider these identified

violations when awarding a federal contract. The DOL issued proposed guidance on the EO on May 28, 2015. The Federal Acquisition Regulatory Counsel (FAR) has also issued a proposed rule on the EO. The comment period for the proposed guidance and the FAR's proposed rule closed July 27, 2015, but as of the date of the publication of the SourceBook neither agency had issued final guidance or regulations on the EO.

VII. THE OFCCP STANDARDS AND GUIDELINES REGARDING COMPENSATION

A. New Directive for Analyzing Pay Discrimination Claims. In February 2013, OFCCP announced that it is rescinding its "Voluntary Guidelines" and "Compensation Standards," which the agency adopted in 2006 to evaluate pay discrimination claims against federal contractors. In their place, OFCCP has issued Policy Directive 307, which sets out the procedures OFCCP investigators will use to review the systems and practices by which government contractors pay their workers. The Directive is available on OFCCP's web site at: http://www.dol.gov/ofccp/regs/compliance/CompGuidance/index.htm.

The OFCCP stated that the 2006 guidance documents imposed arbitrary restrictions that kept the agency from doing its job and "effectively protecting workers from illegal pay discrimination." OFCCP will now follow Title VII principles in investigating and addressing compensation discrimination, using the same standards courts use in evaluating pay discrimination claims brought by individual workers, classes of workers, or federal agencies.

The new Directive describes the procedures and protocols the OFCCP will follow in conducting compensation investigations. While the OFCCP states that one of its goals is to provide transparency, the Directive also outlines the fact that compensation analyses will be tailored in each compliance review on a "case by case" basis depending on the facts of that particular review or contractor. The Directive continues to outline all types of investigative techniques available to compliance officers (COs). While this increases the tools available to the OFCCP, it does little to provide guidance for what contractors can expect in a compliance evaluation.

B. Highlights of the New Procedures and Protocols. Highlights of the procedures and protocols outlined in the Directive include:

1. Preliminary Analysis and Assessment of Quantitative and Qualitative Factors. Generally, the OFCCP will conduct some form of preliminary analysis at the desk-audit stage but the specific analysis will be influenced by whether the agency received summary data or individual data. The OFCCP will use the preliminary analysis to determine whether to continue the compliance evaluation, but will not limit or define the scope of further review based solely on the results of the preliminary analysis.

The preliminary analysis usually will assess both quantitative and qualitative factors.

a. Quantitative factors may include:

- The size of the overall average pay difference based on race and gender;
- The size of the largest average pay difference within AAP job groups, or the contactor's existing salary band or pay grade system;
- The number of job groups or grades where average pay differences based on race or gender exceed a certain threshold; or
- The number of employees affected by race- or gender-based average pay differences within job groups or grades.

b. Qualitative factors may include:

- compliance history, OFCCP or EEOC complaints;
- anecdotal evidence;

- potential violations involving other employment practices; or
- data integrity issues.

2. Use of a Wide Range of Investigative and Analytical Tools. The Directive states that a variety of tools are available for investigating and analyzing compensation issues and that there is no single tool that must be used in every case. The particular analytical tool that will be used depends on the facts of the case. These tools may include:

- statistical analysis, including pooled regression analysis for large pay analysis groups or nonpooled regression analysis for small pay analysis groups;
- nonstatistical analysis, including cohort analyses; and
- anecdotal evidence collected as part of the investigation.

3. Examples of Employment Practices that May Lead to Compensation Disparities. The Directive provides examples of differences in employment practices that may lead to compensation disparities warranting review and investigation for potential discrimination. These include:

- **Difference in Salary or Hourly Rates of Pay:** For example, Hispanic customer service agents are paid less than white employees in the same or similar positions.
- **Differences in Job Assignment or Placement:** For example, women hired into entry-level grocery store positions are disproportionately assigned to the bakery department. Men are assigned to the meat department where pay and promotion opportunities are better.
- **Differences in Training or Advancement Opportunities:** For example, employees participate in a management training program on a recommendation by a manager. Certain managers are referring only white males resulting in disproportionate participation and subsequent promotions of white males.
- **Differences in Earning Opportunities:** For example, African-American sales workers are disproportionately assigned to territories with less potential.
- **Differences in Access to Increases and Add-ons:** For example, female lawyers who get exactly the same base pay as male counterparts earn less on annual bonuses.

