

## Understanding Affirmative Action Obligations as a Landlord, Tenant or Government Contractor

By Paula M. Ketcham

Given the plethora of government regulations spawned in the 80s and 90s, Executive Order 11246 (the “Order”), signed into law by President Lyndon B. Johnson in 1965, may appear to be relatively ancient history. Nevertheless, compliance with this far-reaching rule remains as essential today as it did when the Order was issued. Similarly, it continues to catch unwary federal contractors by surprise. Under the Order, companies that hold federal contracts or subcontracts in excess of \$10,000 are prohibited from discriminating against employees and applicants for employment in hiring or employment decisions on the basis of race, color, gender, religion, and national origin. This aspect of the Order is generally widely understood. What is often overlooked, however, is that these contractors are also subject to certain affirmative action requirements. While the Executive Order has been on the books for nearly 40 years, many companies still find themselves in uncharted territory with respect to their coverage under affirmative action regulations.

This article provides an overview of the applicability of the Order to real estate leases involving the federal government as a tenant and also other contracts and subcontracts that may form a part of the business commonly conducted by lessors, leasing agents, property managers and tenants (such as tenants leasing federal government property). After exploring coverage thresholds and basic regulatory requirements under the Order, this article provides information concerning enforcement of and penalties for noncompliance with the Order and then concludes with tips for preparing for and successfully passing affirmative action audits. Although not within primary focus, two other affirmative action rules that often apply hand in hand with the Order — Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans Readjustment Assistance Act (“VEVRAA”) — are also referenced.

### ‘FEDERAL CONTRACTS’ INCLUDE LEASING CONTRACTS

The business world is generally cognizant that federal supply contracts involve complex requirements, but it is less readily recognized that federal contracts that give rise to the affirmative action requirements of the Executive Order are not limited to the sale of personal property to the federal government (such as airplanes and equipment to the U.S. military). The regulations promulgated under the Executive Order broadly define a federal contract as:

any agreement ... between any contracting agency [of the federal government] and any person for the purchase, sale or use of personal property or nonpersonal services.

The term “personal property” is defined in the regulations as including contracts “for the use of real property (such as lease arrangements).” In other words, any company that leases real estate to or from the federal government under arrangements involving rent or other consideration in excess of \$10,000 in a single year is considered a federal contractor for purposes of the Order. Moreover, generally speaking, once it has been determined that a contractor is subject to the civil rights requirements promulgated under the Order, all of that contractor’s establishments or facilities will be subject to the same regulatory requirements, regardless of where the federal contract originated or is to be performed.

### OBLIGATIONS FLOWING FROM FEDERAL CONTRACTS

The specific obligations that flow from federal leases and other federal contracts of more than \$10,000 are detailed below. Additionally, contractors and subcontractors with a single federal contract of \$50,000 or more, and 50 or more employees, are required to develop a written affirmative action program (“AAP”) that 1) is designed to ensure equal employment opportunity, and 2) sets forth specific action-oriented programs to which a contractor commits itself to apply a good faith effort.

### OBLIGATIONS FLOWING FROM CONTRACTS AND SUBCONTRACTS MORE THAN \$10,000

Under the Order and its implementing regulations, each governmental agency must require every person or entity from which it annually purchases more than \$10,000 of goods or nonpersonal services in the aggregate to be bound by the rules set forth in the following subparagraphs:

(i) Prohibit discrimination against applicants or employees on the basis of their race, color, religion, sex, or national origin; take affirmative action to ensure that applicants are employed and that employees are treated without regard to their race, color, religion, sex, or national origin in regard to employment, upgrading, demotion, transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship; and post in conspicuous places, available to employees and applicants for employment, notices regarding the contractor's nondiscrimination obligations.

(ii) State in all solicitations or advertisements for employees that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.

(iii) Provide each labor union or representative of workers with which the contractor has a collective bargaining agreement or other contract or understanding, a notice of the contractor's commitments under Executive Order 11246.

(iv) Comply with all provisions of Executive Order 11246 and the rules, regulations, and relevant orders of the Secretary of Labor.

(v) Furnish all information and reports required by Executive Order 11246 and by the rules, regulations, and orders of the Secretary of Labor and permit access to the contractor's books, records, and accounts by the contracting governmental agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(vi) In the event of the contractor's noncompliance with the nondiscrimination clauses of the government contract or with any of such rules, regulations, or orders, the contract may be canceled, terminated or suspended in whole or in part and the contractor may be declared ineligible

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(vii) Include the equal opportunity clause in every subcontract or purchase order so that the clause and its requirements will be binding upon each subcontractor or vendor.

(viii) Retain personnel records for 1 year from the date of creating the record or taking a personnel action, whichever occurs later, and retain personnel records of employees who are involuntarily terminated for 1 year from date of termination. If the contractor has contracts of more than \$150,000 per year, the record retention period is extended to 2 years.

(ix) Include an affirmative action clause regarding individuals with disabilities in covered contracts or subcontracts and post notices regarding the contractor's affirmative action obligations toward disabled individuals.

(x) Include an affirmative action clause regarding disabled and Vietnam Era veterans in covered contracts or subcontracts; post notices regarding the contractor's affirmative action obligations toward disabled and Vietnam Era veterans; and list all job openings (except executive and top management jobs) with the state employment service.

(xi) Annually file an Employment Report on Special Disabled Veterans and Veterans of the Vietnam Era (VETS-100).

