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CLIENT ALERT

OFCCP Finalizes Rule Governing AAPs, Effective December 13, 2000: Ambiguous And Substantial New Requirements Face Contractors

November 1, 2000

On November 13, 2000, the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") published a final rule governing affirmative action programs ("AAPs"). The new regulations take effect December 13, 2000, providing contractors precious little time to digest the changes, implement procedures necessary to comply with new requirements, and prepare for a radically-altered enforcement scheme.

FINAL RULE SKIRTS DIFFICULT ISSUES

In its rush to finalize the proposed rule before the end of the Clinton Administration, the OFCCP has done a major disservice to contractors and contractor associations that raised serious concerns about the proposed regulations. In true OFCCP fashion, the final rule sidesteps these legitimate concerns, leaving much ambiguity to be resolved on a case-by-case basis according to the views of individual compliance officers.

First, the Agency failed to respond in a meaningful way to criticism regarding the Equal Opportunity Survey's ("EO Survey's") definition of "applicant" - a definition that would make all who "express an interest" in employment an "applicant," irrespective of the candidate's qualifications or whether there is even a job available. The Agency now claims it is "not revising the meaning of 'applicant' in the final rule" and asserts that it has "adhered to the same definition" since the Question and Answer section to the Uniform Guidelines on Employee Selection Procedures was published in 1979. Contractors who have experienced compliance evaluations know this statement is disingenuous at best, as the definition of "applicant" accepted by the Agency has varied from audit to audit, and district office to district office. Nonetheless, the statement might be useful fodder for argument that current definitions are acceptable, since the Agency claims the final rule does not revise the meaning of the term. This argument could particularly assist contractors who recently completed an audit in which the definition of "applicant" was at issue.

Second, OFCCP sidestepped criticism of the EO Survey's expansive and untenable definition of "promotion" by stating that it is taken verbatim from the glossary in Chapter 1 of OFCCP's Federal Contract Compliance Manual (which has never been exposed to public comment). The final rule fails to address the ambiguity in the definition, again leaving uneven and idiosyncratic resolution in the compliance evaluation process.

Third, the final rule recognizes the harsh criticism leveled with respect to the categories of compensation data sought by the EO Survey - i.e., an amalgamation of comp information according to nine broad EEO-1 categories - but refuses to acknowledge that OFCCP cannot legitimately rely upon such flawed data to select contractors for audit. The Agency retorts that the "Survey responses do not prove that a problem exists, but rather are used as an indicator to guide OFCCP compliance evaluations." There remains no information as to how OFCCP intends to be "guided" in compliance evaluations.

FINAL REGULATIONS: MUCH WORK

The final regulations require contractors to modify both the narrative and statistical portions of their AAPs. However, the changes that will most dramatically impact contractors fall outside the written AAP. We outline each below.

1. Written Affirmative Action Plans

The final rule alters the requirements that have governed the two primary statistical portions of your written AAP - the workforce analysis and the availability analysis. It now provides the option of preparing either a traditional "workforce analysis" (detailing the number of women and minorities by job title in each department, sorted from lowest to highest paid) or a streamlined "organizational profile." The "profile" would essentially be an organizational chart showing, for each unit (i.e., department, division, or group), job title, gender, race, and "ethnicity" of the unit supervisor, as well as total number of male and female employees in each ethnic and racial group for the entire unit. Many contractors, particularly those who have purchased software programs that generate the workforce analysis, will likely opt to retain the less illuminating workforce analysis.

In addition, the final rule replaces the 8-factor availability analysis with a two-factor analysis: external availability (the percentage of women and minorities in the reasonable recruitment area) and internal availability (the percentage of women and minorities among existing employees who are promotable, transferable, and/or trainable for the vacancy).

The final rule also eliminates several of the "boilerplate" narrative portions of the AAP, including: (1) reaffirmation of the contractor's EEO policy; (2) formal internal and external dissemination of the AAP; (3) goals and objectives by organizational unit, including time tables; (4) active support of local and national community action programs; (5) consideration of women and minorities not in the workforce; and (6) compliance with Sex Discrimination guidelines. However, it adds new sections regarding "internal audit and reporting" and, as discussed below, significantly expands the "in-depth analyses" that contractors must undertake.

2. Required Analyses

The significance of the rule becomes more obvious in its requirement that contractors perform various, unspecified analyses to identify "problem areas." In addition to the traditional adverse impact analyses for hires, promotions, and terminations, the final rule states that contractors must evaluate their "compensation systems to determine whether there are gender, race-, or ethnicity-based disparities." Contractors also must evaluate undefined "personnel actions" and "personnel procedures" to "determine whether they result in disparities in the employment or advancement of minorities or women."

The Agency does not further explain these significant new annual requirements. With respect to the compensation analyses - the results of which must be maintained for two years -- OFCCP states only that "contractors have the ability to choose" the type of analysis they will employ. Given this "guidance," and the possibility that any compensation analyses will be discoverable in employment discrimination cases, contractors should carefully consider the extent to which they conduct (or do not conduct) full-blown compensation analyses. Whatever approach is selected, contractors must be aware that under the new regulations, the compensation analyses must not simply analyze the compensation of men relative to women and minorities relative to non-minorities, but also must include an analysis for each ethnic subgroup.

The scope of the requirement that contractors analyze "personnel actions" and "personnel procedures" for disparate impact is wholly undefined and without limitation. The lack of specificity means that compliance officers and district offices will have carte

blanche to interpret this requirement. Will compliance officers read this requirement to mean that contractors must analyze their disciplinary records to determine whether discipline is meted out in an even-handed manner? It is not difficult to imagine such a scenario, considering the latitude given to district offices. Must contractors also now analyze attendance at training sessions "to determine whether there are selection disparities"? Perhaps so. Simply put, the final rule - like the proposed rule - vests the Agency with incredible discretion. Such discretion will render compliance evaluations much less predictable and potentially more costly.

3. EO Survey is Codified

As expected, the final rule codifies the EO Survey that was circulated to 7,000 contractors in the year 2000. The Survey will be sent to approximately half of all non-construction contractor establishments each year and the results will be used to "identify contractor establishments" for compliance evaluations. The Survey will require the submission of data regarding applicants, hires, promotions, terminations, compensation, and tenure, by race and gender. Although the preamble to the final rule defends the OFCCP's decision to issue the EO Survey without formal notice and comment, the final rule contains the contradictory requirement that the Secretary of Labor "follow Notice and Comment procedures" if he or she wants to change "a data element requirement" of the Survey. Thus, Secretary Alexis Herman has attempted to make it more difficult for a successor to undo what she did in issuing the Survey outside the regulatory process.

The only substantive change to the E.O. Survey is that contractors will have the option of providing data on a job group basis, rather than an EEO-1 category basis, if the contractor: (1) submits both personnel activity data (applicants, hires, promotions, and terminations) and compensation data by job group; (2) submits its data via the Internet; (3) identifies the EEO-1 category to which each job group belongs; and (4) does not submit a job group that crosses EEO-1 category lines. Of course, these four conditions appear only in the preamble to the final rule and not in the text of the rule itself.

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As the holiday season approaches, contractors must set aside time to consider the new regulations, requisite modifications to their AAPs, and the manner in which they will attempt to abide by the new requirements. In other words, happy holidays from the OFCCP!

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