4. Effective Date. The investigation procedures established in the Directive apply to all OFCCP compliance evaluations scheduled on or after February 28, 2013. Additionally, they apply to open reviews to the extent they do not conflict with OFCCP guidance or procedures existing prior to the effective date.

C. New EO Regarding Minimum Wage. President Obama signed EO 13658 on February 2014 which will increase the minimum wage for some federal contractor employees to $10.10 per hour. The new wage was effective January 1, 2015, for new contracts. On October 2, 2014, the DOL issued final regulations to implement this Order. The regulations require that covered contractors and subcontractors pay their employees working on federal contracts or subcontracts $10.10 per hour beginning January 1, 2015. Each year after that, the Secretary of Labor is authorized to propose higher hourly rates based on data in the Consumer Price Index for Urban Wage Earners and Clerical Workers. Tipped employees must be paid $4.90 per hour effective January 1, 2015. The EO covers only contracts or solicitations for contracts that are issued on or after January 1, 2015. In addition, it covers contracts of $2,000 or more for construction covered by the Davis-Bacon Act (DBA), and contracts of $2,500 or more that are covered by the Service Contract Act (SCA). The DBA applies to federal contracts to construct, alter, or repair public buildings. The SCA applies to federal contracts that furnish services through the use of service employees. Generally speaking, service employees are individuals engaged in the performance of a contract made by the federal government the principal purpose of which is to furnish services to the United States. The SCA does not apply to a contract for the carriage of freight or personnel by vessel, airplane, bus, truck,

express, railway line or oil or gas pipeline where published tariff rates are in effect. Effective January 1, 2016, the new minimum wage has been increased to $10.15 per hour, and for tipped employees the wage increased to $5.85 per hour.

D. EO on "Pay Secret" Policies. On April 8, 2014, the President issued another compensation EO (EO 13665); this order amended EO 11246 and prohibits federal contractors from discriminating against or retaliating against any employee or applicant because he/she has "inquired about, discussed, or disclosed" his/her own compensation or the compensation of any other employee or applicant. The OFCCP issued final regulations in September 2015 which make the EO effective January 11, 2016.

E. Presidential Memorandum - Advancing Pay Equality Through Compensation Data Collection. On April 8, 2014, President Obama signed a Presidential Memorandum which ordered the OFCCP to propose a compensation data tool for federal contractors. The OFCCP issued regulations and details on this tool on August 8, 2014. The proposed regulations would require contractors to submit an Equal Pay Report on annual compensation by race and gender, and defined job categories. The Equal Pay Report would become an annual obligation if it is finalized as currently proposed.

VIII. THE OFCCP INTERNET APPLICANT RULE

The OFCCP requires covered federal contractors to obtain gender, race, and ethnicity data on employees and, where possible, on applicants. *See* 41 C.F.R. § 60-1.12(c). The OFCCP encourages contractors to seek such information through the use of "electronic tear off sheets" or similar automated means. Effective February 6, 2006, the OFCCP amended its regulations to include "Internet Applicants." The OFCCP's Internet Applicant Rule establishes both recordkeeping and applicant tracking standards for certain applicants for employment. Note that the OFCCP's existing recordkeeping standards continue to apply to jobs for which a government contractor does not obtain applicants through the use of the internet or related technologies and for which it does not accept any electronic submissions of interest.

However, the Internet Applicant Rule applies to those jobs for which a government contractor obtains applicants through the acceptance of expressions of interest via the Internet or related technologies (e.g., e-mail, resume databanks, employer website). It also applies where the contractor considers both applications submitted electronically and those submitted on paper. The Internet Applicant Rule requires the contractor "where possible" to identify and record the gender, race, and ethnicity of each applicant for the job, including each "internet applicant."

A. Definition of Internet Applicant. The rule defines "internet applicant" as an individual who: submits an expression of interest in employment through the Internet or related technologies; is considered by the government contractor for a particular position; indicates in the expression of interest that he or she possesses the basic qualifications for the position; and at no point in the selection process does the individual remove himself or herself from further consideration or otherwise indicates that he or she is no longer interested in employment in the position.