### **OBLIGATIONS FLOWING FROM CONTRACTS OR SUBCONTRACTS MORE THAN \$50,000**

Contractors with a *single* federal contract or subcontract of more than \$50,000 in a 12-month period and more than 50 employees must also:

- file and cause each of [its] subcontractors to file, Compliance Reports;
- maintain a written AAP covering minorities and women;
- maintain a written AAP covering disabled individuals; and
- maintain a written AAP covering disabled and Vietnam Era veterans.

### **ENFORCEMENT AND SANCTIONS UNDER EXECUTIVE ORDER 11246**

The Office of Federal Contract Compliance Programs ("OFCCP"), a branch of the Department of Labor, is charged both with issuing regula-

tions to further implement the Order and enforcing compliance. In recent years, the OFCCP has focused increasingly on identifying instances of widespread, classwide discrimination by employers. In order to identify that type of discrimination, the OFCCP regularly conducts compliance evaluations of federal contractors and subcontractors to ascertain their compliance with equal opportunity and nondiscrimination requirements. A compliance evaluation consists of any one or any combination of the four investigative procedures described in the following subparagraphs.

(a) Compliance Review — a comprehensive analysis and evaluation of each aspect of a company's hiring and employment practices, policies and conditions, including among other subjects such things as hiring, training, employment benefits and promotion. This particular review begins with a desk audit during which the OFCCP reviews the company's Affirmative Action Plan (AAP) and supporting documentation. The OFCCP may also perform an on-site review, conducted at the contractor's establishment, to investigate problem areas identified during the desk audit.

(b) Off-site Review — a review of records that may consist of a full desk audit, which is a review of the contractor's AAP or portions thereof, or a review of particular records such as personnel data.

(c) Focused Review — an on-site review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

(d) Compliance Check — a visit to the establishment to ascertain whether data and other information previously submitted by the contractor are complete and accurate; whether the contractor has maintained records consistent with the regulations issued under the Executive order; and/or whether the contractor has developed an appropriate AAP.

The Order provides for significant sanctions and remedies for noncompliance, including back pay, prejudg-

ment interest, front pay, and injunctive relief for applicants and employees against whom a company has discriminated. The company may also suffer debarment from federal contracting (following a trial-like hearing before an administrative law judge and right to appeal to the federal courts). Ancillary complications can include the interruption of progress payments (also following a trial-like hearing before an administrative law judge, with the right to appeal to the federal courts).

### **HOW TO BE PREPARED FOR AN AFFIRMATIVE ACTION AUDIT**

1) If there are coverage questions regarding your company, explore and be prepared to state your position *before* the OFCCP comes to audit. Historically, the OFCCP has chosen companies for audit based upon the responses that companies provide to questions on the EEO-1 form filed annually by many employers. Accordingly, if your company has indicated on its EEO-1 form that it has federal contracts or subcontracts, then there is a heightened likelihood that it will be audited by the OFCCP. If you believe that your company has been identified in error as a federal contractor, you should be prepared to explain why.

2) If you are a covered contractor or subcontractor, prepare an organized, professional, and meticulous AAP. Make sure that all of the required elements are included. The OFCCP investigator has a checklist for the requisite elements, and so should you. Because the OFCCP has often concluded a desk audit without proceeding to an on-site audit if it appears that the contractor is knowledgeable, thorough, and organized in its AAP, it pays to

have the AAP done correctly.

3) Be prepared to prove that you are an enlightened and proactive employer. Don't hide your light under a bushel! Document all of your EEO achievements, your company's involvement in the community and your company's efforts to recruit minorities and females. For example, if one of your employees or executives attends a local career day, document it. If your company recruits at minority job fairs, have the fliers and programs in a file, handy and ready to send to the investigator at the desk audit stage — and certainly by the on-site audit stage.

4) Identify your weaknesses and be prepared to defend them. Don't let yourself be blindsided. Be prepared to respond to difficult questions. For example, if your applicant data is less than complete, think in advance about what you are doing to gather applicant data and what you could do better. Implement the change before the audit. That way, if the investigator notes problems, you can acknowledge them and point to your voluntary corrective actions, possibly avoiding further negotiations with the OFCCP and potential enforcement actions. Likewise, if the representation of females and minorities in your company is less than what would be expected in light of their availability in the relevant recruitment areas, address the problem, or be prepared to explain why the company has done all that it can do.

5) Be prepared for a possible desk audit. In the unlikely event that your company is selected for a desk audit, be prepared with the items that could be requested by the OFCCP's investigators, including the following:

- a) I-9 forms;
- b) job opening and posting files;
- c) listings of available positions

sent to state unemployment security commissions;

d) compensation analyses demonstrating the absence of any illegitimate disparities (if you haven't already compiled and periodically maintained these types of analyses, you should start without delay);

e) a list of the accommodations that you have provided to disabled individuals;

f) a signed and dated EEO policy, a nonharassment policy, invitations to applicants to self identify, and required notices and posters under Section 503 of the Rehabilitation Act of 1973 and VEVRAA; and

g) required EEO posters.

### **CONCLUSION**

Landlords, property agents and other leasing-related businesses that deal with the federal government must recognize that they are subject to the civil rights laws and regulations that are more commonly understood to apply to more traditional federal contracting industries such as defense contractors. Companies should carefully review their existing contracts and vigilantly monitor their contracting activities to determine whether they are doing business with the federal government, and if so, whether they meet the coverage thresholds for affirmative action obligations and have satisfied all affirmative action requirements.



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