



EEO-1 Reporting and Affirmative Action—What Records Must You Keep?

2015 ASHA **Staffing Law** CONFERENCE



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OFCCP and Basis of Procurement Obligations

- OFCCP is an outgrowth of Executive Order 11246, as amended, issued in 1965. EO 11246 was one of a series of executive orders that established nondiscrimination and affirmative action obligations for government contractors.
- First executive order issued during World War II—EO 8802 in 1941 covered defense contractors.

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Procurement Act of 1949 Government Procurement Obligations

- The legal basis for Executive Orders is the Federal Property and Administrative Services Act of 1949 (Procurement Act)
 - The Procurement Act gives the president the authority to establish policies to increase the efficiency and economy of federal procurement. This has been the basis for many Executive Orders, including those that affect personnel policies of government contractors. EO 11246 and the OFCCP authority was upheld in *Contractors Ass'n v. Secretary of Labor*, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971).



Other OFCCP Requirements

- Subsequent to EO 11246, Congress passed the Rehabilitation Act (Section 503), which established similar requirements for the recruitment and employment of disabled workers, and the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), which applies to veterans.



OFCCP

- All of these programs were consolidated into the OFCCP in 1974. The OFCCP is an agency housed in the U.S. Department of Labor.
- The legal basis for the OFCCP is important to understand—the social obligations required of government contractors only apply if they are determined to increase the efficiency and economy of federal procurement.



EEO-1—The Basic EEO Report

- Consistent with the general requirements of EO 11246, the OFCCP and the EEOC jointly issued the requirement for employers and covered contractors to report yearly employment data to the two agencies using the EEO-1 Form.
- Instruction is explicit that temporary employees are not considered covered employees.
- Employers with 100 or more employees or government contractors with 50 or more employees and \$50,000 contract must file.



Temporary Workers Not Reportable Employees

- EEO-1 instructions provide
 - The term "employee" SHALL NOT include persons who are hired on a casual basis for a specified time, or for the duration of a specified job persons temporarily employed in any industry other than construction, such as temporary office workers, mariners, stevedores, lumber yard workers, etc., who are hired through an employee contractor or agent, or by some individual hiring arrangement, or persons (EXCEPT leased employees) on the payroll of an employment agency who are referred by such agency for work to be performed on the premises of another employer under that employer's direction and control.



Temporary Workers Not Reportable Employees (cont'd)

- The EEO-1 Instructions and the EEO-1 Form are the basis of the definition of covered employee and clearly exclude referred temporary employees from staffing firms.



Status of Staffing Firms

- Insofar as the referred temporary employees are not deemed covered employees, how does this affect the status of staffing firms generally when they provide workers to government contractors?



Three Issues for Designation of Staffing Firms

- No Nexus to Government Contract
 - To the extent that worker requisitions are generally received from clients without reference to a government contract, it is clear referred workers are not covered employees and therefore the staffing firm can argue that it is not a subcontractor.



Three Issues for Designation of Staffing Firms (cont'd)

- Staffing Firm as Government Contractor
 - To the extent that a staffing firm has a direct contract with a federal agency, and the requisition results in a fee of \$50,000 or more or can be expected to result in fees exceeding \$50,000 in a year, then that company will be deemed to be a federal contractor with affirmative action plan obligations.



Three Issues for Designation of Staffing Firms (cont'd)

- In that instance, while the staffing firm may be deemed to be a federal contractor, its record-keeping and reporting obligations will apply to its permanent workforce, not the referred workers.



Three Issues for Designation of Staffing Firms (cont'd)

- Providing Workers for Government Contract
 - To the extent that the staffing firm is specifically contracted to provide workers for the performance of a federal contract, then its status is open to question.
 - The OFCCP has never formally taken the position that staffing firms which provide temporary workers are subcontractors, because the workers themselves are not deemed covered employees.



Three Issues for Designation of Staffing Firms (cont'd)

- Under federal law, only contracts for “nonpersonal services,” including construction, transportation, research, and insurance, are covered government contracts that trigger affirmative action obligations. Employment agreements are excepted from the “government contract” definition.



Three Issues for Designation of Staffing Firms (cont'd)

- Therefore, the consistent argument has been raised that the referral of workers who become temporary employees of a government contractor for the performance of a government contract does not make the referring staffing firm a government contractor.



Congratulations—Welcome to OFCCP’s World

- If a staffing firm is deemed to be a covered government contractor, then it has undertaken to comply with several record-keeping and reporting obligations.
 - Applicant Flow
 - Preparation of AAP
 - Personnel Transactions



Congratulations—Welcome to OFCCP’s World (cont’d)

- Compensation Analysis
- Job Posting—Veterans
- Job Outreach—Disabled and Veterans
- Census Survey—Veterans, Disabled, Race, and Gender
- Census Survey—Compensation



New Requirements

- Note that in addition to the preparation of an affirmative action plan recording the employment of women and minorities, federal requirements require that affirmative action plans be prepared to record the recruitment and employment of disabled employees as well as covered veterans.
- The Department of Labor is now requiring contractors to submit data for employed veterans and employed disabled workers.



New Requirements (cont'd)

- In addition, covered employers must list job openings with designated state employment agencies as well as utilize the E-Verify system.
- Covered contractors are subject to audits from the OFCCP, which are becoming more intensive. Audits are now focused on compensation and benefit programs as well as promotion opportunities.



Veterans and Disabled Workers

- There is a requirement that contractors also regularly invite all of their employees to voluntarily self-identify as an individual with a disability using the self-identification form provided by OFCCP. Employees must also self-identify as covered veterans under Section 4212 of VEVRAA.



Veterans and Disabled Workers (cont'd)

- Contractors must invite their employees to self-identify every five years, beginning the first year that they become subject to the Section 503 voluntary self-identification requirements.
- At least once during the years between these invitations, contractors must remind their employees that they may voluntarily update their disability status at any time.



Veterans and Disabled Workers (cont'd)

- There is a new requirement specific to data collection and analysis. As a contractor, you must document and update annually the following information in 60-741.44(k):
 - For applicants—the total number of applicants for employment, and the number of applicants who are individuals known to have disabilities.



Veterans and Disabled Workers (cont'd)

- For hires
 - Total number of job openings
 - Number of jobs filled

These data must be retained for three years.



Veterans

These records are:

- Evaluations of outreach and recruitment efforts (41 CFR 60-300.44(f))
- Records pertaining to the data collection of comparisons regarding applicants and employees (41 CFR 60-300.44(k))
- Records related to the hiring benchmark requirement (41 CFR 60-300.45)



Disabled Workers—New Regulations

- Require that contractors invite applicants to self-identify as IWDs at both the preoffer and postoffer phases of the application process, using language prescribed by OFCCP
- Require that contractors invite their employees to self-identify as IWDs every five years, using the prescribed language



Questions?

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