B. Basic Qualifications. The "basic qualifications" which an applicant must possess are qualifications that the contractor advertised to potential applicants or criteria that the contractor established in advance. These qualifications must be included in the contractor's advertisement for the job or, if the job is not advertised, must be established prior to the contractor's screening of an external or internal database. In addition, the qualifications must be:

- Noncomparative features of a job seeker (e.g. three years' experience in a particular position, rather than a comparative requirements such as being one of the top five among the candidates in years of experience);
- Objective (e.g., a Bachelor's degree in accounting, but not a technical degree from a good school); and

- Relevant to performance of the particular position and enable the contractor to "accomplish business related goals." It is important to note that employment tests are not considered basic qualifications.

C. Record Retention Requirements. The Internet Applicant Rule requires employers to retain records pertaining to all expressions of interest through the Internet or related electronic data technologies through which the contractor considered the individual for a particular position, such as on-line resumes or internal resume databases. Contractors must also retain records identifying job seekers contacted regarding their interest in a particular position regardless of whether the person qualifies as an Internet Applicant. Additionally, for the purposes of recordkeeping with regard to an internal database, the contractor must maintain a record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search. For purposes of recordkeeping with respect to external resume databases, the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor. Contractors must also retain all tests, test results, and interview notes.

IX. POSTING REQUIREMENTS OF EO 13496

On May 20, 2010, the DOL issued a final regulation implementing EO 13496, signed by President Obama on January 30, 2009. EO 13496 requires nonexempt federal contractors and subcontractors to post a notice informing their employees of their rights under the National Labor Relations Act (NLRA). The final regulation does not apply to public sector employers or employers covered by the Railway Labor Act(RLA). Effective June 21, 2010, all contractors with a contract in excess of $100,000 must post this new notice in a conspicuous area. Employers with subcontracts of $10,000 or less are exempt from this requirement. In *National Ass'n of Manufacturers v. Perez,* 2015 WL 2148230 (D.D.C. May 7, 2015), the court upheld this rule, finding it does not violate employers' First Amendment rights, was properly adopted, and is not preempted by the NLRA.

Employers who generally post electronic notices will be required to use specific language on their web site that will contain a link to the full text of the notice. The DOL will print the required notice poster and provide it to federal contractors through the federal contracting agency. Alternatively, contactors can obtain it from the Office of Labor-Management Standards (OLMS). Contractors will need to follow the specific document requirements below when printing their own copy of the notice. Employers cannot alter the size, color, or content of the poster provided by the DOL; thus, the poster must be printed on 11 x 17 inch paper (or in the 11 x 8.5 inch two-page format). This may make it more difficult (although not impossible) for federal contractors to simply buy an "all-in-one" poster that consolidates all of the federally mandated labor and employment notices (since this is usually done by shrinking the posters to fit the lay-out). In addition, if a "significant portion of the contractor's workforce" is not proficient in English, the employer must post the notice in the language of such employees. Finally, if an employer generally posts electronic notices as explained above and a significant portion of its workforce does not speak English, the employer must provide a web site link to a copy of the notice in the language the employees speak.

The final regulation also sets out the four paragraphs that the EO requires to be included in all nonexempt government contracts and subcontracts (the "employee notice clause"). Unlike the proposed regulation, the final regulation does not require that the employee notice clause be quoted verbatim; instead it can be included in the contract by citation to 29 C.F.R. Part 471, Appendix A to Subpart A.

A. Enforcement. The OFCCP issued a directive stating that it will share responsibility with the OLMS for ensuring that covered contractors and subcontractors comply with EO 13496. The OFCCP's role will be to physically inspect contractors' and subcontractors' establishments at which

employees covered by the NLRA engage in activities relating to the performance of the contract or subcontract, including plants, offices, and work sites. The OFCCP is responsible for examining government contracts and subcontracts to ensure compliance with the EO's posting and contract clause requirements. The OFCCP is also charged with investigating a contractor's or subcontractor's compliance with EO 13496 if a complaint is filed with the OFCCP that a covered contractor or subcontractor is not in compliance with the EO.

The enforcement directive states that the verification process will be made a part of the onsite phase of compliance reviews that the OFCCP conducts under EO 11246, § 503 of the Rehabilitation Act, or VEVRAA. Prior to an onsite review, the OFCCP will request that the contractor or subcontractor provide for inspection a minimum of the last three contracts, subcontracts, or purchase orders resulting from solicitations that took place on or after June 21, 2010. Review of a greater number of contracts and purchase orders, however, may be necessary to ensure compliance. During an onsite investigation, the OFCCP compliance officer will physically inspect a contractor's facility to determine whether the notices are posted in conspicuous places so that the notice is prominent and readily seen by employees. Additionally, during the onsite investigation, the compliance officer will inspect the identified sample of contracts or purchase orders to determine whether they include the required contract clause. If a contractor customarily posts employee notices about terms and conditions of employment in an electronic format, the compliance officer will also view the electronic posting, and ensure that the contractor's website states, "Important Notice About Employee Rights To Organize And Bargain Collectively With Their Employers," and that there is a link to the OLMS website on the contractor's website. If a significant portion of a contractor's workforce is not proficient in English, the OFCCP compliance officer will check to ensure that the poster is provided in the appropriate language. If a contractor is found to be noncompliant during the onsite investigation, the OFCCP will attempt to correct the violation. In addition, the OFCCP will make reasonable efforts to obtain compliance through conciliation.

The remainder of the enforcement order discusses the procedures for an EO 13496 report of noncompliance and the administrative proceedings that relate to a compliance investigation. The enforcement directive remains in effect until superseded or rescinded.

B. Employee Complaints. An employee of a covered contractor may file a complaint alleging that the contractor has failed to post the employee notice as required and/or has failed to include the employee notice clause in subcontracts or purchase orders. Complaints may be filed with the OLMS or the OFCCP. In investigating complaints, the Director of the OFCCP will evaluate the allegations of the complaint and develop a case record. The record will include findings regarding the contractor's compliance with the requirements of EO 13496 and if applicable, a description of conciliation efforts made, corrective action taken, and/or enforcement recommended. The bases for a finding of a violation may include, but are not limited to:

- the results of a compliance evaluation;
- the results of a complaint investigation;
- a contractor's refusal to allow a compliance evaluation or complaint investigation to be conducted; and
- a contractor's refusal to cooperate with the compliance evaluation or complaint investigation, including failure to provide information sought during those procedures.

If a violation is found, the contractor must correct the violation and must commit, in writing, not to repeat the violation, before the contractor may be found to be in compliance. If a violation cannot be resolved through conciliation efforts, the OFCCP Director will refer the matter to the Director of OLMS who may refer the matter to the Solicitor of Labor for institution of administrative enforcement proceedings.

C. Penalties. In enforcing EO 13496, the Director of OLMS may direct a contracting agency to cancel, terminate or suspend any contract for failure of the contractor to comply with its contractual

provisions. Contracts may be canceled, terminated, or suspended absolutely, or continuance of contracts may be conditioned upon compliance. Additionally, an order of debarment may be issued.

X. HOSPITALS PROVIDING MEDICAL SERVICES TO FEDERAL EMPLOYEES

The OFCCP has a long-standing desire to establish jurisdiction over hospitals and other health care providers even when the hospital does not have a direct contract with a federal agency (e.g., the Bureau of Prisons or the Veterans Administration).

A. Providing Services to Health Maintenance Organizations (HMOs). A federal trial court has held that OFCCP has jurisdiction over three hospitals that provided medical services to federal employees who were members of an HMO. *UMPC Braddock v. Harris*, 934 F. Supp. 2d 238 (D.D.C. 2013). The hospitals contracted with a prime contractor, the UPMC Health Plan, which had a contract with the federal government to provide medical services to federal employees. Even though the hospitals did not have an EEO clause in their contracts, and contrary to the arguments that the hospitals raised, the court found that each of the hospitals was a subcontractor that performed services necessary to the performance of the prime contract. Accordingly, although the hospitals never consented to be bound by OFCCP's requirements, the court found that OFCCP had jurisdiction over each of the hospitals. However, the U.S. Court of Appeals for the District of Columbia subsequently vacated the trial court's order in light of the OFCCP's moratorium on the enforcement of affirmative action requirements for subcontractors carrying out the government's TRICARE program (see the discussion, below). In *UPMC Braddock v. Perez*, 584 F. App'x 1 (D.C. Cir. 2014), the court noted that two of the three appellants in that case, UPMC Braddock and UPMC Southside, are no longer operating as independent hospitals. Additionally, the court found that the remaining appellant, UPMC McKeesport, was a TRICARE subcontractor eligible for the moratorium. The court cited a letter from the Secretary of Labor confirming that the DOL had administratively closed all affirmative action compliance reviews of UPMC McKeesport on that basis. Accordingly, the court found that the DOL's closure of that review "eliminated all remaining injury to appellants in this case. Therefore, this appeal is moot." The court ordered the trial court's judgment be vacated and directed it to vacate the ARB decision.

B. Providing Services to TRICARE Beneficiaries. In 2008, the OFCCP sued Florida Hospital of Orlando seeking jurisdiction to conduct a compliance review; the hospital challenged jurisdiction. The OFCCP contended it had jurisdiction based on the hospital's participation in TRICARE. The ALJ found in favor of the OFCCP; the hospital appealed to the ARB.

During the lengthy litigation, Congress passed legislation which was relevant to the case. On December 31, 2011, the National Defense Authorization Act (NDAA) became law and exempted from OFCCP jurisdiction hospitals which provide services to TRICARE beneficiaries. The Act contains the following language:

> In establishing rates and procedures for reimbursement of providers and other administrative requirements, including those contained in provider network agreements, the Secretary shall to the extent practicable maintain adequate network of providers, including institutional, professional, and pharmacy. For the purpose of determining whether network providers under such provider network agreements are subcontractors for purposes of the Federal Acquisition Regulation or any other law, a TRICARE managed care support contract that includes the requirement to establish, manage, or maintain a network of providers may not be considered to be a contract for the performance of health care services or supplies on the basis of such requirement.

After the NDAA was enacted, the hospital in *OFCCP v. Florida Hospital of Orlando* filed a motion to dismiss the litigation since TRICARE was the only basis for OFCCP jurisdiction. The OFCCP

submitted a legal brief after the passage of NDAA. The OFCCP claimed that it maintained jurisdiction over the Hospital because the law is not retroactive. More importantly, the OFCCP interpreted the NDAA to impact only one prong of the subcontractor definition, specifically the second prong (assumption of a contractor's obligation). Thus, the OFCCP contended that the first subcontractor prong (necessary to the performance of one or more contracts) was still effective after NDAA to give it jurisdiction over the Hospital as a TRICARE network provider. In October 2012, the ARB concluded that the NDAA exempted the hospital from OFCCP jurisdiction and thus, the lawsuit was dismissed in favor of the hospital. Subsequently, the ARB issued an en banc opinion and reversed the previous ARB opinion. According to the en banc panel, the hospital was a subcontractor as defined by prong one of the definition ("necessary to the performance of the contract") and that the NDAA did not exempt such subcontracts from OFCCP jurisdiction. The case was remanded to the ALJ for further discussion on whether TRICARE is considered federal financial assistance (like Medicaid) and is therefore, exempt from OFCCP jurisdiction.

Subsequently, in response to the OFCCP's continued efforts to exert jurisdiction over health care providers who receive payments from the federal government, the Protecting Health Care Providers from Increased Administrative Burdens Act (H.R. 3633) was introduced in the House of Representatives. This bill provides that those who receive payment from the federal government related to the delivery of health care services to individuals will not be treated as a federal contractor or subcontractor by the OFCCP.

After the Bill was introduced, Labor Secretary Perez announced a five-year moratorium on enforcement "of the affirmative action obligations of all TRICARE providers," and stated that the OFCCP will administratively close any open and scheduled compliance evaluations for TRICARE subcontractors. Despite this announcement, however, the OFCCP continues to claim jurisdiction over certain healthcare providers that participate in TRICARE as well as the Federal Employees Health Benefits Program (FEHB).

Specifically, during the moratorium, the OFCCP will provide information and technical assistance to TRICARE subcontractors on how to "develop cost effective affirmative action plans, record keeping, and applicant tracking systems." Additionally, the OFCCP will work with various federal agencies to "clarify that those health-care providers that participate as subcontractors in TRICARE and the [FEHB] may, in certain circumstances, be subcontractors for the purposes of the laws that the OFCCP enforces." Furthermore, the moratorium does not apply to holders of prime contracts with the federal government where the contractor is also a TRICARE subcontractor or to TRICARE subcontractors that hold separate, independent, nonhealthcare-related subcontracts.

On March 28, 2014, in accordance with the moratorium, the OFCCP withdrew its jurisdictional Complaint against Florida Hospital of Orlando (discussed above). Due to the withdrawn Complaint, the DOL's ALJ dismissed the case on April 1, 2014. The OFCCP subsequently issued a Directive officially establishing the moratorium. The Directive states that within 30 business days of the effective date of the Directive (May 7, 2014), the OFCCP will administratively close any open compliance evaluations of TRICARE subcontractors affected by the moratorium. The Directive states that the moratorium applies to all health-care entities that participate in TRICARE as subcontractors under a prime contract between the Department of Defense (DOD) TRICARE Management Activity and one of the prime managed-care contractors, including:

- Health-care entities that participate in TRICARE only as subcontractors;
- Health-care entities that participate in TRICARE as subcontractors and as subcontractors under any Medicare program;
- Health-care entities that participate in TRICARE as subcontractors and as subcontractors under the FEHB; and
- Health-care entities that participate in TRICARE as subcontractors and as subcontractors under any other federal health program.

The moratorium does not apply to health-care entities who are TRICARE subcontractors and hold a prime contract with any federal agency. Additionally, it does not apply to TRICARE subcontractors who hold a separate, independent, non-TRICARE-related federal subcontract.

Scope of the Moratorium:

The moratorium applies to the OFCCP's enforcement of a covered TRICARE subcontractor's obligations under EO 11246, § 503 of the Rehabilitation Act, and VEVRAA, including enforcement of obligations related to AAPs and recordkeeping. It does not apply to the processing of complaints of discrimination under 41 CFR 60-1.24; 41 CFR 60-300.61 and 41 CFR 60-741.61. Additionally, the moratorium does not apply to obligations a TRICARE subcontractor may have under other federal nondiscrimination laws.

Administrative Closure of Open Compliance Evaluations:

Within 30 business days of the effective date of the Directive (May 7, 2014), the OFCCP will administratively close any open compliance evaluations of TRICARE subcontractors affected by the moratorium. If a TRICARE subcontractor receives an OFCCP scheduling letter requesting the subcontractor's AAP and supporting data, the Directive states that it should send its local OFCCP office a written request that the compliance evaluation be administratively closed, along with a copy of its agreement to participate in the TRICARE program. The Directive further states that TRICARE subcontractors covered by the moratorium who have received a Corporate Scheduling Announcement Letter (CSAL) should not contact the OFCCP. Instead, the subcontractor should wait to receive a scheduling letter before it contacts the local OFCCP office to request that the compliance evaluation be administratively closed. The OFCCP has provided a list of local offices on its website at: http://www.dol.gov/ofccp/contacts/ofnation2.htm.

OFCCP's Outreach and Assistance Efforts During the Moratorium:

During the moratorium period, the OFCCP will provide technical assistance on compliance with the affirmative action obligations under EO 11246, § 503 and VEVRAA. Among other things, the agency will:

- Provide information, materials, and technical assistance training to TRICARE subcontractors on how to develop cost effective AAPs and recordkeeping and applicant tracking systems;
- Conduct regional and national webinars that cover OFCCP's legal authorities, jurisdiction, and federal contractor and subcontractor obligations; and
- Convene listening sessions to learn about the unique issues facing TRICARE subcontractors in order to provide relevant and targeted technical assistance under all of OFCCP's legal authorities.